

Rural Drainage in South Dakota

Jay Gilbertson, East Dakota WDD

July 23, 2012



Rural Drainage in South Dakota

- Review of SD Drainage Case Law
- 1985 County Drainage Law
- County Drainage Permits
- Issues of Concern



CASE LAW

Sources:

Davidson & Weeks (1997), Drainage, in South Dakota: Wetlands, Lucas, Watersheds and the 1985 Drainage Legislation

Deering & Best (2005), A Review of South Dakota Drainage Law

SD Drainage Case Law

- **Civil Law Rule** – *A lower estate is subject to a legal burden to accept surface water that naturally drains across it, although the owner of an upper estate can do nothing to increase the burden.*

Civil Law Rule for Dummies

Water runs downhill

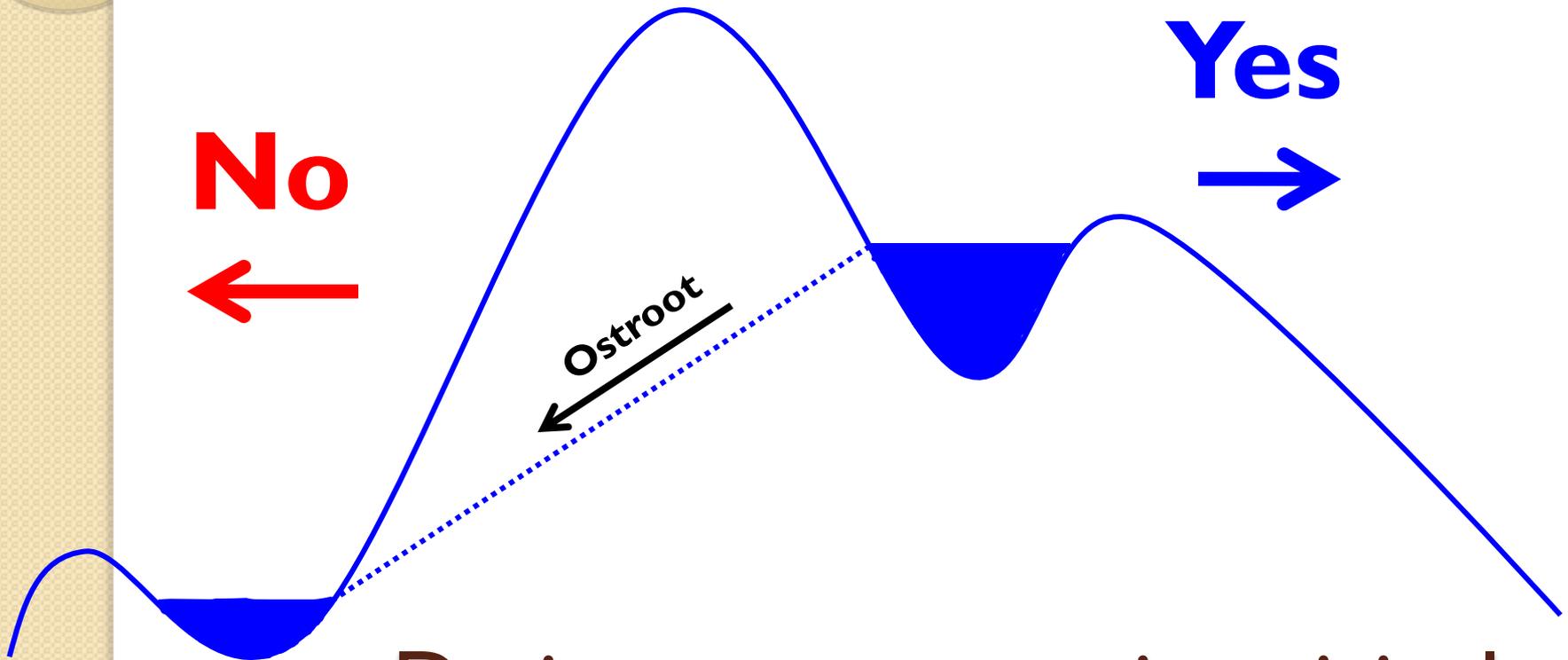


SD Drainage Case Law

- **Boll v. Ostroot (1910)**

- Defendant dug ditch to drain a slough. There was no natural watercourse from the defendant's land extending over the plaintiff's land. The ditch cast water onto plaintiff's land.
- “..the owner of land on which there is a slough or reservoir of surface water **cannot** lawfully discharge it through an artificial channel upon the land of another to his injury.”
- “..under no circumstances can the water be removed by draining it in a direction in which it would not naturally run.”

Boll v. Ostroot (1910)

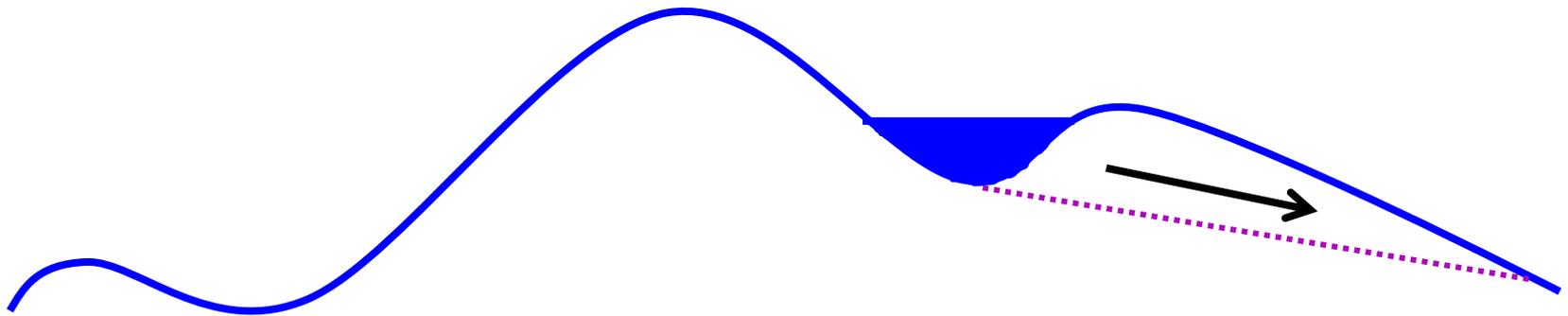


Drainage must stay in original
“watershed”

SD Drainage Case Law

- **Thompson v. Andrews (1917)**

- Defendant deepened a natural water course, allowing all water to leave the slough, some of which had not previously drained.



- *“..lower landowners burdened with easement under which the owner of the upper land may discharge surface waters over such land through such channels as nature has provided.”*

Thompson v. Andrews (1917)

- In this case, the court established a “**reasonable use**” exception to a strict application of the Civil Law Rule:
 - .. so long as the capacity of the watercourse is not overtaxed ..
 - .. alterations allowed, so long as the ultimate burden is not increased significantly ..



Before

After

SD Drainage Case Law

- **Johnson v. Metropolitan Life Insurance Co. (1946)**
 - Defendant discharged water along a natural watercourse which ran through plaintiff's land.
- **LaFleur v. Kolda (1946)**
 - Defendant discharged water from ditches into a closed basin on plaintiff's land, increasing the size of the pond.
 - *Court held for defendant (natural watercourse through) in the first, and the plaintiff (water stayed on) in the latter.*

SD Drainage Case Law

- **Gross v. Connecticut Mutual Life Insurance Co. (1985)**
 - Defendant drained an artificial impoundment, resulting in extended flooding of plaintiff's land. Pond water came from multiple sources, including feed lot runoff/wastes.
 - “.. discharge is allowed over, but not on.. (Johnson)”
 - “..servitude is limited to such drainage as can be accomplished without unreasonable injury to a neighbor's land.” (Thompson)



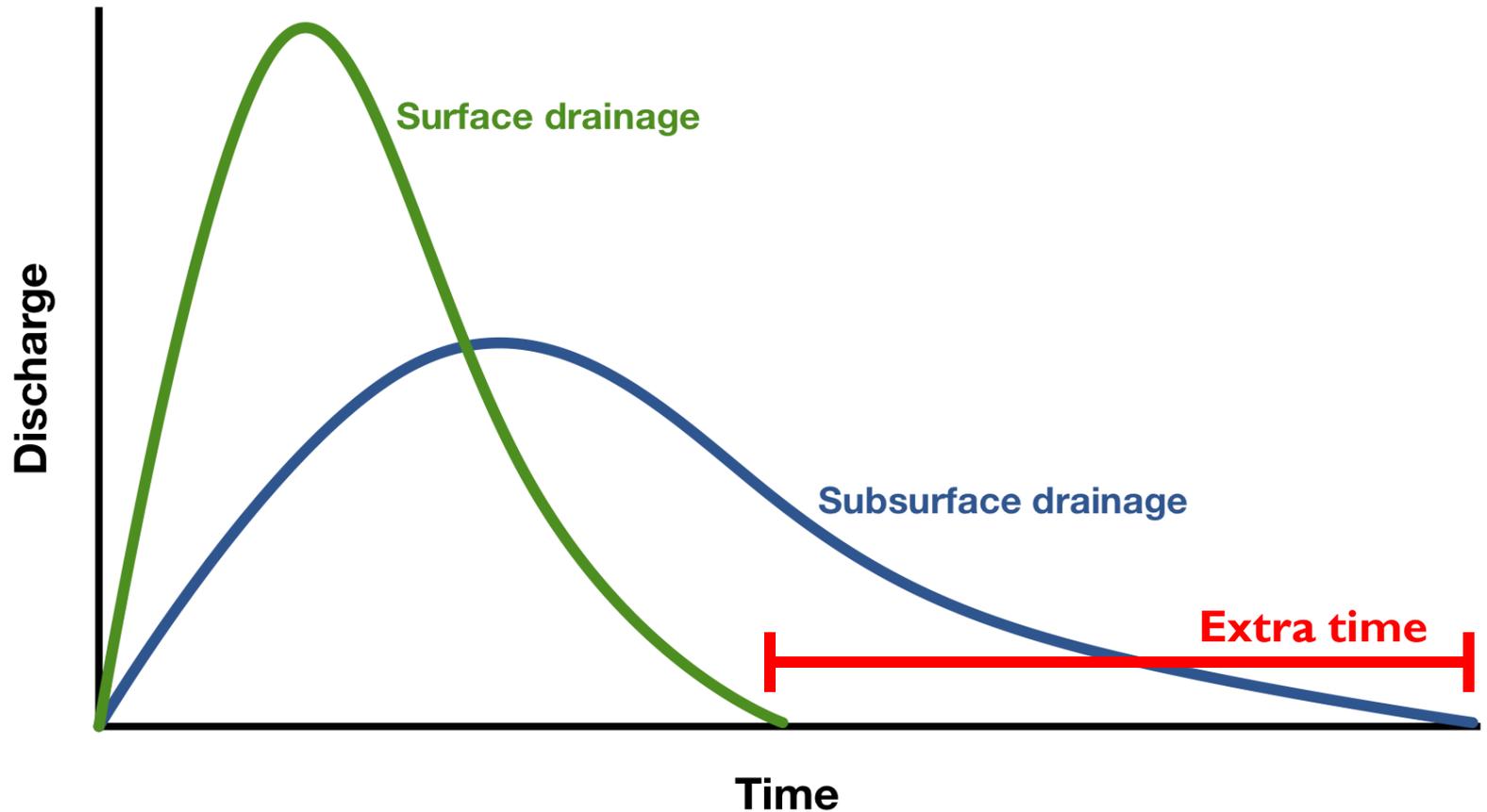
SD Drainage Case Law

- **Winterton v. Elverson (1986)**

- Surface water drained from defendant's land across plaintiff's land via a natural watercourse after spring runoff or a heavy rain. Limited impact to land use.
- Defendant installed tile drains which discharged into the same natural watercourse. Tile produced continuous and even flow at slower rate, resulting in 4 acres remaining wet, and 7 more impaired.



Runoff hydrograph – Impact of subsurface tile



From Dr. Christopher Hay, SDSU

Winterton v. Elverson (1986)



- *The trial court found that the upper landowner had increased the natural burden to the lower landowner “by changing the nature of the natural drainage.”*
- *Supreme Court concurred, asserting the qualification to the civil law rule that “..the drainage must be accomplished without unreasonable injury to the servient estate.”*
- *Thus, the upper landowner may not transfer the burdens imposed by nature on his land to that of the lower owner.”*

SD Drainage Case Law Summary

- Upper landowners have an inherent right to drain on to lower landowners, provided:
 - No inter-watershed transfer;
 - Water moves over, but does not stay on the land;
 - No substantial change in the rate or nature of flow;
 - Capacity of the watercourse is not exceeded; **and**
 - **Water quality is not degraded(?)**.



1985 DRAINAGE LAW



1985 Drainage Law

- In 1985, the Legislature passed House Bill 1154, An Act to recodify county drainage laws and powers.
- HB 1154 was intended to:
 - Codify the principles laid out in prior case law; and
 - Create a system by which the boards of county commissioners could (not mandatory) oversee and regulate rural drainage (“local control”).
- SDCL 46A-10A

SDCL 46A-10A

- The basic framework is similar to that already employed to address other land-use controls (i.e., zoning).
 - County drainage plan, a legislative action which lays out the “vision” of how drainage will be dealt with in a given county.
 - Drainage controls, the administrative procedures (ordinances) by which the County drainage plan is implemented.

SDCL 46A-10A



- Provides a county with wide latitude in what they do and how they choose to regulate drainage.
- However, it stipulates that regardless of the path they choose, they must conform to certain basic provisions.
- SDCL 46A-10A-20, Legal controls for drainage management – Right to continue existing drainage, states that “..any rural land which drains onto other rural land has a right to continue such drainage if:
 - (1) *The land receiving the drainage remains rural in character;*
 - (2) *The land being drained is used in a reasonable manner;*

SDCL 46A-10A

- (3) *The drainage creates no unreasonable hardship or injury to the owner of the land receiving the drainage;*
- (4) *The drainage is natural and occurs by means of a natural watercourse or established watercourse;*
- (5) *The owner of the land being drained does not substantially alter on a permanent basis the course of flow, the amount of flow, or the time of flow from that which would occur; and*
- (6) *no other feasible alternative drainage system is available that will produce less harm without substantially greater cost to the owner of the land being drained.*

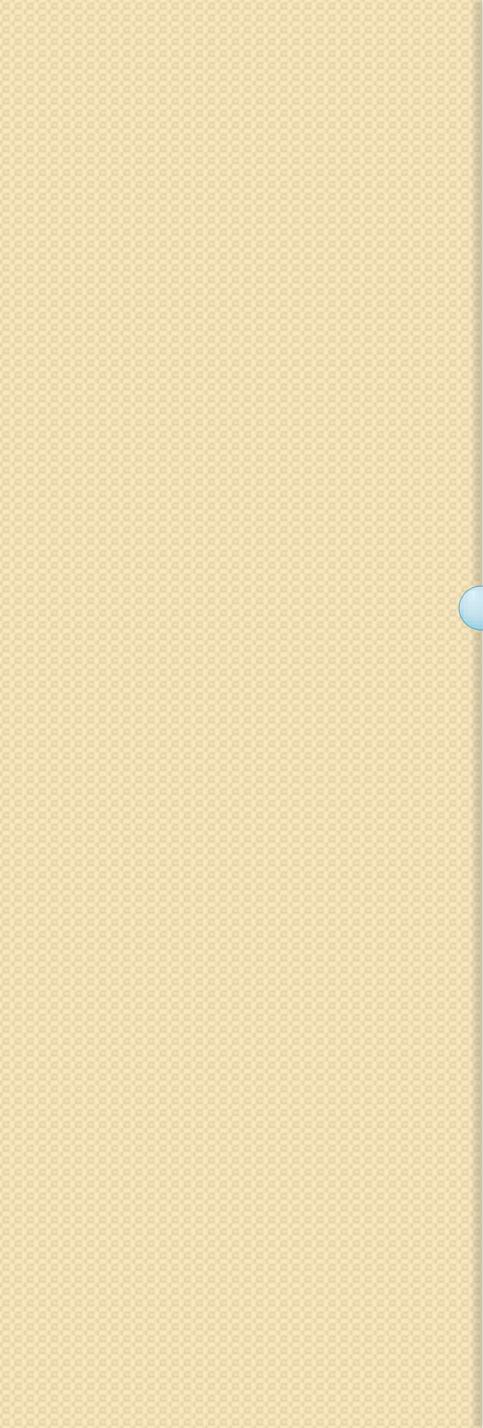
SDCL 46A-10A

- Allows for creation of a permitting process, which must adhere to 46A-10A-20.
- Permits are prospective.
- Fees can be assessed, but capped at \$100 total.
- Applies to new, and modifications of existing, drains. Pre-existing drainage vested.
- Violators can be fined, and civil and criminal penalties applied.

SDCL 46A-10A



- Since 1985, a number of counties in eastern South Dakota adopted some form of drainage controls.
 - First - Brookings County, 7/86
- The basic format is similar.
 - County Commissions act as Drainage Board.
 - Day-to-day administration handled by staff.
 - Process seeks to promote neighbor to neighbor communication.



BASIC DRAINAGE ORDINANCE

“Bold and innocent is the commission
that accepts such a charge.”

Davidson & Weeks, 1997

Basic Drainage Ordinance

- Policies and General Provisions

- Citation of Statutory Authority (SDCL 46A-10A, etc..)
- Statements about importance of agriculture, need for sound water management, intent to protect natural resources, especially wetlands.

- Definitions

- Defines those terms and items that are unique to drainage issues.
- Examples:
 - Watersheds
 - Types of drainage
 - Routine maintenance

Basic Drainage Ordinance

- Drainage Permits

- Permits needed or not?

- New drainage, over a certain size/watershed area - YES
- Expansion of previously permitted activity - YES
- Routine maintenance – Typically NO, provided effort does not exceed original conditions

- Application process

- Application form requires basic information about location, size, point-of-discharge, etc.. and payment of permit fee (\$100 maximum).
- Waivers from down-stream landowners for some distance (0.5 – 2 miles).
- May also require an engineering analysis to address system output, capacity of receiving water course, and pre- and post-conditions.

Basic Drainage Ordinance

- Drainage Permits (cont.)
 - When is a public hearing required
 - Notice of public hearing on a drainage application
 - Public notice(s) in newspaper
 - Any landowners, governmental entities/utilities directly affected(?)
 - Conditions to a drainage permit
 - Penalty for failure to secure permit
 - Rare; after-the-fact permits typically issued

Basic Drainage Ordinance

- **Coordinated Drainage Areas**
 - Defines how multiple landowners may conduct activities (former drainage districts).
- **Statewide or Inter-County Significance**
 - These invariably require a full public hearing.
- **Complaints**
 - Drainage Board may decide which types of complaints to hear, or simply kick everything to circuit court. Can not really pick and choose.
- **Emergency Drainage**

Basic Drainage Ordinance

- Permit Application Evaluation Criteria
 - Whether the flow/quantity of water to be drained will overburden the capacity of the watercourse into which the water will be drained.
 - Whether the drainage will flood or adversely impact the lands of lower properties.
 - Whether water to be drained in the limits of or across any county right-of-way will have an adverse impact on any structures or road surface.
- How is this really being done? This is the \$64,000 question/concern.



ISSUES OF CONCERN



- Rising commodity prices and land values, combined with extended periods of wet conditions, have led to rapid growth in the installation of subsurface agricultural drainage (tiling).
- Commercial and residential development around major communities.
- Each has placed tremendous stress on the existing County permit systems.

Lake County Permits

- Drainage permits/Amount of Tile
 - 2006 – 45 permits, 196,623' (64%)
 - 2007 – 40 permits, 100,505' (35%)
 - 2008 – 48 permits, 166,802' (54%)
 - 2009 – 20 permits, 24,848' (35%)
 - 2010 – 62 permits, 732,153' (90%)
 - 2011 – 128 permits, 1,336,693' (98%)
 - 2012 – 24 permits, 287,991' (100%)
- 367 permits – 2,845,615' (539 miles)

Implications of a Permit

- SDCL 46A-10A-20 requires the permitting authority (county) make specific determinations with regard to possible impacts of proposed drainage.
 - “The drainage creates no unreasonable hardship or injury to the owner of the land receiving the drainage,”
 - “The owner of the land being drained does not substantially alter on a permanent basis the course of flow, the amount of flow, or the time of flow from that which would occur”
- In order to make such determinations, a technical assessment of the proposed action is clearly necessary.

Implications of a Permit (cont.)

- This requires data and resources that are not readily available/accessible. Further, staff and fiscal resources are limited at best.
- Consequently, non-technical proxy criteria have been used to “assess” potential impacts:
 - Downstream landowner waivers
 - Discharge into “blue lines”
 - Agronomic benefits
- Counties (mostly) recognize that the existing ordinances are problematic, at best. As a consequence....

Monday, August 22, 2011



Rolling
Arrows down
Yankton,
Vermillion
Page 1B



Scrimmage
Arrows get
ready for
opener.
Page 1B



Cloudy night
Page 2A

Watertown PUBLIC OPINION

Vol. 125, No. 198

Serving the Glacial Lakes Region of South Dakota and Minnesota since 1887

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Farm land drainage

Grant Co. considers options

By **Tommy O'Keefe**
Public Opinion Staff Writer

MILBANK — Grant County has been one of the most active in the state when it comes to issuing permits for draining farm land.

But some county officials are pondering the idea of getting out of the water control business and letting parties work out the issues between themselves based on state laws.

The county's Board of Commissioners has also acted as the drainage authority for years, dealing with issues of making land tillable and what to do with the water being drained.

"The commissioners asked me to review the county's drainage ordinance and are considering repealing it," Grant County State's Attorney Mark Reedstrom said last week. "A lot of counties in northeast South Dakota have repealed their drainage ordinances."

"It's a touchy issue." Counties for years have struggled with just how to regulate drainage of land in a manner that serves one. Please see **GRANT**, Back Page

■ GRANT

Continued from Front Page

landowner without causing damage to another. That struggle has only been made worse by years of increased flooding on land saturated by heavy rains and snow melt.

"In recent years, particularly in northeast South Dakota, a lot of land has been inundated with excess surface water," Reedstrom said.

Reedstrom said he told the commissioners he favors repealing the county ordinance and returning to a more grassroots method of regulation.

"Traditionally, since the state was established, drainage was left to negotiations between landowners," he said. "Over the years, courts and the Supreme Court have developed some regulations and handled cases on an individual basis."

"In 1985, the Legislature created a statutory scheme for regulating drainage. I think what they tried to do was to put into law a lot of those ideas."

Counties were also encouraged to create their own regulations for oversight, but, "That didn't preclude litigation between landowners and drainage board action can certainly be appealed and wind up in court anyway," Reedstrom said.

There have been many documented cases where land was drained improperly and water ran where it wasn't supposed to, causing damage down stream to other landowners. In today's world of agriculture, that can be a serious issue, Reedstrom said.

"With the cost of land at \$2,000 to \$5,000 an acre and with the value of (ag) commodities, it's very serious," he said. "If the land is drained wrong, it can cause a lot of irreparable damage worth a lot of money."

"That's a huge decision for the county and that's why I think a lot of counties have decided it's better for private parties to settle it on their own — with litigation, if necessary."

Perhaps the basis of Reedstrom's argument is best cited through his reference to the intent of the U.S. Constitution and a U.S. Supreme Court ruling in 1892 involving a case out of South Carolina.

Reedstrom said in that case, Justice Anthony Scalia wrote an opinion for the court that said the Constitution includes certain inherent rights for property owners, including the ability to drain excess water, although not to the detriment of others.

Reedstrom said rulings such as that, along with state legal history leads him to think the county would be better off without the local ordinance.

"I did review, research and gave my opinion on whether we should leave the drainage ordinance as it is, modify it or repeal the ordinance entirely," he said. "I think it's better handled by private parties. There they have the benefits of 100 years of common law that has been evaluated over those years by the courts and decisions handed down."

"There are a lot of complex issues perhaps better handled by the courts."

Better off in the courts

Grant County commissioners are likely pursuing a wise path when considering getting out of the water control business. Grant County State's Attorney Mark Reedstrom has been reviewing the county's drainage ordinance and told the commission he favors repealing the ordinance, which would allow private parties to solve the problem on their own or, when needed, turn to the courts. As Reedstrom pointed out, even if the county does issue a ruling, "it can certainly be appealed and wind up in court anyway." Excess water has been a problem in the region for a couple of years now and arguments concerning draining one property and harming another have increased. State courts have a background in settling these disputes and county commissioners would likely be better off if they removed themselves from the battle.

Editorial — August 26, 2011

County abandons its drainage laws

By Donna Palmlund
The De Smet News

Kingsbury County Commissioners passed a resolution to dissolve the drainage board and all ordinances associated with it effective Oct. 1.

Commissioners acted as the drainage authority for years, dealing with issues of making land tillable and what to do with the water being drained.

"Only 15 out of 66 counties have a drainage ordinance in place," Commission Chair Shelley Nelson said.

Moody, Brookings, Grant, Spink, Lincoln, Brown, Minnehaha, Davidson, Edmunds, Brule, Deuel, Clark, Union, Butte and Kingsbury counties have drainage ordinances.

After Oct. 1, private property owners will deal with tiling issues on their own or take it to court. Property owners will still have to

obey state regulations.

"Any decisions we make can be overturned any how," Commissioner Joe Jensen said.

County Auditor Jennifer Albrecht told the commissioners that the money the county spends dealing with drainage is about equal to what it brings in with permits and sometimes is more.

The decisions commissioners make can be appealed through the courts and commissioners suggested the expense of the permitting process is costly for the county's coffers.

"The more water there is, the more disputes there have been," Commissioner Roger Lee said.

"All the water has confused the issue and it is taking a lot of time and costing the county a lot of money," Lee said.

"I wish people would educate themselves more on tiling and see that it's a good thing," Jensen said.

“It is my general recommendation to the County that we repeal our existing drainage ordinance process, including ruling on drainage permits and disputes, and that we enact an ordinance similar to Turner County.”

Kimberly Dorsett
Brown County State’s Attorney

STATE OF SOUTH DAKOTA
BROWN COUNTY



OFFICE OF THE STATE’S ATTORNEY

BROWN COUNTY COURTHOUSE

22 COURT STREET

ABERDEEN, SD 57401

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September 13, 2011

To: Brown County Commission

From: Kimberly Dorsett
Brown County States Attorney

Dear Commissioners:

I enclose for your information and review a copy of an Ordinance that was recently passed by Turner County. Many of the other County States Attorneys and myself have been corresponding concerning the statewide drainage ordinance procedure and the issues that arise therefrom. Consistent with our prior discussions, many counties are considering a complete repeal of their existing ordinances. Turner County is one such county and they have enacted the enclosed ordinance in its place. Please review at your convenience and we will discuss further. It is my general recommendation to the County that we repeal our existing drainage ordinance process, including ruling upon drainage permits and disputes, and that we enact an ordinance similar to Turner County.

Kimberly Dorsett

Acted on this recommendation on 1/17/12

BROOKINGS COUNTY ORDINANCE

AN ORDINANCE REPEALING THE ORDINANCE REGULATING THE DRAINAGE OF PONDS, SLOUGHS AND LAKES OR ANY SERIES THEREOF

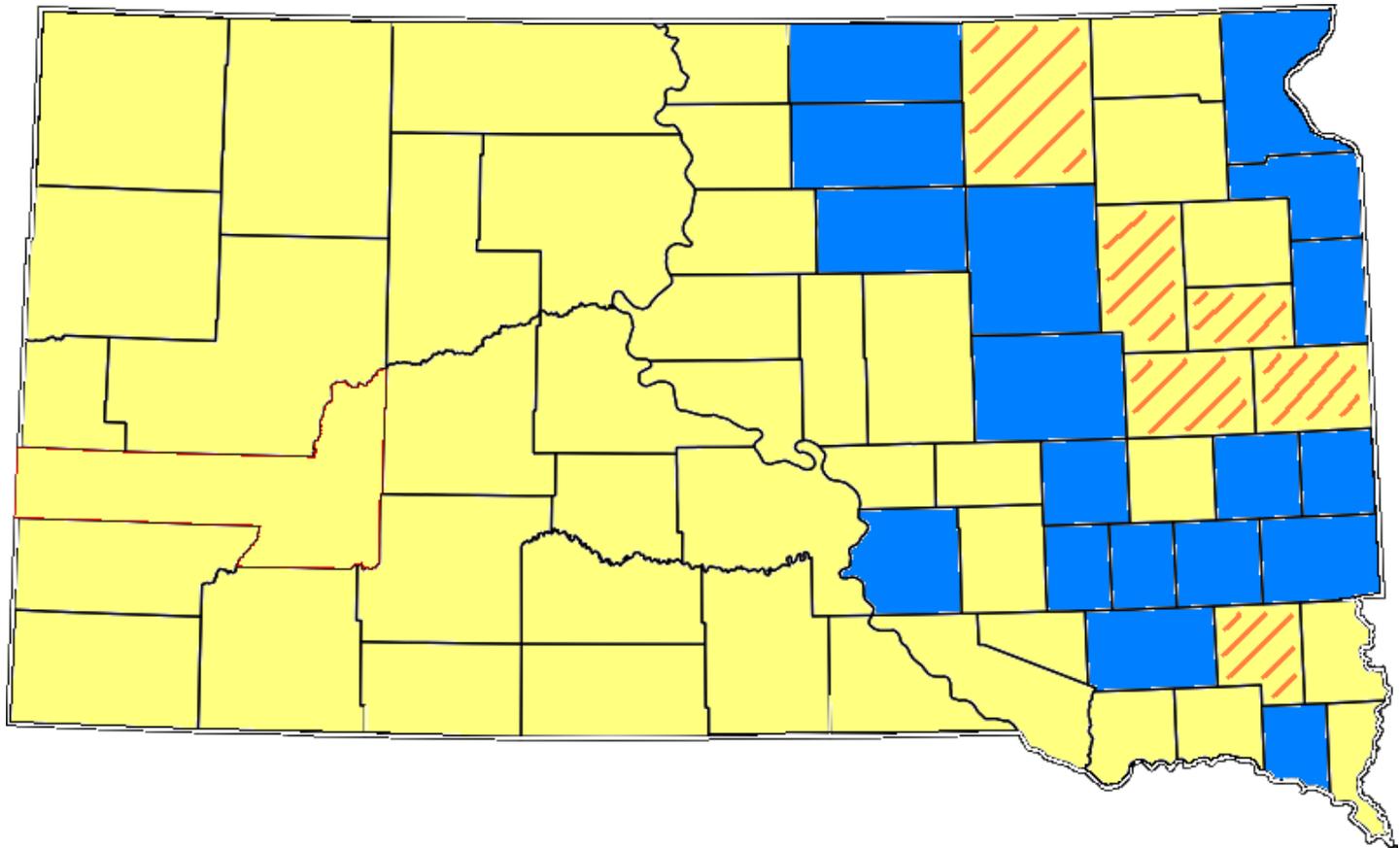
WHEREAS, the County on July 8, 1986, previously adopted an Ordinance Regulating the Drainage Ponds, Sloughs and Lakes, or Any Series Thereof;

WHEREAS, the County now desires to repeal such Ordinance and end the County regulation of such matters;

THEREFORE BE IT ORDAINED that Brookings County Ordinance 86-01, titled Ordinance Regulating the Drainage Ponds, Sloughs and Lakes, or Any Series Thereof, be and the same is hereby repealed.

First Reading **December 6, 2011**
Second Reading **December 20, 2011**

Counties with Drainage Controls



18 of 66 Counties, 7/1/12

Corrective Measures?

- Law explicitly requires evaluation of the possible impacts of proposed drainage action, but provides no guidance as to how this might be reasonably accomplished.
 - Establish minimum criteria for drainage applications.
 - Define evaluation criteria that provide a protection for all parties.
 - Balance between 10 year/\$20,000,000 studies and finger crossing.
 - Support use and/or development of standardized data collection and impact assessment tools.

Corrective Measures? (cont.)

- Provide better definitions/Clarify the language.
 - What exactly is needed to have a complete “drainage plan?” (SDCL 46A-10A-16)
 - What constitutes an “adequate survey and map” for the establishment of a coordinated drainage area? (SDCL 46A-10-48)
 - Clarify status of drainage districts that existed prior to 1985.

Corrective Measures? (cont.)

- SDCL 46A-10A-30 “..*The fee for a permit shall be established by the permitting authority, based on the administrative costs of regulating drainage activities, may not exceed one hundred dollars, and shall be paid only once.*“
- **Allow permitting authority to assess fees that are commensurate with actual costs of complying with SDCL 46A-10-20.**

Corrective Measures? (cont.)

- SDCL 46A-10A-31 *“..Any drainage right lawfully acquired prior to July 1, 1985, arising from drainage which is natural with man-made modifications or entirely man-made is also deemed vested, provided the right is recorded with the appropriate county register of deeds within seven years of July 1, 1985.”*
 - What about a “vested” drainage right that does not meet the criteria laid out in 46A-10-20?

Corrective Measures? (cont.)

- Counties are political entities with boundaries that do not necessarily encompass entire watersheds. Decisions by upstream entities impact downstream neighbors.
 - Require greater level of cooperation by permitting authorities for decisions that could impact others?
 - Consideration of alternate types of entities (watershed-based?) when dealing with “water management” issues.

EDWDD Drainage Research Efforts

- **Kingsbury County Road Crossing Inventory**

- Locate and describe all bridges, culverts, etc..., that cross state, county and township roads.
- In theory, openings should get larger as you progress downstream.
- Provide a basis for replacement to reduce flow obstructions.



EDWDD Drainage Research Efforts

- **SDSU Study of Agricultural Subsurface Drainage Impacts on Hydrology**
 - Exam the hydrologic effects of drained fields compared to un-drained fields under typical crop rotations for commonly drained soils in eastern SD, considering both timing and overall volume of flows.
 - Evaluate the DRAINMOD drainage simulation model using estimated soil hydraulic parameters.
 - Lead: Dr. Chris Hay



South Dakota
Cooperative Extension Service



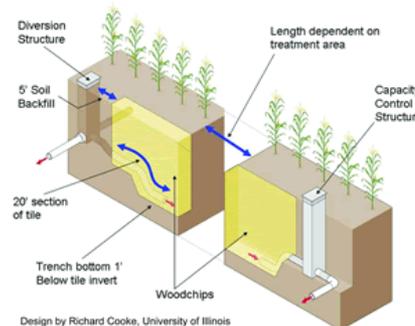
EDWDD Drainage Research Efforts

- **USGS Assessment of Climatic Effects on Stream Flow Characteristics in eastern SD**
 - Stream flow conditions trending upward in eastern South Dakota.
 - Are these changes driven primarily by climatic factors or by various land-use changes?
 - Compare climate data against long-term stream flow records.



EDWDD Drainage Research Efforts

- **SDSU Demonstration of Nitrate Removal Effectiveness of Bioreactors for Drainage Water Management**
 - Agricultural subsurface drain (tile) water is routed through trenches containing wood chips to reduce nitrate levels.
 - Pre- and post-treatment water quality tested.
 - Big Sioux, Vermillion and James River demonstration sites.
 - Lead: Dr. Jeppe Kjaersgaard, WRI



No easy fix for a “problem” that has been around for many years. Therefore, there is unlikely to be a “quick fix.” Careful and thoughtful deliberation will be required.

○ QUESTIONS?

