

OFFICIAL OPINION NO. 93-04, Flood Control Measures

**August 16, 1993**

Representative Roland A. Chicoine  
RR 2, Box 212  
Elk Point, SD 57025

**OFFICIAL OPINION NO. 93-04**

Flood control measures

Dear Representative Chicoine:

You have asked for an official opinion from this Office regarding the following factual situation:

**FACTS:**

Unusual amounts of rainfall have raised the levels of rivers and streams in southeast South Dakota. The effect has been to back water up onto county roads, highways and farm land. Many landowners previously had installed man-made drainage systems, and have obtained drainage permits for their use. These systems often use flood gates and other flood control measures to control drainage.

Based upon the foregoing factual situation, you have posed the question of whether landowners may use flood gates to prevent flood waters from backing up on to private property from a county road.

The answer to your question is that landowners may take such flood control measures provided that the measures comply with (a) county drainage requirements, (b) laws pertaining to obstruction of water courses, (c) laws pertaining to flood control permits, and (d) laws pertaining to the obstruction or damage to roadways.

Landowners are not prohibited from protecting their own property by utilizing man-made drainage systems, including flood gates. Such use, however, must be designed so as not to affect the rights of others. Several different state laws apply.

First, county drainage laws must be considered. In 1985, the South Dakota Legislature delegated responsibility for drainage decisions to individual counties. That legislation, SDCL ch. 46A-10A, allows counties to take emergency measures to regulate drainage (SDCL 46A-10A-15), develop and enforce a county drainage plan (SDCL 46A-10A-16 and SDCL 46A-10A-33), and regulate nonconforming drains or drainage schemes. (SDCL 46A-10A-36.) This comprehensive drainage law, as well as county drainage plans and ordinances adopted thereunder, must, of course, be followed. Therefore, if the situation you have addressed involves the drainage of water from one parcel of real property onto one or more other parcels, the statutes and ordinances must be carefully consulted and utilized. Because the factual situation you have described does not clearly involve the drainage of water from one parcel of property to another, this opinion does not contain a review of SDCL ch. 46A-10A or of any county drainage ordinances. If, however, drainage issues are involved, those statutes and ordinances must be reviewed with regard to the particular drainage situation and circumstances involved.

Second, it must be recognized that landowners are generally prohibited from preventing the natural flow of streams and springs. SDCL 46-5-1. Obstruction or interfering with the stage, level or flow of public waters of this state, including any lake, stream, river or other public water course, is prohibited unless lawful authority exists (generally a court order or a permit from the South Dakota Water Management Board). SDCL 46-5-1.1. In the event that the water involved is a stream, but it is "nonnavigable," it may be dammed under certain conditions pursuant to SDCL 46-5-2. Nonetheless, the course of the water may not be changed, vested water rights may not be interfered with, and the lands of another may not be flooded unless an easement has been secured.

Third, if a water course is involved, consideration must be given to SDCL 46-5-47 and SDCL 46-5-48 which pertain to flood control. Individuals constructing flood control works must obtain a permit from the South Dakota Water Management Board pursuant to SDCL 46-5-47. The permit is necessary in order to protect existing water permits and licenses, to assure the safety of the works, and to prevent damage to property. SDCL 46-5-47. Flood control permits are not required if the "average daily flow" of the water course is less than 0.4 cubic feet per second of water during the period from May 1 to September 30. In other words, if the water course is one where the flow is, on the "average," quite small, a flood control permit is not required to control unique, large flows. Also, even if a flood control permit is required, temporary facilities may be constructed if they are required for the immediate protection of life or property. SDCL 46-5-48. In the event that such temporary

emergency facilities are constructed on a water course where the average daily flow is more than 0.4 cubic feet per second during the summer, the South Dakota Division of Water Rights must be notified of the construction. SDCL 46-5-48.

Finally, regardless of whether the water sought to be controlled is considered drainage (as first discussed in this opinion) or whether it is considered a water course or stream (as discussed in the preceding two paragraphs), consideration must be given to the effect of flood control measures on roadways. In other words, regardless of whether the provisions of other statutes have been met, it is clear under law that roads may not be damaged from such practices. Any person who intentionally injures or destroys a public highway or bridge--or even a private way--is guilty of a Class 6 felony. SDCL 31-32-1. Individuals are prohibited from injuring any highway by removing or destroying the grade constructed for the highway in any manner. SDCL 31-32-7 and SDCL 31-32-8. Persons allowing water to flow upon any street, road or highway are liable to the governing body or board having charge of that street, road or highway if money was necessarily expended in removal or repair. SDCL 31-32-9.

In sum, the flood control measures such as those you have described are appropriate to the extent that they are consistent with the four state law considerations addressed above.

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