

## **N.D.A.G. Letter to Brudvik (June 11, 1991)**

June 11, 1991

Mr. William Brudvik  
Brudvik Law Office  
17 Center Avenue North  
Mayville, ND 58257

Dear Mr. Brudvik:

Thank you for your March 28, 1991, letter. You request clarification as to whether N.D.C.C. § 61-21-43.1 applies to private drains or is limited to assessment drains. You also ask whether N.D.C.C. § 61-21-43.1 applies to drains that have been abandoned as the term is defined by the Food Security Act of 1985 and common law.

The term "drain" as defined in N.D.C.C. § 61-21-01 and used in N.D.C.C. ch. 61-21, means any natural watercourse opened or proposed to be opened and improved for the purpose of drainage and any artificial drains of any nature or description constructed for drainage unless the subject matter otherwise requires. N.D.C.C. § 61-21-01. You suggest in your letter that the subject matter of N.D.C.C. §§ 61-21-42, 61-21-43, and 61-21-43.1 limits the term "drain" as used in these sections to "assessment drains."

I concluded that N.D.C.C. § 61-21-43.1 applied to all drains in an earlier opinion. Letter to Douglas G. Manbeck, November 13, 1990. After reconsidering the issue I believe that conclusion was correct.

I concluded that the term "drain" includes all drains, both legal and private, because the subject matter of the statute in question is not limited to assessment drains. I will analyze one of the sections you ask about to illustrate the rationale for my conclusions.

N.D.C.C. § 61-21-42 provides that all drains constructed in the state, except township drains, are under the charge of the board and it is the duty of the board to keep the drains open and in good repair. This section vests the boards with discretion as to when it is necessary to clean out and repair drains. This part of N.D.C.C. § 61-21-42 applies to both private drains and assessment drains.

If fifty-one percent of the "affected landowners," i.e. landowners whose land is subject to assessment or condemnation, petition the board to open and repair a drain, it becomes the mandatory duty of the board to clean out and repair the drain within limits of available funds. This part of N.D.C.C. § 61-21-42 applies to assessment drains. It also applies to private drains if fifty-one percent of the landowners whose land would be subject to assessment pursuant to N.D.C.C. § 61-21-43 request that the private drain be cleaned and repaired.

In contrast N.D.C.C. § 61-16.1-02(2) and 61-16.1-47 apply only to assessment drains. N.D.C.C. §§ 61-16.1-02(2) and 61-16.1-47 were created in 1981 by the same bill which amended the definition of "drain" in N.D.C.C. § 61-21-01.

N.D.C.C. § 61-16.1-02(2) provides:

"Assessment drain" means any natural watercourse opened, or proposed to be opened, and improved for the purpose of drainage, and any artificial drain of any nature or description constructed for the purpose of drainage, including dikes and appurtenant works, which are financed in whole or in part by special assessment. This definition may include more than one watercourse or artificial channel constructed for the purpose of drainage when the watercourses or channels drain land within a practical drainage area.

N.D.C.C. § 61-16.1-47 provides:

All assessment drains that have been constructed in any district, except township drains, shall be under the charge of the water resource board and it shall be the duty of the board to keep those drains open and in good repair. It shall be the mandatory duty of the board, within the limits of available funds, to clean out and repair any assessment drain when requested to do so by petition of the affected landowners having fifty percent or more of the possible votes, as determined according to section 61-16.1-20.

(Emphasis supplied.)

If the Legislative Assembly had intended "drain" in N.D.C.C. ch. 61-21 to apply only to assessment drains, it could have provided so when it enacted N.D.C.C. ch. 61-16.1. Instead, by not amending N.D.C.C. § 61-21-01 to limit the meaning of the word "drain" to assessment drain, the Legislature specifically amended the definition of "drain" in N.D.C.C. § 61-21-01 to include private drains. It is therefore my opinion that the term "drain" as used in N.D.C.C. §§ 61-21-42, 61-21-43, and 61-21-43.1 is not limited to assessment drains.

Your second issue concerns the treatment of drains that have been abandoned. "[F]or purposes of [N.D.C.C. ch. 61-21], a drain that is not maintained shall be considered abandoned." N.D.C.C. § 61-21-41. The North Dakota Supreme Court has not addressed what constitutes the abandonment of a drain, however, the general elements of abandonment are intent to abandon coupled with overt acts of abandonment. City of Minot v. Fisher, 212 N.W.2d 837, 839 (N.D. 1973). A determination of abandonment is a question of fact. Neuman Signs, Inc. v Hjelle, 317 N.W.2d 810, 817 (N.D. 1982).

You note that rules adopted pursuant to the Food Security Act of 1985 (16 U.S.C.A. §§ 3821-3824 (West Supp. 1991)) (the Act) define abandonment. These rules apply to the

abandonment of wetlands and not to the abandonment of drains. That Act provides that anyone who produces an agricultural commodity on a converted wetland after December 23, 1985, is ineligible for certain benefits provided by the United States Department of Agriculture and agencies of the department. This provision is known as the Swampbuster Provision of the Act. Wetlands converted prior to December 23, 1985, do not have to be restored if no additional wetland or abandoned converted wetland is brought into production. Rules adopted pursuant to the Act provide that, unless it is shown that there was no intent to abandon a previously converted wetland is considered abandoned if cropping, management, or maintenance operations related to the production of an agricultural commodity have ceased. However regardless of intent if there is no crop production for five successive years the land is determined to be abandoned. 7 C.F.R. § 12.33 (1991).

In North Dakota, an ordinance or statute which presumes abandonment after a certain period of nonuse is valid if it is interpreted as inapplicable to those situations where the cessation of use is beyond the control of the property owner. See Neuman Signs, Inc. v. Hjelle, 317 N.W.2d 810, 817 (N.D. 1982). It appears that the five year period of nonuse in 7 C.F.R. § 12.33 (1991) is interpreted in the same manner. See Letter to Ronald M. Dosch from United States Department of Agriculture, Soil Conservation Service (SCS), dated January 4, 1991. The SCS field office originally determined that a wetland had been abandoned since no cropping history existed on the wetland. On appeal, the office determined that the wetland was not abandoned because the landowner had always tried to maintain a ditch on the landowner's property to drain the wetland. The landowner was unable to maintain the ditch due to the lack of maintenance downstream by another landowner over which he had no control. Thus, the landowner was unable to farm the wetland or maintain the ditch at its original constructed depth or size. The SCS determined that the landowner could maintain the downstream outlet at its original discharge capacity and not be in violation of the Swampbuster provisions of federal law.

In your letter, you state that the SCS has determined that the wetland in question is a "converted wetland." If the wetland was converted prior to December 23, 1985, the drains draining the wetland could be maintained without violating the Swampbuster Provisions of federal law. 7 C.F.R. § 12.33(b)(1991) (wetlands converted prior to December 23, 1985, can be maintained and improved so long as such actions do not bring additional wetland into the production of an agricultural commodity).

Activities of a water resource district, drainage district, or similar entity are attributed to all persons within the jurisdiction of the district or other entity who are assessed for the activities of the district or entity. Accordingly, where a person's wetlands are converted due to the actions of the district or entity, the person is considered to have caused or permitted the drainage. 7 C.F.R. § 12.5(d)(vi). Since drainage is intended to be a benefit to landowners, drainage that would result in a violation of Swampbuster and a denial of federal benefits to a landowner would generally not be a benefit to that landowner. It may be that the benefits of maintaining such a drain are outweighed by the detriments. The water resource district board should consider this possibility when it makes a determination with regard to maintenance or abandonment of a drain.

Water resource districts have the duty to keep all drains open and in good repair pursuant to N.D.C.C. § 61-21-42. This section does not require the board to locate all drains, but does require it to keep open and in good repair those drains of which it is aware and that are not abandoned.

You ask who has the burden of proof in the complaint process to establish the existence of a drain and the original depth and contours of a drain. Generally, the moving party has the burden of proof in an administrative proceeding. In the absence of an operative presumption, the moving party has the burden of going forward as well as the burden of persuasion. Matter of Stone Creek Channel Improvement, 424 N.W.2d 894, 898 (N.D. 1988). Consequently, the moving party in the complaint process would have the burden of proving the existence of a drain and its original depth and contours.

You also ask to what extent boards of water resource districts may enter private property to clean out obstructions to privately constructed drains where the landowner refuses to do so and what procedure the board follows to assess the costs of cleaning out a privately constructed drain. N.D.C.C. § 61-21-43.1 provides that if a landowner does not remove an obstruction to a drain after notification by the board, the board shall procure removal of the obstruction and assess the cost or a portion of the cost against the property of the landowner responsible. This statutory authority gives the board the power to enter upon the land to clean out obstructions to privately constructed drains. This section also provides that the cost would be assessed against the property of the landowner or landowners responsible.

I hope this discussion has been helpful.

Sincerely,

Nicholas J. Spaeth

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