

**LETTER OPINION
2009-L-04**

February 9, 2009

Mr. Thomas L. Fischer
Chairman
Cass County Joint Water Resource District
1201 Main Avenue West
West Fargo, ND 58078-1301

Dear Mr. Fischer:

Thank you for your letter asking whether water resource districts¹ in North Dakota can agree to fully indemnify private parties, political subdivisions and the state and, if so, whether the cost-share agreement attached to your letter complies with the statutory requirements for indemnification in N.D.C.C. § 32-12.2-13. It is my opinion that water resource districts acting within the authority of N.D.C.C. ch. 61-16.1 and N.D.C.C. § 32-12.2-13 may only agree to fully indemnify the state, and it is further my opinion that the cost-share agreement you attached complies with N.D.C.C. § 32-12.2-13.

ANALYSIS

Indemnity, in its most basic sense, is reimbursement for a party who discharges a liability that another party rightfully should have assumed.² For example, the state may seek indemnity from a political subdivision for liability that the political subdivision should have assumed. The benefit to such risk transfer is that state and taxpayer dollars are protected from claims involving projects controlled by one political subdivision.

North Dakota recognizes both statutory and common-law indemnity rights. Under N.D.C.C. ch. 22-02, “[i]ndemnity is a contract by which one engages to save another from a legal consequence of the conduct of one of the parties or of some other person.”³ Thus, under the scenario presented, the indemnitee [state], upon becoming liable, is entitled to

¹ This opinion only applies to water resource districts created under N.D.C.C. ch. 61-16.1 and does not address water districts created under N.D.C.C. ch. 61-35.

² See 41 Am. Jur. 2d Indemnity § 1 (2008).

³ N.D.C.C. § 22-02-01.

recover from the indemnitor [political subdivision] the amount of the liability, including the reasonable cost of defending the claim.⁴

The North Dakota Supreme Court recognizes common-law indemnity in North Dakota that can arise by agreement or implication.⁵ Because indemnity is an equitable doctrine, it is not amenable to hard and fast rules.⁶ “[R]ather than using strict standards, courts must examine carefully both parties’ conduct in light of general notions of justice.”⁷ Thus, the facts of each case determine how the parties’ indemnity rights are applied.⁸

North Dakota law avoids strict standards and indemnification for the indemnitee’s own negligence (sometimes called “full indemnity”) is not prohibited. In some situations, the law even requires that the state be fully indemnified.⁹

Your questions involve the general authority of water resource districts in North Dakota to indemnify other parties for liability. You identify two issues concerning a water resource district’s general authority to indemnify:

Issue #1: Can a water resource district agree to indemnify private parties or other political subdivisions?

Issue #2: Can a water resource district agree to indemnify the State of North Dakota?

In a previous opinion, this office determined that a state agency’s authority to indemnify is ascertained by examining the agency’s actual and implied statutory authority, including its authority to spend public funds.¹⁰ Water resource boards, though not state agencies, are

⁴ N.D.C.C. § 22-02-07(1) and (3).

⁵ Mann v. Zabolotny, 615 N.W.2d 526 (N.D. 2000).

⁶ Nelson v. Johnson, 599 N.W.2d 246 (N.D. 1999).

⁷ Id. (citing Sayler v. Holstrom, 239 N.W.2d 276, 279 (N.D.1976)).

⁸ Superior, Inc. v. Behlen Mfg. Co., 738 N.W.2d 19 (N.D. 2007).

⁹ N.D.C.C. § 61-21.1-07 (where the state, through the Industrial Commission, provides financial assistance to landowners for water projects, the landowner “shall agree in writing to indemnify and hold harmless the state, its employees, and its agents and assigns, for any liability or claim of liability arising from the establishment, construction, reconstruction, repair, maintenance, or operation of the water project”); N.D.C.C. § 37-17.1-21 (where local governments receive assistance from the state for debris and wreckage removal in disasters or emergencies, the local government must “first agree[s] to indemnify the state government against any claim arising from such removal”).

¹⁰ N.D.A.G. 2002-L-21 (N.D.C.C. § 54-18-02 provides State Mill with the power to indemnify other parties and budget for payment of the indemnity obligation).

political subdivisions created by statute.¹¹ As such, a water resource district's powers are limited to those that are either expressly granted to them or reasonably or necessarily implied from the statutory powers expressly granted.¹² In addition:

Before a political subdivision may act it must have specific authority to act in that subject area. "In defining a [political subdivision's] powers, the rule of strict construction applies and any doubt as to the existence or the extent of the powers must be resolved against the [political subdivision]." Roeders v. City of Washburn, 298 N.W.2d 779, 782 (N.D. 1980). After it has been determined that a political subdivision has the particular power, the rule of strict construction no longer applies, and the manner and means of exercising those powers, where not limited or specified by the Legislature, are left to the discretion of the political subdivision. Haugland v. City of Bismarck, 429 N.W.2d 449, 453 (N.D. 1988).¹³

A water resource district's statutory powers are found in N.D.C.C. ch. 61-16.1.¹⁴ Water resource districts were established to accelerate development of water resources in North Dakota.¹⁵ To that end, N.D.C.C. ch. 61-16.1 gives water resource districts broad responsibility and authority to plan, develop, finance, construct, operate, and maintain water projects.

Each water resource board shall have the power and authority to . . . [p]lan, locate, relocate, construct, reconstruct, modify, maintain, repair, and control all dams and water conservation and management devices of every nature and water channels, and to control and regulate the same and all reservoirs, artificial lakes, and other water storage devices within the district.¹⁶

A water resource district's spending authority is based on various financing options. Water resource districts can fund water projects through special assessments, general tax collections, service charges, or any combination of such sources.¹⁷ Water resource districts have the authority to accept funds from federal, state, and other public or private

¹¹ Anderson v. Richland County Water Res. Bd., 506 N.W.2d 362, 366 (N.D. 1993); N.D.A.G. 99-F-17.

¹² Burlington N. & Santa Fe Ry. Co. v. Benson County Water Res. Dist., 618 N.W.2d 155, 157-58 (N.D. 2000); N.D.A.G. 2005-L-11; N.D.A.G. 2002-F-03; N.D.A.G. 97-F-07; see also N.D. Const. art. VII, § 2.

¹³ N.D.A.G. 97-F-07; N.D.A.G. 2008-L-05.

¹⁴ Ness v. Ward County Water Res. Dist., 585 N.W.2d 793 (N.D. 1998).

¹⁵ N.D.C.C. § 61-16.1-01.

¹⁶ N.D.C.C. § 61-16.1-09(5).

¹⁷ N.D.C.C. § 61-16.1-06.

sources for the purpose of aiding the construction and maintenance of water projects.¹⁸ Water resource districts can borrow money for water projects and pledge security for the repayment of such loans.¹⁹

Water resource districts can also acquire real and personal property to hold in their corporate names and can obtain any easement and right of way needed to complete a project.²⁰ To acquire the necessary interests in property, water resource districts can issue improvement warrants or raise funds by special assessments, general tax levy, revenue bonds, or by a combination of general ad valorem tax, special assessments, and revenue bonds.²¹

In addition to their broad authority to plan, finance, construct, operate, and maintain water projects under N.D.C.C. ch. 61-16.1, water resource districts, as political subdivisions, have express statutory authority to fully indemnify the state. Section 32-12.2-13, N.D.C.C., authorizes a political subdivision to agree to assume the liability of the state so long as the agreement is entered into in good faith, set forth in a separate writing, and supported by adequate consideration stated in the agreement.

The express language of N.D.C.C. § 32-12.2-13 indicates the Legislature's intention that state agencies and political subdivisions may indemnify each other. This is also supported by the legislative history of that statute.²²

¹⁸ N.D.C.C. § 61-16.1-09(3).

¹⁹ N.D.C.C. § 61-16.1-09(15).

²⁰ N.D.C.C. § 61-16.1-09(12).

²¹ N.D.C.C. §§ 61-16.1-15; 61-16.1-16.

²² Section 32-12.2-13, N.D.C.C., as originally conceived, contemplated an outright prohibition against any indemnity provision in any contract between a political subdivision and the state. The original language was introduced by the North Dakota League of Cities as an amendment to House Bill 1153 during the 1997 North Dakota legislative session and stated:

Contract between the state and a political subdivision. A contract between the state and a political subdivision may not contain any provision that shifts one entity's risk of liability and associated costs to the other.

N.D. League of Cities proposed amendment to H.B. 1153, Jan. 31, 1997; H.B. 1153 (as amended and adopted by the Gov't and Veterans Affairs Comm. on February 14, 1997), 1997 N.D. Leg.

The state opposed the League's amendment. The Office of Management and Budget recommended it be deleted from House Bill 1153, and testified that indemnity provisions

Returning to issues 1 and 2 from your letter, it is clear that water resource districts have broad authority over all phases of their water projects, including the power to raise and spend public funds at their discretion. In the course of planning, developing, financing, constructing, operating, and maintaining their projects, water resource districts undoubtedly will have dealings that involve any number of private parties, political subdivisions and state agencies. Nevertheless, the authority to indemnify such parties, other than state agencies (and to raise and spend funds to provide for the indemnification), is not expressly stated in N.D.C.C. ch. 61-16.1 or elsewhere, nor is it necessarily or reasonably implied from its express powers.

Thus, in applying the rule of strict construction of the powers of a political subdivision, as I must,²³ it is my opinion that a water resource district acting within the authority of N.D.C.C.

by political subdivisions in state contracts “ensure that whichever party governs the method by which the contracted services are provided bears the cost of any loss associated with providing those services.” Hearing on H.B. 1153 Before the Senate Comm. on Gov’t and Veteran’s Affairs, 1997 N.D. Leg. (Mar. 7) (Testimony of Jo Zschomler). The Department of Human Services emphasized that state agencies need the flexibility to obtain indemnity from political subdivisions. Hearing on H.B. 1153 Before the Senate Comm. on Gov’t and Veteran’s Affairs, 1997 N.D. Leg. (Mar. 7) (Testimony of DeNae Kautzmann). Other state agencies submitted letters opposing the amendment for a variety of reasons. Letter from Jerald L. Engelman, North Dakota Judge Advocate General, to Risk Management Division (Mar. 4, 1997) (“Without that flexibility and/or ability to enter into such an agreement, the NDNG would have had to assume the risk of any damage done to the municipal streets of the city of Wilton.”); Letter from Doug Prchal, Director, North Dakota Parks and Recreation Dept. (undated) (“If the department cannot require the locals to accept responsibility for their management actions of these recreation areas we would have to terminate the agreements and close the facilities.”).

In response, the North Dakota League of Cities acknowledged its original language was too restrictive and submitted compromise language. Hearing on H.B. 1153 Before the Senate Comm. on Gov’t and Veteran’s Affairs, 1997 N.D. Leg. (Mar. 7) (Testimony of Jerry Hjelmstad).

The Senate Committee on Government and Veteran’s Affairs then adopted amendments to section 10 of H.B. 1153, authorizing indemnity agreements by political subdivisions, but with conditions designed to ensure fairness.

Report of Standing Comm. on Gov’t and Veteran’s Affairs on H.B. 1153, 1997 N.D. Leg. (Mar. 24) (Sen. Krebsbach, Chairman). This language passed and was codified as N.D.C.C. § 32-12.2-13.

²³ See note 12.

ch. 61-16.1 and N.D.C.C. § 32-12.2-13 may only agree to indemnify the state of North Dakota. It is further my opinion that, when a water resource district agrees to indemnify the state, it must do so consistent with the requirements of section 32-12.2-13.

The remaining issues raised in your letter relate to the situation where water resource districts, in exchange for a grant of state funds to help pay for the cost of their water projects, agree to indemnify the State Water Commission (“Commission”) for claims resulting from the projects. You ask:

Issue #3: Does N.D. Cent. Code § 32-12.2-17 apply to water resource districts?

Water resource districts are political subdivisions and not state agencies.²⁴ Liability issues governing political subdivisions are addressed separately in N.D.C.C. ch. 32-12.1, which expressly prohibits any political subdivision from being construed as a state agency.²⁵ Section 32-12.2-17(1), N.D.C.C., however, governs indemnification and insurance provisions in contracts by an “executive branch state agency” and not a political subdivision. Similarly, section 32-12.2-17(2), which applies where indemnification is required in a contract for services, requires that the contractor (i.e., the party providing the services to the state) indemnify “the state and its agencies, officers, and employees for vicarious liability.” For these reasons, it is my opinion that section 32-12.2-17 applies to state agencies and not to water resource districts.

Section 32-12.2-17(2), N.D.C.C., could apply, however, to a contract between the Commission and a water resource district if the Commission requires indemnity from a water resource district in a service agreement. A cost-share agreement (as described in the Commission’s strategic plans and development reports, and as attached to your letter) involves the Commission providing financial assistance to water resource districts rather than receiving services from a water resource district. The cost-share agreements are not “service agreements” and do not involve any agency relationship that would necessitate indemnification for “vicarious liability” as contemplated by N.D.C.C. § 32-12.2-17(2). Thus, it is further my opinion that N.D.C.C. § 32-12.2-17(2) does not apply to the Commission when it requires indemnity from water resource districts in the cost-share agreements.

In issue 4, you ask whether the Commission can require water resource districts to sign indemnification provisions that require indemnification to “the State of North Dakota, its agencies, officers and employees, and the State Water Commission” under the

²⁴ Anderson v. Richland County Water Res. Bd., 506 N.W.2d at 366.

²⁵ N.D.C.C. § 32-12.1-02(6).

Commission's cost-share agreements.²⁶ The Commission historically has required water resource districts to indemnify the state as a condition of accepting financial assistance under its cost-share program. There is no law that prohibits this long-time practice. While the Commission must evaluate each cost-share application on its unique facts, keeping in mind the underlying equities,²⁷ the typical cost-share appears to involve the Commission simply providing state financial assistance for a project that the water resource district controls. As long as the indemnity agreement complies with section 32-12.2-13, the state may require a water resource district to agree to indemnity language in an agreement. Thus, it is my opinion that the Commission can require water resource districts to sign indemnification provisions.

You ask in issue 5 whether the indemnity provision in "Attachment A" complies with N.D.C.C. § 32-12.2-13. You state that the attachment, on its face, is not a "separate writing" and is not supported by [separate] adequate consideration. I will address your question, but only treat the attachment as an example; the discussion should not be considered as providing an opinion on the status of the contract between the State Water Commission and Cass County.²⁸

Section 32-12.2-13, N.D.C.C., states that a contract between the state and a political subdivision may not contain an indemnity agreement "unless the agreement is entered into in good faith and is set forth in a separate writing signed by both parties and supported by adequate²⁹ consideration which must be stated in the agreement."³⁰

By including the indemnity agreement in an attachment - "Attachment A" - the Commission has attempted to satisfy the conditions for indemnity in N.D.C.C. § 32-12.2-13. By including the language in a "separate writing,"³¹ the Commission removed the indemnity

²⁶ You premised issues 4 and 5 on a "yes" answer to issue 3. Even though I have determined that N.D.C.C. § 32-12.2-17 applies to state agencies and not to water resource districts, I presumed you wished to have issues 4 and 5 addressed.

²⁷ The purpose of indemnity rights in North Dakota is to prevent a situation where one party is exposed to liability by the action of another party who should make good the loss. Johnson v. Haugland, 303 N.W.2d 533, 543 (N.D. 1981).

²⁸ You do not question whether the indemnity agreement you attach was entered into in good faith.

²⁹ Section 32-12.2-13, N.D.C.C., does not require separate consideration.

³⁰ N.D.C.C. § 32-12.2-13.

³¹ The "separate writing" condition in N.D.C.C. § 32-12.2-13 helps to eliminate situations like those reflected in the testimony where political subdivisions sometimes did not understand that a contract included an indemnity agreement. Hearing on H.B. 1153 Before the Senate Comm. on Gov't and Veteran's Affairs, 1997 N.D. Leg. (Mar. 7) (Testimony of Howard Swanson). The "adequate consideration" condition in N.D.C.C. § 32-12.2-13 helps to eliminate situations like those reflected in the testimony where the

language from the body of the cost-share agreement and displayed it in a separate document. Under the heading "READ BEFORE SIGNING," "Attachment A" requires signature of both the water resource district and the Commission. The cost-share agreement has its own, separate, signature page. Including indemnity language in an attachment which requires separate signatures is a reasonable, lawful, and practical way for the Commission to have complied with the "separate writing" requirement of N.D.C.C. § 32-12.2-13.

Another condition of N.D.C.C. § 32-12.2-13 is that the indemnity agreement must be supported by adequate consideration which must be stated in the agreement.³² In "Attachment A," the water resource district agreed to indemnify the Commission "[i]n consideration of the State Water Commission's payment of funds for eligible costs incurred in [the project]." The consideration stated in "Attachment A" -- payment of funds -- is "good consideration" as that term is defined under North Dakota law.³³ The Commission's cost-share program is a voluntary program in which water resource districts may choose to accept state financial assistance after submitting an application and securing approval from the Commission. Further, it is presumed that consideration exists in a written agreement.³⁴ Generally, if good consideration exists, courts will not inquire into the adequacy of the consideration.³⁵

state unfairly required indemnity while it was simply leasing space from a political subdivision. Hearing on H.B. 1153 Before the Senate Comm. on Gov't and Veteran's Affairs, 1997 N.D. Leg. (Mar. 7) (Testimony of Charlie Whitman, Howard Swanson). The good faith condition in N.D.C.C. § 32-12.2-13 provides general protection from unfairness in the agreements and helps prevent situations like those reflected in the testimony where state agencies required indemnity where political subdivisions did not control third parties. Hearing on H.B. 1153 Before the Senate Comm. on Gov't and Veteran's Affairs, 1997 N.D. Leg. (Mar. 7) (Testimony of Howard Swanson).

³² Your letter suggests that N.D.C.C. § 32-12.2-13 requires "separate consideration" in addition to adequate consideration. The statute, on its face, requires only adequate consideration. There is no authority to insert the phrase "separate consideration" into the statute and "separate consideration" is not required. See N.D.C.C. § 1-02-02 (words in a statute are understood in their ordinary sense unless a contrary intention plainly appears); N. Pac. R.R. Co. v. Barnes, 51 N.W. 386, 398 (N.D. 1892), overruled in part by Grandin v. La Bar, 57 N.W. 241 (N.D. 1893) ("In order to arrive at such a construction, it would be necessary to insert new and additional words in the statute; and this, of course, is not permissible. To do so, would be to make a new law, not to construe the old one.").

³³ N.D.C.C. § 9-05-01 (good consideration is "[a]ny benefit conferred or agreed to be conferred upon the promisor by any other person to which the promisor is not entitled lawfully").

³⁴ N.D.C.C. § 9-05-10.

³⁵ Teigen v. State, 749 N.W.2d 505 (N.D. 2008).

Finally, you seek a differentiation relating to full indemnity. You ask:

Issue #6: For the above scenarios, please differentiate between indemnity clauses that require full indemnity, including for the opposing party's own negligence, as opposed to clauses that exclude indemnity for the opposing party's own negligence.

North Dakota law defines contractual indemnity as where "one engages to save another from a legal consequence of the conduct of one of the parties or of some other person."³⁶ This definition would include indemnification in favor of the indemnitee (or as you say, "including for the opposing party's own negligence"). In any event, whether it occurs by contract or common law, North Dakota law does not differentiate between full indemnity and some other type of indemnity. You presented scenarios where a water district agrees to indemnify private parties, another political subdivision, and the state. It is my opinion that a water district may agree to full indemnity with the state in each of these scenarios.

Sincerely,

Wayne Stenehjem
Attorney General

This opinion is issued pursuant to N.D.C.C. § 54-12-01. It governs the actions of public officials until such time as the question presented is decided by the courts.³⁷

³⁶ N.D.C.C. § 22-02-01.

³⁷ See State ex rel. Johnson v. Baker, 21 N.W.2d 355 (N.D. 1946).