

BENTON COUNTY DITCH AUTHORITY
TUESDAY, AUGUST 16, 2022
BENTON COUNTY BOARDROOM

The Benton County Ditch Authority met in regular session on August 16, 2022 in the County Boardroom in Foley, MN with Board members Beth Schlangen, Scott Johnson, Steve Heinen, Jared Gapinski and Ed Popp present. Also present was Chris Byrd, County Engineer; Montgomery Headley, County Administrator; Michelle Meyer, Senior Assistant County Attorney (virtual); Chris Otterness of Houston Engineering (virtual), and Beth Stay, Executive Assistant.

Chair Heinen called the meeting to order at 10:43 AM.

Johnson/Gapinski to approve the agenda as written. Motion carried unanimously.

Popp/Johnson to approve the Meeting Minutes of August 2, 2022 as written. Motion carried unanimously.

Byrd requested to conduct a continuation of the Public Hearing for County Ditch (CD) 9. Byrd stated that the purpose of the continuation of this Public Hearing was to provide corrected notice that the proceeding was to reestablish the records for CD 9. The date of Order appointing an engineer and ordering a Reestablishment of Records was on June 7, 2022. The date of Report for Reestablishment was on April 19, 2022 and was discovered because of a valid Repair Petition which was dated August 19, 2020. The date of Acceptance of report to reestablish the Public Drainage System Record for the drainage system was on June 21, 2022. The notice for this public hearing was provided. Byrd added that CD 9 was originally ordered by the Benton County Drainage Authority on September 25, 1905 and the records indicated a deepening and widening of the ditch because of the addition of CD 12 and CD 14 which drained into CD 9 in 1916. Chris Otterness of Houston Engineering provided their engineers report on CD 9.

The purpose of the reestablishment report is to provide Benton County with the results of the investigation and analysis of the Benton CD 9 public drainage system. Otterness cited Minn. Statute §103E.101, Subd. 4a which refers to reestablishing records and stated: "If after thorough investigation of drainage system records, a drainage authority finds that records establishing the alignment, cross-section, profile, or right-of-way of a drainage system that it administers are lost, destroyed, or otherwise incomplete, it may, by order, reestablish records defining the alignment; cross-section; profile; hydraulic structure locations, materials, dimensions and elevations; or right-of-way of the drainage system as originally constructed or subsequently improved in accordance with this chapter". Otterness added that this statute was specifically written for when the records are not clear and to get the record back into place, so it is clear for everybody. Otterness stated that there is approximately 5.6 miles of open channel. The records that were established in the 1905 Viewer's Report stated there were approximately 572 benefitted acres and is now proposing that there are now 7,143 acres which includes CD 12 and CD 14 acres draining into CD 9. Otterness stated they conducted soil borings to determine the as-built condition. Otterness also stated the report shows culverts are in alignment with the original plans. Otterness stated that he recommends the order of the Reestablishment Drainage System Record

consistent with their engineer's report and following Statute §103E.101. Following the Re-Order of Reestablishment Records, Otterness recommends continuing the preparation of the Repair Report consistent with Statute §103E.

Johnson had a few questions for Otterness. The first one pertained to the lack of historical records and if Otterness can expound on what they mean by lack of historical records. Otterness stated that they did have the original plans from 1905, however they are lacking the as-built condition and they are lacking the modifications during the last 115 years to CD 9. Otterness stated they did their investigation and got a lot of records from the Historical Society, and they are very comfortable with the records they have now. Johnson asked if they found any evidence of damages that were paid in 1905 and Otterness stated that Houston Engineering did not find that information. Then, Johnson asked if Houston Engineering had discussions with any of the current property owners to see if they had any existing records regarding the work done in 1905 and Otterness stated that is not necessarily something that they usually do, and it is very rare that landowners would have those records available, but added that if any landowners do have those records, they could provide that information now to be considered. Last, Johnson asked about doing a Reestablishment of Records after a Redetermination of Benefits was a common practice. Otterness stated that he has seen this process done both ways where you do the Reestablishment of Records first and then the Redetermination of Benefits, and the Redetermination of Benefits first then the Reestablishment of Records. Otterness stated that we need to have an understanding of the overall extent of the drainage system. Otterness stated that there are pretty clear historical records that were obtained, and the Viewers felt comfortable with providing a Viewer's Report on the Redetermination of Benefits ahead of this proceeding. Byrd added that they did receive a valid repair petition for CD 9, and that we do not have an accurate graphical depiction of the ditch when it was originally constructed. Byrd noted that there is more area benefitting now than was on file. Byrd stated that we do have the order from the County Commissioners back in 1905 accepting the work and releasing the contractor to do the work and when the work occurred. Byrd added that we do not however have the final drawing of CD 9 that we have today.

The Public Hearing for CD 9 opened at 11:11 AM.

David Beehler of 16819 55th St NE Foley, MN 56329 was present to speak. Mr. Beehler stated that less than a year ago the Minnesota Court of Appeals found that Big Stone County Board of Commissioners exceeded its statutory authority, acted arbitrarily and made a decision not supported by substantial evidence when it ordered reestablishment of drainage records for a drainage ditch in its jurisdiction on September 20, 2021. Mr. Beehler also noted a Supreme Court Case in the Petition of Zimmer, which said "as constructed or subsequently improved condition of a ditch, (not design, not plans) determine maintenance changes to the ditch". Mr. Beehler stated plans or designs are not enough. Mr. Beehler feels if the County Board orders Reestablishment based on this record, and what Houston Engineering has done, it will have acted arbitrarily and made a decision not supported by substantial evidence. Mr. Beehler stated he wrote a memo that he filed last night with the Benton County Commissioners and provided hard copies to the County Board, along with large pictures of Beehler Exhibits 1-4 (which are in his memo) which are maps of his property. Mr. Beehler stated this is evidence as to why you should not

order reestablishment of records. Mr. Beehler stated he will walk the County Board through what the Courts have said about interpreting Statutes, so they have a clear and present understanding of what is required by County Commissioners. In reference to Mr. Beehler's memo, Mr. Beehler found evidence in Houston Engineering's Technical Memorandum that admits they have no actual documents showing they have construction, and they took two approaches to try to make the County Board infer that they can figure it out and establish that. They said the current geometry of the system indicates improvement and was completed. The other states that the soil borings show the design. Mr. Beehler explained how both approaches had no evidence and were wrong. The Supreme Court case on page 2, which determines repair vs. improvement, stated an improvement has more criteria, and you cannot establish a base for repair, you must start from the beginning, update it or call it an improvement. Mr. Beehler stated the Supreme Court reversed what that County had done. Mr. Beehler said that consultants talk about constructed plans and they are referring to the plans they have now, and they admit it on page 6 of Houston Engineering's Technical Memorandum that they do not have as-built plans for this improvement, and that they don't exist. Mr. Beehler stated the current geometry indicates this improvement was completed consistent with the design with the exception of a proposed realignment in the Technical Memo. Mr. Beehler included four maps in his memo, the first is exhibit 1 from 1855 which shows the layout of his land and in particular Culner Creek. The second and third Exhibit show Culner Creek from 1903 with no changes from 1855. The last, Exhibit 4 shows no change of Culner Creek from 1930. Mr. Beehler stated that Houston Engineering's Technical Memo asserts that the current geometry of CD 9 is a result of work from 1916 and added that it has not changed since 1930. Mr. Beehler also referenced the soil borings and if they are statistically valid, they will not show causation as to any geometrical changes to the ditch. Mr. Beehler stated that contrary to Zimmer, we cannot use design, and it is not a statistical standard practice. Mr. Beehler referred to this as smoothing the data, where you would delete certain data from documents. Mr. Beehler stated that if you do delete data from a document, you would acknowledge a reason as to why, such as an error or a specific reason, but stated there was no attempt to explain why data was deleted here and that they are trying to force a fit. Mr. Beehler referenced page 10 and stated we are messing with a wetland and draining a wetland and if you put a ditch through that, it will affect the ground water. Mr. Beehler noted a case pending right now from Renville County, where the Court of Appeals reversed what the County did and noted the State Statute defines what a public water is, and it has a total drainage area of 2 miles and added that Otterness stated we have over 5.6 miles in his presentation. Mr. Beehler has a concern because of what the Court of Appeals has said that if it's a natural waterway, that fits, we have to do a complete DNR work-up. Mr. Beehler stated that if you can't prove the work was actually done and what that work actually did, then you can't order a repair. You either stop or start from the beginning as a new project or improvement until you find out what effects are going to happen if you act. Mr. Beehler asked not to pass any motion to reestablish records.

Otterness addressed that this is an important decision to make to reestablish the records. Otterness acknowledged that we do not have a complete record of CD 9 and we need to have a public hearing to reestablish the entire record of the drainage system. The statute was created about 10 years ago so we could re-create the records through a public hearing process and provide input from the public on it prior to moving forward. If we didn't have this process, we couldn't procure the Drainage Authority's

obligations of reacting to petitions and other activities on the Drainage System. The Drainage System exists regardless of whether we take the process here or not, and this process provides clarification to the Ditch Authority and landowners, and it makes it clearer on what the Ditch Authority's responsibilities are. Documentation of a creek being called a different name is very common and Otterness stated he has seen numerous drainage systems with different names after data collection in the field and it coincides with another swail or creek prior to the construction of the ditch. Otterness addressed the soil boring process which is identified in the Minnesota Public Drainage Manual and has been vetted through multiple agencies such as the DNR and other environmental groups such as the Center for Environmental Advocacy (to which Otterness helped write the engineering chapter) and this is where they derive the process to determine the original channel bottom via the soil borings along with the use of statistical analysis of the borings because they are only capturing a snapshot at different locations and what they are looking for in this process is using the evidence from the soil borings, and every other reestablishment of records has used this same process to reestablish the records. Otterness noted the wetlands that are adjacent to this water system will be addressed in the Repair Report and they don't have a bearing on the proceeding right now. There has not been an identified public waters on this drainage system.

Byrd addressed what determines the geometry of the ditches; first being the alignment which is best denoted by looking at graphical maps, plat maps, aerial maps, which helps define the geometry. The shape of the bottom also helps determine the geometry, along with the shape of the sides and added that when we note a change in geometry, we may be referring to changing the slope of the sides or changing the width of the bottom of the ditch.

Mr. Beehler stated if the record showed only a repair was going to proceed, Minnesota Chapter 103E.015 Subdivision 1a and Subdivision 2 require proper consideration to alternative funding of wetlands and water protection. Mr. Beehler acknowledged that the statute was created to reestablish the records but that doesn't mean that if you don't have sufficient records, you make it up. Mr. Beehler is not accusing anyone of having bad faith, but instead saying there is not sufficient evidence to establish what was there. Mr. Beehler clarified who he meant by saying they and he is referring to the Technical Memo from Houston Engineering.

Popp questioned the wetland that is being discussed and if that has been addressed by the DNR? Byrd stated the Board of Soil and Resources and the DNR require to send notices to them, and we have sent notices to them and have not received any reply from either agency.

Johnson requested clarification from Otterness that CD 9 has not been identified as a public waterway and Otterness stated CD 9 is identified as a public water course on the DNR public water inventory and there are no public water wetlands or public basins on the map, but it is identified as a public water course. Johnson asked if it is typical for the DNR not to respond to a notice and Otterness stated they have seen it both ways where they have and have not responded but felt if there was something concerning to them, they would have responded to this. Popp stated that if the DNR was notified of a wetland and it is of a concern, they would respond. Mr. Beehler stated he disagrees with Popp and said

the DNR will see what the Board of Commissioners will do, and when the cases were reversed, that's when the DNR got involved. Mr. Beehler stated that the Court of Appeals said that it doesn't have to be listed on the public waterway and here we are on the list. Mr. Beehler stated the creek on his property goes into the St. Francis River which goes into the waterway.

Next, Todd Braucks of 6656 175th Ave NE, Foley, MN 56357 stated that at the last presentation they talked about the culverts being too high but didn't touch on the concrete culvert on County Road 4 in this presentation like they did last time. County Road 4 is now Highway 23 (due to a road detour) and there are wetlands off to the right. Mr. Braucks said his notice stated he would have a benefit of 8.49 acres and questioned where we see that benefit on his wetlands by draining that? The total estimated cost is \$3,577.89 and estimated assessment is \$287.00 and Mr. Braucks stated he does not see the benefit of doing this.

Gary Held of 16195 75th St NE Oak Park, MN 56357 asked the County Board if they considered this a public waterway, and asked if this is a public waterway, why are a select few paying for it? Mr. Held questioned who is benefitting from this and stated this doesn't seem equitable to all involved.

The Public Hearing for CD 9 closed at 11:50 AM.

Otterness addressed the last two comments and stated those are repair issues and not reestablishment of records issues, and the repair issues hold no bearing on the proceeding at hand. Then Otterness addressed the public water course which is not necessarily public owned nor would provide public access and that's why a public drainage system does not provide public access to benefitting landowners on the drainage system. The right-of-way that we identified is for the use of the Drainage Authority to do inspection maintenance on the ditch. Otterness stated this does not provide rights to access to private landowners, and the access is for regulation purposes and not for public use.

Gapinski stated the ditches haven't been touched in many years and we are all relatively new to this and we are all learning together. Gapinski questioned what kind of insurances we have if this was reversed? Gapinski stated we are relying on our Engineers to provide us correct data and their recommendations. Otterness stated they do carry professional liability insurance and they have to provide that in order to work on this project.

Assistant County Attorney Michelle Meyer addressed the legal issues brought forth by Mr. Beehler and provided a background to the case that landed with the Court of Appeals. The decision in Chippewa/Swift County was the DNR provided information to that Drainage Authority regarding their concerns and regarded the fact that they had a tiled ditch that they were now saying was an open ditch and basing it off a record that didn't exist before it was established. Meyer stated we do have records, we do have information, we do have an investigation and we're not converting a tiled ditch to an open ditch. We are simply investigating what is the proper alignment, cross-section and that type of information. Meyer stated we have followed the State Statute, we have provided proper notice to all proper parties involved, those benefitted, the DNR, and BWSR, we have now conducted a public hearing

and the Ditch Authority will either grant or not grant the reestablishment. We have done everything we can do to properly reestablish those records.

Gapinski questioned what else we can do to appease all who have concerns. Meyer stated that unfortunately we are unable to appease everybody's concerns and we have a drainage system that is the Ditch Authority's responsibility to maintain and repair. We do have protections in place regarding wetlands and public waterways. We have always followed the process and considered all environmental impacts.

Johnson asked if there are no concerns with the lack of records. Meyer stated the Ditch Authority has been presented all the information and the Ditch Authority has to make a decision if there are sufficient records or insufficient records. Johnson asked if the reestablishment is denied, what happens to the Repair Petition? Byrd stated we do have a valid petition and we ordered a repair report in order to determine if a repair is necessary. We need to determine the establishment of the ditch and accept the records, and if we don't have that, how can we determine if a repair is necessary?

Popp said if this was overlooked by the DNR, is there anything else we need to do to reestablish this? Otterness does not believe there are any other necessary steps, and that Houston Engineering is very comfortable with the information that has been provided since it provided sufficient information to make a decision on reestablishing the drainage record.

Gapinski acknowledged Mr. Beehler's issues with the waterways while noting the Ditch Authority's obligations to the valid repair petition that was filed. Gapinski stated he heard that our engineers do not believe there could be anything else done to better this.

Johnson asked what would happen if we got an opinion from the DNR or BWSR? Byrd stated that accepting the reestablishment does not mean we are starting the work. The work follows the repair proceedings. We are aware of the wetlands near the ditches that will need extra consideration before the repair. We will have another hearing to discuss the report.

Popp stated that if we accept the reestablishment today, it goes on record that this is the correct reestablishment of records.

Gapinski asked if Benton County would be liable for any fees or fines owed if it was appealed? Meyer stated she is comfortable with the process that has been followed but cannot speak for the technical pieces and that's where you have to have an investigation by a professional engineer, and we have done our due diligence. Meyer noted that there are no concerns raised by BWSR or the DNR.

Schlangen stated she was not comfortable with the information that was brought today and feels we need feedback from the DNR.

Byrd stated he is comfortable with the records and recorded documents and stated we do have a valid repair report.

Gapinski asked Mr. Beehler after hearing what our engineers have said, do you feel comfortable with the information provided today. Mr. Beehler said if we do not have sufficient evidence, you lack jurisdiction to proceed which means this ends and it becomes an improvement and not a repair. Mr. Beehler said we are trying to sidestep that this is actually an improvement and not a repair since we can't show anything was done.

Byrd stated the improvements that were made in 2004 were paid for and completed by the landowners and permission was granted by the Drainage Authority to complete those improvements and that is on record.

Popp motioned to order a reestablishment of the drainage records of CD 9 and to allow staff time to create a Findings and Order. Seconded by Heinen. The motion carried on a three to two roll call vote with Schlangen and Johnson voting "no" and Heinen, Gapinski and Popp voting "aye".

Schlangen stated she would like to see input from the DNR and changes they would make and what they would suggest.

Gapinski stated the landowners can appeal the decision if unhappy with today's decision and encourages those landowners to do so.

Next, Byrd requested to consider additional services request for additional analysis of Wetlands along CD 9 and CD 14. The Drainage Authority has received a request to amend the Agreement to allow for field investigation of wetlands including Wetland Delineation of Type 3, 4, and 5 areas. Additional work also includes creation of Wetland Delineation Reports and submittal to the LGU. This amendment also includes additional landowner engagement prior to the completion of a repair report. Motion by Popp and seconded by Schlangen to approve the additional services request for additional analysis of Wetlands along CD 9 and CD 14. Motion carried unanimously.

Next, Byrd requested to award a construction contract for the Repair of CD 6. The Drainage Authority advertised for sealed bids and bids were opened August 2, 2022 at 2:00 via an online bid opening. Six (6) bids were received, and the Lowest Responsible Bidder was Helmin Construction, Inc. of Foley, MN. Byrd recommended that a construction contract be awarded to Helmin Construction Inc for \$218,405.60. Byrd stated that Helmin Construction Inc. has demonstrated competency for completing the proposed work. Motion by Johnson and seconded by Gapinski to award a Construction Contract for the Repair of CD 6 for \$218,405.60, and to budget an additional 20% for any additional costs incurred. Motion carried unanimously.

Last, Byrd requested to purchase a subscription of a web-based Public Drainage Data Management system. At the June 30, 2022 Committee of the Whole Meeting, the County Board heard a presentation

of a software program named DrainageDB. This program will greatly improve the Drainage Authority's method of documentation and tracking of Drainage Proceedings. The first year's cost is \$15,000, then the annual subscription fee is \$4,000 and will be assessed to all landowners in all of our drainage systems. The County Board was in agreeance that this is something we need, and it will help with keeping accurate records of our County Ditches for the future. Motion by Johnson and seconded by Heinen to approve the purchase of a subscription of a web-based Public Drainage Data Management system named DrainageDB. Motion carried unanimously.

The Ditch Authority Meeting adjourned at 12:32 PM.

Steven J. Heinen, Chair
Benton County Ditch Authority

ATTEST:

Montgomery Headley
Benton County Administrator