OPINION
49-84

November 12, 1949 (OPINION)

HEART BUTTE IRRIGATION DISTRICT

Your letter under date of August 28, 1949, addressed to Honorable Wallace Warner, Attorney General, and the questionnaire attached thereto, has been referred to me as Special Assistant Attorney General for the State Water Conservation Commission for consideration and reply.

I shall state my opinion as to each of your questions in the order set forth in your questionnaire.

> "Question 1: What lands in the irrigation district are assessable, and how will the designation of assessments on various tracts, parcels or subdivisions be applied according to the types of assessments? Will the inclusion of a special public tax on such real property alter manner used in assessment proceedings?"

Answer: Assessments of an irrigation district are analogous to the assessments of a drainage district for drainage purposes. In the case of an irrigation district, assessments must be levied against irrigable lands in proportion to benefits received or derived. Any, or all, funds required by an irrigation district, or by a drainage district, must be raised through assessments against benefited lands.

Under the provisions of section 57-0238 of the 1943 Revised Code an assessment unit may not exceed 160 acres. However, a fraction of an acre of land may be separately assessed. It must, of course, be separately listed on assessment records. In McKenzie County of this state, where farm lands have been classified for purposes of assessment and taxation, the unit of assessment is 40 acres.

A tract of land containing an area smaller than the unit customarily assessed for general tax purposes, must of course be separately listed in the assessment records. There is certainly no reason why lands may not be assessed in smaller units than 160 acres. a tract of land may, or less, as for example, the SW1/4 SW1/4 SW1/4 SW1/4 of section 1 . . . . An irregular tract of land would, of course, have to be described by metes and bounds and designated on the assessment lists as a lot or unit.

The matter of determining units of assessment in the Heart Butte irrigation district does not, in my opinion, present a serious problem. It is an administrative detail which will have to be arranged and worked out with the county auditor and possibly county treasurer of Morton county. A separate assessment is or record will have to be prepared for the lands in the irrigation district. The method used in McKenzie County for assessing lands in the Yellowstone Irrigation District for general taxes, as well as district assessments, can readily be adopted. Preparation of an assessment list or record for the Heart Butte district will, of course, necessitate considerable extra work for the county auditor and

possibly the county treasurer. But these officials will, I am sure, gladly cooperate with the directors of the district to accomplish this.

In order to enable the county auditor to prepare assessment lists or records for the irrigation district, the Board of Directors thereof will have to furnish him with a description of each tract of land against which district assessments will be levied. It may be necessary to prepare a map showing such tracts of land. That, however, should not be difficult to do unless metes and bounds descriptions are found necessary.

It is my opinion that only the lands which are susceptible of irrigation by the irrigation works, that is to say, the irrigation facilities furnishing water to the district, may be assessed for irrigation benefits or district expenses. Section 61-0903 of the 1943 Revised Code provides: "Whenever any assessment is made within an irrigation district it shall be apportioned and spread upon the lands in proportion to benefits received." Such legislative intention is clearly indicated in section 61-1016 which contains the following provisions:

> "In no case shall any land be held by a district or taxed for irrigation purposes if from any natural cause, it can not be irrigated thereby."

And such intention is also indicated by the provision of subdivision 3 of section 61-0916, which provides that payments of assessments under protest may be recovered if "by reason of sub-irregation the lands could not now be benefited by irrigation or that the lands are not susceptible of irrigation from the canal of the district."

The statutory provisions above mentioned were contained in the irrigation district law enacted in 1917 and have not been changed.

> "Question 2: If a person owns five acres or more in an irrigation district, none of which is irrigable, is he entitled to vote? And is a person entitled to vote on his total acres or just on the basis of the total number of acres classified as irrigable."

Answer: 61-0503 of the 1943 Revised Code, as last amended, provides:

> "Any elector owning 20 acres or less, but not less than 5 acres subject to assessment for construction costs, or other costs within a proposed irrigation district, shall have one vote, and any elector owning more than 20 acres subject to such assessments within such district shall have one additional vote for each additional 20 acres or major fraction thereof, but no elector shall be entitled to cast more than 8 votes in any district election regardless of the number of acres of land owned by him in the district."

Section 61-0501 of the 1943 Revised Code, as amended, defines "elector" as follows:

> "'Elector' shall mean any land owner owning not less than five acres of land whose land will be, or is, subject to assessment for construction or other costs within the proposed or existing irrigation district and who is a resident of this state . . . ."

It is therefore plain that any person who owns only non-irrigable land within an irrigation district is not an "elector" and may not vote in any irrigation district election. And since only land classified as irrigable is "subject to assessment for construction or other costs" the non-irrigable land which an elector owns cannot be considered in the determination of the number of votes to which he is entitled.

The word "works is defined under subdivision 2 of section 61-0501 of the 1947 Supplement. Generally, or ordinarily, the word "works" means the irrigation facilities. And as stated above, only land which is benefited, that is to say, land which can be irrigated through the operation of such facilities or works is subject to assessments for the costs of construction and maintenance thereof.

> "Question 3: In voting on repayment contracts what is meant by 'majority of electors' as contained insection 61-0731?"

Answer: Section 61-0731 of the 1943 Revised Code is the same as section 67 of chapter 115, Laws 1917, noted as section 8247 A67 of the 1925 Supplement. In the law in effect prior to 1939 the term 'elector' was defined as follows: "The term 'elector' as used in this chapter shall include any resident of the State of North Dakota owning not less than ten acres of land within any proposed district, or entryman upon public lands therein, or any resident of the State of North Dakota holding a lease hold estate in not less than 40 acres of state land within said elector seeks to exercise the elective franchise."

In otherwords under the 1917 law, each elector had one vote.

The Code Commission which prepared the 1943 Revised Code overlooked changing the language of section 61-0731 so as to conform to and harmonize with the changes in the irrigation district law adopted in 1939 and 1941.

It is my opinion that the term "elector" as used in section 61-0731, must conform with the definition of that term as set forth under section 61-0503 of the 1947 Supplement, as amended, and that consequently "majority of electors" as used in section 61-1731 now means the majority of votes cast by electors on the question of approval or disapproval of a repayment contract.

> "Question 4. Can section 61-0909 be interpreted to mean that irrigation districts can levy assessments for general purposes which can be used at the discretion of the Board for unforeseen expenditures which the deem practicable and in the best interests of the district?"

Answer: My answer to this question is yes. The board of directors of an irrigation district may exercise reasonable discretion in levying

assessments to meet financial obligations, present and prospective, in order to maintain the district in a sound and solvent condition.

I believe that the foregoing covers the questions which you have asked. With reference to the provision in section 61-0903 of the Revised Code which provides that "all real property within the district shall be subject to assessment for any deficit in any fund created for the payment of bonds, district improvement warrants or other obligations," it is my opinion that said provision refers to all real property in the district which may be assessed for irrigation benefits. For, as stated above, under our existing irrigation laws, only lands susceptible of irrigation by the "works" or irrigation facilities are subject to assessment by an irrigation district.

WALLACE E. WARNER

Attorney General