

**LETTER OPINION**  
**96-L-171**

October 1, 1996

Representative Bruce Laughlin  
3204 16th Avenue SW  
Fargo, ND 58103

Dear Representative Laughlin:

Thank you for your letter regarding a township's obligation to provide for drainage through roads over which it has jurisdiction. According to the letter that you included with your request, a township road runs through a coulee area between two sections of land. If the road were not there, water would flow to the south. A culvert located in the road is plugged. As a result, water cannot flow and is backing up on the adjacent property. The township's board of supervisors has indicated that it may remove the culvert completely.

North Dakota Century Code § 24-03-06 provides:

Any and all highways of any kind hereafter constructed or reconstructed by the department, any board of county commissioners, any board of township supervisors, their contractors, subcontractors or agents, or by any individual firm, corporation, or limited liability company must be so designed as to permit the waters running into such ditches to drain into coulees, rivers, and lakes according to the surface and terrain where such highway or highways are constructed in accordance with scientific highway construction and engineering so as to avoid the waters flowing into and accumulating in the ditches to overflow adjacent and adjoining lands. In the construction of highways, as herein provided, the natural flow and drainage of surface waters may not be obstructed, but such water must be permitted to follow the natural course according to the surface and terrain of the particular terrain.

This law has been addressed in several Attorney General's Opinions and by the North Dakota Supreme Court. In 1988 N.D. Op. Att'y Gen. 8, Attorney General Nicholas Spaeth said:

As to natural water courses which are not improved or will not be improved for drainage, the entity responsible for the road (i.e., the township is responsible for township roads, the county for county roads, etc.) must construct and maintain the road so as to allow for 'the natural flow and drainage of surface waters.' N.D.C.C. § 24-03-06. Failure to do so may result in an obstruction of a water

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course which is prohibited. N.D.C.C. § 61-01-07. Where such a natural water course exists, proper culverts must be installed to assure that there is no obstruction and the water will flow as it would were no road present.

In a letter from Attorney General Robert O. Wefald to Senator L.L. "Pete" Naden (April 10, 1984), this office said that N.D.C.C. § 24-03-06 imposes an obligation on a township to provide a culvert of sufficient diameter to provide for "the adequate draining of the surface waters in the ditch." The failure to do so would result in a potential liability for the flooding of an adjacent landowner's property if it were shown that the culvert was of an inadequate size. Id.

The duty to provide a drain for surface water includes the duty of maintaining the drain. Rynestad v. Clemetson, 133 N.W.2d 559, 565 (N.D. 1965). The duty of maintaining such a drain includes the duty of maintaining or replacing culverts. Letter from Attorney General Nicholas J. Spaeth to Earl R. Meyers (August 22, 1986). The entity responsible for the road therefore has a duty to unplug a blocked culvert so that water would flow as if the road had not been constructed.

N.D.C.C. § 24-03-06 provides that in the construction of highways, etc. the "natural flow and drainage of surface waters" may not be obstructed. The letter included with your request indicates that the township board may take the position that there is no "natural flow" of water because of the alleged drainage that may have been done in the surrounding area. In other words, because the water is there due to artificial drainage it is no longer the "natural" flow and the statute does not prohibit a road from blocking artificial flows. However, the "natural flow and drainage" has been consistently interpreted to mean the natural course water follows and not the natural or artificial source of the water.

Generally, an upper landowner may artificially drain the land into a natural watercourse, but will be liable to a lower landowner if the drainage causes injury by discharge of water in greater volume or concentration than would have happened if natural conditions had been left undisturbed. Rynestad, 133 N.W.2d at 563-564. In Viestenz v. Arthur Township, 54 N.W.2d 572 (N.D. 1952), the North Dakota Supreme Court reviewed the natural drainage pattern of the land to determine the township's obligation to install appropriately sized culverts. The court, in interpreting what is now § 24-03-06, said:

By this law those in charge of the construction of highways in addition to making the roads fit for travel must consider the drainage affected by the construction. It is made their mandatory duty to provide drainage

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towards a natural water course of any water which may accumulate in ditches along the highway.

Id. at 575. (emphasis added)

The Attorney General, based on the above statement from Viestenz, issued an opinion that the highway department could not obstruct the natural surface water drainage of abutting landowners and could not prohibit drainage into a ditch by an abutting landowner in the absence of a threat to the structural integrity of the highway. Letter from Attorney General Allen I. Olson to Mr. Walter R. Hjelle (May 12, 1977). See also Lemer v. Koble, 86 N.W.2d 44, 48 (N.D. 1957)(the entity responsible for the road has a duty to inspect and make plans for culverts to be constructed where necessary to preserve a natural drainway for surface water, including naturally and artificially drained water) and Olson v. Cass County, 253 N.W.2d 179, 181 n. 1 (N.D. 1977) (N.D.C.C. § 24-03-06 provides that drainage of surface water shall not be obstructed, but shall be allowed to follow the natural water flow course). In N.D.C.C. § 24-03-06, the word "natural" does not mean water which would flow naturally without artificial alteration, but instead describes the direction water naturally flows within a drainage basin.

In conclusion, it is my opinion that the township has a mandatory duty to provide and maintain culverts of sufficient size so that any water that legally accumulates in the ditches is not obstructed by the road but flows as it would had the road not been built.

This opinion governs the actions of public officials until such time as the question presented is decided by the courts.

Sincerely,

Heidi Heitkamp  
Attorney General

JAK/dmm