

LETTER OPINION
98-L-41

April 14, 1998

Ms. Jonal H. Uglem
Steele County State's Attorney
PO Box 331
Finley, ND 58230-0331

Dear Ms. Uglem:

Thank you for your letter asking whether a county is responsible for a portion of the costs of replacing culverts on a county or township highway system that are needed to accommodate flows arising as a result of the creation of a legal drain if the culverts were adequate to handle the flows that existed prior to construction of the drain. By "legal" drain, I assume you mean a drain established by a water resource district under the authority granted to it in N.D.C.C. ch. 61-16.1. You cited N.D.C.C. § 61-16.1-43 which provides, in part:

Whenever any bridge or culvert is to be constructed on a county or township highway system over and across or in connection with a drain, the cost of constructing such bridge or culvert shall be shared in the following manner:

1. The state water commission may, if funds are available, participate in accordance with such rules and regulations as it may prescribe. The remaining cost shall be borne forty percent by the county and sixty percent by the district which has created the need for such construction.
2. If, however, moneys have not been made available to the commission for participation in accordance with subsection 1, then forty percent of the cost of a bridge or culvert shall be paid by the county and sixty percent shall be charged as cost of the drain to the district.
3. Where such bridges or culverts are constructed with federal financial participation, the costs exceeding the amount of the federal participation shall be borne by the district and county according to the provisions of this section, as the case may be.

This section must be read in conjunction with N.D.C.C. § 61-16.1-42, which provides:

Drains may be laid along, within the limits of, or across any public road or highway, but not to the injury of such

Ms. Jonal H. Uglem
April 14, 1998
Page 2

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.

Ms. Jonal H. Uglem
April 14, 1998
Page 3

(Emphasis added.) These sections require a county to pay forty percent of the costs of necessary culverts or bridges, not paid by the state or federal government, whenever a drain is constructed through an existing road. If no culverts or bridges existed prior to construction of a drain, these statutes would require the county to absorb a portion of the costs of constructing necessary culverts, even if no culverts were previously needed to handle any existing flows. It follows from this, that if these statutes require counties to pay for the costs associated with the construction of new culverts to accommodate the creation of a drain, they also require counties to absorb costs of replacing culverts necessary to accommodate the drain. This is true regardless of whether the existing culverts adequately handle pre-drain flows. See 1988 N.D. Op. Att'y Gen. 8 (Feb. 8 Op. to James Wold) (these statutes require a county to bear forty percent of the costs of constructing culverts in roads in situations where a drain is established after a road is built). Because the Legislature has recognized the public benefits of drainage, a portion of the costs is also shared by the road entity. Id. See also Southeast Cass Water Resource District v. Burlington Northern R. Co., 527 N.W.2d 884 (N.D. 1995) (the language in N.D.C.C. § 61-16.1-42 authorizing a water resource district to run a drain across a railroad and requiring railroad companies to build the required bridges and culverts needed and to keep them in repair places continuing responsibility on railroads for the costs of accommodating increased drainage flows).

Sincerely,

Heidi Heitkamp
ATTORNEY GENERAL

jak\bah