

MICROFILM DIVIDER

OMB/RECORDS MANAGEMENT DIVISION

SFN 2053 (2/85) 5M



ROLL NUMBER

DESCRIPTION

13999

2005 HOUSE POLITICAL SUBDIVISIONS


HB 1399

2005 HOUSE STANDING COMMITTEE MINUTES

BILL/RESOLUTION NO. HB 1399

House Political Subdivisions Committee

Conference Committee
Meeting Date February 3, 2005

Tape Number	Side A	Side B	Meter #
2	x		10.5 to end
2		x	0.6 to 40.5
Committee Clerk Signature 			

Minutes: **Rep. Devlin, Chairman** opened the hearing on HB 1399, A Bill for an Act to amend and reenact section 61-16.1-09 of the North Dakota Century Code, relating to special assessments for snagging, clearing, and maintaining watercourses; and to declare an emergency.

Sen. Thomas Fischer representing District 46 and a prime sponsor of this bill spoke very much from a neutral stance on this bill. His presentation was that of a historical background. It is a bill that was drawn for one county --- Trail county --- but it is something that could happen in almost any county. There was a spring flood that caused a lot of debris to back up on a bridge on the Goose River. It was an emergency -- a fear of losing the bridge -- they had to go out and borrow money have the debris removed to save the bridge. There was several pieces of legislation introduced -- first it failed and then carried. Putting together assessment districts and getting it passed is too cumbersome to respond to emergencies. There were concerns subsequent to passing the law -- that was subsection C under section 1 -- wherein the revenue under subsection 1 must be exhausted before a subsequent assessment could be made or levied. There

were concerns about hearing notices and notice in general. Today there are some amendments to be brought forth by Rep. Damschen who is not here to bring them in.

Rep. Kaldor (14.6) Do you see anyway that this bill could be amended so that it would be used only in cases of an emergency?

Sen. Fischer : Not sure because it is a difficult thing to define an emergency when dealing with debris. The hazards, emergency, and maintenance clearing all have their own definitions in the law.

Rep. Kretschmar (16.4) Did this bill come about because the water Resource district is using the funds to construct a drain?

Sen Fischer : I think there are some issues in the northeast part of the state which I can't address because I don't know the details.

Rep.Devlin, Chairman (17.5) I assume a water Resource district can go over more than one County but was it the intent of the original language that a county board could work within their one county -- or ?

Sen. Fischer : Water Resource districts can not operate unless they have joint powers or a joint board -- taxation wise that is -- they can work together across county lines but taxation wise no.

Bill Hardy a farmer from Walhalla and chairman of the Cavalier county Water Resource Board spoke in support of the bill. It is a good bill if it is used right. They ran into a problem with their adjoining county -- on the Tongue river when they ran into a problem they wanted to assess the whole county in Cavalier county. They did meet with the Cavalier County Board and the water board. They were told to put it to a vote of the people and it never did resolve. With the

language in this it seem clear that the county boards and the water resource boards have to get together to solve the problems.

Rep. Herbal, Vice Chairman based on this how do you determine who is to be assessed?

Bill Hardy : You survey where the damage occurred and determine the benefit area downstream and assess it.

In opposition testimony:

Lloyd Huber : representing the Morton county Water Board spoke in support of the bill but not entirely Mr. Huber owns land in Morton County and in Oliver County. The water board should order the snagging but when it comes down to line --- where is says to tax those " benefited by the project" but not to tax those who did nothing in contributing to the problem -- that should be stricken from the law.

The chairman pointed out that that language was already in the law and discussion continued with examples of how assessments do and should occur.

Clarence Boettger from the Pembina County water Board. Spoke in opposition to the bill.

Others from the Pembina County Water board were in attendance -- Randy Wagner, Ed Strimick, Dallas Johnson, and Ronald Johnson. They prepared a document which is attached.

Their testimony was well organized in the booklet which contains on the first page itemized specific objections with supporting documentation for their position and attorney general's opinions.

Committee member questioned Mr. Boettger on such subjects as the limits of watershed and county boundaries; downstream benefits versus upstream contributions to debris, silt, etc.

There were clearly emotion and differences of opinions as to who benefits and who contributes.

Sen Fischer (51.0) attempted to clarify that the legislation has grown out of emergency situations as opposed to normal maintenance although a lack of maintenance could be a causative factor.

Discussion continued to the end of side a of the tape.

Continued on Side B of Tape 2

Mike Dwyer Special Assistant Attorney General for the State Water Commission was present and indicated that the problem had few solutions. The question though not directly on the question was to be heard in the state Supreme Court on the 28th of this month.

A bit more of discussion continued.

Rep. Chuck Damschen a prime sponsor appeared in support of the bill and restated the intent of the legislation. There was discussion of joint powers options, clearing downstream problems, etc. **Mike Dwyer** : In a lengthy discussion Mr. Dwyer explained the history and experiences of water boards and drainage boards across county lines. Also discussed was the assessment s and taxation of the various types of districts involving more than one watershed; watersheds involving more than one county;

Rep. Zaiser moved a 'Do Not Pass' motion for HB 1399 part way through the discussion. **Rep. Kretschmar** seconded the motion. Then at the end of the discussion the question was called. On a roll call vote the motion carried **8 ayes 2 nays and 2 absent**. **Rep. Kaldor** was designated to carry the bill on the floor. End of record (40.2) .

2005 HOUSE STANDING COMMITTEE MINUTES

BILL/RESOLUTION NO. HB 1399 b

House Political Subdivisions Committee

Conference Committee

Hearing Date February 10, 2005

Tape Number	Side A	Side B	Meter #
1	x		0.6 to 10.9

Committee Clerk Signature *Lauren B. Fink*

Minutes: **Rep. Herbal, Vice Chairman** moved to reconsider HB 1399 which the Committee had passed out with a 'Do Not Pass' motion. There is new information and more new testimony to heard this morning. **Rep. Maragos** seconded the motion. The motion carried on a voice vote. **Rep. Devlin, Chairman** explained that when the large group had left after the hearing last we that Sen. Fischer and Rep. Damschen had gotten together with the Attorney General. The arrived at what would be a good resolution to the problem this bill was trying to fix. Further they feel that this would defuse the issue and the disputes.

Sen. Fischer representing District 46 appeared to explain their proposed amendment. The amendments would not change the water law. What this amendment does is to take the snagging and clearing work and refers it back to the water law section of the code and the process starts and follows through like any other water project rather than as a sperate new levying district.

They would use an engineer to define the areas of benefit. Plus if the board finds benefits outside the boundaries of the water district then the requirements for notice must go out and a hearing on

Page 2

House Political Subdivisions Committee

Bill/Resolution Number HB 1399 b

Hearing Date February 10, 2005

the matter. With this snagging and clearing --- you need to remember that this is new in the law -- some of this is in the water law but this is being added so that the board of each water district must make that determination and approve the assessment by a two-third majority of the board of county commissioners of each county. That puts it in the Commissions hand of both counties.

It may not settle all the differences but it does lay out the procedure for addressing the problem.

There was discussion by members of the committee with Sen. Fischer.

Rep. Koppelman moved to adopt the amendment proposed by Sen Fischer. **Rep. Zaiser**

seconded the motion. Motion carried by voice vote.

Rep. Zaiser moved a 'Do Pass as Amended' motion for HB 1399. **Rep. Koppelman** seconded

the motion. On a roll call vote the motion carried **12 ayes 0 nays 0 absent**. **Rep. Kaldor**

was designated to carry the bill on the floor. **End (10.9)**.

Date: February 3, 2005
 Roll Call Vote:

2005 HOUSE STANDING COMMITTEE ROLL CALL VOTES
BILL/RESOLUTION NO. HB 1399

House POLITICAL SUBDIVISIONS Committee

Check here for Conference Committee

Legislative Council Amendment Number _____

Action Taken D N P

Motion Made By Rep. Zaiser Seconded By Rep. Kretschmar

Representatives	Yes	No	Representatives	Yes	No
Rep. Devlin, Chairman	✓		Rep. Ekstrom	A	
Rep. Herbel, Vice Chairman	✓		Rep. Kaldor	✓	
Rep. Dietrich	✓		Rep. Zaiser	✓	
Rep. Johnson	✓				
Rep. Koppelman		✓			
Rep. Kretschmar	✓				
Rep. Maragos	A				
Rep. Pietsch	✓				
Rep. Wrangham		✓			

Total (Yes) 8 No 2

Absent 2

Floor Assignment Rep. Kaldor

If the vote is on an amendment, briefly indicate intent:

Date: February 10, 2005
Roll Call Vote:

2005 HOUSE STANDING COMMITTEE ROLL CALL VOTES
BILL/RESOLUTION NO. HB 1399

House POLITICAL SUBDIVISIONS Committee

Check here for Conference Committee

Legislative Council Amendment Number

Reconsider Voice
Amendment

Action Taken _____

Motion Made By

Herb

Seconded By

Mayr

Representatives	Yes	No	Representatives	Yes	No
Rep. Devlin, Chairman			Rep. Ekstrom		
Rep. Herbel, Vice Chairman			Rep. Kaldor		
Rep. Dietrich			Rep. Zaiser		
Rep. Johnson					
Rep. Koppelman					
Rep. Kretschmar					
Rep. Maragos					
Rep. Pietsch					
Rep. Wrangham					

Total (Yes) _____ No _____

Absent _____

Floor Assignment _____

If the vote is on an amendment, briefly indicate intent:

February 10, 2005

House Amendments to HB 1399 - Political Subdivisions Committee 02/11/2005

Page 1, line 11, remove "within the boundaries of the water"

Page 1, line 12, remove "resource district" and after the period insert "The benefits of a project must be determined in the manner provided in section 61-16.1-17."

House Amendments to HB 1399 - Political Subdivisions Committee 02/11/2005

Page 2, line 3, after the period insert:

- (1) If a board that undertakes a project finds that the project will benefit lands outside water resource district boundaries, the board shall provide notice to the water resource board where the benefited lands are located together with the report prepared under section 61-16.1-17.
- (2) The board of each water resource district containing lands benefited by a project must approve the project and assessment by a vote of two-thirds of its members. The board of county commissioners in each county that contains lands benefited by a project must approve and levy the assessment to be made by a vote of two-thirds of its members.
- (3) If a project and assessment is not approved by all affected water resource boards and county commission boards, the board of each water resource district and the board of county commissioners of each county shall meet to ensure that all common water management problems are resolved pursuant to section 61-16.1-10. In addition, the water resource board that undertakes the project may proceed with the project if the board finances the cost of the project and does not assess land outside the boundaries of the district.

Page 2, line 8, after "held" insert "and", overstrike the first "board" and insert immediately thereafter "affected water resource boards", and overstrike the second "board" and insert immediately thereafter "affected boards"

Re-number accordingly

Date: February 10, 2005
Roll Call Vote:

**2005 HOUSE STANDING COMMITTEE ROLL CALL VOTES
BILL/RESOLUTION NO.**

House POLITICAL SUBDIVISIONS Committee

Check here for Conference Committee

Legislative Council Amendment Number Rep. Mored Amendment - Rep. Zaiser 2nd Carried Voice Vote

Action Taken Do Pass as Amended

Motion Made By Rep. Zaiser Seconded By Rep. Koppelman

Representatives	Yes	No	Representatives	Yes	No
Rep. Devlin, Chairman	✓		Rep. Ekstrom	✓	
Rep. Herbel, Vice Chairman	✓		Rep. Kaldor	✓	
Rep. Dietrich	✓		Rep. Zaiser	✓	
Rep. Johnson	✓				
Rep. Koppelman	✓				
Rep. Kretschmar	✓				
Rep. Maragos	✓				
Rep. Pietsch	✓				
Rep. Wrangham	✓				

Total (Yes) 12 No 0

Absent 0

Floor Assignment Rep. Kaldor

If the vote is on an amendment, briefly indicate intent:

REPORT OF STANDING COMMITTEE

HB 1399: Political Subdivisions Committee (Rep. Devlin, Chairman) recommends AMENDMENTS AS FOLLOWS and when so amended, recommends DO PASS (12 YEAS, 0 NAYS, 0 ABSENT AND NOT VOTING). HB 1399 was placed on the Sixth order on the calendar.

Page 1, line 11, remove "within the boundaries of the water"

Page 1, line 12, remove "resource district" and after the period insert "The benefits of a project must be determined in the manner provided in section 61-16.1-17."

Page 2, line 3, after the period insert:

- "(1) If a board that undertakes a project finds that the project will benefit lands outside water resource district boundaries, the board shall provide notice to the water resource board where the benefited lands are located together with the report prepared under section 61-16.1-17.
- (2) The board of each water resource district containing lands benefited by a project must approve the project and assessment by a vote of two-thirds of its members. The board of county commissioners in each county that contains lands benefited by a project must approve and levy the assessment to be made by a vote of two-thirds of its members.
- (3) If a project and assessment is not approved by all affected water resource boards and county commission boards, the board of each water resource district and the board of county commissioners of each county shall meet to ensure that all common water management problems are resolved pursuant to section 61-16.1-10. In addition, the water resource board that undertakes the project may proceed with the project if the board finances the cost of the project and does not assess land outside the boundaries of the district."

Page 2, line 8, after "held" insert "and", overstrike the first "board" and insert immediately thereafter "affected water resource boards", and overstrike the second "board" and insert immediately thereafter "affected boards"

Renumber accordingly

2005 SENATE NATURAL RESOURCES

HB 1399

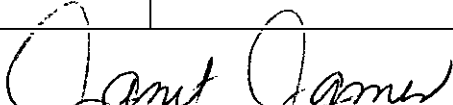
2005 SENATE STANDING COMMITTEE MINUTES

BILL/RESOLUTION NO. HB 1399

Senate Natural Resources Committee

Conference Committee

Hearing Date March 4, 2005

Tape Number	Side A	Side B	Meter #
1		X	12.8 - 31.6
Committee Clerk Signature 			

Minutes:

Senator Stanley Lyson, Chairman of the Senate Natural Resources Committee opened the hearing on HB 1399 relating to special assessments for snagging, clearing and maintaining watercourses; and declare an emergency.

All members of the committee were present.

Representative Chuck Damschen of District 10 sponsor of HB 1399 introduced the bill stating this bill should sound familiar to the committee as this the third session this issue is being dealt with. The issue was introduced by Senator Tom Fischer three sessions ago to deal with situations that had to be dealt with before the normal time required to enact an assessment project. This was to enact a \$.50 per acre assessment on those properties benefiting from clearing and snagging of natural waterways. If properly applied the legislation was good, unfortunately it was broadly misinterpreted and again amended to define it even more. These assessment were charged to those who did not benefit from the clearing and even crossed county lines producing a law suit.

HB 1399 is not to address that lawsuit but to keep the issue from surfacing again. An amendment was offered to better define the issue. There is as defined by law, a very detailed procedure to follow for joint projects involving multiple counties and this was not followed. This amendment should address this issue.

Senator John Traynor commented that there would seem to be some controversy between snagging and clearing or construction for draining.

Representative Damschen agreed this was also an issue, but this was specifically meant for natural waterways and not for assessment projects. The bill was broadly interpreted and it was tried to be clarified in the last session to be only for snagging and clearing.

Cameron Sillers (22.3) from the Cavalier County Water Resource Board testified in support of HB 1399 stating his county does not feel all counties in a basin should be assessed for drain projects. The question is can a county tax an assessment on another county without going through the assessment process. This bill clarifies that if an assessment is going to be made without going through an assessment process and vote of the people, it can now happen if the county commissioner and the county water board members approve it. There is now a connection between the voters and the people who are charging the assessment.

Representative David Monson (26.0) of District 10 testified in support of HB 1399 stating he was present to lend support of the bill.

Bill Hardy of the Chairman of the Cavalier County Water Resource Board testified in support of HB 1399. It is his county that was assessed fees without say and this bill clear up a lot of issues. He further stated his firmly believes that those that are taxed should have a say.

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Senate Natural Resources Committee

Bill/Resolution Number HB 1399

Hearing Date 3-4-05

Senator Lyson asked for testify in opposition to HB 1399.

Mike Dwyer representing the North Dakota Water Resource Districts testified both in favor and opposition to the bill. He stated that this was a difficult issue and the intent of the bill was never for emergency proposes but clearing and snagging of natural water courses. It is an alternative method of getting things done and can be used in advance of emergencies.

Senator Lyson closed the hearing on HB 1399.

Senator John Traynor made a motion for a Do Pass of HB 1399.

Senator Michael Every second the motion.

Roll call vote for Do Pass of HB 1399 was taken indicating 7 YEAS 0 NAYS AND 0 ABSENT OR NOT VOTING.

Senator Traynor will carry HB 1399.

Date: 3-4
Roll Call Vote #: 1

2005 SENATE STANDING COMMITTEE ROLL CALL VOTES
BILL/RESOLUTION NO. 1399

Senate Senate Natural Resources Committee

Check here for Conference Committee

Legislative Council Amendment Number _____

Action Taken Do Pass

Motion Made By Traynor Seconded By Every

Senators	Yes	No	Senators	Yes	No
Senator Stanley Lyson, Chairman	✓		Senator Joel Heitkamp	✓	
Senator Ben Tollefson, Vice Chair	✓		Senator Michael Every	✓	
Senator Layton Freborg	✓				
Senator Rich Wardner	✓				
Senator John Traynor	✓				

Total (Yes) 7 No 0

Absent 0

Floor Assignment Traynor

If the vote is on an amendment, briefly indicate intent:

REPORT OF STANDING COMMITTEE (410)
March 4, 2005 11:36 a.m.

Module No: SR-40-4165
Carrier: Traynor
Insert LC: . Title: .

REPORT OF STANDING COMMITTEE

HB 1399, as engrossed: Natural Resources Committee (Sen. Lyson, Chairman)
recommends **DO PASS** (7 YEAS, 0 NAYS, 0 ABSENT AND NOT VOTING).
Engrossed HB 1399 was placed on the Fourteenth order on the calendar.

2005 TESTIMONY

HB 1399

Fifty-ninth Legislative Assembly

Political Subdivisions

House Bill No. 1399

A bill for an Act to amend and reenact Section 61-16.1-09.1 NDCC

Hearing Date: February 3, 2005

Presented by:
Pembina County Water Resource District
308 Courthouse Drive #5
Cavalier, ND 58220

HOUSE BILL No. 1399

02/03/05 House Committee Hearing 02:30

Exhibit A:

within the boundaries of the water resource district

If district in this case means County, it would be cumbersome to work only in the county because several natural watercourses go in and out of county lines. Water management to be effective, cannot stop at county lines. Water does not respect political boundaries.

See Appendix A Attorney General Opinion No. 84-23
See Appendix B Attorney General Opinion No. 2003 L-26

Exhibit B:

Revenue from an assessment under this section may not be used for construction of a drain or reconstruction or maintenance of an existing assessment drain. Any question as to whether the board is maintaining a natural watercourse or is constructing a drain or reconstructing or maintaining an existing assessment drain must be determined by the state engineer.

We feel that this section is redundant and covered under other sections of law.

Exhibit C:

In which the project is located

Several natural watercourses extend in and out of boundary lines of districts. Therefore it would not be beneficial to stop at a county line. Upstream landowners must share with downstream landowners the responsibility to provide for the proper management of surface waters.

See Appendix C NDCC 61-16.1-15
See Appendix D NDCC 61-16.1-10 (4)

Conclusion:

The language in the proposed amendments would not be beneficial. We recommend that you vote no on the proposed changes and leave the bill as is.

Introduced by

Representatives Damschen, DeKrey, Monson

Senators Fischer, Trenbeath

1 A BILL for an Act to amend and reenact section 61-16.1-09.1 of the North Dakota Century
2 Code, relating to special assessments for snagging, clearing, and maintaining watercourses;
3 and to declare an emergency.

4 BE IN ENACTED BY THE LEGISLATIVE ASSEMBLY OF NORTH DAKOTA:

5 SECTION 1. AMENDMENT. Section 61-16.1-09.1 of the North Dakota Century Code
6 is amended and reenacted as follows:

7 61-16.1-09.1. Watercourses, bridges, and low water crossings.

8 1. A water resource board may undertake the snagging, clearing, and maintaining of
9 natural watercourses and the debrisement of bridges and low water crossings. The
10 board may finance the project in whole or in part with funds raised through the
11 collection of a special assessment levied within the boundaries of the water {See exhibit A}
12 resource district against the land and premises benefited by the project. Revenue
13 from an assessment under this section may not be used for construction of a drain } See
14 or reconstruction or maintenance of an existing assessment drain. Any question } Exhibit
15 as to whether the board is maintaining a natural watercourse or is constructing a } B
16 drain or reconstructing or maintaining an existing assessment drain must be }
17 determined by the state engineer. All provisions of this chapter apply to }
18 assessments levied under this section except:

- 19 a. An assessment may not exceed fifty cents per acre (.40 hectare) annually on
20 agricultural lands and may not exceed fifty cents annually for each five
21 hundred dollars of taxable valuation of nonagricultural property; and
22 b. If the assessment is for a project costing less than one hundred thousand
23 dollars, no action is required for the establishment of the assessment district
24 or the assessments except the board must approve the project and

- 1 assessment by a vote of two-thirds of the members and the board of county
2 commissioners of the county in which the project is located must approve and } See
3 levy the assessments to be made by a vote of two-thirds of its members. Exhibit C
4 c. All revenue from an assessment under this section must be exhausted before
5 a subsequent assessment covering any portion of lands subject to a prior
6 assessment may be levied.
7 2. Before an assessment may be levied under this section, a public hearing must be
8 held attended by a quorum of the board and a quorum of the board of county
9 commissioners. The hearing must be preceded by notice as to date, time, location,
10 and subject matter published in the official newspaper in the county or counties in
11 which the proposed assessment is to be levied. The notice must be published at
12 least ten days but not more than thirty days before the public hearing.
13 SECTION 2. EMERGENCY. This Act is declared to be an emergency measure.

APPENDIX A

Attorney General's Opinion 84-23

STATE OF NORTH DAKOTA

ATTORNEY GENERAL'S OPINION 84-23

Date issued: May 9, 1984

Requested by: F. E. Foughty
Attorney for Ramsey County Water Resource District

- 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

May 9, 1984

Page 2

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:

16-16.1-17. 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

May 9, 1984

Page 3

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

May 9, 1984

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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.

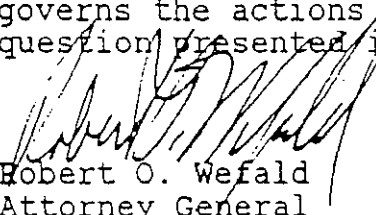
The use of the term "district" in Section 61-16.1-28, N.D.C.C., is classified by Section 61-16.1-02, N.D.C.C., which provides that "[i]n this chapter, unless the context or subject matter otherwise provides: 'District' means a water resource district." Therefore, when the context or subject matter provide, "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.


Robert O. Wefald
Attorney General

Prepared by: Joseph J. Cichy
Assistant Attorney General

bww



Timothy L. Kingstad
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June 1, 1988

Mr. Tom Trenbeath
Attorney-at-Law
P.O. Box 633
Cavalier, ND 58220

Dear Tom,

Thank you for your May 11, 1988, letter in which you ask what is meant by the word "benefit" in N.D.C.C. §61-16.1-40.1.

Knowing nothing of the Tongue River Watershed Project, the district's maintenance project, or the area of the project, I cannot advise you on which lands will be benefitted. I can, however, give you some law that may guide this determination. Property benefitted by a project is property that will be enhanced in value. Stanley v. City of Salem, 427 P. 2d 406, 407 (Or. 1967). The difficulty, however, "arises in the application of this law to the facts of the particular case." Id.

Determining what land will be benefitted by the Pembina County Water Resource District's maintenance project is a question of fact. See Foss Methodist Church v. City of Wahpeton, 157 N.W. 2d 347, 350 (N.D. 1968). Generally, the district may use any method to determine which lands will be benefitted. See 70A Am.Jur. 2D Special or Local Assessments §27 (1987).

It is also true that North Dakota courts have typically upheld assessments challenged by landowners. "'Generally, all presumptions are in favor of the validity of assessments for local improvements and the burden is on persons attacking the validity of assessments to show that they are invalid.'" Cloverdale Foods Co. v. City of Mandan, 364 N.W. 2d 56, 60 (N.D. 1985). And this burden "is an exceedingly heavy one." Patterson v. City of Bismarck, 212 N.W. 2d 374, 384 (N.D. 1973). "[P]arties cannot be heard to assert invalidity of special assessments, in the absence of fraud, and the courts do not inquire into the correctness of the judgment of the board as to alleged benefits in the absence of fraud or the manifest abuse of discretion." Patterson v. City of Bismarck, 212 N.W. 2d at 384. See also Cloverdale Foods, 364 N.W. 2d at 60. In summary, the water resource district has considerable discretion in determining which lands will be benefitted. So long as it has a sound, factual basis for its decision, the assessment should be legal.

You apparently take the view that all land in the drainage area of the Tongue River will be benefitted and, therefore, may be assessed. Knowing nothing of the Tongue River or of the surrounding area, I trust there is a factual basis for your view.

June 1, 1988
Mr. Tom Trenbeath
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The Tongue River does flow through Cavalier County. I do not know whether your water resource district intends to assess land in Cavalier County. If this is the plan, you may wish to review Attorney General's Opinion 84-23, a copy of which is enclosed.

Be advised that this letter does not constitute an official opinion of the Attorney General.

Sincerely,



Charles Carvell
Assistant Attorney General

CC:djc

cc: Rosellen Sand
Assistant Attorney General

Enclosure

APPENDIX B

Attorney General's Opinion

No. 2003 L-26



Wayne Stenehjem
ATTORNEY GENERAL

STATE OF NORTH DAKOTA
OFFICE OF ATTORNEY GENERAL

STATE CAPITOL
600 E BOULEVARD AVE DEPT 125
BISMARCK, ND 58505-6043
(701) 328-2210 FAX (701) 328-2226

LETTER OPINION
2003-L-26

April 14, 2003

Mr. Neil W. Fleming
Pembina County Water Resource District
PO Box 633
Cavalier, ND 58220-0633

Dear Mr. Fleming:

Thank you for your letter requesting my opinion¹ on whether the Pembina County Water Resource District may levy special assessments under N.D.C.C. § 61-16.1-09.1 on land in Cavalier County which would be benefited by a proposed Tongue River snagging and clearing project. You indicate that although approximately 80% of the Tongue River watershed is located in Pembina County, certain Cavalier County lands in the watershed would be benefited by the project which would maintain the natural watercourse. Annual assessments for snagging and clearing projects are limited by law to fifty cents per acre on agricultural lands and fifty cents per \$500 of taxable valuation of nonagricultural lands.² N.D.C.C. § 61-16.1-09.1(1).

Water resource districts are "creatures of statute, and they have no powers except such as are expressly granted by the statute or reasonably implied from the powers granted." Burlington Northern and Santa Fe Ry. Co. v. Benson County Water Resource Dist., 618 N.W.2d 155, 157-58 (N.D. 2000) (citations omitted). Water resource districts have broad powers under N.D.C.C. ch. 61-16.1 to develop projects for the control and regulation of water.³ In construing the power of a water resource board to construct,

¹ The Attorney General is authorized to render opinions to water resource boards. N.D.C.C. § 61-16.1-58. Water resource boards are also authorized to bring an action in district court to judicially confirm and approve the levying of special assessments. N.D.C.C. § 61-16.1-59.

² Thus, for example, if an agricultural landowner had 160 acres benefited by the project, the annual assessment would be \$80. Similarly, if an adjoining nonagricultural parcel of land worth \$50,000 was benefited by the project, the annual assessment would be limited to \$50.

³ In exercising its authority to construct projects that affect other water resource districts, a water resource board should be mindful of its duty to cooperate with other water resource boards having a common river basin. N.D.C.C. § 61-16.1-10.

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April 14, 2003

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modify, maintain, and repair all "water conservation and management devices of every nature and water channels," found in N.D.C.C. § 61-16.1-09(5), the Attorney General determined that this subsection gave water resource boards the authority to develop projects without restricting the projects to the boundaries of the district. N.D.A.G. 84-23 (copy enclosed). See also 14 E. McQuillin, The Law of Municipal Corporations § 38.52 (3d ed. 1998) (land outside a municipality's limits may be included in an assessment district if authorized by statute).

In N.D.A.G. 84-23, the Attorney General concluded that a water resource board does not interfere with the powers of an adjoining water resource board by levying a special assessment in an adjoining county. The opinion also concluded that a board may establish an assessment district project that includes land in adjacent counties and levy and require the collection of assessments on the land benefited by the project, including the land located in other districts. In reaching this conclusion, the Attorney General found it significant that several statutes governing how assessment projects are established did not confine assessment districts to the geographical boundaries of the water resource district; rather, the statutes referred to establishing assessment districts encompassing lands benefited by the project. *Id.* As noted in the opinion, "[w]ater management, to be effective, cannot stop at county lines. Water does not respect political boundaries." *Id.* See also Freeman v. Trimble, 129 N.W. 83, 87 (N.D. 1910) ("The power to establish drains would often be of no beneficial use whatever, if the drainage boards must stop all work at the boundary line of their districts.").

The authorizing statute for a snagging and clearing project is N.D.C.C. § 61-16.1-09.1, which provides, in part:

A water resource board may undertake the snagging, clearing, and maintaining of natural watercourses and the debrisment of bridges and low water crossings. The board may finance the project in whole or in part with funds raised through the collection of a special assessment levied against the land and premises within the watershed benefited by the project. All provisions of this chapter apply to assessments levied under this section except:

2. If the assessment is for a project costing less than one hundred thousand dollars, no action is required for the establishment of the assessment district or the assessments except the board must approve the project and assessment by a vote of two-thirds of the members and the board of county commissioners of the county

LETTER OPINION 2003-L-26

April 14, 2003

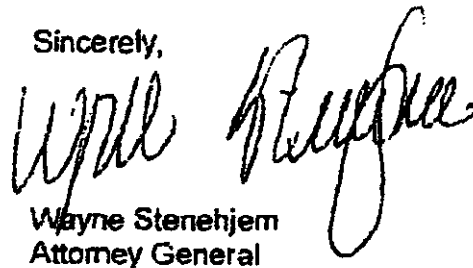
Page 3

must approve and levy the assessments to be made by a vote of two-thirds of its members.

(Emphasis supplied.) The statute expressly authorizes the board to collect a special assessment against all land within the watershed benefited by the project. The statute does not limit the assessment area to the geographical boundary of the water resource district.⁴ As noted in N.D.A.G. 84-23, allowing a water resource board to establish a project encompassing all lands benefited comports with the water policy of the state to provide for water management and prevent flood damage "in the watersheds of the state" N.D.A.G. 84-23.

It is my opinion that a water resource board has the authority under N.D.C.C. § 61-16.1-09.1 to assess benefited lands beyond the water resource district's borders provided the procedures in that section are followed.

Sincerely,



Wayne Stenehjem
Attorney General

mas/pg
Enclosure

⁴ Whether land is correctly included in the special assessment district is appealable to the State Engineer. N.D.C.C. § 61-16.1-23. In the alternative, a water resource board's decision regarding assessments may be appealed to district court. N.D.C.C. § 61-16.1-54; Investment Rarities, Inc. v. Bottineau County Water Resource Dist., 396 N.W.2d 746, 748 (N.D. 1986).

APPENDIX C

North Dakota Century Code 61-16.1-15

61-16.1-15. Financing project through revenue bonds, general taxes, or special assessments - Apportionment of benefits. A water resource board shall have the authority, either upon request or by its own motion, to acquire needed interest in property and provide for the cost of construction, alteration, repair, operation, and maintenance of a project through issuance of improvement warrants or with funds raised by special assessments, general tax levy, issuance revenue bonds, or by a combination of general ad valorem tax, special assessments, and revenue bonds. Whenever a water resource board decides to acquire property or interests in property to construct, operate, alter, repair, or maintain a project with funds raised in whole or in part through special assessments, such assessments shall be apportioned to and spread upon lands or premises benefited by the project in proportion to and in accordance with benefits accruing thereto. The board shall assess the proportion of the cost of the project, or the part of the cost to be financed with funds raised through levy and collection of special assessments which any lot, piece, or parcel of land shall bear in proportion to the benefits accruing thereto and any county, city, or township which is benefited thereby. In determining assessments the water resource board shall carry out to the maximum extent possible the water management policy of this chapter that upstream landowners must share with downstream landowners the responsibility to provide for the proper management of surface waters.

APPENDIX D

North Dakota Century Code 61-16.1-10 (4)

61-16.1-10. Responsibilities and duties of water resource board. Each water resource board shall:

1. Meet jointly with other water resource boards within a common river basin at least twice each year at times and places as mutually agreed upon for the purpose of reviewing and coordinating efforts for the maximum benefit of the entire river basin.
2. Cooperate with other water resource boards of a common river basin and provide mutual assistance to the maximum extent possible.
3. Exercise jointly with other water resource districts within a river basin to effectively resolve the significant and common water resource management problem or problems of the river basin or region and to jointly develop a comprehensive plan for the river basin or region.
4. Encourage all landowners to retain water on the land to the maximum extent possible in accordance with sound water management policies, and carry out to the maximum extent possible the water management policy that upstream landowners and districts that have artificially altered the hydrologic scheme must share with downstream landowners the responsibility of providing for proper management and control of surface waters.
5. Address and consider fully in the planning of any surface water project the downstream impacts caused by the project. A determination of whether to proceed with the construction of a project shall be based on the following principles:
 - a. Reasonable necessity of the project.
 - b. Reasonable care to be taken to avoid unnecessary injury by fully considering all alternatives.
 - c. Consideration of whether the utility or benefit accruing from the project reasonably outweighs the adverse impacts resulting from the project.
6. Require that appropriate easements be obtained in accordance with applicable state and federal law when projects will cause an adverse impact to lands of other landowners.