

OPINION
66-462

January 27, 1966 (OPINION)

Mr. Milo Hoisveen

State Engineer

RE: Waters - Irrigation District - Notice of Hearing

for Establishment

This is in reply to your letter of January 26, 1966, in which you set forth the following facts and questions;

On January 3, 1966 a group of landowners filed a petition with the State Engineer to establish an irrigation district in Wells County near Harvey.

On January 13 and 20, 1966 a Notice of Hearing was published in the Harvey Herald, Harvey, North Dakota, which noted the time, place, and date of a hearing on the petition. The hearing was held as advertised on January 24, 1966 at the Harvey Armory. There were no objections presented at the hearing orally or in writing.

Section 61-05-10 of the North Dakota Century Code provides that the notice shall be published in the county official newspaper. The Harvey Herald, it is now learned, is not the county official newspaper.

I respectfully request your opinion on the following questions:

1. Will the fact that the Notice of Hearing was not published in the county official newspaper invalidate the establishment of the district if another hearing is not held?
2. If a majority of the landowners voting at the special election on the question of whether or not to establish the district sign a waiver of their right to object to the district's establishment because of the publication error, will this validate the proceedings?
3. Will it be necessary to schedule another hearing and publish the Notice in the Wells County Free Press in Fessenden in order to establish a valid entity?"

Section 61-05-10 of the North Dakota Century Code provides in part:

The state engineer shall examine the petition, maps, papers, and data pertaining to the proposed irrigation district and shall fix a time and place for hearing such petition. A notice stating that such petition will be heard, and stating the time

and place of hearing, shall be filed with the county auditor of each county wherein such proposed district is located. Such notice shall be published once each week for two weeks prior to the date of such hearing in the official newspaper of the county wherein the proposed irrigation district is located, and if such district is located in more than one county, then such notice shall be published in the official newspaper of each such county. * * *."

Sections 61-05-11 and 65-05-12 provide for the amendment of the proposed irrigation plan or the denial of the petition following the hearing provided for in section 61-05-10. Section 61-05-13 provides for the establishment of the district by order of the state engineer if the state engineer, subsequent to the hearing held as provided in section 61-05-10, finds the plan to be practicable and economically sound. The establishment is subject to the approval of the electors of the district at an election called by the state engineer for that purpose.

The obvious purpose of the hearing required by section 61-05-10 is to listen to any evidence and testimony for or against the proposal. It is possible such testimony may result in an amendment of the plan by the state engineer. It is conceivable, if not probable, that some person qualified to testify may not have had knowledge of the hearing. It is also conceivable, if not probable, that the testimony of this person may have resulted in an alteration or denial of the proposal by the state engineer.

The holding of the hearing, in the manner required by law, is a condition precedent to the formation of the irrigation district. See *In Re Fort Clark Irr. Dist. of Mercer and Oliver Counties*, 48 N.W. 2d. 741 (ND 1951) in which the Court stated, page 745:

Under the provisions of section 61-05-07, 1949 Supp., RCND, the filing of a petition signed by a majority of qualified electors owning a majority of the acres of land to be included within the irrigation district and the giving of notice of hearing and a reasonable opportunity to be heard confers jurisdiction upon the state engineer to establish irrigation districts subject to approval by the electors at a special election as required by law. See 30 Am. Jur. page 655, sec. 80."

One implication which might reasonably be drawn from this statement is that if the notice of hearing is not given as required by law, the state engineer is without authority to establish the district. Where a specified mode of giving notice is prescribed by statute that method is exclusive. See 39 AM. Jr. 237, section 9, Notice and Notices. In this instance the statute prescribed publication of the notice in the official county newspaper.

It is possible that subsequent to the formation of the district the statutory provision requiring notice of the hearing to be given in the official newspaper might be considered directory rather than mandatory. We do not, however, believe it is wise to base the formation of an irrigation district upon such a tenuous foundation. While the signing of the waiver might estop those persons signing same from challenging the legality of the formation of the district,

it would not appear effective as to a landowner who did not sign such a waiver.

In direct response to your questions:

1. It is our opinion that the fact the Notice of Hearing was not published in the official county newspaper as required by statute would create serious doubt as to the validity of the establishment of the district and would very probably invalidate the establishment of the district.
2. It is our opinion the signing of a waiver of the right to object to the establishment of the district because of the publication error by a majority of the landowners would not validate the proceedings insofar as those landowners who did not sign such a waiver are concerned.
3. It is our opinion it is necessary to schedule another hearing and publish the notice of such hearing in the official county newspaper as required by statute.

HELGI JOHANNESON

Attorney General