OPINION
70-470

August 6, 1970 (OPINION)

Mr. Leo J. Beauclair

Barnes County States Attorney

RE: Waters - Legal Drains - Liability for Damage

This is in reply to your letter of July 29, 1970, requesting an opinion of this office with regard to liability for establishment and construction of legal drains, by local boards of drainage commissioners.

You call our attention to Chapter 61-21 of the North Dakota Century Code empowering the board of drainage commissioners to establish and construct legal drains in the county whenever the same shall be conducive to the public health, convenience or welfare.

You state that the question arises as to the liability of the parties included in an established legal drain district should they be charged with damaging upstream and downstream property owners by virtue of the establishment of their legal drain.

You state that the Code provides the authority for the establishment of a drain, the legal process which must be followed in the establishment thereof as well as the method of assessing payment for same. The Code makes no provision for the nonliability of assessed property owners should the establishment of the drain under the authority of the drain commissioners result in damage to parties not included in the drain. You restate your question as, specifically, are the assessed property owners in an established legal drain immune from civil liability for damages which may occur to land owners as a result of the establishment and operation of such a drain.

We do not find a specific provision of Chapter 61-21 of the North Dakota Century Code prescribing specifically what type of entity the Board of Drainage Commissioners is. We do note in the footnotes to section 61-21-03 under the heading "Decisions under Prior Law" the statement that:

> "* * * A county drainage board appointed and organized under C.L. 1913 section 2461 to 2495, as amended, was a quasi-corporation and an agency of the state. Walstad v. Dawson, 64 N.D. 333, 252 N.W. 64. * * *"

We do note, that upon favorable vote, petition, etc., of the landowners and completion of the procedures prescribed in that chapter for determination of whether a drain shall be established, the "board shall let contracts for the construction of the drain, culverts, bridges and appurtenances thereto," pay for same, assess benefits, etc. We note that administrative expenses tax is levied by the board of county commissioners, held by the county treasurer, and disbursed upon the order of the county commissioners (61-21-09 N.D.C.C.). Benefits are assessed by the drainage board (61-21-20

N.D.C.C.), collected by the county treasurer (61-21-28 N.D.C.C.) but paid out upon order of the drainage board and warrants signed by the chairman and one other member of the drainage board (61-21-29 N.D.C.C.).

It would appear, however, that rights-of-way, etc., acquired for drains are acquired by the county. Thus section 61-21-19 of the 1969 Supplement to the North Dakota Century Code provides in part:

> "* * * The right of way for the construction, operation and maintenance of any proposed drain, if not conveyed to the county by the owner, may be acquired by eminent domain in such manner as may be prescribed by law. * * *" "* * * Such right of way, when acquired, shall be the property of the county. * * *"

On these basis, it seems doubtful to us that there is any basis, upon which liability of the individual landowner in an action against him could be predicated, even though, he may have voted for the improvement and even though he may have contributed to the construction of same through benefits assessed against his lands. The drain was not constructed by him, but by a quasi-corporate governmental body, not by any or all the individual landowners.

We are not suggesting, however, that the individual landowners would not eventually end up paying for the damages that might occur to land owners as a result of the establishment and operation of such a drain. To quote a part of section 14 of the North Dakota Constitution:

> "Private property shall not be taken or damaged for public use without just compensation having been first made to, or paid into court for the owner. No right of way shall be appropriated to the use of any corporation until full compensation therefor be first made in money or ascertained and paid into court for the owner, irrespective of any benefit from any improvement proposed by such corporation, which compensation shall be ascertained by a jury, unless a jury be waived, * * *"

"Inverse condemnation" has long been recognized by the courts. See generally 27 Am. Jur.2d. 406-413 Eminent Domain section 478, and 26 Am. Jur.2d. 823-826 Eminent Domain section 157. In this same regard you might consider some of the cases cited in the footnotes to section 14 of the North Dakota Constitution as printed in the North Dakota Century Code. Donaldson v. Bismarck, 71 N.D. 592, 3 N.W. 2d. 808 presents an interesting decision in this regard. While, the complaint was pleaded in the wrong manner in Mayer v. Studer and M. Co. and Starck County, 66 N.D. 190 262 N.W. 925, the statement is made on Page 195 of 66 N.D. that:

> "* * * Where the state or an agency thereof acting in a sovereign capacity takes or damages private property for public use without legal exercise of the power of eminent domain, the aggrieved party may recover compensation for the property thus taken or compensation for the damage to his property thus inflicted. * * *"

Thus in the type of circumstances to which you make reference, we would assume that the county commissioners and the board of drain commissioners, would find, as a result of the action brought against them that through their power of eminent domain, they had acquired flowage easements, or similar property rights, the value of such flowage easements, or similar property rights, would be judicially determined, and judgment would be entered against them for such value. We would presume at that point, they would assess the benefits of the cost of such additionally acquired flowage easements or similar property rights against the lands previously determined to be benefited by the drain at which point the landowners would be, in proportion to the benefits received, in effect charged for the damage to the upstream or downstream property.

In theory of course, the landowners could not be subjected to tort liability for damages to other property, as the "tort" if any, is that of the drainage district or county. We would also assume, that the County or Drainage District, or both could not be held liable in "tort" for the damages done to other property, as both entities could claim sovereign immunity from suit, in these circumstances. However, the doctrine of sovereign immunity does not apply to suits in inverse condemnation, with the result that a judgment for the value of the property "taken" could be entered against county, or drainage district, or both. While the landowners, not being responsible for the tort of the county and drainage district, could not be held liable in tort, their property is subject to assessments for the benefits of the drain, into which computation, the costs of right-of-way acquired, including that acquired by inverse as well as direct condemnation proceedings, enters.

While we have assumed herein that the inverse condemnation valuation determination would be as the result of judicial proceedings, it is entirely possible, that in instances where the damage to other property is obvious, the drain board, would probably wish to negotiate for acquisition of the additional flowage easements, as shown by the damage to other's property. Insofar as, inverse condemnation proceedings value the property, as of the date the property is actually taken, by physical action of the acquiring body, rather than as of the date of determination of damages, plus of course interest to the date such determination of damages is made, we assume that the same measures would be applied in informal negotiations for settlement of such inverse condemnation.

HELGI JOHANNESON

Attorney General