

OFFICIAL OPINION NO. 93-06, County Drainage Jurisdiction

August 16, 1993

The Honorable Roger Brooks
State Representative
1800 Sylvan Cr.
Brandon, SD 57005

OFFICIAL OPINION NO. 93-06

County drainage jurisdiction

Dear Representative Brooks:

You have requested an official opinion from this Office concerning the following facts:

FACTS:

Nine Mile Creek cuts across northern Lincoln County in a southeasterly direction passing just east of Tea, just south of Harrisburg, and finally emptying into Lake Alvin. The creek is a natural waterway which flows only during times of runoff from rainfall and snow melt. Development in northern Lincoln County has altered drainage patterns in the area, forcing more runoff into Nine Mile Creek. The creek has also had its capacity reduced by siltation, vegetation and debris over the years. The creek has not been cleaned for several years. As a result, each year the lands adjacent to the creek have become increasingly susceptible to flooding.

Landowners who have been subjected to this increased flooding have requested that the Lincoln County Commission take action pursuant to SDCL ch. 46A-10A to clean out Nine Mile Creek. The commissioners responded that they did not have jurisdiction over the drainage because it crossed private lands. It was the commission's position that it had by resolution limited county jurisdiction over drainage to only those instances involving a county right-of-way (county ditch).

Based upon these facts, you have asked the following question:

QUESTION:

Does the Lincoln County Commission have jurisdiction under SDCL ch. 46A-10A to clean out Nine Mile Creek?

IN RE QUESTION:

In 1985 the Legislature revised South Dakota's drainage laws and made drainage the responsibility of county government. The Legislature delegated a variety of planning, construction and regulatory powers to the counties. Some of the powers granted were optional in nature, to be exercised should the county desire or need to do so. The exercise of other authority is mandated in that the county must respond if certain conditions come about.

The authority granted in the amendments to SDCL ch. 46A-10A can be broken into three broad areas. First, county government is given the authority to undertake drainage planning as a potential method of avoiding the problems that usually accompany times of high runoff. Second, the Legislature provided for the resolution of private disputes at the county level as an alternative to court actions. Both of those areas were new grants of authority to the counties; prior to 1985 there was no drainage planning mechanism in the statutes, and private disputes were left to the courts for resolution.

The third area of legislative delegation is the authority over the construction, maintenance and improvement of drains. This was not a grant of new authority; county government has had jurisdiction over such matters for some eighty years. While the statutes were amended to some extent, the basic county power over construction, maintenance and repair of drainage works was not substantially altered.

In this instance, landowners adjacent to Nine Mile Creek and affected by its flooding have made a written request to the county commission to take action to prevent further flooding. They seek to have the waterway cleaned and maintained. The commission evidently has taken the position that it lacks jurisdiction to do so. It is the commissioners' claim that they have passed a resolution limiting their authority to drainage matters involving only county rights-of-way (county ditches). You inquire whether, under those circumstances, they have additional jurisdiction to take the requested action. In my opinion, the county commission clearly has the authority and ability to do so.

Lincoln County evidently has adopted a resolution pursuant to SDCL 46A-10A-34, which provides:

A board shall provide for appointment of its drainage commission to serve as a board of resolution and, under the regulations and controls adopted pursuant to this chapter, shall provide that the board of resolution in individual cases may make, upon an affirmative vote of three-fourths of the full membership of the board of resolution, special exceptions or variances to any official controls and shall reach decisions in individual drainage disputes between landowners, consistent with the provisions of <185> 46A-10A-20. The board may constitute itself as the board of resolution. The board may further provide that specified types or categories of drainage disputes may not be heard by the board of resolution. A drainage dispute which is not within the jurisdiction of the board of resolution shall be taken directly to the circuit court of the county wherein the conflict exists. (Emphasis added.)

Pursuant to this statute, the Lincoln County Commission has restricted the type of drainage disputes it will hear as a board of resolution. Its functions as a board of resolution, however, are separate from its functions with reference to construction, maintenance and repair of drainage projects and works. The Legislature clearly gave the county commission authority to limit its jurisdiction as a board of resolution. However, no such authority has been granted concerning the county commission's jurisdiction over drainage projects.

Such is not to say that the county lacks discretion in the area of constructing or maintaining drains. Pursuant to SDCL 46A-10A-82, the county commission "may at any time and on its own motion, without notice, . . . maintain a drainage project" by removing silt weeds and other vegetation, and taking other actions necessary "to maintain the project's original efficiency or capacity." If, however, the county fails or refuses to exercise that authority on its own, a majority of the affected landowners by petition may compel such action by the county.

SDCL 46A-10A-83 provides:

If a board fails to make necessary drainage repairs or improvements or fails to act as provided in <185><185> 46A-10A-81 to 46A-10A-88, inclusive, a majority of the owners of lands affected or likely to be affected by the proposed repairs or improvements may file with the county auditor a petition signed by them requesting the board to take such action. If the drainage extends over more than one county, a petition shall be filed in each county and each involved board shall act. (Emphasis added.)

In those instances where the work sought by the affected landowners cannot be characterized as maintenance or repair of an existing drain, a similar petitioning process

exists for initial construction of a drainage project. A petition for construction of a drainage project must contain the information required by SDCL 46A-10A-59 and must be signed by a majority of the resident landowners likely to be affected by the proposed drainage. SDCL 46A-10A-58. The petition is to be presented to the board at one of its meetings and if the petition is in proper form, it is ordered filed with the county auditor. At that point "[i]t is the duty of the board to act within thirty days" on the drainage petition. SDCL 46A-10A-60 (emphasis added). A survey and study is undertaken if the board deems such necessary and a hearing is conducted. If after the hearing the board determines that the "proposed project, or any variation thereof, is feasible and conducive to public welfare and necessary or practicable for draining land, the board by resolution shall establish the project." SDCL 46A-10A-65 (emphasis added).

An itemized list of expenditures for any project construction, maintenance or repairs must be maintained and made available for public inspection in the county treasurer's office. SDCL 46A-10A-94. The cost is ultimately borne by the affected landowners through the special assessment system detailed in SDCL ch. 46A-11. SDCL <185><185> 46A-10A-66; 46A-10A-80.

The board of county commissioners may not avoid the impact of these statutes by passing a resolution divesting itself of authority over these matters. In fact, SDCL 46A-10A-45 allows for a mandamus action if the county refuses to perform any nondiscretionary duty. While the board is not compelled to undertake drainage projects or maintenance on its own, once a proper petition is received for either a project or maintenance and repair, the board has a duty to at least proceed as the statutes require. My answer to your question is, "Yes."

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