

N.D.A.G. Letter to Johnson (Sep. 19, 1991)

September 19, 1991

Mr. Ward K. Johnson III
Attorney at Law
Grand Forks Water Resource District
P. O. Box 1735
Grand Forks, ND 58206-1735

Dear Mr. Johnson:

Thank you for your August 13, 1991 letter regarding the payment of drain assessments by the North Dakota Game and Fish Department (hereinafter "Department") under N.D.C.C. ch. 61-16.1 and 61-21. For the reasons set forth below, it is my opinion that the Department should not pay assessments for drain construction and maintenance.

The Department owns land for fish and wildlife management purposes in the name of the State of North Dakota. The North Dakota Constitution provides that "[P]roperty of the state, county, and municipal corporations, to the extent immunity from taxation has not been waived by an act of the legislative assembly . . . shall be exempt from taxation." N.D. Const. art. X, § 5.

"Tax" is not defined in the Century Code for any general purpose. The term is defined in North Dakota case law as an enforced contribution for public purposes which is in no way dependent upon the will or express consent of the person taxed. Menz v. Coyle, 117 N.W.2d 290, 297 (N.D. 1962). In various places throughout N.D.C.C. chs. 61-16.1 and 61-21, assessments are referred to as taxes or are levied in the same manner as taxes. See N.D.C.C. §§ 61-16.1-08, 61-16.1-31, 61-21-27, 61-21-28, 61-21-52. Furthermore, the North Dakota Supreme Court has previously treated drainage assessments as taxes. Erickson v. Cass County, 92 N.W. 841 (N.D. 1902). Therefore, the assessments in N.D.C.C. ch. 61-16.1 and 61-21 may be characterized as taxes.

When an attempt is made to tax property of the state, the next question is whether the legislature has waived the state's immunity to taxation. No provisions in N.D.C.C. ch. 61-16.1 and 61-21 authorize an assessment against state property. The legislature has waived immunity for county, city and township property. See N.D.C.C. §§ 61-16.1-21, 61-16.1-33, 61-21-20, 61-21-62. However, no such waiver of immunity is granted for state property.

Since there is no specific authority given to water resource districts to assess the state for drains, and because there is a constitutional provision prohibiting taxation of the state, it is my opinion that drainage assessments may not be levied against the Department.

Sincerely,

Nicholas J. Spaeth

ah