

**OPINION
76-76**

May 17, 1976 (OPINION)

Murray G. Sagsveen
Director, Legal Division
State Water Commission
900 East Boulevard
Bismarck ND 58505

RE: Your SWC Project #1629

Dear Mr. Sagsveen:

This is in response to your request dated April 29, 1976, for an opinion regarding the authority of water management districts to acquire right of entry from landowners for survey purposes pursuant to Chapter 61-16, North Dakota Century Code. You state in your letter the following facts, questions and conclusions:

This is a request for an opinion relative to eminent domain authority of water management districts. A conflict of opinion has arisen between a state's attorney, who is a legal advisor for a water management district, and the State Water Commission.

The State Water commission frequently contracts with water management districts to conduct investigations or surveys. A standard clause in the contract relates to acquisition of permission from affected landowners:

Applicant (the water management district) agrees to obtain written permission from all affected landowners whereby permission is granted to the Commission and/or contractors engaged by them, for the purpose of surveying said lands for investigation and subsurface explorations.

In 1975, the Commission executed a contract with a water management district to evaluate alternatives for the management of runoff waters accumulating on certain real estate. The contract contained the clause mentioned above. The water management district, however, has failed to secure the permission from the appropriate landowners for rights-of-entry for the Commission's survey crew.

Subsequently, the board of commissioners for the district requested, at the recommendation of the state's attorney, that the Commission proceed with whatever legal steps are necessary to conduct the survey. The Commission's response, which I drafted, was as follows:

I have been informed that you have requested legal

assistance to secure the right to enter the Tiegen property for survey purposes.

The Commission will not provide such legal services since the responsibility rests with your district. The agreement which was executed on July 17, 1975, states:

2. Applicant agrees to obtain written permission from all affected landowners whereby permission is granted to the Commission and/or contractors engaged by them, for the purpose of surveying said lands for investigation and subsurface explorations.

The Commission's Director of Legal Services believes the Divide County Water Management District has the authority to acquire the necessary rights of entry pursuant to Section 61-16-11 of the North Dakota Century Code. He further advises that failure of the District to secure the necessary permission for entry constitutes a breach of the agreement.

Therefore, if the District does not secure the necessary permission within a reasonable time, I will return the remaining portion of the deposit agreement and consider the agreement void.

The state's attorney reply stated:

I do not agree that the Water Management District has the authority to exercise eminent domains for the purpose of entry for a survey pursuant to Section 61-16-11(2). There is no authority for that proposition.

The specific subsection of Section 61-16-11 is subsection 2:

To exercise the power of eminent domain in the manner provided by title 32, Judicial Remedies for the purpose of acquiring and securing any rights, titles, interests, estates, or easements necessary or proper to carry out the duties imposed by this chapter, and particularly to acquire the necessary rights in land for the construction of dams and other water conservation works of any nature and to flood lands, and to secure the right of access to such dams and other devices and the right of the public access to the waters impounded thereby;

This subsection, in my opinion, must be read in conjunction with Chapter 32-15. That chapter, and specifically Sections 32-15-02(4), 32-15-03(3), 32-15-04(6) and 32-15-06, indicates a right of entry may be secured by a water management district for survey purposes.

Therefore, my question is:

Does the district have the authority to acquire the necessary rights of entry for survey purposes.

We concur in your conclusion that Chapters 61-16 and 32-15 of the North Dakota Century Code provide the board of commissioners of a water management district with the authority to acquire the rights necessary to enter upon private and public lands for the purpose of making survey and examination for proposed or intended water conservation and flood control projects within its district.

Section 61-16-11, subsection 2 authorizes the board of commissioners of a water management district to exercise the power of eminent domain pursuant to "title 32, Judicial Remedies" for the purpose of carrying out its duties under Chapter 61-16. Your letter indicates that the purpose of the contract between the State Water Commission and the Divide County Water Management District is "to evaluate alternatives for the management of runoff water accumulating on certain real estate". Assuming that the water management alternatives include the construction of water conservation and flood control projects authorized under Chapter 61-16, the survey and examination of the lands to be affected may reasonably be considered as necessary and proper functions of the District. Section 32-15-06 of the chapter on eminent domain provides:

ENTRY FOR MAKING SURVEYS. - In all cases when land is required for public use, the person or corporation, or his or its agents, in charge of such use may survey and locate the same, but it must be located in the manner which will be compatible with the greatest public benefit and the least private injury and subject to the provisions of section 32-15-21. Whoever may be in charge of such public use may enter upon the land and make examinations, surveys, and maps thereof, and such entry shall constitute no cause of action in favor of the owner of the land except for injuries resulting from negligence, wantonness, or malice. (Emphasis added).

Accordingly, it is our opinion that the board of commissioners of a water management district has the authority to acquire the rights necessary for the purpose of entering upon private and public lands to conduct surveys and examinations relating to water conservation and flood control projects authorized under Chapter 61-16, N.D.C.C. Where the right of entry may not be obtained by the voluntary approval of the affected landowners, a water management district board of commissioners may obtain such right of entry by following the procedures and authorities set out in Chapter 32-15, N.D.C.C., and by the North Dakota Supreme Court in the case of Square Butte Electric Cooperative v. Dohn, 219 N.W.2d. 877 (N.D. 1974).

It is hoped that the foregoing will be of assistance.

Sincerely,

ALLEN I. OLSON

Attorney General