

North Dakota
Water Resource
Districts Association

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Dear North Dakota Water Managers:

North Dakota's water managers have extensive authorities, duties, and responsibilities for the management of North Dakota's water resources.

This Handbook provides information to assist water managers for the management of North Dakota's water resources.

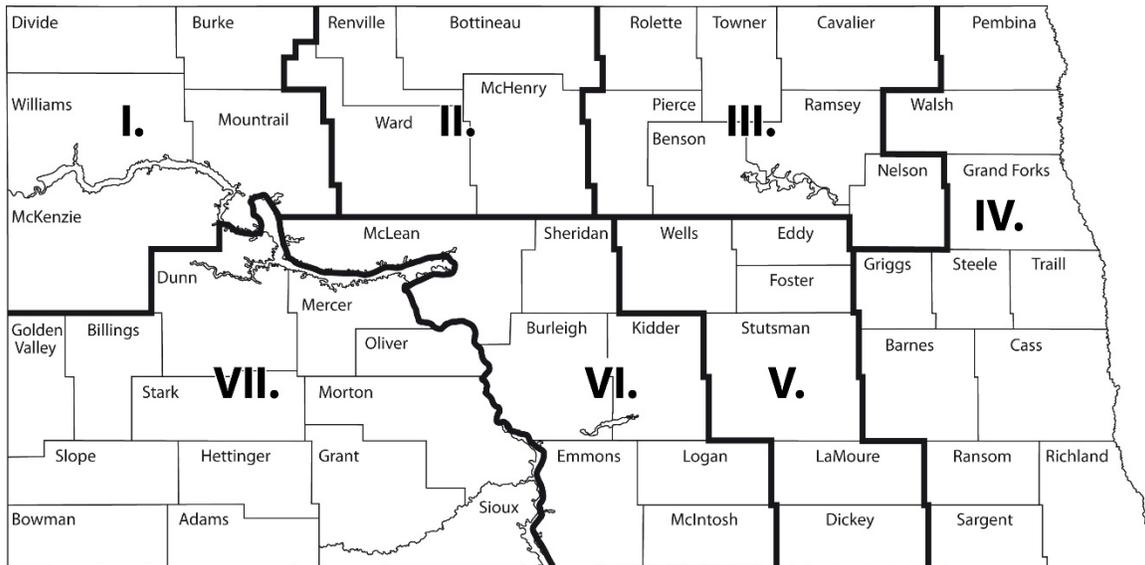
The mission of the North Dakota Water Resource Districts Association is to support and help water managers achieve wise and effective water resource management in North Dakota. This Handbook is a part of that mission.

Sincerely,


Dan Jacobson
President

HANDBOOK FOR WATER MANAGERS

The Handbook was first published by the North Dakota Water Resource Districts Association in 1989, and updated in 1995, 2002, 2003, 2004, 2010, 2017, and 2020. This is the updated version for 2021.



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IMPORTANT NOTICE

The material and information contained in this Handbook is to assist water managers in carrying out the duties, authorities, and responsibilities for the management of North Dakota's water resource.

This Handbook is not to be used as a substitute for your own attorney when legal questions arise. Nor are these materials to be construed as a legal interpretation of the law for specific problems that water managers may encounter. Each specific situation has different factual circumstances which must be considered. Therefore, please contact your Attorney for any legal issues you may encounter.

We hope that you will find the materials contained in this Handbook helpful.

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- ND Surface Water Sources
- ND River Basin Boundaries
- ND Groundwater Supplies
- ND Annual Rainfall

HISTORY OF WATER RESOURCE DISTRICTS

1. Creation of Water Resource Districts

The function of government in the area of water management is critically important. Local groups and local governments often rely on the state and federal government to provide assistance beyond the scope of their ability or jurisdiction. State and federal governmental agencies in turn rely on effective local governments for sponsorship or implementation of federal programs and projects.

In the area of water management, the need for a local unit of government to be responsible for water management and water development was recognized when enabling legislation for water conservation districts was first enacted in 1935 (S.L. 1935, Chapter 228). Initially, a water conservation district could be established only by order of the State Water Conservation Commission, upon receipt of a petition signed by any county, city, village, or township, or by 50 percent of the freeholders within the proposed district.

The initial water management laws were codified as N.D.C.C. § 61-16. This chapter remained virtually unchanged until 1957, when the Legislature enacted a comprehensive reform of water management statutes. The name for local water resource districts was changed from "water conservation district" to "Water Conservation and Flood Control District",

but the procedures for creation were similar. The State Water Conservation Commission continued to have the authority to create a district and establish the boundaries upon receipt of a proper petition.

In 1973, the Legislature again changed the name, this time to "water management district", and decided that all land in North Dakota should be in a "water management district".

In 1981, the Legislature again changed the name, this time to "water resource districts", and enacted another comprehensive reform of water management laws. In so doing, it expanded the powers and authorities, and made other changes designed to improve the effectiveness of water resource districts.

In addition to the initial enabling legislation for water resource districts in 1935, and the major revisions and expansion in 1957 and 1981, the Legislature has made a few changes to the statutes pertaining to water resource districts each legislative session.

2. Drain Boards

Enabling legislation for drain boards was first enacted in 1895 (R.C. 1895, s 1444), and was a part of North Dakota statutes from 1895 until 1981. Initially, drain boards were created by the county commission by appointing three freeholders to serve as a Board of Drain Commissioners. In

1981, the Legislature eliminated "legal" drain boards, as they were known, and transferred the powers and authorities of drain boards to water resource districts. The Legislature also changed the name of "legal" drains to "assessment drains".

3. Boundaries of Water Resource Districts

When water resource districts were first created in 1935, the Legislature gave the State Water Commission the authority to set boundaries. The Legislature specifically directed the State Water Commission not to consider county and township boundaries when creating districts. The 1935 version of N.D.C.C. § 61-16-05 provided:

61-16-05. Area to be Included Within District - How Determined.

In determining the area to be included within the district, the commission shall disregard township and county boundaries and shall consider only the drainage areas to be affected by the water development proposed and the probable future development thereof. Whenever practicable, such boundaries shall follow section lines.

At that time, the Legislature preferred watershed boundaries over political boundaries for water resource districts and gave the State Water Commission sole discretion to determine and establish the boundaries of water resource districts.

In 1957, N.D.C.C. § 61-16-05 was amended to provide as follows:

61-16-05. Area to be Included Within District - How Determined.

The area or areas to be included in a water conservation and flood control district shall embrace the territory described in the petition for the creation thereof. The commission shall, however, consider and may include within boundaries of the district, the watershed and drainage areas which will be benefited by the construction and maintenance of works therein for water conservation, flood control of drainage as the case may be.

So, beginning in 1957, boundaries for water resource districts were established as requested in the petition, yet the State Water Commission had the authority to include additional watershed and drainage areas benefited by the creation of the district.

In 1973, when the Legislature decided that all land in North Dakota must be within a water resource district, most water resource districts were created along county boundaries. In 1981, the North Dakota Legislature considered but did not adopt a proposal to reorganize water resource districts along watershed boundaries.

During the consideration of the watershed proposal in 1981, the North Dakota State Engineer offered the following reasons for supporting the watershed idea in the State Water Commission "Oxbow" publication. State Engineer Vern Fahy stated as follows:

As most of you know, I support the concept of water management on a watershed basis, as provided for in HB-1077. My support is based on three reasons:

1. First, within practical considerations, watershed management means that individual stream systems would be managed from their source to their mouth. By being accountable to all people in a stream system, all interests must be carefully balanced. This is the best way to ensure that proper water management decisions are made. For example, flood water retention by upstream residents and wise floodplain development by downstream residents must be balanced to achieve acceptable and workable decisions. The result of this watershed approach is the most effective and coordinated water management that is possible.

2. Second, the days when the federal government provided the initiative and funds for our water development and water management projects are over, at least for the present time. Although some scattered funds may still be available, if water management solutions are going to be implemented in North Dakota, the state and local governments must provide the leadership and initiative. This requires innovative and effective ideas and approaches to water management solutions.

3. The Nebraska example of water management on a watershed basis has proved to be extremely workable and effective. Prior to adoption of the watershed concept in 1972, Nebraska had many local water management, water use, and other water-related districts established along county lines. These were consolidated into 24 Natural Resource Districts, which were established primarily along watershed boundaries. After the initial organizational period, Nebraska's Natural Resource Districts have provided the initiative and leadership to resolve many localized water management problems throughout Nebraska. What was previously thought to be local control in Nebraska has truly become local control.

Notwithstanding the support of the State Engineer, the proposal was rejected by the legislature.

The evolution of water resource districts has resulted in a water resource district in every county in North Dakota. In a few counties, more than one water resource district exists.

Water resource districts have extensive duties, authorities, and responsibilities, and are facing increasing challenges.

Water resource districts are North Dakota's political subdivisions assigned to work towards coordinated and comprehensive management of the state's water resources at the local level.

4. Joint Water Resource Boards

Even though the Legislature did not adopt the proposal to reorganize water resource districts along watershed boundaries, it did authorize water resource districts to create joint water resource boards to address water management issues within hydrologic boundaries. Water resource districts in West River, Souris River, Devils Lake, Red River, and James River have all created joint water boards.

STATE POLICY TOWARDS WATER MANAGEMENT

The official state policy of North Dakota towards water management is expressed in three separate statutes:

61-01-26. Declaration of state water resources policy.

In view of legislative findings and determination of the ever-increasing demand and anticipated future need for water in North Dakota for every beneficial purpose and use, it is hereby declared to be the water resources policy of the state that:

1. The public health, safety, and general welfare, including without limitation, enhancement of opportunities for social and economic growth and expansion, of all of the people of the state,

depend in large measure upon the optimum protection, management, and wise utilization of all of the water and related land resources of the state.

2. Well-being of all of the people of the state shall be the overriding determinant in considering the best use, or combination of uses, of water and related land resources.
3. Storage of the maximum water supplies shall be provided wherever and whenever deemed feasible and practicable.
4. Accruing benefits from these resources can best be achieved for the people of the state through the development, execution, and periodic updating of comprehensive, coordinated, and well-balanced short-term and long-term plans and programs for the conservation and development of such resources by the departments and agencies of the state having responsibilities therefor. The plans and programs for the conservation and development of these resources may include implementation of a program to cost-share with local sponsors of water quality improvement projects.
5. Adequate implementation of such plans and programs shall be provided by the state through cost-sharing and cooperative participation with the appropriate federal and state departments and agencies and political subdivisions within the limitation of budgetary requirements and administrative capabilities, including consideration of cost-sharing for water quality improvement projects.
6. Required assurances of state cooperation and for meeting nonfederal repayment obligations of the state in connection with federal-assisted state projects shall be provided by the appropriate state department or agency.
7. Required assurances of local cooperation and for meeting nonfederal repayment obligations of local interests in connection with federal-assisted local projects may, at the request of political subdivisions or other local interests be provided

by the appropriate state department or agency, provided, if for any reason it is deemed necessary by any department or agency of the state to expend state funds in order to fulfill any obligation of a political subdivision or other local interests in connection with the construction, operation, or maintenance of any such project, the state shall have and may enforce a claim against the political subdivision or other local interests for such expenditures.

The provisions of this section may not be construed in any manner to limit, impair, or abrogate the rights, powers, duties, or functions of any department or agency of the state having jurisdiction or responsibilities in the field of water and related land resources conservation, development, or utilization.

N.D.C.C. § 61-16.1-01 establishes the legislative intent and purpose section for water resource districts.

61-16.1-01. Legislative intent and purpose.

The legislative assembly of North Dakota recognizes and declares that the general welfare and the protection of the lives, health, property, and the rights of all people of this state require that the management, conservation, protection, development, and control of waters in this state, navigable or non-navigable, surface or subsurface, the control of floods, the prevention of damage to property therefrom, involve and necessitate the exercise of the sovereign powers of this state and are affected with and concern a public purpose. To realize these objectives it is hereby declared to be the 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 this state and thereby to protect and promote the health, safety, and general welfare of the people of this state.

The legislative assembly further recognizes the significant achievements that have been made in the management, conservation, protection, development, and control of our water and related land resources, and declares that the most efficient and economical method of accelerating these achievements is to establish water

resource districts encompassing all of the geographic area of the state, and emphasizing hydrologic boundaries.

Finally, the Legislature has specifically assigned certain duties and responsibilities to water resource districts. These specific duties and responsibilities are contained in N.D.C.C. § 61-16.1-10.

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.

The mandatory duties and the extensive authorities vested with water resource districts reflect the importance of strong and effective water management at the local level.

Local Authority Over Water Rights

Whenever a person or entity wishes to appropriate and use any amount of water for municipal or industrial purposes, that person or entity must acquire a water permit. If a person or entity wishes to irrigate more than five acres of land, a water permit is also necessary. Finally, any person or entity desiring to appropriate water for domestic livestock, fish or wildlife, and recreation must receive a permit if the proposed diversion exceeds twelve and one-half acre-feet of water. A conditional water permit is required prior to constructing any works (well, dam, impoundment, etc.) for a project that will require a water permit.

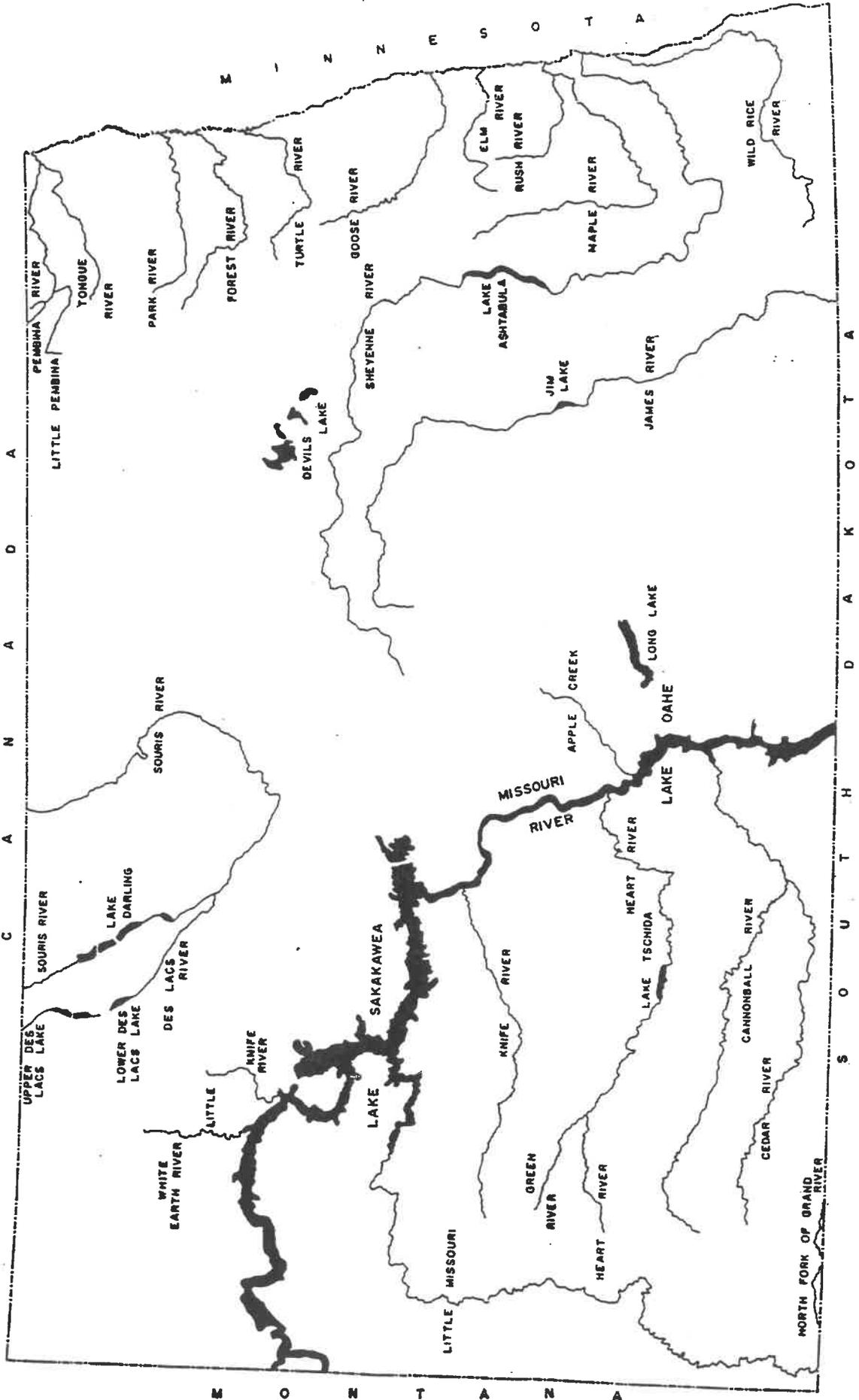
Water resource districts do not have authority or control over the appropriation of water. The Department of Water Resources has the exclusive authority over water permit applications for the appropriation of up to 5,000 acre-feet of water, while the State Water Commission has the final authority for requests in excess of 5,000 acre-feet of water.

The department may also authorize emergency or temporary authorization contained in 61-04-02.1

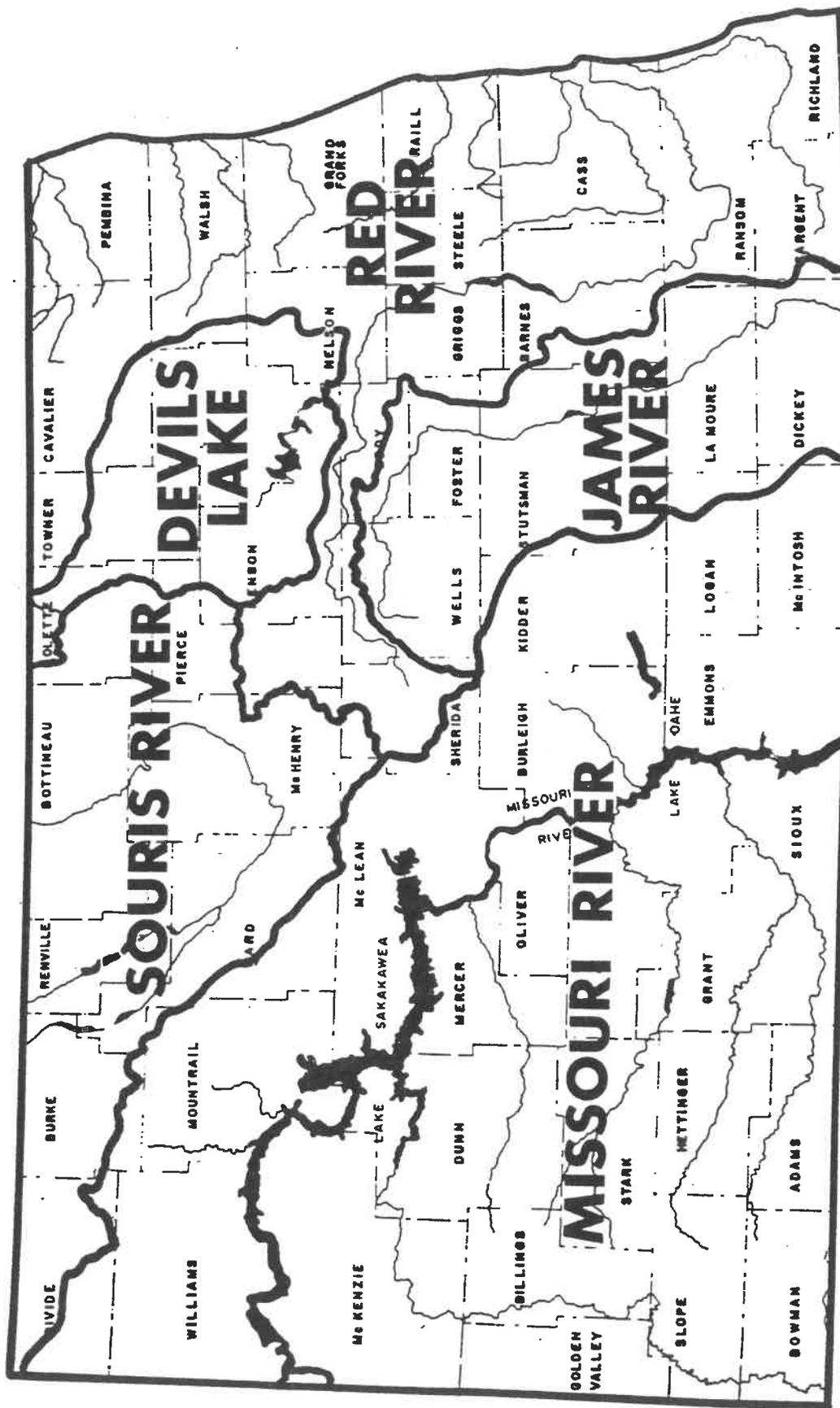
61-04-02.1. Emergency or temporary authorization.

The department of water resources may authorize emergency or temporary use of water for periods not to exceed twelve months if the department determines the use will not be to the detriment of existing rights. The department shall establish by rule a separate procedure for processing applications for emergency or temporary use. Prescriptive and other rights to the use of water may not be acquired by use of water as authorized in this section.

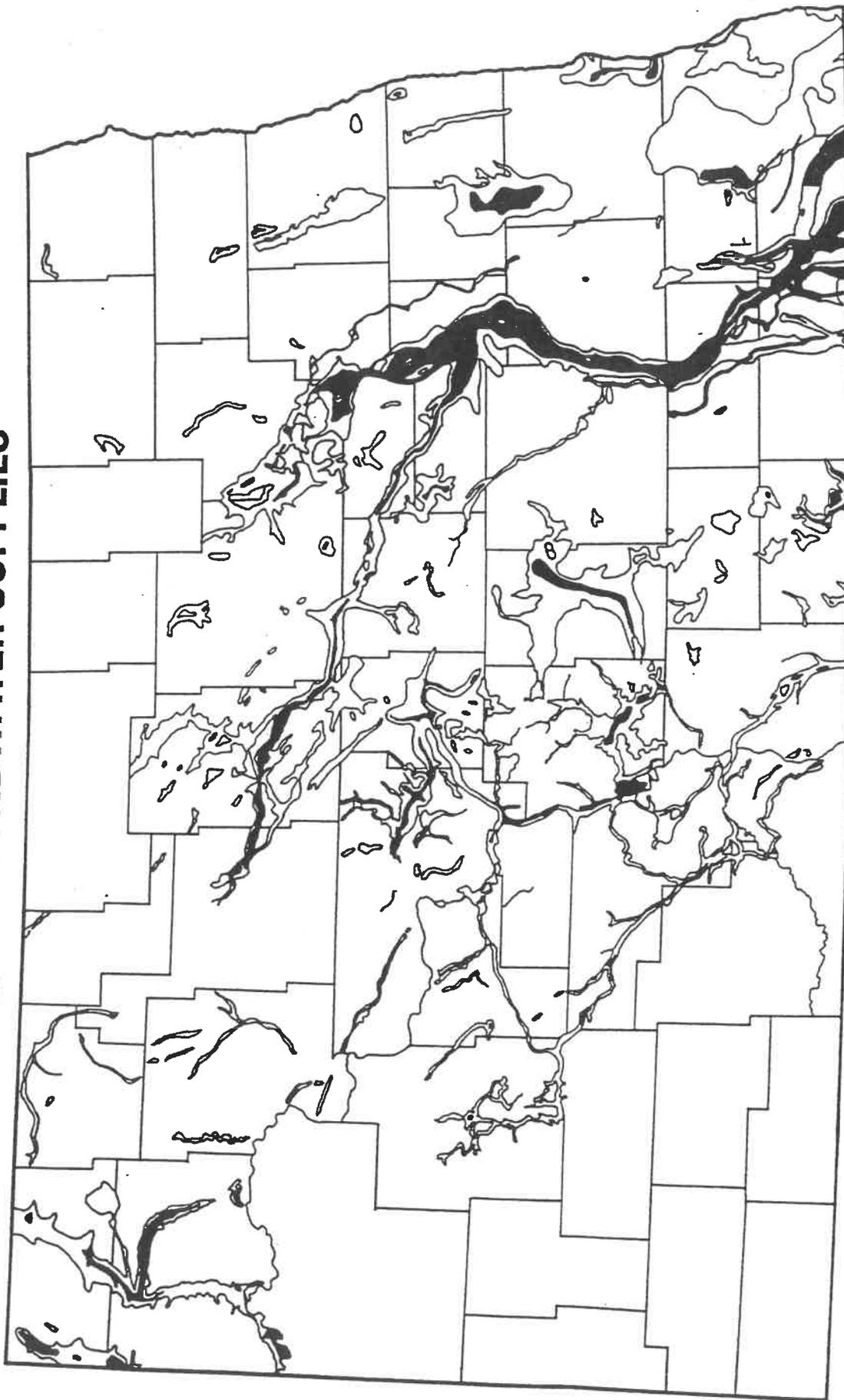
ND SURFACE WATER SOURCES



ND RIVER BASIN BOUNDARIES



ND GROUNDWATER SUPPLIES

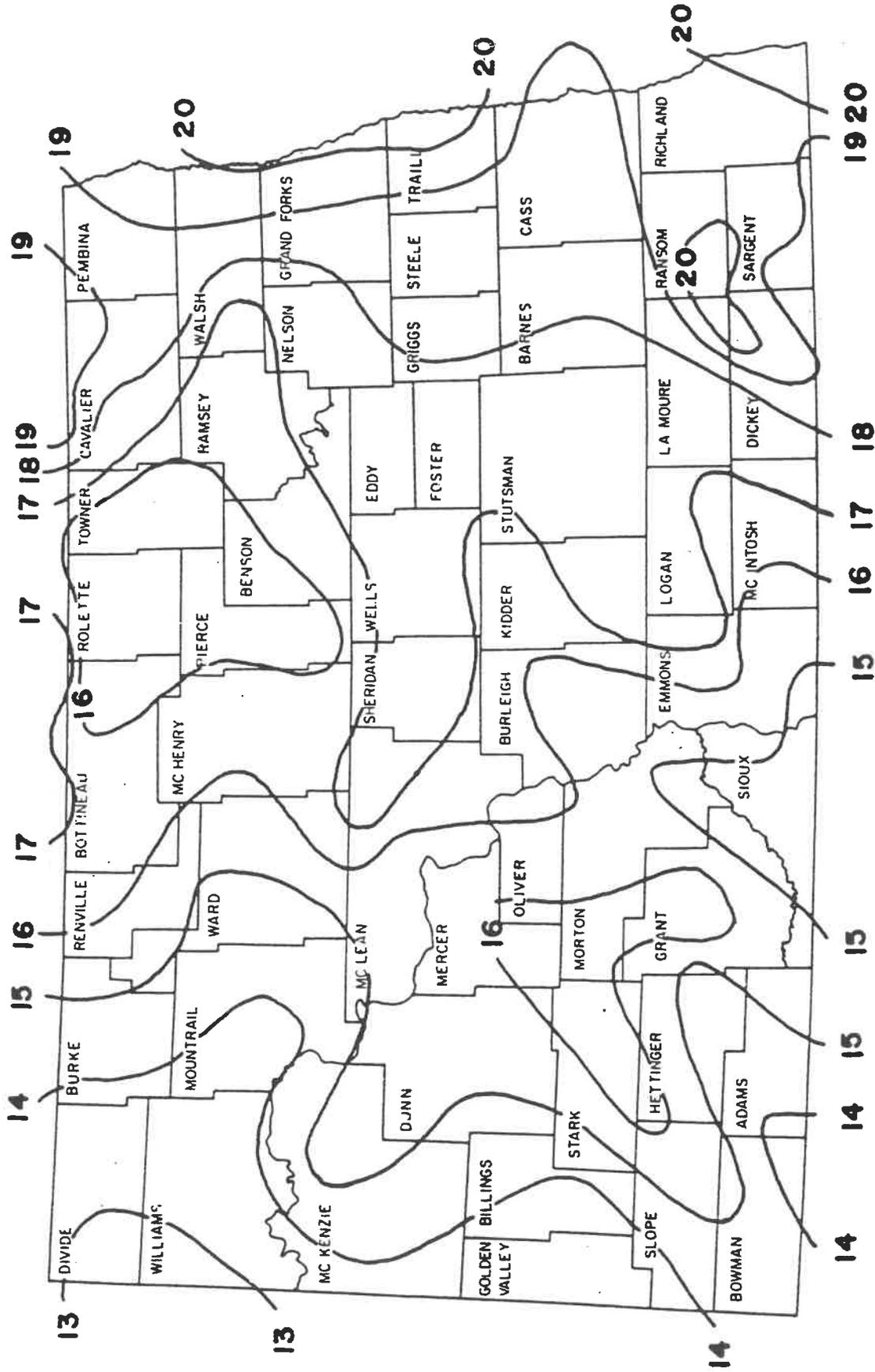


POTENTIAL YIELD IN GALLONS PER MINUTE

MORE THAN 500



ND ANNUAL RAINFALL



Annual Mean Precipitation in Inches.

CHAPTER 2 - POWERS AND DUTIES OF Water Resource Districts

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POWERS OF WATER RESOURCE DISTRICTS

1. Basic Authorities

The powers of water resource districts are set forth in Chapter 61-16.1 of the North Dakota Century Code (N.D.C.C.). N.D.C.C. § 61-16.1-09 sets both specific powers and authorities, while the rest of Chapter 61-16.1 supplements these basic powers and authorities. N.D.C.C. § 61-16.1-09 provides as follows:

61-16.1-09. Powers of water resource board.

Each water resource board shall have the power and authority to:

1. Sue and be sued in the name of the district.
2. Exercise the power of eminent domain as follows:
 - a. Except as permitted under subdivision b, the board shall comply with title 32 for the purpose of acquiring and securing by eminent domain any rights, titles, interests, estates, or easements necessary or proper to carry out the duties imposed by this chapter, and particularly to acquire the necessary rights in land for the construction of dams, flood control projects, and other water conservation, distribution, and supply works of any nature and to permit the flooding of lands, and to secure the right of access to such dams and other devices and the right of public access to any waters impounded thereby.
 - b. (1) If the interest sought to be acquired is an easement for a right of way for any project authorized in this chapter for which federal or state funds have been made available, the district may acquire the right of way by quick take eminent domain as authorized by section 16 of article I of the Constitution of North

Dakota, after the district attempts to purchase the easement for the right of way by:

a. Conducting informal negotiations for not less than sixty days.

b. If informal negotiations fail, the district shall engage in formal negotiations by:

(1) Sending the landowner an appraisal and written offer for just compensation, which includes a specific description of the exact location of the right of way, by certified mail or commercial delivery requiring a signed receipt, and receiving the signed receipt or documentation of constructive notice.

(2) Sending the landowner a written request for a meeting by certified mail or commercial delivery requiring a signed receipt if there is no agreement regarding compensation or no response to the written offer within fifteen days of receipt, and receiving the signed receipt or documentation of constructive notice.

(3) Sending the landowner a written notice, by certified mail or commercial delivery requiring a signed receipt, of intent to take possession of the right of way if there is no agreement regarding compensation or no response to the written request for a meeting within thirty days of receipt, and receiving the signed receipt or documentation of constructive notice.

(2) Any written communication to the landowner must include contact information for responding to the board and a description of the required negotiation timeline.

(3) A district may not include or utilize any reference to quick take eminent domain during negotiations to acquire the necessary easement for a right of way. If formal negotiation efforts fail, the district shall request approval from the board of county commissioners of the county in which the right

of way is located to take possession of the right of way by quick take eminent domain. After receiving the request, the county commissioners shall hold a public meeting and give the landowner thirty days' notice of the meeting to allow the landowner to attend. After receiving verification from the district that there has been no reference or threat of quick take eminent domain by the district during negotiations, the commissioners shall vote on whether to approve the taking of the easement for a right of way using quick take eminent domain. If the county commissioners approve the use of quick take eminent domain by a majority vote, the district may take immediate possession of the right of way, but not a blanket easement, if the district files an affidavit by the chairman of the water resource board which states the district has fulfilled the required negotiation steps and deposits the amount of the written offer with the clerk of the district court of the county in which the right of way is located.

(4) Within thirty days after notice has been given in writing to the landowner by the clerk of the district court that a deposit has been made for the taking of a right of way as authorized in this subsection, the owner of the property taken may appeal to the district court by serving a notice of appeal upon the acquiring agency, and the matter must be tried at the next regular or special term of court with a jury unless a jury be waived, in the manner prescribed for trials under chapter 32-15.

(5) If ownership of a right of way has not terminated, ownership of a right of way acquired under this subdivision terminates automatically when the district no longer needs the right of way for the purpose for which it was acquired.

3. Accept funds and property or other assistance, financial or otherwise, from federal, state, and

other public or private sources for the purposes of aiding the construction or maintenance of water conservation, distribution, and flood control projects; and cooperate and contract with the state or federal government, or any department or agency thereof, or any municipality within the district, in furnishing assurances and meeting local cooperation requirements of any project involving control, conservation, distribution, and use of water.

4. Procure the services of engineers and other technical experts, and employ an attorney or attorneys to assist, advise, and act for it in its proceedings.
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.
6. Maintain and control the water levels and the flow of water in the bodies of water and streams involved in water conservation and flood control projects within the district and regulate streams, channels, or watercourses and the flow of water therein by changing, widening, deepening, or straightening the same, or otherwise improving the use and capacity thereof.
7. Regulate and control water for the prevention of floods and flood damages by deepening, widening, straightening, or diking the channels or floodplains of any stream or watercourse within the district, and construct reservoirs or other structures to impound and regulate such waters.
8. Make rules and regulations concerning the management, control, regulation, and conservation of waters and prevent the pollution, contamination, or other misuse of the water resources, streams, or

bodies of water included within the district.

9. Do all things reasonably necessary and proper to preserve the benefits to be derived from the conservation, control, and regulation of the water resources of this state.
10. Construct, operate, and maintain recreational facilities, including beaches, swimming areas, boat docking and landing facilities, toilets, wells, picnic tables, trash receptacles, and parking areas, and to establish and enforce rules and regulations for the use thereof.
11. Have, in addition to any powers provided in this chapter, the authority to construct an assessment drain in accordance with the procedures and provisions of chapter 61-21.
12. Acquire by lease, purchase, gift, condemnation, or other lawful means and to hold in its corporate name for its use and control both real and personal property and easements and rights of way within or without the limits of the district for all purposes authorized by law or necessary to the exercise of any other stated power.
13. Convey, sell, dispose of, or lease personal and real property of the district as provided by this chapter.
14. Authorize and issue warrants to finance construction of water conservation and flood control projects, assess benefited property for part or all of the cost of such projects, and require appropriations and tax levies to maintain sinking funds for construction warrants on a cash basis at all times.
15. Borrow money within the limitations imposed by this chapter for projects herein authorized and pledge security for the repayment of such loans.
16. Order or initiate appropriate legal action to compel

the entity responsible for the maintenance and repair of any bridge or culvert to remove from under, within, and around such bridge or culvert all dirt, rocks, weeds, brush, shrubbery, other debris, and any artificial block which hinders or decreases the flow of water through such bridge or culvert.

17. Order or initiate appropriate legal action to compel the cessation of the destruction of native woodland bordering within two hundred feet [60.96 meters] of that portion of a riverbank subject to overflow flooding that will cause extensive property damage, or in the alternative, order, that, if such destruction is permitted, the party or parties responsible for the destruction must, when the board has determined that such destruction will cause excessive property damage from overflow flooding due to the erosion or blocking of the river channel, plant a shelterbelt which meets the specifications of the board. In the event the native woodland within such area has already been destroyed, the board may, in its discretion, order the planting of a shelterbelt which, in the judgment of the board, will curtail the erosion or blocking of such river channel where overflow flooding has caused extensive property damage. For purposes of this subsection, the words "riverbank" and "river channel" relate to rivers as defined in the United States geological survey base map of North Dakota, edition of 1963. The provisions of this subsection shall not be construed to limit, impair, or abrogate the rights, powers, duties, or functions of any federal, state, or local entity to construct and maintain any flood control, irrigation, recreational, or municipal or industrial water supply project.
18. Petition any zoning authority established pursuant to chapter 11-33, 11-35, or 40-47 or section 58-03-13 to assume jurisdiction over a floodplain for zoning purposes when such zoning is required to regulate and enforce the placement, erection, construction, reconstruction, repair, and use of

buildings and structures to protect and promote the health, safety, and general welfare of the public within a floodplain area. In the event such zoning authority fails to act or does not exist, the board may request the state water commission to assist it in a study to determine and delineate the floodplain area. Upon completion of such study, the board shall make suitable recommendations for the establishment of a floodplain zone to all zoning authorities and the governing bodies of all political subdivisions having jurisdiction within the floodplain area.

19. Plan, locate, relocate, construct, reconstruct, modify, extend, improve, operate, maintain, and repair sanitary and storm sewer systems, or combinations thereof, including sewage and water treatment plants, and regulate the quantity of sewage effluent discharged from municipal lagoons; and contract with the United States government, or any department or agency thereof, or any private or public corporation or limited liability company, the government of this state, or any department, agency, or political subdivision thereof, or any municipality or person with respect to any such systems.
20. Develop water supply systems, store and transport water, and provide, contract for, and furnish water service for domestic, municipal, and rural water purposes, irrigation, milling, manufacturing, mining, metallurgical, and any and all other beneficial uses, and fix the terms and rates therefor. Each district may acquire, construct, operate, and maintain dams, reservoirs, ground water storage areas, canals, conduits, pipelines, tunnels, and any and all works, facilities, improvements, and property necessary therefor.
21. Coordinate proposals for installation, modification, or construction of culverts and bridges in an effort to achieve appropriate sizing and maximum consistency of road openings. The department of transportation, railroads, counties,

and townships shall cooperate with the districts in this effort. Each district shall also consider the possibility of incorporating appropriate water control structures, where appropriate, as a part of such road openings.

22. Plug abandoned water wells and participate in cost-sharing arrangements with water well owners to plug water wells to protect aquifers from pollution or depletion, maintain pressure, and prevent damage to surrounding property.
23. Have, in addition to any powers provided in this chapter, the authority to conduct weather modification operations in accordance with the procedures and provisions of chapter 61-04.1.

2. Water Project Financing

A water resource district can finance its operations or local projects in one or more of the following ways:

1. General district-wide mill levy (not more than four mills for each individual water resource district, with two additional mills for joint boards)
2. Special Assessment
3. User Fees
4. Revenue Bonds or Improvement Warrants

Developing and financing water projects is more fully discussed in the project development section (Chapter 6) of this Handbook.

3. Regulatory Powers

Water resource districts have the statutory responsibility to review and approve or deny permits for the

following activities:

1. Dikes, dams, and other devices capable of retaining, impounding, diverting, or obstructing more than 50 acre-feet of water or 25 acre-feet of water for a medium-hazard or high-hazard dam. (See Dikes and Dams, Chapter 8)
2. Drains which drain a pond, slough, lake, or sheetwater, or any series thereof, with a watershed area of 80 acres or more. (See Drainage and Wetlands, Chapter 7, and also the North Dakota Wetlands Management Handbook)

4. Enforcement

Water resource districts also have statutory responsibility to enforce rules regarding illegal drainage, negligent obstructions to drains or watercourses, and illegal construction of dikes, dams, and other devices.

N.D.C.C. § 61-16.1-51 provides for enforcement action to remove certain obstructions to drains.

61-16.1-51. Removal of obstructions to drain - Notice and hearing - Appeal - Injunction - Definition.

1. If a water resource board determines that an obstruction to a drain has been caused by the negligent act or omission of a landowner or tenant, the board shall notify the landowner by registered mail at the landowner's post-office address of record. A copy of the notice must also be sent to the tenant, if any. The notice must specify the nature and extent of the obstruction, the opinion of the board as to its cause, and must state that if the obstruction is not removed within such period as the board determines, but not less than fifteen days, the board shall procure removal of the obstruction and assess the cost of the removal,

or the portion the board determines appropriate, against the property of the landowner responsible. The notice must also state that the affected landowner, within fifteen days of the date the notice is mailed, may demand, in writing, a hearing on the matter. Upon receipt of the demand, the board shall set a hearing date within fifteen days from the date the demand is received. In the event of an emergency, the board may immediately apply to the appropriate district court for an injunction prohibiting a landowner or tenant from maintaining an obstruction. Assessments levied under the provisions of this section must be collected in the same manner as other assessments authorized by this chapter. If, in the opinion of the board, more than one landowner or tenant has been responsible, the costs may be assessed on a pro rata basis in accordance with the proportionate responsibility of the landowners. A landowner aggrieved by action of the board under this section may appeal the decision of the board to the district court of the county in which the land is located in accordance with the procedure provided in section 28-34-01. A hearing as provided for in this section is not a prerequisite to an appeal. If a complaint is frivolous in the discretion of the board, the board may assess the costs of the frivolous complaint against the complainant. If the obstruction is located in a road ditch, the timing and method of removal must be approved by the appropriate road authority before the notice required by this section is given and appropriate construction site protection standards must be followed.

2. For the purposes of this section, "an obstruction to a drain" means a barrier to a watercourse, as defined by section 61-01-06, or an artificial drain, including if the watercourse or drain is located within a road ditch, which materially affects the free flow of waters in the watercourse or drain.
3. Following removal of an obstruction to a drain, either by a water resource board or by a party

complying with an order of a water resource board, the board may assess its costs against the property of the responsible landowner.

N.D.C.C. § 61-16.1-53 provides for enforcement action for unauthorized construction of a dike, dam, or other device for retaining, obstructing, or diverting water.

61-16.1-53. Removal of a noncomplying dike, dam or other device - Notice and hearing - Appeal - Injunction.

1. Upon receipt of a complaint of unauthorized construction of a dike, dam, or other device for water conservation, flood control, regulation, watershed improvement, or storage of water, the water resource board shall promptly investigate and make a determination thereon. If the board determines that a dike, dam, or other device, capable of retaining, obstructing, or diverting more than fifty acre-feet [61674.08 cubic meters] of water or twenty-five acre-feet [30837.04 cubic meters] of water for a medium-hazard or high-hazard dam, has been established or constructed by a landowner or tenant contrary to this title or any rules adopted by the board, the board shall notify the landowner by certified mail at the landowner's post-office address of record. A copy of the notice must also be sent to the tenant, if any. The notice must specify the nature and extent of the noncompliance and must state that if the dike, dam, or other device is not removed within the period the board determines, but not less than fifteen days, the board shall cause the removal of the dike, dam, or other device and assess the cost of the removal, or the portion the board determines, against the property of the landowner responsible. The notice must also state that the affected landowner, within fifteen days of the date the notice is mailed, may demand, in writing, a hearing upon the matter. Upon receipt of the demand, the board shall set a hearing date within fifteen days from the date the demand is received. In the event

of an emergency, the board may immediately apply to the appropriate district court for an injunction prohibiting the landowner or tenant from constructing or maintaining the dike, dam, or other device, or ordering the landowner to remove the dike, dam, or other device. Assessments levied under this section must be collected in the same manner as other assessments authorized by this chapter. If, in the opinion of the board, more than one landowner or tenant has been responsible, the costs may be assessed on a pro rata basis in proportion to the responsibility of the landowners. If a complaint is frivolous in the discretion of the board, the board may assess the costs of the frivolous complaint against the complainant.

2. Following removal of an unauthorized dike, dam, or other device, either by a water resource board or by a party complying with an order of a water resource board, the board may assess its costs against the property of the responsible landowner.

A person aggrieved by action of the board under this section may appeal the decision of the board to the district court of the county in which the land is located in accordance with the procedure provided in N.D.C.C. § 28-34-01. A hearing as provided for in this section is not prerequisite to an appeal.

N.D.C.C. § 61-32-07 provides for enforcement action for unauthorized drainage of wetlands.

61-32-07. Closing a noncomplying drain - Notice and hearing - Appeal - Injunction - Frivolous complaints.

1. Only a landowner experiencing flooding or adverse effects from an unauthorized drain constructed before January 1, 1975, may file a complaint with

the water resource board. Any person may file a complaint about an unauthorized drain constructed after January 1, 1975. Upon receipt of a complaint of unauthorized drainage, the water resource board shall promptly investigate and make a determination of the facts with respect to the complaint. If the board determines that a drain, lateral drain, or ditch has been opened or established by a landowner or tenant contrary to this title or any rules adopted by the board, the board shall notify the landowner by certified mail at the landowner's post-office address of record. A copy of the notice must also be sent to the tenant, if known. The notice must specify the nature and extent of the noncompliance and must state that if the drain, lateral drain, or ditch is not closed or filled within a reasonable time as the board determines, but not less than fifteen days, the board shall procure the closing or filling of the drain, lateral drain, or ditch and assess the cost of the closing or filling, or the portion the board determines, against the property of the landowner responsible. The notice must also state that the affected landowner, within fifteen days of the date the notice is mailed, may demand, in writing, a hearing on the matter. Upon receipt of the demand, the board shall set a hearing date within fifteen days from the date the demand is received. In the event of an emergency, the board may immediately apply to the appropriate district court for an injunction prohibiting the landowner or tenant from constructing or maintaining the drain, lateral drain, or ditch and ordering the closure of the illegal drain. Assessments levied under this section must be collected in the same manner as assessments authorized by chapter 61-16.1. If, in the opinion of the board, more than one landowner or tenant has been responsible, the costs may be assessed on a pro rata basis in proportion to the responsibility of the landowners. If a complaint is frivolous in the discretion of the board, the board may assess the costs of the frivolous complaint against the complainant.

2. Following the closing or filling of an unauthorized drain, either by a water resource board or by a party complying with an order of a water resource board, the board may assess its costs against the property of the responsible landowner.

DUTIES OF WATER RESOURCE DISTRICTS

N.D.C.C. § 61-16.1-10 sets forth some general and specific duties of water resource districts. Since this statute is a mandate from the Legislature to water resource districts, it is a part of the overall state policy concerning water management.

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.

In addition to the duties outlined in N.D.C.C. § 61-16.1-10, water resource boards have several specific duties relating to water management problems and issues:

1. Advertise for, and let bids for projects exceeding \$200,000, in accordance with N.D.C.C. § 48-01.2. (N.D.C.C. § 61-16.1-14)
2. Hold public hearings on proposed assessment projects. (N.D.C.C. § 61-16.1-18)
3. Inspect property which may be subject to assessment and determine the benefit the property will receive if the proposed assessment project is built. (N.D.C.C. § 61-16.1-21)

4. Provide a treasurer's report to the county commissioners in June and December of each year and as otherwise required by the county commissioners. A verified copy of the report must be submitted to the county auditor's office in which the district is located and shall be open to public inspection. (N.D.C.C. § 61-16.1-25)
5. Upon receipt of a petition of an affected landowner, hold a hearing to determine the benefit to each tract of land from a project which has been in existence for at least one year and where necessary reassess the benefits. At least thirty (30) days' notice needs to be given by newspaper publication and by ordinary mail to each landowner whose land is to be raised in the proposed assessment. The board need not make a reassessment more than once every ten (10) years. (N.D.C.C. § 61-16.1-26)
6. Encourage structural and nonstructural solutions to water management problems. (N.D.C.C. § 61-16.1-37)
7. Consider applications for construction or modifications of "dikes, dams, or other devices" capable of "retaining, obstructing, or diverting more than fifty acre-feet [61674.08 cubic meters] of water or twenty-five acre-feet [30837.04 cubic meters] of water for a medium-hazard or high-hazard dam" after the Department of Water Resources has made the initial review of the application. (N.D.C.C. § 61-16.1-38)
8. Investigate applications for drainage of a pond, slough, lake, or sheetwater, or any series thereof, which drains an area comprising eighty areas or more. (N.D.C.C. § 61-32-03)
9. Finance maintenance of a federal project through collection of a special assessment, not exceeding \$4 per acre against agriculture lands and \$2 per \$500 of taxable valuation against non-agricultural lands. (N.D.C.C. § 61-16.1-40.1)

10. Construct necessary bridges or culverts in connection with an assessment drain. (N.D.C.C. § 61-16.1-43)
11. Keep all assessment drains "open and in good repair". (N.D.C.C. § 61-16.1-47)
12. Investigate drainage obstructions, and where necessary, procure their removal. (N.D.C.C. § 61-16.1-51)
13. Investigate drainage complaints and, where appropriate, secure the closure of the drain. (N.D.C.C. § 61-32-07)
14. Investigate complaints concerning noncomplying "dikes, dams, and other devices" capable of "retaining, obstructing, or diverting more than fifty acre-feet [61674.08 cubic meters] of water or twenty-five acre-feet [30837.04 cubic meters] of water for a medium-hazard or high-hazard dam", and, where justified, procure the removal of same. (N.D.C.C. § 61-16.1-53)

These are some of the duties of water resource districts. This list should not be construed as complete list of such duties. Also, a general list of the duties of water resource districts does not take into account the different factual circumstances of each separate project or issue. The duties outlined above include most of the primary tasks of water resource districts but contact your attorney if you have questions concerning these duties, or application of these duties to specific situations.

CHAPTER 3 - DISTRICT OPERATIONS

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OPEN MEETINGS AND RECORDS

The North Dakota Constitution, and laws passed by the North Dakota Legislature, require that all records and meetings of public bodies be accessible and open to the public. Thus, water resource districts are required to conduct open meetings, and maintain accurate records of their minutes, accounts, and other affairs, and make them available for public inspection during reasonable business hours.

1. Open Records and Meetings Laws

The open records and meetings laws were substantially revised in 1997. The revisions were primarily intended to codify the large body of case law and attorney general's opinions interpreting these laws, to make the laws easier to understand and follow, and to create an effective enforcement mechanism for violations of these laws. The purpose of the open records and meetings laws is to provide the public with the means to see how government business is conducted and how public funds are spent. Grand Forks Herald, Inc. v. Lyons, 101 N.W.2d 543, 5456 (N.D. 1960). Thus, the definitions of both "record" and "meeting" require a connection to "public business", which is defined as any matters that may relate to the public entity's performance of governmental functions or use of public funds. (N.D.C.C. § 44-04-17.1(12))

2. What is a "Public Entity"?

Open records and meetings laws apply to any organization, governmental or private, which performs a governmental function or uses public funds. The definition of "public entity" in N.D.C.C. § 44-04-17.1(13) covers entities that are created or recognized by the state or a political subdivision, either through legislative action (state constitution, state statute, resolution, ordinance, etc.) or executive order (of the governor or chief executive authority of the political subdivision), to perform a governmental function. Also specifically included under "public entity" are organizations that expend public funds and organizations that are "supported in whole or in part by public funds". In addition, the definition of "record" includes records held by an organization in its capacity as agent of a public entity. (N.D.C.C. § 44-04-17.1(16)) Finally, the definition of "meeting" includes a gathering of an organization that is acting pursuant to authority delegated to the organization by the "governing body" of a public entity. (N.D.C.C. § 44-04-17.1(6), (9))

3. Meetings

The meaning of the term "meeting" continues to be difficult to describe under the open records and meetings law. There are two parts to the definition of "meeting" in

N.D.C.C. § 44-04-17.1(9) (a). A "meeting" means a formal or informal gathering or a work session, whether in person or through electronic means such as telephone or videoconference, of: (1) a quorum of the members of the governing body of a public entity regarding public business; or (2) less than a quorum of the members of the governing body of a public entity regarding public business, if the members attending one or more of such smaller gatherings collectively constitute a quorum and if the members hold the gathering for the purpose of avoiding the requirements of N.D.C.C. § 44-04-19. A "meeting" does not include: (1) a chance or social gathering at which public business is not considered; (2) emergency operations during a disaster or emergency declared under N.D.C.C. § 37-17.1-10 or an equivalent ordinance if a quorum of the members of the governing body are present but are not discussing public business as the full governing body or as a task force or working group; (3) the attendance of members of a governing body at meetings of any national, regional, or state association to which the public entity, the governing body, or individual members belong; and (4) training seminars where no other public business is considered or discussed.

A key step in determining whether a gathering is a "meeting" is identifying the governing body of a public

entity. "Governing body" means "the multimember body responsible for making a collective decision on behalf of a "public entity". (N.D.C.C. § 44-04-17.1(6)) The public's right to know how government decisions are made and how public funds are spent requires access to meetings of any group that is authorized to perform some role in a public entity's decision-making process. The definition of "governing body" preserves the public's right to view the process leading up to government decision-making but does not extend the open meetings law to conversations between public officials or employees that are not part of that process.

If the open meetings law applied only to the chief decision-making body of a public entity, the body could avoid compliance with the open meetings law simply by delegating authority to a committee or other group, which would effectively render the open meetings law meaningless. Therefore, the open meetings law further defines "governing body" to include "any group of persons, regardless of membership, acting collectively pursuant to authority delegated to that group by the governing body". This definition follows the delegation of authority from one governing body to another.

4. Notices of Meetings, Votes, and Closed Meetings

Meetings that are subject to the open meetings law must

be preceded by public notice and accompanied by minutes as described in N.D.C.C. §§ 44-04-20 and 44-04-21(2). Recorded roll-call votes are required for all non-procedural matters and upon the request of any member for procedural matters. (N.D.C.C. § 44-04-21(1) All votes, whether procedural or not, must be "open, public votes". The minutes of each meeting must reflect every vote taken and must show the vote of each member on each roll call vote. In addition, certain procedures must be followed when a public entity holds a closed meeting. A public record is made of the public entity's reason and legal authority for closing the meeting. (N.D.C.C. § 44-04-19.2) The portion of a meeting that is closed to the public must be recorded so either the courts or the Office of Attorney General can determine if the meeting was properly closed.

5. Records

The open records law is more straightforward. The definition of "record" means recorded information in any form which is in the possession or custody of a public entity or its agent and pertains to public business. (N.D.C.C. § 44-04-17.1(16)) By referring to each item of "recorded information", this definition does not allow a public entity to close an entire document because an exception to the open records law applies to some of the recorded information in

the document. A governing body is required to excise the non-public material and disclose the rest. (N.D.C.C. § 44-04-18.10) If a request for records is not granted, the public entity must explain the legal authority for denying request. The fee that may be charged for copies is limited to the entity's actual cost of making the copies.

6. Enforcement

A civil action can be brought against a public entity for violation of the open records law. The public entity can cure any violation before a lawsuit is brought, as long as no one is harmed by the delay. The public entity must be given notice at least three working days before the entity is sued for damages, attorney's fees, or both.

In addition to a civil action, any person can have an alleged violation reviewed by the Office of Attorney General. (N.D.C.C. § 44-04-21.1) If a review is requested within thirty days of the alleged violation, the attorney general must issue an opinion to the public entity indicating whether the law has been violated. This process is designed to resolve disputed questions of law; disputed facts are resolved in favor of the public entity. If a violation has occurred, the public entity will have seven days from the date the opinion is issued to comply with the opinion and take corrective action. If the public entity fails to comply with the opinion,

and the person requesting the opinion prevails in a court action based on the violation, the public entity is required to pay the person's attorney fees and costs for both the trial and any appeal.

7. Summary and Exceptions

The open records and meetings laws continue to establish a general presumption of openness for entities performing governmental functions or using public funds. Exceptions to the open records and meetings laws are plentiful and can be found in N.D.C.C 44-04.

8. Water Resource District Meetings

Each water resource district is encouraged to set a regular schedule for its meetings. If it does so, it must file the schedule of regular meetings for the forthcoming year with the county auditor. The schedule must be filed annually. The regular schedule of meetings must also be furnished to individuals upon request. If a water resource district does not schedule regular meetings, it is not required to file any schedule with the county auditor. Special meetings may be called by the secretary at the order of the chairman or upon written request by two members of the water resource board. Notice of special meetings must be sent to all water resource board members at least five days prior to the meeting, except that special meetings may be held without

prior notice if all board members give written consent or are present at the meeting.

9. Notice of Meetings

In addition to the schedule of regular meetings which must be filed with the county auditor annually, a written notice of each meeting must be posted at the place the meeting is held and at the principal office of the water resource district. Notices of meetings must be posted no later than the date the members of the board are notified of the meeting and must be available to anyone upon request. Notices do not have to be published. If a representative of the news media requests notice of special and emergency meetings of the water resource district, such representative must be notified of special and emergency meetings of the board. Meeting notices must contain the date, time, and location of the meeting, and where practicable, the topics to be considered. However, the lack of an agenda in the notice, or a departure or an addition to the agenda at a meeting will not affect the validity of the meeting or the actions taken at the meeting.

10. Applicable North Dakota Law Governing Open Records

Some of the most pertinent statutes governing North Dakota's open meetings and open records requirements are as follows:

Article XI, Section 5. (ND Constitution) Unless otherwise provided by law, all meetings of public or governmental bodies, boards, bureaus, commissions, or agencies of the state or any political subdivision of the state, or organizations or agencies supported in whole or in part by public funds, or expending public funds, shall be open to the public.

Article XI, Section 6. (ND Constitution) Unless otherwise provided by law, all records of public or governmental bodies, boards, bureaus, commissions, or agencies of the state or any political subdivision of the state, or organizations or agencies supported in whole or in part by public funds, or expending public funds, shall be public records, open and accessible for inspection during reasonable office hours.

61-16-09. Oath of office - Organization of water resource board - Appointment of employees - Meetings.

Upon receiving notice of appointment as member of the water resource board, such appointee shall take the oath of office prescribed for civil officers. Such oath shall be filed with the secretary of the board. Notice of the appointment of a member or members of a water resource board shall be mailed to the state water commission. Such notice shall state the name and post-office address of each appointee and the date of appointment.

A majority of the managers shall constitute a quorum for the transaction of such business as may come before the board but any number may adjourn a meeting for want of a quorum. The water resource board shall appoint a secretary and treasurer and such other employees as needed for the efficient conduct of the district's business and shall fix their compensation. The offices of secretary and treasurer may be held by the same person. Officers and employees shall hold office at the pleasure of the board.

The board shall provide an office suitable for its use as a meeting place and for conducting the affairs of the district. It shall adopt such rules for transacting the business of the district as it may deem necessary, including the time and place of holding regular meetings of the board. Special meetings may be called by the secretary on order of the chairman of the board or upon written request of two members of the board. Notice of

a special meeting shall be mailed to each member of the board at least five days before any such meeting provided, that a special meeting may be held whenever all members of the board are present or consent thereto in writing.

61-16.1-04. Minutes, books, and records.

The water resource board shall keep accurate minutes of its meetings and accurate records and books of account, clearly setting out and reflecting the entire operation, management, and business of the district. These books and records shall be kept at the principal office of the district or at such other regularly maintained office or offices of the district as shall be designated by the board, with due regard to the convenience of the district, its customers, and residents. The books and records shall be open to public inspection during reasonable business hours.

44-04-17.1. Definitions.

As used in this section through section 44-04-21.2:

1. "Closed meeting" means all or part of an exempt meeting that a public entity in its discretion has not opened to the public, although any person necessary to carry out or further the purposes of a closed meeting may be admitted.
2. "Closed record" means all or part of an exempt record that a public entity in its discretion has not opened to the public.
3. "Confidential meeting" or "confidential record" means all or part of a record or meeting that is either expressly declared confidential or is prohibited from being open to the public.
4. "Executive session" means all or part of a meeting that is closed or confidential.
5. "Exempt meeting" or "exempt record" means all or part of a record or meeting that is neither required by law to be open to the public, nor is confidential, but may be open in the discretion of the public entity.
6. "Governing body" means the multimember body

responsible for making a collective decision on behalf of a public entity. "Governing body" also includes any group of persons, regardless of membership, acting collectively pursuant to authority delegated to that group by the governing body.

7. "Law" includes federal statutes, applicable federal regulations, and state statutes.
8. a. "Meeting" means a formal or informal gathering or a work session, whether in person or through electronic means such as telephone or videoconference, of:
 - (1) A quorum of the members of the governing body of a public entity regarding public business; or
 - (2) Less than a quorum of the members of the governing body of a public entity regarding public business, if the members attending one or more of such smaller gatherings collectively constitute a quorum and if the members hold the gathering for the purpose of avoiding the requirements of section 44-04-19.
- b. "Meeting" does not include:
 - (1) A chance or social gathering at which public business is not considered;
 - (2) Emergency operations during a disaster or emergency declared under section 37-17.1-10 or an equivalent ordinance if a quorum of the members of the governing body are present but are not discussing public business as the full governing body or as a task force or working group;
 - (3) The attendance of members of a governing body at meetings of any national, regional, or state association to which the public entity, the governing body, or individual members belong; and
 - (4) Training seminars where no other public business is considered or discussed.
- c. Notwithstanding subdivisions a and b, as applied to the legislative assembly, "meeting" means any gathering subject to section 14 of article IV of the Constitution of North Dakota.

9. "Organization or agency supported in whole or in part by public funds" means an organization or agency in any form which has received public funds exceeding the fair market value of any goods or services given in exchange for the public funds, whether through grants, membership dues, fees, or any other payment. An exchange must be conclusively presumed to be for fair market value, and does not constitute support by public funds, when an organization or agency receives a benefit under any authorized economic development program.
10. "Political subdivision" includes any county or city, regardless of the adoption of any home rule charter, and any airport authority, township, school district, park district, rural fire protection district, water resource district, solid waste management authority, rural ambulance service district, irrigation district, hospital district, soil conservation district, recreation service district, railroad authority, or district health unit.
11. "Public business" means all matters that relate or may foreseeably relate in any way to:
 - a. The performance of the public entity's governmental functions, including any matter over which the public entity has supervision, control, jurisdiction, or advisory power; or
 - b. The public entity's use of public funds.
12. "Public entity" means all:
 - a. Public or governmental bodies, boards, bureaus, commissions, or agencies of the state, including any entity created or recognized by the Constitution of North Dakota, state statute, or executive order of the governor or any task force or working group created by the individual in charge of a state agency or institution, to exercise public authority or perform a governmental function;
 - b. Public or governmental bodies, boards, bureaus, commissions, or agencies of any political subdivision of the state and any entity created or recognized by the

Constitution of North Dakota, state statute, executive order of the governor, resolution, ordinance, rule, bylaw, or executive order of the chief executive authority of a political subdivision of the state to exercise public authority or perform a governmental function; and

- c. Organizations or agencies supported in whole or in part by public funds, or expending public funds.
13. "Public funds" means cash and other assets with more than minimal value received from the state or any political subdivision of the state.
 14. "Quorum" means one-half or more of the members of the governing body, or any smaller number if sufficient for a governing body to transact business on behalf of the public entity.
 15. "Record" means recorded information of any kind, regardless of the physical form or characteristic by which the information is stored, recorded, or reproduced, which is in the possession or custody of a public entity or its agent and which has been received or prepared for use in connection with public business or contains information relating to public business. "Record" does not include unrecorded thought processes or mental impressions, but does include preliminary drafts and working papers. "Record" also does not include records in the possession of a court of this state.
 16. "Task force or working group" means a group of individuals who have been formally appointed and delegated to meet as a group to assist, advise, or act on behalf of the individual in charge of a state agency or institution when a majority of the members of the group are not employees of the agency or institution.

44-04-18. Access to public records - Electronically stored information.

1. Except as otherwise specifically provided by law, all records of a public entity are public records, open and accessible for inspection during

reasonable office hours. As used in this subsection, "reasonable office hours" includes all regular office hours of a public entity. If a public entity does not have regular office hours, the name and telephone number of a contact person authorized to provide access to the public entity's records must be posted on the door of the office of the public entity, if any. Otherwise, the information regarding the contact person must be filed with the secretary of state for state-level entities, for public entities defined in subdivision c of subsection 13 of section 44-04-17.1, the city auditor or designee of the city for city-level entities, or the county auditor or designee of the county for other entities.

2. Upon request for a copy of specific public records, any entity subject to subsection 1 shall furnish the requester one copy of the public records requested. An initial request need not be made in person or in writing, and the copy must be mailed upon request. A public entity may require written clarification of the request to determine what records are being requested, but may not ask for the motive or reason for requesting the records or for the identity of the person requesting public records. A public entity may charge up to twenty-five cents per impression of a paper copy. As used in this section, "paper copy" means a one-sided or two-sided duplicated copy of a size not more than eight and one-half by fourteen inches [19.05 by 35.56 centimeters]. For any copy of a record that is not a paper copy as defined in this section, the public entity may charge a reasonable fee for making the copy. As used in this section, "reasonable fee" means the actual cost to the public entity of making the copy, including labor, materials, and equipment. The entity may charge for the actual cost of postage to mail a copy of a record. An entity may require payment before locating, redacting, making, or mailing the copy. The public entity may withhold records pursuant to a request until such time as a requester provides payment for any outstanding balance for prior requests. An entity may impose a fee not exceeding twenty-five dollars per hour per request, excluding the initial hour, for locating records, including

electronic records, if locating the records requires more than one hour. An entity may impose a fee not exceeding twenty-five dollars per hour per request, excluding the initial hour, for excising confidential or closed material under section 44-04-18.10 from the records, including electronic records. If a public entity receives five or more requests from the same requester within seven days, the public entity may treat the requests as one request in computing the time it takes to locate and excise the records. If the entity is not authorized to use the fees to cover the cost of providing or mailing the copy, or both, or if a copy machine is not readily available, the entity may make arrangements for the copy to be provided or mailed, or both, by another entity, public or private, and the requester shall pay the fee to that other entity. This subsection does not apply to copies of public records for which a different fee is specifically provided by law.

3. Automation of public records must not erode the right of access to those records. As each public entity increases its use of and dependence on electronic recordkeeping, each agency must provide reasonable public access to records electronically maintained and must ensure that exempt or confidential records are not disclosed except as otherwise permitted by law. A public entity may not enter into a contract for the creation or maintenance of a public records database if that contract impairs the ability of the public to inspect or copy the public records of the agency, including public records online or stored in an electronic recordkeeping system used by the agency. An electronic copy of a record must be provided upon request at no cost, other than costs allowed in subsection 2, except if the nature or volume of the public records requested to be accessed or provided requires extensive use of information technology resources, the agency may charge no more than the actual cost incurred for the extensive use of information technology resources incurred by the public entity. "Extensive" is defined as a request for copies of electronic records which take more than one hour of information technology resources to produce.

4. Except as provided in this subsection, nothing in this section requires a public entity to create or compile a record that does not exist. Access to an electronically stored record under this section, or a copy thereof, must be provided at the requester's option in either a printed document or through any other available medium. A computer file is not an available medium if no means exist to separate or prevent the disclosure of any closed or confidential information contained in that file. Except as reasonably necessary to reveal the organization of data contained in an electronically stored record, a public entity is not required to provide an electronically stored record in a different structure, format, or organization. This section does not require a public entity to provide a requester with access to a computer terminal or mobile device. A public entity is not required to provide a copy of a record that is available to the requester on the public entity's website or on the internet. The public entity shall notify the requester the record is available online and direct the requester to the website where the record can be accessed. If the requester does not have reasonable access to the internet due to lack of computer, lack of internet availability, or inability to use a computer or the internet, the public entity shall produce paper copies for the requester, but may charge the applicable fees under this section.

5. A state-level public entity as defined in subdivision a of subsection 13 of section 44-04-17.1 or a political subdivision as defined in subsection 11 of section 44-04-17.1, may establish procedures for providing access from an outside location to any computer database or electronically filed or stored information maintained by that entity. The procedures must address the measures that are necessary to maintain the confidentiality of information protected by federal or state law. Except for access provided to another state-level public entity or political subdivision, the state or political subdivision may charge a reasonable fee for providing that outside access. If the original information is keyed, entered, provided,

compiled, or submitted by any political subdivision, the fees must be shared by the state and the political subdivision based on their proportional costs to make the data available.

6. Any request under this section for records in the possession of a public entity by a party to a criminal or civil action, adjudicative proceeding as defined in subsection 1 of section 28-32-01, or arbitration in which the public entity is a party, or by an agent of the party, must comply with applicable discovery rules or orders and be made to the attorney representing that entity in the criminal or civil action, adjudicative proceeding, or arbitration. The public entity may deny a request from a party or an agent of a party under this subsection if the request seeks records that are privileged under applicable discovery rules.
7. A denial of a request for records made under this section must describe the legal authority for the denial, or a statement that a record does not exist, and must be in writing if requested.
8. This section is violated when a person's right to review or receive a copy of a record that is not exempt or confidential is denied or unreasonably delayed or when a fee is charged in excess of the amount authorized in subsections 2 and 3.
9. It is not an unreasonable delay or a denial of access under this section to withhold from the public a record that is prepared at the express direction of, and for presentation to, a governing body until the record is mailed or otherwise provided to a member of the body or until the next meeting of the body, whichever occurs first. It also is not an unreasonable delay or a denial of access to withhold from the public a working paper or preliminary draft until a final draft is completed, the record is distributed to a member of a governing body or discussed by the body at an open meeting, or work is discontinued on the draft but no final version has been prepared, whichever occurs first.
10. For public entities headed by a single individual,

it is not an unreasonable delay or a denial of access to withhold from the public a working paper or preliminary draft until a final draft is completed, or work is discontinued on the draft but no final version has been prepared, whichever occurs first. A working paper or preliminary draft shall be deemed completed if it can reasonably be concluded, upon a good-faith review, that all substantive work on it has been completed.

11. A disclosure of a requested record under this section is not a waiver of any copyright held by the public entity in the requested record or of any applicable evidentiary privilege.

44-04-18.10. Disclosure of public records.

1. A public entity may not deny a request for an open record on the ground that the record also contains confidential or closed information.
2. Subject to subsection 3 of section 44-04-18, if confidential or closed information is contained in an open record, a public entity shall permit inspection and receipt of copies of the information contained in the record that is not confidential or closed, but shall delete, excise, or otherwise withhold the confidential or closed information.
3. An officer or employee of a public entity may disclose or comment on the substance of an open record. Any agreement prohibiting the disclosure or comment is void and against public policy.
4. Unless otherwise prohibited by federal law, records of a public entity which are otherwise closed or confidential may be disclosed to any public entity or federal agency for the purpose of law enforcement or collection of debts owed to a public entity, provided that the records are not used for other purposes and the closed or confidential nature of the records is otherwise maintained. For the purpose of this subsection, "public entity" is limited to those entities defined in subdivision a or b of subsection 13 of section 44-04-17.1.
5. Confidential records that are authorized by law to

be disclosed to another entity continue to be confidential in the possession of the receiving entity, except as otherwise provided by law.

6. Records confidential or exempt under subsection 7 of section 44-04-18.4 and which are required to be disclosed to another entity for emergency or disaster prevention, protection, mitigation, response, and recovery or for cybersecurity planning, mitigation, or threat remain confidential or exempt after the required disclosure.

44-04-19. Access to public meetings.

Except as otherwise specifically provided by law, all meetings of a public entity must be open to the public. That portion of a meeting of the governing body of a public entity as defined in subdivision c of subsection 13 of section 44-04-17.1 which does not regard public business is not required to be open under this section.

1. This section is violated when any person is denied access to a meeting under this section, unless such refusal, implicitly or explicitly communicated, is due to a lack of physical space in the meeting room for the person or persons seeking access.
2. For purposes of this section, the meeting room must be accessible to, and the size of the room must accommodate, the number of persons reasonably expected to attend the meeting.
3. The right of a person to attend a meeting under this section includes the right to photograph, to record on audiotape or videotape and to broadcast live on radio or television the portion of the meeting that is not held in executive session, provided that there is no active interference with the conduct of the meeting. The exercise of this right may not be dependent upon the prior approval of the governing body. However, the governing body may impose reasonable limitations on recording activity to minimize the possibility of disruption of the meeting.
4. For meetings subject to this section when one or more of the members of the governing body is participating by telephone or video, a speakerphone

or monitor must be provided at the location specified in the notice issued under section 44-04-20.

44-04-19.1. Open records and open meetings - Exemptions for attorney work product, attorney consultation, and negotiation preparation.

1. Attorney work product is exempt from section 44-04-18. Attorney work product and copies thereof shall not be open to public inspection, examination, or copying unless specifically made public by the public entity receiving such work product.
2. Attorney consultation is exempt from section 44-04-19. That portion of a meeting of a governing body during which an attorney consultation occurs may be closed by the governing body under section 44-04-19.2.
3. Active investigatory work product is exempt from section 44-04-18.
4. "Adversarial administrative proceedings" include only those administrative proceedings in which the administrative agency or institution of higher education acts as a complainant, respondent, or decisionmaker in an adverse administrative proceeding. This term does not refer to those instances in which the administrative agency or institution acts in its own rulemaking capacity.
5. "Attorney consultation" means any discussion between a governing body and its attorney in instances in which the governing body seeks or receives the attorney's advice regarding and in anticipation of reasonably predictable or pending civil or criminal litigation or adversarial administrative proceedings or to receive its attorney's advice and guidance on the legal risks, strengths, and weaknesses of an action of a public entity which, if held in public, would have an adverse fiscal effect on the entity. All other discussions beyond the attorney's advice and guidance must be made in the open, unless otherwise provided by law. Mere presence or participation of

an attorney at a meeting is not sufficient to constitute attorney consultation.

6. "Attorney work product" means any document or record that:
 - a. Was prepared by an attorney representing a public entity or prepared at such an attorney's express direction;
 - b. Reflects a mental impression, conclusion, litigation strategy, or legal theory of that attorney or the entity; and
 - c. Was prepared exclusively for civil or criminal litigation, for adversarial administrative proceedings, in anticipation of reasonably predictable civil or criminal litigation or adversarial administrative proceedings, or for guidance on the legal risks, strengths, and weaknesses of an action of a public entity.

7. "Investigatory work product" means records obtained, compiled, or prepared by a public entity in an effort to monitor and enforce compliance with the law or an order. Investigatory work product must be considered active as long as it is related to monitoring and enforcement activity conducted with a reasonable good-faith belief that it will lead to enforcement of the law or an order the public entity is charged by statute or other law with monitoring and enforcing.

8. Following the final completion of the civil or criminal litigation or the adversarial administrative proceeding, including the exhaustion of all appellate remedies, attorney work product must be made available for public disclosure by the public entity, unless another exception to section 44-04-18 applies or if disclosure would have an adverse fiscal effect on the conduct or settlement of other pending or reasonably predictable civil or criminal litigation or adversarial administrative proceedings, or the attorney work product reflects mental impressions, opinions, conclusions, or legal theories regarding potential liability of a public entity.

9. A governing body may hold an executive session

under section 44-04-19.2 to discuss negotiating strategy or provide negotiating instructions to its attorney or other negotiator regarding a pending claim, litigation, adversarial administrative proceedings, or contracts, which are currently being negotiated or for which negotiation is reasonably likely to occur in the immediate future. An executive session may be held under this subsection only when an open meeting would have an adverse fiscal effect on the bargaining or litigating position of the public entity. A record revealing negotiation strategy or instruction under this section is exempt. Drafts of contracts or agreements subject to negotiations are exempt but only for so long as release would have an adverse fiscal effect on the public entity, unless the records are otherwise exempt or confidential.

10. Nothing in this section may be construed to waive any attorney-client privilege of a public entity as defined in subdivision c of subsection 13 of section 44-04-17.1 regarding matters that do not pertain to public business.
11. A settlement agreement between a public entity and another party is exempt from disclosure until it has been fully executed and accepted by all concerned parties unless the records are otherwise exempt or confidential. In the case of multiple settlement agreements involving multiple parties involved in the same incident or undertaking, a settlement agreement is exempt until settlement agreements have been fully executed by all concerned parties unless the records are otherwise exempt or confidential.

44-04-19.2. Confidential or closed meetings.

1. A governing body may hold an executive session to consider or discuss closed or confidential records.
2. Unless a different procedure is provided by law, an executive session that is authorized by law may be held if:
 - a. The governing body first convenes in an open session and, unless a confidential meeting is required, passes a motion to hold an executive

- session;
- b. The governing body announces during the open portion of the meeting the topics to be discussed or considered during the executive session and the body's legal authority for holding an executive session on those topics;
 - c. The executive session is recorded under subsection 5;
 - d. The topics discussed or considered during the executive session are limited to those for which an executive session is authorized by law and that have been previously announced under this subsection; and
 - e. Final action concerning the topics discussed or considered during the executive session is taken at a meeting open to the public, unless final action is otherwise required by law to be taken during a closed or confidential meeting. For purposes of this subsection, "final action" means a collective decision or a collective commitment or promise to make a decision on any matter, including formation of a position or policy, but does not include guidance given by members of the governing body to legal counsel or other negotiator in a closed attorney consultation or negotiation preparation session authorized in section 44-04-19.1.
3. The remainder of a meeting during which an executive session is held is an open meeting unless a specific exemption is otherwise applicable.
 4. The minutes of an open meeting during which an executive session is held must indicate the names of the members attending the executive session, the date and time the executive session was called to order and adjourned, a summary of the general topics that were discussed or considered that does not disclose any closed or confidential information, and the legal authority for holding the executive session.
 5. All meetings of the governing body of a public entity that are not open to the public must be recorded electronically or on audiotape or videotape. The recording must be disclosed pursuant

to court order under subsection 2 of section 44-04-18.11 or to the attorney general for the purpose of administrative review under section 44-04-21.1. The attorney general may not disclose to the public any recording received under this subsection and must return the recording to the governing body upon completion of the administrative review. The recording may be disclosed upon majority vote of the governing body unless the executive session was required to be confidential. Disclosure of the recording by a public servant except as provided in this subsection is a violation of section 12.1-13-01. All recordings under this subsection must be retained for a minimum of six months after the executive session that is the subject of the recording.

6. A public entity may sequester all competitors in a competitive selection or hiring process from that portion of a public meeting wherein presentations are heard or interviews are conducted.

44-04-20. Notice of public meetings required - Exceptions - Schedule set by statute, ordinance, or resolution.

1. Unless otherwise provided by law, public notice must be given in advance of all meetings of a public entity as defined in section 44-04-17.1, including executive sessions, conference call meetings, and videoconferences. Unless otherwise specified by law, resolution, or ordinance, or as decided by the public entity, notices required by this section need not be published.
2. The notice required in this section must contain the date, time, and location of the meeting and, if practicable, the topics to be considered. However, the lack of an agenda in the notice, or a departure from, or an addition to, the agenda at a meeting, does not affect the validity of the meeting or the actions taken thereat. The notice must also contain the general subject matter of any executive session expected to be held during the meeting. For meetings to be held by telephone or videoconference, or other electronic means, the location of the meeting and the place the meeting

is held is the location of a speakerphone or monitor as required under section 44-04-19.

3. If the governing body holds regularly scheduled meetings, the schedule of these meetings, including the aforementioned notice information, if available, must be filed annually with the secretary of state for state-level bodies or for public entities defined in subdivision c of subsection 13 of section 44-04-17.1, the city auditor or designee of the city for city-level bodies, and the county auditor or designee of the county for all other bodies or the schedule must be posted on the public entity's website. This schedule must be furnished to anyone who requests the information. When reasonable and practicable, a governing body of a public entity should attempt to set a regular schedule for its meetings by statute, ordinance, or resolution. This subsection does not apply to meetings of the legislative assembly or any committee thereof. Filing a yearly schedule of upcoming meetings does not relieve a public entity from its obligation to post an agenda for each meeting as required in subsections 2 and 4.
4. The notice required in this section must be posted at the principal office of the governing body holding the meeting, if such exists, and at the location of the meeting on the day of the meeting. In addition, unless all the information contained in the notice was previously filed with the appropriate office under subsection 3, the notice must be filed in the office of the secretary of state for state-level bodies or for public entities defined in subdivision c of subsection 13 of section 44-04-17.1, the city auditor or designee of the city for city-level bodies, the county auditor or designee of the county for all other bodies, or posted on the public entity's website. This subsection does not apply to meetings of the legislative assembly or any committee thereof.
5. The governing body's presiding officer has the responsibility of assuring that public notice of a meeting's date, time, and location, is given at the same time as such governing body's members are

notified, and that this notice is available to anyone requesting such information. As soon as an agenda is prepared for a meeting with the information required in subsection 2 and given to members of the governing body, the agenda must be posted at the locations as required by subsection 4 and given to anyone requesting the information. When a request is made for notice of meetings, the request is effective for one year unless a different time period is specified.

6. In the event of emergency or special meetings of a governing body, the person calling such a meeting shall, in addition to the notices in subsection 4, also notify the public entity's official newspaper, if any, and any representatives of the news media which have requested to be so notified of such special or emergency meetings, of the time, place, date, and topics to be considered at the same time as such governing body's members are notified. If the public entity does not have an official newspaper, then it must notify the official newspaper of the county where its principal office or mailing address is located. Topics that may be considered at an emergency or special meeting are limited to those included in the notice.
7. A committee of an institution under the authority of the state board of higher education, in lieu of the notice requirements in this section, may file in the office of the president of the institution the name, address, and telephone number of a person who may be contacted to obtain specific times, dates, and locations of any meetings of that committee or to request specific notification of each meeting of that committee.
8. The attorney general shall prepare general guidelines to assist public entities in following the provisions of this section.
9. This section is violated when a notice is not provided in substantial compliance with this section.

44-04-21. Open voting at public meetings required - Results recorded in minutes.

1. Unless otherwise specifically provided by law, all votes of whatever kind taken at any public meeting governed by the provisions of section 44-04-19 must be open, public votes, and all nonprocedural votes must be recorded roll call votes, with the votes of each member being made public at the open meeting. Procedural votes must be recorded roll call votes upon the request of any member of a governing body holding a meeting subject to this section. As used in this section, "nonprocedural" should be broadly interpreted and includes all votes that pertain to the merits of the matter before the governing body.
2. Minutes must be kept of all open meetings and are records subject to section 44-04-18. The minutes must include, at a minimum:
 - a. The names of the members attending the meeting;
 - b. The date and time the meeting was called to order and adjourned;
 - c. A list of topics discussed regarding public business;
 - d. A description of each motion made at the meeting and whether the motion was seconded;
 - e. The results of every vote taken at the meeting; and
 - f. The vote of each member on every recorded roll call vote.

Notwithstanding subsection 8 of section 44-04-18, the disclosure of minutes kept under this subsection may not be conditioned on the approval of the minutes by the governing body.

44-04-21.1. Administrative review procedure.

1. Any interested person may request an attorney general's opinion to review a written denial of a request for records under section 44-04-18, a denial of access to a meeting under section 44-04-19, or other alleged violation of section 44-04-18, 44-04-19, 44-04-19.2, 44-04-20, or 44-04-21 by any public entity other than the legislative assembly or any committee thereof. A request made

under this section must be made within thirty days of the alleged violation, except that a request based on allegations that a meeting occurred without the notice required by section 44-04-20, must be made within ninety days of the alleged violation. In preparing an opinion under this section, the attorney general has discretion to obtain and review a recording made under section 44-04-19.2. The attorney general may request and obtain information claimed to be exempt or confidential for the purpose of determining whether the information is exempt or confidential. Any such information may not be released by the attorney general and may be returned to the provider of the information. The attorney general shall issue to the public entity involved an opinion on the alleged violation, which may be a summary opinion, unless the request is withdrawn by the person requesting the opinion or a civil action has been filed involving the possible violation. If the request pertains to a public entity as defined in subdivision c of subsection 13 of section 44-04-17.1, the opinion must be issued to the public entity providing the public funds. In any opinion issued under this section, the attorney general shall base the opinion on the facts given by the public entity.

2. If the attorney general issues a written opinion concluding that a violation has occurred, the public entity has seven days after the opinion is issued, regardless of whether a civil action is filed under section 44-04-21.2, to disclose the record, to issue a notice of a meeting that will be held within a reasonable time to correct the violation, or to take steps to correct any other violation. If the public entity fails to take the required action within the seven-day period and the person requesting the opinion prevails in a civil action brought under section 44-04-21.2, the person must be awarded costs, disbursements, and reasonable attorney's fees in the action and on appeal. The attorney general may require officials of the public entity at issue in the opinion to obtain mandatory training by a certain date. The consequences for failing to comply with an attorney general's opinion issued under this section will be

the same as for other attorney general's opinions, including potential personal liability for the person or persons responsible for the noncompliance.

3. If a state-level public entity as defined in subdivision a of subsection 13 of section 44-04-17.1 does not comply in full with the attorney general's opinion, and a civil action is brought under section 44-04-21.2 or is reasonably predictable, the entity, at its sole cost and expense, shall retain separate counsel who has been approved and appointed by the attorney general as a special assistant attorney general to represent the entity in that action.

44-04-21.2. Remedies for violations and enforcement procedure.

1. A violation of section 44-04-18, 44-04-19, 44-04-19.2, 44-04-20, or 44-04-21 may be the subject of a civil action brought by an interested person or entity. For an alleged violation of section 44-04-18, the complaint must be accompanied by a dated, written request for the requested record. If a court finds that any of these sections have been violated by a public entity, the court may award declaratory relief, an injunction, a writ of prohibition or mandamus, costs, disbursements, and reasonable attorney's fees against the entity. For an intentional or knowing violation of section 44-04-18, 44-04-19, 44-04-19.2, 44-04-20, or 44-04-21, the court may also award damages in an amount equal to one thousand dollars or actual damages caused by the violation, whichever is greater. An action under this subsection must be commenced within sixty days of the date the person knew or should have known of the violation or within thirty days of issuance of an attorney general's opinion on the alleged violation, whichever is later. Venue for an action is in the county where the entity has its principal office or, if the entity does not have a principal office within the state, in Burleigh County.
2. Any action that is a product of a violation of section 44-04-19, 44-04-20, or 44-04-21 is voidable

by a court in a civil action authorized by this section.

3. The remedies provided in this section are not available if a violation of section 44-04-18, 44-04-19, 44-04-19.2, 44-04-20, or 44-04-21 has been corrected before a civil action is filed and no person has been prejudiced or harmed by the delay. An interested person or entity may not file a civil action under this section seeking attorney's fees or damages, or both, until at least three working days after providing notice of the alleged violation to the chief administrative officer for the public entity. This subsection does not apply if the attorney general has found under section 44-04-21.1, on a prior occasion, that the public entity has violated section 44-04-18, 44-04-19, 44-04-19.2, 44-04-20, or 44-04-21.

BONDING OF WATER MANAGERS AND EMPLOYEES

A bond is a certificate, or evidence, of a debt. An official bond is one given by a public officer or employee and conditioned that they will perform all their duties properly. Bonds cover all duties of an official, those existing at the time the bond was executed and those which were created subsequently. North Dakota law requires all but a few elected and appointed officials to be bonded.

The treasurer of a water resource district is required by law to be bonded in an amount not less than \$1,000. Other district employees must also be bonded.

District officers and employees can be bonded with the state bonding fund by notifying the State Commissioner of

Insurance. The premium for a bond must be paid in advance and must be at least two dollars and fifty cents. The premium must be waived until the reserve fund of the state bonding fund has been depleted below the sum of \$2 million. Once the balance drops below \$2 million, premiums are reinstated until the balance of the fund increases to \$3 million, at which time the waiver provision again applies.

At the present time, the state bonding fund has bonds in force covering most water resource districts. These bonds are Public Employee Blanket Bonds. These bonds cover collectively all public employees and public officials without the necessity of scheduling names or positions as a part of the bond, and a bond whereby new public employees and new public officials entering employment or office during the period of the bond are automatically included without notice to the fund.

The amount of bond required is set by the commissioner of insurance depending upon the amount of money or property handled and the opportunity for embezzlement, but the amount must at least equal the amount of money or property actually handled or ten thousand dollars, whichever is less. The commissioner may deny coverage for public employees or officers. The denial must take place within sixty days of the application, or the individual will be deemed covered. The

commissioner of insurance may cancel the fund's liability for any public employee or official after an investigation reveals to the commissioner's satisfaction that it would be in the best interest of the fund. Cancellation takes place thirty days after written notice. The public employee or official has twenty days to bring an appeal of the commissioner's decision.

Individuals not covered by the state bonding fund may furnish their own coverage but only with private funds. This coverage must be in an amount determined by the commissioner. The private bond must be filed with the commissioner.

A public employee or official may not be a surety for another public employee or official of the same political entity. For purposes of this restriction, the term "public employee" includes subcontractors and contractors of public works and "public official" includes deputies and court appointed officers.

The supervisor of a public employee or official, within sixty days of discovering a wrongful act or a default, must file a claim with the commissioner of insurance. Any injured persons must also file claims within the sixty-day time limit if they wish to hold the fund liable. All actions against the fund must be commenced within one year of the claim filing. To effect recovery from the fund, that person must join the

fund as codefendant.

If a public employee or official defaults or creates a liability against the fund, the commissioner must notify the state auditor. The state auditor then examines the accounts of the public employee or official to determine if any irregularities exist. Additionally, if the commissioner believes a public employee's or official's action will jeopardize the fund, he may request the state auditor to examine the appropriate books. An action for an accounting may be commenced and the commissioner may request that the governor remove a public official from office if acts are committed which endanger the fund.

If your district is presently not bonded with the state bonding fund and you wish to do so, you may obtain the proper form and instructions by writing to:

North Dakota Insurance Department
State Bonding Fund
600 E Boulevard Ave
Bismarck, ND 58505-0320

Applicable North Dakota law governing bonds are as follows:

61-16.1-05. Bonds of treasurer and appointive officers.

The treasurer of a district shall be bonded in the amount set by the water resource board but the bond shall not be less than one thousand dollars. Other district employees shall be bonded in any amount set by the board. Every officer or employee of whom a bond is required shall be deemed bonded with the state bonding fund upon notice of that appointment given to the state insurance

commissioner by the secretary of the district. Upon notification by the state bonding fund of the premium required, the district treasurer shall remit the same.

26.1-21-07. Coverage.

The amount of coverage afforded to each state agency or political subdivision must be determined by the commissioner based upon the amount of money or property handled and the opportunity for defalcation but the amount must at least equal the amount of money or property actually handled or ten thousand dollars, whichever is less. The coverage may be greater than but not less than the amount required by law or determined under law for a position. The coverage for a state legislative or judicial branch agency, however, may be determined by the legislative council or supreme court, respectively. Notwithstanding any other provision of law, the commissioner may issue bonds in such amounts as the commissioner determines necessary to carry out the purposes of the fund and, in determining the amount of coverage to be offered, the commissioner may consider the reserves necessary to pay the bonds and for all other necessary costs or expenses to carry out the purposes of the fund.

26.1-21-09. Premiums - Amount to whom paid - Minimum.

The commissioner shall determine the premium for a blanket bond. Each state agency and political subdivision shall pay the premium in advance to the fund and the premiums collected must be kept in the fund. The minimum premium for each bond must be two dollars and fifty cents per public employee per year. Payments must be made for one year or for a longer term as prescribed by the commissioner. The premiums referred to in this section must be waived until the reserve fund of the state bonding fund has been depleted below the sum of two million dollars. The collection of premiums must be resumed on the bonds, at the rates provided under this section, whenever the reserve fund is depleted below the sum of two million dollars. The premiums must continue to be collected until the reserve fund reaches a total of three million dollars, at which time all premiums must again be waived until the reserve fund has been depleted below the sum of two million dollars.

26.1-21-10. Automatic insurance of state and political subdivisions.

1. Each state agency and each political subdivision shall apply to be bonded in the fund no less often than on a biennial basis or when a change in coverage is requested, whichever occurs first. Unless an application is denied within sixty days from the date it is received by the commissioner, the application will be deemed approved and bond coverage in force. If a bond is in the discretion of the state agency or political subdivision and a bond is not requested, the state agency or political subdivision is exempt from this section.
2. The application must include a requested amount of bond coverage based on the amount of money and property handled and the opportunity for defalcation and any other condition imposed by law and list twenty-five percent of the money in control of the public officials or employees for which the bond is requested for the preceding year based on the total monthly balances. In addition, the application must include any information requested by the commissioner to determine the amount of money and property handled and the opportunity for defalcation, including the procedure used to determine the amount of bond requested, revenues for the last budget period by type, expenditures for the last budget period by type, the number of people that handle money, any portion of the last audit, and any financial procedures.

EXPENSES AND SALARIES OF WATER MANAGERS

Water managers are entitled to receive at least \$75 but not more than \$189 per day while performing their duties as water manager. The cap on pay for water managers is tied to the daily compensation for legislators therefore the cap will increase in July 2022 and potentially again in future

legislative sessions. In addition, water managers are entitled to be reimbursed for their expenses at the same rate as state employees. At present time, those rates are as follows and for future reference can be found at N.D.C.C. § 44-08-04:

Meals:	Breakfast	\$ 7.00
	Lunch	\$10.50
	Dinner	<u>\$17.50</u>
	TOTAL	\$35.00/day

Receipts for meals do not need to be shown, so water managers are entitled to be reimbursed for the total of \$35.00 per day for meals, regardless of what they spend.

Travel: \$.575 per mile

Lodging: Actual cost, but not to exceed the amount established by the office of management and budget which is presently \$96 plus state or local taxes. Lodging outside the state must be the actual lodging expense. Receipts for lodging must be provided. A political subdivision may reimburse an elective or appointive officer, employee, representative, or agent for actual lodging expenses.

Applicable North Dakota law is as follows:

61-16-08. Eligibility for appointment to board - Term of office - Removal - Filling vacancies - Compensation of managers.

1. When a water resource district has been created, any resident landowner in the district, except a county commissioner, is eligible, subject to the provisions of this section, for appointment to the water resource board. After June 30, 1985, when the term of office of a district manager has expired, the manager's successor shall hold office for three years from the first day of January next following the date of the successor's appointment. The term

of office of a manager does not terminate until the successor in office is appointed and qualified. In case the office of any district manager becomes vacant, the manager appointed to fill the vacancy shall serve the unexpired term of the manager whose office became vacant. Within three months after the start of an individual's term as a district manager, the individual shall attend a course on water management, and each district manager shall attend a course on water management every three years during the manager's term.

2. While performing duties as a member of a water resource board, each member is entitled to receive compensation of at least seventy-five dollars per day but not more than the rate set for a member of the legislative assembly under section 54-03-20, an allowance for meals at the same rates and under the same conditions as provided by law for state officials and employees, and reimbursement of lodging and other necessary travel expenses at the same rate and under the same conditions as provided by law for state officials and employees. A request for an allowance or reimbursement must be evidenced by a sub-voucher or receipt as provided by section 21-05-01.
3. A manager may be removed from the board by the board of county commissioners after it appears to the board of county commissioners by competent evidence, and after a public hearing, if so requested by the manager subject to removal, at which hearing the manager must be apprised of and allowed ample opportunity to repudiate the evidence, that the manager has been guilty of misconduct, malfeasance, crime in office, neglect of duty in office, habitual drunkenness, gross incompetency, or inability to perform the duties of office for reasons of health.

44-08-04. Expense account - Amount allowed - Verification.

2. For travel within the state, the following rates for each quarter of any twenty-four-hour period must be used:
 - a. First quarter is from six a.m. to twelve noon

- and the sum must be seven dollars. First quarter reimbursement may not be made if travel began after seven a.m.
- b. Second quarter is from twelve noon to six p.m. and the sum must be ten dollars and fifty cents.
 - c. Third quarter is from six p.m. to twelve midnight and the sum must be seventeen dollars and fifty cents.
 - d. Fourth quarter is from twelve midnight to six a.m. and the sum must be the actual lodging expenses not to exceed an amount established by policy by the director of the office of management and budget plus any additional applicable state or local taxes. The director shall establish a policy to set the lodging reimbursement at an amount equal to ninety percent of the rate established by the United States general services administration for lodging reimbursement in this state. A political subdivision may reimburse an elective or appointive officer, employee, representative, or agent for actual lodging expenses.

ACCOUNTING

The Uniform Accounting Manual for North Dakota Water Resource Districts may be obtained from either of the following two places:

- 1. Office of the State Auditor
600 E. Boulevard Ave, 3rd Floor
Bismarck, ND 58505-0060
Phone: (701) 328-2241
- 2. ND Water Resource Districts Associations
PO Box 2254
Bismarck, ND 58502-2254
Phone: (701) 223-4615

UNIFORM ACCOUNTING SYSTEM
FOR
WATER RESOURCE DISTRICTS

INTRODUCTION

An accounting manual is a handbook explaining the accounting system and describing the procedures and forms needed to maintain a comprehensive system of records and to produce uniform, accurate, and timely reports.

1. Furnish standards to evaluate the existing system.
2. Describe and illustrate forms and procedures needed by clerical personnel with little formal training.
3. Adopt a revision as needed.
4. Maintain consistency in procedure and reports despite personnel changes.
5. Facilitate financial comparison with other water management districts in North Dakota and nationwide through consistent use of standard classification and terminology.
6. Aid in the audit of the records.

The Water Resource District Accounting Manual sets forth requirements regarding the prescribed accounting system. The following is the principal source of information for preparing this manual.

"Governmental Accounting, Auditing, and Financial Reporting, National Committee on Governmental Accounting, Municipal Finance Officers Association of the United States and Canada"

GOVERNMENTAL IMMUNITY AND LIABILITY **OF A WATER RESOURCE DISTRICT**

1. Introduction

The problem of tort liability against the government and its employees has become serious. The problem is not only the tort liability exposure for water resource districts and their employees, but also the increasing difficulty of

obtaining adequate insurance to protect against these potential liability exposures. Incredible judgments have been rendered by the courts in recent years, and in some cases, awards have been so large that the cost of commercial liability insurance coverage are either unaffordable or unavailable. The following are some examples of judgments and awards made through our judicial system:

1. A man in New York City decided to commit suicide and jumped in the path of an oncoming subway train. He was badly injured but did not die. He promptly sued the subway authority and collected \$650,000 in damages.
2. A man attempting to rob a school fell through a skylight and sued the educational district. The insurance company was required to pay him \$260,000 and \$1,500 per month into the foreseeable future.
3. A man in a telephone booth was injured when a drunken driver crashed over the sidewalk and hit him. The company which designed the booth was held responsible.
4. Two men living side by side needed a trimmer for the hedge that separated their houses. One of them bought a lawn mower from Sears, and they held it high to cut the shrubbery. The mower slipped and

cut two fingers from one man's hand. The man sued Sears for not telling him that the machine was not a hedge cutter. He won.

5. An overweight man with a heart condition bought a lawn mower for home use. Unfortunately, he suffered a heart attack when he tried to start it. He was awarded \$1,800,000 in damages.

Two solutions are available for this problem. First, water resource districts must implement a risk mitigation program to minimize opportunities for potential liability exposure. Second, adequate insurance must be obtained to protect against potential liability exposure.

An alternative to commercial liability insurance is available through the North Dakota Insurance Reserve Fund (NDIRF). The NDIRF is a self-insurance plan, owned and operated by state agencies and political subdivisions of North Dakota, to provide protection for various liability exposures.

In North Dakota, governmental immunity for political subdivisions was abolished in Kitto vs. Minot Park District, 224 N.W.2d 795 (1974). After Kitto, political subdivisions are liable for the ministerial acts of their officers and employees.

In response to the Kitto decision, the legislative

assembly enacted N.D.C.C. § 32-12.1 which limits the liability of political subdivisions. This law limits a water resource district's liability to \$375,000 for injury per person and \$1 million for any number of claims arising from any single occurrence. This cap will increase annually until July 1, 2026. However, punitive or exemplary damages may exceed those limits.

A water resource district may not be held liable for the discretionary actions of its officers and employees.

2. Discretionary vs. Ministerial Duties

The initial determination in deciding whether a public official will be liable is whether an action taken was discretionary or ministerial. Ministerial acts are those which are required. No choice or decision is left to the individual and performance is mandatory. Public officials may be held liable for improper performance or refusal or failure to perform ministerial functions.

However, "...no tort action will lie against governmental units for those acts which may be termed discretionary in character. Included within this category are acts traditionally deemed legislative or quasi-legislative, or judicial or quasi-judicial, in nature. The exercise of discretion carries with it the right to be wrong. It is for torts committed in the execution of the activity decided upon

that liability attaches, not for the decision itself." Kitto,
at 804

The general rule that a public official is not liable for discretionary acts has been modified by the judicial interpretation of 42 U.S.C. 1983, which is a federal law. This statute, as applied, places liability on the actions of a public official if the actions were done with malicious intent to deprive a person of their constitutional rights or if the official knew or had reason to know the action taken would violate another's constitutional rights. In other words, an official must act with reasonableness and good faith if his actions involve the constitutional rights of another.

3. Acts for Which Personal Liability May Accrue

Public officials may also be liable for their actions in the following circumstances:

1. Acts committed in the line of duty or color of authority which exceed the power conferred by law.
2. Acts committed outside the scope of an officer's jurisdiction and without legal authorization.
3. Nonfeasance, or knowingly, negligently failing or refusing to do a ministerial act required by law.
4. Negligence for damages sustained in the performance of ministerial duties, unless the wrong is a violation of a duty owed solely to the public. (Recovery for damages sustained due to negligence in the performance of discretionary duties will be denied. The remedy in that situation is indictment or impeachment.)

4. Summary

Liability exposure is a serious concern which may affect the number of persons who are willing to serve on water resource boards. However, the NDIRF provides affordable insurance coverage. If a district is covered by the insurance policy of its county commission, it must make sure that it is named separately as an "additional insured".

APPOINTMENT, TERMS, AND REMOVAL OF WATER MANAGERS

If the district's boundaries are confined to one county, the board of county commissioners shall appoint a water resource board consisting of three or five managers. When a district includes two counties, the water resource board shall consist of five managers, three appointed by the board of county commissioners of the county having the larger aggregate taxable valuation of property, and two appointed by the board of county commissioners of the other county. If a district includes three counties, the water resource board shall consist of five managers, one appointed by the board of county commissioners having the lowest aggregate taxable valuation of property in the district, and two appointed by the board of county commissioners of each of the other two counties. If a district includes four or six counties, the water resource board shall consist of two members from the

county having the largest aggregate taxable valuation of property in the district, and one manager from each of the other counties. If a district includes five or seven counties, the water resource board shall consist of one manager from each county. Appointments to the water resource board shall be made by the boards of county commissioners of the respective counties.

Water managers must be resident landowners in the district. County commissioners are prohibited from serving on water resource boards. The terms of office of water managers are three years. Water managers are appointed by the county commission.

A water manager may be removed from the board for misconduct, malfeasance, crime in office, neglect of duty in office, habitual drunkenness, gross incompetence, or inability to perform due to reasons of health. Before a board of county commissioners can remove a water manager, it must conduct a public hearing, and its decision must be based on competent evidence. Applicable North Dakota law is found in N.D.C.C. § 61-16-08.

OFFICERS

The principal duties of the district officers should include the following:

Chairman:

1. Preside at all meetings.
2. Order special meetings when necessary.
3. Develop a tentative agenda which is sent to each water manager with the meeting notification.
4. Open meetings promptly, follow agenda, and close meetings promptly after all business has been completed.
5. See that invitations are extended to all individuals who should attend the meeting.
5. Robert's Rules of Order should be followed at meetings.
7. Recognize visitors and other individuals present at Board meetings.
8. Refer regularly to the district's short- and long-term plans to ensure that all plans are being properly implemented.
9. Delegate administrative responsibility to the district's employees, thereby permitting the Board to concentrate on its supervisory and policy setting responsibilities.

NOTE: It is recommended that boards establish a continuing policy to rotate the Board Chairmanship. Such a policy would ensure development of water managers and spread the burdens imposed upon a District Chairman.

Vice Chairman:

1. Assume the duties of the Chairman in the Chairman's absence.
2. Be familiar with the district's plans and activities so that the Vice Chairman can assist the Chairman whenever necessary.

Secretary:

1. Make a complete record of all meetings including name of district, date and place of meeting, officer presiding, and names of all those present, including visitors and organizations represented. See sample minutes, Form #1.
2. File one copy of the approved minutes.
3. Read each motion before action is taken and record the vote on each motion.
4. Request that action be completed on each item of business so that a record can be made of what was done.
5. Ask agency representatives to make written reports when necessary.
6. Initiate correspondence on behalf of the board as necessary.
7. Inform the Chairman of any business that should come before the Board.

Treasurer:

1. Assist in developing budget for the year's operation. See sample budget, Form #2.
2. Maintain complete and accurate records of receipts and expenditures.
3. Give financial report at each meeting. See sample financial statement, Form #3.
4. Pay bills approved by the Board and issue receipt for incoming funds.
5. Maintain separate accountings of any funds the district may receive for a specified purpose.

A water resource district may employ engineers, technical experts, attorneys, and any other experts for the proper execution of the board's responsibilities.

BUDGET AND FINANCES

Water resource districts have several methods to finance operations. These methods are as follows:

1. Through the levy of an ad valorem tax of not to exceed four mills over the entire district.
2. Special assessments against property benefited by a project or activity of a water resource district.
3. User fees imposed and collected for the services or use of a project.
4. Through the levy of a general ad valorem tax not to exceed two mills for a project or activity carried out or constructed jointly and in conjunction with one or several other water resource districts. The two mill levy for joint boards is in addition to the four mill levy for each individual water resource district.

Revenues raised from the levy of a general ad valorem tax, either under the four or two mill authority, must be approved by the Board of County Commissioners in which the district is located. The Board of County Commissioners has final authority over the budget submitted by a water resource district, it may amend the proposed budget and approve the amended budget, or it may disapprove the proposed budget. A water resource district may borrow up to 80 percent of its

general ad valorem levy for any one year to pay district expenses.

The procedures for imposing special assessments against any property that is benefited by a project are very specifically outlined in North Dakota law. Failure to follow these procedures may result in a court order prohibiting the special assessments until the proper procedures are followed.

A water resource district also has the authority to sell revenue bonds to finance a water project. However, revenue bonds require that project revenues pay off the bonds, so the use of revenue bonds require a self-supporting project.

CHAPTER 4 - JOINT BOARDS

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JOINT WATER RESOURCE BOARDS

In Chapter 1 of this Handbook, there is a review of the history of the creation of water resource districts. That review indicates that prior to 1973 water resource districts could be created either by watershed or county boundaries. It was not mandatory that every area in North Dakota have a water resource district. In 1973, the North Dakota Legislature decided that all land in North Dakota should be included in a water resource district, and thus passed a law requiring that water resource districts be created throughout the state. Before 1973, the emphasis in the statute was to create water resource districts along watershed boundaries. However, both before and after 1973, primarily for matters of convenience, most water resource districts were created along county boundaries. Bottineau and Cass are the most notable counties that have water resource districts that are established on watershed boundaries.

While the Legislature recognized that most water resource districts were and would be established along county boundaries, the Legislature also recognized that water did not flow along political boundaries and that effective water management could require two or more water resource districts to work together. Thus, in 1975, the North Dakota Legislature

enacted the joint exercise of powers statute for water resource districts. This statute was patterned closely after the joint exercise of governmental powers statute in the North Dakota Century Code, Chapter 54-40. The joint exercise of powers statute for water resource districts is N.D.C.C. § 61-16.1-11, which provides as follows:

61-16.1-11. Joint exercise of powers.

1. Two or more districts may, by agreement, jointly or cooperatively exercise any power which is authorized a board by this title. The agreement shall state its purpose and the powers to be exercised, and shall provide for the method by which the power or powers shall be exercised. When the agreement provides for the use of a joint water resource board, the joint board shall be representative of the boards which are parties to the agreement. Notwithstanding other provisions of law, the agreement may specify the number, composition, terms, or qualifications of the members of the joint board. A joint board created under this section is a political subdivision of the state.
2. The districts which are parties to such an agreement may provide for disbursements from their individual budgets to carry out the purpose of the agreement. In addition, a joint board established pursuant to this section may adopt, by resolution, on or before July first of each year, a budget showing estimated expenses for the ensuing fiscal year and the proposed contributions of each member district as determined by the agreement. The boards of the member districts then shall levy by resolution a tax not to exceed two mills upon the taxable valuation of the real property within each district within the river basin or region subject to the joint agreement. The levy may be in excess of any other levy authorized for a district.

3. The proceeds of one-half of this levy shall be credited to the joint board's administrative fund and shall be used for regulatory activities and for the construction and maintenance of projects of common benefit to the member districts. The remainder shall be credited to the construction funds of the joint board and shall be used for the construction and maintenance of projects of common benefit to more than one district.
4. Funds may be paid to and disbursed by the joint board as agreed upon, but the method of disbursement shall agree as far as practicable with the method provided by law for the disbursement of funds by individual districts. Contracts let and purchases made under the agreements shall conform to the requirements applicable to contracts and purchases by individual districts. The joint board shall be accountable for all funds and reports of all receipts and disbursements to the state water commission in a manner prescribed by the commission.
5. The agreement may be continued for a definite term or until rescinded or terminated in accordance with its terms. The agreement shall provide for the disposition of any property required as the result of a joint or cooperative exercise of powers, and the return of any surplus moneys in proportion to contributions of the several contracting districts after the purpose of the agreement has been completed.
6. Residence requirements for holding office in a district shall not apply to any officer appointed to carry out any agreement.
7. This section does not dispense with procedural requirements of any other statute providing for the joint or cooperative exercise of any governmental power.

Because efforts to reorganize water resource districts along watershed lines have not been successful, the joint

exercise of powers authority is widely used by water resource districts. The first joint water resource board to be created was the Red River Joint Water Resource Board, in 1979. Shortly after that the Rocky Run Joint Board was created, consisting of the Eddy, Wells, and Foster Water Resource Districts, for the purposes of developing flood control projects in the Rocky Run Watershed.

Since that time, joint boards have been created in the West River area, the Souris River Basin, along the Missouri River, the James River Basin, the Upper Sheyenne River, the Devils Lake Basin, and other areas.

The authority for individual water resource districts to join together as joint boards is very useful because it allows water resource districts to do together what they could not do alone.

CREATED JOINT WATER RESOURCE BOARDS

The following joint water resource district boards have been created in North Dakota:

1. Red River Joint Board
2. Devils Lake Joint Board
3. West River Joint Board
4. Missouri River Joint Board

5. Souris River Joint Board
6. Rocky Run Joint Board
7. Upper Sheyenne River Joint Board
8. James River Joint Board

CHAPTER 5 - Water Resource Planning

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WATER RESOURCE PLANNING

Water is an unpredictable natural occurrence in North Dakota that presents water resource managers with constantly changing circumstances and new challenges. Whether it is prolonged drought or devastating floods, planning for these events is essential to prevent crisis-driven water management which often results in unnecessary hardship and added future cost to compensate for the lack of preplanning. Good planning can result in targeted solutions to complex problems and can help water managers avoid costly shortsighted decisions. Water resource districts and joint water resource boards have recognized the benefits of long-range planning by participating in the comprehensive planning process initiated by the State Water Commission (SWC).

In North Dakota, the water planning process has always started at the local level. Water management problems and needs are identified by local entities and solutions are initiated and pursued by local entities. Historically, state and federal agencies assist in funding water projects when expected outcomes are mutually supported. Water projects are typically costly and usually beyond the financial means of water resource districts to implement without cost-share from federal and state agencies.

Developing partnerships has proven to be a good way for water resource districts, agencies, and various entities to promote water resource management projects and programs. These partnerships have been very successful in combining limited dollars to implement projects and programs that have provided multiple benefits to collaborating entities.

The State of North Dakota provides cost-share funds for water development and water management projects through the SWC. The SWC allocates funds, appropriated by the Legislature, from several sources, but primarily the Resources Trust Fund.

In addition to the SWC, several federal agencies participate with water resource districts and other political subdivisions in implementing water development and water management projects and programs. They include the U.S. Army Corps of Engineers, the U.S. Department of Agriculture's Natural Resources Conservation Service, and U.S. Department of Agriculture—Rural Development. Water resource districts and political subdivisions have been able to implement much needed water development and water management projects and programs throughout North Dakota with the financial and technical assistance of these agencies and others through cooperative efforts.

The number, type, and size of projects requiring cost-share is expanding. As the cost of projects increase and local sponsors' ability to provide adequate funding declines, more local sponsors are requesting state funding. As a result, the state will continue to be challenged to meet the ever-increasing need and demand for statewide water development and water management projects.

WATER DEVELOPMENT AND WATER MANAGEMENT
PLANNING AT THE LOCAL LEVEL

In North Dakota, the water planning process begins at the local level when a water problem is documented or when a potential future need or problem is predicted. Resolving local water problems often proves to be more complex and costly than local water resource districts can handle, and other agencies such as the SWC, USDA Natural Resources Conservation Service, USDA Rural Development, the Corps, and others are brought in to provide technical and financial assistance. The federal and state agencies are approached by many groups each year and, because they also have limited resources, can only participate in certain projects. The projects most often selected are those that are well planned.

There are two levels of planning that are often confused because they are related but distinct. The first type of planning deals with specific projects and is commonly referred to as project planning or development. As the name implies, it deals with the steps leading to the construction of a project.

A second type of planning is comprehensive planning. Comprehensive plans are often referred to as master plans or long-range plans. These plans are used to set a general course of action and serve as a guide for an entity to reach a specific goal or combination of closely related goals. For example, a water resource district that experiences flooding may set a goal of reducing flood damages. The district then must discuss how to accomplish flood reduction. Typically, there are no easy solutions and if the board seriously wants to reduce flooding, some tough decisions will have to be made. With the assistance of technicians, local water authorities, and the public, a set of objectives must be developed. For example, a few objectives that are appropriate to reach the goal of flood damage reduction include defining a floodway, identifying acceptable structural or non-structural solutions to reduce flood damages, and the removal of abandoned structures in the floodway.

With these and other objectives clearly stated, the board can proceed with action that addresses each objective. This same process of setting goals and objectives can be done for all major activities of water resource districts. It is also important to note that a comprehensive plan does not have to be complicated or lengthy. A plan that is concise, to the point, and void of complicated discussions is the easiest plan to understand and to implement.

If a water resource district is interested in developing a water resource district plan, assistance is available from the SWC's Planning and Education Division.

PLANNING REQUIREMENTS

In 1981, the Legislature enacted a law requiring each water resource district to develop a master plan. However, in 1985, the Legislature repealed N.D.C.C. § 61-16.1-13 and instead enacted a law requiring water resource districts to jointly develop, with other water resource districts, a comprehensive plan for the river basin or region in which the water resource district is located. Joint water resource boards are key to fulfilling this requirement found in N.D.C.C. § 61-16.1-10.

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

Each water resource board shall:

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.

PLANNING FOR NORTH DAKOTA'S

WATER MANAGEMENT AND WATER DEVELOPMENT

North Dakota Century Code mandates that the SWC develop and maintain a comprehensive water plan to manage North Dakota's water resources. Every biennium, with assistance from water resource districts, joint water resource districts, and other water users, the SWC has developed State Water Development Plans (SWDP).

The SWDP is a comprehensive plan that: identifies water needs and projected water use throughout the state; identifies water management goals and objectives; identifies potential projects and opportunities for water development and water management; documents funding needs; and identifies water resource management and development challenges.

The SWC maintains a SWDP database that is comprised of a list of potential and active water development projects in the state. The database is updated, as new information

becomes available regarding project status. At that time, input is sought and received from all water interest groups throughout the state for the development of the SWDP.

The Legislature mandates that the SWC provide a SWDP to the Legislature. The purpose of the plan is twofold: 1) identify potential water development funding needs; thereby, providing information to Legislature that will assist them in appropriating funds for water development projects; and 2) provide the opportunity to inform the Legislature of the projects that have been funded and completed during the previous biennium and to provide the status of ongoing projects. The information received from water resource districts and other water interest groups is essential in documenting present and future water needs as well as tracking the status of ongoing water projects.

The Legislature provides funding to the SWC for cost-share with local entities from several sources. A finite amount of money is made available for water development projects each biennium and competition for funds among the water development interests is common. With input from water interest groups, the SWC prioritizes funding based upon need, the ability of the local entity to provide the necessary cost-share dollars, and other factors.

To assist the SWC in developing the SWDP, water resource districts submit information to the SWC providing basic project information including funding requirements and timelines for potential projects development.

If the project sponsor wants to obtain state cost-share, information should be submitted for every project under consideration by a water resource district or water interest group. Once the project planning has progressed to a stage where the sponsor feels the project can be implemented, the sponsor must formally request cost-share from the SWC.

FUTURE PLANNING AND FUNDING

The SWC will continue to work closely with water resource districts to promote the wise management and development of North Dakota's water resources to benefit all the citizens of the state. This will be accomplished by continuing to seek the input of water resource districts and water interest groups in the implementation of North Dakota's Water Management Plan and Water Development Biennial Reports as mandated by the State Legislature.

To further this spirit of cooperation among water interests, water resource districts are strongly encouraged to work with adjacent water resource districts to address

water management from a watershed perspective. This will result in a more comprehensive approach to water-related issues ensuring that all potential projects within a watershed contribute and positively benefit or complement one another. This watershed approach to water resource issues is essential to effective water management.

If requested by the water resource districts, the SWC will provide technical assistance to water resource districts hoping to develop regional watershed plans that address management issues in a comprehensive manner.

FORMS AND ADDITIONAL INFORMATION

The Project Information and Planning Form and various permit applications forms can be completed or downloaded from the State Water Commission's website at: www.swc.nd.gov. In addition, the SWC website contains information regarding topics of interest involving local, state, regional, federal, and international water management policy, issues, programs, and projects.

LINKS

Project Information and Planning Form:
<https://www.swc.nd.gov/reclink/4dcgi/projectPlanningForm>

All SWC Reports and Publications:
[https://www.swc.nd.gov/info edu/reports and publications/](https://www.swc.nd.gov/info%20edu/reports%20and%20publications/)

CHAPTER 6 - PROJECT DEVELOPMENT

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INTRODUCTION

A water resource district project may involve the expenditure of public money. The public expects public money to be spent wisely and efficiently so the maximum benefit per dollar will be achieved. Thus, it is necessary to obtain competent technical assistance for any water resource district project.

Developing and constructing a water resource project is a complex procedure. The following general steps are suggested as guidelines for water resource districts:

1. Identification of Problem or Need

Problems generally make themselves known, while some needs are less obvious. Complaints of flooding, for example, are often indications of a problem with channel capacity. However, an unfulfilled creation or water supply need may not be subject to the same degree of complaint.

Complaints and requests from the public, combined with the personal knowledge of a water resource district, should be carefully considered. Water managers should objectively assess whether the problems or needs identified are components of a larger problem.

2. Consideration of Ideas and Possible Solutions

After a problem or need has been identified, ideas about how to solve or alleviate the problem should be developed.

This discussion could result in some ideas being combined with others, eliminated, or changed in order to develop the best alternative solutions.

3. General Investigation of Alternatives

The alternative solutions which are developed should be compiled. The features of each alternative should be identified as specifically as possible, including locations, sizes, capacities, and in particular, the landowners impacted by each alternative.

4. Public Meeting Including Affected Landowners

Public input is an important component of the planning and development of a water resource project. Therefore, public meetings should be held after the alternatives have been identified. Public meetings are most fruitful if specific alternatives have been identified. Adequate public notice of a public meeting is essential so that interested parties, and in particular impacted landowners, can consider the issues involved.

5. Preliminary Engineering and Feasibility Study

At this point, sufficient information should be available to conduct a preliminary engineering and feasibility study. This process should be conducted by a competent engineering agency or firm. This study will include a preliminary design to determine the actual locations,

dimensions, features of project alternatives, and an estimate of costs. This is also the appropriate time to explore methods of financing. Local, state, and federal agencies that may be able to participate should be identified and contacted.

6. Selection of a Preferred Alternative

When the cost estimates, preliminary designs, and proposed methods of financing are known, a decision can be made to select a preferred alternative.

The selected alternative may have changed to some degree based on the preliminary investigation. Features may have been added or deleted. The cost may also be greater than expected. The public should be informed of the current progress of the project, and their comments should be solicited. A decision on whether to proceed further must also be made.

7. Solicitation of Funding from Various Entities

If the decision is made to proceed, agreements for funding with funding sources should be developed and executed. It may be necessary to establish an assessment district, which would be done at this point.

8. Obtaining Land Options

At this time, the land requirements for the selected alternative can be identified and options can be obtained.

9. Applications for Permits

Various federal, state, and local permits may be required for the project. Applications should be made for these permits at this time. The decision to approve certain permits may not be made until the final design is available, but the application process should begin as soon as possible. In some cases, it may be necessary to obtain a federal or state permit at the beginning of the project development, but normally it will be best to wait until this step is in the process because information will be more specific and developed.

10. Final Design

After the decision to proceed is made, final design should be completed. This process will include the detailed design of project features and will produce construction plans. It should also incorporate comments from the permitting agencies. The final design may have to be submitted to permitting agencies which require it. A final review should be made to assure that all required permits have been obtained.

11. Land and Right-of-Way Acquisition

The necessary land and rights-of-way can now be purchased.

12. Construction

After the final design has been completed, permits granted, and land obtained, construction can proceed.

13. Maintenance.

A water resource district should always establish maintenance responsibilities before a project is constructed.

ASSESSMENT PROJECTS:
PROCEDURES

1. Procedures for Water Resource District Projects Under N.D.C.C. § 61-16.1

N.D.C.C. § 61-16.1 includes the authority and procedure for a water resource district to establish special assessment projects, including assessment drains. The following procedure must be followed:

1. A project may be initiated by a water resource district on its own motion or by request. (N.D.C.C. § 61-16.1-15)

2. A water resource board must adopt a resolution declaring the necessity of building the project. The resolution must state the nature and purpose of the project and must designate a registered engineer to assist the board. The engineer must prepare profiles, plans, and specifications and must estimate the cost of the project, including the costs of acquisition of rights-of-way. (N.D.C.C. § 61-16.1-17)

3. Assessment lists must be prepared:
 - a. A personal inspection by the board is required of all land which may be subject to assessment.
 - b. Assessments are based on the proportion of the total cost of the project to the benefits received.
 - c. Assessment can be made against any county, township, and city in its corporate capacity and against any lot, piece, or parcel of land benefited by the project.
 - d. Considerations in determining assessments include degree of improvement of the property, productivity of the property, and property values.
 - e. Property belonging to the United States is exempt from assessments unless otherwise provided for by the United States.
 - f. Counties, townships, and cities may provide for payment of the assessment from the general fund or by levying a general property tax.
 - g. A certificate must be issued and signed by a majority of the members of the water resource board, certifying that the assessment is correct and stating the items included in the assessment.
(N.D.C.C. § 16-16.1-21)
4. A notice of the first public hearing to review

assessments must set forth the following:

- a. Notice that a statement showing the percentage assessment against each parcel of land benefited by the proposed project has been filed with the county auditor of each county in which the project will be located;
- b. The general nature of the project;
- c. The resolution approving the project and the time and place of the hearing; and
- d. When and where votes concerning the proposed project may be filed.

The notice of the hearing and assessment list must be mailed to each impacted landowner. The notice of hearing must be published once a week for two consecutive weeks in both the newspaper of general circulation in the area, and in the official newspaper of the appropriate county. The date of the hearing must be at least twenty days after the mailing of the notice. (N.D.C.C. § 61-16.1-18)

5. After the hearing, the vote required in N.D.C.C. § 61-16.1-19, must be held. The vote must be held within 30 days after the date of the hearing. Affected landowners, and the governing body of any county, township, or city which will be assessed, may file their votes with the secretary of the water resource board. The value given to each vote shall

be one vote for each dollar of assessment or one vote for each dollar of the assessed valuation of land condemned for the project. A majority of the total votes cast must be in favor of the project in order for the board to issue an order establishing the proposed project. Notice of the order establishing the project or denying establishment of the project must be published in the official county newspaper and in the newspaper of general circulation. (N.D.C.C. §§ 61-16.1-19, 61-16.1-20)

6. After an order establishing the project has been issued, the actual assessment list must be published once each week for three successive weeks in the newspaper or newspapers of general circulation and the official county newspaper together with a hearing notice. The notice must state the time and place for making objections to the assessments. This is called the assessment hearing. A copy of the notice must be mailed to each impacted landowner. The assessment hearing must be held less than thirty days after the mailing of the notice. Alterations may be made to the assessments if the aggregate total of all assessments is not decreased. (N.D.C.C. § 61-16.1-22)

7. Correction of mathematical errors or mistakes resulting in a deficiency may be made, as provided in N.D.C.C. § 61-16.1-27.

8. Upon a motion of the board, or a petition of any impacted landowner or political subdivision, after the project has been in existence for one year or more, the board shall hold a reassessment hearing to determine whether the benefits of the project should be reassessed. Notice of the hearing must be given by publication once each week for three consecutive weeks, beginning at least thirty days before the hearing, in the official county newspaper, and by mailing a notice to each owner of land impacted by the project. The board cannot be forced to make a reassessment of benefits more than once every ten years. (N.D.C.C. § 61-16.1-26)

Forms for the establishment of an assessment district under N.D.C.C § 61-16.1, are included in this Chapter.

2. Procedures for Assessment Drains Under N.D.C.C. § 61-21

Under this Chapter, a water resource district is limited to "assessment" drains, as they are now defined.

1. A project may be initiated only by a written petition of landowners impacted by the proposed drain. The petition must designate the starting point, terminus, and general course of the proposed drain. The petition shall be signed by at least six property owners or a majority of landowners within the proposed district whose property will be drained by the proposed drain. The board may require a bond from the petitioners. If the petition is approved but

the drain is not constructed, the petitioners shall not be required to pay for the expenses of surveys or any other incurred expenses. (N.D.C.C. §§ 61-21-10, 61-21-11)

2. Upon presentation of a petition, if the board feels further proceedings are warranted, it must adopt a resolution and appoint an engineer to assist. (N.D.C.C. § 61-21-12)

3. The engineer is assigned the task of preparing profiles, plans, specifications, and estimates of total cost, which must be sufficient to enable the board to determine the proportion of assessments for each landowner. The engineer must also prepare a map of the land to be drained, which must be filed with the County Auditor for public inspection. (N.D.C.C. § 61-21-12)

4. The approximate assessment list must be prepared and filed ten days prior to the first assessment hearing on the petition for a drain. (N.D.C.C. § 61-21-13)

5. A notice of the assessment hearing must be prepared. The notice must include a copy of the petition, the time and date of the hearing, and the point of beginning, general course, and terminus of the proposed drain. The notice must also state when and where votes for or against the proposed drain may be filed. (N.D.C.C. § 61-21-13)

6. A notice of the assessment hearing must be published at least once, and at least ten days before the

hearing, in the official county newspaper of the county.
(N.D.C.C. § 61-21-13)

7. The notice of the assessment hearing must be mailed to each landowner subject to assessment or subject to condemnation. (N.D.C.C. § 61-21-13)

8. A ballot must be prepared and sent to each landowner along with a notice of the assessment hearing. (N.D.C.C. § 61-21-13)

9. At the hearing, impacted landowners must be informed of the total estimated cost of the project and their individual share of the cost. (N.D.C.C. § 61-21-14)

10. After the hearing, a vote is conducted. The board must allow at least 10 days after the hearing for the vote. Objections to or approvals of the drain in writing may be filed with the board and shall be considered as votes for or against the proposed drain. The votes are determined on a basis of one vote for each dollar of assessment or one vote for each dollar of the assessed valuation of land condemned for the drain. Any form of written vote is sufficient. (N.D.C.C. §§ 61-21-14, 61-21-16)

11. A majority of the votes filed must be in favor of the proposed drain in order for the water resource district to continue with the project. (N.D.C.C. § 61-21-15)

12. The board may issue an order establishing the drain

only if it finds that a majority (more than 50 percent) of the votes filed are in favor of the project and the benefits of the proposed drain are greater than the costs. (N.D.C.C. § 61-21-14)

13. After an order is issued, landowners have the right to appeal. Only landowners whose land is or may be assessed or condemned may appeal to the district court a board's order concerning a drain. (N.D.C.C. § 61-21-18)

14. After the board issues an order establishing drain, assessments are reviewed and finally determined. An assessment hearing must be held for impacted landowners. A notice of final hearing on assessments must be published in a newspaper having general circulation in the county at least ten days prior to the hearing. The notice of final hearing on assessments must also be mailed to each impacted landowner. (N.D.C.C. §§ 61-21-20, 61-21-21)

15. At the hearing, the water resource district must review complaints on percentage assessments and will then make a final decision to correct or confirm the assessments. (N.D.C.C. § 61-21-22)

16. In determining the original assessment list, and in correcting and/or confirming the final assessments, consideration must be given to present drainage facilities, potential use of the proposed drain, benefit or harm caused

by a change in flow and course of drainage of water, and other pertinent matters. (N.D.C.C. § 61-21-20)

17. An appeal to the Department of Water Resources to review percentage assessments and examine the drain may be made by a majority of impacted landowners within ten days after the final assessment hearing. The department's corrections of assessments, or orders to relocate or redesign the drain, are final. (N.D.C.C. § 61-21-22)

18. Any landowner who feels no benefit is received from the project, but is assessed, may appeal the assessment to the department upon the filing of a two hundred- and fifty-dollar (\$250) bond with the board for the payment of the costs incurred by the department. The department may only determine whether the landowner will receive benefits or not. The department's decision is final. (N.D.C.C. § 61-21-22)

19. After the project has been in existence for one year or more, and upon the board's motion or a petition of any impacted landowner, the board is required to hold a hearing to determine the benefits of the project. Ten days' notice of the hearing must be given by publication in a newspaper of general circulation in the county and by mailing a notice to each landowner impacted by the project. The board cannot be required to make a reassessment more than once every ten years. (N.D.C.C. § 61-21-44)

20. If there is a deficiency in the assessment, it can be corrected by a general county levy. (N.D.C.C. § 61-21-55)

21. As with all water resource district projects, maintenance responsibilities and procedures should be determined prior to construction.

3. Procedures for Snagging and Clearing Projects Under N.D.C.C. § 61-16.1-09.1

N.D.C.C. § 61-16.1-09.1 was first enacted in 2001 to provide another method for establishing a special assessment for snagging and clearing projects. This method does not include a landowner vote, but rather a two-thirds vote of the water resource board and the county commission. The statute is self-explanatory.

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

1. 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 benefited by the project. The benefits of a project must be determined in the manner provided in section 61-16.1-17. 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 resolved by the department of water resources. All provisions of this chapter apply to assessments levied under this section except:

- a. An assessment may not exceed fifty cents per acre [.40 hectare] annually on agricultural lands and may not exceed fifty cents annually for each five hundred dollars of taxable valuation of nonagricultural property; and
- b. 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 in which the project is located must approve and levy the assessments to be made by a vote of two-thirds of its members.
 - (1) If a board that undertakes a project finds 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 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.
- c. All revenue from an assessment under this

section must be exhausted before a subsequent assessment covering any portion of lands subject to a prior assessment may be levied.

2. Before an assessment may be levied under this section, a public hearing must be held and attended by a quorum of the affected water resource boards and a quorum of the affected boards of county commissioners. The hearing must be preceded by notice as to date, time, location, and subject matter published in the official newspaper in the county or counties in which the proposed assessment is to be levied. The notice must be published at least ten days but not more than thirty days before the public hearing.

CONTRACTS AND BIDDING

Water resource districts should seek the advice and counsel of an attorney to ensure compliance with all laws governing the advertising and awarding of contracts for construction of projects.

1. Requirements for Competitive Bids

Water resource districts may let contracts by competitive bids under both Chapter 61-16.1 and Chapter 61-21.

- (a) N.D.C.C. § 61-16.1: If the cost of building or maintaining a project does not exceed the amount provided under N.D.C.C. § 48-01.2-02 (\$200,000), the water resource district may have the work done on a day work basis or let without advertising.
- N.D.C.C. § 61-16.1-14: If the cost is more than \$200,000, competitive bidding is required in

accordance with N.D.C.C. § 48-01.2.

If a water resource district desires to buy culverts and pipe arches, the district may use the bids -- if any -- received by the county within which the district has jurisdiction and accept one or more of these bids. (N.D.C.C. § 61-16.1-44) If the district decides to do this, it may buy materials from the accepted bidder or bidders for one year from the date of acceptance of the bids.

(b) N.D.C.C. § 61-21. If a water resource district uses the procedures of N.D.C.C. § 61-21 to build a drain, the district is bound by competitive bidding requirements, in accordance with N.D.C.C. § 48-02.1. and N.D.C.C. §§ 61-21-24 and 61-21-25.

Regarding bids for culverts and pipe arches, N.D.C.C. § 61-21 has the same provisions for culverts and pipe arches as in N.D.C.C. §§ 61-16.1-44 and 61-21-32.1.

Regarding cleaning or repairing a drain, if more than one cleaning or repairing project is carried out under one contract, and the project does not exceed the amount provided under N.D.C.C. § 48-01.2-02 (\$200,000) in any one year, such work may be done on a day work basis or the contract let without advertisement. (N.D.C.C. § 61-21-45) If the cost is greater than \$200,000 in any one year, a contract must be let in accordance with N.D.C.C. § 48-01.2. The competitive

bidding requirement may be waived in an emergency.

2. Advertisement for Bids

Proper advertisement must satisfy the following criteria:

(a) The advertisement must be published for three consecutive weeks, the first publication being at least 21 days before the date the bids are opened. (N.D.C.C. § 48-01.2-04)

(b) Besides the appropriate newspaper in which the public improvement is or will be located, the advertisement must be placed in a trade publication of general circulation among North Dakota contractors, building manufacturers, and dealers. (N.D.C.C. § 48-01.2-04)

(c) The water resource district's advertisement must contain the following:

- The nature of the work and the type and location of the proposed public improvement. (N.D.C.C. § 48.01.2-05(1))
- When and where plans, drawings, and specifications may be examined. (N.D.C.C. § 48-01.2-05(2))
- The date, place, and time the bids will be opened. (N.D.C.C. § 48-01.2-05(3))
- That each bid is to be accompanied by a separate

envelope containing a bidder's bond equal to five percent of the bid. This bond must be executed by the bidder as principal and by a surety company authorized to do business in North Dakota. It must contain the condition that if the bid is accepted and contract awarded, the bidder, within 10 days of the award, will sign a contract in accordance with the terms of the bid and will executive a contractor's bond as required by law and the district's regulations and determinations. (N.D.C.C. § 48-01.-05(4))

- That bidders, except bidders for municipal, rural and industrial water supply projects (MR&I projects) authorized under the Garrison Unit Reformulation Act of 1986 (Pub. L. No. 99-294, 100 Stat. 418), must be licensed for the amount of their bid in accordance with N.D.C.C. § 43-07-12. For MR&I projects authorized for funding under the Garrison Unit Reformulation Act, the advertisement must state that unless a bidder obtains a contractor's license for the amount of the bid within 20 days after it is determined to be the lowest and best bidder, the bid will be rejected, and the contract awarded to the next

lowest, best, and licensed bidder. (N.D.C.C. § 48-01.2-05(5))

- That no bid will be read or considered that fails to fully comply with the above provisions as to bonds and license, and any deficient bid will be resealed and immediately returned to the bidder. (N.D.C.C. § 48-01.2-05(6))
- The right of the district to reject all bids. (N.D.C.C. § 48-01.2-05(7))

3. A Qualified Bid

N.D.C.C. § 48-01.2-05 sets forth several of the requirements a bid must meet to be a valid bid. The provision applies to all projects the water resource district must bid pursuant to N.D.C.C. § 48-01.2.

(a) General

- A bid must be accompanied by a separate envelope containing a bidder's bond in a sum equal to five percent of the amount of the bid. The purpose of a bidder's bond is to guarantee a contract by the successful bidder and upon failure to do so, to indemnify the water resource district for damages and expenses.
- The bidder's bond must be executed by the

bidder as principal and by a surety company authorized to do business in North Dakota.

- The bond must have a condition saying that if the bid is accepted and a contract awarded to the bidder, the bidder will, within 10 days of the award, execute and effect:
 - i) a contract in accordance with the terms of the bid, and
 - ii) a contractor's bond as required by law and the district's regulations and determinations.

(b) License Requirements

Bidders must show they are licensed in accordance with N.D.C.C. § 43-07-07 for the highest amount of their bid. Except for bidders on MR&I projects, a copy of the license or certificate of renewal thereof must be in the bid bond envelope. The bidder must hold the proper license at least 10 days before the date set for receiving bids. No contract may be awarded to any contractor unless they hold a license in the class within which the value of the project falls. A bid submitted without this license information properly enclosed in the bid bond envelope may not be read or considered and must be

returned to the bidder. (N.D.C.C. § 43-07-12) The provisions of N.D.C.C. § 43-07-12, however, are not applicable to bids submitted for use of MR&I funds. For MR&I projects authorized for funding under the Garrison Reformulation Act, the bidder must obtain a contractor's license for the full amount of the contractor's bid within 20 days after it is determined the bidder is the lowest and best bidder. If the contractor's license is not submitted, the bid must be rejected and the contract awarded to the next lowest, best, licensed bidder. [It may also be noted that no foreign corporation may transact business in North Dakota or obtain any license or permit required by this state until it has procured a certificate of authority from the Secretary of State. (N.D.C.C. § 10-01.1)]

(c) Consequence of an Unqualified Bid

If a bid does not include the bond and licenses required in paragraphs (a) and (b) above, the bid must not be read and is to be returned to the bidder. (N.D.C.C. §§ 48-01.2-05(6), 43-07-12)

4. Bidding Procedure

At the time and place specified in the advertisement, the

water resource district's board of managers shall publicly open and read aloud all bids received. The board may award the contract to the lowest and best bidder or reject all bids and readvertise. (N.D.C.C. §§ 48-01.2-07)

5. Preferences

The water resource district "in purchasing any goods, merchandise, supplies, or equipment of any kind, or contracting to build or repair any building, structure, road, or other real property, shall give preference to bidders, sellers, or contractors resident in North Dakota." (N.D.C.C. § 44-08-01) This preference shall be equal to the preference given or required by the state of the nonresident bidder, seller, or contractor. Id. N.D.C.C. § 44-08-02 defines "resident North Dakota bidder."

6. The Contract

(a) The Bonds.

Before permitting any work to be done on a contract under which the total estimated cost of all work involved is more than \$200,000, the water resource district must receive a bond from the contractor for an amount equal at least to the price stated in the contract. (N.D.C.C. § 48-01.2-10) The purpose of this bond is to make certain all persons who furnish material and labor to the contractor or subcontractor will be paid. The bond must

be furnished by a surety company authorized to do business in North Dakota. (N.D.C.C. § 26.1-11-07) In every bond, in addition to general provisions regarding faithful performance of all work required under the contract, there must be a clause requiring the contractor to comply with certain aspects of the North Dakota worker's compensation law. (N.D.C.C. § 65-04-10) Another clause must say the contractor will pay or cause to be paid all sales and use taxes which may accrue. (N.D.C.C. §§ 57-40.2-14 and 57-39.2-04(15))

(b) Contents of the Contract

- All contracts -- except those involving federal funds and where a preference would be contrary to federal law -- let for construction, repair, or maintenance work, must have a provision requiring the contractor to give employment preference to North Dakota residents, with priority to qualified veterans. (N.D.C.C. § 43-07-20) The preference does not apply to engineering, superintendent, management, office, or clerical work. If the contractor fails to execute a contract with such a clause, no contract may be let.

- The water resource district may impose reasonable requirements and conditions precedent to the awarding of a contract for construction or reconstruction of public works. (N.D.C.C. § 43-07-06)
- The contract may not include a provision making the contractor liable for the owner's errors and omissions in the plans and specifications. (N.D.C.C. § 9-08-02.1)
- If a project involves federal funds, the contract may also require provisions satisfying federal laws, such as the Davis-Bacon Act, 40 U.S.C.S. §§ 276a-276a-7; the Anti-Kickback Act of 1986, 41 U.S.C.A. § 51; and Executive Order 11246 concerning equal employment opportunity and its revisions. To determine exactly what provisions should be in the contract, reference must be made to the law and federal funding agency.

MAINTENANCE OF ASSESSMENT DRAINS

The question often arises about the maintenance of an assessment drain. How much can a water resource district levy and how much money may a board accumulate for purposes of

drain maintenance?

N.D.C.C. §§ 61-16.1 and 61-21 each provide for a maximum levy of \$4.00 per acre per year on the highest assessed lands in the project, for the purpose of maintaining a project. These statutes also allow the board to accumulate a maintenance fund not to exceed the sum produced by the maximum levy for six (6) years. These statutes are clear regarding the maximum assessment and the amount that may be accumulated. N.D.C.C. § 61-16.1-39.1 provides that a petition may be made to a water resource district requesting maintenance specified in the petition. N.D.C.C. § 61-16.1-39.2 provides that a water resource district may finance the maintenance in the same manner the original project was financed, but if it is a special assessment, the \$4.00 per acre limitation for assessment drains is also applicable.

For projects constructed by a federal agency, the water resource district may finance in whole or in part the maintenance of the project with funds raised through the collection of a special assessment. The assessments may be levied not exceeding \$2.00 per acre on agricultural lands and \$2.00 per \$500 of taxable valuation on nonagricultural lands.

LAWS GOVERNING MAINTENANCE OF PROJECTS

61-16.1-39.1. Petition for maintenance - Bond required.

A written petition for maintenance of a project other than an assessment drain may be made to the board under this section. The petition shall designate the maintenance requested. The petition must be signed by six, or if a majority is less than six, by a majority of the landowners within the area benefited by the project. The petitioners shall supply a surety bond in the amount of two hundred fifty dollars. The bond must be for the payment of costs if the board finds the petition was improvidently made.

61-16.1-39.2. Maintenance of project - Exception.

If, upon receipt of a petition meeting the requirements of section 61-16.1-39.1, or upon the board's own motion, the board determines a project established under the provisions of this chapter requires maintenance, the board may provide the required maintenance by using the same method used initially to finance the project. Unless otherwise provided by law or agreement, the participation of the state in financing the initial project does not bind the state to finance any maintenance. Any maintenance financed through special assessments may not exceed the maximum levy established by section 61-16.1-45. This section does not apply to maintenance of assessment drains.

61-16.1-40. When dams constructed by federal agency under control of district.

Any dam, dike, or other water control device or flood control project constructed by or with the assistance of any federal agency but which is not maintained or operated by any federal agency shall become the responsibility of the district where it is located. The district may take any action concerning this dam, dike, or other water control device it deems feasible or necessary.

61-16.1-40.1. Maintenance of federally constructed projects - Assessment district established.

With regard to projects constructed by a federal agency, including the soil conservation service or natural resources conservation service, the water resource board may finance in whole or in part the maintenance of the project with funds raised through the

collection of a special assessment levied against the land and premises benefited by maintenance of the project. The assessments to be levied may not exceed four dollars per acre [.40 hectare] annually on agricultural lands and may not exceed two dollars annually for each five hundred dollars of taxable valuation of nonagricultural property. No action is required for the establishment of the assessment district or the assessments except the water resource board must approve the maintenance and assessment therefor by a vote of two-thirds of the members and the board of county commissioners of the county in which the project is located must approve and levy the assessments to be made by a vote of two-thirds of its members. If a board that undertakes a project finds that the project may benefit lands in this state outside water resource district boundaries, the board shall provide notice to the water resource board where the benefited lands are located. The board of each water resource district containing lands benefited by a project must approve the project and assessment by 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 vote of two-thirds of its members. If a project and assessment is not approved by all affected water resource boards and boards of county commissioners, 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 jointly addressed. 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 of the district. Before an assessment may be levied under this section, a public hearing must be held. The hearing must be preceded by notice as to date, time, location, and subject matter published in the official newspaper in the county or counties in which the proposed assessment is to be levied. The notice must be published at least ten days but not more than thirty days before the public hearing.

61-16.1-45. Maintenance of drainage projects.

1. If it is desired to provide for maintenance of an assessment drain in whole or in part by means of special assessments, the levy in any year for the maintenance may not exceed four dollars per acre [.40

hectare] on any agricultural lands benefited by the drain. The district, at its own discretion, may utilize either of the following methods for levying special assessments for the maintenance:

- a. Agricultural lands that carried the highest assessment when the drain was originally established, or received the most benefits under a reassessment of benefits, may be assessed the maximum amount of four dollars per acre [.40 hectare]. The assessment of other agricultural lands in the district must be based upon the proportion that the assessment of benefits at the time of construction or at the time of any reassessment of benefits bears to the assessment of the benefits of the agricultural land assessed the full four dollars per acre [.40 hectare]. Nonagricultural property must be assessed the sum in any one year as the ratio of the benefits under the original assessments or any reassessment bears to the assessment of agricultural lands bearing the highest assessment.
 - b. Agricultural lands must be assessed uniformly throughout the entire assessed area. Nonagricultural property must be assessed an amount not to exceed two dollars for each five hundred dollars of taxable valuation of the nonagricultural property.
2. In case the maximum levy or assessment on agricultural and nonagricultural property for any year will not produce an amount sufficient to cover the cost of cleaning out and repairing the drain, a water resource board may accumulate a fund in an amount not exceeding the sum produced by the maximum permissible levy for six years.
 3. If the cost of, or obligation for, the cleaning and repairing of any drain exceeds the total amount that may be levied by the board in any six-year period, the board shall obtain the approval of the majority of the landowners as determined by chapter 61-16.1 before obligating the district for the costs.

61-16.1-48. Assessment of costs of cleaning and repairing drains.

The cost of cleaning out and repairing an assessment

drain or a drainage structure constructed by any governmental entity for which no continuing funds for maintenance are available must be assessed pro rata against the lands benefited in the same proportion as the original assessment of the costs in establishing such drain, or in accordance with any reassessment of benefits if there has been a reassessment of benefits under the provisions of section 61-16.1-26. If no assessment for construction costs or reassessment of benefits has been made, the water resource board shall make assessments for the cost of cleaning and repairing such drain or drainage structure constructed by any governmental entity for which no continuing funds for maintenance are available in accordance with the provisions of this chapter for the establishment of a new project. The governing body of any incorporated city, by agreement with the board, is authorized to contribute to the cost of cleaning out, repairing, and maintaining a drain in excess of the amount assessed under this section, and such excess contribution may be expended for such purposes by the board.

61-21-43. Assessment of costs of cleaning and repairing drains.

The cost of cleaning out and repairing a drain or a drainage structure constructed by any governmental entity for which no continuing funds for maintenance are available must be assessed pro rata against the lands benefited in the same proportion as the original assessment of the costs in establishing such drain, or in accordance with any reassessment of benefits in instances in which there has been a reassessment of benefits under the provisions of section 61-21-44. If no assessment for construction costs or reassessment of benefits has been made, the board shall make assessments for the cost of cleaning and repairing such drain or drainage structure constructed by any governmental entity for which no continuing funds for maintenance are available after a hearing thereon as prescribed in this chapter in the case of a hearing on the petition for the establishment of a new drain. The governing body of any incorporated city, by agreement with the board, is authorized to contribute to the cost of cleaning out, repairing, and maintaining a drain in excess of the amount assessed under this section, and such excess contribution may be expended for such purposes by the board.

61-21-45. Contracts for work of cleaning and repairing drains.

If the cost of any work of cleaning out or repairing any drain, or system of legal drains, if more than one cleaning or repair project is carried on under one contract, does not exceed the amount provided for construction of a public improvement under section 48-01.2-02 in any one year, the work may be done on a day work basis or a contract may be let without being advertised. When the cost of such work exceeds the amount provided for construction of a public improvement under section 48-01.2-02 in any one year, a contract must be let in accordance with chapter 48-01.2. The competitive bid requirement is waived, upon the determination of the board that an emergency situation exists requiring the prompt repair of a project, and a contract may be made for the prompt repair of the project without seeking bids.

61-21-46. Maximum levy - Accumulation of fund.

1. The levy in any year for cleaning out and repairing a drain may not exceed four dollars per acre [.40 hectare] on any agricultural lands in the drainage district.
 - a. Agricultural lands that carried the highest assessment when the drain was originally established, or received the most benefits under a reassessment of benefits, may be assessed the maximum amount of four dollars per acre [.40 hectare]. The assessment of other agricultural lands in the district must be based upon the proportion that the assessment of benefits at the time of construction or at the time of any reassessment of benefits bears to the assessment of the benefits of the agricultural land assessed the full four dollars per acre [.40 hectare]. Nonagricultural property must be assessed the sum in any one year as the ratio of the benefits under the original assessments or any reassessments bears to the assessment of agricultural land bearing the highest assessment.
 - b. Agricultural lands must be assessed uniformly throughout the entire assessed area. Nonagricultural property must be assessed an amount not to exceed two dollars for each five

hundred dollars of taxable valuation of the nonagricultural property.

2. In case the maximum levy or assessment on agricultural and nonagricultural property for any year will not produce an amount sufficient to cover the cost of cleaning out and repairing the drain, the board may accumulate a fund in an amount not exceeding the sum produced by the maximum permissible levy for six years. If the cost of, or obligation for, the cleaning and repair of any drain exceeds the total amount that can be levied by the board in any six-year period, the board shall obtain an affirmative vote of the majority of the landowners as determined by section 61-21-16 before obligating the district for the costs.

61-21-47. Expenditures in excess of maximum levy.

If the cost of maintenance, cleaning out, and repairing any drain shall exceed the amount produced by the maximum levy of four dollars per acre [.40 hectare] in any year, with the amount accumulated in the drainage fund, the board may proceed with such cleaning out and make an additional levy only upon petition of at least sixty-one percent of the affected landowners. The percentage of the affected landowners signing such petition shall be determined in accordance with the weighted voting provisions in section 61-21-16.

RECENT COURT CASES

Since 1990, the North Dakota Supreme Court has issued opinions in several cases concerning water management. Those cases include:

- Cossette v. Cass County. Joint Water Res. Dist, 894 N.W.2d 858 (ND 2017).
- 2015 Application for Permit To Enter Land, 883 N.W. 2d 844 (ND 2016).
- Nandan, LLP v. City of Fargo, 858 N.W. 2d 892 (ND 2015).
- Burlington Northern and Santa Fe Railway Company, et.al

- vs. Benson County Water Resource District, 618 NW 2d 155 (ND 2000).
- Fandrich vs. Wells County board of County Commissioners, 618 NW 2d 166 (ND 2000).
 - Douville vs. Pembina County Water Resource District, 612 NW 2d 270 (ND 2000).
 - Huber vs. Oliver County, 602 NW 2d 710 (ND 1999).
 - Graber vs. Logan County Water Resource board, 598 NW 2d 846 (ND 1999).
 - Ness vs. Ward County Water Resource District, 585 NW 2d 793 (ND 1998).
 - Kadlec vs. Greendale Township board of Township Supervisors, 583 NW 2d 817 (ND 1998).
 - Mougey Farms vs. Kasper, 579 NW 2d 583 (ND 1998).
 - Southeast Cass Water Resource District vs. Burlington Northern Railroad Company, 527 NW 2d 884 (ND 1995).
 - Anderson vs. Richland County Water Resource board, 506 NW 2d 362 (ND 1993).
 - Nagel vs. Emmons County North Dakota Water Resource District, 474 NW 2d 46 (ND 1991).

The *Kadlec* and *Ness* opinions clearly state that water resource districts do not have the authority to order culverts to be installed in township, county, or state roads. While the Court encourages the cooperation of water resource districts, the authority to install culverts lies with the appropriate road authority.

The Benson County case extended that limit further by declaring that water resource districts also do not have the

authority to order culverts through railroad beds.

The Southeast Cass Water Resource District case upheld the requirement that railroads must install openings through the railroad tracks to accommodate assessment drains.

The Kadlec and Ness cases affirmed the longstanding principle that roads cannot alter the natural flow of water and cannot impound water on upstream lands. This principle was also affirmed in the Fandrich and Huber cases, both of which establish a standard of reasonableness in applying N.D.C.C. §§ 24-03-06 and 24-03-08 to road opening issues.

In the Nagel vs. Emmons County case, the Court declared that Emmons County had acquired a prescriptive easement when it changed the natural flow of water as part of a road project. The Court declared that a prescriptive easement began when road construction occurred, and not when the landowner received actual damage. Douville vs. Pembina Water Resource District also involved an argument over a prescriptive easement, which in Douville was denied. Douville also affirmed the authority of a water resource district to enforce unauthorized construction of dikes.

The 2015 Application for Permit to Enter Land opinion relates back to a case between the Cass County Joint Water Resource District (district) and a group of trustees for the Dorothy v. Brakke Revocable Living Trust. Essentially a group

of landowners appealed the decision that granted the district permission to enter their property so the district could conduct surveys, mapping, and examinations for a proposed flood control project. The biggest point of contention was the fact that the district proposed soil boring as part of the examination. The Supreme Court determined that, although the proposed soil borings penetrated the ground's surface, the testing was minimally invasive and the removal and subsequent replacement of one to two pints of soil for testing did not constitute a compensable taking. This allowed the proposed soil boring to go forward per N.D.C.C. § 32-15-06.

Under subsection one (1) of N.D.C.C. § 40-22-01, when a water resource district enters into an agreement with a municipality, like that in the Nandan case, a municipality may defray the expenses of any or all improvements by special assessments. These expenses can include incidental costs to the completion of an improvement project that falls into this category. While code leaves us with a rather vague understanding as to what exactly can be defined as incidental costs, from the opinion in Nandan, we can conclude what the courts might construe as incidental costs. In this case, the court ruled the project did not create any boulevards or public places, acquire any easements or real property, nor construct any parking lots, garages, ramps, or other

facilities for motor vehicles. While these are not the only factors that can go into determining if expenses are incidental, it does give us a good look into the thought process as to which costs could be considered incidental on a case-by-case basis.

Anderson upheld a local water resource district's authority for determining benefits for an assessment drain and affirmed the water resource district decision.

The Cossette case further define when a person becomes an "aggrieved" party eligible to bring an appeal to a water resource district under N.D.C.C § 61-16.1-54. While an aggrieved person is still determined on a case-by-case basis, the opinion of the Supreme Court in this case helps shed some light on when a party may have crossed the threshold and become "aggrieved". When the Cossette's brought their appeal, the water resource district had yet to vote on the project the Cossettes were appealing. Due to the uncertainty surrounding the fate of the project, the Supreme Court determined that the Cossette's were not an "aggrieved party".

INSTRUCTIONS FOR N.D.C.C. § 61-16.1 PROCEDURE

- Step 1: A written petition may be submitted to the board, or the board may initiate action on its own motion. (see Form 6-1)
- Step 2: The board must meet to adopt a resolution (see Form

- 6-2, the First Resolution). The board should:
- a. consider whether a bond should be filed;
 - b. determine whether further proceedings are warranted, and if so;
 - c. designate a registered engineer to assist; and
 - d. instruct the engineer what must be done.

Step 3: After the engineer has developed the plans, the board must again meet (see Form 6-3, the Second Resolution). The board should, among other things:

- a. approve the engineer's report;
- b. compute the assessments;
- c. set a hearing;
- d. establish protest procedures;
- e. instruct the secretary to publish a notice (Form 6-3); and
- f. instruct the secretary to file the resolution with the County Auditor.

Step 4: Conduct a hearing at least twenty (20) days after the notices are published (see Form 6-5).

Step 5: Issue an order to terminate or establish the project.

- a. An order establishing the project and accompanying notice are Forms 6-6 and 6-7.
- b. An order terminating the project and accompanying notice are Forms 6-8 and 6-9.

COST-SHARE POLICY, PROCEDURE, AND GENERAL REQUIREMENTS

The State Water Commission has adopted a policy to support local sponsors in development of sustainable water-related projects in North Dakota. The policy reflects the agency's cost-share priorities and provides the basic requirements for all projects considered for prioritization during the agency's budgeting process. Projects and studies that receive cost-share funding from the agency's

appropriated funds are consistent with the public interest. The State Water Commission values and relies on local sponsors and their participation to assure on-the-ground support for projects and prudent expenditure of funding for evaluations and project construction. It is the policy of the State Water Commission that only the items described in the policy are eligible for cost-share upon approval by the State Water Commission, unless specifically authorized by State Water Commission action. This policy can be found on the State Water Commission Website, www.swc.nd.gov.

5. The engineer shall prepare profiles, plans, and specifications for the proposed project, calculate estimates of the total cost thereof, and provide a map or plan of the lands impacted. A copy of the map or plan shall be filed in the office of the County Auditor for inspection by the public.

6. In determining the best location for the proposed project, the engineer may recommend the location on lines differing from the lines described in the petition. Further, the engineer may recommend that the project be revised. The estimate of costs prepared by the engineer 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 impacted landowners in the proposed project assessment district.

APPROVED BY THE BOARD OF MANAGERS this _____ day of _____, 20____.

_____, Chairman

order for the project to be terminated.

7. The Secretary of the board shall immediately file a copy of this resolution, along with all attached exhibits, with the County Auditor.

8. The Secretary of the board shall immediately publish the notice of hearing once a week for two consecutive weeks in the official county newspaper and a newspaper or newspapers of general circulation in the area in which the impacted landowners reside.

9. The list of assessments is a true and correct assessment of the benefits therein described to the best of our judgment.

10. The expenses incurred in developing the assessment were:

APPROVED BY THE BOARD OF MANAGERS this _____ day of _____, 20__.

_____, Chairman

Member

Member

Member

Member

STATE OF NORTH DAKOTA

BEFORE THE BOARD OF MANAGERS

COUNTY OF _____ COUNTY RESOURCE DISTRICT

In the Matter of _____)

The Construction of (Project) _____) NOTICE OF HEARING

1. A petition has been filed with the Board of Managers, _____ County Resource District, to construct (project). The proposed (project) would _____. The starting point, general course, and terminus of the drain, and a general description of the project, are detailed below:

2. The board has determined that it is necessary to construct and maintain (project). The board adopted the following resolution:

(Quote Second Resolution)

3. The assessment list has been filed with the County Auditor. The plans of the proposed drain have also been filed with the County Auditor. The assessment list and plans may be reviewed during normal business hours at the County Auditor's office.

Dated this _____ day of _____, 20__.

_____, Chairman

5. Impacted landowners were informed that protests must be filed or postmarked no later than: (This date must be more than 30 days after the date of hearing.)

6. Details concerning the protest procedures were explained.

7. Members of the board and representatives of _____ Engineering were available to answer questions from impacted landowners.

Dated this _____ day of _____,
20____.

_____, Chairman

5. The assessments for the project will be as follows:

6. The board will meet to hear objections to any assessment by any interested party, or an agent or attorney for that party, at the following time, date, and location: (The date must be more than 20 days after the first publication of the notice.)

7. The Secretary of the board shall give notice of this order to all impacted landowners by publishing a notice in a newspaper of general circulation in the area in which the impacted landowners reside and the official newspaper of this county once each week for two consecutive weeks. The notice shall recite paragraphs 1-6 of this Order.

Dated this _____ day of _____, 20__.

_____, Chairman

the project, are detailed below:

5. The assessments for the project will be as follows:
6. The board will meet to hear objections to any assessment by any interested party, or an agent or attorney for that party, at the following time, date, and location:

Dated this _____ day of _____, 20__.

_____, Chairman

STATE OF NORTH DAKOTA

BEFORE THE BOARD OF MANAGERS

COUNTY OF _____

_____ COUNTY RESOURCE DISTRICT

In the Matter of _____)

ORDER TERMINATING

The Construction of (Project) _____)

(PROJECT)

1. A Petition has been filed with the Board of Managers to construct (Project).

2. The board has complied with all procedural requirements of N.D.C.C. §§ 61-16.1-20 through 61-16.1-25 in handling the Petition.

3. Having determined that fifty percent or more of the impacted landowners protest the establishment of the proposed project, it is ordered that the Petition to establish (Project) is hereby denied.

4. The Secretary of the board shall give notice of this Order to all impacted landowners by publishing a notice in a newspaper of general circulation in the area in which the landowners reside and the official newspaper of this county once each week for two consecutive weeks. The notice shall recite paragraphs 1-3 of this Order.

Dated this _____ day of _____, 20__.

_____, Chairman

CHAPTER 7 - SURFACE DRAINAGE AND WETLANDS

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DRAINAGE LAW

There are two (2) bodies of law that govern drainage: statutory and judicial precedent.

1. Statutory Requirements for Drainage

Any person, before draining a pond, slough, lake, or sheetwater, or any series thereof which drains an area of 80 acres or more, must secure a permit. New drainage of 80 acres or more, or modification of existing drainage (deepening, widening, extending drains), requires a permit. Maintenance of existing drainage (i.e., cleaning and clearing obstructions from natural watercourses or artificial drains), does not require a permit.

N.D.C.C. § 61-32-03 contains North Dakota's drain permit law.

61-32-03. Permit to drain waters required - Penalty.

Any person, before draining a pond, slough, lake, or sheetwater, or any series thereof, which has a watershed area comprising eighty acres [32.37 hectares] or more, shall first secure a permit to do so. The permit application must be submitted to the department of water resources. The department shall refer the application to the water resource district or districts within which is found a majority of the watershed or drainage area of the pond, slough, lake, or sheetwater for consideration and approval, but the department may require applications proposing drainage of statewide or interdistrict significance be returned to the department for final approval. A permit may not be granted until an investigation discloses the quantity of water which will be drained from the pond, slough, lake, or sheetwater, or any series of those water bodies, will not flood or adversely affect downstream lands. If the

investigation shows that the proposed drainage will flood or adversely affect lands of downstream landowners, the water resource board may not issue a permit until flowage easements are obtained. The flowage easements must be filed for record in the office of the recorder of the county or counties in which the lands are situated. An owner of land proposing to drain shall undertake and agree to pay the expenses incurred in making the required investigation. This section does not apply to the construction or maintenance of any existing or prospective drain constructed under the supervision of a state or federal agency, as determined by the department of water resources.

Any person draining, or causing to be drained, a pond, slough, lake, or sheetwater, or any series of those water bodies, which has a watershed area comprising eighty acres [32.37 hectares] or more, without first securing a permit to do so, as provided by this section, is liable for all damage sustained by any person caused by the draining, and is guilty of an infraction. As used in this section, sheetwater means shallow water that floods land not normally subject to standing water. The department of water resources may adopt rules for temporary permits for emergency drainage.

An application for a drain permit by any person, including any firm, partnership, association, corporation, or any other type of private legal relationship, and any governmental organization, which includes any agency of the United States, a state agency, and any political subdivision of the state, must be filed with the Department of Water Resources on a form provided by the department. The applicant, if requested by the department or water resource district, shall provide an engineering analysis showing the downstream impacts of the proposed drainage.

The department initially reviews the applications to determine its sufficiency. The application is returned to the applicant for correction if it is incomplete, or if the information contained therein is insufficient to enable the department or water resource district to make an informed decision.

When the application is properly prepared and a permit is required, the department may add comments, recommendations, and engineering data which may assist the water resource district in reviewing the application. The department will also indicate whether the application proposes drainage which has statewide or inter-district significance.

In making the determination whether the drainage application involves drainage of statewide or inter-district significance, the department is guided by the following criteria:

1. Drainage which would impact property owned by the state or its political subdivisions.
2. Drainage of sloughs, ponds, or lakes having recognized fish and wildlife values.
3. Drainage or partial drainage of a meandered lake.
4. Drainage which would have a substantial impact on another water resource district.
5. Drainage which would convert previously noncontributing areas (based on twenty-five-year event-four percent chance) into permanently contributing areas.
6. For good cause, the department may classify any

proposed drainage as having statewide or inter-district significance, or the department may determine that certain proposed drainage is not of statewide or inter-district significance.

If the department determines that the proposed drainage is not of statewide or inter-district significance, the application will be forwarded to the water resource district where a majority of the watershed of the pond, slough, lake, or sheetwater, or any series thereof, is located. The board of the water resource district will then make the final decision to approve or deny the permit application. In doing so, the board shall review the permit application and may hold a public meeting to consider the project if the board determines it necessary. In approving or denying the permit application, the board must consider the volume of water proposed to be drained and its downstream impact; the project's impact on flooding problems in the project watershed; impacts to recognized fish and wildlife values; impacts on agricultural lands; the engineering design; whether easements are required; and other factors unique to the project.

If the department determines that the proposed drainage is of statewide or inter-district significance, the water resource board must set a date, time, and place for a hearing on the application. The purpose of this local hearing is to

establish a record concerning the application to drain and whether the application should be approved. The board shall give notice of the hearing by mail to the applicant, landowners whose property will be crossed by the proposed drain, downstream landowners who are adversely impacted (as determined by the board), the State Game and Fish Department, the State Department of Health, the Department of Water Resources, the State Department of Transportation, and any person who has made a written request for notification. The notice must be published in a newspaper of general circulation in the area of the proposed drainage project and must give essential facts of the proposed project including name and address of applicant; the legal description of the area to be drained; the purpose of the project; the watercourse into which the water will be drained; the time, date, and place of the board's hearing; and when and where information regarding the project is available. The hearing must be recorded, and the board must allow submission of all relevant oral or written evidence. In evaluating the permit application, the board shall consider the same factors listed above for application not of statewide or inter-district significance. At the conclusion of the hearing, the board must announce that a denial of a permit is final, and appeals

must be taken to the district court within thirty days, and that an approved application will be forwarded to the department for final decision.

The water resource board should make a determination on the application within sixty (60) days after receipt of the application from the department. This deadline may be extended only with the written consent of the department. For applications involving assessment drains, the 60-day time period does not commence until the date the assessments are finally established by the board and are no longer subject to appeal to a court of law or the department.

The following criteria will assist a water resource district in determining whether the drainage will cause flooding on, or otherwise adversely impact, downstream landowners. Those criteria are:

1. Uncontrolled drainage into receiving watercourses which do not have sufficient capacity to handle the additional flow and quantity of water shall be considered to have an adverse effect.
2. Whether drainage is accomplished by reasonably improving and aiding the normal and natural system of drainage according to its reasonable carrying capacity, or in the absence of a practical natural drain, a reasonable artificial drain system is adopted.
3. The amount of water proposed to be drained.
4. The design and other physical aspects of the drain.
5. The impact of sustained flow.

An application approved by the water resource board, if

not involving drainage of statewide or inter-district significance, is a permit to drain. In these cases, the permit is forwarded to the applicant, with notice of the board's action mailed to the Department of Water Resources. A denied application and the reasons for denial must be returned to the applicant, with a copy to the department.

If the board approves an application involving drainage of statewide or inter-district significance, the approved application, minutes of the board's action, minutes of the public hearing, copies of easements, copies of publication of notice, and all information used by the board in arriving at its decision must be forwarded immediately to the Department of Water Resources for a decision by the department. Notice of the board's action must be forwarded to the applicant.

A water resource district's decision approving or denying an application to drain may be appealed to district court. The appeal must be taken to the district court of the county in which the water resource district is located. An appeal of a board's order must be taken within 30 days after the decision has been entered by the secretary of the water resource board.

The Department of Water Resources, upon receiving an application to drain which has been approved by the board

that is of inter-district or statewide significance, must independently determine whether the granting of the permit is warranted. The department's evaluation shall use all relevant documentary information submitted, oral testimony given at the board's hearing and an independent evaluation of the project by department staff. In making a decision on the drainage application, the department will consider the same criteria as considered by the local water resource board. The department will either approve or deny the application, with or without additional conditions. If the department is not satisfied that all statutory requirements have been met, the department may return the application to the water resource district for reconsideration.

Any aggrieved party may request a departmental hearing on the project within thirty (30) days of the date of service of the department's decision. The department's decision may also be appealed to district court of the county in which the land is located. The decision of the department must be appealed within thirty (30) days after the decision of the department has been filed.

All permits shall include the following conditions:

a. The project and the rights granted under the permit are subject to modification to protect public health, safety,

and welfare.

b. That construction must be completed within two (2) years from the date of final approval. (A permit may be extended beyond two (2) years for good cause.)

If the permit was determined to be of statewide or inter-district significance, it shall include the following additional conditions:

a. All high erodible drainage channels must be seeded to a sod-forming grass.

b. The vegetative cover must be adequately maintained for the life of the project or control structures must be installed, or a combination of these two (2) criteria.

2. Judicial Precedent

In North Dakota, the Supreme Court has adopted the reasonable use doctrine. The reasonable use doctrine comes into play when the drainage permit laws do not apply or when an individual commences a court action for damages and/or a court order to close a drain. This doctrine is applied by the courts when addressing the merits of a case and is separate from applicable statutory requirements. The reasonable use doctrine provides that in providing reasonable use of land for a legitimate purpose, a landowner, acting in good faith, may drain his land of surface waters and cast them as a burden upon the land of another, despite the fact that such drainage includes some waters which otherwise would have remained on

the land until absorbed or evaporated. However, such drainage must take place in accordance with the following conditions:

- a. There is a reasonable necessity for such drainage;
- b. Reasonable care is taken to avoid unnecessary injury to the land receiving the burden;
- c. The utility or benefit accruing to the land drained reasonably outweighs the gravity of harm resulting to the land receiving the burden; and
- d. Where practicable, it is accomplished by reasonably improving and aiding the normal and natural system of drainage according to its reasonable carrying capacity, or if, in the absence of a practicable natural drain, a reasonable and feasible artificial drainage system is adopted.

DRAINAGE ENFORCEMENT

Water resource districts have the primary responsibility for drainage enforcement pursuant to N.D.C.C. § 61-32-07.

61-32-07. Closing a noncomplying drain - Notice and hearing - Appeal - Injunction - Frivolous complaints.

1. Only a landowner experiencing flooding or adverse effects from an unauthorized drain constructed before January 1, 1975, may file a complaint with the water resource board. Any person may file a complaint about an unauthorized drain constructed after January 1, 1975. Upon receipt of a complaint of unauthorized drainage, the water resource board shall promptly investigate and make a determination of the facts with respect to the complaint. If the board determines that a drain, lateral drain, or ditch has been opened or established by a landowner or tenant contrary to this title or any rules adopted by the board, the board shall notify the landowner by certified mail at the landowner's post-office address of record. A copy of the notice must also be sent to the tenant, if known. The notice must specify the nature and extent of the noncompliance and must state that if the drain, lateral drain, or ditch is not closed or filled within a reasonable time as the board determines, but not less than fifteen days, the board shall procure the

closing or filling of the drain, lateral drain, or ditch and assess the cost of the closing or filling, or the portion the board determines, against the property of the landowner responsible. The notice must also state that the affected landowner, within fifteen days of the date the notice is mailed, may demand, in writing, a hearing on the matter. Upon receipt of the demand, the board shall set a hearing date within fifteen days from the date the demand is received. In the event of an emergency, the board may immediately apply to the appropriate district court for an injunction prohibiting the landowner or tenant from constructing or maintaining the drain, lateral drain, or ditch and ordering the closure of the illegal drain. Assessments levied under this section must be collected in the same manner as assessments authorized by chapter 61-16.1. If, in the opinion of the board, more than one landowner or tenant has been responsible, the costs may be assessed on a pro rata basis in proportion to the responsibility of the landowners. If a complaint is frivolous in the discretion of the board, the board may assess the costs of the frivolous complaint against the complainant.

2. Following the closing or filling of an unauthorized drain, either by a water resource board or by a party complying with an order of a water resource board, the board may assess its costs against the property of the responsible landowner.

The original statute requiring a permit to drain became law on July 1, 1957. Drainage constructed prior to July 1, 1957, does not need a permit. However, if the drainage is causing damage, the landowner(s) receiving the damage can file a lawsuit in district court. The court would apply the reasonable use doctrine discussed above.

1. Exemptions

There were a number of exemptions to permitting in the

original drainage statute. A drainage permit was not required for: drainage of a pond, slough, or lake if the drainage area was less than 80 acres; if the drainage was constructed under the supervision of a state or federal agency; if the drain was established by a board of county commissioners or a board of township supervisors; or if the county in which the drain is located had a board of drain commissioners. In 1975, the exemptions for county commissioners, townships, and counties that had a board of drain commissioners were removed. In 1981, the exemption concerning drainage constructed under the supervision of a state or federal agency was changed to only those agencies approved by the state. Also in 1981, language was added that only landowners experiencing flooding or adverse impacts from drainage constructed prior to 1975 could file a complaint.

2. Investigation

The question that water resource districts must answer when processing drainage complaints is whether a permit was required at the time the drain was constructed. To make this determination, the water resource district board of managers must conduct an investigation. The board can retain professional help (engineers, surveyors, attorneys, etc.) to assist in the investigation.

3. Determination by Water Resource District

It is recommended that a water resource district develop a formalized procedure to carry out its responsibilities. This will allow the board to respond quickly and effectively, as well as to assure fair and consistent procedures when responding to complaints. These procedures should include the requirement that all complaints filed with the board be written and contain, at a minimum, the legal description of the land involved and the complainant's signature(s). The board must make a decision on the complaint within a reasonable time, but not to exceed 120 days after receiving the complaint. After the board has completed its investigation, it should organize all data concerning the complaint and review the information at a regular or special board meeting and make a determination. This decision must be recorded in the board's minutes of the regular or special meeting.

4. Notification, Hearing, Appeal

If the board determines that no violation occurred, a letter stating this and the board's reasons for reaching such a decision should be sent to the complainant(s) and all interested parties. The letter should also state that a person aggrieved by action of the board may appeal the board's

decision to district court or, if the drainage was constructed after January 1, 1987, to the Department of Water Resources. If the board determines that the drainage is in violation of N.D.C.C. § 61-32-07, the board must:

1. Notify the landowners(s) by registered mail at the landowner's post office address of record, and a copy of the notice must be sent to the tenant, if known.
2. The notice must specify the nature and extent of the noncompliance and must state that if the drain is closed or filled within a reasonable time (determined by the board), but not less than 15 days, the board shall procure the closing or filling of the drain and assess the costs against the property of the landowners(s) responsible.
3. The notice must state that the impacted landowner(s), within 15 days of the date the notice is mailed, may demand, in writing, a hearing before the board on the matter.

Although not required, the notice should also state that any person aggrieved by the board's action may appeal the decision to district court or, if the drainage was constructed after January 1, 1987, to the Department of Water Resources.

It is important that the water resource districts act efficiently, fairly, and professionally when responding to complaints. Such action reflects the water resource district's willingness to serve the public.

SUPREME COURT CASES

North Dakota Supreme Court decisions addressed issues related to the provisions of the original drainage statute

before its repeal in 1975.

The Supreme Court has ruled that the drainage permit requirements prior to 1975 do not apply to counties that had county drain boards, whether these boards were separate entities, or whether a single board was appointed as a drain commission and water management district.

A Supreme Court decision, In the Matter of Drainage by Persons, Et al., involved a Barnes County drain constructed in 1969 with financial assistance from the Soil Conservation Service (SCS). In 1979, 50 downstream landowners filed a complaint with the Barnes County Water Management District. The board ruled that the drain was not permitted, and that the drain be closed. The drainers appealed to district court and received a favorable decision. The downstream landowners then appealed to the North Dakota Supreme Court.

The sole issue presented to the Supreme Court on appeal was whether the federal involvement in this case exempted the drain from the permit requirements of N.D.C.C. § 61-01-22.

The answer to that issue centered around the meaning of the term "supervision". The Court said that the term, although broad, was not ambiguous and that "supervision" generally means to oversee, inspect, or manage. The Supreme Court said that since the SCS took an active role in the construction of

the drain, evidence upheld the lower court's determination that the drain was federally "supervised" and therefore exempt from the permit requirement.

The controlling statement of the Court was that the word "supervision", as used in the drainage law, requires greater involvement in a drainage project than rendering mere technical assistance. Thus, because the SCS had taken an active role (feasibility study, design, overseeing construction, examining completed project, etc.) in the drain process, the drain was exempt from the permit requirements.

The Rush Lake case is another case that limited water resource districts' regulatory authority over drainage. The ruling in the case was that the State Engineer had no regulatory authority over drainage occurring between 1957 and 1975 in counties that (1) had a board of drain commissioners in any form; and (2) established drainage projects pursuant to N.D.C.C. § 61-21, because those drains are exempt from the drainage law. The case also held that the State Engineer had regulatory authority over the drainage of all meandered bodies of water.

These principles have thus been established:

1. Only landowners experiencing flooding or adverse impacts from unauthorized drainage constructed between 1957 and 1975 may file a complaint to close a drain.

2. Drains constructed prior to 1981 and constructed under the supervision of a federal agency are exempt from the permit requirement.
3. Between 1957 and 1975, counties with boards of drain commissioners were exempted from the drainage permit requirements as well as drains constructed under Chapter 61-21.

A number of cases have resulted in opinions concerning North Dakota's drain permit law, enacted in 1975, revised in 1987, and further amended several times since. These include:

1. Bottineau County Water Resource District v North Dakota Wildlife Society, 424 NW2d 852 (ND 1988).
2. Lang v Wonnenberg 455 NW2d 852 (ND 1990).
3. Nilson v Markestad, 353 NW2d 312 (ND 1984).
4. In re Persons, 334 NW2d 471 (ND 1983).
5. Graber v Logan County Water Resource Board, 598 NW2d 846 (ND 1999).

WETLAND CONSERVATION PROVISIONS (SWAMPBUSTER)

The Food Security Act of 1985, as amended, applies to landowners/operators that participate in USDA programs. Section 1221 of the Act disqualifies a landowner from receiving USDA farm program benefits if they convert wetlands. A USDA participant that converts wetlands is ineligible for USDA benefits on all farms owned or operated by the participant and remains ineligible until the wetland is restored or mitigated.

A converted wetland is a wetland that after December 23, 1985, has been drained, dredged, filled, leveled, or

otherwise manipulated (including the removal of woody vegetation or any activity that results in impairing or reducing the flow and circulation of water) for the purpose of, or to have the effect of, making the production of an agricultural commodity possible.

USDA participants are encouraged to have a certified wetland determination completed prior to manipulating wetlands. Certified wetland determinations offer landowners the assurance of a final wetland determination. A certified determination will not change as long as the site remains in agricultural use (provided no violations occur). The Natural Resources Conservation Service (NRCS) makes certified wetland determinations and delineations when a USDA participant submits form AD-1026. NRCS will also provide advice about planned activities. USDA participants may hire a consultant to identify and delineate wetlands; however, NRCS will review the work and make the final wetland determination.

The Farm Bill does provide for exemptions. Five main exemptions are:

1. Prior converted wetland (PC) is a wetland that was converted prior to December 23, 1985. The wetland no longer meets the criteria needed to be considered a wetland. PCs

are exempt under the Farm Bill. PC areas have been extensively manipulated and drained and are therefore no longer wetlands. Production of an agricultural commodity and maintenance or improvement of drainage systems on the PC area is exempt from the wetland conservation provisions.

2. A minimal effect exemption is applicable to actions that manipulate a wetland but has only a minimal impact on the function of the wetland. The wetland conservation provisions allow landowners to produce agricultural commodities even if their actions involve converting a wetland, as long as there is only a minor impact on the functions and values of the landowner's wetland and other wetlands in the area. Landowners must request a minimal effect exemption at the local NRCS office. A conservationist will visit the wetland, discuss the proposed action, and determine if impacts are minimal. If the planned manipulation is considered a potential conversion, NRCS will conduct a wetland functional assessment and determine if the proposed project will have minimal effect on the wetland functions in the area.

3. A mitigation exemption is applicable when a USDA participant compensates for the conversion of the wetland functions through: restoration of a wetland converted

prior to December 23, 1985; creation of equivalent wetland functions; or enhancement of an existing wetland on a new site in the area.

Restoration of a wetland returns the natural and/or historic functions to a former or degraded wetland. Creation of a wetland means the manipulation of the physical, chemical, or biological characteristics present to develop a wetland where a wetland did not previously exist.

Enhancement of a wetland is manipulation of the physical, chemical, or biological characteristics on either an undisturbed or a degraded wetland site that will heighten, intensify, and/or improve specific wetland functions or change the growth stage or composition of the vegetation present, and is undertaken for specified purposes such as water quality improvement, flood water retention, or wildlife habitat improvement. Due to the potential loss of other functions, enhancement may not be adequate to mitigate for lost wetland functions and is rarely used. Preservation of a wetland is not an authorized form of mitigation under the Farm Bill.

All mitigation techniques must be completed according to a mitigation plan approved by NRCS. The mitigation plan must

provide for the equivalent wetland acres and functions that will be lost as a result of the wetland conversion. Mitigation occurs before or at the same time as the wetland conversion or production of an agricultural commodity. Mitigation cannot be at the expense of the Federal Government and the wetlands mitigated must be in the same general area of the local watershed as the converted wetlands. If available, regional mitigation banks can be used.

As part of the mitigation process, the landowner grants USDA an easement that will be recorded on public land records. The easement will remain valid for as long as the converted wetland mitigated remains in agricultural use or is returned to its original wetland status with equal functions. For the life of the easement, any alteration to the restored, enhanced, or created wetland that lowers the wetlands functions is not allowed.

4. A good faith exemption is a determination by the Farm Service Agency (FSA) that a wetland violation occurred without intent of the landowner to violate. If FSA grants a good faith violation, NRCS will assist in the development of a mitigation plan to restore the wetland functions. The practices in the plan must be installed within one (1)

year. If the practices in the plan are properly installed, and all conditions are met, the landowner will not risk loss of program benefits due to the wetland violation.

5. A third-party exemption applies when a wetland is converted due to actions not under the USDA participant's control. FSA is responsible for determining when this exemption applies. Wetland conversions caused by a water resource district, drainage district, local road authority, or similar entity are not considered eligible.

A USDA participant can maintain surface drainage ditches or repair tile from a wetland. NRCS will conduct the scope and effect determination of the drainage system. The drainage system can be maintained as it existed on December 23, 1985. This means that tile may be repaired, and ditches may be cleaned, as long as no added drainage capacity is achieved. USDA program participants must complete form AD-1026 prior to beginning the proposed project.

Trees and stumps may be removed only if the effect is minimal, or if wetland functions are replaced through mitigation, and all required permits are obtained prior to the activity.

LINKS

CHAPTER 8 - Subsurface Drainage / Drain Tile

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Introduction

During the 65th Legislative Session, the state legislature passed House Bill 1390 which changed how water resource districts handle subsurface drainage permits. Essentially, HB 1390 updated the process to receive a permit for the installation of drain tile that covers 80 acres [32.37 hectares] or more. The 67th Legislature made additional clarifications to the process for applying for drainage permits on projects of 80 acres or more and added a notification requirement for projects covering less than 80 acres.

Application Requirements

When applying for a subsurface permit, for a project of 80 acres or more, the landowner must submit a completed application to the water resource district board where the majority of the land is found. The water resource district board may charge a permit application fee of up to \$500, an increase from the \$150 fee limit previously in place.

In order for an application to be considered complete, it must include:

1. A completed "Application to Install a Subsurface Water Management System" form, found on the State Water Commission website;

2. Evidence of ownership for each parcel to be tiled according to the tax rolls of the county in which the parcel is located;
3. A project design, including:
 - a. A detailed drawing depicting the subsurface water management system's location overlain on an aerial photo of the parcel;
 - b. The system's location by legal description identifying either the relevant quarter, section, township, and range (for unplatted land) or the relevant block and lot number (for platted land);
 - c. The physical footprint of the system's layout;
 - d. The tile - main sizes and locations;
 - e. The laterals to the tile - main sizes and locations;
 - f. Surface inlet sizes, and locations; and
 - g. Outlet sizes, locations, and types;
4. A downstream flow map or depiction of the flow direction from each outlet location for one mile [1.61 kilometers] downstream which includes the location of the downstream parcels by legal description identifying either the relevant quarter, section, township, and range or the relevant block and lot number; and
5. Evidence of ownership for each parcel within one mile [1.61 kilometers] downstream of each project outlet according to the tax rolls for the county in which the parcel is located, unless the distance to the nearest assessment drain, natural watercourse, slough, or lake is less than one mile [1.61 kilometers] downstream of a proposed outlet, in which case the applicant shall provide evidence of ownership for each parcel between the outlet and the nearest assessment drain, natural watercourse, slough, or lake.

Permit Process

Water resource districts have three business days after the day the district receives an application to certify whether an application is complete. If an application is not complete, the water resource district must notify the applicant and provide a list of additional information needed. The law is silent on the method of notification;

consider calling an applicant or their tile contractor if an application is incomplete, then following up by email or otherwise in writing. Absent a notification from the water resource district within that timeline, the application is deemed complete.

Water resource districts are allowed to add certain conditions to a permit if the district deems those conditions necessary. Per N.D.C.C 61-32-03.1 the allowable conditions a water resource district can choose from are:

- a. Outlet locations including requirements for pump and control structures to be installed no closer than - 25 feet [7.62 meters] from the top of the back slope of an assessment drain.
- b. Installation and maintenance of proper erosion control at all outlets.
- c. Re-establishment of disturbed areas to previous conditions.
- d. The minimum distance from rural water supply lines. (However, a district may not attach a condition requiring a system to extend beyond an existing easement for a rural waterline, or, if the rural waterline was installed under a blanket easement, requiring a system to extend beyond 20 feet [6.1 meters] from either side of a rural waterline.)
- e. Installation and operation of control structures at project outlets including requirements for control structures to be closed or pump outlets to be turned off during critical flood periods.
- f. Requirements for a permittee to obtain an amendment to a permit for alterations to outlet locations, new outlets, or improvements resulting in drainage of additional acres.
- g. If the subsurface water management system will discharge into the watershed area of an assessment drain, inclusion of the relevant property into the assessment district for the assessment drain in accordance with the benefits the property receives, provided the property is not assessed already for

the assessment drain. (The water resource district may include the new property into the assessment district and determine the benefits and assessment amounts under chapters 61 - 21 and 61 - 16.1, without conducting the reassessment of benefit proceedings under sections 61 - 21 - 44 and 61 - 16.1 - 26, provided the property is not assessed already for the assessment drain.)

- h. Requirements for a permittee to remove silt and vegetation, or repair erosion and scour damages directly caused by the subsurface water management system, up to one mile [1.61 kilometers] downstream from a proposed outlet, unless the distance to the nearest assessment drain, natural watercourse, slough, or lake is less than one mile [1.61 kilometers] downstream of the proposed outlet, in which case the district may require silt and vegetation removal or erosion and scour damage repair between the outlet and the nearest assessment drain, natural watercourse, slough, or lake. For purposes of this subdivision and subdivision i:

- (1) Downstream damage repair does not include deepening or widening a road ditch or existing drain;

- (2) The timing and method of silt and vegetation removal or damage repair in a county or township road ditch must be preapproved by the appropriate road authority; and

- (3) The applicant shall follow any construction site protection requirements of the road authority.

- i. If a downstream landowner or road authority presents substantial evidence that a subsurface water management system directly has caused accumulation of silt, vegetation erosion, or scouring, the requirement or authorization of the applicant to remove the silt and vegetation or repair the erosion and scour damages directly caused by the system. However, the applicant may not spread silt, vegetation, or debris along adjoining land without the permission of all parties having a legal interest in the land.

It is important to note that water resource districts should be judicious in the use of these conditions, and should justify their application in the district's minutes.

Under the streamlined procedure passed in HB 1437, the district has 30 days from receipt of the application to approve the application with conditions. If 30 days lapse, the permit is deemed approved with no conditions.

After approving the permit, districts are required to forward notice of the approved permit and the downstream flow map to the Department of Water Resources and each downstream landowner within one mile of each project outlet. The project design submitted with the application is an exempt record and should only be provided to individuals needing access to it to make a decision on the permit application (e.g., water managers, Secretary-Treasurer, the water resource district's engineer, the water resource district's attorney).

Appeal

The decision of any board to deny an application or attach conditions to an approved permit can be appealed, under N.D.C.C. 28-34-01, to the district court of the county in which the permit application was filed.

28-34-01. Appeals from local governing bodies - Procedures.

This section, to the extent that it is not inconsistent with procedural rules adopted by the North Dakota supreme court,

governs any appeal provided by statute from the decision of a local governing body, except those court reviews provided under sections 2-04-11 and 40-51.2-15. For the purposes of this section, "local governing body" includes any officer, board, commission, resource or conservation district, or other political subdivision. Each appeal is governed by the following procedure:

1. The notice of appeal must be filed with the clerk of the court within thirty days after the decision of the local governing body. A copy of the notice of appeal must be served on the local governing body in the manner provided by rule 4 of the North Dakota Rules of Civil Procedure.
2. The appellee shall prepare and file a single copy of the record on appeal with the court. Within thirty days, or such longer time as the court by order may direct, after the notice of appeal has been filed in the court, and after the deposit by the appellant of the estimated cost of a transcript of the evidence, the local governing body shall prepare and file in the office of the clerk of the court in which the appeal is pending the original or a certified copy of the entire proceedings before the local governing body, or such abstract of the record as may be agreed upon and stipulated by the parties, including the pleadings, notices, transcripts of all testimony taken, exhibits, reports or memoranda, exceptions or objections, briefs, findings of fact, proposed findings of fact submitted to the local governing body, and the decision of the local governing body in the proceedings. If the notice of appeal specifies that no exception or objection is made to the local governing body's findings of fact, and that the appeal is concerned only with the local governing body's conclusions based on the facts found by it, the evidence submitted at the hearing before the local governing body must be omitted from the record filed in the court. The court may permit amendments or additions to the record to complete the record.
3. If the court determines on its own motion or if an application for leave to adduce additional evidence is made to the court in which an appeal from a determination from a local governing body is pending, and it is shown to the satisfaction of the court that such additional evidence is material and that there are reasonable grounds for the failure to adduce such evidence in the hearing or proceeding had before the local governing body, or that such evidence is material to the issues involved and was rejected or excluded by the local governing body, the court may order that such additional evidence be taken, heard, and considered by the local governing body on such terms

and conditions as the court may determine. After considering the additional evidence, the local governing body may amend or modify its decision and shall file with the court a transcript of the additional evidence together with its new or modified decision, if any.

Notification Provisions

The 67th Legislature also instituted a notification requirement for subsurface drainage projects comprising less than 80 acres (32.37 hectares) of agricultural land where the project will allow for flow of water off the landowner's personal property. Projects that are on farmyards or other non-agricultural lands are exempted. Also exempted are projects where drained water will remain on the landowner's property.

The notification, which could be an email or phone call to the water resource district, should include the following information:

1. The system's total acreage and legal description of the land being drained;
2. The outlet locations and types; and
3. The flow direction from each outlet location.

A project requiring notification must also ensure the project is installed such that pump and control structures at pump outlets are installed more than 25 feet (7.62 meters) from the top of the back slope of an assessment drain. The project must also have proper erosion controls installed and maintained at all outlets and pumps and control structures

must be able to be turned off or closed during critical flood periods. (N.D.C.C. 61-32-03.2)

Information received by water resource districts on projects less than 80 acres is exempt from disclosure.

This notification provision is effective until December 31, 2022. The legislature has indicated its intent to revisit this requirement in the 2023 Legislative Session.

LINKS

Application to Install Subsurface Water Management System:
https://www.swc.nd.gov/pdfs/sfn_61244_application_to_install_a_subsurface_water_management_system.pdf

Notification to Install Subsurface Water Management System:
http://www.swc.state.nd.us/pdfs/sfn_61990_notification_install_subsurface_water_management_system.pdf

CHAPTER 9 - DIKES, DAMS, AND OTHER STRUCTURES

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PERMITS FOR DAMS, DIKES, AND OTHER STRUCTURES

The Department of Water Resources has the primary responsibility for permitting dams, dikes, and other devices which are capable of retaining, obstructing, or diverting more than 50-acre feet or 25-acre feet of water for a medium-hazard or high-hazard dam. The department must not allow construction of unsafe unauthorized dams, dikes, or other devices, and is responsible for allocating the use of water. A dam, dike, or other device is unsafe if it threatens harm to life or property or is improperly maintained. Water resource districts also have authorities in the permitting of dams, dikes, or other devices. These specific authorities are set forth in the following statutes:

61-16.1-38. Permit to construct or modify dam, dike, or other device required - Penalty - Emergency.

No dikes, dams, or other devices for water conservation, flood control regulation, watershed improvement, or storage of water which are capable of retaining, obstructing, or diverting more than fifty acre-feet [61674.08 cubic meters] of water or twenty-five acre-feet [30837.04 cubic meters] of water for a medium-hazard or high-hazard dam, may be constructed within any district except in accordance with the provisions of this chapter. An application for the construction of any dike, dam, or other device, along with complete plans and specifications, must be presented first to the department of water resources . Except for low-hazard dams less than ten feet [3.05 meters] in height or agricultural dikes less than two feet [0.61 meters] in height, the plans and specifications must be completed by a professional engineer registered in this state. After receipt, the department shall consider the application in such detail as the department deems necessary and proper. The department shall refuse to allow the construction of any unsafe or improper dike,

dam, or other device which would interfere with the orderly control of the water resources of the district, or may order changes, conditions, or modifications as in the judgment of the department may be necessary for safety or the protection of property. Within forty-five days after receipt of the application, except in unique or complex situations, the department shall complete the department's initial review of the application and forward the application, along with any changes, conditions, or modifications, to the water resource board of the district within which the contemplated project is located. The board shall consider the application within forty-five days and suggest any changes, conditions, or modifications to the department. If the board approves the application, the board shall forward the approved application to the department. If the board fails to respond within forty-five days, the board will be deemed to have no changes, conditions, or modifications to make. The department shall make the final decision on the application and forward that decision to the applicant and the local water resource board. The department may issue temporary permits for dikes, dams, or other devices in cases of an emergency. Any person constructing a dam, dike, or other device, capable of retaining, obstructing, or diverting more than fifty acre-feet [61674.08 cubic meters] of water or twenty-five acre-feet [30837.04 cubic meters] of water for a medium-hazard or high-hazard dam, without first securing a permit to do so, as required by this section, is liable for all damages proximately caused by the dam, dike, or other device, and is guilty of a class B misdemeanor.

61-16.1-39. Dams or other devices constructed within a district shall come under control of a water resource board.

All dams, dikes, and other water conservation and flood control works or devices constructed within any district, unless specifically exempted, are under the jurisdiction of the water resource board for the district within which the dam, dike, works, or device exists or is to be constructed. The district's jurisdiction over the dam, dike, works, or device does not affect the commission's or department's authority relative to the dam, dike, works, or device. No changes or modification of any existing dams, dikes, or other works or devices may be made without complying fully

with the provisions of this chapter.

61-16.1-40. When dams constructed by federal agency under control of district. Any dam, dike, or other water control device or flood control project constructed by or with the assistance of any federal agency but which is not maintained or operated by any federal agency shall become the responsibility of the district where it is located. The district may take any action concerning this dam, dike, or other water control device it deems feasible or necessary.

The procedures for permitting applicable dams, dikes, and other devices are:

1. An application, along with complete plans and specifications, must first be presented to the Department of Water Resources. Except for low-hazard dams less than ten feet in height or agricultural dikes less than two feet in height, the plans and specifications must be completed by a professional engineer registered in North Dakota.
2. The department then conducts a brief initial review of the application and accompanying data.
3. Within 45 days of receipt of the application, the department must forward the application with any changes to the water resource district where the project is located.
4. The water resource district has 45 days to consider the application and suggest any changes or conditions and forward the application to the department.
5. The department makes the final decision on the application and notifies the applicant and the water resource district.

In the permit process, it is the water resource district's responsibility to recommend changes, conditions, or modifications to the department.

The following definitions have been developed by the

Department of Water Resources.

1. "Dam" means any artificial barrier obstruction, including any appurtenant works, across a stream channel, watercourse, or an area that drains naturally or may impound water.
2. "Dike" means an embankment, including appurtenant works, constructed to protect real or personal property.
3. "High-hazard dam" means any dam located upstream of developed or urban areas where failure may cause serious damage to homes, industrial and commercial buildings, and major public utilities. There is potential for the loss of more than a few lives if the dam fails.
4. "Low-hazard dam" means a dam located in rural or agricultural areas where there is little possibility of future development. Failure of low-hazard dams may result in damage to agricultural land, township or county roads, and farm buildings other than residences. No loss of life is expected if the dam fails.
5. "Medium-hazard dam" means a dam located in predominantly rural or agricultural areas where failure may damage isolated homes, main highways, or railroads, or cause interruption of minor public utilities. The potential for the loss of a few lives may be expected if the dam fails.
6. "Other device" means a water control structure, other than a dam or dike, which may include, but is not limited to, diversion ditches, dugouts, lagoons, and holding ponds.

REMOVAL OF UNAUTHORIZED DIKES, DAMS, OR OTHER STRUCTURES

Water resource districts and the Department of Water Resources have concurrent responsibility and authority to remove dams, dikes, or other structures that have not been authorized. The procedure for water resource districts to

remove a dam, dike, or other structure is as follows:

1. Upon receipt of a complaint of unauthorized construction of a structure, the board must promptly investigate and make a determination. The board shall make a determination within a reasonable time, not exceeding 120 days after receiving the complaint and shall notify all parties of its decision by registered mail.
2. If the board determines that the structure is capable of retaining, obstructing, or diverting more than 50-acre feet of water or 25-acre feet of water for a medium-hazard or high-hazard dam and was constructed without the proper permit(s), the board must notify the landowner by registered mail at the landowner's post office address of record. A copy of the notice must also be sent to the tenant, if any.
3. The notice must specify the nature and extent of the noncompliance and that if the structure is not removed within the period specified by the board, but not less than 15 days, the board shall have the structure removed with costs assessed against the property of the landowner.
4. The notice must state that the impacted landowner, within 15 days of the date the notice is mailed, may demand, in writing, a hearing on the matter.
5. Upon receipt of a demand for a hearing, a hearing date must be set within 15 days from the date the demand is received.
6. The notice should also state, any person aggrieved by the board's action may appeal to the district court (a hearing is not a prerequisite to an appeal to district court) and that the board's decision may also be appealed to the Department of Water Resources by any aggrieved party within 30 days from the date notice of the board's decision was received. The appeal must be in writing and must specifically set forth the reason why the appealing party believes the board's decision is erroneous.

If the board fails to investigate and make a

determination within 120 days, the person filing the complaint may file the complaint with the Department of Water Resources.

N.D.C.C. § 61-16.1-53, authorizes removal of dikes, dams, or other structures by a water resource district and N.D.C.C. § 61-16.1-53.1, concerns appeal of the board's decision to the Department of Water Resources.

61-16.1-53. Removal of a noncomplying dike, dam, or other device - Notice and hearing - Appeal - Injunction.

1. Upon receipt of a complaint of unauthorized construction of a dike, dam, or other device for water conservation, flood control, regulation, watershed improvement, or storage of water, the water resource board shall promptly investigate and make a determination thereon. If the board determines that a dike, dam, or other device, capable of retaining, obstructing, or diverting more than fifty acre-feet [61674.08 cubic meters] of water or twenty-five acre-feet [30837.04 cubic meters] of water for a medium-hazard or high-hazard dam, has been established or constructed by a landowner or tenant contrary to this title or any rules adopted by the board, the board shall notify the landowner by certified mail at the landowner's post-office address of record. A copy of the notice must also be sent to the tenant, if any. The notice must specify the nature and extent of the noncompliance and must state that if the dike, dam, or other device is not removed within the period the board determines, but not less than fifteen days, the board shall cause the removal of the dike, dam, or other device and assess the cost of the removal, or the portion the board determines, against the property of the landowner responsible. The notice must also state that the affected landowner, within fifteen days of the date the notice is mailed, may demand, in writing, a hearing upon the matter. Upon receipt of the demand, the board shall set a hearing date within fifteen days from the date the demand is received. In the event of an emergency, the board may immediately apply to the appropriate district

court for an injunction prohibiting the landowner or tenant from constructing or maintaining the dike, dam, or other device, or ordering the landowner to remove the dike, dam, or other device. Assessments levied under this section must be collected in the same manner as other assessments authorized by this chapter. If, in the opinion of the board, more than one landowner or tenant has been responsible, the costs may be assessed on a pro rata basis in proportion to the responsibility of the landowners. If a complaint is frivolous in the discretion of the board, the board may assess the costs of the frivolous complaint against the complainant.

2. Following removal of an unauthorized dike, dam, or other device, either by a water resource board or by a party complying with an order of a water resource board, the board may assess its costs against the property of the responsible landowner.

A person aggrieved by action of the board under this section may appeal the decision of the board to the district court of the county in which the land is located in accordance with the procedure provided in N.D.C.C. § 28-34-01. A hearing as provided for in this section is not prerequisite to an appeal.

61-16.1-53.1. Appeal of board decisions - State engineer review - Closing of noncomplying dams, dikes, or other devices for water conservation, flood control, regulation, and watershed improvement.

1. The board shall make the decision required by section 61-16.1-53 within a reasonable time, not exceeding one hundred twenty days, after receiving the complaint. The board shall notify all parties of its decision by certified mail. Any aggrieved party may appeal the board's decision to the department of water resources. The appeal to the department must be made within thirty days from the date notice of the board's decision has been received. The appeal must be made by submitting a written notice to the department, which must state specifically the reason why the board's decision is erroneous. The appealing party also shall submit copies of the written appeal notice to the board and to all non-appealing parties. Upon receipt of this notice, the board, if it has ordered removal of a dam, dike, or other device, is relieved of its obligation to procure the removal of

the dam, dike, or other device. The department shall handle the appeal by conducting an independent investigation and making an independent determination of the matter. The department may enter property affected by the complaint to investigate the complaint.

2. If the board fails to investigate and make a determination concerning the complaint within a reasonable time, not exceeding one hundred twenty days, the person filing the complaint may file the complaint with the department of water resources within one hundred fifty days of the submittal date of the original complaint. Without reference to chapter 28-32, the department shall cause the investigation and determination to be made, either by action against the board or by conducting the investigation and making the determination.
3. If the department of water resources determines a dam, dike, or other device has been constructed or established by a landowner or tenant contrary to title 61 or any rules adopted by the board, the department shall take one of these three actions:
 - a. Notify the landowner by certified mail at the landowner's post-office address of record;
 - b. Return the matter to the jurisdiction of the board along with the investigation report; or
 - c. Forward the dam, dike, or other device complaint and investigation report to the state's attorney.
4. If the department of water resources decides to notify the landowner, the notice must specify the nature and extent of the noncompliance and state that if the dam, dike, or other device is not removed within a reasonable time as determined by the department, but not less than thirty days, the department shall procure the removal of the dam, dike, or other device and assess the cost of removal against the responsible landowner's property. The notice from the department also must state that, within fifteen days of the date the notice is mailed, the affected landowner may demand, in writing, a hearing on the matter. Upon receipt of the demand, the department shall set a hearing date within fifteen days from the date the demand is

received. If, in the opinion of the department, more than one landowner or tenant has been responsible, the costs may be assessed on a pro rata basis in proportion to the responsibility of the landowners. Upon assessment of costs, the department shall certify the assessment to the county auditor of the county where the noncomplying dam, dike, or other device is located. The county auditor shall extend the assessment against the property assessed. Each assessment must be collected and paid as other property taxes are collected and paid. Assessments collected must be deposited with the state treasurer and credited to the contract fund established by section 61-02-64.1. Any person aggrieved by action of the department under this section may appeal the decision of the department to the district court under chapter 28-32. A hearing by the department as provided for in this section is a prerequisite to an appeal.

5. If the department, after completing the investigation required under this section, decides to return the matter to the board, a complete copy of the investigation report must be forwarded to the board and must include the nature and extent of the noncompliance. Upon having the matter returned to its jurisdiction, the board shall carry out the department's decision under the terms of this section.
6. If the department of water resources, after completing the investigation required under this section, decides to forward the dam, dike, or other device complaint to the state's attorney, a complete copy of the investigation report must also be forwarded, and must include the nature and extent of the noncompliance. The state's attorney shall prosecute the complaint under the statutory responsibilities prescribed in chapter 11-16.
7. In addition to the penalty imposed by the court on conviction under this statute, the court shall order the dam, dike, or other device removed within a reasonable time period as the court determines, but not less than thirty days. If the dam, dike, or other device is not removed within the time

prescribed by the court, the court shall procure the removal of the dam, dike, or other device, and assess the cost against the property of the landowner responsible, in the same manner as other assessments under chapter 61-16.1 are levied. If, in the opinion of the court, more than one landowner or tenant has been responsible, the costs may be assessed on a pro rata basis in proportion to the responsibility of the landowners.

The authority granted in this section may only be exercised for dams, dikes, or other structures constructed after August 1, 1999.

REMOVAL OF AN OBSTRUCTION TO A DRAIN

The water resource district also has authority to remove an obstruction to a drain. An obstruction to a drain could include any barrier to a watercourse or an artificial drain. If a water resource district determines that an obstruction to a drain has been caused by the negligent act or omission of a landowner or tenant, the board shall:

1. Notify the landowner by registered mail at the landowner's post office address of record. A copy of the notice must also be sent to the tenant, if any.
2. The notice must specify the nature and extent of the obstruction, the opinion of the board as to its cause, and must state that if the obstruction is not removed within such period as the board determines, but not less than 15 days, the board shall procure removal of the obstruction and assess the cost of the removal against the property of the landowner(s) responsible.
3. Notice must state that the impacted landowner,

- within 15 days of the date the notice is mailed, may demand, in writing, a hearing on the matter.
4. Upon receipt of a demand for a hearing, a hearing date must be set within 15 days from the date the demand is received.
 5. The notice should also state, any person aggrieved by the board's action may appeal to the district court. A hearing is not a prerequisite to an appeal to district court.

N.D.C.C. § 61-16.1-51, authorizes removal of an obstruction to a drain by a water resource district.

61-16.1-51. Removal of obstructions to drain - Notice and hearing - Appeal - Injunction - Definition.

1. If a water resource board determines that an obstruction to a drain has been caused by the negligent act or omission of a landowner or tenant, the board shall notify the landowner by registered mail at the landowner's post-office address of record. A copy of the notice must also be sent to the tenant, if any. The notice must specify the nature and extent of the obstruction, the opinion of the board as to its cause, and must state that if the obstruction is not removed within such period as the board determines, but not less than fifteen days, the board shall procure removal of the obstruction and assess the cost of the removal, or the portion the board determines appropriate, against the property of the landowner responsible. The notice must also state that the affected landowner, within fifteen days of the date the notice is mailed, may demand, in writing, a hearing on the matter. Upon receipt of the demand, the board shall set a hearing date within fifteen days from the date the demand is received. In the event of an emergency, the board may immediately apply to the appropriate district court for an injunction prohibiting a landowner or tenant from maintaining an obstruction. Assessments levied under the provisions of this section must be collected in the same manner as other assessments authorized by this chapter. If, in the opinion of the board, more than one landowner or tenant has been responsible, the costs may be assessed on a pro rata basis in accordance with the proportionate responsibility of the landowners. A landowner aggrieved by action of the board under this

section may appeal the decision of the board to the district court of the county in which the land is located in accordance with the procedure provided in section 28-34-01. A hearing as provided for in this section is not a prerequisite to an appeal. If a complaint is frivolous in the discretion of the board, the board may assess the costs of the frivolous complaint against the complainant. If the obstruction is located in a road ditch, the timing and method of removal must be approved by the appropriate road authority before the notice required by this section is given and appropriate construction site protection standards must be followed.

2. For the purposes of this section, "an obstruction to a drain" means a barrier to a watercourse, as defined by section 61-01-06, or an artificial drain, including if the watercourse or drain is located within a road ditch, which materially affects the free flow of waters in the watercourse or drain.
3. Following removal of an obstruction to a drain, either by a water resource board or by a party complying with an order of a water resource board, the board may assess its costs against the property of the responsible landowner.

For the purposes of this section, "an obstruction to a drain" means a barrier to watercourse, as defined by section 61-01-06, or an artificial drain, including if the watercourse or drain is located within a road ditch, which materially impacts the free flow of waters in the watercourse or drain.

LINKS

Application/Notification to Construct or Modify a Dam, Dike, Ring Dike, or Other Water Resource Facility:
https://www.swc.nd.gov/pdfs/sfn_51695_construction_modify_dam_dike.pdf

Notification to Construct an Emergency Dike:

https://www.swc.nd.gov/pdfs/sfn_61411_construct_emergency_dike.pdf

Construction Completion Notification:

https://www.swc.nd.gov/pdfs/sfn_60895_construction_completion_notification.pdf

Notification to Breach/Remove a Dam, Dike, or Other Water Control Structure:

https://www.swc.nd.gov/pdfs/sfn_61403_notification_breach_remove_dam.pdf

CHAPTER 10 - ROADWAYS

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AUTHORITY OF WATER RESOURCE DISTRICTS
OVER BRIDGES AND CULVERTS

Water resource districts have statutory authority over the installation of culverts, but this authority must be exercised in accordance with certain statutory authorities that govern installation of culverts in public roads. The authority of water resource districts over culverts is derived from several statutes of the North Dakota Century Code.

N.D.C.C. § 61-16.1-09(21) of the North Dakota Century Code provides the primary authority of water resource districts concerning bridges and culverts:

61-16.1-09. Powers of water resource board.

Each water resource board shall have the power and authority to:

21. Coordinate proposals for installation, modification, or construction of culverts and bridges in an effort to achieve appropriate sizing and maximum consistency of road openings. The department of transportation, railroads, counties, and townships shall cooperate with the districts in this effort. Each district shall also consider the possibility of incorporating appropriate water control structures, where appropriate, as a part of such road openings.

Thus, the Department of Transportation, railroads, counties, and townships must cooperate with water resource districts for installation of culverts. Water resource districts also have extensive authority over the flow of water in watercourses. N.D.C.C. § 61-16.1-09 also provides as follows:

61-16.1-09. Powers of water resource board.

Each water resource 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.
6. Maintain and control the water levels and the flow of water in the bodies of water and streams involved in water conservation and flood control projects within the district and regulate streams, channels, or watercourses and the flow of water therein by changing, widening, deepening, or straightening the same, or otherwise improving the use and capacity thereof.
7. Regulate and control water for the prevention of floods and flood damages by deepening, widening, straightening, or diking the channels or floodplains of any stream or watercourse within the district, and construct reservoirs or other structures to impound and regulate such waters.

These authorities clearly give water resource districts the authority to take necessary action to control the flow of water for various purposes, including flooding. The above-quoted authorities in N.D.C.C. § 61-16.1-09 can be exercised in several ways, including the construction of impoundments, channelization, diking, and water control structures as part of road openings. Each of these devices may require some construction activities as well as acquisition of easements for either construction or displacement of water.

Water resource districts also have some mandatory duties

concerning the flow of water. N.D.C.C. § 61-16.1-10 of the North Dakota Century Code provides, in part:

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

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.

While this statute is primarily directed toward artificial drainage activities of landowners, it may also have some application to road openings as well. N.D.C.C. § 61-16.1-09.1 gives water resource districts the authority to snag, clear, and maintain natural watercourses and to undertake the debrisment of bridges and low water crossings.

Finally, N.D.C.C. § 61-16.1-38 requires permits for dikes, dams, or other devices. If any road entity proposes to construct a road which is also intended to serve as a dike, dam, or other device as indicated in N.D.C.C. § 61-16.1-38, a permit would be required.

STATUTORY REQUIREMENTS FOR ROAD OPENINGS

N.D.C.C. § 24-03-06 provides the general rule regarding the construction of roads as they pertain to the flow of water. This section applies equally to state, county, or

township roads.

24-03-06. Method of construction of highway ditches.

All highways constructed or reconstructed by the department, board of county commissioners, board of township supervisors, their contractors, subcontractors, or agents, or by any individual, firm, corporation, or limited liability company must be so designed as to permit the waters running into the ditches to drain into coulees, rivers, and lakes according to the surface and terrain where the highway or highways are constructed in accordance with the stream crossing standards prepared by the department and the department of water resources so as to avoid the waters flowing into and accumulating in the ditches to overflow adjacent and adjoining lands. In the construction of highways the natural flow and drainage of surface waters to the extent required to meet the stream crossing standards prepared by the department and the department of water resources may not be obstructed, but the water must be permitted to follow the natural course according to the surface and terrain of the particular terrain. The department, county, township, their contractors, subcontractors, or agents, or any individual, firm, corporation, or limited liability company is not liable for any damage caused to any structure or property by water detained by the highway at the crossing if the highway crossing has been constructed in accordance with the stream crossing standards prepared by the department and the department of water resources.

The North Dakota Supreme Court has addressed this issue in several cases. In the early case of Carrol v. Township of Rye, 13 N.D. 458, 101 N.W. 525, it was held that a "township is not liable for loss suffered by a landowner from increased flow of surface water upon his land resulting solely from improvement of a highway in the ordinary manner without negligence". The Court has issued several more recent opinions, all of which firmly establish that highways constructed by the state, county, or township must provide for

the natural flow of surface water. In the case of Viestenz v. Arthur Township, 78 N.D. 1029, 54 NW.2d 573, (1952), the Supreme Court held that "an owner of land over which natural drainage has been unlawfully obstructed by road embankments was entitled to injunction against the township supervisors directing them to provide an outlet for surface water". The Court also has expressed the opinion that it is the duty of the board of township supervisors to inspect and make plans for culverts to be constructed where necessary, to preserve a natural drainway for surface water. Lemer v. Koble, 86 N.W.2d 44. (1957)

The case of Frank v. County of Mercer, 186 NW.2d 439, (1971) involved an action by a landowner against the County of Mercer and the State Highway Department seeking recovery of damages allegedly caused by a highway and bridge which were incapable of handling the flows of a particular storm. The storm produced a rainfall of more than twice the maximum that would be expected to occur once in a hundred years. The North Dakota Supreme Court accepted the argument of Mercer County and held that such a flow was so unprecedented and extraordinary as to be an act of God, precluding recovery of damages caused by the backed-up water. The Court defined "extraordinary or unprecedented flooding" as floods of such unusual occurrence that they could not have been foreseen by

men of ordinary experience and prudence. The Court did not say that the ordinary flood, the occurrence of which may be reasonably anticipated from general experience of men residing in the region, would be the 50-, 75-, or 100-year flood. Rather, the Court stated that this is a factual question, depending on past rains or run-off, topographical and climatic conditions of the region, perviousness of soil, presence or absence of factors which tend to increase or decrease rapid run-off, etc. In summary, the Frank v. County of Mercer case espouses the general rule that bridges and culverts must be designed to handle the "ordinary flood," and that if a bridge is not so designed, the North Dakota Constitution and N.D.C.C. § 24-03-06 provide that the entity responsible for the under-designed bridge will be liable for damages, and that injunctive relief would be proper to require a redesign and reconstruction of the bridge.

Therefore, although drainage of adjoining lands does not have to be perfect, Little v. Burleigh County, 82 N.W.2d 603, (1957), Frank v. County of Mercer, (1971), supra, it is a well settled principle in this state that neither the state, a county, or township has the legal right to artificially dam up water on a person's land by constructing or maintaining a highway which functions as a dam. This principle has been further affirmed in recent cases, including Fandrich vs. Wells

County Board of County Commissioners, 618 NW 2d 166 (ND 2000),
Huber vs. Oliver County, 602 NW 2d 710 (ND 1999), Ness vs.
Ward County Water Resource District, 585 NW 2d 793 (ND 1998),
and Kadlec vs. Greendate Township Board of Township
Supervisors, 583 NW 2d 817 (ND 1998).

N.D.C.C. § 61-01-07 furthers the general rule of
N.D.C.C. § 24-03-06 by providing that anyone who obstructs a
watercourse shall be liable for all damages. It states:

61-01-07. Obstruction of watercourses - Penalty.

If any person illegally obstructs any ditch, drain, or
watercourse, or diverts the water therein from its
natural or artificial course, the person is liable to the
party suffering injury from the obstruction or diversion
for the full amount of the damage done, and, in addition,
is guilty of a class B misdemeanor.

Both statutes and court cases are clear on upholding the
principle that roads cannot obstruct the material flow of
water.

PROCEDURES FOR INCREASING UNDER-DESIGNED ROAD OPENINGS

The court cases which require roads to pass the natural
flow of water do not provide any insight as to when an under-
designed stream crossing must be increased and who can require
it. N.D.C.C. § 24-03-08 provides one method:

**24-03-08. Determinations of surface water flow and
appropriate highway construction.**

Whenever and wherever a highway under the supervision,
control, and jurisdiction of the department or under the
supervision, control, and jurisdiction of the board of

county commissioners of any county or the board of township supervisors has been or will be constructed over a watercourse or draw into which flow surface waters from farmlands, the department of water resources, upon petition of the majority of landowners of the area affected or at the request of the board of county commissioners, township supervisors, or a water resource board, shall determine as nearly as practicable the design discharge that the crossing is required to carry to meet the stream crossing standards prepared by the department and the department of water resources. When the determination has been made by the department of water resources, the department of transportation, the board of county commissioners, or the board of township supervisors, as the case may be, upon notification of the determination, shall install a culvert or bridge of sufficient capacity to permit the water to flow freely and unimpeded through the culvert or under the bridge. The department, county, and township are not liable for any damage to any structure or property caused by water detained by the highway at the crossing if the highway crossing has been constructed in accordance with the stream crossing standards prepared by the department and the department of water resources.

This statute could be utilized by a local water resource district by requesting the Department of Water Resources determine the design discharge the crossing is required to carry to meet the stream crossing standards. If the Department of Water Resources determines that additional capacity is necessary to handle the flow of surface water, the law clearly requires the Department of Transportation, county, or township to take appropriate action.

The legislature has imposed additional and specific limitations on proposals to construct or reconstruct a township road stream crossing. N.D.C.C. § 24-06-26.1 provides:

24-06-26.1. Township road and drainage construction standards.

When the construction or reconstruction of a township road or bridge, the insertion of a culvert in a township road, or the construction or reconstruction of a ditch or drain in connection with a township road affects the flow of surface waters and increases the surface waterflow through ditches, drains, bridges, and culverts in other townships, the board of township supervisors or the township overseer of highways of the township undertaking the construction or reconstruction shall give notice to the boards of township supervisors or township overseers of highways in all townships affected by the construction or reconstruction projects.

The boards of township supervisors of townships affected by any road or bridge construction that changes or increases the flow of surface waters shall cooperate in the construction projects expending on any portion of the projects the portions of the road and bridge tax as deemed conducive to the interests of the township. The board of township supervisors shall construct the ditches, drains, bridges, and culverts in accordance with stream crossing standards prepared by the department and the department of water resources. A township, board of township supervisors, and township overseer of highways are not liable for any damage caused to any structure or property by water detained by the highway at the crossing if the highway crossing has been constructed in accordance with the stream crossing standards prepared by the department and the department of water resources.

Thus, if upon the request of the local water resource district or anyone else, a township board proposes to increase the capacity of a stream crossing, it must satisfy the requirements of N.D.C.C. § 24-06-26.1.

CULVERTS AND BRIDGES ASSOCIATED WITH DRAINAGE PROJECTS

Two statutes address the subject of bridges and culverts which are required to be installed in roads due to drainage

projects.

24-03-07. Drains across state highways.

The director, when notified by the board of drain commissioners of any drainage district that it is necessary to run a drain across any state or federal-aid highway, shall make the necessary opening through such highway and shall build and keep in repair suitable culverts or bridges, as provided in title 61.

61-16.1-42. Drains along and across public roads and railroads.

Drains may be laid along, within the limits of, or across any public road or highway, but not to the injury of such road. In instances where it is necessary to run a drain across a highway, the department of transportation, the board of county commissioners, or the board of township supervisors, as the case may be, when notified by the water resource board to do so, shall make necessary openings through the road or highway at its own expense, and shall build and keep in repair all required culverts or bridges as provided under section 61-16.1-43. In instances where drains are laid along or within the rights of way of roads or highways, the drains shall be maintained and kept open by and at the expense of the water resource district concerned. A drain may be laid along any railroad when necessary, but not to the injury of the railroad, and when it is necessary to run a drain across the railroad, the railroad company, when notified by the water resource board to do so, shall make the necessary opening through such railroad, shall build the required bridges and culverts, and shall keep them in repair.

RAILROAD CROSSINGS OVER WATERCOURSES

The North Dakota Century Code does not address railroad crossings. However, several cases have discussed the duty of a railroad to provide for the undisturbed passage of flood waters which may reasonably be anticipated. At the time these cases were decided, N.D.C.C. § 61-01-07 had not been enacted.

Rather, courts relied on Section 14 of the North Dakota Constitution and the general rule pertaining to waters flowing in natural watercourses. In Soules et al v. Northern Pacific Railway Co., 157 N.W. 824, (1916), the North Dakota Supreme Court discussed at length whether the channel involved constituted surface water or a natural watercourse. After determining that it was indeed a natural watercourse, the Court stated:

Being, then a natural drainway, it was the duty of the defendant railway company to accommodate itself and to provide for the undistributed passage through it of all water which was or might be reasonable anticipated to drain therein and this duty was a continuing duty.

This general rule has been affirmed in many cases, most recently in Frank v. County of Mercer, supra.

Thus, since the railroad has a duty to provide for the "normal flood", railroad stream crossings incapable of passing those flows are subject to correction. Again, a water resource district, supported by hydrologic facts, may order a railroad to increase the capacity of a particular crossing. As a practical matter, legal action may be necessary to enforce such an order.

As noticed by N.D.C.C. § 61-16.1-42, railroads are required by law to pay the costs of making openings in railroads for drains. However, in a situation where the capacity of a railroad stream crossing was required to be

increased due to additional water from a water resource district drain, there is no provision for requiring the railroad to increase the capacity of its opening.

CLOSING SECTION LINE ROADS FOR WATER PROJECTS

It is well settled that the owner of adjoining land along a section line owns the fee title to the property included in the 33-foot easement up to the section line. He owns fee title, and the public has merely an easement of passage. See Small v. Burleigh County, 225 N.W.2d 295, (1974); Rutten v. Wood, 57 N.W.2d 112, (1953); and Lallm v. Williams County, 105 N.W.2d 339, (1960).

Second, the rights of way over congressional section lines within North Dakota, granted by 43 U.S.C. § 932 (1940), Act of Congress of July 26, 1866, become a *grant in praesenti* when accepted by the state. An earlier opinion of the Attorney General dated June 2, 1976, provides a discussion of this issue:

The original offer from the federal government to the state and territories was quite brief. It stated simply:

That the right-of-way for the construction of highways over public lands, not reserved for public uses, is hereby granted. Section 2477, Revised Statutes 1866, [also found at Chapter 262, Statutes at Large; 43 U.S.C. § 932].

This offer did not specify or limit the methods to be followed in the establishment of such highways, and they,

therefore, must be established in accordance with the law of the state accepting the grant. Ball v. Stephens, 158 P.2d 207 (Cal. 1945).

Because of the language used in the offer of the United States to the states and territories, a question was quickly raised as to whether the effective date of the right-of-way grant was tied to the establishment of a highway or not. Some states took the position that the act was a law rather than a conveyance, and therefore the grant remained in abeyance until a highway was established under some public law of the state and, therefore, no present interest passed with the grant. Stofferan v. Okanogan County, 136 P. 484 (S.C. Wash. 1913) Other states, however, including North Dakota, have adopted the position that the act was a conveyance of a present interest which became effective upon acceptance by the state or territory. In the case of Hillsboro National Bank v. Ackerman, 189 N.W. 657 (1922), the North Dakota Supreme Court observed that:

It has been determined that such grant when accepted by this state became a grant in praesenti; that all section lines in the Territory of Dakota, so far as practicable, became by operation of law public highway; that the highways thus established on section lines have never since been vacated or the right of the public in them in any way surrendered.

This is also the position taken by the Supreme Court of South Dakota, Lawrence v. Ewert, 114 N.W. 709, and at least

one Federal court, Wilderness Society v. Morton, 479 F.2d 842 (D.C. Cir. 1973), in which the Court stated, with reference to the 1866 offer of the United States:

That section acts as a present grant which takes effect as soon as it is accepted by the state.

It is apparent, then, that in 1871 the territorial legislature accepted the offer of the federal government of 1866, and as a result, all section lines in North Dakota, are public highways.

Third, congressional section lines outside the limits of incorporated cities are open for public travel without the necessity of any prior action by a board of township supervisors or county commissioners. Small v. Burleigh County, 225 N.W.2d 295 (1975).

Fourth, and finally, all section lines are public highways. While no court decision to date has held that all section lines in the state of North Dakota are public highways, this conclusion has been strongly implied, and has been adhered to by the North Dakota Attorney General in several opinions.

With this background in mind, the question to be addressed here is whether public access along a section line can be restricted by the construction of a water project that requires section line access for public travel to be

eliminated. With respect to this question, the North Dakota Supreme Court stated, in Small v. Burleigh County, supra:

We hold that congressional section lines outside the limits of incorporated cities, unless closed by proceedings permitted by statute, are open for public travel without the necessity of any prior action by a board of township supervisors or county commissioners. (Emphasis added.)

This is clear recognition that there are instances, according to statute, which provide for the closing of section line roads. This recognition was also contained in an Attorney General's opinion dated July 7, 1967, to John E. Jacobsen:

While, as noted by the Supreme Court in Small v. Burleigh County, 225 N.W.2d 295 (N.D. 1975), this office has, in a long line of opinions, consistently held that section line highways are open to the public without any action having been previously taken by a township or county board, that is not precisely the same question as whether the township or county board may take affirmative action to close the road. Prior to 1965, this office . . . had also indicated that such roads could be closed pursuant to the statutory provisions for closing roads. That position was not inconsistent since the two questions are different..

Thus, it seems rather clear that, in a proper case, it may be possible to vacate, change, permit obstruction or limited obstruction, or close to public travel, roads, including section line roads.

The proper procedure for closing section line roads and access is contained in N.D.C.C. §§ 24-07-03, 24-07-04, and 24-06-28.

RECENT COURT CASES

Since 1990, the North Dakota Supreme Court has issued opinions in several cases concerning water management. Those cases include:

- Cossette v. Cass County. Joint Water Resource District, 894 N.W.2d 858 (ND 2017).
- 2015 Application for Permit to Enter Land, 883 N.W. 2d 844 (ND 2016).
- Nandan, LLP v. City of Fargo, 894 N.W.2d 858 (ND 2017).
- Burlington Northern and Santa Fe Railway Company, et.al vs. Benson County Water Resource District, 618 NW 2d 155 (ND 2000).
- Fandrich vs. Wells County Board of County Commissioners, 618 NW 2d 166 (ND 2000).
- Douville vs. Pembina County Water Resource District, 612 NW 2d 270 (ND 2000).
- Huber vs. Oliver County, 602 NW 2d 710 (ND 1999).
- Graber vs. Logan County Water Resource Board, 598 NW 2d 846 (ND 1999).
- Ness vs. Ward County Water Resource District, 585 NW 2d 793 (ND 1998).
- Kadlec vs. Greendale Township Board of Township Supervisors, 583 NW 2d 817 (ND 1998)
- Mougey Farms vs. Kasper, 579 NW 2d 583 (ND 1998).
- Southeast Cass Water Resource District vs. Burlington Northern Railroad Company, 527 NW 2d 884 (ND 1995).
- Anderson vs. Richland County Water Resource Board, 506 NW 2d 362 (ND 1993).

- Nagel vs. Emmons County North Dakota Water Resource District, 474 NW 2d 46 (ND 1991).

The Kadlec and Ness opinions clearly state that water resource districts do not have the authority to order culverts to be installed in township, county, or state roads. While the Court encourages the cooperation of water resource districts, the authority to install culverts lies with the appropriate road authority.

The Benson County case extends that limit a bit further, by declaring that water resource districts also do not have the authority to order culverts through railroad beds.

The Kadlec and Ness cases affirmed the longstanding principle that roads cannot alter the natural flow of water and cannot impound water on upstream lands. This principle was also affirmed in the Fandrich and Huber cases, which establish a standard of reasonableness in applying N.D.C.C. §§ 24-03-06 and 24-03-08 to road opening issues.

In the Nagel vs. Emmons County case, the Court declared that Emmons County had acquired a prescriptive easement when it changed the natural flow of water as part of a road project. The Court declared that a prescriptive easement began when road construction occurred, and not when the landowner received actual damage. Douville vs. Pembina Water Resource District also involved an argument over a prescriptive

easement, which in Douville was denied. Douville also affirmed the authority of a water resource district to enforce unauthorized construction of dikes.

Under subsection one (1) of N.D.C.C. § 40-22-01, when a water resource district enters into an agreement with a municipality, like that in the Nandan case, a municipality may defray the expenses of any or all improvements by special assessments. These expenses can include incidental costs to the completion of an improvement project that falls into this category. While code leaves us with a rather vague understanding as to what exactly can be defined as incidental costs, from the opinion in Nandan, we can conclude what the courts might construe as incidental costs. In this case, the court ruled the project did not create any boulevards or public places, acquire any easements or real property in connection with the project, nor construct any parking lots, garages, ramps, or other facilities for motor vehicles. While these are not the only factors that can go into determining if expenses are incidental, it does give us a good look into the thought process as to which costs could be considered incidental on a case-by-case basis.

The Southeast Cass Water Resource District case upheld the requirement that railroads must install openings through the railroad tracks to accommodate assessment drains.

Anderson upheld a local water resource district's authority for determining benefits for an assessment drain and affirmed the water resource district decision.

The Cossette case further defined when a person becomes an "aggrieved" party eligible bring an appeal to a water resource district under N.D.C.C § 61-16.1-54. While an aggrieved person is still determined on a case-by-case basis, the opinion of the Supreme Court in this case helps shed some light on when a party may have crossed the threshold and become "aggrieved". When the Cossette's brought their appeal, the water resource district had yet to vote on the project the Cossettes were appealing. Due to the uncertainty surrounding the fate of the project, the Supreme Court determined that the Cossette's were not an "aggrieved party".

SUMMARY

In conclusion, close coordination between public entities charged with the responsibility of constructing roadways and water resource districts is important to ensure sound water resource development within the district. It is highly recommended that water resource districts establish rules and regulations concerning the management, control, regulation, and conservation of waters within the district. The relationship with those entities responsible for roadway

construction should be spelled out in such rules. Any problems which may develop between districts and those entities charged with the responsibility of constructing roadways should be reviewed very carefully on a case-by-case basis and advice should be sought from the district's legal counsel. Some water resource districts have taken a very active role in decisions concerning the sizing of highway drainage structures, while others have opted not to accept any responsibility in this area. The prime consideration when making a decision concerning involvement or noninvolvement in roadway construction should be good water management.

CHAPTER 11 - FLOODPLAIN MANAGEMENT

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INTRODUCTION

Floodplain management can be defined as the selection, integration, and application of measures to deal with flooding in an identified area. The two basic measures of dealing with flooding problems are structural and nonstructural. Historically, solutions to flooding problems have most often been structural floodplain management measures which move floods away from people. Examples are dams, dikes, or diversions. Nonstructural measures seek to move people away from floods. There are three separate statutes concerning water resource districts which address floodplain management, and which stresses nonstructural measures to reduce flood damages. These statutes are:

N.D.C.C. § 61-16.1-37, which requires water resource districts to encourage both structural and nonstructural measures to solve water management problems;

N.D.C.C. § 61-16.1-09(18), which authorizes a water resource board to petition a zoning authority to identify and regulate floodplain development, and to take other measures to delineate floodplain areas and establish floodplain zones; and

N.D.C.C. § 61-16.2, which is North Dakota's Floodplain Management Act of 1981.

Of these three, the Floodplain Management Act provides the most direction and guidance to persons or governmental bodies (such as water resource districts) involved in floodplain management activities.

State Floodplain Management Policies

Three major policies are set forth in the Floodplain Management Act for the State of North Dakota.

N.D.C.C. § 61-16.2-01 provides as follows:

61-16.2-01. Legislative intent and purpose.

The legislative assembly finds and declares that a large portion of the state's land resources is subject to recurrent flooding by overflow of streams and other watercourses causing loss of life and property, disruption of commerce and governmental services, unsanitary conditions, and interruption of transportation and communications, all of which are detrimental to the health, safety, welfare, and property of the occupants of flooded lands and the people of this state. The legislative assembly further finds that public interest necessitates that the floodplains of this state be developed in a manner which will alleviate loss of life and threat to health and reduce private and public economic loss caused by flooding.

It is therefore the policy of this state and the purpose of this chapter to guide development of the floodplains of this state in accordance with the enumerated legislative findings, to reduce flood damages through sound floodplain management, stressing nonstructural measures such as floodplain zoning and floodproofing, acquisition and relocation, and flood warning practices; and to ensure as far as practicable that the channels and those portions of the floodplains of watercourses which are the floodways are not inhabited and are kept free and clear of interference or obstructions which may cause any undue restriction of the capacity of the floodways.

It is also the policy of this state and purpose of this chapter to provide state coordination and assistance to communities in floodplain management activities, to encourage communities to adopt, administer, and enforce sound floodplain management ordinances, and to provide the department of water resources with authority necessary to carry out and enforce a floodplain management program for the state and to coordinate federal, state, and local floodplain management

activities in this state.

N.D.C.C. § 61-16.2-03 sets forth the duties of the Department of Water Resources.

61-16.2-03. Duties of department.

The department shall:

1. Collect and distribute information relating to flooding and floodplain management.
2. Coordinate local, state, and federal floodplain management activities to the greatest extent possible, and encourage appropriate federal agencies to make their flood control planning data available to communities and districts for planning purposes, in order to allow adequate local participation in the planning process and in the selection of desirable alternatives.
3. Assist communities and districts in their floodplain management activities within the limits of available appropriations and personnel in cooperation with the division of homeland security.
4. Do all other things, within lawful authority, which are necessary or desirable to manage the floodplains for uses compatible with the preservation of the capacity of the floodplain to carry and discharge the base flood. In cooperation with communities and districts, the department shall conduct, whenever possible, periodic inspections to determine the effectiveness of local floodplain management programs, including an evaluation of the enforcement of and compliance with local floodplain management ordinances.

National Flood Insurance Program (NFIP)

The North Dakota Floodplain Management Act of 1981 adopts the standards of the National Flood Insurance Program (NFIP) for the State of North Dakota. Communities actively enroll in the NFIP and by doing so adopt NFIP standards through

enactment of a Floodplain Management Ordinance. North Dakota communities which participate in the NFIP are cities, counties, townships, and tribes.

The NFIP standards are the minimum requirements that must be met for any new development in a mapped 100-year floodplain. Development is defined as any man-made change to improved or unimproved real estate, including mining, dredging, filling, grading, paving, excavation, or drilling operations, or storage of equipment or materials.

Protection against damages caused by the 100-year flood event is the benchmark of the NFIP. Maps printed by the NFIP, known as flood insurance rate maps, identify the 100-year floodplain for communities which participate in the NFIP. It is important to note not all communities participate in the NFIP, and not all that do are mapped.

The NFIP standards are designed to meet two overall goals:

1. That new development and redevelopment be safe from future flood damages; and
2. That new development or redevelopment do not increase flood hazards elsewhere.

Community standards, established by individual communities, generally require that new structures be elevated or floodproofed using materials and methods that resist or minimize flood damage. As an example, the standards of most

communities require residential structures to have their lowest floor (including basements) elevated to or above 100-year flood level.

Community standards generally allow limited development in identified floodplains as long as it does not aggravate or transfer flood problems onto other property.

Water resource districts which plan projects in their jurisdiction or review applications for dike or drainage permits need to be aware of flood maps and the NFIP and appropriate community standards for managing floodplain development. Water resource districts must work closely with the city, county, township, or tribal officials responsible for ensuring that floodplain management standards are met.

Specific State Requirements

In addition to adopting the standards of the NFIP, state law specifically lists those uses allowed in the floodway and flood fringe, specific terms to describe two flood mapping features. Both features lie within the 100-year floodplain. A floodway, which lies closest to a river or stream, is defined as that portion of a river channel or other watercourse and its adjacent overbank areas that must be reserved in order to discharge the 100-year flood without cumulatively increasing the water surface elevation more than a designated height (up

to a maximum of one foot). The flood fringe is that area in the 100-year floodplain outside of the floodway that can be developed.

1. Allowable Floodway Uses: Upon delineation of the floodway under the national flood insurance program [42 U.S.C. 4001 et seq.], uses shall be permitted within the floodway to the extent that they do not result in any increase in flood levels during the occurrence of the base flood discharge. Any exception to the national flood insurance program in implementing regulations granted by the appropriate federal agency to a community participation in the national flood insurance program is an approved exception. (N.D.C.C. 61-16.2-06)
2. Allowable Flood Fringe Use: Most development as long as it is elevated (preferably fill) or floodproofed above the elevation of the 100-year flood.
 - a. Residential structures are constructed so the lowest floor, including basements, is elevated to at least one foot above the base flood elevation unless granted a residential basement floodproof exception under the national flood insurance program.
 - b. Non-residential structures either are constructed as specified in subdivision a and elevated to at least one foot above the base flood elevation or are floodproofed adequately up to an elevation no lower than two feet above the base flood elevation. The floodproofing must be in accordance with the standards either adopted by the community under the national flood insurance program or under this chapter, whichever are more restrictive. (N.D.C.C. 61-16.2-08)

Exceptions

Two exceptions to the State Floodplain Management Act are identified, provided the flood carrying capacity of any

watercourse is maintained, and the cumulative effect of any action or construction will not increase the water surface elevation of the 100-year flood more than one foot at any point.

These exceptions are:

1. Ring dikes around individual farmsteads which are not constructed with tiebacks to existing roadways or dikes. For the purposes of this section, "ring dike" means an embankment constructed of earth or other suitable materials for purposes of enclosing a farmstead consisting of a farm dwelling and associated farm buildings.
2. Agricultural dikes along the Red River of the North and Bois de Sioux River which are constructed pursuant to and in accordance with any joint and cooperative agreements between North Dakota and Minnesota for the establishment of criteria for authorizing dikes and other flood control structures and measures on the Red River of the North and Bois de Sioux River.

Community Responsibilities

In North Dakota, all communities subject to excessive flooding as determined by the Department of Water Resources shall participate in the National Flood Insurance Program (NFIP). As a part of the NFIP enrollment process, a community must adopt and enforce an ordinance which:

1. Adopts the NFIP minimum standards for new development and redevelopment in floodplains. These standards are based on the detail of flood mapping made available by the Federal Emergency Management Agency (FEMA); and
2. Establishes a development permit system

requiring that a permit be acquired from the local government unit before most development can take place in the 100-year floodplain.

These community responsibilities apply to cities, counties, townships, and tribes which are enrolled in the NFIP. Often, the cost of flood insurance depends on proper community floodplain management practices. Water resource boards should be familiar with these responsibilities since projects they undertake will require a permit from the local governmental unit if located in a 100-year floodplain.

If a community fails to regulate floodplain development, the water resource district can ask them to do so. N.D.C.C. § 61-16.1-09(18) specifically lists one of the water resource district's powers:

61-16.1-09. Powers of water resource board.

Each water resource board shall have the power and authority to:

18. Petition any zoning authority established pursuant to chapter 11-33, 11-35, or 40-47 or section 58-03-13 to assume jurisdiction over a floodplain for zoning purposes when such zoning is required to regulate and enforce the placement, erection, construction, reconstruction, repair, and use of buildings and structures to protect and promote the health, safety, and general welfare of the public within a floodplain area. In the event such zoning authority fails to act or does not exist, the board may request the state water commission to assist it in a study to determine and delineate the floodplain area. Upon completion of such study, the board shall make suitable recommendations for the establishment of a floodplain zone to all zoning authorities and the governing bodies of all political subdivisions having jurisdiction within

the floodplain area.

Delineation of Floodplains and Floodways

Most floodplain identification (floodmaps) in North Dakota has been provided by the NFIP. In North Dakota, of the communities participating in the NFIP, a large majority have maps showing floodplains, and about 25% of these have floodways. Concerning cities, almost all, if not all, of the largest cities have floodplains identified. Additionally, most counties in North Dakota participate. N.D.C.C § 61-16.2-04 of the State Floodplain Management Act authorizes the Department of Water Resources to work with communities and districts to assist them in developing the data and other necessary information for the delineation of floodplains and floodways. This activity has evolved to now focus on restudies or refining flood hazard data which already exists.

Cost Share Policy

Communities or districts who are interested in assistance from the State to delineate flood hazard areas should submit a written request to the Department of Water Resources. The State Water Commission has historically provided up to 75 percent of the cost of the project if the local community provides the remaining 25 percent. However, if the cost share

is requested as part of a larger effort with primarily federal funding, the State Water Commission will cost share 50 percent of the local share. Local governments are given the option of either paying 25 percent of the study costs in cash or providing other services needed to complete the floodplain study. Aerial photography and the use of imaging such as LIDAR (Light Direction and Ranging) have also become important in developing good base maps to place the 100-year flood hazard.

CHAPTER 12 - SOVEREIGN LANDS

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INTRODUCTION

Each of the thirteen original colonies at the time of independence, "became themselves sovereign; and in that character hold absolute right to all the navigable waters and soils under them for their own common use". In 1845, the United States Supreme Court concluded that states entering the union after 1789 did so on an "equal footing" with the original states and so have similar ownership over these "sovereign lands".

In 1953, Congress confirmed the states' equal footing rights to submerged lands beneath inland navigable waters when it enacted the Submerged Lands Act. The Act "confirmed" and "established" each state's title to and interest in "lands beneath navigable waters within the boundaries of the respective States".

North Dakota's sovereign lands are those areas, including beds and islands, lying within the ordinary high-water marks of navigable lakes and streams. North Dakota plays an important role in the management of sovereign land through the Department of Water Resources, who is responsible for administering the state's non-mineral interests in North Dakota's sovereign lands.

The goal of the Department of Water Resources in managing this vital resource is to manage, operate, and

supervise North Dakota's sovereign land, for multiple uses, consistent with the Public Trust Doctrine, and in the best interest of present and future generations. The Public Trust Doctrine is "the principle that navigable waters are preserved for the public use, and that the state is responsible for protecting the public's right to the use".

The North Dakota Supreme Court has constructed that the Public Trust Doctrine imposes on the state the duty to manage sovereign land to foster not only the "public's right of navigation" but also "other important aspects of the state's public trust interest, such as bathing, swimming, recreation and fishing, as well as irrigation, industrial and other water supplies". The Doctrine further requires the protection and preservation of other interests including "natural, scenic, historic, and aesthetic values".

The Department of Water Resource's authority to manage sovereign land is derived from N.D.C.C. § 61-33. The department has adopted administrative rules (Administrative Code § 89-10) to create a framework for the management of North Dakota's sovereign lands.

The department has a responsibility, under the Public Trust Doctrine, to use prudent judgment in identifying all rivers and lakes throughout the state that should be

included on the state's list of navigable waters.

To make those determinations, the state relies on the federal standard for navigability, which is whether a water body was "susceptible" to navigation at statehood, or if historical documentation warrants a navigability determination.

Navigability

Two interrelated federal standards may be considered for determining whether a given water body is navigable. The first is the federal standard for establishing state title to sovereign lands under the Equal Footing Doctrine. The second is where water bodies are defined as navigable waters of the United States under the commerce clause of the United States Constitution.

Federal Standard under the Equal Footing Doctrine:

"Those rivers must be regarded as public navigable rivers in law which are navigable in fact. And they are navigable in fact when they are used, or are susceptible of being used, in their ordinary condition, as highways for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water.

The presence of rapids, waterfalls and sandbars which may require portaging around does not preclude navigability because the fact that navigation may be difficult and at places interrupted does not render a stream un-navigable. The character of a river as a public highway is not determined by the frequency of its use, but by its capacity for being used. Nor is it essential that a stream should be capable of being

navigated at all seasons of the year.”

**Federal Standard under the United States Constitution
Commerce Clause:**

The Commerce Clause of the United States Constitution states: “The Congress shall have power . . . to regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes . . .” Federal jurisdiction over navigable waterways has been asserted through various statutes such as Section 10 of the Rivers and Harbors Act of 1899 and the Federal Powers Act of 1920.

The delineation of the ordinary high-water mark is a critical component of sovereign land management because it identifies the specific areas in and around the state’s navigable waters that are under the jurisdiction of the Department of Water Resources. The ordinary high-water mark delineates the boundary between the uplands, owned by the riparian landowners, and the state-owned sovereign lands. Sovereign land begins at the ordinary high-water mark of the state’s navigable waters.

As defined in Administrative Code 89-10-01-03, ordinary high-water mark means:

[T]hat line below which the action of the water is frequent enough either to prevent the growth of vegetation or to restrict its growth to predominantly wetland species. Islands in navigable waters are considered to be below the ordinary high watermark in their entirety.

The Department of Water Resources developed Ordinary High Water Mark Delineation Guidelines in 2007 intended to

define a consistent and technically defensible approach for delineating the ordinary high-water mark in both riverine and lake settings in North Dakota.

Sovereign Land Permit

Each project that occurs on the state's sovereign lands requires an authorization from the Department of Water Resources prior to construction or operation, except as specified in Administrative Code §§ 89-10-01-10, 89-10-01-19.

As defined in Administrative Code § 89-10-01-03, project means:

[A]ny activity which occurs either partially or wholly on sovereign lands.

Applications for an authorization must be on the form Application for Authorization to Construct a Project within Islands and Beds of Navigable Streams and Waters.

As provided in Administrative Code § 89-10-01-06, upon receipt of a completed application, the Department of Water Resources shall initiate a review as follows:

1. Comments must be requested from the following entities:
 - a. North Dakota Game and Fish Department;
 - b. North Dakota Department of Environmental Quality;
 - c. North Dakota Historical Society;
 - d. North Dakota Department of Trust Lands;
 - e. North Dakota Parks and Recreation

- Department;
- f. U.S. Fish and Wildlife Service;
 - g. The park district and planning commission of any city or county where the proposed project will be located;
 - h. Any water resource district in which the proposed project will be located; and
 - i. Other agencies, private entities, and landowner associations as appropriate or required by law.
2. Each entity must submit all comments in writing to the Department of Water Resources. The department is not bound by any comment submitted. The department must receive comments within thirty days of the mailing date requesting comments.
3. Upon completion of the review and any public meeting held under Administrative Code § 89-10-01-07, the department may grant, deny, or condition the application.

LINKS

Application for Authorization to Construct a Project Within Sovereign Lands of North Dakota:

https://www.swc.nd.gov/pdfs/sfn_61408_authorized_sovereign_lands.pdf

