

**OPINION
74-249**

May 8, 1974 (OPINION)

Mr. Paul G. Woutat
Attorney
Grand Forks County
Board of Drainage Commissioners
Box 1617
Grand Forks, ND 58201

Dear Mr. Woutat:

This is in reply to your letter of May 1, 1974, requesting our opinion on behalf of the Grand Forks County Board of Drainage Commissioners as to their authority under chapter 61-21 of the North Dakota Century Code to acquire wildlife easements incident to the construction of legal drains. You state the following facts and questions:

At the present time it is necessary that the Grand Forks County Board of Drainage Commissioners provide wildlife area easements prior to North Dakota State Water Commission cost sharing in connection with drainage projects."

"In the event a particular landowner refuses to voluntarily grant such an easement, it may become necessary to attempt acquisition of such easement by eminent domain."

"The Grand Forks County Board of Drainage Commissioners has requested your opinion as to whether it would have the authority to acquire such an easement by eminent domain procedures."

Section 61-21-19 of the North Dakota Century Code, as amended, provides:

"RIGHT OF WAY - HOW ACQUIRED - ASSESSMENT OF DAMAGES - ISSUANCE OF WARRANTS. The right of way for the construction, operation and maintenance of any proposed drain, if not conveyed to the county by the owner, may be acquired by eminent domain in such manner as may be prescribed by law. Where lands assessed for drainage benefits are not contiguous to such drain, access right of way thereto over the land of others may be acquired in the same manner. Such right of way, when acquired, shall be the property of the county. The board may issue warrants, in a sum sufficient to pay the damages assessed for such right of way. Such warrants shall be drawn upon the proper county treasurer, and shall be payable out of any drain funds in the hands of the treasurer which have been collected for the construction of the drain for which such right of way is sought to be obtained. The board shall negotiate the warrants at not less than the par value thereof and shall pay into court for the benefit of the owners of the right of way the amount to which each is entitled according to the assessment of damages, paying the surplus, if any, to the county treasurer, who shall place the same to the credit of the proper drain fund."

Section 32-15-02 of the North Dakota Century Code provides in part:

"Subject to the provisions of this chapter, the right of eminent domain may be exercised in behalf of the following public uses:

* * *

3. Public buildings and grounds for the use of any county, city, park, district; canals, aqueducts, flumes, ditches, or pipes for conducting water for the use of the inhabitants of any county, city, or village, or for draining any county, city, or village; raising the banks of streams, removing obstructions therefrom, and widening, deepening, or straightening their canals; roads, streets, and alleys, and all other uses for the benefit of any county, city, park district, or village, or the inhabitants thereof, which may be authorized by the legislative assembly, but the mode of apportioning and collecting the costs of such improvement shall be such as may be provided in the statutes by which the same may be authorized;

* * * ." (emphasis supplied)

Section 61-01-03 of the N.D.C.C. provides:

"EMINENT DOMAIN - WHO MAY EXERCISE. The united States, or any person, corporation, or association may exercise the right of eminent domain to acquire for a public use any property or rights existing when found necessary for the application of water to beneficial uses, including the right to enlarge existing structures and use the same in common with the former owner. Any canal right of way so acquired shall be located so as to do the least damage to private or public property, consistent with proper and economical engineering construction. Such property or rights may be acquired in the manner provided in chapter 32-15 of the title Judicial Remedies, and the North Dakota Rules of Civil Procedure."

The above cited statutes apply to authority of the board of drainage commissioners. The Water Commission has additional powers and the following statutes appear pertinent to the question at hand:

61-01-14. "The commission shall have full and complete power, authority, and general jurisdiction:

1. To investigate, plan, regulate, undertake, construct, establish, maintain, control, and supervise all works, dams, and projects, public and private, which in its judgment may be necessary or advisable:

* * *

- g. To develop, restore, and stabilize the waters of the state for domestic, agricultural, and municipal needs, irrigation, flood control, recreation, and wildlife conservation, by the construction maintenance of dams, reservoirs and diversion canals;

* * *

2. To define, declare, and establish rules and regulations:

* * *

- d. Establish rules and regulations governing and providing for financing by local participants to the maximum extent deemed practical and equitable in any water development project in which the state participates in cooperation with the United States or with political subdivisions or local entities.

* * * ."

In your letter you do not state whether the wildlife easement in question would be provided from the land acquired by the county for drainage purposes or whether it would require the taking of land over and above what is needed for the establishment of the drainage project itself. If the easement required is to be given on property which would also be required for the drainage project, we believe the board of drainage commissioners has the authority to acquire such property by eminent domain and provide wildlife easements.

If, on the other hand, the wildlife easements would acquire the taking of property over and above that which would be needed for the drainage project, it does not appear the county board of drainage commissioners has such authority. We have found no statute which vest in the county board of drainage commissioners the right to acquire land for wildlife easements by eminent domain.

The Supreme Court of North Dakota in *Sheridan County v. Davis*, 240 N.W. 876 (N.D. 1932) held that the grant of the power of eminent domain was to be strictly construed. On page 870 of the reported case, the court stated:

"If any doubt existed as to the proper construction of our statute . . . it should be resolved against the authority to take the fee."

While the statutes confer certain powers upon the Water Commission with respect to wildlife purposes and with respect to the enactment of rules and regulations concerning financing or projects with local political subdivisions or entities including, we assume, drainage districts, the fact remains that the board of drainage commissioners and not the Water Commission would apparently acquire the easements under the facts outlined in your letter. We have found no statutory provisions authorizing the board of drainage commissioners to acquire wildlife easements through eminent domain proceedings. In view of the fact that the grant of power of eminent domain must be strictly construed against the authority to take property, we must conclude the board of drainage commissioners is without statutory authority to acquire wildlife easements by eminent domain proceedings.

I trust this will satisfactorily set forth our position on the question presented.

Sincerely yours,

Allen I. Olson

Attorney General