Rural Drainage in South Dakota

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

Sources:


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
Boll v. Ostroot (1910)

- Defendant dug ditch to drain a slough. There was no natural watercourse from the defendants land extending over the plaintiffs land. The ditch cast water onto plaintiffs 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
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**

  - 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.”
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
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
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*;
(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.
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)

Source: John Maursetter, Lake County
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....
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 Paimlund
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 tiltable 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, Davison, 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

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
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.