

OPINION
67-340

April 11, 1967 (OPINION)

Mr. Roger D. Schell

Assistant State's Attorney

Bottineau County

RE: Waters - Drain Assessments - Procedure in Spreading

Re: Boundary Creek Water Management District

This is in reply to your letter of April 4, 1967, in which you state the following facts and questions:

Pursuant to section 61-16-26 of the North Dakota Century Code and other related sections, the above district will finalize the assessment list which will be certified to the Bottineau County auditor for spreading over the property.

The Boundary Creek project is one project which is being assessed as such. The project will be constructed in four segments, each segment being done one year after the other. The first construction will be the channeling of the lower drain which undoubtedly will benefit the upper areas to the extent that the waste water will flow more rapidly toward the river.

The question is whether or not the county auditor can spread the assessments in four segments as the construction is being completed or must he spread the whole levy at the same time. Actual construction in the upper drainage areas of this project will not begin for about four or five years.

* * *

Because of the size of the project and the amount of money involved, we would appreciate a formal attorney general's opinion on this question in order that we may inform those landholders in the assessment district of the procedure which will be followed by the Boundary Creek Board."

Section 61-16-26 of the North Dakota Century Code provides for the preparation of the assessment list, notice of hearing of objection to the list, alteration of assessments at hearing, confirmation of assessment list by the board of commissioners of a water management district and the certification by the board of such assessment list.

Section 61-26-28 of the North Dakota Century Code, as amended, provides that when the assessments to cover the cost of constructing a water conservation or flood control project have been levied by the board, the board shall determine the rate of interest unpaid special assessments shall bear, which rate shall not exceed seven percent per annum and shall not be less than the warrant rate. The section

further provides "Special assessments may be certified and made payable in equal annual installments, the last of which shall be due and payable not more than thirty years after the date of the warrants to be paid. The secretary of the district shall certify to the county auditor of the county in which the district is situated, or if the district embraces land situated in more than one county, to the county auditor of each county in which district lands subject to such special assessments are situated, the total amount levied against such lands in his county and the proportion or percentage of such amount assessed against each piece, parcel, lot or tract of land." (Emphasis supplied)

Section 61-16-29 of the North Dakota Century Code provides:

EXTENSION OF SPECIAL ASSESSMENTS ON TAX LISTS - COLLECTION - PAYMENT TO WATER CONSERVATION AND FLOOD CONTROL DISTRICT. The county auditor of each county embracing territory situated within a water conservation and flood control district shall extend the special assessments certified to him on the tax list of the district for the current year and such assessments, with interest and penalties if any, shall be collected by the county treasurer as general taxes are collected and shall be paid to the treasurer of the district."

Under these provisions it would appear that the total amount assessed must be certified to the county auditor but the total amount extended against the lots to be assessed need be only the amount of the annual installment then due. This gives the owner of the property subject to assessment the right to pay the entire amount at once or pay it in annual installments with interest.

However the statute most relevant to your question is section 61-16-24 of the North Dakota Century Code which provides:

WHEN ASSESSMENTS MAY BE MADE. At any time after a contract and bond for any work for which a special assessment is required have been approved by the board and the total cost of such work shall have been estimated as nearly as practicable, the board may direct assessments to be levied for the payment of all or any part of such cost, and the secretary shall certify to the board the items of total cost thereof to be paid by special assessments so far as the same have been ascertained. Such certificate shall include the estimated construction cost under the terms of any contract, a reasonable allowance for cost of extra work which may be authorized under the plans and specifications, engineering, fiscal agents' and attorney fees for any services in connection with the authorization and financing of the improvement, cost of publication of required notices and printing of improvement warrants, cost necessarily paid for damages caused by such improvement, interest during the construction period, and all expenses incurred in making of the improvement and levy of assessments therefor. In the event that any error is made in estimating the cost, the board may make a supplemental assessment therefor as provided in this chapter."

Under this provision, which precedes the other statutes cited above,

a contract and bond for the work for which the special assessments are required must be approved by the board prior to the time the board may direct the assessments to be levied. Under the situation outlined in your letter it would appear the district is actually considering four separate projects, each of which must be considered separately under the proper procedure for notice, hearing, etc. In such instance it is our opinion it would not be proper to certify the assessments for all four projects or segments at one time. If the contract and bond for the first segment has been approved by the board, then the special assessments for that segment only should be certified as outlined in the statutes cited above. This would be true even if the "overhead costs" are allocated to each project. The total assessment, "overhead" as prorated and other costs, would be on each project. The following segment would then be considered as separate projects and the same procedure would be followed for each, including but not limited to the right of protest under section 61-16-23 and section 61-16-26.

Should the contract and bond have been approved by the board for all the work with different construction dates included therein for each segment, then it would be our opinion that the entire amount must be certified to the county auditor as provided in section 61-16-28. If the board has provided for payment in annual installments, the owner would not be required to pay the total amount at one time. However the owner of the lot could pay the entire amount if he so desired.

HELGI JOHANNESON

Attorney General