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North Dakota Drainage Law

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NORTH DAKOTA DRAINAGE LAW

by

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There are two sources of North Dakota drainage law. First, the North Dakota Supreme Court has declared that the common law doctrine of reasonable use is the standard or guide under which liability for damages from drainage will be determined. Drainage easements obtained under common law by conveyance or prescription may be protected. Second, the North Dakota State Legislature has enacted various statutes by which rules or regulations have been established to regulate certain types of drainage. Some statutes grant powers of eminent domain to specific political bodies which may be used to drain land.

Both the common and the statutory drainage law are important to the farmer/rancher. It will help you to know the various categories and types of waters and other terms with which drainage law deals before discussing North Dakota drainage law. There are different legal consequences for each type of water drained.

I. Categories and Types of Waters

There are two general categories of waters: surface and subsurface. There are various types of waters within each category which might be drained by a farmer or rancher.

Generally surface water categories include: diffused surface waters, water courses, flood waters, lakes and ponds, and sloughs and swamps. Subsurface or groundwater categories include: underground streams, percolating waters, and rechargeable or nonrechargeable aquifers. For drainage purposes, the surface categories of major concern to the North Dakota farmer/rancher are lakes, ponds, sloughs, and diffused surface waters. Of the subsurface categories, only percolating waters are important.

Diffused surface waters include rain, melting snow, and perhaps water from springs that flow on the surface of the earth and have not found their way into a well-defined body of water, watercourse, or drainway. These waters are generally

temporary in nature, being disposed of by evaporation, absorption, or drainage. They may or may not lose their character as diffused surface waters when they soak into or are absorbed by the marshy or boggy land where they are collected. If such waterlogged land is connected to a lake or stream, clearly that water would no longer be classified as diffused surface water.

North Dakota slough waters are found in three types of lowlands. Type one is called a "seasonally flooded basin or flat." The soil is covered with water or is waterlogged during some parts of the growing season but is usually well-drained during much of the growing season. They are found both in upland depressions and in overflow bottomlands. Along river courses, flooding occurs in the late fall, winter, or spring. In the uplands, basins or flats may be filled with water during periods of heavy rain or melting snow. Type two is called an "inland fresh meadow," where the soil is usually without standing water during most of the growing season but is waterlogged within at least a few inches of its surface. Type three is called an "inland shallow fresh marsh." The soil is usually waterlogged during the growing season; often it is covered with as much as six inches or more of water.

Pond waters are found in lowlands called "inland deep fresh marshes." The soil is covered with six inches to three feet or more of water during the growing season.

Lake waters include those found in lowlands called "inland open fresh water." Lake waters are simply deeper and more permanent than either a slough or pond. A meandered lake is any pond, slough, or lake which has been totally or partially drawn (described by metes and bounds) on a map by the government of the United States in the survey of public lands.

Percolating waters are those subsurface waters which slowly move through the soil but are not a part of any body of water or the flow of any watercourse. However, percolating waters (in their underground course) may become part of any underground stream or aquifer and thus lose their identity as percolating waters.

A "watercourse" is defined by the NORTH DAKOTA CENTURY CODE to exist

if there is sufficient natural and accustomed flow of

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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.

North Dakota has a natural drainway classification which describes a path where water is accustomed to drain in a particular way, but it is not sufficiently channelized to be referred to as a watercourse. A drain may be natural or artificial. A natural drain includes any natural watercourse opened or improved for purposes of drainage. An artificial drain is man-made by digging ditches, laying pipe or tile, and so forth. The artificial drainway is not a watercourse; nor, necessarily, is the natural drainway. A lateral drain is an artificial drain which is constructed after and flows into the original permitted artificial drainage system. A waterway is any channel, either natural or artificial. A natural waterway, for example, may be a lake, river, stream, creek, or draw. An artificial waterway may be a canal, grassed ditch, drain, ditch, or pipe. An outlet waterway is the reach of a waterway which is directly connected to a drained wetland. A watershed is the area draining into or contributing water into a slough, pond, or lake.

II. North Dakota Statutes

A. *North Dakota Statutes May Require A Permit to Drain Water From Land*

There are four instances where a permit to drain is required. First, a permit is required before any person may construct a waterway for the purpose of draining a slough, pond, or lake or any series thereof having a watershed of eighty (80) acres or more. Second, a permit is required before any person may drain or attempts to drain any meandered lake. Third, a permit is required before any person may drain by pumping a slough, pond, or lake or connected series of sloughs, ponds, or lakes having a watershed of 80 acres or more. Fourth, a permit is required for a "legal drain," such as those constructed by a water management district or a drainage district.

A permit must be amended before a lateral drain may be constructed. An amended permit is also required before any person may modify in any manner the drainage authorized in the original permit. Modification includes deepening and widening of drains which have been or may be constructed, the extension of any drain, and the construction of any lateral drain. However, modification of drainage does not include cleaning and clearing of ob-

structions from the drainage facility, or seeding, or riprapping.

While a permit is generally required in the four instances described above, there is an exception. In all instances, except the drainage of a meandered lake or pond, no permit is required for a drain constructed under the comprehensive supervision of a federal or state agency. However, the only agencies deemed capable of such supervision are the North Dakota State Water Commission; the U.S. Army Corps of Engineers; the U.S. Department of Agriculture, and its Soil Conservation Service for a project constructed pursuant to the Watershed Protection and Flood Prevention Act and the Bureau of Reclamation. Other exemptions may be granted by the state engineer on a case-by-case basis.

B. *The Permit Application Process*

Application for drainage by any person including any firm, partnership, association, corporation, or governmental organization, such as a drainage district, must be filed with the state engineer on State Water Commission Form #28. A copy of the permit application also must be filed at the same time with the board of commissioners of the water management district within which is found a majority of the watershed of the pond, slough, or lake or series thereof. A valid drainage permit must contain the approval of both the appropriate water management board and the state engineer. The state engineer reviews the application and any recommendation by the water management district. The application is returned to the applicant for correction if it is defective or insufficient to enable the state engineer or water management district to make a decision. If the state engineer determines that a permit is not required he signs the application and forwards it to the appropriate water management district.

Where the application is properly prepared and a permit is required, the state engineer adds comments, recommendations, and engineering data which may assist the water management district in approving or disapproving the application. The state engineer also will indicate whether or not the application is for drainage which has statewide or interdistrict significance.

The state engineer considers the following criteria in determining whether the proposed drainage has statewide or interdistrict significance:

1. Drainage which would affect property owned by the state or its political subdivisions.
2. Drainage which would cause drainage of sloughs, ponds, or lakes having recognized fish and wildlife values.
3. Drainage which would reduce the storage capacity

of a slough, pond, or lake to be drained by 25 acre-feet (30.83 cubic dekameters) or more.

4. Drainage which would drain or partially drain a meandered lake.
5. Drainage which would have a substantial effect on another water management district.
6. Drainage which would place previously noncontributing areas (based on a 25-year event—4 percent chance) into permanently contributing areas.
7. The state engineer is not limited to the above criteria. For good cause, the state engineer may classify *any* proposed drainage as having statewide or interdistrict significance, or the state engineer may determine that *any* proposed drainage is not of statewide or interdistrict significance except drainage of a meandered lake.
8. Drainage of type one wetlands is not of statewide or interdistrict significance.

Where the state engineer determines that the proposed drainage is not of statewide or interdistrict significance, he will sign the application and forward it to the appropriate board of commissioners of the water management district within which is found a majority of the watershed of the pond, slough, or lake or any series thereof. The board then may approve or disapprove the application without a hearing. However, if the state engineer finds the proposed drainage is of statewide or interdistrict significance, the board of commissioners must set a date for a hearing. The state engineer and board of commissioners may agree to have the state engineer or the state engineer's representative act as the hearing officer.

The purpose of the hearing is to collect evidence from those concerned or affected as to whether the application to drain should be granted and, if so, the conditions under which any water may be drained. The board will investigate whether the projected additional quantity of water drained will exceed the capacity of the waterway drained into and whether the drainage will flood or adversely affect the lands of lower lying landowners.

Although a hearing is required for proposed drainage of interdistrict or statewide significance, it may be waived by the state engineer in order for the board of commissioners to process applications for temporary emergency drainage. However, a hearing shall be conducted at the earliest opportunity if the emergency drainage is to be permanent.

The applicant must give two forms of notice when a hearing is required. First, he must publish notice in a newspaper of general circulation in the area of the proposed drainage once a week for two consecutive weeks. The final published notice must be published not more than 15 days, nor less than five days before the date set for the hearing. Second, the applicant

must give notice by certified mail not more than 30 days nor less than 10 days from the date set for hearing to:

1. All record title owners of real estate or holders of a contract for deed whose property would be directly affected by the proposed draining.
2. All downstream landowners riparian to the affected waterway within two miles (3 kilometers) from the slough, pond, or lake to be drained, unless the board of commissioners or state engineer indicates otherwise.
3. Any water management district which would be affected by the water to be drained. This must include any adjacent district into which the drained water will flow.
4. The North Dakota Game and Fish Department.
5. The North Dakota Department of Health.
6. The North Dakota Highway Department for any proposed drainage which will affect the right-of-way of any state highway.

The notice given by publication and mail must give all essential facts concerning the proposed drainage, including, but not limited to, the name and address of the applicant, the legal descriptions of the area to be drained, the purpose of the drainage, the waterway into which the water will be drained, the legal description of the confluence of the outlet waterway and creek or unnamed tributary, the estimated dates drainage construction will commence, the time, date and location of the hearing, and all other pertinent information.

An affidavit of mailing and publication of notice must be forwarded to the board of commissioners before they will decide on the application.

The board of commissioners must make a determination on the application within 30 days after a hearing or at the earliest opportunity in emergency situations. The time limit may be extended for complex or unique applications.

There are five determinations which must be made by the board upon a permit application:

1. Whether the quantity of water to be drained will exceed the capacity of the waterway into which the water will be drained.
2. Whether the drainage will cause flooding on or otherwise adversely affect the lands of lower proprietors.
3. Whether easements already acquired are adequate.
4. Whether the board has considered comments of the Game and Fish Department, the Department of Health, and the State Highway Department.
5. Any conditions placed on the approval.

Several criteria help the board of commissioners determine whether or not the drainage will cause flooding on or otherwise adversely affect the lands of lower landowners.

1. No uncontrolled drainage shall be permitted into receiving natural waterways unless specific data indicate that the receiving watercourse has sufficient capacity to handle a one in 25 years' event (4 percent chance) or greater.
2. No uncontrolled drainage shall be permitted from a non-contributing watershed. A noncontributing natural flowing surface water to a waterway at an average frequency more often than once in three years over the latest 30-year period.
3. No outlet waterway shall be designed to exceed a maximum capacity of a one in eight-year event (12½ percent chance).
4. Exceptions may be authorized by the board of commissioners and state engineer on an individual basis. Factors that will be considered shall be watercourse capacities, control structures, drainage area, increased volume of runoff, and environmental effects. Request for exceptions must be accompanied by a plan satisfactory to the board of commissioners and state engineer.

An application approved by the board of commissioners, if not involving drainage of statewide or interdistrict significance, is a permit to drain and notice of the board's action is forwarded to the state engineer. However, if the board approves an application involving drainage of statewide or interdistrict significance, the approved application along with minutes of the hearing and any information used by the board must be forwarded to the state engineer for approval before a permit may be issued.

An application denied by the board of commissioners must be returned to the applicant along with a copy of the board's determination. A copy also is forwarded to the state engineer. A denied application may be appealed to the local district court. Where the water management district is confined to the limits of one county, the appeal must be taken to the district court of that county. The appeal must be taken to the district court of the county in which the land to be drained lies when the district includes two or more counties. Likewise, any person adversely affected by the board's approval of a drainage application also may appeal to a district court. However, appeal may be made to the district court in the county where the injured land is situated.

The state engineer, upon receiving an application to drain which has been approved by the board of commissioners and is of interdistrict or statewide significance, must independently determine whether the granting of the permit is in the best interest of the state. The state engineer approves the permit if he determines that the applicant and board of commissioners have satisfactorily shown that the proposed drainage would be in North Dakota's interest. The state engineer will either deny the application or

return it the appropriate board of commissioners for reconsideration if he is not satisfied that it is in the state's interest.

The state engineer must consider:

1. Whether the proposed drainage will adversely affect property owned by the state or a political subdivision.
2. Whether the water to be drained may overburden an interdistrict watercourse.
3. Whether the proposed drainage will adversely affect the property of downstream landowners.
4. Other factors of statewide or interdistrict significance.

The state engineer must be guided by the same criteria used by the board, as mentioned above, in considering whether or not the proposed drainage of interdistrict or statewide significance will adversely affect the property of downstream landowners.

If the state engineer denies an application for a permit to drain, whether or not the drainage is considered to be of interdistrict or statewide significance, an appeal may be taken by the denied applicant to the district court of the county in which the land to be drained is located. If the land is located in more than one county the appeal may be taken to the district court of any county in which any part of the land is located. Likewise, if any person feels that an application should not have been approved, because he will be adversely affected by the approved drainage, he also may appeal the state engineer's decision to a district court. However, the adversely affected person must appeal to the district court of the county in which his land is located. If his land is located in more than one county, the appeal may be taken to the district court of any county in which any part of the land is located.

The decision of the state engineer may be appealed by either a drainage permit applicant or an adversely affected person downstream or elsewhere within 30 days after the decision of the state engineer has been filed.

The state engineer may require a post-construction survey of the approved drain as a condition to any permit. Other conditions may be attached to an approved permit by the state engineer to fit the circumstances of each application.

A permit to drain is valid when the application has been approved by both the appropriate board of commissioners of a water management district and the state engineer.

C. Unauthorized Drainage

The state engineer notifies the appropriate water management district upon receiving a complaint of

unauthorized drainage which is of statewide or interdistrict significance. The district must report on the complaint within 60 days or if its report indicates the existence of unauthorized drainage but that it intends to take no action on the complaint, the state engineer may notify the district of his intent to file suit under the North Dakota Environmental Law Enforcement Act of 1975, as provided in the NORTH DAKOTA CENTURY CODE. The state engineer may file a suit against the district if the district does not respond to this notice. Even if no one complains of an unauthorized drainage, the state engineer may take enforcement action or file a criminal complaint.

Any "person," i.e., human being and political entities, aggrieved by the violation of drainage statutes, rules, or regulations may bring an action against any other "person" in the appropriate district court to enforce the drainage statutes, rules, or regulations, and/or to recover any damages that have occurred as a result of the violation.

D. Public Drainage Projects—Districts

The North Dakota Legislature has permitted several types of political entities or public corporations informally or formally called "districts" to be created. Some "districts" are closely associated with county government and have co-extensive boundaries. The districts may undertake specific types of public projects within their respective geographic areas. Many districts appear to have the power to undertake public projects of which drainage may be a part. The public entities include: Irrigation Districts; Flood Irrigation Districts (Flood Irrigation Projects), Water Management Districts or Water Conservation and Flood Control Districts, Drainage Districts (Drainage Projects), Garrison Conservancy Districts, and Soil and Water Conservation Districts.

Requirements for formation of "districts" vary. A petition signed by a required number of people may be required, the county board upon its own motion or by petition of any person may appoint a board, or the districts may be created by statute. Board members may be appointed by the county board of supervisors or by lot, or may be elected. Usually, board members must be bonded and they can be removed from office for various reasons.

Although districts may have different primary objectives, such as soil productivity and conservation, water conservation, flood prevention, drainage, and irrigation, each district's projects may include drainage to further its special purpose. For example, soil agricultural productivity projects undertaken by a soil and water conservation district or drainage

district may be enhanced by and include drainage; irrigation projects undertaken by irrigation and flood irrigation and Garrison Conservancy Districts may need a drainage system. One district's projects to further its special goals or purposes may conflict with another district's special purposes. Obviously, if a drainage district were to go unchecked in its purpose to drain land, the purpose of a water management district to prevent floods, flood damage, and conserve water could be undermined.

Districts must comply with the general drainage laws of North Dakota even though each has powers of eminent domain and powers to levy taxes to further its projects, and uses those powers to drain land as part of a project to achieve its purpose. By definition, a "person" includes districts; so a district must secure a permit to drain if one is required. If no permit is required, then the district or person undertaking a drainage project must follow the common law doctrine of reasonable use in order to avoid liability for injury to others.

III. North Dakota Common Law

A. The Reasonable Use Doctrine

The owner of land remaining in its natural condition is not required to prevent the natural flow of diffused surface waters from his land to that of his neighbor. But when the flow of water over the surface or through a natural drainway is increased or when a natural or artificial drainway is modified, the landowner who is so interfering is subject to the standard of using his land as not to unreasonably injure his neighbor.

As a general rule, every landowner is privileged to reasonably use his own land. Should some harm be caused to a neighbor by the flow of altered or excess diffused surface water, the law may hold the landowner responsible only if his use of his land in causing this alteration was unreasonable. However, the water must be accepted on the land over which it flows if his use is reasonable. It cannot be cast from where it came.

What is reasonable use is a question of fact to be determined by the circumstances of each case. Circumstances to be considered include such things as the amount of harm caused, whether that harm could have been foreseen, the motive of the landowner in casting the water off of his land, the location (whether urban or rural) and use (whether residential, industrial or agricultural) of the land, and all other relevant facts. The landowner may be able to cast off water from his land, which would otherwise have remained there, to the detriment

of another, if:

1. The drainage is reasonably necessary.
2. If the landowner uses reasonable care as to avoid unnecessary injury to his neighbor,
3. If the benefit to the land drained outweighs the amount of harm caused to the land receiving the excess water, and
4. If it is accomplished by reasonably improving a natural drain or, if that is impractical, by constructing a reasonable and feasible artificial drainage system.

Drainage with intent to injure a neighbor would be unreasonable.

B. Examples of Reasonable Use

While the reasonable use rule often avoids harsh results, it is unpredictable. One cannot say with certainty what is or is not a reasonable use. Below are six examples of what courts in the United States have declared to be reasonable or unreasonable uses. Whether they will meet the requirements of the reasonable use rule in North Dakota remains to be seen. However, in most instances, they probably will.

The examples will be classified into six subject areas. They are: (1) the obstruction of drainage, (2) artificial drains, (3) the increased flow of water in the drainway, (4) drainage problems resulting from highway construction, (5) the effect of storms, and (6) the polluting of diffused surface waters.

1. Obstruction of Drainage

Obstruction of drainage may occur when land is filled in or graded so as to block natural flow or when a natural drain is artificially modified, such as by lining it with rocks to prevent soil erosion. Alterations, if made to achieve a reasonable use of one's land and if not obstructing a drainway, are permissible. But obstructing a natural drain, at least if it is an important one so as to hold back the water and flood a neighbor's land, generally would not be considered a reasonable use. Further, if the direction of natural flow of the diffused surface water not in a drainway is changed or is concentrated and substantial injury results therefrom, the use may well be unreasonable.

It is permissible to line a natural drainway with rocks, which in effect becomes an artificial drain, if the elevation of the drain is not raised. In fact, a washout may be lined with rocks if the flow of diffused surface water would not materially differ from the natural drainway had it been permitted to continue in existence.

2. Artificial Drains

Land may be artificially drained by ditches, culverts, etc. The landowner may not be liable if the water is sent in substantially the same direction and quantity without undue con-

centration. But the use might be unreasonable if, by following the artificial drain, the diffused surface water causes substantial injury to the adjoining land. The ditching might be viewed as aiding the natural drain if the increase is not substantial. A landowner should try to turn the water into the course that will do the least injury to adjacent landowners.

An artificial drain usually will have to be repaired from time to time to remain in use. Persons using the drain cannot force a landowner through whose land it runs to maintain it at his expense. However, users are permitted to enter the property through which the drain runs for the purpose of repairing or keeping the drain in repair, assuming that the drain initially was properly created. It may even be an unreasonable use for a landowner who uses a drain to allow it to fall into disrepair to the injury of other users.

3. Increased Flow

A landowner is privileged to drain his land, but he cannot cast the diffused surface waters off of his land in unusual quantities or with a greater than normal velocity to the injury of his neighbor. This rule applies whether the land drains into a ditch or drainway. The use may be reasonable unless there is a substantial increase in the quantity or velocity. It is not clear as to what is required to show a substantial increase. The increase was held to be substantial where almost 75 percent of the value of the property was destroyed. On the other hand, an unusual increase of water might be due to an abnormally wet season and not to drainage.

Another problem of increased flow arises in connection with the draining of diffused surface waters into watercourses, causing them to overflow their banks. The result is uncertain. It will probably be resolved by whether or not the overflow is substantial.

4. Highway Drainage

The State Highway Department, county commissioners, or township supervisors are required to construct bridges and culverts at the expense of their governmental units to drain land adjacent to roads. Because they are required to install bridges and culverts, they are not liable for the damages caused an adjoining landowner by the increased flow of water, provided that the increased flow results solely from the construction of the highway in an ordinary manner without negligence. The governmental agency building the road has a mandatory duty to provide for the drainage of water which may accumulate in the ditches along the highway.

5. Storms

Rains that are so heavy that the artificial drainway or pipe will not handle them will not impose liability if such rains were unusual and unexpected. Rains are unusual and unexpected if, through ordinary foresight, they could not

have been anticipated. What should be anticipated may be found by searching the rainfall records for the previous years and constructing the drain accordingly, which means to build a drain which will handle a little more water than the amount which fell in the heaviest rain recorded.

6. Pollution

A landowner has no right to pollute diffused surface water on his land and allow it to flow in this polluted condition onto the land of another. Such a use, insofar as it interferes with the possible enjoyment of the adjoining land, is a nuisance. The state of North Dakota may take legal action against a polluter upon complaint.

C. Drainage Easements By Conveyance or Prescription

1. Conveyance

A person may acquire a drainage right-of-way over another's land by voluntary negotiation and transfer, i.e., conveyance. The general law of easements, which is discussed in another report, also is applicable here.

2. Prescription

A prescriptive right may arise under certain conditions when one person uses the land of another; for example, where one land user has for many years crossed the pasture of a landowner on his way to town. However, before the first land user may gain an easement by prescription (right to use) across the other's pasture, he must show that his use is (1) adverse to the landowner; (2) open and notorious; (3) continuous and uninterrupted for a period of 20 years. An adverse and hostile use means that the crosser had not received permission of the landowner to cross his land. The use is not adverse if the crosser had been given the owner's permission to cross the land and the crosser cannot gain a prescriptive right. The open and notorious requirement is to give the landowner notice that someone is using his land without his permission. This may be shown by a worn path or the landowner may have seen the crosser cross his pasture on numerous occasions. Continuous and uninterrupted for a period of 20 years means a periodic use. It does not require the crosser to travel the path every day. All it requires is that the crosser periodically use the path.

It is uncertain whether a prescriptive right can be gained in North Dakota to drain water through an artificial drain. However, one state which does recognize such a prescriptive

right has ruled that the right acquired is one to drain a particular area, not a given quantity of water. The quantity or volume of water drained will differ from time to time, because rainfall intensity, soil saturation, and run-off characteristics are uncertain factors. Thus, it is not an adequate standard. The most constant factor is the area drained. But one may not gain a prescriptive right to cast sewage upon another's land.

IV. Conclusions

Generally, North Dakota drainage law does not offer a set of rules which will guide a farmer or rancher with certainty in determining whether or not his drainage is within the law. The various types of waters and conditions under which they may be drained do not easily lead to absolute, hard and fast rules of when and where the waters may be drained. This uncertainty works to the advantage of both the "person" who desires to drain and the "person" who believes he will be injured by his neighbor's drainage. There is one certainty, however; the North Dakota Legislature has determined that certain types of drainage may pose a threat to the public health, safety, and welfare. Such drainage must be thoroughly considered through an extensive administrative process. Only after the approval of both the appropriate water management district and the state engineer may a drainage permit be issued for the drainage to proceed. If violation of the required permit process occurs, then the violator is open to criminal and civil liability. But even if there has been compliance with the permit process, it is not clear that even this will absolutely protect the permit holder from liability; that is, he may still have to meet the standard of reasonable use. While a permit may not be required, a landowner should proceed with caution to drain his land. If a permit is not needed and the landowner has any doubts as to the reasonableness of the drainage, he should probably seek some legal advice. Such advice should be sought before large investment and injury has occurred.

For more information contact:

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