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STATE OF NORTH DAKOTA

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

Robert & Laurie Banderet, Carol Beck, Gerald Bosse, Matthew 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, v. 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 APPELLANTS

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[¶2] Whether a water board's official act to waive its duty to hold a vote required by state law is void for lack of jurisdiction.

[¶3] Whether a water board that intentionally does not notify the public of its actions and incorrectly informs the public that their appeal deadline has passed has made it "impossible to fairly litigate issues on appeal" and renders the appeal itself an "inadequate remedy at law," thus allowing a collateral action.

[¶4] Whether the district court erred by concluding as a matter of law that SCWRD's reconstruction and expansion of Drain 11 is maintenance.

[¶5] Whether the district court erred by dismissing the underlying complaint for lack of subject matter jurisdiction for failure to appeal Sargent County Water Resource District's Resolution of Necessity.

[¶6] Whether Sargent County Water Resource District may levy assessments on Ransom County landowners who benefit from Drain 11 without approval from Ransom County Water Resource District.

II. CASE SUMMARY AND INTRODUCTION

[¶7] This case was initiated by the Appellants (hereafter "Landowners") with a summons and complaint served upon the Sargent County Water Resource District ("SCWRD") and the Ransom County Water Resource District ("RCWRD"). The complaint sought declaratory and injunctive relief from the district court to compel SCWRD to hold a statutorily required hearing and vote before proceeding with a multi-million dollar project to rebuild and expand Assessment Drain 11. Because the Landowners allege that the Drain 11 Improvement Project also benefits a large portion of Ransom County, the Landowners joined RCWRD to the case. After initially denying motions to dismiss, on reconsideration the district court dismissed the Landowners' case for failure to appeal SCWRD's Resolution of Necessity.

[¶8] In its order granting reconsideration and dismissing the case, the district court adequately described the policy issues underpinning the Landowners' appeal to this Court as follows:

> The Sargent County Water Board cloaks itself in its minimal compliance with statutory requirements by taking the action it did at a regularly noticed meeting and that if the plaintiffs were more diligent they would have attended the meeting to 'protect their interests' or made open records requests to obtain the minutes after the meeting. (It is unknown as to when the minutes were actually prepared and available). Although plaintiffs had no reason to suspect that 'their interests' were going to be or were affected by the Sargent County Water Board at the October 20, 2016 meeting because the agenda item they were interested in was <u>not on the agenda</u>. The Sargent County Water Board would have the plaintiffs be more prophylactic and attend every meeting of the county commission, school board, park board, water board, public health district, airport board, township board, city commission, legislature, Garrison Diversion Conservation District, and any other body with regulatory or taxing authority over them in order to 'protect their interests.' In the unfortunate event the plaintiffs have to work, attend to family or some other less important matter than attending meetings of governing bodies to 'protect their interests,' they had better obtain and review the minutes of each of these meetings post haste in order to protect themselves from adverse government action.

App. 83, ¶6 (emphasis in original). The district court concluded, saying that "[t]his position and the actions of the Sargent County Water Board in approving the Drain 11 maintenance project subvert the intent of the sunshine laws, are morally deficient, and do anything but instill faith and confidence in local government." *Id*. (emphasis added).

III. STATEMENT OF THE FACTS

A. SCWRD planned a multi-million-dollar project to reconstruct and expand Drain 11 and to construct new water retention areas.

[¶9] Sargent County Drain 11 is a drain project that spans approximately 45 miles across Sargent County. App. 115. The drain consists of a north branch, a south branch, and an east branch. *Id.* The north branch and south branch flow into the east branch. The east branch then outlets into the Upper Wild Rice River. *Id.* The drain was originally constructed in 1917. *Id.*

[¶10] The Appellants in this case are a group of landowners—mostly farmers—who own land in the Drain 11 assessment district in Sargent County and would be saddled with multi-million-dollar combined assessments for the Drain 11 Improvement Project. Complaint, App. 112-114.

[¶11] In September of 2014, an engineer with Moore Engineering informed SCWRD that Moore Engineering "is questioning the capacity of the existing [Drain 11] channel" because "parts of the channel and many of the existing crossings are severely undersized and would require large structures to meet typical design standards." SCWRD Minutes, App. 121. SCWRD's board then authorized Moore Engineering to "proceed with developing a master plan for a future channel improvement of the entire drain." *Id*.

[¶12] In response, Moore Engineering created the Upper Wild Rice River Watershed Study and presented this study to SCWRD in April of 2016. SCWRD Minutes,

App. 136. That study is a detailed conceptual plan to completely reconstruct and expand Drain 11, as well as add new water retention areas not a part of the assessment drain. This plan would ultimately become the Drain 11 Improvement Project at issue in this case. The project developed by Moore Engineering in its Upper Wild Rice River Watershed Study included the following features:

a. Increase the size of the Drain 11 flood channel by 70%. Watershed Study, App. 119.

b. Increase the size of Drain 11's culverts by 60%. *Id.*

c. Develop newly constructed water storage areas along "Bruns, Big, South, and Meszaros" sloughs, each of which would be "about one square mile in size," sufficient to store water in a 10-year flood event.

App. 117-118. Moore Engineering explained in its report that the new multi-square-mile water storage areas were necessary to prevent flooding from the increased flows of water that would result from increasing the size of Drain 11's flood channel and culverts. App. 118. These features are parts a single project.

B. SCWRD split this project into stages in an attempt to fund the project with maintenance levies and avoid a landowner vote.

[¶13] After presentation of the Upper Wild Rice River Watershed Study, SCWRD went to great lengths to avoid funding the project with a special assessment (which would require a vote) and to instead fund the project with "maintenance" levies (which would not require a vote). Specifically, SCWRD's minutes reflect that after reviewing the Upper Wild Rice River Watershed Study, "[a] lengthy discussion followed with how to begin this process." SCWRD Minutes, App. 136. That lengthy discussion ultimately focused on splitting the one project into "phases" in order to use maintenance levies. The minutes state:

"Any work will be done in phases and starting at the south end." *Id.* Chris Gross of Moore Engineering then suggested to SCWRD "that board members think about how they want to break up into phases." *Id.*

[¶14] The Landowners' complaint alleged that not only was SCWRD attempting to split the Drain 11 Improvement Project into phases (thus avoiding a vote), but further that this effort nonetheless failed because the first phase alone exceeds the maximum allowable six-year maintenance levy. This is also supported by the record. On June 16, 2016, Moore Engineering indicated to SCWRD that the first phase of the Drain 11 Improvement Project would cost "$3,900,000." SCWRD Minutes, App. 138. This $3.9 million dollar first phase addressed only improvements 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)." *Id.* Meszaros Slough is approximately located where the North and South Branches of Drain 11 flow into the East Branch, and therefore this work from "Meszaros Slough" to the "outlet" included only improvements to the East Branch of Drain 11. *See* Watershed Study, at App. 116 (project overview map). Moore Engineering's $3.9 million projection for the Drain 11 Improvement Project did not include costs for similar proposed improvements to the North and South Branches of Drain 11, which would require additional assessments beyond the $3.9 million. According to the minutes of the June 16, 2016 SCWRD meeting, Moore Engineering's proposed cost-breakdown for just the first phase of the project included:

- $1,417,967 from the State Water Commission as a cost share grant;
- $200,547 from the Sargent County Road Department for road crossings; and
- $2,281,486 from the local maintenance fund.

SCWRD Minutes, App. 138. SCWRD's Board then moved unanimously to "request cost share" from the North Dakota State Water Commission and "to proceed with submission of an Application to Drain for this project" to the North Dakota State Water Commission. *Id.*

[¶15] On September 15, 2016, SCWRD passed a special maintenance levy of $4/acre for Drain 11 ($4/acre is the maximum maintenance levy allowed by both N.D.C.C. § 61-16.1-45 and N.D.C.C. § 61-21-46). According to the signed levy from the Board, the total for this $4/acre levy was $283,003.64. *See* Doc. 82, "Special Tax Levy for 2016," PL0268-PL0289. If SCWRD levies this statutory maximum maintenance levy over the course of six years, the total accumulated maintenance levy would be $1,698,021.84. This amount is $583,464.16 less than the $2,281,486 that SCWRD calculated that SCWRD would need from the local maintenance fund just to complete phase one of the Drain 11 Improvement Project. SCWRD Minutes, Doc. 80, at PL0069 (containing $2,281,486 figure). Thus, as the Landowners alleged in their complaint, it is impossible for SCWRD to fund even this one phase of the Drain 11 Improvement Project using funds accumulated via six years of maximum maintenance levies. As explained *infra*, maintenance levies cannot be used if the project cost exceeds the combined maximum maintenance levy assessed over six years. N.D.C.C. § 61-16.1-45(3).

C. SCWRD passed a Resolution of Necessity for its Drain 11 Project without giving the public any notice that it would consider this resolution.

[¶16] The district court explained that "[a]s this project was working its way through the process some of the affected landowners and Plaintiffs became aware of the proposal, started attending the Sargent County Water Board meetings, and made it known they were not in favor of the proposal and thought it should be put to a vote of the affected

landowners." App. 81-82. For example, Paul Mathews attended the July, 2016 SCWRD meeting because he noticed references to the Drain 11 Improvement Project in the previous month's Board minutes. Doc. 44, Aff. Mathews, ¶ 2. Appellant Bosse also attended this meeting. App. 139.

[¶17] SCWRD provided no notice to the public that it would be considering anything related to the Drain 11 Improvement Project or a Resolution of Necessity at its October 20, 2016 meeting. The only references to Drain 11 on SCWRD's agenda for this meeting referred to a "cost share request" and the length of a specific culvert. Agenda, App. 155-156.

[¶18] As the district court explained, SCWRD did not put any of this information in its public agenda for this meeting even though SCWRD was aware that some members of the public had already expressly voiced opposition to the project to SCWRD. App. 81-82, ¶5. The district court further explained that "[n]one of the plaintiff opponents were present at the October 20, 2016 meeting due in part because the Drain 11 project was not on the agenda. The Sargent County Water Board either knew in advance it was going to consider the motion at this meeting and consciously chose not to put it on the agenda, or it saw it as an opportunity to consider going forward with the project without those affected landowners opposed to the project in attendance." *Id.*

[¶19] If the Landowners wished to appeal any SCWRD action undertaken on October 20, 2016, their deadline to appeal would have expired thirty days later on November 19, 2016. SCWRD approved the minutes of its October 20, 2016 meeting at its next meeting on November 17, 2016. District Court Order, App. 82. However, SCWRD

did not publicly post its minutes until November 30, 2016—after the appeal period would have passed. *Id.*

[¶20] Responding to SCWRD's arguments to the district court that the Landowners should have relied upon open records laws to stay apprised of what happened at the October 20, 2016 meeting, the district court had stern words for SCWRD, saying that "this position and the actions of the Sargent County Water Board in approving the Drain 11 maintenance project subvert the intent of the sunshine laws, are morally deficient, and do anything but instill faith and confidence in local government." App. 83, ¶6 (emphasis added).

D. SCWRD's Resolution of Necessity, among other things, attempted to waive all applicable state law (including the right to vote on the project).

[¶21] Regardless of the lack of public notice, on October 20, 2016, SCWRD approved the Resolution of Necessity for the Drain 11 Improvement Project. This was a detailed document, from which there are several important items to note.

[¶22] First, the Resolution of Necessity described an extensive array of work that would be required to reconstruct the Drain, including relocating structures and acquiring new land for the Project. The work described is not mere maintenance. The Resolution said that the following work is "necessary" for this Project: "construction of additional channel bottom depth, capacity, and side slope improvements; relocation, installation, and improvements of intercept drainage culverts; design, redesign, construction, and reconstruction of various crossings; purchasing and acquiring additional right of way to accommodate the drainage improvements; and other work necessary and incident to the reconstruction and improvement of Drain 11." App. 141-142.

[¶23] Second, the Resolution of Necessity explained that Drain 11 had previously been managed as an "assessment drain" (i.e., under N.D.C.C. ch. 61-21) but would now be managed as a "Project" under N.D.C.C. ch. 61-16.1. App. 142.

[¶24] Third, the Resolution of Necessity explained that it was SCWRD's conclusion that "the Drain 11 Improvement Project will provide … improved drainage for the benefit of the Drain 11 watershed." *Id*. Notably, Moore Engineering had previously concluded that the watershed extends into 97 square miles of Ransom County, as discussed *infra*. App. 126.

[¶25] Finally, the Resolution of Necessity asserted that "construction of the Drain 11 Project does not require an excess levy vote, an additional assessment district vote, or any other additional legal proceedings under North Dakota law." App. 142.

E. Ransom County also benefits from Drain 11.

[¶26] At SCWRD's December, 2014 meeting, Moore Engineering explained that Ransom County has 97 square miles of watershed that drain into Drain No. 11. App. 126. In response, SCWRD began making preparations to meet with Ransom County Water Resource District ("RCWRD") to propose a joint assessment district. App. 129. This work culminated in a preliminary assessment map created by Moore Engineering to assess a total of $8,832 per year on Ransom County landowners. App. 130. Regardless of Moore Engineering's work, SCWRD's November, 2015 minutes indicate that Ransom County declined to create a joint assessment district for Drain 11 "because it would not be beneficial to landowners in Ransom County." App. 134. This contradicts SCWRD's determination in its Resolution of Necessity that the "Drain 11 Improvement Project will provide … improved drainage for the benefit of the Drain 11 watershed." App. 142.

IV. STATEMENT OF THE CASE

[¶27] Landowners initiated the underlying case with a summons and complaint served upon SCWRD and RCWRD. App. 12-31. The complaint generally requested declaratory relief for four claims. The first claim sought a declaratory judgment that SCWRD's Drain 11 Improvement Project violates the six-year maximum maintenance levy that can be imposed by a water board under N.D.C.C. ch. 61-21 and N.D.C.C. ch. 61-16.1. App. 24-26. The second claim sought a declaratory judgment that the Landowners were entitled to a vote and hearing on the Drain 11 Improvement Project as a matter of law. App. 26-27. The third claim sought a declaratory judgment that the Drain 11 Improvement Project is not maintenance and therefore cannot be funded with maintenance levies. App. 27. The fourth claim sought the mandatory development of a comprehensive plan for the Upper Wild Rice River Basin between SCWRD and RCWRD under N.D.C.C. § 61-16.1-10 and for the inclusion of Ransom County benefitted properties in the Drain 11 assessment district. App. 27-29. Additionally, the complaint sought injunctive relief to prevent work on the Project until a proper vote was held. App. 30.

[¶28] In response, SCWRD and RCWRD filed motions to dismiss. Doc. 13 and Doc. 21. SCWRD premised its motion to dismiss primarily on the alleged requirement that the Landowners were required to present all of their arguments in an appeal of SCWRD's Resolution of Necessity. *See* Doc. 14, pp. 4-12. RCWRD premised its motion to dismiss primarily on standing. *See* Doc. 22, pp. 3-6. Landowners responded to SCWRD by generally raising arguments about the impossibility of an appeal under the circumstances, the absolute right to compel mandatory duties of government officials through the courts, and by explaining that SCWRD's attempts to waive state law were void for lack of jurisdiction, all of which are well-established bases for a direct action for declaratory and

injunctive relief. Doc. 34, pp. 5-26. The Landowners also responded to SCWRD with affidavits of several Landowners who explained that they were aggrieved because they were forced to shoulder the cost of the Drain 11 Improvement Project, even though it benefits Ransom County as well. Doc. 44, Aff. of Paul Mathews, Doc. 45, Aff. of Robert Banderet, and Doc. 46, Aff. of Valera Hayen.

[¶29] The district court denied both motions to dismiss. App. 67-79. The district court focused on due process, explaining that SCWRD's failure to give the public notice of its Resolution of Necessity prior to the close of the thirty-day appeal period deprived the Landowners of due process of law. App. 69-74.

[¶30] Upon learning that SCWRD would be levying several hundred thousand dollars in maintenance assessments on the Drain 11 Assessment District while this case was pending, the Landowners moved for a preliminary injunction to prevent SCWRD from expending these funds or beginning work on the Drain 11 Improvement Project until this case was resolved. Doc. 75.

[¶31] The district court then held an evidentiary hearing on Landowners' preliminary injunction motion. SCWRD and RCWRD subsequently both filed motions for reconsideration of the court's order denying the water boards' respective motions to dismiss. Doc. 122 and Doc. 134. Shortly thereafter, the court held a telephonic oral argument on the motions for reconsideration of the order denying the defendants' motions to dismiss. The court requested proposed findings of fact, conclusions of law, and an order from all parties on the motions for reconsideration. *See* Doc. 182, 184, and 186. The district court then adopted edited versions of the water boards' proposed findings of fact,

conclusions of law, and order and dismissed Landowners' complaint for failure to appeal SCWRD's Resolution of Necessity. App. 80-94, and App. 95-103.

[¶32] The court's findings of fact referenced that several Landowners had some awareness of the Project prior to the expiration of the appeal period and three of the Landowners were informed by SCWRD at the November 17, 2016 meeting that the Resolution of Necessity had passed. App. 88, ¶22. The district court also noted, though, that at the November 17, 2016 meeting, a representative of the water board told these three Landowners that the appeal period had *already* expired, when in fact it had not expired. App. 82, ¶5.

[¶33] Judgment of dismissal was entered on April 17, 2018 (as to SCWRD) and April 26, 2018 (as to RCWRD). App. 104-105, and App. 106-107. Notice of the entry of these judgments were entered on April 19th, 2018 (as to SCWRD) and April 26, 2018 (as to RCWRD). Doc. 195 and Doc. 199. This appeal followed.

V. STANDARD OF REVIEW

[¶34] The standard of review applicable to this case was stated in *Schirado v. Foote*, 2010 ND 136, ¶ 7, 785 N.W.2d 235. For convenience, the standard of review is quoted from that case here:

> challenges to a district court's subject matter jurisdiction are reviewed de novo when the jurisdictional facts are not in dispute. When jurisdictional facts are disputed, the district court's decision on subject matter jurisdiction necessarily involves findings of fact and conclusions of law. Therefore, when disputed facts surround a challenge to the district court's subject matter jurisdiction, we are presented with a mixed question of law and fact. Under this standard, we review the questions of law subject to the de novo standard of review and the findings of fact subject to the clearly erroneous standard of review.

Schirado v. Foote, 2010 ND 136, ¶ 7, 785 N.W.2d 235. (internal citations and quotations omitted).

VI. ARGUMENT

A. The underlying case was properly filed as an action for declaratory and injunctive relief, rather than as an appeal.

[¶35] The Landowners properly filed their case as a claim for declaratory and injunctive relief for two reasons. First, although SCWRD had jurisdiction to pass its Resolution of Necessity, it had no jurisdiction to put language within that Resolution purporting to waive all further legal process. This portion of the Resolution is void and of no effect for lack of jurisdiction, and the Landowners thus had the right to compel the water board to fulfill duties required of it by statute. Second, SCWRD's attempts to thwart an appeal by not posting any notice of its activities and telling members of the public that their appeal deadline had passed when it had not passed made it "impossible to fairly litigate on appeal" and made an appeal an "inadequate remedy at law."

i. The statement within SCWRD's Resolution of Necessity purporting to waive all applicable legal proceedings is void for lack of jurisdiction.

[¶36] Case law is well-established that if a government body acts outside of its jurisdiction, such actions are void. For instance, "[a] judgment entered without subject matter jurisdiction is void." *Roe v. Doe*, 2002 ND 136, ¶ 6, 649 N.W.2d 566; *Alliance Pipeline L.P. v. Smith*, 2013 ND 117, ¶ 18, 833 N.W.2d 464 ("A judgment is void if the court lacked subject matter jurisdiction over the action."). In *State v. Chicago & N.W. Ry. Co.*, 46 N.D. 313, 179 N.W. 378, 382 (1920), Justice Robinson (concurring specially) explained that an "arbitrary order, made in an arbitrary manner, and without any jurisdiction" is "null and void." Likewise, if a governmental contract is entered into without jurisdiction, it is void. *See generally* 56 Am. Jur. 2d *Municipal Corporations, Etc.* §§ 436-437 (citing numerous supporting cases) ("Contracts executed by municipal corporations are void when there is a failure to comply with the mandatory provisions of

the applicable statutes or charters") ("Ultra vires contracts of a municipal corporation are void.").

[¶37] Thus, this Court has held that "an action taken by a person or persons entirely lacking jurisdiction over the substance of the action may be challenged collaterally." *Olson v. Cass Cty.*, 253 N.W.2d 179, 182–83 (N.D. 1977) (citing *Farrington v. Swenson*, 210 N.W.2d 82 (N.D.1973)).

[¶38] Here, the following statement in SCWRD's Resolution of Necessity is void for lack of jurisdiction: "construction of the Drain 11 Project does not require an excess levy vote, an additional assessment district vote, or any other additional legal proceedings under North Dakota law." App. 142. This statement attempted to waive and ignore applicable state law in N.D.C.C. §§ 61-16.1-17 *et. seq* mandating detailed procedures for notice, a hearing, and a vote before proceeding to construct a Project.

[¶39] "Jurisdiction is the authority or power to decide a matter and does not depend on whether a decision is right or wrong." *Medical Arts Clinic, P.C. v. Franciscan Initiatives, Inc.*, 531 N.W.2d 289, 297 (N.D. 1995). Here, SCWRD did not have the authority to decide to waive or ignore applicable laws governing the procedures for the development of a project under N.D.C.C. ch. 61-16.1. Once SCWRD chose to designate a new "Project" pursuant to this chapter in its Resolution, SCWRD was required to follow the remaining procedures to obtain final approval of the Project from the affected public. Because SCWRD's statement in its Resolution was made without any jurisdiction, that statement is void, and it was proper for the Landowners to bring a declaratory and injunctive action to compel SCWRD to perform the duties required of it as a consequence

of its having undertaken a Project under N.D.C.C. ch. 61-16.1. There was no need for Landowners to appeal this decision.

ii. The Landowners had an absolute right to compel the water board to conduct statutorily mandated voting through the courts.

[¶40] Established case law holds that the public has the absolute right to seek relief in the courts if a government body or employee refuses to perform a statutorily required duty. This section first discusses why Landowners' underlying complaint (taking the facts alleged in that complaint as true) properly alleged that SCWRD had mandatory duties to perform. It then discusses North Dakota precedent holding that declaratory judgments, injunctions, and writs of prohibition and mandamus are all appropriate means to compel these duties when they are unlawfully withheld.

[¶41] SCWRD's mandatory duties regarding the Drain 11 Improvement Project began with the passage of its Resolution of Necessity. In that Resolution of Necessity, SCWRD stated that Drain 11 had previously been established and managed as an "assessment drain" (i.e., under N.D.C.C. ch. 61-21) but would now be managed as a "Project" under N.D.C.C. ch. 61-16.1. App. 142. This is an important determination for a water board to make because a "project" is defined much more broadly under the Century Code than a "drain" and affords the water district significantly expanded authority to conduct work beyond management of a drain.

[¶42] A "project" is defined as "any undertaking for water conservation, flood control, water supply, water delivery, erosion control and watershed improvement, drainage of surface waters, collection, processing, and treatment of sewage, or discharge of sewage effluent, or any combination thereof, including incidental features of any such undertaking." N.D.C.C. § 61-16.1-02(8). By comparison, "drain" means "any natural

watercourse opened, or proposed to be opened, and improved for drainage and any artificial drains of any nature or description constructed for that purpose, including dikes and appurtenant works." N.D.C.C. § 61-21-01(4).

[¶43] By specifying for the first time in Drain 11's 100-year history that Drain 11 would now be managed as a "project" under N.D.C.C. ch. 61-16.1 as opposed to as a "drain" under N.D.C.C. ch. 61-21, SCWRD was asserting significantly broader jurisdiction and authority to operate Drain 11.

[¶44] Importantly, the Century Code requires a water board to follow very specific procedures when establishing a new "project." Adopting a Resolution of Necessity is the first step. N.D.C.C. § 61-16.1-17 states "if in [the water board's] opinion further proceedings are warranted, it shall adopt a resolution and declare that it is necessary to construct and maintain the project. The resolution shall briefly state the nature and purpose of the proposed project and shall designate a registered engineer to assist the board." Here, SCWRD passed a Resolution of Necessity. The resolution explained that it was creating a new "Project" and described the need for the Project. App. 142. The resolution also identified Moore Engineering to assist SCWRD with all aspects of engineering the project. *Id.* Additionally, in June of 2016, Moore Engineering presented to SCWRD the probable cost of the Drain 11 Improvement Project ($3,900,000), App. 138, which is also required by N.D.C.C. § 61-16.1-17.

[¶45] The subsequent process is clearly outlined by the following section of the Century Code. N.D.C.C. § 61-16.1-18 explains that after the engineer's report required by N.D.C.C. § 61-16.1-17 is filed and an assessment plan is developed for the project, the water board "shall fix a date and place for public hearing on the proposed project" and

"shall" send a notice of hearing containing specific information, by mail, to every landowner who would be assessed by the project.

[¶46] After the hearing, N.D.C.C. § 61-16.1-19 provides that the affected landowners have thirty days to vote on the project and, "if the board finds that fifty percent or more of the total votes filed are against the proposed project, then the vote constitutes a bar against proceeding further with the project." Likewise, "[i]f the board finds that the number of votes filed against the proposed project is less than fifty percent of the votes filed, the board shall issue an order establishing the proposed project and may proceed." *Id.* An appeal may be taken *after* this process if a project is approved by the landowners. *Id*.

[¶47] In other words, the creation of a "project" by passing a Resolution of Necessity under N.D.C.C. ch. 61-16.1 sets in motion very specific mandatory duties imposed by statute. The Legislative Assembly presumably put these safeguards in place to ensure that water boards obtained the consent of landowners before proceeding with multi-million-dollar projects such as the one at issue in this case.

[¶48] Unfortunately, as alleged in Landowners' complaint and indicated in the record, SCWRD refused to hold a vote or hearing and therefore ignored its mandatory duty. App. 146. SCWRD further circumvented the statutory process by funding the Project with maintenance funds (which can be assessed without a vote). *See, e.g.*, Doc. 82 ($283,003.64 assessment at a maximum of $4.00/acre). The Landowners therefore filed the underlying case to compel the performance of those duties as required preconditions of proceeding with the Drain 11 Improvement Project.

[¶49] It is well-established that a writ of mandamus or prohibition or, alternatively, a declaratory judgment and injunction, are the correct means to compel a government body to perform a mandatory duty. *Medical Arts Clinic, P.C. v. Franciscan Initiatives, Inc.*, 531 N.W.2d 289 (N.D. 1995), contains an extensive discussion of when an injunction directed to a public official is proper and improper in light of the principle of administrative exhaustion and the right to appeal. In that case, this Court explained that "the factors necessitating injunctive relief replicate the requirements for a writ of mandamus." *Id.* at 295 (citing N.D.C.C. §§ 32-34-01 and 32-34-02). "The writ of mandamus may be issued by the supreme and district courts to any inferior tribunal, corporation, board, or person to compel the performance of an act which the law specially enjoins as a duty resulting from an office, trust, or station…" N.D.C.C. § 32-34-01. The Court likewise explained a prohibitory injunction is also appropriate in certain circumstances:

> [I]f there is no adequate legal remedy and a threat of irreparable harm, injunctive relief is appropriate to determine whether a public official's acts are in excess of, or without, authority. The circumstances supporting injunctive relief [] parallel the criteria for a writ of prohibition…

Id. at 296 (citing N.D.C.C. §§ 32-35-01, 32-35-02; *State ex rel. Linde v. Packard*, 32 N.D. 301, 155 N.W. 666 (1915) (original writ of prohibition to restrain Tax Commissioner from exceeding authority)).

[¶50] Likewise, in *Viestenz v. Arthur Twp.*, 78 N.D. 1029, 54 N.W.2d 572 (1952), this Court explained "[a]n injunction will not lie to restrain public officers from the performance of their legal duties. The authorities are uniform, however, in holding that public officers may be restrained by injunction as far as their acts are shown to be in violation of or non-compliance with law when such acts cause irreparable injury and the

injured person has no adequate remedy at law." (citing 42 Am. Jur. 2d Injunctions § 166); *see also Larson v. State*, 534 P.2d 854, 859 (Mont. 1975) ("public bodies and public officers may be restrained by injunction from proceeding in violation of law, to the prejudice of the public, or to the injury of individual rights").

[¶51] Applied to the facts and circumstances of this case, it is well-established that an action for declaratory judgment and injunction directed to a public official or governmental body is proper to compel the performance of a mandatory duty. Here, SCWRD is attempting to construct a new Drain 11 Project without following the mandatory procedural safeguards put in place to give the public oversight over such projects. N.D.C.C. §§ 61-16.1-17 *et. seq.* uses the mandatory word "shall" repeatedly. "Use of the word 'shall' in a statute ordinarily creates a mandatory duty." *Ramsey Cty. Farm Bureau v. Ramsey Cty.*, 2008 ND 175, ¶ 13, 755 N.W.2d 920; *see also James Valley Grain, LLC v. David*, 2011 ND 160, ¶ 12, 802 N.W.2d 158 ("Use of the words 'must' and 'shall' in a statute normally indicate a mandatory duty."). The Landowners had an absolute right to bring a direct action under these circumstances, and an appeal was not required.

iii. An appeal is not required when a water board intentionally keeps the public in the dark about its activities and actively attempts to thwart an appeal.

[¶52] The district court in its original order denying defendants' motions to dismiss held that "[a]n administrative appeal pursuant to NDCC § 28-34-01 was factually and legally impossible under the circumstances of this case, thereby making it neither adequate nor fair under the principles of due process." App. 73. Although the Landowners did not originally raise a due process claim in their complaint, they did note the impossibility of appeal in arguments before the district court.

[¶53] This Court has previously left open the question of whether an appeal is required if a government body does not give notice to the public in *Zajac v. Traill Cty. Water Res. Dist.*, 2016 ND 134, ¶ 8, 881 N.W.2d 666. In that case, this Court held that the district court properly dismissed the landowner's appeal when the landowner received notice of the government body's decision but then only appealed after the thirty-day window in N.D.C.C. § 28-34-01 had expired. *Id.* at ¶ 12. This Court further explained that "[t]his is not a case in which Zajac did not receive a notice of the decision, or that the notice given did not allow adequate time to appeal, and we need not consider questions about the timeliness of his appeal in those contexts." *Id.* at ¶ 8.

[¶54] There are two separate ways to frame this issue. The first is whether lack of notice makes an appeal an inadequate remedy at law. The second is whether lack of notice makes it impossible to fairly litigate issues in an appeal. This Court explained in *Olson v. Cass Cty.*, 253 N.W.2d 179, 182 (N.D. 1977), that "[i]f the grievance of the person challenging a board's decision is of a type that could have been fairly litigated on appeal, then that statutory appeal is an adequate legal remedy, and no suit for injunction will lie as a substitute." (emphasis added).

[¶55] The Landowners assert that SCWRD's Resolution of Necessity was a not "decision … of a type that could have been fairly litigated" on appeal and that an appeal was not an "adequate remedy at law" in light of SCWRD's lack of notice and overt attempts to thwart an appeal. *Id.* Here, SCWRD intentionally made no effort to apprise the public of its Resolution of Necessity (an act that SCWRD now claims was of such importance that Landowners were required to appeal from it). SCWRD's agenda for its October 20, 2016 meeting said nothing of approving the Drain 11 Improvement Project, even though

the Resolution was clearly prepared in advance of the meeting and was for a significant, multi-million-dollar Project. App.155-156. Then, SCWRD did not post its minutes publicly until November 30, 2016, after the appeal deadline had passed. App. 82, ¶5. And further, SCWRD's representative informed several of the Landowners at SCWRD's November 17, 2016 meeting that the Resolution of Necessity had been approved and that their appeal deadline had already passed (which was false). *Id.*

[¶56] Unlike *Zajac*, this is a case where the Appellants had no notice at all. Then, SCWRD went further and actually made representations that could have the effect of thwarting an appeal. The Landowners believe the law is clear that an appeal was not required for the reasons stated in the previous portions of this Argument regarding SCWRD's lack of jurisdiction to waive state law and the authority to compel mandatory duties in court. However, if this Court determines that the Landowners should have appealed the Resolution of Necessity, they request that this Court hold that where an aggrieved party is given no notice of a government body's action, that an appeal is both not an adequate remedy at law and the decision is not one that could be fairly litigated on appeal (and that such circumstances are present here). Such a holding would follow from this Court's established precedent in *Olson v. Cass Cty.*, 253 N.W.2d 179, 182 (N.D. 1977) and *Zajac v. Traill Cty. Water Res. Dist.*, 2016 ND 134, ¶ 8, 881 N.W.2d 666. To hold otherwise would violate Landowners' rights to due process.

B. The district court erred by concluding as a matter of law that the Drain 11 Improvement Project is maintenance.

[¶57] In conclusions of law that the district court adopted verbatim from SCWRD's counsel, the district court concluded as a matter of law that:

> The Drain 11 Project, relating to Drain 11 (a drain that has been in existence for more than 100 years), and the assessment to landowners to pay a portion, is permitted and is being pursued under N.D.C.C. § 61-16.1-45. … The statutory procedures for construction of a new legal drain, as argued by Plaintiffs, specifically N.D.C.C. § 61-16.1-17; N.D.C.C. § 61-16.1-18 and N.D.C.C. § 61-16.1-19, are not applicable to the Drain 11 Project. … Pursuant to the plain language of N.D.C.C. § 61-16.1-45, the Sargent County Water Board was not required to provide notice of the Resolution of Necessity to all landowners within the Drain 11 assessment area.

App. 90-92, ¶¶ 28, 34. This was a decision on the merits of Plaintiffs' Landowners' case, which is improper when deciding a motion to dismiss for lack of subject matter jurisdiction. Specifically, N.D.C.C. § 61-16.1-45 is the statute that allows a water board to assess maintenance levies for a project. Whether or not SCWRD's Drain 11 Improvement Project is "maintenance" is a central issue on the merits of Landowners' underlying complaint. If the activity is mere maintenance, then a vote and hearing is not required. If the activity is not maintenance, then SCWRD cannot fund the Project using maintenance levies and can only proceed with the project after holding a hearing and vote.

[¶58] The district court improperly decided the merits of this issue as a basis for determining whether or not it had subject matter jurisdiction to hear the case. This is impermissible. For example, the U.S. Supreme Court recently explained that "to ask what conduct a [statute] reaches is to ask what conduct [the statute] prohibits, which is a merits question…Subject-matter jurisdiction, by contrast, refers to a tribunal's power to hear a case…[i]t presents an issue quite separate from the question whether the allegations the plaintiff makes entitle him to relief." *Morrison v. National Australia Bank Ltd.*, 561 U.S. 247, 253–54 (2010); *see also* Howard M. Wasserman, JURISDICTION AND MERITS, 80 Wash. L. Rev. 643, 646 (2005) (containing extensive discussion of this issue in context of federal court subject matter jurisdiction).

[¶59] Further, the district court's conclusion of law that the Drain 11 Improvement Project is "maintenance" was in error. First, the Drain 11 Improvement Project is not maintenance at all under the regulatory definition of "maintenance." The State Water Commission's drainage rules define "maintenance" as "removal of silt and vegetation from a drain. Maintenance does not include deepening or widening a drain." N.D.A.C. § 89-02-01-02(8). Here, SCWRD's Drain 11 Improvement Project includes the following:

a. Increase the size of the Drain 11 flood channel by 70%. Watershed Study, App. 119.

b. Increase the size of Drain 11's culverts by 60%. *Id.*

c. Develop newly constructed water storage areas along "Bruns, Big, South, and Meszaros" sloughs, each of which would be "about one square mile in size," sufficient to store water in a 10-year flood event.

Watershed Study, App. 117-118. These activities all go well beyond the State Water Commission's definition of drain "maintenance." N.D.A.C. § 89-02-01-02(8).

[¶60] Second, the project is also not maintenance and cannot be funded with maintenance levies because the project exceeds the statutory maximum amount of funds that may be levied under this provision. The Landowners alleged this in detail in their complaint with extensive supporting documentation and citations to SCWRD's minutes. App. 21-27.

[¶61] Here, the district court improperly determined as a matter of law that SCWRD's Drain 11 Improvement Project was maintenance as a basis to assert lack of subject matter jurisdiction. Because this is an issue at the heart of the merits of Landowners'

case, the court was in error and this aspect of the district court's decision must be reversed and remanded. The detailed information in Landowners' complaint and in SCWRD's minutes is also sufficient, on its own, to show that the district court erred on this point.

C. If this Court remands, the Landowners request guidance on whether the District Court correctly determined that SCWRD has jurisdiction to levy Ransom County landowners for an assessment drain.

[¶62] The district court concluded in its order granting RCWRD's motion for reconsideration that "[h]ad Sargent County WRD determined that lands in Ransom County would be benefited by its project, it had the authority to assess any such Ransom County benefited properties." App. 100, ¶16. This language was adopted verbatim from RCWRD's proposed conclusions of law. As the basis for this holding, the court relied upon *Klindt v. Pembina Cty. Water Res. Bd.*, 2005 ND 106, ¶ 15, 697 N.W.2d 339. App. 101, ¶16.

[¶63] The Landowners resisted RCWRD's position on this point before the district court because *Klindt* appears distinguishable, and it is important for the Landowners to have a clear order from the Court as to the proper procedure for which landowners in Ransom County may be assessed for the benefits of Sargent County's project. The *Klindt* case involved a snagging and clearing project on a section of the Tongue River that would benefit the entire watershed, including areas outside of Pembina County. The Pembina County Water Resource District determined that the project would benefit landowners in Cavalier County as well, but chose to only assess landowners in Pembina County. This Court held that "[w]e 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." *Klindt v. Pembina Cty. Water Res. Bd.*, 2005 ND 106, ¶ 15.

[¶64] The language of N.D.C.C. § 61–16.1–09.1(1) at the time of the *Klindt* case was unique. Specifically, the second sentence provided the "board may finance the project in whole or in part with funds raised through the collection of a special assessment levied against the land and premises within the watershed benefited by the project." 2003 N.D. Sess. Laws ch. 552, § 1 (emphasis added). It appears that this may have been a contested issue at that time, because while the *Klindt* case was pending, the Legislative Assembly revised this language to remove the "within the watershed" language. This is discussed in detail in *Klindt* at ¶¶ 13-15. The Legislative Assembly also added the following language to the statute during the pendency of that case:

> If a project and assessment is not approved by all affected water resource boards and county commission boards, the board of each water resource district and the board of county commissioners of each county shall meet to ensure that all common water management problems are resolved pursuant to section 61-16.1-10. In addition, the water resource board that undertakes the project may proceed with the project if the board finances the cost of the project and does not assess land outside the boundaries of the district.

N.D.C.C. § 61-16.1-09.1(1)(b)(3); 2005 N.D. Sess. Laws ch. 592 (H.B. 1399). Because this Court decided *Klindt* on the basis of the preexisting language that included the phrase "within the watershed," this Court held that Pembina County was required to assess the remainder of the watershed.

[¶65] However, the facts (and law) present in *Klindt* are not present in this case. The word "watershed" appears in neither N.D.C.C. 61-16.1-17 through N.D.C.C. § 61-16.1-21 (the statutes governing assessment of a new project) nor N.D.C.C. § 61-16.1-45 (the statute governing maintenance assessments for a project). Rather, those statutes simply refer to properties that "benefit" from the project. Further, there is a specific statute that allows water resource districts to exercise joint powers (typically through the creation of a

joint water resource district). N.D.C.C. § 61-16.1-11. If a water board may simply assess landowners outside of the county, the purpose of such a statute seems limited. Moreover, N.D.C.C. § 61-16.1-10 requires water resource districts to "[e]xercise jointly with other water resource districts within a river basin to effectively resolve the significant and common water resource management problem or problems of the river basin." Allowing a water board to assess landowners in a different county would allow a water board to circumvent this duty imposed upon water boards by the legislature. It is also worth noting that if one water board is allowed to assess landowners in a different county, the water board members would not be accountable to the county commissioners of the second county or to the citizens who vote the commissioners into office.

[¶66] The Landowners originally joined RCWRD to this case based on the presumption that only RCWRD could assess Ransom County lands benefitting from the Drain 11 Improvement Project. If this is the case, then Ransom County is an appropriate party. If this is not the case, Landowners request direction from this Court making it clear that Ransom County is not an appropriate party *because* Sargent County can indeed assess Ransom County landowners.

VII. CONCLUSION

[¶67] The Sargent County Board has consistently maintained that the only consideration that is important or relevant in this case is whether Landowners brought a timely appeal; and that it is irrelevant that the Board made no attempt to provide notice of its actions. Landowners share the reaction of the district court that "This position and the actions of the Sargent County Water Board in approving the Drain 11 maintenance project subvert the intent of the sunshine laws, are morally deficient, and do anything but instill faith and confidence in local government." For the reasons explained above, this position

is also untenable, legally unjustified, and would violate Landowners' rights to due process of law.

Signed this 30th day of July 2018.

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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 & and Beth Wentworth, Appellants, v. 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

CERTIFICATE OF SERVICE

I hereby certify that on July 30, 2018, I electronically filed with the Clerk of the North Dakota Supreme Court the following documents in the above-captioned matter:

1. Brief of Appellants; and
2. Appendix of Appellants

and on July 30, 2018 served the same by electronic mail upon the following counsel for all parties to this appeal:

- Daniel Lee Gaustad, counsel for Appellee Sargent County Water Resource District, at dan@grandforkslaw.com;
- Joseph Elmer Quinn, counsel for Appellee Sargent County Water Resource District, at jquinn@grandforkslaw.com;
- Jane L. Dynes, counsel for Appellee Ransom County Water Resource District, at jdynes@serklandlaw.com; and
- Kasey Duane McNary, counsel for Appellee Ransom County Water Resource District, at kmcnary@serklandlaw.com

/s/ *JJ England*
JJ England

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

Robert & Laurie Banderet, Carol Beck, Gerald Bosse, Matthew 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, v. 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

CERTIFICATE OF SERVICE

I hereby certify that on August 6, 2018, I electronically filed with the Clerk of the North Dakota Supreme Court the following documents in the above-captioned matter:

1. Brief of Appellants; and
2. Appendix of Appellants

and on August 6, 2018 served the same by electronic mail upon the following counsel for all parties to this appeal:

- Daniel Lee Gaustad, counsel for Appellee Sargent County Water Resource District, at dan@grandforkslaw.com;
- Joseph Elmer Quinn, counsel for Appellee Sargent County Water Resource District, at jquinn@grandforkslaw.com;
- Jane L. Dynes, counsel for Appellee Ransom County Water Resource District, at jdynes@serklandlaw.com; and
- Kasey Duane McNary, counsel for Appellee Ransom County Water Resource District, at kmcnary@serklandlaw.com

/s/ *JJ England*
JJ England