

**IN THE SUPREME COURT  
STATE OF NORTH DAKOTA**

Robert & Laurie Banderet, Carol Beck,  
Gerald Bosse, Mathew Bosse, Duane &  
Valera Hayen, Beverley Kelley, Leon  
Mallberg, Paul Mathews, Nancy Mathews,  
Katheryn Nelson, R & I Memorial Trust,  
Kathaleen R. Rehborg as Trustee, Gerald &  
Judith Ringdahl, and John & Beth  
Wentworth,

Plaintiffs and Appellants,  
and

William E. Kurschet, and Jan Vold &  
Melanie Jones as Trustees of the Evergreen  
Trust,

Plaintiffs,

vs.

Sargent County Water Resource District,  
and Ransom County Water Resource  
District,

Appellees.

**Supreme Court No. 20180253**

**Sargent County District Court Case  
No. 41-2017-CV-00014**

Appeal from Judgments Entered on April 17, 2017 & April 26, 2017  
Case No. 41-2017-CV-00014  
County of Sargent, Southeast Judicial District  
The Honorable Bradley A. Cruff, Presiding

**BRIEF OF APPELLEE RANSOM COUNTY WATER RESOURCE DISTRICT**

Jane L. Dynes (ND #04495)  
**SERKLAND LAW FIRM**  
10 Roberts Street | PO Box 6017  
Fargo, ND 58108-6017  
Phone: (701) 232-8957  
Fax: (701) 237-4049  
Email: jdynes@serklandlaw.com  
**Attorney for Appellee Ransom County  
Water Resource District**

**TABLE OF CONTENTS**

	<b><u>Para. No.</u></b>
I. STATEMENT OF ISSUES .....	1
II. STATEMENT OF THE FACTS .....	3
III. STANDARD OF REVIEW .....	16
IV. LAW AND ARGUMENT .....	19
A. The District Court Properly Granted Ransom County WRD’s Motion to Dismiss the Declaratory Judgment Action Against it.....	19
1. There Was No Determination that Ransom County Land Would Benefit from Drain 11 Improvement Project 2016-01 .....	21
2. Mere Assertions that Ransom County Land “May” Benefit are Insufficient to Preclude Summary Judgment of Dismissal.....	22
3. Water Resource Districts are Not Mandated to Work Together on Specific Projects.....	26
B. The District Court’s Determination that Landowners Lack Standing to Pursue a Declaratory Judgment Action Against Ransom County WRD is Properly Affirmed.....	29
C. The District Court Appropriately Relied on <u>Klindt</u> in Dismissing the Complaint Against Ransom County WRD .....	40
D. Ransom County WRD’s Determination of No Benefit to Land in Ransom County Should be Protected by the Doctrine of Separation of Powers .....	42
V. CONCLUSION.....	44

**TABLE OF AUTHORITIES**

**Para. No.**

**Cases**

<u>Anderson v. Richland Co. Water Resource Bd.</u> , 506 N.W.2d 362, 367 (N.D. 1993) .....	22
<u>Arnegard v. Arnegard Township</u> , 2018 ND 80 ¶11, 908 N.W.2d 737 .....	26
<u>Cossette v. Cass County Joint Water Resource District</u> , 2017 ND 120, ¶7, 894 N.W.2d 858 .....	16
<u>Eck v. City of Bismarck</u> , 283 N.W.2d 193, 196 (N.D. 1979) .....	19
<u>Gress v. Kocourek</u> , 427 N.W.2d 815, 816-817 (N.D. 1988) .....	23
<u>Kjolsrud v. MKB Management Corp.</u> , 2003 ND 144 ¶14, 669 N.W.2d 82 .....	30
<u>Klindt v. Pembina County Water Resource Bd.</u> , 2005 ND 106, ¶4, 697 N.W.2d 339, .....	24, 33, 40, 41
<u>Overlie v. State</u> , 2011 ND 191, ¶11, 804 N.W.2d 50 .....	16
<u>Pic v. City of Grafton</u> , 1998 ND 202, ¶6, 586 N.W.2d 159 .....	42, 43
<u>Podrygula v. Bray</u> , 2014 ND 226, ¶9, 856 N.W.2d 791 .....	19
<u>Poppe v. Stockert</u> , 2015 ND 252, ¶4, 870 N.W.2d 187 .....	16
<u>Rebel v. Nodak Mutual</u> , 1998 ND 194, ¶8, 585 N.W.2d 811 .....	29, 32, 37
<u>Tibert v. City of Minto</u> , 2006 ND 189, ¶8, 720 N.W.2d 921 .....	42

## Statutes

N.D.C.C. § 28-34-01 .....	43
N.D.C.C. § 32-23-01 .....	38
N.D.C.C. § 32-23-02 .....	38
N.D.C.C. § 61-16.1-09 .....	24, 36, 40
N.D.C.C. § 61-16.1-10 .....	3, 27, 28, 31, 38, 39
N.D.C.C. § 61-16.1-11 .....	17, 27
N.D.C.C. § 61-16.1-15 .....	21, 35
N.D.C.C. § 61-16.1-21 .....	36
N.D.C.C. § 61-16.1-26 .....	33
N.D.C.C. § 61-16.1-33 .....	40
North Dakota Rule of Civil Procedure 12(b) .....	13, 16
North Dakota Rule of Civil Procedure 56 .....	19

**I. STATEMENT OF ISSUES**

¶1 Whether the District Court properly dismissed the Complaint against Ransom County Water Resource District as a matter of law because it acted in compliance with statutory requirements and there was no determination that land in Ransom County would benefit from Drain 11 Improvement Project 2016-01.

¶2 Whether the District Court properly dismissed the Complaint against Ransom County Water Resource District because the Plaintiff Landowners lacked standing to pursue a declaratory judgment against it.

## II. STATEMENT OF THE FACTS

¶3 The Plaintiffs/Appellants are Sargent County landowners (hereinafter collectively referred to as “Landowners”). They filed a Complaint against Ransom County Water Resource District (hereinafter referred to as “Ransom County WRD”) seeking a declaratory judgment that Ransom County WRD failed to comply with N.D.C.C. § 61-16.1-10, and that land in Ransom County must be included in the Drain 11 Assessment District. See Appendix of Appellants, pp. 28-29 (hereinafter referred to as “App.”).

¶4 Ransom County lies north of Sargent County in the southeast corner of the state. See App. p. 116. Drain 11 is a legal assessment drain, the boundaries of which are located wholly within Sargent County. *Id.* at p. 115; Appendix of Appellee Ransom County WRD, p. 39 (hereinafter referred to as “RCWRD App.”). At a meeting of the Sargent County Water Resource District (hereinafter referred to as “Sargent County WRD”) on September 18, 2014, along with discussions questioning the capacity of the existing Drain 11 channel, the District raised the possibility of including Ransom County land into the Drain 11 assessment area. App. pp. 121-122.

¶5 Thereafter, on October 16, 2014, the Sargent County WRD reviewed a new map which outlined the Sargent County Drain No. 11 watershed to include Ransom County. App. p. 124. Sargent County WRD discussed scheduling a potential meeting with the Ransom County WRD board “to discuss the possibility of a Joint Agreement . . . to expand the [Drain 11 watershed] assessment area.” App. p. 124; RCWRD App. p. 39; see also, <sup>1</sup>Docket Index # 125: Exhibit 1 to Gaustad Affidavit, Transcript of January 9,

---

<sup>1</sup> Hereinafter all references to “Index #” are references to the Docket Index #.

2018 Preliminary Injunction Hearing, pp. 27-28. Ransom County WRD invited members of the Sargent County WRD board to its November 24, 2014, meeting to discuss Sargent County WRD's inquiry into expanding the Drain 11 watershed area into Ransom County. RCWRD App. p. 12. Following their attendance at that meeting with the Ransom County WRD, members of the Sargent County WRD reported that Ransom County WRD was "not willing to proceed with a joint board unless they can see some improvement that will happen for Ransom County." App. p. 126. However, Ransom County WRD agreed to pay \$5,000 toward a study of the watershed area. Id.

[¶6] Sargent County continued to consider "how to include" drainage from Ransom County into the Drain 11 Assessment District. RCWRD App. p. 16. In March 2015, Sargent County WRD authorized Moore Engineering to prepare a study of the Wild Rice River Watershed. App. p. 127. In May 2015, members of the Sargent County WRD Board again met with the Ransom County WRD to discuss extending the Drain 11 assessment area into Ransom County and felt the meeting had "some positive comments." App. p. 129.

[¶7] In June 2015, Sargent County WRD reviewed the existing Drain 11 Assessment District Map, the Wild Rice River Watershed Area Map, and a preliminary expanded Drain 11 Assessment District map that included land in Ransom County. App. p. 130. The preliminary assessment district including Ransom County was "only a start to get something ready for the Board to present to Ransom County." Id. A month later, in July 2015, the Sargent County WRD agreed to share its proposed map for extending the Drain 11 Assessment District into Ransom County with the Ransom County WRD. RCWRD App. p. 19.

[¶8] Members of the Sargent County WRD met with the Ransom County WRD on August 17, 2015. App. p. 132. Ransom County WRD reviewed the proposed map showing a Drain 11 Assessment District area that extended into Ransom County. Id. Ransom County asked questions and asked to see the U.S. Fish and Wildlife Conservation and Wetlands easement areas in Ransom County overlaid on the proposed expanded Drain 11 Assessment District map. Id. In September 2015, Sargent County WRD had the overlay map prepared and sent to Ransom County WRD showing the Ransom County Waterfowl Production Areas, U.S. Fish and Wildlife Conservation Areas, and Wetlands Easements. RCWRD App. p. 26.

[¶9] On October 20, 2015, after receiving the maps provided by Sargent County WRD, including the proposed map extending the Drain 11 Assessment District into Ransom County, Ransom County WRD informed Sargent County WRD that the maps with the overlays of the many existing easements showed that the proposed extended Drain 11 Assessment District included a vast amount of undrainable land in Ransom County. App. p. 134. Ransom County WRD determined that extending the Drain 11 Assessment District area into Ransom County would not benefit landowners in Ransom County. Id. Ransom County WRD offered to meet with the Sargent County WRD again on the subject and suggested that landowners be invited to give their input. Id.

[¶10] On March 17, 2016, Moore Engineering completed its work on the Upper Wild Rice River Watershed Study in connection with the Sargent County WRD Drain 11 proposal. Index # 81; RCWRD App. pp. 28-29. The final signed copy of the Upper Wild Rice Watershed Study for Drain 11 was presented to the Sargent County WRD on April



21, 2016. App. p. 136. Sargent County WRD discussed beginning the necessary work on Drain 11 in phases starting at the south end of Drain 11. Id. The Drain 11 channel improvements project would start “from the outlet in Section 7-129-56 (Taylor Township) northerly to the northern edge of Meszaros Slough in Section 9-130-57 (Sargent Township).” App. p. 138; see also, RCWRD App. p. 47 (Drain 11 Project 2016-01 Map Area and map inset showing none of the Project’s proposed work would be in Ransom County). In May 2016, Sargent County WRD continued the engineering work in order to prepare a cost sharing request with the State Water Commission. RCWRD App. p. 34. In July 2016, in response to a question regarding the Drain 11 project, the Sargent County WRD again reported that Ransom County had no interest in pursuing a joint project “at this time.” RCWRD App. pp. 36-37.

[¶11] On October 20, 2016, the Sargent County WRD passed a Resolution of Necessity for Drain 11 Improvement Project 2016-01 stating that “the Drain 11 Project will not require the addition of any new properties to the existing Drain 11 Assessment District.” App. p. 142. The Resolution contains no specific determination that identified lands in Ransom County would be benefited by the project. App. pp. 141-143. The Drain 11 Assessment District and the Drain 11 Improvement Project 2016-01 area cover the same geographical area. RCWRD App. pp. 98-99.

[¶12] On November 16, 2016, Sargent County WRD presented Drain 11 Improvement Project 2016-01 to landowners in the area. App. p. 144. Engineer Chris Gross made a power point presentation which included a map of the project area. RCWRD App. p. 47; see also, RCWRD App. pp. 76-85: partial transcript of January 9, 2018 Preliminary Injunction Hearing. The entirety of Drain 11 Improvement Project

2016-01 area is in Sargent County. *Id.* at p. 84. The Sargent County WRD Drain 11 Assessment District does not include any land in Ransom County. App. p. 115. The Drain 11 Project was designed to start at the outlet or bottom of the drain because, from an engineering standpoint, it makes sense to improve the outlet before doing improvements upstream that increase drainage. Otherwise a bottleneck could occur at the bottom/outlet because it is inadequate to handle increased upstream drainage. RCWRD App. p. 94. The Drain 11 Improvement Project 2016-01 improvements would be built in Taylor, Brampton, and Sargent townships only. App. p. 146.

[¶13] Ransom County WRD filed a Motion to Dismiss pursuant to North Dakota Rule of Civil Procedure 12(b). Index # 21-22: Motion and Brief. The Landowners opposed both Sargent County and Ransom County WRDs' Motions to Dismiss through a combined response brief and submitted copies of various minutes of the Sargent County WRD Meetings, Landowner Affidavits, and other materials. Index # 35-46. After a hearing, District Judge Bradley A. Cruff, relied on the Landowners' affidavits in denying the motions to dismiss. App. pp. 72, 77-78.

[¶14] Landowners filed a Motion for Preliminary Injunction and, in support thereof, submitted additional Sargent County WRD minutes as well as the Upper Wild Rice River Watershed Study. Index # 74-77, 80-81. Additional evidence in the form of documents and testimony was submitted at the preliminary injunction motion hearing.

[¶15] On February 7, 2018, Ransom County WRD filed its Motion for Reconsideration of the Court's Order dated January 2, 2018, Denying Its Motion to Dismiss and Brief in support. Index # 134-135. Landowners filed an opposing brief. Index #164. Following a March 21, 2018, telephonic hearing on the motions to

reconsider, the district court entered Findings of Fact, Conclusions of Law, and Order Granting Ransom County WRD's Motion for Reconsideration. App. pp. 95-103. This appeal followed.

### **III. STANDARD OF REVIEW**

[¶16] The district court granted Ransom County WRD's Motion to Reconsider the January 2, 2018, Order Denying its Motion to Dismiss. In reviewing an appeal from a 12(b) dismissal, the complaint is construed in the light most favorable to the plaintiff, taking as true the well pleaded allegations in the complaint. See Cossette v. Cass County Joint Water Resource District, 2017 ND 120, ¶7, 894 N.W.2d 858. However, in considering the Ransom County WRD Motion to Dismiss, the district court considered materials outside the pleadings. (See Supra ¶¶13-14). If a Rule 12(b) motion is based on the pleadings, and if matters outside the pleadings are considered, the motion must be treated as a motion for summary judgment under North Dakota Rule of Civil Procedure 56. Overlie v. State, 2011 ND 191, ¶11, 804 N.W.2d 50. The standard for reviewing summary judgment is well established:

Summary judgment is a procedural device for the prompt resolution of a controversy on the merits without a trial if there are no genuine issues of material fact or inferences that can reasonably be drawn from undisputed facts, or if the only issues to be resolved are questions of law. A party moving for summary judgment has the burden of showing there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. In determining whether summary judgment was appropriately granted, we must view the evidence in the light most favorable to the party opposing the motion, and that party will be given the benefit of all favorable inferences which can reasonably be drawn from the record. On appeal, this Court decides whether the information available to the district court precluded the existence of a genuine issue of material fact and entitled the moving party to judgment as a matter of law. Whether the district court properly

granted summary judgment is a question of law which we review de novo on the entire record.

Poppe v. Stockert, 2015 ND 252, ¶4, 870 N.W.2d 187.

¶17] The district court determined that Landowners did not have standing to bring suit for declaratory judgment against Ransom County WRD because they did not have a legally protectable interest against it and had no standing to sue Ransom County WRD for declaratory relief. App. pp. 102-103. The court also determined that Landowners did not have standing against Ransom County WRD because they were not injured by any “punitively illegal” action or inaction of Ransom County WRD. App. p. 102 at ¶20. Landowners do not appear to challenge the standing determination made by the court below. App. pp. 108-110. The district court also determined that Ransom County WRD met its obligations under N.D.C.C. § 61-16.1-11(1) by meeting and cooperating with Sargent County WRD in regard to the Wild Rice River Watershed. App. p. 102.

¶18] Landowners do contest the underlying facts herein as they apply to Ransom County WRD and no genuine issues of material fact exist. Application of the standard of review for summary judgment and *de novo* review properly results in an affirmance of the order below granting Ransom County WRD’s Motion to Dismiss.

#### IV. LAW AND ARGUMENT

##### A. **The District Court Properly Granted Ransom County WRD’s Motion to Dismiss the Declaratory Judgment Action Against it.**

¶19] During the course of proceedings in the court below, numerous meeting minutes, affidavits, documentary exhibits, and hearing testimony were presented to the district court. The parties had a reasonable opportunity to present material pertinent to the dismissal motion which was converted to a rule 56 motion because those materials

outside the pleadings were presented, considered, and relied on by the court in making its determination on the requested dismissal. See, Podrygula v. Bray, 2014 ND 226, ¶9, 856 N.W.2d 791. When a district court’s decision on a motion to dismiss should have been treated as one for summary judgment, review of the district court’s disposition of the motion requires disregarding the label used to announce the decision and looking to the substance of that decision instead. Eck v. City of Bismarck, 283 N.W.2d 193, 196 (N.D. 1979).

[¶20] No evidence presented to the district court created a genuine issue of material fact to preclude the dismissal of the Complaint against Ransom County WRD.

**1. There Was No Determination that Ransom County Land Would Benefit from Drain 11 Improvement Project 2016-01.**

[¶21] No water resource district may impose assessments for a proposed project absent a determination that a proposed project will benefit particular lands. By statute, “assessments shall be apportioned to and spread upon lands or premises benefited by the project in proportion to and in accordance with benefits accruing thereto.” N.D.C.C. § 61-16.1-15 (emphasis added). Ransom County WRD considered Sargent County WRD’s proposal to expand the Drain 11 Assessment District area to include land in Ransom County. Ransom County WRD determined, within its authority, that land in Ransom County would not benefit from the proposed project due to the vast amount of undrainable land. App. p. 134. Additionally, Sargent County WRD made no finding or determination that Ransom County properties, even those in the Upper Wild Rice Watershed, were benefited by the proposed Drain 11 Improvement project. App. p. 142. The Resolution of Necessity states Project 2016-01 will not require the “addition of any new properties to the existing Drain 11 Assessment District.” Id. With no determination

of benefit to land in Ransom County, no water resource district could assess lands therein.

**2. Mere Assertions that Ransom County Land “May” Benefit are Insufficient to Preclude Summary Judgment of Dismissal.**

[¶22] The affidavits relied on by the court in its initial denial of the Ransom County WRD Motion to Dismiss state only that the Landowner affiants “believe that . . . the Sargent County WRD engineer determined that the Project will benefit landowners in Ransom County.” App. p. 68 ¶3; see also, Index # 44-46. However, Sargent County WRD Engineering Consultant Chris Gross acknowledged that, while models can show that an improvement to the outlet of a drain generally improves the drain system, improvements to the outlet may not improve the entire system. RCWRD App. p. 95, lines 17-22. Moreover, a consulting engineer does not have the authority to determine what property benefits from a proposed project. That is a decision only a water resource district has the authority to make. “The legislature has left the task of determining ‘benefit’ to Water Resource Districts.” Anderson v. Richland Co. Water Resource Bd., 506 N.W.2d 362, 367 (N.D. 1993). Again, Sargent County WRD did not determine that Ransom County land benefited from its Drain 11 Improvement Project. App. pp. 141-143.

[¶23] Nothing in the record indicates that Ransom County land would be benefited by the project other than the assertions of the Landowners. Their affidavits are unpersuasive. “Generally, conclusory statements are not enough. . . . affidavits containing conclusory statements that are not supported by specific facts are insufficient.” Gress v. Kocourek, 427 N.W.2d 815, 816-817 (N.D. 1988) (internal citations omitted).

[¶24] Ransom County WRD determined that the proposed Drain 11 project would not benefit land in its county. That decision, however, was not necessarily a bar against Sargent County WRD making its own determination regarding whether land in Ransom County benefited from its proposed Drain 11 Improvement Project 2016-01. In Klindt v. Pembina County Water Resource Bd., 2005 ND 106, ¶4, 697 N.W.2d 339, Pembina County WRD Board determined “[a]ll of the lands both agricultural and non-agricultural in the Tongue River Watershed . . . would benefit from a snagging and clearing project at the location mentioned.” This determination served as the basis for the Court’s conclusion that the Pembina County Board’s decision to confine the assessment area to the watershed located in Pembina County was arbitrary and inconsistent with its benefits determination and its decision to seek assessments against landowners within the watershed but outside of their county pursuant to N.D.C.C. § 61-16.1-09.1. Id. at ¶¶1, 20-21.

[¶25] With no determination that land in Ransom County would benefit from the Drain 11 Improvement Project 2016-01, any assertion of such benefit by Landowners was insufficient to support its declaratory judgment action against Ransom County WRD. The Complaint was properly dismissed.

**3. Water Resource Districts are Not Mandated to Work Together on Specific Projects.**

[¶26] Landowners seek a statutory interpretation which would mandate that Ransom County land be assessed for the Sargent County WRD Drain 11 Improvement Project 2016-01. The purpose of statutory interpretation is to determine the intention of the legislation. Arnegard v. Arnegard Township, 2018 ND 80 ¶11, 908 N.W.2d 737.

[¶27] North Dakota Century Code § 61-16.1-11(1) states that: “[t]wo or more districts may, by agreement, jointly or cooperatively exercise any power which is authorized a board by this title” (emphasis added). Landowners assert that Ransom County was “mandated” by N.D.C.C. § 61-16.1-10(3) to agree to the Sargent County WRD’s proposal to extend the Drain 11 Assessment District area into Ransom County. See Index # 34: Plaintiffs’ Combined Response to Defendants’ Motions to Dismiss, ¶53. The evidence shows that Sargent and Ransom County WRDs did meet to discuss the watershed on multiple occasions. Ransom County WRD pledged money toward the completion of the Upper Wild Rice River Watershed Study. App. p. 126. Even the statutory section that Landowners rely on states that any joint exercise requires that there be a significant and common water resource management problem. N.D.C.C. § 61-16.1-10(3). Ransom County determined, as it was authorized to do, that the proposed Drain 11 Improvement Project would not benefit Ransom County land due to the distinct nature of much of the land being undrainable.

[¶28] Moreover, N.D.C.C. § 61-16.1-10 lists the responsibilities that water resource district boards have to each other. It requires only that the boards meet to review and coordinate efforts “for the maximum benefit of the entire river basin.” N.D.C.C. § 61-16.1-10(1). The statute contains no requirement that water resource district boards levy assessments or develop specific projects together, particularly when a project will be entirely situated within a drain assessment district which does not include, or benefit, property in another county. The statute limits the required cooperation and assistance between water resource districts in a common river basin “to the extent possible.”



N.D.C.C. § 61-16.1-10(2). The statute does not strip a water resource district of its authority to exercise its own judgment.

**B. The District Court’s Determination that Landowners Lack Standing to Pursue a Declaratory Judgment Action Against Ransom County WRD is Properly Affirmed.**

[¶29] The district court determined that Landowners lacked standing to pursue their declaratory judgment action against Ransom County WRD. App. pp. 102-103. Only after standing has been established are the merits of a dispute to be decided. Rebel v. Nodak Mut. Ins. Co., 1998 ND 194, ¶8, 585 N.W.2d 811.

[¶30] There is a two-pronged test to determine whether a litigant has alleged such a personal stake in the outcome of a controversy as to justify the court’s remedial powers to decide the merits of the dispute. Kjolsrud v. MKB Management Corp., 2003 ND 144 ¶14, 669 N.W.2d 82. The first requirement is that a litigant must have suffered some threatened or actual injury resulting from the putatively illegal action. Id. The second requirement is that the asserted harm must not be a generalized grievance shared by all or a large class of citizens; rather, a litigant must assert his or her legal rights and interests and cannot rest a claim to relief on the legal rights and interests of third parties. Id.

[¶31] Landowners have suffered no threatened or actual injury stemming from any “putatively illegal” actions of Ransom County WRD under N.D.C.C. § 61-16.1-10. Ransom County WRD met its responsibilities to Sargent County WRD under that statute. There was also no wrongful “inaction” of the Ransom County WRD that caused or threatened harm to Landowners. Ransom County WRD did not develop the Drain 11 Improvement Project and did not impose assessments on anyone for Drain 11 Improvement Project 2016-01. The only thing Ransom County WRD did was determine

that the proposed Drain 11 Project would not benefit land in Ransom County – a decision it was authorized to make. There is no evidence that Ransom County’s determination that the Sargent County WRD’s proposed project for Drain 11 provided no benefit to Ransom County lands was a “putatively illegal” action.

[¶32] This Court has “consistently required that a person have a legally protectible [sic] interest in the controversy to obtain declaratory relief. . . . The disputed question must be raised by one who has an interest in and a legal right to raise it.” Rebel v. Nodak Mut. Ins. Co., 1998 ND 194, ¶13 (internal citations omitted). Here, Landowners do not have standing against Ransom County WRD because they were not injured by any “putatively illegal” action (or inaction) of the Ransom County WRD.

[¶33] This Court determined that a water resource board ought to assess “all of the land it had determined would be benefited by the project,” but was clear that a failure to assess such properties in another county was the responsibility of the county pursuing the project, not the county where other benefited land may be. See, Klindt v. Pembina County Water Resource Bd., 2005 ND 106, ¶¶19-23 (emphasis added). Setting aside the issue of an untimely appeal of Sargent County WRD’s Resolution of Necessity, and assuming for purposes of argument that Sargent County had determined Ransom County land would benefit from its Drain 11 Improvement Project, the Landowners may arguably have had standing to bring a declaratory judgment action against the Sargent County WRD. However, such standing does not extend to Ransom County WRD. The more appropriate remedy to challenge assessments is the reassessment of benefits procedure detailed in N.D.C.C. § 61-16.1-26.

[¶34] Ransom County land cannot be assessed because there was no determination, by either water resource district, that Ransom County land would benefit from the Drain 11 project. Thus, there is no relationship between Ransom County WRD and Landowners regarding the Drain 11 Improvement Project 2016-01 that creates standing for Landowners to sue Ransom County WRD.

[¶35] Multiple statutes reference a water resource district's power to assess lands, even those that lay outside the boundaries of its district area, that are benefited by a project. N.D.C.C. § 61-16.1-15 provides that a water resource board shall:

assess the proportion of the cost of the project, or the part of the cost to be financed with funds raised through levy and collection of special assessments which any lot, piece, or parcel of land shall bear in proportion to the benefits accruing thereto and any county, city, or township which is benefited thereby.

Id. (emphasis added)

[¶36] N.D.C.C. § 61-16.1-09.1(1)(b) provides, “[i]f a board that undertakes a project finds that the project will benefit lands outside the water resource district boundaries,” steps must be taken so that the boards of each water resource district benefited by a project must approve the project by a two-thirds vote. The statute further states that, if all water boards do not agree, the water resource board that undertakes the project may proceed with the project if it finances the cost of the project and does not assess land outside the boundaries of the district. Id. at (1)(b)(3). N.D.C.C. § 61-16.1-21 also specifies a water resource district can assess any “lot, piece or parcel of land which is directly benefited by such improvement.” Id.

[¶37] The various statutory provisions authorizing a water resource district board to determine benefits to land, even those outside the water district's boundaries,

negates any duty or relationship by which Landowners gain standing as to Ransom County WRD. “The declaratory judgment statutes do not create a relationship between the parties that does not otherwise exist to confer standing.” Rebel v. Nodak Mut. Ins. Co., 1998 ND 194, ¶13.

[¶38] Landowners do not have standing against Ransom County under N.D.C.C. § 61-16.1-10 as the statute is not related to landowner rights. Even if N.D.C.C. § 61.16.1-10 mandated that Ransom County WRD join with Sargent County WRD on its Drain 11 project (despite no determination that land in Ransom County would benefit from it), the statute does not create a duty that Ransom County WRD owed to Sargent County landowners. Landowners have argued that their rights, status or other legal relations have been injured by Ransom County WRD under N.D.C.C. § 61.16.1-10, which is the basis they assert for standing against Ransom County WRD in its declaratory judgment action. See Index # 3: Complaint, ¶86. However, N.D.C.C. § 61-16.1-10 lists the responsibilities water resource district boards owe to each other. It does not provide rights to citizens who reside outside the boundaries of a particular water resource district. A declaratory judgment action under N.D.C.C. § 32-23-01 may only be used to “declare rights, status, and other legal relations.” A party seeking declaration of rights or status must have their own rights, status, or other legal relations affected. N.D.C.C. § 32-23-02.

[¶39] Ransom County WRD fulfilled its statutory responsibilities to Sargent County WRD under N.D.C.C. § 61-16.1-10. It met with the Sargent County WRD multiple times regarding the proposal for Drain 11 and proposed expansion of its assessment area into Ransom County. It pledged money to help pay for the Upper Wild Rice River Watershed Study. Ransom County WRD reviewed the proposal and maps

Sargent County WRD provided when it sought to expand the Drain 11 Assessment District area into Ransom County. Ransom County WRD questioned and considered the proposal, and then came to its own conclusion regarding the lack of benefit to land in Ransom County. Ransom County WRD offered to meet again if the Sargent County WRD so desired. Any purported injury to Landowners is not the result of an action or inaction on the part of Ransom Country WRD.

**C. The District Court Appropriately Relied on Klindt in Dismissing the Complaint Against Ransom County WRD.**

[¶40] In the only section in Landowners’ brief that addresses Ransom County WRD, they assert that the Klindt case “appears distinguishable.” Unlike the present matter, the Klindt case involved a snagging and clearing project that the Pembina County Water Resource Board determined would benefit the entire watershed. See, Klindt, 2005 ND 106. While the Klindt decision focused on a statute specific to “snagging and clearing projects,” other provisions in Chapter 61-16.1 provide similar authority if there has been a determination that land will benefit from a project. See, N.D.C.C. § 61-16.1-33 (Water resource board may apportion assessments for benefits of a project against “any tract of land benefited”). This difference in projects does not diminish Klindt’s application here. Further, as to the amendments to N.D.C.C. § 61-16.1-09.1 this Court stated:

We see nothing in the language of N.D.C.C. § 61-16.1-09.1(1) or in the legislative history of the 2003 amendment that precludes a water resource board from finding that an entire watershed would be benefited by a snagging and clearing project, even if the legislative intention of the amendment was to allow assessments of less than all of the land within a watershed. The Board specifically found the entire watershed would be benefited by the project, and this finding is not contrary to law.

Klindt at ¶15.

¶41] As the Court noted in Klindt, statutes governing water resource districts demonstrate a strong water management policy encouraging the assessment of all land that will be benefited by a water project. Id. at ¶19. Again, however, in this case, no water resource district made any determination that lands in Ransom County would benefit from the Drain 11 Improvement Project. No water resource district made any determination that the Wild Rice River Watershed, outside the Drain 11 Assessment Area, would benefit from the Drain 11 Project. The district court's reliance on Klindt in its order dismissing the Complaint against Ransom County WRD was appropriate. Klindt establishes that assuming other requirements of a statute are met, there is no statutory ban preventing a water resource district from assessing lands (even lands outside its county) within a river watershed if there has been a determination of benefit to the entire watershed. No such benefit determination was made in the case at hand.

**D. Ransom County WRD's Determination of No Benefit to Land in Ransom County Should be Protected by the Doctrine of Separation of Powers.**

¶42] Ransom County WRD determined that the Sargent County WRD proposed Drain 11 Improvement Project and expansion of the Drain 11 assessment district area into Ransom County would not benefit lands in Ransom County. This was a decision of a local governing body. Review of a local governing body's decision should be limited by the separation of powers doctrine. Pic v. City of Grafton, 1998 ND 202, ¶6, 586 N.W.2d 159 (internal citations omitted). A decision of the local governing body must be affirmed unless it acted "arbitrarily, capriciously, or unreasonably, or there is not substantial evidence to support the decision." Tibert v. City of Minto, 2006 ND 189, ¶8, 720 N.W.2d 921.

¶43 In the typical process seeking review of one of its decisions, Ransom County WRD would be entitled to limited review of its decision that the proposed Drain 11 project and expanded assessment area would not benefit land in its county under N.D.C.C. § 28-34-01. In this declaratory judgment setting, however, Ransom County WRD has lost, through no fault of its own, the limited review it should be entitled to under the separation of powers doctrine. Through this declaratory judgment action, Landowners want a court to substitute its judgment for that of the local governing body that initially made the decision. See, Pic v. City of Grafton, 1998 ND 202.

## V. CONCLUSION

¶44 The district court determined Landowners lacked standing to pursue a declaratory judgment action against Ransom County WRD. The parties had a reasonable opportunity to present materials pertinent to the resolution of the motions to dismiss. No genuine issue of material fact exists to preclude summary judgment. Ransom County WRD met with and cooperated with Sargent County WRD to the extent it was possible for it to do so. Based on the foregoing, Ransom County WRD respectfully requests that this Court affirm the district court's Order Granting its Motion for Reconsideration of the Court's January 2, 2018 Order Denying its Motion to Dismiss, and Judgment entered thereon.

Dated this 29th day of August, 2018.

*/s/ Jane L. Dynes* \_\_\_\_\_

Jane L. Dynes (ND #04495)

**SERKLAND LAW FIRM**

10 Roberts Street | PO Box 6017

Fargo, ND 58108-6017

Phone: (701) 232-8957

Fax: (701) 237-4049

Email: [jdynes@serklandlaw.com](mailto:jdynes@serklandlaw.com)

**Attorney for Appellee Ransom  
County Water Resource District**



**CERTIFICATE OF COMPLIANCE**

[¶45] The undersigned, as attorney for the Appellee, Ransom County Water Resource District, in the above-entitled matter, and as the author of the above brief, hereby certify, in compliance with Rule 32(a)(5) and Rule 32(8)(a) of the North Dakota Rules of Appellate Procedure, that the above Brief of Appellee was prepared with proportional typeface and the total number of words in the above Brief, excluding words in the table of contents, table of authorities, certificate of service and this certificate of compliance, totals **5,265**.

Dated this 29th day of August, 2018.

*/s/ Jane L. Dynes*

Jane L. Dynes (ND #04495)

**SERKLAND LAW FIRM**

10 Roberts Street | PO Box 6017

Fargo, ND 58108-6017

Phone: (701) 232-8957

Fax: (701) 237-4049

Email: [jdynes@serklandlaw.com](mailto:jdynes@serklandlaw.com)

**Attorney for Appellee Ransom  
County Water Resource District**

**IN THE SUPREME COURT  
STATE OF NORTH DAKOTA**

<p>Robert &amp; Laurie Banderet, Carol Beck, Gerald Bosse, Mathew Bosse, Duane &amp; Valera Hayen, Beverley Kelley, Leon Mallberg, Paul Mathews, Nancy Mathews, Katheryn Nelson, R &amp; I Memorial Trust, Kathaleen R. Rehborg as Trustee, Gerald &amp; Judith Ringdahl, and John &amp; Beth Wentworth,</p> <p style="text-align: right;">Plaintiffs and Appellants,</p> <p>and</p> <p>William E. Kurschet, and Jan Vold &amp; Melanie Jones as Trustees of the Evergreen Trust,</p> <p style="text-align: right;">Plaintiffs,</p> <p style="text-align: center;">vs.</p> <p>Sargent County Water Resource District, and Ransom County Water Resource District,</p> <p style="text-align: right;">Appellees.</p>	<p><b>Supreme Court No. 20180253</b></p> <p><b>Sargent County District Court Case No. 41-2017-CV-00014</b></p>
---	--

**CERTIFICATE OF SERVICE BY E-MAIL**

STATE OF NORTH DAKOTA    )  
  ) ss.  
COUNTY OF CASS             )

The undersigned, being first duly sworn, deposes and says that she served the attached

**1. BRIEF OF APPELLEE RANSOM COUNTY WATER RESOURCE DISTRICT; and**  
**2. APPENDIX OF APPELLEE RANSOM COUNTY WATER RESOURCE DISTRICT**

on August 29, 2018, by sending a true and correct copy thereof by electronic means only to the following e-mail address, to-wit:

**Derrick Braaten**  
**BRAATEN LAW FIRM**  
*derrick@braatenlawfirm.com*

**Daniel L. Gaustad**  
**PEARSON & CHRISTENSEN, PLLP**  
*dan@grandforkslaw.com*

**JJ England**  
**BRAATEN LAW FIRM**  
*jj@braatenlawfirm.com*

**Joseph E. Quinn**  
**PEARSON & CHRISTENSEN, PLLP**  
*jquinn@grandforkslaw.com*

**Kyra Hill**  
**BRAATEN LAW FIRM**  
*kyra@braatenlawfirm.com*

**Michelle D. Mahlen**  
**PEARSON & CHRISTENSEN, PLLP**  
*michelle@grandforkslaw.com*

To the best of affiant's knowledge, the email address above given is the actual email address of the party intended to be so served. The above documents were mailed in accordance with the provisions of the Rules of Civil Procedure.

*/s/ Robyn L. Tande*

\_\_\_\_\_  
Robyn L. Tande

Subscribed and sworn to before me this 29th day of August, 2018.

*/s/ Lacey A. Hruby*

\_\_\_\_\_  
Lacey A. Hruby, Notary Public  
Cass County, North Dakota  
Commission Expires: Sept. 21, 2022

(SEAL)