

LETTER OPINION
93-L-225

July 15, 1993

Earle R. Myers, Jr.
State's Attorney
Richland County State's Attorney's Office
413 3rd Avenue North
Wahpeton, ND 58075

Dear Mr. Myers:

Thank you for your May 17, 1993, letter concerning whether the citizens of Richland County, a home rule county, may petition the Richland County Commission to have the water resource board elected rather than appointed by the board of county commissioners.

Pursuant to North Dakota Century Code (N.D.C.C.) Section 11-09.1-05, home rule counties may exercise certain enumerated powers if those powers have been included within their home rule charters and implemented through ordinances. One of the powers enumerated in Section 11-09.1-05 is to provide for county elected and appointed officers and employees, their selection, powers, duties, qualifications, and compensation, and the terms of county appointed officers and employees. N.D.C.C. ? 11-09.105(3). Accordingly, the initial inquiry must be to determine whether members of a water resource board are county officers or employees.

In State ex rel. Birdzell v. Jorgenson, 142 N.W. 450 (N.D. 1913) the North Dakota Supreme Court addressed the issue of whether members of the state board of tax commissioners were state officers. The court, finding that the tax commissioners, whose jurisdiction was statewide, were state officers, stated:

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State officers are those whose duties concern the state at large or the general public, although exercised within defined limits, and to whom are delegated the exercise of a portion of the sovereign powers of the state. They are in a sense those whose duties and powers are coextensive with the state, or not limited to any political subdivisions of the state, and are thus distinguished from municipal officers strictly, whose functions relate exclusively to the particular municipality, and from county, city, town, and school district officers.

Id. at 456.

The provisions governing the creation of water resource districts and their governing boards is found in N.D.C.C. ch. 61-16. N.D.C.C. ? 61-16-05 provides that all land in North Dakota shall be within a water resource district. Water resource districts are governmental agencies. N.D.C.C. ? 61-16-06. Water resource district boundaries do not necessarily coincide with county boundaries. The area of a water resource district may lie within a county boundary or consist of parts or all of more than one county. N.D.C.C. ? 61-16-07. Water resource boards have the powers set forth in N.D.C.C. ? 61-16.1-09. Once a board member is appointed, the member has a distinct duty to the water resource district and the member's duties relate to the district as a whole and not to the county from which the member is appointed.

Although the water resource district's budget must be approved by the board of county commissioners, the money raised by any levy authorized remains with the water resource district until expended and does not revert to the county. N.D.C.C. ? 61-16.1-06. In addition special assessments, except for federally constructed projects (N.D.C.C. ? 61-16.1-40.1), may be imposed by the water resource board without approval of the board of county commissioners. N.D.C.C. ?? 61-16.1-06, 61-16.1-09(4), 61-16.1-15. Board members are paid per diem and travel expenses out of the special mill levy of the water resource district and are not

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paid out of the county general fund. N.D.C.C. ? 61-16-08, 61-16.1-07.

The above statutes indicate that water resource boards are separate entities from counties and the board members are not county officials or county employees. The fact that members of water resource district boards are appointed by boards of county commissioners does not change this conclusion. Barnes v. Dist. of Columbia, 91 U.S. 540 (1875) (powers and duties of judges are not affected by the manner of their selection); Cranston v. Weston Co. Weed & Pest Bd., 826 P.2d 251, 256 (Wyo. 1992) (fact that weed and pest control board members were appointed and could be removed by the county commissioners did not affect decision that weed and pest control districts were separate governmental entities from the county).

In conclusion, because home rule counties only have authority over county officials, the county commission does not have authority under a home rule charter to provide for the election rather than the appointment of water resource boards.

Sincerely,

Heidi Heitkamp
ATTORNEY GENERAL

JAK/mh