

**OPINION
59-290**

June 3, 1959 (OPINION)

WATERS

RE: Water Conservation Commission - International Stream -

Utilization of Allocated Waters

We are in receipt of your letter of June 2, 1959, with references to the urgent need of the City of Westhope to obtain water from the Souris River for the city's municipal requirements and for domestic use of its inhabitants.

You say in your letter that Westhope has been granted the right to appropriate water from the Souris River but due to the fact that lands lying adjacent to the river are owned by the federal government, and are under the control of the Wildlife Service, an easement is needed to obtain access to waters of the river.

You request our opinion as to "Whether or not the Federal Wildlife Service would be held liable in case action might be started by prior user."

It is our understanding that the Souris River is an international stream which is under the jurisdiction and control of the International Joint Commission, created in 1909 by a treaty entered into between the United States and the Dominion of Canada. It is also our understanding that it is the function of that Commission to divide or allocate the waters of the Souris River among the provinces of Saskatchewan, Manitoba and the State of North Dakota.

It is our opinion that it is neither the concern nor function of the International Joint Commission to determine for what purpose the waters allocated to each Canadian province or to the North Dakota shall be used. Waters of the Souris River, allocated to the State of North Dakota, are under the supervision, control and regulation of the State Engineer and State Water Conservation Commission.

It is therefore our opinion that the Federal Wildlife Service will not incur any liability to anyone who holds a water right, which may be prior to the right of the City of Westhope to appropriate water from the Souris River, if the Service grants the City the required easement so as to permit access to waters of the river impounded in a reservoir. For if a prior appropriator is deprived of waters to which he is rightfully entitled, because of water being diverted from the river by Westhope, his remedy will be to seek redress from the Water Conservation Commission and, if necessary, to appeal from the decision of the Commission to the District Court.

LESLIE R. BURGUM

Attorney General