

September 6, 1961 (OPINION)

BOARD OF UNIVERSITY AND SCHOOL LANDS

RE: Drainage Districts - Assessment of Benefits

This is in reply to your letter of August 22, 1961 in regard to a drainage tax statement. You enclose a copy of a drainage tax statement from the Grand Forks County Treasurer which was handed to you by the State Auditor, as it concerns original grant school lands under the jurisdiction of the Board of University and School Lands. You request that we notify you as to whether or not your department is liable for this drainage tax.

The land involved is a part of the original grant of every sixteenth and thirty-sixth section in every township within the territorial limits of the State of North Dakota (with the exception of certain military and Indian reservations lands) made by the United States government under section 10 of the Enabling Act, chapter 180 United States Statutes at Large 676. Said land would therefore be subject to the provisions of section 11 of the said Enabling Act to the effect that:

. . . .Provided, however, that none of such lands, nor any estate or interest therein, shall ever be disposed of except in pursuance of general laws providing for such disposition, nor unless the full market value of the estate or interest disposed of, to be ascertained in such manner as may be provided by law, has been paid or safely secured to the state. "

Section 176 of the North Dakota Constitution does provide in part:

. . . .The property of the United States and of the state, county and municipal corporations and property used exclusively for schools, religious, cemetery, charitable or other public purposes shall be exempt from taxation. . . ."

We note, however, that under the principles announced in *Gallagher et al v. City of Fargo*, (N.D.) 64 N.W.2d. 444, this section applies only to general taxes and would not apply to city special assessments. Likewise, we believe the same situation would prevail with regard to drainage district assessments.

Section 153 of the North Dakota Constitution provides in regard to these federally granted lands:

All proceeds of the public lands that have heretofore been, or may hereafter be granted by the United States for the support of the common schools in this state; all such per centum as may be granted by the United States on the sale of public lands; the proceeds of property that shall fall to the state by escheat; the proceeds of all gifts and donations to the state for common schools, or not otherwise appropriated by the terms of the gift, and all other property otherwise acquired for common schools, shall be and remain a perpetual fund for the

maintenance of common schools of the state. It shall be deemed a trust fund, the principal of which shall forever remain inviolate and may be increased but never diminished. The state shall make good all losses thereof."

Section 154 of the North Dakota Constitution provides in regard to these lands:

The interest and income of this fund together with the net proceeds all of fines for violations of state laws and all other sums which may be added thereto by law, shall be faithfully used and applied each year for the benefit of the common schools of the state, and shall be for this purpose apportioned among and between all the several common school corporations of the state in proportion to the number of children in each of school age, as may be fixed by law, and no part of the fund shall ever be diverted, even temporarily, from this purpose or used for any other purpose whatever than the maintenance of common schools for the equal benefit of all the people of the state; provided however, that if any portion of the interest or income aforesaid be not expended during any year, said portion shall be added to and become a part of the school fund."

Section 163 of the North Dakota Constitution provides in regard of these lands:

No law shall ever be passed by the legislative assembly granting to any person, corporation or association any privileges by reason of the occupation, cultivation or improvement of any public lands by said person, corporation or association subsequent to the survey thereof by the general government. No claim for the occupation, cultivation or improvement of any public lands shall ever be recognized, nor shall such occupation, cultivation or improvement of any public lands ever be used to diminish either directly or indirectly, the purchase price of said lands."

Thus while we must recognize that a drain can in particular circumstances be of considerable value to the land concerned, it would seem doubtful that any part of the land concerned, it would seem doubtful that any part of the land itself or the proceeds thereof (in the absence of a sale of same into private ownership) could be utilized to pay for the cost of the drain.

Looking further, however, to the general principles of special assessments by municipal corporate entities, we find stated at 63 C.J.S. 1067, Municipal Corporations section 1332, subsection c:

In the absence of a constitutional provision to the contrary, the Legislature has power to make property of a state situated within a municipality liable to special assessments for benefits accruing from local improvements, and the exercise of this power is not repugnant to a constitutional provision that public property used for public purposes shall be exempt from taxation. The power to subject the property of the state to assessments of this character does not exist in the absence of

statutes conferring it, and the power must be conferred either expressly or by necessary implications. While it has been held that statutes or charters, which in general terms confer on a municipality power to levy special assessments on property benefited by local improvements do not authorize municipalities to levy special assessments on state property, it has also been held that the power to impose special assessments on state property is given by a statute which provides that all lots or parcels of land within a specified improvement district are subject to assessments for the purposes stated 'except such as may belong to the United States or are used as a cemetery.'

Also to this same effect see: 44 C.J. 523, Municipal Corporations, section 2881, 48 AM. Jur. page 641, section 87 McQuillin Municipal Corporations (3rd. ed.) section 3873.

We note also section 57-02-08 of the North Dakota Century Code which provides in so far as here applicable:

57-02-08. PROPERTY EXEMPT FROM TAXATION. All property described in this section to the extent herein limited shall be exempt from taxation, that is to say: . . . .

2. All property, real or personal, owned by this state, but no lands contracted to be sold by the state shall be exempt. . . ."

Looking then to the drainage district statutes we find the basic statute for the levy of the assessment to be section 61-21-20 of the North Dakota Century Code which provides in so far as here applicable:

61-21-20. ASSESSING COST OF CONSTRUCTING AND MAINTAINING DRAIN. After the making of the order establishing the drain, the board shall assess the percentage of the cost of acquiring the right of way and constructing and maintaining such drain in accordance with benefits received, against:

1. Any county, township, city, or village which is benefited thereby; and
2. Any lot, piece, parcel, or interest in land which is either directly or indirectly benefited by such drain or by such drain in connection with other existing or proposed drains. . . ."

We tentatively presume that the first subsection of said statute may be in regard to benefits received directly by a county, township, city or village, rather than county-owned, township-owned or village-owned lands. However, we note further the provision of section 61-21-49 of the North Dakota Century Code to the effect that county tax deed lands may be assessed for benefits received in the particular circumstances there outlined.

However, considering the provisions of said chapter 61-21-49 as a whole it must be our conclusion that said chapter was not intended to authorize or allow assessment of benefits for drains against state

owned Board of University and School Lands. Also, under the provisions of section 57-02-08 of the North Dakota Century Code it is clear that such lands are tax exempt. Further, in view of the provisions of the constitutional sections outlined above it seems doubtful that any part of the land itself or the proceeds thereof could be used for the payment of the proportionate cost of the assessment thereof, or could be so affected as to diminish the purchase price of said lands. Our conclusion must therefore be that the drainage assessment indicated is totally invalid.

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