LETTER OPINION
2002-L-07

February 4, 2002

Mr. Daniel L. Gaustad
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Dear Mr. Gaustad:

Thank you for your January 8, 2002, letter concerning the maintenance of easements.

Your first question is whether the Walsh County Water Resource Board has the right to access land abutting drain structures and use it to maintain and repair the structures. While the Board would have this right if expressly acquired in the easement agreement with the landowner, your question concerns situations in which the easement agreement is silent on this subject or the easement was acquired by prescription.

In Laden v. Atkeson, 116 P.2d 881, 883 (Mont. 1941), the Montana Supreme Court addressed the right of an easement owner, or dominant tenant, to enter upon a landowner's property, or servient tenement, to maintain an easement. The court recognized the general principle that "'[t]he right to enter upon the servient tenement for the purpose of repairing or renewing an artificial structure, constituting an easement, is called a 'secondary easement,' a mere incident of the easement . . . by prescription.'" See also Guthrie v. Hardy, 28 P.3d 467 (Mont. 2001) (recognizing the general rule that the owner of the easement has not only the right but the duty to keep it in repair); 25 Am.Jur.2d, Easements and Licenses in Real Property § 95 (1996). The Montana Supreme Court provided the following illustration:

> A person having an easement in a ditch running through the land of another may go upon the servient land and use so much thereof on either side of the ditch as may be required to make all necessary repairs and to clean out the ditch at all reasonable times.

Laden, 116 P.2d at 883 (citations omitted). In Otter Tail Power Co. v. Malme, 92 N.W.2d 514, 523 (N.D. 1958), the North Dakota Supreme Court explained:

> One of the cardinal principles of the law of easements is that the dominant owner has the right of access to make repairs and that he may enter upon the servient estate for this purpose at all reasonable times. He may not, however, inflict unnecessary injury. 17 A, Am.Jur., Section 130, Easements, page 739. The right to maintain and repair an easement is based upon the principle that a grant of the use of a thing carries with it everything by which the grantee may reasonably enjoy the use thereof. 17 A, Am.Jur., Section 129, Easements, page 737.

Id. Although the court's decision in Malme was premised upon a condemnation action, the court said that it could see no reason why access rules should not apply equally to easements obtained by condemnation and to those obtained by grant. Id. In Laden, the court said the access rules applied to easements obtained by prescription in addition to those acquired by grant. Laden, 116 P.2d at 883.

Under these authorities, the Water Resource Board has the right to enter upon the servient land and maintain its ditch.

Your second question asks how much of the abutting land may be used by the Water Resource Board. In Malme, the court stated that the dominant owner may have access to maintain his easement, as long as unnecessary injury is not inflicted. Malme, 92 N.W.2d at 523. In Laden, the court said that the secondary easement can be exercised only when necessary and in such a reasonable manner as not to needlessly increase the burden upon the servient tenement. Laden, 116 P.2d at 883. The use is confined to the times, places, and extent necessary. Id. at 886. See also 25 Am.Jur.2d § 95. Thus, the Board may use whatever is reasonable, which, of course, will depend on the circumstances. Furthermore, the maintenance cannot needlessly increase the burden on the lands surrounding the easement.

It would be advisable to contact the servient landowner to determine a reasonable maintenance area and to arrange a mutually acceptable time to provide maintenance to the drain so as to not unnecessarily damage the servient landowner's property.

Your third question asks whether the Water Resource Board has an easement or other property rights over the maintenance easement area to permit the debris and other materials removed from the drain structures during maintenance or repair, commonly referred to as the "spoil," to be permanently deposited and remain upon the maintenance easement area.

In Peters v. Milks Grove Special Drainage Dist. No. 1 of Iroquois County, 610 N.E.2d 1385 (Ill. App.3d 1993), the court addressed the issue of spoil banks. It found that the

drainage district enlarged its easement on the servient tenement by spreading newly excavated soil beyond the boundaries of the existing spoil bank.[1] The Peters court determined that the district was limited to the extent of actual prior use, and because the district was a public agency, it was prohibited from taking private property for public use without paying just compensation. Id. at 1389. The court determined that Peters was entitled to just compensation because he was deprived of 1.65 acres of land, which was taken by a public agency for public use. Id. at 1390.

Although Peters is not controlling precedent, the principles it relies upon are instructive. It is reasonable to conclude that the Water Resource Board's easements are restricted to the extent of its actual prior use and that it may be required to compensate the servient landowners if it chooses to deposit the spoil beyond any existing spoil bank.

Sincerely,

Wayne Stenehjem
Attorney General

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[1] See Matter of Onarga, Douglas & Danforth Drainage Dist. of Iroquois County, 534 N.E.2d 226 (Ill. App. 3d 1989) (a drainage district could not unilaterally and without the landowner's consent increase the burden of an easement on the servient tenement; the district's easement was restricted to the extent of its actual use). But see Robinson v. Cuneo, 290 P.2d 656, 658 (Cal. App. 2d 1956) (primary easement to maintain and repair an irrigation ditch included the secondary easements of keeping the ditch clean and of piling the spoil on the banks of the ditch).