

OPINION
49-39

April 1, 1949 (OPINION)

DRAINS

RE: Financing

Re: Section 61-2142 of 1947 Supplement

Your letter of March 28th, 1949 relative to payment by Board of County Commissioners of cost of keeping established drains open and in repair as provided by section 61-2142 of the 1947 Supplement, has been received and referred to my desk.

This section makes it the mandatory duty of the Board of County Commissioners to keep all established drains in their several counties open and in repair. This section provides that funds for the payment of the costs shall be levied, assessed and collected as the funds are raised for the original construction of the drain. This section further provides that when the cost of such work is not in excess of \$150 in any one year it "shall be paid out of the county road and bridge fund."

Your specific question is: Does the Board of County Commissioners have authority to issue warrants under the provisions of section 61-2130 or must they first realize on certificates of indebtedness when there is not sufficient money in the road and bridge fund to pay such costs?

Section 61-2130 clearly applies to the powers of the Board of Drain Commissioners and not to the Board of County Commissioners. Therefore, section 61-2130 would give the county commissioners no power to issue warrants under the power given the Board of Drain Commissioners under section 61-2130. Since section 21-0103 prohibits the issuance of warrants in excess of funds on hand, it would seem that the Board of County Commissioners could not issue warrants for the payment of the cost of keeping a drain open and in repair when the cost does not exceed the sum of \$150, upon the road and bridge fund unless there were in said fund sufficient funds to pay them. Therefore, it is our opinion that in such case the Board of County Commissioners must proceed under the provisions of chapter 21-02 to provide funds for such purpose.

Section 61-2142 of the 1947 Supplement to the North Dakota Revised Code of 1943 requires Boards of County Commissioners, with reference to any drain heretofore built and constructed, "to keep said drain open and in good repair," and further provides that "the cost of such keeping open and in repair shall in all cases be assessed, levied and collected." This levy shall not exceed fifty cents per acre on any lands in such drainage district. The funds thus provided are to be used to pay the expense of keeping drains open and in repair. It is apparent that a levy made in any year will not reach the county treasurer until the succeeding year.

Since section 21-0103 prohibits the issuance of warrants in excess of

funds on hand applicable to payment thereof, this levy cannot be used the year the levy is made. However, since a tax is "deemed to have been levied when it has been voted by the tax levying board and certified to the county auditor," the levy may be used as the basis for the issuance of certificates of indebtedness. Section 21-0203. The proceeds of such certificates may then be used to pay the expenses incident to the keeping of drains open and in repair. By this procedure, in effect, the proceeds of the levy may be used the year the levy is made.

WALLACE E. WARNER

Attorney General