

BENTON COUNTY DITCH AUTHORITY
TUESDAY, SEPTEMBER 6, 2022
BENTON COUNTY BOARDROOM

The Benton County Ditch Authority met in regular session on September 6, 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); and Beth Stay, Executive Assistant.

Chair Heinen called the meeting to order at 10:42 AM.

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

Popp/Gapinski to approve the Meeting Minutes of August 16, 2022 as written. Motion carried unanimously.

Next, County Engineer Chris Byrd requested the County Board approve a construction contract for repair of County Ditch No. 6. At the August 16, 2022 Ditch Authority Meeting, the Drainage Authority accepted the bids and awarded a construction contract to the lowest responsible bidder, Helmin Construction Inc. of Foley, MN. Motion by Popp and seconded by Johnson to approve the construction Contract for repair of County Ditch No. 6 to Helmin Construction Inc. Motion carried unanimously.

Next, Byrd requested a continuation of a Public Hearing on the Reestablishment of Drainage Records for County Ditch No. 9. A public hearing was held on August 2, 2022 and public testimony was received. The Hearing was continued to August 16, 2022 where additional public testimony was heard and received. The public comment portion was closed and the hearing continued until the September 6, 2022 meeting to allow staff time to prepare the Findings and draft an Order to Reestablish the Drainage records.

The public hearing for County Ditch (CD) 9 opened at 10:47 AM.

David Beehler of 16819 55th Street NE, Foley MN 56329 asked the County Board to reconsider their vote from the August 16, 2022 Ditch Authority Meeting which approved the Reestablishment of Drainage Records for CD 9 now that the facts have been laid out to them. Mr. Beehler stated that after re-listening to the Ditch Authority Meeting from August 16th, the concerns that the three Commissioners that voted to approve the Reestablishment of Records for CD 9 were: 1) that if the DNR didn't respond, then they didn't have an issue; 2) concerns regarding insurance if the decision was reversed, would Benton County be liable; 3) that Benton County did everything they could to determine the reestablishment of records; and 4) that landowners could appeal the decision. Mr. Beehler stated that he feels that there is lack of credible evidence of work done in 1916 or before and there is a lack of records that Houston Engineering obtained on CD 9 after 1916. Mr. Beehler stated that he will not appeal the County Board's decision because he does not want the Board to lay further costs onto the landowners. Assistant County Attorney Michelle Meyer stated that all of the items in the Findings were direct findings from the public hearings, and there was nothing added by the engineers, the

Commissioners, or the public; only the testimony that was heard at the public hearings was included in the Findings. Byrd stated he received feedback from the DNR, and he had not received any other correspondence until that day regarding the Reestablishment of Records for CD 9. Byrd stated that the point was made that this is a Reestablishment of Records, and no work on CD 9 has been scheduled yet. Byrd stated the County Board is not being asked to approve any repairs today, just the Reestablishment of Records.

Next, Randy Ihlers of 6599 165th Ave NE Oak Park, MN 56357 suggested we continue to move forward with the Reestablishment of Records and Repair of CD 9.

The public hearing for CD 9 closed at 10:57 AM.

Gapinski addressed Mr. Beehler's concerns regarding the publication of the Findings and Order of CD 9. Meyer stated that she does not believe there was a notice issue, and that they went above and beyond to provide an additional notice for this meeting and advised the County Board that if they feel the Findings and Order are reflective of the previous hearings, then they can act on this or have it corrected. Meyer stated that the Findings are what was heard at the last two public hearings.

Motion by Gapinski and seconded by Heinen to grant the Reestablishment of Records. Byrd read the Findings of CD 9 into the record:

Findings:

1. **Benton County Board Of Commissioners** is the drainage authority for **Benton County Ditch No. 9**.
2. County Ditch Engineer, Chris Byrd, along with consultant, Houston Engineering, investigated the **Benton County Ditch No. 9** records and found that records establishing the alignment, cross-section, profile, or right-of-way of the drainage system were lost, destroyed, or otherwise incomplete. This information was reported to the drainage authority on June 21, 2022.
3. On June 21, 2022, the drainage authority adopted a resolution to follow the procedures of Minn. Stat. § 103E.101, subd. 4a to reestablish and correct the drainage system record of **Benton County Ditch No. 9**.
4. County Ditch Engineer, Chris Byrd was appointed to conduct an investigation and a report of findings supported by existing records and evidence, including, but not limited to, applicable aerial photographs, soil borings, or test pits, culvert dimensions and invert elevations, and bridge design records. County Ditch Engineer, Chris Byrd consulted with Houston Engineering to investigate and report for **Benton County Ditch No. 9**.
5. As part of the analysis of the drainage system, the engineer has identified the existing functional alignment, dimension, and grade of the drainage system as it provides beneficial public drainage today. This functional alignment, dimension, and grade match the basic functional efficiency of the system as designed and established to provide beneficial public drainage.
6. The engineer has also identified the alignment; cross-section; profile; hydraulic structure locations, materials, dimensions, and elevations; and right-of-way of the drainage systems in their as constructed and subsequently improved state.

7. The engineer's study included evaluation of existing records and evidence, including, but not limited to, applicable aerial photographs, soil borings or test pits, culvert dimensions and invert elevations, field investigation and bridge design records.
8. The intent of these proceedings was to reconcile the historical record of the drainage system with the functional alignment, dimension, and grade of the system to describe the equivalent of the as constructed and subsequently improved condition.
9. Future work on the drainage system will utilize the as constructed and subsequently improved condition, established in these proceedings, as a baseline for determining repair or improvement of the drainage system.
10. Engineer Chris Byrd filed a report of findings dated April 19, 2022 with the drainage authority.
11. The drainage authority, by order, set a public hearing for review of the engineer's report of findings on June 21, 2022 and directed the Auditor to provide notice, by mail, of the time and location of the hearing to the Commissioner of Natural Resources, the executive director of the Board of Water and Soil Resources, the petitioners, and all property owners benefited or damaged by the drainage system and notice to other interested parties either in a newspaper of general circulation in the drainage system or by publication on the drainage authority's website.
12. Notice of the public hearing was properly provided to benefitted property owners, Minnesota Department of Natural Resources and Minnesota Board of Soil and Water Resources as required by law.
13. The drainage authority held a public hearing on the correction and reestablishment of the drainage system records on August 2, 2022 at 10:00 a.m. at the Benton County Boardroom., continued that hearing due to defective notice to August 16, 2022 at the Benton County Boardroom, and continued it again until September 6, 2022 to allow staff to draft the findings and order at Benton County Boardroom. Evidence of all notices are on file with the drainage authority office.
14. At the public hearing, the engineer presented the engineer's report of findings. Chris Byrd, P.E., Benton County Public Works Director and Garrett Monson, P.E., and Chris Otterness, P.E. both with Houston Engineering presented a report to Re-establish Benton County Ditch No. 9 records.

The report provided the results of the investigation and analysis of Benton County Ditch No. 9. The report documented the investigation of the drainage system records and the physical condition of the drainage system. There were a substantial amount of historical records available for the CD 9. CD 9 was established September 26, 1905, by the Benton County Board. The historical record contained original construction plans but did not include "as-builts" of the constructed ditch. "As-builts" were not standard practice in the early 1900's.

A petition for a "repair" of the system was filed on July 14, 1916, in part due to the construction of County Ditch 12 and County Ditch 14. The Board accepted the petition and ordered an engineer's report. An Engineer's Report with specifications for the deepening and widening of the ditch was filed October 11, 1916. Today this would be known as an improvement. Although there are no "as-built" construction drawings of this improvement, other evidence including current geometry, indicates that the improvement was completed consistent with the design.

A total of seven culverts were noted along the drainage system. Records do not show culverts constructed as part of the drainage system. The culverts were likely installed after construction of the drainage system. Several of the culverts were substantially higher than the called for

elevation of the drainage system. However, the culverts were placed on top of layers of accumulated sedimentation.

CD 9 is identified as a Public Watercourse by the MN DNR's Public Waters Inventory and does intersect with wetlands identified in the U.S. Fish and Wildlife Service National Wetland Inventory. Neither the MN DNR nor MN BWSR provided any comment regarding the reestablishment of records for CD 9.

Soil borings and survey data were collected in April of 2021 to determine the current condition of the drainage system. Soil borings were taken approximately every 1,000 feet along CD 9. The As Constructed and Subsequently improved Condition (ACSIC) was determined with a statistical comparison of the soil borings and the design.

The Re-establishment Report provides a description of the alignment; cross-section; profile; hydraulic structure locations, dimensions and elevations; and right-of-way to establish the ACSIC. The report was used by the engineer to recommend reestablishment of drainage records as necessary to maintain the historic function of the drainage system.

15. During the public hearing portion of the proceedings, the following persons appeared and provided comment (the Board's response is indicated in italics following each comment):

a. David Beehler, 16819 55th Street NE, Foley, MN 56329:

Faulty premise. It is to shift cost of increase farming value and footprints versus other property owners who are not interested. He doesn't farm his property and there would be no value to the repair of the property. He is attempted to preserve his property. A lot of wetlands in the area.

No attempt to determine what the creek was servicing. It is an increase of value to increase footprint of farmland. The project will not increase his property value at all. It is wetland surrounding a cemetery. It will not increase the farmland or benefit his wetland.

Mr. Beehler presented case law regarding reestablishment of records proceedings. He presented pictures of Collier Creek and asked why it was not indicated on the diagrams. He expressed concerns the Board was exceeding its authority and did not have sufficient information to reestablish the records. He questioned the exclusion of some of the soil borings. He stressed the importance of this decision.

Chris Otterness noted that every reestablishment of records proceeding occurs because the record is not definitive and incomplete. The lack of a definitive record is not a deficiency in the proceeding, but rather the very reason the proceeding occurs.

Chris Byrd noted that additional work is needed regarding wetlands. Byrd addressed what determines the geometry of the ditches and first being the alignment which is best denoted by looking at graphical maps, plat maps, aerial maps, which helps define the alignment. 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, while the alignment may remain essentially the same

Chris Otterness also indicated some of the concerns are related to redetermination of benefits or repair proceeding.

Chris Otterness indicated a wetland delineation is recommended before completion of the repair report. Chris Otterness acknowledged the importance of this process. He noted that it is common for a ditch to be called by multiple names and have multiple designations. He stated that the ditch is identified as a public watercourse in the public waters inventory. Comments were not received from the MN DNR.

b. Todd Brauks, 6656 175th Ave. NE, Oak Park, MN 56357:

The culvert on County Road 4 is by a wetland. His water does not flow that way. He 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.

County Board is only allowed to work with legal scope of authority.

c. Gary Held, 16195 75th St NE Oak Park, MN 56357

He 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.

Chris Otterness stated the issues raised by Mr. Brauks and Mr. Held are related to the redetermination of benefits proceeding.

Commissioner Gapinski thanked them for their comments and stated we are all learning this together.

16. At the close of public comments during the continued hearing on August 16, 2022, the Board adopted a motion with a 3-2 vote to continue the proceeding to allow staff to prepare findings, including all comments received through the public comment process, and an order to grant the correction and reestablishment of records.
17. Benefitted property owners and impacted governing agencies were mailed notice of the continued hearing for September 6, 2022, at 10:00 a.m. to adopt the findings and order granting the correction and reestablishment of record prepared by Staff.

18. The proposed functional alignment and grade of the **Benton County Ditch No. 9.** as described in the engineer's report of findings reflects the level of performance similar in nature to the as constructed and subsequently improved condition of the drainage system considering the function required by the change in land use to reestablish the historic drainage function to benefited lands.
19. Correction of the drainage system records to adopt the proposed functional alignment and grade of the drainage system, as described in the engineer's review memoranda, will provide for the efficient administration of the drainage system.
20. Adopting the proposed functional alignment and grade of the drainage system, as described in the engineer's report of findings, will reconcile the historical record of the drainage system with the functional alignment, dimension, and grade of the system as it has historically provided public benefit.

Then, Byrd read the Order into the record:

Order:

Based on the foregoing Findings and the entire record of proceedings before the Board, the Board, acting as the drainage authority for **Benton County Ditch No. 9.**, hereby orders as follows:

- A. The Board hereby corrects and reestablishes the drainage system records of **Benton County Ditch No. 9.** to reflect the alignment; cross-section; profile; hydraulic structure locations, materials, dimensions, and elevations; and right-of-way of the drainage system as originally constructed or subsequently improved and as detailed in the engineer's report of findings dated April 19, 2022 (**Exhibit A**).
- B. The Board further directs filing and recording of documents necessary to reflect the reestablishment and correction of the public drainage system records established herein.

The motion carried on a 3 to 2 roll call vote, with Commissioners Schlangen and Johnson voting "nay" and Commissioners Heinen, Gapinski and Popp voting "yea".

The Ditch Authority Meeting adjourned at 11:29 AM.

Steven J. Heinen, Chair
Benton County Ditch Authority

ATTEST:

Montgomery Headley
Benton County Administrator