

Ins and Outs of Legal Drains and Stream Crossings

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First who are the players in Water?

- Department of Water Resources
- DOT
- Counties
- Townships
- Water Resource Districts
- Basin Commissions

History for Water Law is Long & Complex

- Different theories of water law
- Common Enemy – Do what you need to do
- Natural flow – You can use the flow but cannot diminish the flow or quality for downstream use
- Reasonable Use – The way you use or don't use the water is fact dependent and will be evaluated whether it is “reasonable”
- Although the North Dakota Supreme Court started down this path earlier they formally adopts the reasonable use standard in 1967
 - Jones v. Boeing 153 N.W.2d 897
- “We desire to apply a rule which will be fair and just.”

History Continued...

- 1952 - ND Supreme Court reviewed the natural drainage pattern of the land to determine the township's obligation to install appropriately sized culverts.
- Citing what is now 24-03-06 they determined the Government has a **mandatory duty** to provide drainage towards a natural water course.
- Viestenz v. Arthur Township, 54 N.W.2d 572 (N.D. 1952),
- See also 2001 N.D. Op. Atty. Gen. No. L-01

Still More Historical Context

- Although the Government certainly has a mandatory duty to keep natural drainage....
- The Government is not required to create “PERFECT” drainage
- “the county was bound by its duty to furnish drainage to plaintiff's adjoining farm, equal in capacity and efficiency to that existing prior to the relocation, but it was not under a duty to furnish perfect drainage.”
- Little v. Burleigh County 82 N.W.2d 603(1957)

How is Reasonable or Perfect decided?

The Legislature has tried to define reasonable....

- In particular for road construction
- NDCC 24-06-26.1
- “The board of township supervisors shall construct the ditches, drains, bridges, and culverts in accordance with **stream crossing standards** prepared by the department and the department of water resources.”
- NDCC 24-06-34
- “the county or township shall provide notice in any way to the water resource board of the water resource district in which is located the bridge, culvert, or drain.”

With all the various boards who does what? Let's stick to roads for today...

- Water boards vs. road authority
- Can sometimes lead to conflict
- Water boards are not elected – Appointed by County Commissioners
- Water doesn't follow county lines
- But not being elected means no taxing authority
- Water boards need commission approval of their budget

What is the Water Resource District's Role?

Coordinate proposals for installation, modification, or construction of culverts and bridges in an effort to achieve appropriate sizing and maximum consistency of road openings. The department of transportation, railroads, counties, and townships **shall cooperate** with the districts in this effort.

NDCC 61-16.1-09(21)



“Normal” drainage responsibility

- The North Dakota Supreme Court has ruled that the boards of county commissioners are responsible for the **county road systems** and that this responsibility includes the **authority to install culverts** and to make the decisions about where culverts should be placed.
 - Olson v. Cass County, 253 N.W.2d 179, 183 (N.D. 1977).
- It is my opinion **that boards of county commissioners, and not water resource districts, have the authority** to decide whether to install culverts in county roads. In sum, the authority to install culverts beneath township or county roads rests with the township board of supervisors or the board of county commissioners, respectively.
 - 2000 N.D. Op. Atty. Gen. L-57

But seriously...who pays for what?

- 40% County 60% Water board in the case of legal drains
 - NDCC 61-16.1-43
- County pays township for culverts for established drains
 - NDCC 24-08-02.1
- What about just “normal” drainage?????

What is actually going on out there?

- COUNTY POLICIES FOR COST SHARE ON STRUCTURE REPLACEMENTS ON LEGAL DRAINS AND HIGHWAYS
- There is not a consistent Policy used by all Counties
- Some Counties follow the ND Century Code for Cost Share for Structures on Legal Drains
- Some Counties have their own cost share policy for structures on Legal Drains that do not follow Century Code
- Some Counties don't have a cost share policy for structures on legal drains
- Some Counties work directly with the Water Resource Districts on Projects and share costs

Other Sage Advice –Communication is the Key

PLANNING AHEAD

- When working on Budgets sit down with Water Resource District and discuss what projects they are planning on doing in the next 1-2 -3 -4 and 5 years that will affect highways in the County?
- Let the Water Resource Districts know what the Highway Departments 5 year highway improvement plan is so they can budget also
- Each Year during the Budgeting Process go over the Improvement plans again as priorities and conditions of structures can change over the year.
- Work Together on projects
- Before committing to something such as a hydraulic study discuss with each entity
- Use whatever Policy for Cost Share is working for you