

Date Issued: May 9, 1984 (AGO 84-23)

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- QUESTIONS PRESENTED -

I.

Whether a water resource board interferes with the powers delegated to an adjoining water resource board in exercising the power to levy special assessments in an adjoining county.

II.

Whether a water resource board may establish an assessment district project that includes land in adjacent counties and then levy and require the collection of assessments on the land that is benefited by the project which lies in another county.

- ATTORNEY GENERAL'S OPINION -

I.

It is my opinion that a water resource board does not interfere with the powers delegated to an adjoining water resource board in exercising the power to levy special assessments in an adjoining county.

II.

It is my further opinion that a water resource board may establish an assessment district project that includes land in adjacent counties and then levy and require the collection of assessments on the land that is benefited by the project which lies in another county.

- ANALYSIS -

I.

Water management, to be effective, cannot stop at county lines. Water does not respect political boundaries. The Legislative Assembly has recognized these facts by creating water resource boards with the duty, under section 61-16.1-10(4) of the North Dakota Century Code, ". . . to carry out to the maximum extent possible the water management policy that upstream landowners who have artificially altered the hydrologic scheme must share with downstream landowners the responsibility of providing for proper management and control of surface waters."

Within section 61-16.1-09, N.D.C.C., the Legislature has granted water resource boards the general authority to develop water resource projects and to regulate activities within its district. Section 61-16.1-09(5), N.D.C.C., provides that each board shall have the power and authority to:

5. Plan, locate, relocate, construct, reconstruct, modify, maintain, repair, and control all dams and water conservation and management devices of every nature and water channels, and to control and regulate the same and all reservoirs, artificial lakes, and other water storage devices within the district.

There are two separate authorities granted by this subsection; one being project development and the other being regulation. The above subsection provides the boards with the broad authority to develop projects without restricting the projects to the boundaries of one county while restricting all regulatory authority (permits, enforcement powers) to water resource district boundaries. This comports with the water policy of the state "to provide for the management, conservation, protection, development and control of water resources and for the prevention of flood damage in the watersheds of the state" Section 61-16.1-01, N.D.C.C.

Therefore, it is my opinion that water resource boards are within their statutory authority to develop assessment projects that include lands in adjacent counties but that the regulatory authority of the boards may only be exercised within the boundaries of each individual water resource district.

II.

In chapter 61-16.1, N.D.C.C., the statutes relative to special assessments avoid the county boundary issue. Section 61-16.1-17, N.D.C.C., refers to benefited lands when setting out the procedures for establishing an assessment district. The statute makes no reference to county boundaries and states as follows:

61-16.1-17. FINANCING OF SPECIAL IMPROVEMENTS - PROCEDURE. When it is proposed to finance in whole or in part the construction of a project with funds raised through the collection of special assessments levied against lands and premises benefited by construction and maintenance of such project, the water resource board shall examine the proposed project, and if in its opinion further proceedings are warranted, it shall adopt a resolution and declare that it is necessary to construct and maintain the project. The resolution shall briefly state the nature and purpose of the proposed project, and shall designate a registered engineer to assist the board. For the purpose of making examinations or surveys, the board or its employees, after written notice to each landowner, may enter upon any land on which the proposed project is located or any other lands necessary to gain access. The engineer shall prepare profiles, plans, and specifications of the proposed project and estimates of the total cost thereof.

The estimate of costs prepared by the engineer shall include acquisition of right of way, and shall be in sufficient detail to allow the board to determine the probable share of the total costs that will be assessed against each of the affected landowners in the proposed project assessment district.

This statute speaks to special assessments levied against lands benefited by the project and does not limit the assessment districts to a single county. Rather, the statute provides for the establishment of assessment districts in more than one county.

Section 61-16.1-18, N.D.C.C., provides for a hearing on the proposed assessment project. Again, county borders are not a limitation on the special assessment project. The section provides as follows:

61-16.1-18. HEARING - NOTICE - CONTENTS. Upon the filing of the engineer's report provided for in section 61-16.1-17, and after satisfying the requirements of section 61-16.1-21, the water resource board shall fix a date and place for public hearing on the proposed project. Such place of hearing shall be in the vicinity of the proposed project and shall be convenient and accessible for the majority of the landowners subject to assessment for such project or whose property shall be subject to condemnation for the proposed project. The board shall cause a complete list of the benefits and assessments to be made, setting forth each county, township, or city assessed in its corporate capacity as well as each lot, piece, or parcel of land assessed, the amount each is benefited by the improvement and the amount assessed against each. At least ten days before the hearing, the board shall file with the county auditor of each county or counties in which the project is or will be located the list showing the percentage assessment against each parcel of land benefited by the proposed project and the approximate assessment in terms of money apportioned thereto. Notice of such filing shall be included in the notice of hearing. Notices of the hearing shall contain a copy of the resolution of the board as well as the time and place where the board will conduct the hearing. The notice of hearing shall specify the general nature of the project as finally determined by the engineer and the board. The notice of hearing shall also specify when and where protests against such proposed project shall be filed and an assessment list showing the percentage assessment against each parcel of land benefited by the proposed project and the approximate assessment in terms of money apportioned thereto. The board shall cause the notice of hearing to be published once a week for two consecutive weeks in the newspaper or newspapers of general circulation in the area in which the affected landowners reside, and in the official county newspaper of each county in which the benefited lands are located. The date set for such hearing shall not be less than twenty days after the first publication of the notice. A record of the hearing shall be made by the board, including a list of affected landowners present in person or by agent, and such record shall be preserved in the minutes of the meeting. Affected

landowners, and the governing body of any county, township, or city to be assessed, shall be informed at the hearing of the probable total cost of the project and their individual share of such cost and the portion of their property, if any, to be condemned for such project. (Emphasis supplied).

It is clear that county boundaries do not pose a deterrent when attempting to establish special assessment projects.

All additional statutory requirements that must be met in order to fund a project with special assessments are replete with reference to assessment district encompassing more than one county. (See sections 61-16.1-19, 61-16.1-20, 61-16.1-21 and 61-16.1-26, N.D.C.C.).

The final concern in establishing a project to be financed by special assessments is the collection of those assessments. Section 61-16.1-28, N.D.C.C., provides in pertinent part as follows:

. . . The secretary of the district shall also file with the county auditor of each county in which district lands lie a statement showing the cost of the project, the part thereof, if any, which will be paid out of the general taxes, and the part to be financed by special assessments. Funds needed to pay the cost of maintaining a project may be raised in the same manner as funds were raised to meet construction costs. If the project was financed in whole or in part through the use of special assessments, the water resource board shall prorate the costs of maintaining projects in the same proportion as were the original costs of construction or, in the event a reassessment of benefits has been adopted, the costs shall be prorated in accordance with the reassessment of benefits as authorized by section 61-16.1-54.

The use of the term "district" in section 61-16.1-28, N.D.C.C., is classified by section 61-16.1-02, N.D.C.C., which provides that "in this chapter, unless the context or subject matter otherwise provides: 'District' means a water resource district." Therefore, when the context or subject matter provide, "district" may be defined as something other than a water resource district. That situation arises in section 61-16.1-28, N.D.C.C., where the context of the statute dictates that "district" be defined as "assessment district".

A portion of chapter 61-16.1, N.D.C.C. speaks to establishing assessment districts. It provides that projects and subsequent assessment districts may be established in more than one county. Therefore, if a project and assessment district can be established in more than one county and the benefited lands are, by statute, required to be assessed equitably, then there must be a method for certifying those assessments so that the tax may be collected and applied to the project cost. Section 61-16.1-28, N.D.C.C., provides that mechanism with the term "district", where appropriate, defined in the context of assessment district.

Therefore, it is my opinion that if the statutory procedures provided in chapter 61-16.1, N.D.C.C., for establishing assessment districts are followed, a project that includes lands in adjacent counties may be established with benefited lands in all counties sharing their proportionate costs of the project.

- EFFECT -

This opinion is issued pursuant to section 54-12-01, N.D.C.C. It governs the actions of public officials until such time as the question presented is decided by the courts.

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