

**OPINION
69-530**

May 28, 1969 (OPINION)

Mr. John A. Amundson

Attorney

Bowman County Water Management District

RE: Waters - Water Management Districts - Authority of Board

to Limit Impoundments

Your letter of April 18, 1969, requests an opinion relative to subsection 8 of section 61-16-11 of the North Dakota Century Code. This section describes the powers and duties of the board of commissioners of a water management district, and subsection 8 provides as follows:

POWERS AND DUTIES OF BOARD OF COMMISSIONERS. The board of commissioners shall have the power:

* * *

8. To make rules and regulations concerning the use to which such waters may be put and prevent the pollution, contamination or other misuse of the water resources, streams, or bodies of water included within the district;

* * *. "

You also cite the following underscored provisions of section 61-04-02:

APPLICATION FOR BENEFICIAL USE OF WATER REQUIRED. The United States, any department or agency thereof and any person, association or corporation intending to acquire the right to the beneficial use of any waters, before commencing any construction for such purpose or before taking the same from any constructed works, shall make an application to the state engineer for a water permit, unless such construction or taking from such constructed works is for domestic or livestock purposes or for fish, wildlife and other recreational uses. However, immediately upon completing any constructed works for domestic or livestock purposes or for fish, wildlife and other recreational uses the water user shall notify the state engineer of such constructed works, dam or dugout's location and acre-feet capacity. Regardless of proposed use, however, all water users shall secure a water permit prior to constructing an impoundment capable of retaining more than twelve and one-half acre-feet of water." (Underscoring ours.)

You then ask the following questions:

Does the Bowman County Water Management District, within the

county of Bowman, North Dakota, have the power and authority to limit construction of water impoundments within the county regardless of their size or proposed use?

Does the Bowman County Water Management District have the authority under this subsection to restrict all impoundments to sizes of less than two acre-feet?

Does the Bowman County Water Management District have the authority under this section to require drawdown tubes for purpose of releasing water in any dam constructed within the given watershed area within the county of Bowman?

Does section 61-16-15 divest a water management district of its authorities to make rules and regulations concerning the use of water when such rules and regulations would prevent the construction of dams and dugouts having a capability of impounding more than two acre-feet of water?"

Section 61-01-01.1 of the North Dakota Century Code states in part:

* * * Neither a conditional nor a perfected water permit shall be required of a landowner or his lessee to appropriate water from any source or any constructed works for domestic and livestock uses. * * *."

Sections 61-01-01.1 and 61-04-02, as previously quoted, in effect allow water to be appropriated from any source without requiring the appropriator to secure a water permit providing the water thus appropriated is used for domestic, livestock or fish, wildlife or other recreational purposes, and the impoundment is not capable of retaining more than twelve and one-half acre-feet of water.

We do not find any law which specifically or by necessary implication authorizes a water management district to: (1) limit the construction of water impoundments; (2) restrict all impoundments to sizes of less than two acre-feet of water; or (3) require drawdown tubes in dams.

It is a well settled rule of law that political subdivisions and administrative agencies have only those powers which are specifically granted or necessarily implied from the grant. The provisions of section 61-16-11 relating to the powers and duties of the board of commissioners must be construed in light of court decisions relating to such provisions and the rules of law that would apply. We cannot say that the provisions of section 61-16-11, or subsection 8 thereof, imply plenary authority to do all of the things mentioned. For example, section 61-01-01.1 establishes certain priorities and concludes by stating that: "Neither a conditional nor a perfected water permit shall be required of a landowner or his lessee to appropriate water from any source or any constructed works for domestic and livestock uses. Regardless of proposed use, however, all water users shall secure a water permit prior to constructing an impoundment capable of retaining more than twelve and one-half acre-feet of water."

The legislature has specifically created certain priorities and

provided for other means of control, which applies equally well to a user and the board of commissioners. If the provisions relating to the powers and duties of the board of commissioners were construed as granting plenary power, such provisions could then be classified as granting an unlawful legislative power. It is a well settled rule of law in this state that the legislature cannot delegate any legislative powers to an administrative agency or political subdivision. It is also well established that administrative agencies may not go beyond what the legislature has authorized. (See *Medical Properties v. N. D. Board of Pharmacy*, 80 N.W.2d. 87.) A regulation, to be valid, must not only be consistent with the authority given to it by law but it must also be reasonable. Reasonableness appears to be a major factor in determining the rights of the board of commissioners or the rights of a user.

It is conceivable that under a certain given set of facts, taking into account all of the other provisions of law related to waters, that the board of commissioners may take certain action to regulate the use of water and prevent pollution, contamination or other misuse of water resources, but under the existing laws the board of commissioners of a water management district may not arbitrarily set a limitation or restriction without a real basis in fact. The board's activities or powers must also meet the constitutional due process provisions.

As to your first question, the board of commissioners of a water management district does not have the authority to limit the construction of water impoundments within the county regardless of their size or proposed use.

As to your second question, the district does not have the authority under subsection 8 of section 61-16-11 to actively restrict all impoundments to sizes of less than two-acre feet. However, it is conceivable that under certain given facts the management district may limit the impoundments in certain areas for certain purposes to sizes of less than two-acre feet. This becomes a fact question.

As to your third question, the management district does not have the authority to require drawdown tubes for the purpose of releasing water in any dam constructed within the watershed area, unless it can be established that this is a necessary means or the only practical means of regulating the use of the water or preventing the pollution or contamination of the water after taking into account all of the other provisions of law and rights of the individuals concerned.

As to your fourth question, section 61-16-15 does not divest the water management district of its authority. However, the authority of the water management district, as indicated above, is not plenary and any rule or regulation must be based on reasonableness and necessity, and the rights of water users, and must have a basis in fact for its adoption, and must be within the power granted to it or necessarily implied.

It becomes eminently clear that the questions asked cannot be answered with a categorical "yes" or "no." A given set of facts could produce a definite "no" to all of those questions, and in a given set of facts the answer would be a modified "yes."

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