

**OPINION  
76-42**

March 26, 1976 (OPINION)

Mr. Duane R. Breitling

Ohnstad, Twichell, Breitling,

Arntson and Hagen

Box 458

West Fargo, ND 58078

Dear Mr. Breitling:

This is in response to your letter of February 17, 1976, wherein you request an opinion concerning the procedure to be followed in petitioning for a drainage project consisting of two nonintersecting parallel drainage channels. You submit the following in your letter of inquiry.

"This firm represents the Cass County Drain Board. In that regard, we have received a request from property owners in the Leonard, North Dakota area for the establishment of a legal drain. This legal drain envisions two parallel channels, both using the Maple River as an outlet, with the two never intersecting at any point.

"We have received the appropriate statutes in Title 61-21 of the North Dakota Century Code concerning legal drains. In particular, we have referred to Section 61-21-10 concerning petitions for the construction of a drain, Section 61-21-12 concerning the examination of a line for a drain, the designation of a surveyor, specifications and cost estimates, and Section 61-21-15 concerning denying or making an order establishing drain. Our examination of the same has revealed that there seems to be neither a specific prohibition or authorization of such a facility.

"The area to be serviced and benefited by these two paralleling channels is one general drainage and water shed area. In order to appropriately and properly handle the surface runoff from this area, the property owners who would be assessed for the project feel that the two nonintersecting parallel channels, located two miles apart, are absolutely essential.

"To treat these two channels as two separate drainage projects would cause a great deal of problems with assessments. Many of the local property owners feel that these problems would be insurmountable. Consequently, they are very much concerned that if these two channels are treated as separate projects, neither will pass.

"For your information, we are including herewith, copies of the proposed petition for the establishment of this proposed legal

drain, as well as a map of the area on which are depicted the two channels which are proposed to be constructed.

"We would appreciate it immensely if you could provide us with an opinion as to whether or not a Drain Board may establish a legal drain which consists of two channels, paralleling each other, two miles apart. Any priority that you can grant this request would be greatly appreciated."

The proposed petition referred to in your letter is attached for reference.

Throughout Chapter 61-21, the word "drain" is consistently used in its singular form. The following examples so indicate:

"A written petition for the construction of a drain may be made to the board. Such petition shall designate the starting point, terminus, and general course for the proposed drain. If among the leading purposes of the proposed drain are benefits to the health, convenience, or welfare of the people of any city or village, the petition shall be signed by a sufficient number of the property owners of such city or village to satisfy the board that there is a public demand for such drain. The petition shall be signed by at least six property owners or a majority of the landowners within the proposed district whose property will be drained by the proposed drain." (Section 61-21-10; emphasis added)

"Upon presentation of a petition as provided in Section 61-21-10, the board shall examine the line of the proposed drain. . . ." (Section 61-21-12; emphasis added)

"Upon the filing of the surveyor's or engineer's report provided for in section 61-21-12, the board shall fix a date and place for public hearing on the petition. Such place of hearing shall be in the vicinity of the proposed drain and shall be convenient and accessible for such drain. . . ." (Section 61-21-13; emphasis added)

". . . If it shall appear . . . that the proposed drain will not cost more than the amount of benefits to be derived therefrom and is approved by more than fifty percent of the votes of the affected landowners filed with the board . . . the board shall make an order establishing the drain. . . ." (Section 61-21-15; emphasis added)

It is noted that the word "drain" appears in its plural form in the definition of the word "drain" in Section 61-21-01:

The word "drain" shall include any natural watercourse opened, or proposed to be opened, and improved for the purpose of drainage and any artificial drains of any nature or description constructed for such purpose, \* \* \* \* (Emphasis added)

However it is considered that the word "drains" as it appears in that definition, provides neither a sufficient nor a reasonable basis for concluding that two separate and distinct drainage channels which do

not intersect at any point can be considered to be a single drain for the purpose of meeting the petition requirements of Section 61-21-10.

Section 61-21-10, quoted above, requires the presentation of a written petition for the construction of a drain to the Board of Drainage Commissioners. The petition enclosed with your letter proposes the construction of two drains which do not share a common "starting point, terminus and general course." The drains proposed for construction would be parallel and nonintersecting. Because of the basic jurisdictional nature of the petition process, its requirements must be strictly adhered to by persons presenting a proposal to the Board. The petition process established by Section 61-21-10 requires that "at least six property owners" sign the petition. If the proposed petition were considered to be legally sufficient, it could have the effect of invoking the Board's jurisdiction pursuant to Section 61-21-10 under circumstances where less than six property owners affected by each proposed drain were signatories to the petition.

It is our opinion that in order to comply with the basic requirements of the petition process, as provided in Section 61-21-10, any drain proposed by petition must be a single drainage channel with an independent and separate "starting point, terminus and general course." Each proposed drain must be presented to the Board by a single petition containing the signature of "at least six property owners or a majority of the landowners" as provided in Section 61-21-10.

The proposed petition enclosed with your letter fails to satisfy the legal requirements of Section 61-21-10 and therefore would fail to invoke the jurisdiction of the Board of Drainage Commissioners.

It is hoped that the foregoing will be of assistance.

Sincerely,

ALLEN I. OLSON

Attorney General