

OPINION
66-473

January 26, 1966 (OPINION)

Mr. Gordon Berg

Chairman

Sweetwater-Dry Lake Water Management District

Devils Lake, North Dakota

RE: Waters - Water Management District - Compensation of Owners of
Riparian Land

Mr. F.E. Foughty, Secretary of the Sweetwater-Dry Lake Water Management District, has requested this office to issue an opinion to you based upon the following facts contained in Mr. Foughty's letter of January 22, 1966:

Sweetwater Lake is a complex of small lakes located north of Devils Lake. A number of coulees flow into Sweetwater Lake, draining an area of several hundred square miles. Sweetwater Lake is a meander lake. All around the lake there is agricultural land. Much of the time the water recedes considerably below the meander line. The riparian land owners in and around the lake cultivate and pasture and make hay on much of the meander land. All of this lake bottom land was flooded at the time of the original survey in 1883.

The Water Management District is planning a project which would provide for a canal from Sweetwater Lake into Devils Lake. This canal would be adequate to run the excess water from Sweetwater Lake down to the meander elevation of the lake shore. The project would also provide for the improvement of drainage of the several hundred square miles of area draining into the lake, and the project would also provide for the diverting of an additional coulee into the lake which now drains into another lake located to the west of Sweetwater Lake.

In other words, artificial means would be used to improve the drainage of the area, and there would be one additional coulee diverted into Sweetwater Lake that presently is not flowing into this lake.

The canal flowing from Sweetwater Lake to Devils Lake would be adequate so that the water level of Sweetwater Lake would not go to an elevation beyond that of the meander line of the lake.

However, the project would increase the volume of the water flowing into Sweetwater Lake, and would tend to maintain the level of the lake at a higher level than is otherwise the case.

Due to the construction of the canal from Sweetwater Lake to Devils Lake, the project would prevent the flooding of the adjacent deeded land in and around the lake.

However, the project would tend to maintain Sweetwater Lake at a higher, more constant elevation within the meander elevation of the lake.

Therefore, this project would tend to prevent the use of the land below the meander line level of the lake for agricultural purposes.

Under present conditions, the owners of the riparian lands in and around the lake use the land of the lake bottom as the water recedes. As the water recedes, each of the riparian owners is entitled to use the land down to the water level to the center of the lake, in a pie-shaped parcel. Such use of the riparian land of the lake bottom would be decreased and possibly eliminated by the proposed project as the lake would be maintained at a more constant level near the meander line level.

The Water Management District's legal question is this: Will the Water Management District be required to compensate the owners of riparian land in and around Sweetwater Lake for the lake bottom land below the meander line which would be flooded more constantly by reason of the project than is the case at the present time?

This question is similar, if not identical, to that which will be presented by the flooding of Devils Lake by the Missouri River Diversion Project which will deprive some of the riparian and owners in and around Devils Lake from the use of some of the lake bottom land below the meander line for agricultural purposes."

The following statutes are pertinent to the question presented. Section 61-15-01 of the North Dakota Century Code provides:

DEFINITIONS. In this chapter, unless the context or subject matter otherwise requires:

1. 'Ordinary high-water mark' shall mean that line reached only by water when lake or stream is ordinarily full and the water ordinarily high; and
2. 'A navigable lake' shall include any lake which shall have been meandered and its metes and bounds established by the government of the United States in the survey of public lands."

Section 61-15-02 of the North Dakota Century Code provides:

CONTROL OF WATER AND WILDLIFE CONSERVATION PROJECTS VESTED IN STATE. By virtue of its police powers the state shall be vested with the control of navigable lakes which have been

meandered and their metes and bounds established by the government of the United States in the survey of public lands, within the ordinary high-water mark for the purpose of constructing, maintaining, and operating dams, dikes, ditches, fills, spillways, or other structures to promote the conservation, development, storage, distribution, and utilization of such water and the propagation and preservation of wildlife."

The construction of the proposed canal and the improvement of drainage of the several hundred square miles draining into Sweetwater Lake would appear to come within the provisions of section 61-15-02, cited above. The state has granted to Water Management Districts the authority to perform the functions outlined in the letter. See section 61-16-11 of the North Dakota Century Code, as amended.

In construing the above-quoted statutory provisions, the Supreme Court of North Dakota has held that when North Dakota became a state it acquired title to lands under all navigable waters within its borders, subject to the limitation of the commerce clause of the federal constitution and that admission to statehood did not vest any title in the state to lands underlying nonnavigable bodies of water. Title to such lands remained in the federal government or in persons to whom it had transferred title. See *State v. Brace*, 36 N.W.2d. 330 (N.D. 1949). The Court further held that sections 61-15-01 and 61-15-02 do not purport to vest title to property in the state since obviously they could not divest owners of their lands and transfer property to the state without the payment of due compensation under the exercise of the powers of eminent domain. The Court held the Legislature could not adopt a retroactive definition of navigability which would destroy a title already vested under a federal grant, or transfer to the state a property right in a body of water or the bed thereof that had been previously acquired by a private owner.

The Court stated on pages 332 and 333 of the Reporter:

A legislative declaration that all meandered lakes are navigable will not make them so if they are not navigable in fact, as against the preexisting rights of riparian owners, unless compensation is made to such owners for the property thus injured or taken by the state. * * * * Thus we reach the conclusion that the state may not now successfully assert title, on the ground of navigability, to lands lying beneath nonnavigable waters unless those waters were in fact navigable at the time of statehood in the absence of subsequent conveyances to the state. Where patents were issued to riparian owners prior to statehood rights thereunder with reference to navigable or nonnavigable waters would be determined as of the date of the patent." (See also *Ozark-Mahoning Co. v. State*, 37 N.W.2d. 488 (N.D. 1949)).

In *Roberts v. Taylor*, 181 N.W. 622 (N.D. 1921), the Supreme Court of North Dakota held that Sweetwater Lake in Ramsey County was a navigable lake and that the bed of the lake passed to the state when North Dakota was admitted to the Union. If the lake described in the letter is the same lake as the one referred to in the *Roberts* case, the question of navigability has already been determined by the

Supreme Court of North Dakota. For purposes of this opinion, we will assume the lakes are the same. Should they not be the same, the determination of the question presented might be materially altered.

Assuming therefore that Sweetwater Lake is a navigable lake, the state and its subdivisions, such as the Sweetwater-Dry Lake Water Management District, has the authority to use such lake bed for the purposes described within the ordinary high-water mark as defined by section 61-15-01. What is the ordinary high-water mark of the lake is a question of fact which this office cannot determine and must be determined by competent evidence. In action by owners of land on a navigable lake to enjoin the state from artificially raising the level of such lake the burden rests upon the owners to prove by a clear preponderance of evidence that such proposal would result in the flooding of land which the owners had acquired through reliction. (See *Rutten v. State*, 92 N.W.2d. (N.D. 1958)).

Even if we assume the owners of the land surrounding Sweetwater Lake can prove, within the standard prescribed in the *Rutten* case, *supra*, that they hold title to the ordinary low water mark the intervening area between the low water mark and high water mark is subject to a public right or use for public purposes, particularly in connection with the use of the lake which is a navigable lake. (See *Anderson v. Ray*, 156 N.W. 591 (S.D. 1916); (*Flisrand v. Madson*, 152 N.W. 796 (S.D. 1915.))

The meander lines are not *per se* boundary lines. They are lines run along the margin of a body of water to ascertain the quantity of upland to be charged for when sold and not to limit the title of the grantee to the meander lines. The waters themselves constitute the real boundaries of the lands abutting on such meander lines. (see *State v. Brace and Ozark-Mahoning Co. v. State*, *supra*.)

Assuming therefore that the ordinary high water mark, as defined by statute, and the meander lines referred to in the letter are the same, it is our opinion that the Water Management District will not be required to compensate the owners of riparian land in and around Sweetwater Lake for the lake bottom land below the meander line which would be flooded more constantly by reason of the project than is the case at the present time.

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