

**OPINION
66-344**

November 2, 1966 (OPINION)

Mr. Milo W. Hoisveen

Secretary & Chief Engineer

Water Commission

RE: Waters - Obstructions - Liability for Removal

This is in response to your letter of October 21, 1966, in which you requested an attorney general's opinion relative to the removal of obstructions from natural watercourses and drainways. Your question is, "May a water management district, situated at the upper end of a watershed, maintain the natural watercourses and drainways of such watershed without incurring liability for any damages suffered by other water management districts or landowners situated at the lower end of the watershed?" After a brief explanation of the facts of the situation you ask, "If they (referring to a water management district) remove all obstructions from such natural watercourses and drainways and the land of a lower water management district or landowner is flooded, either because the natural watercourses and drainways of such lower water management district and landowner are also obstructed or because such lower landowner is now farming the low areas of the watercourses and drainways, may the upper water management district be held liable for such flooding?"

Section 61-01-07 of the North Dakota Century Code makes it unlawful for any person, municipality, or corporation to willfully obstruct any ditch, drain or watercourse. Section 61-01-06 states that "A watercourse entitled to the protection of the law is constituted if there is a sufficient natural and accustomed flow of water to form and maintain a distinct and a defined channel. It is not essential that the supply of water should be continuous or from a perennial living source. It is enough if the flow arises periodically from natural causes and reaches a plainly defined channel of a permanent character."

Although it has been held, in *Henderson v. Hines*, 48 N.D. 152, 183 N.W. 531, that a drainway for surface water through runoff channels artificially or naturally provided is not a watercourse, it was also held in the same case that a landowner is liable for damages if he negligently obstructs a natural drainway and causes flood waters to be impounded on the land of another. It appears then that a landowner may not obstruct any watercourse under any circumstances and may not obstruct any natural drainway if such act of obstructing is negligent and causes flood waters to be impounded on another's land.

Subsection 6 of section 61-16-11 gives the board of commissioners of a water management district the power to "maintain and control the water levels and the flow of water in the bodies of water and streams involved in water conservation and flood control projects within its district, and regulate streams, channels or watercourses and the flow

of water therein by changing, widening, deepening, straightening the same or otherwise improving the use and capacity thereof."

Based on the foregoing, it is my opinion that a water management district, after securing the legal right to enter upon the land, may restore either a natural watercourse or a natural drainway to its original depth and width without being liable for damages suffered by a downstream water management district or landowner.

HELGI JOHANNESON

Attorney General