

2019 SENATE ENERGY AND NATURAL RESOURCES

SB 2358

2019 SENATE STANDING COMMITTEE MINUTES

Energy and Natural Resources Committee Fort Lincoln Room, State Capitol

SB 2358
1/31/2019
Job Number 31875

- Subcommittee
 Conference Committee

Committee Clerk: Marne Johnson

Explanation or reason for introduction of bill/resolution:

Relating to the definition of a watercourse.

Minutes:

4 attachments

Chair Unruh: Opened the hearing, all committee members were present.

Mike Murphy, Citizen, Foster County: (1:00-3:50) Testified in favor. I'm testifying in favor, out of frustration with the process that I've experienced in development of a sub-surface drainage system. The course of events included filing my application with all the required documentation. Before I started the process I was determined to do this the right way, so that I could be relatively well assured that my application be approved. I consulted with attorneys, NRCS people, people in the sub-surface drainage business. Every single one looked at my proposal, you have no problem you have a natural watercourse there, you don't need approval from the downstream landowners. They believed it was a natural watercourse because the USGS topo map showed the dashed blue line. We didn't know any better as to what that dashed blue line represented. I completed my application, turned it into my water board, apparently they didn't feel they had the knowledge to determine if there was a natural watercourse. They sent it to the state, the State Engineer's office reviewed the material, after 3 months they looked at the site, another couple months went by, had a report that there is no natural watercourse there. The primary reason is there is no defined channel bed or banks. I had to hire an engineer and an attorney to help me appeal the decision, which was held on January 8th, part of my testimony at hearing included a drone video of what I believe should be a natural watercourse.

Chair Unruh: Before we watch the video, we're going to let Senator Wanzek speak.

Senator Terry Wanzek, District 29 (4:30-9:30) Introduced the bill, please see attachment #1. I might add, anecdotally, when I first learned about sub-surface drainage, I had the same perception most folks do. You're taking water from your land and moving it downstream. Sub-surface drainage is a little different than surface drainage in my opinion. If you imagine a piece of land with slope, if you have areas of that property, I'm not talking wetlands, one thing we cannot do is tile or drain wetlands; if you do convert a wetland you have to mitigate it. In most cases what you're trying to do is reduce the excess subsoil

moisture to get more oxygen in the soil to help plant root development and growth. Plants need both water and oxygen. Some of these soil the water absorption, it's so full of water the plant doesn't do well. If you imagine a 3-4 inch heavy rain event, and your soil is full of water, and there's no place for that water to go, where does the water go? It's running downstream. NDSU at one workshop put out a bell shaped curve graphs, they showed what happens when you get a heavy rain event, immediate rush of water and then it comes down fast. With sub-surface tile, it's much more gradual. I would argue tiling actually will help in many situations reduce the flooding effect downstream. It's taken an education process to understand that. If you remove the water table down some, that provides more room in the soil, which is a sponge, so the next time you get a 3-inch rain, more of it's going to soak in than run off over the top. If we can identify which direction the moisture would go in a heavy rain event, we have to take a look at having that tiled in that direction.

Senator Piepkorn: I know involved with the tiling legislation for quite some time; other than being Mr. Murphy's Senator, do you have any affiliation with the project?

Senator Wanzek: No, no interest. He farms 50 miles north from me, he called me.

Mike Murphy: Showed a short video **Please see attachment #2** (12:05-16:52).

Chair Unruh: I want to make sure I fully understand the issue; I believe we'll have some testimony from the state to help us understand the process. You had someone who objected to your application to tile, that definition of a waterway inhibited you in that process?

Mike Murphy: I would characterize it this way. The downstream landowner doesn't want to cooperate with anybody, I reached out to her numerous times. Is there anything I can do to make this project better so you don't feel like somebody's dumping on you? She threatened to sue anybody who had anything to do with that drainage project. Got everything together, got my easements, find out I had to have the mainline of drainage be surveyed professionally. It cost another \$4000 for the survey and other \$1500 for the easements and another year of time. That's my frustration with the process. Then I turn it into my water board, then they started sending me letters; you don't have a complete application because you're missing this or that. Then I get to the state and the state says no, it's not a natural watercourse. That's when I hired an attorney and we went through the hearing process. It doesn't work; I spend \$12-15,000 additional to solve this problem, that wouldn't have had to have been done. This process has been going on since 2015. The neighboring landowner offered to sell the land, I buy the land, put my paperwork together and I'm stopped dead. I can't see how this woman will be harmed by water flowing through this natural watercourse. I think it's wrong the way it sits right now.

Chair Unruh: I appreciate you bringing this issue in front of us.

Senator Piepkorn: Would your drainage put more water into this waterway than would otherwise occur and cause more flooding?

Mike Murphy: I can no more increase precipitation on my land or anybody else's than the man on the moon. Only so much water is going to fall on that land. When it falls, if the soil

profile is full, it's going to runoff. If it's drained down 3 feet, it's going to infiltrate. There's no way drain tile will result in more flow. It will take the peak off the flow curve.

Aaron Carranaza, Director, Regulatory Division, Office of the State Engineer (22:05) testified in opposition, please see attachment #3. The process that appears to be a frustrating part of Mr. Murphy's experience is more toward the drain tile permitting process and not so much the definition. It is a part of that, but the drain tile process is a separate part within water law. There are two bills that are addressing the process of how time projects are permitted. In current state law there is no requirement for easements just notarized letters of approval are obtained the notification process for downstream landowners does not need to move forward. The designation of a watercourse being present or not present does not kill a project it just has different notification requirements. These are pieces of information that are necessary.

Chair Unruh: Where is that mentioned in the Constitution?

Aaron Carranaza: On page 6 of my testimony, article 11, section 3.

Continued (24:55) If you go through tile law, a watercourse, if deemed appropriate, removes the ability of a downstream landowners to receive notice and provide comment in a tile project if a watercourse determination is positive, that downstream landowner has no say in the permitting process and the civil lawsuit can still play out regardless if a permit is obtained or not.

Chair Unruh: You answered one of my questions on how a watercourse is tied in to the tiling process.

Senator Cook: Have you looked at this Mr. Murphy's land?

Aaron Carranaza: I personally have not, an engineer in our division did walk the site to determine if a distinct and defined channel was present, according to her professional analysis, one was not. While the area does convey flow, it's more akin to a waterway or drainage way, but not a watercourse.

Senator Cook: Mr. Murphy has no recourse once that decision is made?

Aaron Carranaza: There are multiple options. As he mentioned, he's currently in the administrative hearing process right now. We held a hearing with the Office of Administrative Hearings a few weeks ago, we are currently waiting for the administrative law judge's decision on the State Engineer's determination that a watercourse was not present. Depending on how the state takes that next recommendation, his next recourse is to go to district court against the State Engineer's decision. That same process exists for any decision of a water resource district instead of an administrative process it's a direct to district court appeal process.

Senator Schaible: With the process that we've heard about today, what took so long? A clarification of was this a waterway and would it even be applicable to apply for the permit should have been answered right away. Instead it's taken years and lawsuits to figure it out.

Aaron Carranaza: I can't speak to what happened prior to the application being submitted to the water resource district, the securing of easements is not a requirement in state law, that was a path chosen by the applicant. I can't speak to why that process took as long as it did. What I can say is our watercourse determinations typically take 2-4 months, just by the nature of work load, getting out to the site, doing an analysis, doing the background analysis, and again due to the special significance watercourses hold within state law, we want to get it right, we don't want to place the encumbrance of a positive watercourse determination on the landowner that hosts the water course, but we don't want to arbitrarily is or is not there, it's a due diligence process.

Senator Schaible: Is there a process if someone is looking at doing a project like this, or applying for a permit that says these are the steps, these are the things you need to know before you can do that. It seems we're working backwards, he's applying for a project, doing some work and then they find out there's a roadblock, it seems if there's a roadblock they should be notified in advance. Is there a check list?

Aaron Carranaza: There is not a codified advanced engagement process, as the water resource board is the sole permitting entity for a sub-surface water management system, we recommend they contact their water resource board when they're looking at putting in a project. The water resource board has all the tools necessary to inform them of the process, one of which is whether or not a watercourse is present. The State Engineer has a permit application, part of that is some information that would be advanced warning that some of these questions need to be answered. Again, a positive watercourse determination does not roadblock a project it just provides who gets notice that a project is going in and who doesn't. If you receive notice you have 30 days to provide technical evidence that you can be harmed by a project, and if so then the water resource board may require letters of approval from downstream landowners. If no technical information is received, and even if you receive notice as a landowner, the water board can't place the requirement that you receive downstream approval on your application or your permit. There is not necessarily a roadblock, more of a who gets notice and who does not.

Senator Schaible: It seems here that the water resource board seemed to think the application was ok, then when it got to the state water commission it was denied. Somewhere along the line there was miscommunication. How do we fix that?

Aaron Carranaza: The State Engineer did not look at or review the merits of the drain tile or the sub-surface water management system project, we strictly looked at whether or not a watercourse as defined by state law was in existence at this location. The merits of the sub-surface water management project are strictly in the purview of the water resource district; we did not deny, approve, make any recommendation for that project.

Chair Unruh: If the downstream landowner doesn't have a watercourse, but objects to the projects it's still up to the water resource district whether or not to approve the tiling project?

Aaron Carranaza: My understanding of the testimony from 2017 and the way the law is written, if a downstream landowner objects to a project but doesn't provide technical evidence within 30 days, the board can't consider those claims. There is a general statute that any decision of a water resource district may be appealed in district court or challenged in district

court. There are several limitations a water resource district has before they can start adding additional conditions on landowner permissions downstream of a project. It's a very small window, some of those concerns came up in the 2017 legislation as far as how much permission or authority was given to downstream landowners to enter into the process their concerns. That was addressed as part of the new tile bill rework.

Jack Dwyer, Executive Secretary of the ND Water Resource Districts Association (38:55) Provided amendments, please see attachment #4. Out of concern for plat maps not being reliable, we felt, speaking with Mr. Murphy's engineer and some different water managers that using a USGS topography map would be a more reliable source to rely on for this statute.

Senator Schaible: If was a determination of whether it was a natural watercourse or not, that seemed to be the confusion in this project, if that determination would have been made earlier it would have gone a lot quicker?

Jack Dwyer: A water board has 60 days upon receipt of the application to make a determination on tile permit, they cannot deny a permit after 60 days. In this case, the Foster County water resource district sent a water course determination request to the North Dakota State Water Commission; that was returned in August, the application was filed in April. In my opinion, the Foster County Water Resource District should have acted on the permit sooner, within 60 days of receipt; they did not do so. If we're dealing with a natural watercourse the downstream landowner does not the ability to submit technical evidence to the water board, does not get notice. If it's not a natural watercourse the downstream landowner does have the ability to submit technical evidence. After receiving technical evidence, the water board must make a determination based on the technical evidence submitted whether the tile project will flood or unreasonably harm the downstream landowner. In this case the Foster County Water Resource District blew through their deadline. And so that's another thing that we're looking at with Mr. Murphy.

Senator Schaible: If this bill would have been in place with this amendment, that would have helped the situation and sped up the process?

Jack Dwyer: If this was a watercourse, the downstream landowner would not have the ability to submit technical evidence to the water board, therefore they would not have any reason to deny the permit. They would have to act on the permit in 60 days.

Chair Unruh: We heard from the State Engineer's Office that there's a long history with the definition of a watercourse; is there a different solution other than changing the definition of a watercourse that would improve the situation?

Jack Dwyer: I don't know, I have not done a full review of the code

Senator Piepkorn: There seems like there should be some sort of direct course whether this is a waterway or not. Rather than getting all this investment beforehand. I don't know if we're able to address that in this particular case.

Jack Dwyer: I think Senator Wanzek indicated another alternative and that would be having the State Engineer's office indicate what is and isn't a natural watercourse on the front end. I know that would require a considerable amount of work from the State Engineer's Office.

Chair Unruh: I think the fiscal note would be a rather large one.

Aaron Carranza: The State Engineer is not opposed to drain tile projects or sub-surface water management systems and likewise echo Senator Schaible's and Senator Piepkorn's concerns that there should be some mechanisms we can work through to provide a solution without overhauling a number of North Dakota Century Code Chapters.

Chair Unruh: Closed the hearing.

2019 SENATE STANDING COMMITTEE MINUTES

Energy and Natural Resources Committee Fort Lincoln Room, State Capitol

SB 2358
2/14/2019
Job Number 32738

- Subcommittee
 Conference Committee

Committee Clerk: Marne Johnson

Explanation or reason for introduction of bill/resolution:

A bill relating to the definition of a watercourse.

Minutes:

1 attachment

Chair Unruh: There were problems, not so much understanding what the issue was but more so what the repercussions of changing the definition of a watercourse were. We heard from the Engineer's Office it's used throughout the century code quite extensively. I actually had someone approach me and say they were going to go through the code to look to see if that could be changed. That turned out to not be a feasible task because of how frequently the term watercourse is used. My proposal (**please see attachment #1**) is to allow for us to study that in the interim committee to get a handle on it, and see if it does need to be changed.

Senator Cook: I move to adopt the amendments ending in .01001.

Senator Piepkorn: I second.

A voice vote was taken.
Motion carries.

Senator Cook: Moved a Do Pass As Amended.

Senator Schaible: I second.

A roll call vote was taken.
Motion passes 6-0-0.

Chair Unruh will carry.

Chair Unruh: Closed the meeting.

February 7, 2019

2/14/19
[Handwritten initials]

PROPOSED AMENDMENTS TO SENATE BILL NO. 2358

Page 1, line 1, after "A BILL" replace the remainder of the bill with "for an Act to provide for a legislative management study regarding the use of the term "watercourse" in the North Dakota Century Code.

BE IT ENACTED BY THE LEGISLATIVE ASSEMBLY OF NORTH DAKOTA:

SECTION 1. LEGISLATIVE MANAGEMENT STUDY - USE OF "WATERCOURSE" IN STATUTES. During the 2019-20 interim, the legislative management shall consider studying the use of the term "watercourse" throughout the North Dakota Century Code. The study must include consideration of the different meanings of the term and the contexts in which the term is used. The purpose of the study is to develop information that will be useful in deciding whether a new definition of "watercourse" in the North Dakota Century Code is necessary and, if so, what the new definition should be. The legislative management shall report its findings and recommendations, together with any legislation required to implement the recommendations to the sixty-seventh legislative assembly."

Renumber accordingly

Date: 2/14
Roll Call Vote #: _____

**2019 SENATE STANDING COMMITTEE
ROLL CALL VOTES
BILL/RESOLUTION NO. 2358**

Senate Energy and Natural Resources Committee

Subcommittee

Amendment LC# or Description: 19.1149.01001

Recommendation: Adopt Amendment
 Do Pass Do Not Pass Without Committee Recommendation
 As Amended Rerefer to Appropriations
 Place on Consent Calendar
Other Actions: Reconsider _____

Motion Made By Sen. Cook Seconded By Sen. Piepkorn

Senators	Yes	No	Senators	Yes	No
Senator Jessica Unruh			Senator Merrill Piepkorn		
Senator Curt Kreun					
Senator Donald Schaible					
Senator Dwight Cook					
Senator Jim Roers					

Total (Yes) _____ No _____

Absent _____

Floor Assignment _____

If the vote is on an amendment, briefly indicate intent:

*Voice Vote
Motion Carries*

Date: 2/14
 Roll Call Vote #: 2

**2019 SENATE STANDING COMMITTEE
 ROLL CALL VOTES
 BILL/RESOLUTION NO. 2358**

Senate Energy and Natural Resources Committee

Subcommittee

Amendment LC# or Description: 19.1149.01001

- Recommendation: Adopt Amendment
 Do Pass Do Not Pass Without Committee Recommendation
 As Amended Rerefer to Appropriations
 Place on Consent Calendar
- Other Actions: Reconsider _____

Motion Made By Sen. Cook Seconded By Sen. Schaible

Senators	Yes	No	Senators	Yes	No
Senator Jessica Unruh	X		Senator Merrill Piepkorn	X	
Senator Curt Kreun	X				
Senator Donald Schaible	X				
Senator Dwight Cook	X				
Senator Jim Roers	X				

Total (Yes) 6 No 0

Absent 0

Floor Assignment Sen. Unruh

If the vote is on an amendment, briefly indicate intent:

REPORT OF STANDING COMMITTEE

SB 2358: Energy and Natural Resources Committee (Sen. Unruh, Chairman) recommends **AMENDMENTS AS FOLLOWS** and when so amended, recommends **DO PASS** (6 YEAS, 0 NAYS, 0 ABSENT AND NOT VOTING). SB 2358 was placed on the Sixth order on the calendar.

Page 1, line 1, after "A BILL" replace the remainder of the bill with "for an Act to provide for a legislative management study regarding the use of the term "watercourse" in the North Dakota Century Code.

BE IT ENACTED BY THE LEGISLATIVE ASSEMBLY OF NORTH DAKOTA:

SECTION 1. LEGISLATIVE MANAGEMENT STUDY - USE OF "WATERCOURSE" IN STATUTES. During the 2019-20 interim, the legislative management shall consider studying the use of the term "watercourse" throughout the North Dakota Century Code. The study must include consideration of the different meanings of the term and the contexts in which the term is used. The purpose of the study is to develop information that will be useful in deciding whether a new definition of "watercourse" in the North Dakota Century Code is necessary and, if so, what the new definition should be. The legislative management shall report its findings and recommendations, together with any legislation required to implement the recommendations to the sixty-seventh legislative assembly."

Renumber accordingly

2019 HOUSE ENERGY AND NATURAL RESOURCES

SB 2358

2019 HOUSE STANDING COMMITTEE MINUTES

Energy and Natural Resources Committee Coteau A Room, State Capitol

SB 2358
3/7/2019
33416

- Subcommittee
 Conference Committee

Committee Clerk, Kathleen Davis by Donna Whetham

Explanation or reason for introduction of bill/resolution:

Relating to provide for a legislative management study regarding the use of the term “watercourse” in North Dakota Century Code.

Minutes:

Attachment 1,2

Chairman Porter: Opened the hearing on SB 2358.

Sen. Terry Wanzek, District. 29: Introduced SB 2358. presented **Attachment 1.**

Rep. Anderson: Have you ever went and look to see if you could find maps on water courses at the state water commission? I’ve heard they are there but I have never checked.

4:00

Sen. Wanzek: I would have to say I am not aware of it. I have visited with attorneys and I have been told there really is no area you need to get a ruling from the water commission.

Rep. Keiser: What is a watercourse?

Sen. Wanzek: Good question. A route that water naturally flows due to gravity. There is a lot of misunderstanding on to what subsurface tiling is. This is more about managing the water content in your soil, not about draining wetlands. Excessive moisture is not good for plants. By tiling you are opening the sponge in the ground and help alleviate the flooding issue downstream.

Rep. Mitskog: Is this unique to your area?

Sen. Wanzek: I think I probably is more. We are not at the same level as southern Minnesota. There’s beginning to be a lot more tiling in our area. We don’t have the assessed drains, we have a more rolling topography and water runs by gravity in certain directions. Lot of those tiling projects do follow the natural water course. Most cases tiling

is not going to increase the flow downstream. If you get heavy rain, the water comes in a huge rush with tiling the same amount of water comes at a slower place.

Mike Murphy, Carrington, North Dakota: In support of SB 2358. Presented a video and testimony. The way this evolved, 4 years ago I started working on a tiling project. Next door neighbors didn't want to give an easement to bury a pipe but were not opposed to tiling. They offered to sell me the land. Continued on how he got the land bought and started to get the tiling begun. They spent the money to get the easements recorded but they wouldn't record them at the courthouse because an underground pipeline has to have a survey. \$4,000 and 4 months later I had a survey and then I had to repeat my easement process for another \$2,500 and take it to the water board. Which they refused because you don't have permission from the downstream. I stated I didn't need permission because it is a natural water course. They said they didn't know if it was. They turned it over to the state. That was in April and in June the state came out and walked the water course and stated it wasn't a natural watercourse because they couldn't find natural bed and banks. So I filed an appeal and hired an attorney and an engineer and found in his opinion it was a natural watercourse. We went to court and the court stated it wasn't enough proof to overrule the state engineer. This was disappointing. Is there something that can be done so we can include these features on the land as a natural water course. I don't think this should be a study so it can die. I am in support of the original bill. Went through the video slides. See **Attachment 2**.

Rep. Anderson: It looks like a natural waterway as long as you can remember. It looks like the water even drains out to Lake Bonita so it looks like a natural water way.

Mike Murphy: It is probably a 10 foot drop from where my land starts to Lake Bonita. I am frustrated with the water board and to the Administrative law judge who wouldn't rule against someone else who works for the state.

Rep Heinert: Do you have the right to appeal?

Mike Murphy: Yes, for another \$7000. We're actually looking at going back on some flaws of the water board in denying my request. I have already spent \$15,000 to \$17,000 more than I should have had to. That is real money to me. This problem isn't specific to just me. If you talk to other tile installment people they will tell you the same thing, it is a dash blue line on a USGS topo map go right ahead you have no problem. Well they don't know what they are talking about and apparently no one else does either.

21:49

Rep Heinert: I can't disagree with you but I don't think we can sit here today without all the information in front of us and come to a logical conclusion. That is why I asked if there is an appeal process so you at least have the right to appeal what the state has said. You're not the first person to come before us that has had an issue. I just want to make sure there's an appeal process that you can follow to correct this. Maybe your attorney could advise you if there is any reimbursement of the expenses you have occurred outside of the norm of what you would have had to do anyhow.

Mike Murphy: What I ask of the committee is to realize is you do have is an opportunity to make an amendment to the original bill and just put in the language I have underlined in my testimony. That clears it up to anyone who looks at a USGS topo map and sees a dashed blue line will know that is.

Vice Chairman Damschen: I haven't seen the original legislation that came as the bill. Is that what you'd like to see amended.

Mike Murphy: Yes. Where I think the problem with that is went as far as saying something defective, a feature identified on a plat book would be considered a natural water course. What came out of the state engineer's office was at the Senate testimony was the words "natural watercourse" are enshrined in the constitution in "X" number of times and various other laws and suddenly you are going to say a line drawn in on a plat book is a natural watercourse. The implications are perhaps bigger than you intended. So take out the part about the plat book and put in the part about the dash blue line. That would clear up a lot. I don't know how the state engineer's office can be opposed to it because they stated to me that they are not opposed to tile drainage. I am not mad at them but I'm disappointed in the administrative law judge.

Rep. Anderson: I'm going to comment. I sometimes see this in other areas of the state also. I've seen this in other parts of the state. Some county water boards are very good and others don't do a very good job.

26:26

Mike Murphy: If someone wanted to spend the time and money to survey the state and determine what is a natural water course and what isn't, fine. I don't know why do we have to spend the time and money when something like this can fix this and then go ahead and study it. There is no map that I know of.

Vice Chairman Damschen: I think water's going to run downhill whether it's regulated by the district or the state. I don't understand why we have to spend a lot of money to find this out.

Mike Murphy: Some of the hurdles, fine, we have to have some process and some regulation on how these things are done. The level to which I've had to slog through this one, I don't want anyone else to have to do that. It has taken all the extra money I have.

Rep. Lefor: Did you propose the amendment on the Senate side?

Mike Murphy: I did not.

Rep. Mitskog: Are there others in your area that have encountered these road blocks?

Mike Murphy: The former chairman and one of the current members of the water board is probable the most active tiler in the county and he doesn't want anyone else to do it.

Rep. Devlin: Did your local water board or the state commission look at the video?

Mike Murphy: Not the local water board, but the state did.

Rep. Keiser: We're here from the government, we're here to help. You said early on the state does not have an adequate definition of water course. Really that is the problem. We need to correct the problem. You're not the first person to have this problem with definitions. We've got to solve the definition.

Mike Murphy: Thank you, that is my thought exactly. I would like to see this fixed by adding the dash blue line.

Rep. Lefor: Just so I'm understanding your memory, in the original bill it refers to section 61-01-06 and you are saying throw that out and replace it with what pertains to NDCC 61-32-03.1. So the original bill you don't need. You want the amendment to be in a different section of code, is that correct?

Mike Murphy: I would like to repeat what I want to make sure. What I think of the original bill is if you want to take out the part about a plat book line should be considered a natural water course, fine, then use the original bill. If you don't like anything about the original bill except someone wanted to turn it into a study so it goes away, don't let it stay a study, turn it back to the original bill but change it so it says "water way depicted as a perennial or intermittent stream or river on a USGS topography map. If you want to say with a dash blue line that is even more clear.

Rep. Lefor: What I am thinking is you have water course definition in the original bill. What you are saying in this amendment is in a different section of code that you have underlined waterway depicted as a perennial or intermittent stream or river on a USGS topography map. That is your new wording of the existing code. It we add that it would take care of your problem?

Mike Murphy: Yes, I believe.

Chairman Porter: Geographically how do I get to this land?

Mike Murphy: The primary portion of this natural watercourse go to Melville on 281, go ½ mile N, 1 ½ mile west. You will be right there. On the map I gave you 27 is the land I own together with my nephew and 33 is where the downstream obstruction is in Foster County, Melville Township.

Chairman Porter: Inside of the original bill you think part of the resistance was using what was marked blue inside of the plat book?

Mike Murphy: The watercourse definition here, this is what you will find in Meriam Webster. The problem is this amendment which is underlined here, "a creek river or stream appearing in a plat book must be deemed a watercourse". I can understand some may not want to rely on a plat book that is not scientific enough. Let's use USGS maps, someone actually went out there took elevation and drew it in. Take out the part about the plat book.

Chairman Porter: Inside of your proposed amendment it is in the general definition portion of the watercourse and in 61-032-03 is that specific to tiling application process?

Mike Murphy: Yes that is specific to tiling.

Rep. Devlin: When I read what they did in the Senate, I could make an argument that what we just saw in the video is not a creek, river or stream. I could see where this maybe won't help but where he wants to amend the other it will take care of the problem inside the application process.

Chairman Porter: Further testimony in support? Any opposition to SB 2358? Anyone here from the state engineer's office? Seeing Matt Lindsey. Did the State engineers office discuss this in the Senate?

Matt Lindsey, State Engineers office: Yes we discussed this in the Senate, and opposed the original bill. The amendment was for a study and we were okay with that and working with Senator Unruh on it.

Chairman Porter: What will a study find us? A book and a blue line that Federal government put there and that's going to show us how the water flows?

39:00

Matt Lindsey: A study was suggested because the term watercourse is used throughout many parts 13 Sections of Administrative Code and 35 Sections of Century Code. We are concerned if you change the definition that it may have broad implications not only for water laws but for other areas of Century Code.

Chairman Porter: So opening up the specific component of drain tile application process where now we are narrowed down to something very specific where the word water course would mean the little blue line on the topo map. Was that discussed and have you looked at that as a solution to that permitting process?

Matt Lindsey: It gets complicated because the state engineer really isn't involved in tile permitting anymore. We are just a mechanism for the tile application, we create that for the water board. We keep a data base in our office of all the tile permits that are approved so you have access to that data but in general we don't have an opinion on that. Because we were taking out of the tile permitting process last session. Saying how the process should go is probably out of realm.

Chairman Porter: But you do end up in a situation where they come to you and say is this a water course? You saw the movie with us and did that not look like a natural water course with the water flow ending in the lake?

Matt Lindsey: Whenever we get requests of a watercourse determination that can only be done by a county water resource district. Typically, it is done at the local level. In Mr. Murphy's specific case the county water board did not want to make that determination, so they withheld his application until they got a determination from the state as to whether or

not we thought it was a watercourse. That is in the law, the definition of a watercourse and the option for a water resource board to request the state to determine if it is definitely a watercourse. Usually we don't get that question unless it is a difficult one. We thought a watercourse was something special and something specific in that law that the legislature intended. So we hold it to a high standard.

Chairman Porter: You saw the video. You saw the natural course of the water flowing down to the lake and came up with the determination that it was not a natural water course?

Matt Lindsey: We have an engineer go out on sight and do a survey. My engineer went out on, walked it, took pictures, they came back and review information including USGS maps, plat book maps, aerial photography, and LiDAR information. There is some court cases on this issue. In Mr. Murphy's case we did not disagree that the flow was entering the site or that it would experience period flow but we disagreed that it was a clear and defined channel. Where the definition calls it out where it would rise to the level of what we would call a watercourse. That had implications for the tile permit because if there's a natural watercourse downstream someone can discharge into that without having to notify the downstream landowner. We took as looking at the intent of the legislature and with all the other laws and specifically the tile law and putting the word watercourse in there.

Rep. Porter: Can you get us a copy of your internal documents? Electronically would be perfect.

Matt Lindsey: Yes.

Rep. Zubke: When you mentioned the administrative code and century code sections, you're using the same definition for water course throughout all of those sections?

Matt Lindsey: Yes. We are assuming that was the intent. That was part of the reason of the study is because maybe there's generalities, maybe it was used loosely throughout history and that is what we are after clearing up.

Rep. Keiser: It's interesting thing, historically we have placed in many sections of law your definition of watercourse, we looked it up and it is where water flows whether it is a dry bed or not. It doesn't need to be a flowing river at all times but gravity pulls water. That's a simple definition. We have developed a different definition. What is that?

Matt Lindsey: The definition of a watercourse is in North Dakota Century Code 61-01-06. That definition has existed since 1907 and only 1 change in 1981 when the legislature added "if requested by a water resource board the state engineer shall determine if a watercourse is constituted". I think that was put in there as a check on the water boards if they are unsure. In Mr. Murphy's case it went before an Administrative Law Judge.

Rep. Keiser: I now have a copy and I'm reading it, you saw the video what is not a watercourse? It's maintained, it's a distinct channel, it doesn't have to be continuous, what doesn't meet your definition? There is no alternate channel on that land that I saw.

Matt Lindsey: Yes, we did look at several things and picked apart the definition. We're not arguing natural flow, we're not arguing the water was a sufficient natural and accustomed flow. We are not arguing whatever was formed and maintained by water, or that the water was not periodic. We were arguing whether or not it was a distinct and defined channel. In our opinion that had a significance because of in the case of tile projects as well as other drainage, watercourses are supposed to have a certain conveyance capacity.

Rep. Keiser: That's not in here. Don't tell me it's supposed to be in there. I'm looking at your definition.

Matt Lindsey: If you would look at old case law regarding this. When we do this we look at it holistically we don't look strictly at the definition. We look at lots of other data and historic case law and what they have said about watercourses.

Chairman Porter: Inside the electronic record you will send to us then your conclusion will be part of that?

Matt Lindsey: Yes. We may be able to get. We issued a decision and it was internally reviewed inside the State Engineering and that was in September and maybe the ALJ documents as well as far as what Mr. Murphy was referencing.

Chairman Porter: I'm also going to give you a homework assignment. In looking at the language Mr. Murphy gave us, so that we aren't interfering with the 35 Sections of Century Code and 13 Sections of Administrative code and stay very specific to a definition inside of the permitting process in 61-32-03.1. If you could look through that and get back to me on that particular topic, I'd appreciate it. Any further questions? Seeing none.

Closed the hearing.

2019 HOUSE STANDING COMMITTEE MINUTES

Energy and Natural Resources Committee Coteau A Room, State Capitol

SB 2358
3/21/2019
34101

- Subcommittee
 Conference Committee

Committee Clerk, Kathleen Davis

Explanation or reason for introduction of bill/resolution:

Relating to provide for a legislative management study regarding the use of the term “watercourse” in North Dakota Century Code.

Minutes:

Attachment 1

Chairman Porter: Opened the hearing on SB 2358 on the watercourse. Presented Attachment 1. Mr. Murphy was here and showed us a nice aerial footage using drone technology and also presented us with an amendment. There was a way the Senate amended the bill. The way they did that was to go into the general section of definitions and change what the word watercourse was. I’m sorry, the ORIGINAL bill changed the course of definition of what a watercourse was. They said it appeared in the Century Code numerous times and that it needed to be studied because they didn’t know the full implications of changing that one definition.

Mr. Murphy came in during his presentation and said, after giving what the Senate did more thought, that the easy fix is to change the definition inside of the tiling section of the Code. So the amendment you see is the one Mr. Murphy had suggested to us, that goes into the tiling rules and changes the application process in the definition of what a water course is.

Rep. Devlin: I will move the amendment.

Rep. Ruby: second.

Chairman Porter: We have a motion and a second to adopt Amendment 19.1149.02001. Discussion?

Rep Bosch: I wasn’t here during this hearing. So we’re taking away the study completely and putting in the amendment?

Chairman Porter: That is correct. This is a hoghouse, that takes away the study language from the Senate and goes into the tiling regulations and changes the definition inside of tiling.

Further discussion on the motion to amendment 02001? Voice vote, motion carried.
We have an amended bill.

Rep. Anderson: Move a Do Pass as Amended on SB 2358.

Rep. Ruby: second.

Chairman Porter: we have a motion and a second for a Do Pass as Amended on SB 2358. Discussion?

Rep. Keiser: Only to point out the study for the Senate.

Chairman Porter: that's a great comment. I will say that Mr. Murphy was very well informed, very well aware of what happened, how it happened and why it happened. I applaud him for doing the study for us and making us look as smart as we are by coming in and making the suggestion, "why don't you just change a couple words inside of the tiling restrictions?" I think that really expands on our citizen legislature on how the constituent still fix and show us the way.

Rep. Anderson: This also shows my concern for some of the local county water boards because I think that's where the problem came from to begin with.

Chairman Porter: I can't hardly deny that. Further discussion on amended version of SB 2358? Roll call vote on Do Pass as Amended on SB 2358: 14 yes 0 no 0 absent. Rep. Lefor is carrier.

PROPOSED AMENDMENTS TO ENGROSSED SENATE BILL NO. 2358

Page 1, line 1, after "A BILL" replace the remainder of the bill with "for an Act to amend and reenact subdivision b of subsection 2 of section 61-32-03.1 of the North Dakota Century Code, relating to notice of proposed subsurface water management systems.

BE IT ENACTED BY THE LEGISLATIVE ASSEMBLY OF NORTH DAKOTA:

SECTION 1. AMENDMENT. Subdivision b of subsection 2 of section 61-32-03.1 of the North Dakota Century Code is amended and reenacted as follows:

- b. Upon submission of a completed application for a permit, the water resource district board immediately shall give notice and a copy of the submission via certified mail to each owner of land within one mile [1.61 kilometers] downstream of the proposed subsurface water management system outlet unless the distance to the nearest waterway depicted as a perennial or intermittent stream or river on a United States geological survey topography map, assessment drain, natural watercourse, slough, or lake is less than one mile [1.61 kilometers], in which case notice and a copy of the submission must be given immediately to each owner of land between the outlet and the nearest assessment drain, natural watercourse, slough, or lake. The notice requirement in this section must be waived if the applicant presents signed, notarized letters of approval from all downstream landowners entitled to notice in this subsection."

Renumber accordingly

Date: 3-21-19
 Roll Call Vote #: 1

**2019 HOUSE STANDING COMMITTEE
 ROLL CALL VOTES
 BILL/RESOLUTION NO. 2358**

House Energy and Natural Resources Committee

Subcommittee

Amendment LC# or Description: 19.1149.02001

- Recommendation: Adopt Amendment
 Do Pass Do Not Pass Without Committee Recommendation
 As Amended Rerefer to Appropriations
 Place on Consent Calendar
 Other Actions: Reconsider _____

Motion Made By Devlin Seconded By Ruby

Representatives	Yes	No	Representatives	Yes	No
Chairman Porter			Rep. Lefor		
Vice Chairman Damschen			Rep. Marschall		
Rep. Anderson			Rep. Roers Jones		
Rep Bosch			Rep. Ruby		
Rep. Devlin			Rep. Zubke		
Rep. Heinert					
Rep. Keiser			Rep. Mitskog		
			Rep. Eidson		

Total (Yes) _____ No _____

Absent _____

Floor Assignment Voice vote Motion carried

If the vote is on an amendment, briefly indicate intent:

Date: 3-21-19
 Roll Call Vote #: 2

**2019 HOUSE STANDING COMMITTEE
 ROLL CALL VOTES
 BILL/RESOLUTION NO. 2358**

House Energy and Natural Resources Committee

Subcommittee

Amendment LC# or Description: _____

Recommendation: Adopt Amendment
 Do Pass Do Not Pass Without Committee Recommendation
 As Amended Rerefer to Appropriations
 Place on Consent Calendar
 Other Actions: Reconsider _____

Motion Made By Anderson Seconded By Ruby

Representatives	Yes	No	Representatives	Yes	No
Chairman Porter	✓		Rep. Lefor	✓	
Vice Chairman Damschen	✓		Rep. Marschall	✓	
Rep. Anderson	✓		Rep. Roers Jones	✓	
Rep. Bosch	✓		Rep. Ruby	✓	
Rep. Devlin	✓		Rep. Zubke	✓	
Rep. Heinert	✓				
Rep. Keiser	✓		Rep. Mitskog	✓	
			Rep. Eidson	✓	

Total (Yes) 14 No 0

Absent 0

Floor Assignment Lefor

If the vote is on an amendment, briefly indicate intent:

REPORT OF STANDING COMMITTEE

SB 2358, as engrossed: Energy and Natural Resources Committee (Rep. Porter, Chairman) recommends **AMENDMENTS AS FOLLOWS** and when so amended, recommends **DO PASS** (14 YEAS, 0 NAYS, 0 ABSENT AND NOT VOTING). Engrossed SB 2358 was placed on the Sixth order on the calendar.

Page 1, line 1, after "A BILL" replace the remainder of the bill with "for an Act to amend and reenact subdivision b of subsection 2 of section 61-32-03.1 of the North Dakota Century Code, relating to notice of proposed subsurface water management systems.

BE IT ENACTED BY THE LEGISLATIVE ASSEMBLY OF NORTH DAKOTA:

SECTION 1. AMENDMENT. Subdivision b of subsection 2 of section 61-32-03.1 of the North Dakota Century Code is amended and reenacted as follows:

- b. Upon submission of a completed application for a permit, the water resource district board immediately shall give notice and a copy of the submission via certified mail to each owner of land within one mile [1.61 kilometers] downstream of the proposed subsurface water management system outlet unless the distance to the nearest waterway depicted as a perennial or intermittent stream or river on a United States geological survey topography map, assessment drain, natural watercourse, slough, or lake is less than one mile [1.61 kilometers], in which case notice and a copy of the submission must be given immediately to each owner of land between the outlet and the nearest assessment drain, natural watercourse, slough, or lake. The notice requirement in this section must be waived if the applicant presents signed, notarized letters of approval from all downstream landowners entitled to notice in this subsection."

Renumber accordingly

2019 CONFERENCE COMMITTEE

SB 2358

2019 SENATE STANDING COMMITTEE MINUTES

Energy and Natural Resources Committee Fort Lincoln Room, State Capitol

SB 2358
4/11/2019
Job Number 34689

Subcommittee
 Conference Committee

Committee Clerk: Marne Johnson

Explanation or reason for introduction of bill/resolution:

A bill relating to notice of proposed subsurface water management systems.

Minutes:

No attachments

Chairman Kreun: Opened the conference committee. All members were present.

Representative Anderson: We added one line on section 1, on lines 11 and 12, we put the waterway depicted as a perennial or intermittent stream or river on a USGS topographic map. After we heard testimony, we could tell that that was a waterway, it was reaffirmed by watching a video. The waterway went across the road, went through a couple culverts and a mile away it went into another lake. We thought that was a good definition, depicting what a waterway or watercourse was.

Chairman Kreun: In your discussions with the Department of State Engineers, were they part of the process?

Representative Anderson: Actually, I believe that the State Water Engineer's Office had reviewed that and they agreed that it wasn't initially, but our committee couldn't understand why it wasn't depicted as a waterway. After we looked at the video and the topographic maps, we decided that that looked like a waterway to us, so that's why we put that in there.

Chairman Kreun: Was that confirmation felt with the Engineer's Office as well?

Representative Anderson: Not on their initial, they were out there and inspected that, we disagreed with their assessment that that wasn't a drain, I don't understand how they come up with their assessment.

Senator Unruh: How about all of the other scenarios that this would affect too? We could all agree about that one, but what about all of the other scenarios and field checking that USGS map, I've used it at work multiple times for multiple things, sometimes they've got a rock pile depicted as a wetland, it's not always the most accurate. In that specific scenario I agree, but in all the other scenarios, I don't have confidence in that map. Did you discuss that at all?

Representative Anderson: We discussed the topographic map, but if you look who is doing the survey, for the most part they are fairly accurate. It's also going to be inspected by the county water board and the State Engineer's Office. After we had the hearing and saw they map, and looked at the video, we just thought there was a mistake made. This is under the tiling code, the guy received permission to go ahead and tile his land, and after he spent the money and made the decision, they backtracked on him, it wasn't the right decision.

Chairman Kreun: The county water board has 60 days to deny or accept as a permit, that had expired and there was action to take more information, then the State Engineer's Office was involved and gave the overview of not being a waterway, after the information was given at testimony, I don't think that we have an objection from the State Engineer's Office that this is a waterway.

Representative Anderson: I've been around county water boards for a long time, some of them do a relatively good job, but sometimes there's politics. This would help eliminate a lot of that.

Senator Piepkorn: You said that the landowner had received permission to tile, went ahead and did it, and then someone came along after the fact and rescinded that permission?

Representative Anderson: I believe that's right.

Senator Piepkorn: That doesn't seem possible, that would be an injustice.

Representative Damschen: Backtracking to what Senator Unruh said, I think that there is a possibility of those errors occurring on some maps. I think some of them have come out based on photos and shown rock piles as wetlands and wetlands on top of hills, but I think the topographical map that shows elevations and identifies waterways, there would be a lot less of a chance of that map being inaccurate. The natural drop would be depicted in the elevations. That concern wouldn't be as bad.

Senator Piepkorn: Didn't we send over a bill to make it a study?

Representative Anderson: Yes.

Senator Piepkorn: But then the version we have back is 03000?

Representative Anderson: That's correct. Also they are studying the term watercourse, but the watercourse is already defined in century code, I don't know what you are going to gain by the study. In this case, the landowner who had went ahead investing the money, to wait two years to come up with a study to realize his investment, I think it was wrong and I would like to make this pretty simple change in the language to help him greatly.

Senator Piepkorn: I guess I might have to hear from the landowner.

Mike Murphy, Carrington, Foster County: I did get green light to go ahead and pursue this project, I did not put any pipe in the ground. Before you start a project this size, a fair amount

of technical investigation has to be done, in terms of developing that plan. Water runs downhill, but you have to know elevations all the way down, how much it will cost. Various steps along the way, if you exceed certain parameters, you need more approval. NRCS, the tile company, my attorney in water law; all told me I had a natural watercourse, to proceed. I looked at the topo map, there is a dashed blue line, natural watercourse, so I proceeded.

Senator Piepkorn: All of these organizations you just mentioned, were they the permitting authorities?

Mike Murphy: No, they were not. I took my completed application in to the water board, they said yes, you've got a natural watercourse, get your easements, get all this stuff drafted, take it in. So I took it in. Then they told me I needed a survey, which got done, and resubmitted my application, then they said they weren't sure if this was a natural watercourse.

Senator Piepkorn: Wouldn't they have to make a decision? Rather than go, we don't know, wouldn't they have to say yes or no?

Mike Murphy: They get the option of deciding when the application is complete. Every time I came in, they told me my application wasn't complete; they were waiting for the State Engineer's Office to complete their study. The time passes, meanwhile I hired an engineer, to go out and review this whole thing. Go to the Administrative Law Judge, get shot down.

Representative Zubke: Could you explain to us how this would fix your problem?

Mike Murphy: Anybody who is going to do a tiling project, where they know it is over 80 acres and you need water board approval, can look at a topo map, see the dashed line and know for sure at the beginning, before they invest any money in a tiling plan, that they can proceed. They will know what they can do.

Senator Unruh: You mentioned that you had obtained easements, can you explain what those easements were for? Were they for you to be able to discharge water down the waterway?

Mike Murphy: Technically yes. The natural watercourse, if it is depicted as a dashed blue line on a US topo map, which is what I was told, that natural watercourse headwaters is within a quarter mile of my land. By the law as it was written, I don't need permission from anybody. That natural watercourse is within one mile of my outlet, technically. I chose to move my outlet downstream so I would have to put a pump in. I'm still discharging into that natural watercourse, but the water board wouldn't give me a permit, they don't know the law.

Senator Unruh: Back to the easements that you have, you got them up to the point where you couldn't any more, there was a landowner that didn't want to give you an easement for your project. If this was designated as a watercourse, if we changed this law, and this had been in effect, you wouldn't have had to get any easements, you could have just discharged down the watercourse, without the landowner's approval. While you were trying to determine with the professionals in the field if this was a watercourse or not, did you ever reach out to the State Engineer's Office and go around the water board to see what their input was? Tell me about that.

Mike Murphy: When I knew this downstream landowner was threatening, I reached out to the State Engineer's Office, they were aware of it, they had received a call from the downstream landowner too, this is how it goes, if you have a natural watercourse, you are in good shape. Eventually the State Engineer's Office received request from my water board.

Senator Unruh: Did you get the designation of a watercourse at the end?

Mike Murphy: No, that's up for debate; it's an opinion. My engineer says it is. I have definite stream bed and banks. The State Engineer's Office didn't find that.

Senator Unruh: That ultimate decision aligned with the State Engineer's Office, and then an ALJ upheld their decision.

Representative Anderson: It shows that the elevation drop is almost 14 feet per mile, which to me is pretty significant that water is going to flow downhill.

Mike Murphy: It has to do with the definition of a natural watercourse. Were those elements contained in the definition of a natural watercourse present, along this path? The State Engineer's Office says no, my engineer says yes.

There are errors in topo maps, because they are drawn up by people, and people make mistakes. So that piece of information, with an onsite visit, topo map, my tile plan submitted to the water board; a rational person couldn't say we can't use the topo map, because it's wrong. But what about the other evidence that you have that shows this is where the water has flowed for thousands of years.

Chairman Kreun: One of the things I looked at was the elevations that came through and the diagrams of the banks. If you take a look at the definition of a watercourse, a watercourse entitled to the protection of the law is constituted if there is sufficient natural and accustomed flow of water to form and maintain a distinct and defined channel. It is not essential that the supply of water should be continuous or from a perennial source, it is enough if that flow arises periodically from natural causes and reaches a plainly defined channel of permanent character. If requested by a water resource board, the State Engineer shall determine if a watercourse is constituted. Now, from the testimony that was brought forward, there was lots of diagrams to indicate the elevation, the basic channel, and the berms. Then if you take a look at that, the watercourse is defined. We had no testimony, other than the written testimony from the Engineer's Office, they did this, but they did not give us the type of research they used. There's nothing to refute what he's indicated. I'm questioning why that didn't happen.

Senator Piepkorn: Wasn't the Engineer's Office here?

Chairman Kreun: Yes, what they gave us what they can use, but we haven't seen that. I haven't seen anything other than this statement, from the Engineer's Office. We have a pretty detailed diagram from his engineer stating that the drop is 14 feet in a mile.

Senator Unruh: A little food for thought, I like clarity, but we also have to keep in mind the ramifications if we do make this change of what the effects on the downstream surface

owners, who also still have rights, what those are, make sure that we aren't taking something from them that they would have had before. It's a tough balancing act.

Chairman Kreun: Would this amendment clear up some of this confusion before you start the process? Is this one of the things that would clear up your question.

Senator Unruh: It might be good to get some information from the State Engineer's Office to know if this really expands what currently would be designated as a watercourse, or if it's relatively similar. If it's relatively similar, and it could provide clarity for these people, I could be amenable to the change, but I think we should try and understand that, the whole scope of things.

Representative Zubke: To that end, we could study what a watercourse is, and end up with this same problem. I think what we're changing in this bill, just very narrowly defines and addresses the issue, and does not impact a lot of other issues, as far as the definition of a watercourse.

Mike Murphy: The State Engineer's Office has expressed they have no problem with this change.

Matt Lindsey, State Engineer's Office: As far as the amendment to the House bill, both bills, we have no issue with, the study we support, the bill on the House side, where they choose to call it a waterway, on a USGS quad map, that could change the intent of the tile law, but the State Engineer's Office isn't involved with the tile legislation or the process, other than making the permit application for the county water boards and keeping a database on the permits. As far as the background on a watercourse, the State Engineer's Office came in a late date, we were asked for a watercourse determination, that's a separate process with the definition of a watercourse we are kind of roped into it.

Chairman Kreun: If we add this, will that solve some of the problems early on?

Matt Lindsey: Potentially. It's up to you how to view the tile law and what the permissions downstream need to be. As far as USGS quad maps, Mr. Murphy referred to them as the gold standard, they are to a certain degree. It's important to realize how they are developed. In our office we have a map maker, those blue dashed lines are made from aerial photo interpretation. They have done field investigations. It's hard to say how accurate they are, but they are a good tool, we use them for a lot of things.

Chairman Kreun: I think we need some more time, we'll be back.
Closed the conference committee.

2019 SENATE STANDING COMMITTEE MINUTES

Energy and Natural Resources Committee Fort Lincoln Room, State Capitol

SB 2358
4/12/2019
Job Number 34724

Subcommittee
 Conference Committee

Committee Clerk: Marne Johnson

Explanation or reason for introduction of bill/resolution:

A bill relating to notice of proposed subsurface water management systems.

Minutes:

No attachments

Chairman Kreun: Opened the conference committee. All conferees were present. We had some questions about the amendment last time, what the topographical survey map would do downstream and what long term consequences to anyone involved in the tiling permit process. I asked Aaron Carranza from the State Engineer's Office to come down to give us an overview. The State Engineer's Office really does not oversee the tiling aspect of it.

Senator Unruh: My only outlying piece with this is if we do add this as a tool, is that far more expansive than the list that we have now, or does it not change a lot? We are trying to provide certainty for the people that put their applications in, but at the same time, I want to make sure if a downstream surface owner would have been notified before, that they have the right to protest, if this changes the amount of people who would have the right to protest significantly?

Aaron Carranza, Director, Regulatory Division, Office of the State Engineer: It would make the water resource districts' ability to denote what is out there, as far as when a downstream landowner would be notified. It makes that process a little easier, they can go to a single source, like a map. However, you are right, it would have the potential to limit a downstream landowner's ability to receive notice, and then provide technical evidence refuting or disputing a potential project. It would have some consequences to the downstream landowner, of not being notified, but would make the water resource district's job on achieving a permit decision within 60 days a little easier.

Senator Unruh: This just changes who is given a notice?

Aaron Carranza: Correct.

Chairman Kreun: What's the difference between topographical map and a plat book? Why would this change it?

Aaron Carranza: The way the tile law works, an applicant puts an application with the water resource district, and by law they have to give notice to all landowners within one mile downstream of the outlet. Unless within that one mile, they run into an assessment drain, a natural watercourse, a slough or lake, and if this proposed amendment goes through, a blue line on a USGS quad map. If they hit that, then their notice obligation stops at that feature. The plat book as far as denoting who owns a property, wouldn't be modified, the concern with the original bill language, the 1000 version, insinuated that if a line shows up on a plat book, that would automatically be termed a watercourse, for the definition of a watercourse, where this is discussing who receives notice, what features once you reach that feature the notice obligation is no longer present for an applicant when they submit an application for subsurface water management.

Representative Zubke: Basically, the notice requirements are all staying the same, it's just that along with a watercourse or a slough, we are including a waterway that is on a topographical map that will have that exception, if its less than one mile.

Aaron Carranza: That's correct.

Representative Anderson: I don't know if we should use the word slough in a watercourse, in a watercourse, that water is there temporarily. It's on the way to another stream, a slough is there all year long.

Aaron Carranza: Again, that language is from the 2017 Legislative Assembly on when a landowner deserves to be notified, during that bill draft, they discussed that if you had these features in line with your system, then you don't deserve to have notice as a landowner.

Representative Anderson: No one should drain water into an enclosed lake. That's when you start violating someone's rights on their land.

Aaron Carranza: The permitting process is the permitting process, however there is still the civil liability issue that is still in play regardless of if a permit is obtained or not, according to our attorneys.

Senator Unruh: In response to Representative Anderson's comment, you would be surprised the amount of landowners who are upset because they have additional water running across their land, even if it is a natural watercourse.

Senator Piepkorn: If the tiler can refer to any of these conditions individually, now we are adding to that the USGS topography map. Any one of those will allow that less notification of the downstream person.

Aaron Carranza: That is correct. There is one clarification, this language is included in the early part of the paragraph, the actual direction that is supposed to be taken occurs on lines 15 and 16, if the intent is to have this language a controlling feature of the application, the committee might consider moving that same language and repeating it down on lines 15 and 16 to complete the seconds notice of a list.

Chairman Kreun: Any one of these conditions will automatically let that permit go forward? Or is it the culmination of several?

Aaron Carranza: This language is the notification of a received application, it's not the decision of the application. If any one of these are within one mile of the outlet, any landowners downstream of any of these features would not receive notice, but it doesn't mean the permit would be automatically approved, it's more of which landowners receive notification when an application has been submitted. It's not a board permitting action. The board still has to consider a number of factors separately. This section only relates to the notification process. The consideration of the application itself is handled under a separate section of code, under 61.32-03.1.

Chairman Kreun: This is only notification. Is there a difference between topographical map and stream or river?

Aaron Carranza: Currently there are four items on the list that show when notification can stop, this adds a fifth item to that list, they all carry equal weight. There is no difference.

Senator Unruh: I did not realize this was only in the notice section, I think it will eliminate some notifications that will need to be made to downstream surface owners. I think that's fine, I'm okay if it's just a notification. If we're just changing the notification process, how does this help the person who came to us with the problem? I'm not convinced this has gotten to the heart of the issue, if this is just a notice requirement.

Representative Damschen: I think the thing would be, he would not have to have permission from a neighbor to use the outlet from the tile.

Senator Unruh: This only talks about notice in this section, so it has nothing to do with permission.

Representative Damschen: It would seem that way, but he was stopped from doing it. I think we was already intending to dump into what he thought was a waterway.

Senator Unruh: I understand his problem; I don't think this is a solution to his problem.

Aaron Carranza: My understanding is this section was proposed by Mr. Murphy, during House committee work, as part of drain tile law, if a downstream landowner does not provide technical evidence saying that they do not support the project, and give that to the water resource district within 30 days of receiving notice, then their complaints are not addressed, and there will not be conditions on seeking property rights for that outlet water, because that process didn't go through, that gave some latitude for the board to attach some conditions to the permit. As far as a remedy for Mr. Murphy, if this language is adopted as proposed, once the bill becomes effective, then if Mr. Murphy reapplies for a permit, this would be the controlling factor and in this particular case, a blue line does exist on this property and he would be outside of the notification requirements for the particular landowner that was at issue with the project. That is one remedy.

Senator Unruh: If you don't receive notice, you don't have the right to protest.

Aaron Carranza: That is correct.

Senator Unruh: That does take me back to the question I had when we started as to how expansive this is. I don't think we know that yet.

Chairman Kreun: Part of this is the information that was continually asked by the water board, if that is listed as a waterway, that would help solve that 60-day problem, and give more information for that board to make a decision. That is part of the reason we are here, the board continuously indicated they needed more information, and they didn't start the 60-day clock, they played a game in my opinion. This would give them definite information within that mile.

Aaron Carranza: That isn't accurate, the water resource district and the landowner were in communication about the draft application for a year to 18 months before the state was asked for an opinion. As far as notification and information necessary to complete the Application, this would have addressed that issue at that time, but wouldn't have addressed to 18 months prior to the request.

Representative Anderson: When you look at topographic map, can you determine a watercourse?

Aaron Carranza: The short answer is maybe. The blue lines that show up on a USGS topographic map are done by looking at aerial photos. As far as watercourse what originally had the State Engineer's Office concerned in the language, a watercourse is something special in North Dakota century code, the definition is clearly defined as a clear and defined channel with some other caveats on what it is. Again, the term is used 35 times in century code, it has a special characteristic that a desktop exercise may not capture. The question before the legislature is which standard is appropriate for downstream landowner notification for a drain tile process.

Chairman Kreun: Would this help make that determination easier, plat books are made by several different people, you may or may not make that determination. What we're looking for is what does this do for the determination? This would define the determination much quicker. That individual has a determination that much quicker, in the 60 days. I would expect all the information for an application to be put together before they start the clock. That's been the crux this whole time, when and how those individuals on the board made the determination.

Senator Unruh: We have zeroed in on my concern, that is taking away the downstream landowner's ability to have input on the process. If we have what we had before as waterways, and then we use the blue lines on the map, if that means a lot of people have the right to protest or not. That's what I'm trying to understand before we take action.

Senator Piepkorn: I think it's clear this would give fewer people the right to protest. The discussion makes a good argument to revert back to the original Senate bill of studying the use of watercourse in statutes.

Representative Damschen: Is there a difference as far as the State Engineer's Office in a waterway and a watercourse?

Aaron Carranza: Yes. Waterway, draw, and drainage way are all descriptions of a feature that can convey water. A watercourse is something special that has a separate test, any one of those features could also be a watercourse, but not all those features are a watercourse.

Representative Damschen: We were going to affect the whole definition of a watercourse, we changed it so it fit this tiling thing. Isn't the intent of the original legislation passed in 2017 to let the subsurface drainage empty into a working drain? That's why assessment drain and those things are noted in here; isn't that blue line on the topographical maps a working drain, whether it's artificial or natural drain. That's why it's already working, that's why there is no need to notify people downstream. I'm not sure they can't still protest, even if they're downstream, but they don't have to be notified by the person who is sponsoring the project.

Aaron Carranza: The intent of the list, that is for the legislative body, whether or not the body believes that that should be included in a more limiting view on who deserves to be noticed. As far as the landowner right to protest, if they do not receive notice as part of this process, they lose their administrative remedy to submit technical evidence disputing the intent, or how that drain is going to effect that property. Again, there may be a civil liability component that they can engage in, however that's additional funds out of the landowner's pocket, through no action of their own. It's on the legislative body on how they want to pursue and treat subsurface water management systems in North Dakota.

Representative Damschen: If subsurface drainage is added, if there is an initial increase of water moving, that would be the most change, the water is going to run off the saturated land or it's going to go through the land into the tile. There is more of a chance being used in a growing crop when there's tile there. The effect on downstream landowners is really minimal.

Aaron Carranza: There is a robust amount of research showing the benefits of subsurface water management systems, in general you could say the amount of water flowing downstream may or may not be negatively affecting a downstream landowner. As with most water projects, one size doesn't fit all, there could be scenarios where that could be an issue, which is why there is an opportunity for comments. Then there is an opportunity to mitigate and address potential concerns through the permitting process. It really depends on the land, but most will have fairly minor effect.

Chairman Kreun: Our time is up; we will meet next week.
Closed the conference committee.

2019 SENATE STANDING COMMITTEE MINUTES

Energy and Natural Resources Committee Fort Lincoln Room, State Capitol

SB 2358
4/16/2019
Job 34762

- Subcommittee
 Conference Committee

Committee Clerk: Marne Johnson

Explanation or reason for introduction of bill/resolution:

A bill relating to Red River valley water supply project contract terms, elimination of voter approval requirements, and notice of proposed subsurface water management systems.

Minutes:

1 Attachment

Chairman Kreun: Called the meeting to order.

Representative Anderson: We're going to have an amendment, .02002, (**please see attachment #1**) we will recede from our amendments as printed on page 1169 and 1170 of the Senate Journal and pages 1267 and 1268 of the House Journal, and amend as follows, and you all have a copy of the proposed amendments.

Representative Zubke: I second.

Chairman Kreun: There's been some work on the Red River valley and the library and museum and combining both of these water bills, to accommodate the situation. These amendments are a hoghouse that includes the existing SB 2358, what is added is the municipality portion of the Red River valley water supply. This was approved in another bill, now we will bring it back through SB 2358.

Representative Anderson: That's correct, it passed the House.

Representative Damschen: The subsurface water part goes in with the amendments?

Chairman Kreun: Yes. It is important to have a standardized method to determine what is a watercourse. I heard from county water boards and attorneys, the vast majority of them are already utilizing topographical maps. They indicated that it would be nice to have the standard involved, to prevent ambiguity.

Representative Anderson: Bottineau county is relatively flat, and we are using topographical maps to develop their drains up there too.

Senator Unruh: I had expressed some concerns about whether or not this would have a significant effect on the downstream folks from projects like this. I wasn't sure if that map had a lot more lines than waterways that met the definition, after some conversations this weekend with folks more familiar with the tiling law, I do think this is a good addition to the tools that can be used at the local level. I am supportive of the amendment.

**A roll call vote was taken.
Motion passes 6-0-0.**

Senator Piepkorn: What does this contain now?

Chairman Kreun: It will contain the original SB 2358 and the Red River valley water supply information.

Chairman Kreun and Representative Anderson will carry.

Chairman Kreun: Closed the meeting.

April 15, 2019

SK
4/16
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PROPOSED AMENDMENTS TO ENGROSSED SENATE BILL NO. 2358

That the House recede from its amendments as printed on pages 1169 and 1170 of the Senate Journal and pages 1267 and 1268 of the House Journal and that Engrossed Senate Bill No. 2358 be amended as follows:

Page 1, line 1, after "A BILL" replace the remainder of the bill with "for an Act to amend and reenact section 40-33-16, subsections 11 and 27 of section 61-24-08, subdivision b of subsection 2 of section 61-32-03.1, and subsection 8 of section 61-39-05 of the North Dakota Century Code, relating to Red River valley water supply project contract terms, elimination of voter approval requirements, and notice of proposed subsurface water management systems.

BE IT ENACTED BY THE LEGISLATIVE ASSEMBLY OF NORTH DAKOTA:

SECTION 1. AMENDMENT. Section 40-33-16 of the North Dakota Century Code is amended and reenacted as follows:

40-33-16. Municipality may purchase water for distribution.

1. Any city owning a system for the distribution of water for fire protection and other public purposes and for selling water to its inhabitants and industries, but for which the water supply is unsuitable or inadequate, may contract to purchase water at wholesale for ~~such~~those purposes from any person, firm, public or private corporation, or limited liability company able and willing to furnish the same, upon ~~such~~the terms and during ~~such~~the period, not exceeding forty years, as the city governing body ~~shall deem~~deems appropriate. ~~Any such~~The contract ~~shall~~must be authorized by an ordinance submitted to the voters for approval by a majority of those voting on the proposition before it takes effect. ~~In and by such~~Pursuant to the ordinance and contract, the city may bind itself:
 - 4- a. To establish and maintain rates and charges for supplying water by it to its inhabitants and industries, either according to a prescribed schedule agreed upon or sufficient to produce net stated amounts for specified periods during the life of the contract, or both, and to appropriate and use the same for payments to become due under the contract, and, if the contract so provides, the city ~~shall be~~is obligated to pay for ~~such~~the water solely out of ~~such~~the net revenues;
 - 2- b. To pay, at an agreed rate or rates, for all water taken by the city under ~~such~~the contract and not resold by it; and
 - 3- c. To do and perform any other acts or things ~~which, in the discretion of the governing body, are deemed~~deems reasonable and appropriate for the procurement of ~~such~~the water on the most efficient and economical basis.

- 2. Notwithstanding subsection 1, contracts to purchase water from the water supply system created by the Red River valley water supply project may have a term exceeding forty years and, if executed in relation to the initial construction of the system, need not be submitted to the voters for approval.
- 3. If any payments under any contract are to be made solely out of net revenues, the contract may fix and prescribe the method or basis on which net revenues are to be computed.

SECTION 2. AMENDMENT. Subsection 11 of section 61-24-08 of the North Dakota Century Code is amended and reenacted as follows:

- 11. To operate and maintain or to contract for the operation and maintenance of water supply and irrigation works serving lands and uses within or outside the district, and in connection therewith, to maintain a reserve fund to meet major unforeseen costs of operation and maintenance. The acquisition, construction, operation, and maintenance of dams, reservoirs, ground water storage areas, canals, conduits, pipelines, tunnels, and any other plants, works, facilities, improvements, or property necessary to operate or maintain water supply or irrigation works under this section are exempt from any requirements for voter approval.

SECTION 3. AMENDMENT. Subsection 27 of section 61-24-08 of the North Dakota Century Code is amended and reenacted as follows:

- 27. To enter water service contracts with municipalities, water districts, or other political subdivisions in this state and public utilities in Minnesota as part of the Red River valley water supply project, regardless of whether the acquisition, construction, or reconstruction of any Red River valley water supply project is actually completed and whether water actually is delivered under the contracts. These contracts with cities and water districts are authorized to be executed without limitation on term of years notwithstanding any limitation to the contrary and, if the contracts are executed in relation to the initial construction of the system, without voter approval.

SECTION 4. AMENDMENT. Subdivision b of subsection 2 of section 61-32-03.1 of the North Dakota Century Code is amended and reenacted as follows:

- b. Upon submission of a completed application for a permit, the water resource district board immediately shall give notice and a copy of the submission via certified mail to each owner of land within one mile [1.61 kilometers] downstream of the proposed subsurface water management system outlet unless the distance to the nearest waterway depicted as a perennial or intermittent stream or river on a United States geological survey topography map, assessment drain, natural watercourse, slough, or lake is less than one mile [1.61 kilometers], in which case notice and a copy of the submission must be given immediately to each owner of land between the outlet and the nearest assessment drain, natural watercourse, slough, or lake. The notice requirement in this section must be waived if the applicant presents signed, notarized letters of approval from all downstream landowners entitled to notice in this subsection.

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SECTION 5. AMENDMENT. Subsection 8 of section 61-39-05 of the North Dakota Century Code is amended and reenacted as follows:

- 8. Enter ~~a contract or contracts~~ to provide for a supply of bulk water from the Garrison Diversion Conservancy District which ~~contract or contracts~~ may provide for payments to fund some or all of the Garrison Diversion Conservancy District's costs of acquiring, designing, constructing, or reconstructing one or more features of a Red River valley water supply project, ~~which project the that the Garrison Diversion Conservancy District may acquire, design, construct, improve, and own, as well as the Garrison Diversion Conservancy District's costs of operating and maintaining one or more Red River valley water supply projects, whether the acquisition, construction, or reconstruction of any Red River valley water supply project actually is completed and whether water actually is delivered pursuant to the contract or contracts, and which contract or contracts the Garrison Diversion Conservancy District may execute.~~ Contracts executed under this subsection may be executed without limitation on the term of years and, if executed in relation to the initial construction of the system, need not be submitted to the voters for approval."

Renumber accordingly

Date: 4/16
 Roll Call Vote #: 1

**2019 SENATE CONFERENCE COMMITTEE
 ROLL CALL VOTES**

BILL/RESOLUTION NO. SB 2358 as (re) engrossed

Senate Energy and Natural Resources Committee

- Action Taken**
- SENATE accede to House Amendments
 - SENATE accede to House Amendments and further amend
 - HOUSE recede from House amendments
 - HOUSE recede from House amendments and amend as follows
 - Unable to agree, recommends that the committee be discharged and a new committee be appointed

Motion Made by: Rep Anderson Seconded by: Rep Zubke

Senators	4/11	4/12	4/16	Yes	No	Representatives	4/11	4/12	4/16	Yes	No
Senator Kreun	X	X	X	X		Representative Anderson	X	X	X	X	
Senator Unruh	X	X	X	X		Representative Damschen	X	X	X	X	
Senator Piepkorn	X	X	X	X		Representative Zubke	X	X	X	X	
Total Senate Vote				3		Total Rep. Vote				3	

Vote Count Yes: 6 No: 0 Absent: 0

Senate Carrier Sen. Kreun House Carrier Rep. Anderson

LC Number 19.1149.02002 of amendment

LC Number 19.1149.04000 of engrossment

Emergency clause added or deleted

Statement of purpose of amendment

Insert LC: 19.1149.02002
Senate Carrier: Kreun
House Carrier: D. Anderson

REPORT OF CONFERENCE COMMITTEE

SB 2358, as engrossed: Your conference committee (Sens. Kreun, Unruh, Piepkorn and Reps. D. Anderson, Zubke, Damschen) recommends that the **HOUSE RECEDE** from the House amendments as printed on SJ pages 1169-1170, adopt amendments as follows, and place SB 2358 on the Seventh order:

That the House recede from its amendments as printed on pages 1169 and 1170 of the Senate Journal and pages 1267 and 1268 of the House Journal and that Engrossed Senate Bill No. 2358 be amended as follows:

Page 1, line 1, after "A BILL" replace the remainder of the bill with "for an Act to amend and reenact section 40-33-16, subsections 11 and 27 of section 61-24-08, subdivision b of subsection 2 of section 61-32-03.1, and subsection 8 of section 61-39-05 of the North Dakota Century Code, relating to Red River valley water supply project contract terms, elimination of voter approval requirements, and notice of proposed subsurface water management systems.

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 - 4- a. To establish and maintain rates and charges for supplying water by it to its inhabitants and industries, either according to a prescribed schedule agreed upon or sufficient to produce net stated amounts for specified periods during the life of the contract, or both, and to appropriate and use the same for payments to become due under the contract, and, if the contract so provides, the city ~~shall be~~is obligated to pay for ~~such~~the water solely out of ~~such~~the net revenues;
 - 2- b. To pay, at an agreed rate or rates, for all water taken by the city under ~~such~~the contract and not resold by it; and
 - 3- c. To do and perform any other acts or things which, ~~in the discretion of the governing body, are deemed~~deems reasonable and appropriate for the procurement of ~~such~~the water on the most efficient and economical basis.
2. Notwithstanding subsection 1, contracts to purchase water from the water supply system created by the Red River valley water supply project may have a term exceeding forty years and, if executed in relation to the initial construction of the system, need not be submitted to the voters for approval.

Insert LC: 19.1149.02002
Senate Carrier: Kreun
House Carrier: D. Anderson

3. If any payments under any contract are to be made solely out of net revenues, the contract may fix and prescribe the method or basis on which net revenues are to be computed.

SECTION 2. AMENDMENT. Subsection 11 of section 61-24-08 of the North Dakota Century Code is amended and reenacted as follows:

11. To operate and maintain or to contract for the operation and maintenance of water supply and irrigation works serving lands and uses within or outside the district, and in connection therewith, to maintain a reserve fund to meet major unforeseen costs of operation and maintenance. The acquisition, construction, operation, and maintenance of dams, reservoirs, ground water storage areas, canals, conduits, pipelines, tunnels, and any other plants, works, facilities, improvements, or property necessary to operate or maintain water supply or irrigation works under this section are exempt from any requirements for voter approval.

SECTION 3. AMENDMENT. Subsection 27 of section 61-24-08 of the North Dakota Century Code is amended and reenacted as follows:

27. To enter water service contracts with municipalities, water districts, or other political subdivisions in this state and public utilities in Minnesota as part of the Red River valley water supply project, regardless of whether the acquisition, construction, or reconstruction of any Red River valley water supply project is actually completed and whether water actually is delivered under the contracts. These contracts with cities and water districts are authorized to be executed without limitation on term of years notwithstanding any limitation to the contrary and, if the contracts are executed in relation to the initial construction of the system, without voter approval.

SECTION 4. AMENDMENT. Subdivision b of subsection 2 of section 61-32-03.1 of the North Dakota Century Code is amended and reenacted as follows:

- b. Upon submission of a completed application for a permit, the water resource district board immediately shall give notice and a copy of the submission via certified mail to each owner of land within one mile [1.61 kilometers] downstream of the proposed subsurface water management system outlet unless the distance to the nearest waterway depicted as a perennial or intermittent stream or river on a United States geological survey topography map, assessment drain, natural watercourse, slough, or lake is less than one mile [1.61 kilometers], in which case notice and a copy of the submission must be given immediately to each owner of land between the outlet and the nearest assessment drain, natural watercourse, slough, or lake. The notice requirement in this section must be waived if the applicant presents signed, notarized letters of approval from all downstream landowners entitled to notice in this subsection.

SECTION 5. AMENDMENT. Subsection 8 of section 61-39-05 of the North Dakota Century Code is amended and reenacted as follows:

8. Enter ~~a contract or~~ contracts to provide for a supply of bulk water from the Garrison Diversion Conservancy District which ~~contract or contracts~~ may provide for payments to fund some or all of the Garrison Diversion Conservancy District's costs of acquiring, designing, constructing, or reconstructing one or more features of a Red River valley water supply project, ~~which project the that the~~ Garrison Diversion Conservancy District may acquire, design, construct, improve, and own, as well as the

Insert LC: 19.1149.02002
Senate Carrier: Kreun
House Carrier: D. Anderson

Garrison Diversion Conservancy District's costs of ~~operating~~ and maintaining one or more Red River valley water supply projects, whether the acquisition, construction, or reconstruction of any Red River valley water supply project actually is completed and whether water actually is delivered pursuant to the ~~contract or contracts, and which contract or contracts the Garrison Diversion Conservancy District may execute.~~ Contracts executed under this subsection may be executed without limitation on the term of years and, if executed in relation to the initial construction of the system, need not be submitted to the voters for approval."

Renumber accordingly

Engrossed SB 2358 was placed on the Seventh order of business on the calendar.

2019 TESTIMONY

SB 2358

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**Testimony on SB 2358
Senate Energy and Natural
Resource Committee
Senator Terry Wanzek**

Good morning Madam Chairman Senator Unruh and members of the Senate Energy and Natural Resources Committee. I introduced SB 2358 on behalf of a constituent who is here today to share his story. He made a significant investment in engineering and surveying for permitting a tiling project on his farm.

His technical experts and attorney believed there was a natural water course to outlet his sub surface drainage. And it also showed up in the plat book and the GIS maps. It was only after spending money on the design that he later had the State Water Commission reject the project because they declared it not a water course. I believe one of his questions was, why could he not be informed sooner of the State Water Commissions ruling. Why did he have to go through the process of permitting and spending a significant amount of money before he could get a ruling from the Water Commission.

I know the bill seems like a simple approach. Maybe referencing the GIS maps would be better. Or maybe enable the State Water Commission to identify natural water courses on the maps to provide more certainty for landowners who wish to improve their soil health and soil productivity by subsurface tiling.

I appreciate you Senators listening to Mr. Murphy as he shares his story. I also appreciate this committee giving SB 2358 strong consideration.

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<https://www.legis.nd.gov/downloads/bill-history-media-file/66-2019/sb2358/sb2358-snatres-01312019-attachment2.mp4>

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Testimony
Senate Bill 2358 – Office of the State Engineer
Senate Energy and Natural Resources Committee
Senator Unruh, Madame Chairman
January 31, 2019

Madam Chairman Unruh and members of the Senate Energy and Natural Resources Committee, my name is Aaron Carranza. I am the Director of the Regulatory Division for the Office of the State Engineer. I am here today to present testimony in opposition to Senate Bill 2358, as it proposes a significant and unnecessary change regarding what constitutes a watercourse in the state of North Dakota.

The term "watercourse" holds special significance in North Dakota. As can be seen in Attachment 1, the term "watercourse" appears once in the North Dakota Constitution, in 35 sections of North Dakota Century Code, and in 13 sections of North Dakota Administrative Code. Given the use in North Dakota's Constitution and the prevalence of the use within North Dakota Century and Administrative Codes, a watercourse is something specific and special.

Starting in 1907, the definition of "watercourse" in North Dakota Century Code remained unchanged until 1981. In 1981, the legislative assembly

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added the following language “[i]f requested by a water resource board, the state engineer shall determine if a watercourse is constituted.”

The proposed change to the definition of watercourse contained in Senate Bill 2358 adds the phrase “A creek, river, or stream appearing in a plat book must be deemed a watercourse.” This addition has several concerning implications.

First, a plat book’s intended purpose is to describe divisions of a piece of land, acreages within those divisions, and information on ownership of those divisions. Any waterbody or other information contained within a plat book is merely an artist’s rendition of what may be located in the area, and may not be based on any technical justification.

Secondly, not all plat books are created equal as there are multiple companies that produce plat books, at least six for North Dakota. Some companies convey only the base information - namely land divisions, acreage, and landowners, while other companies include depictions that very roughly approximate where water might be located within an area. Also, even within the same company, different year’s plat books could show different levels of approximation as can be observed on Attachment 2. This will unnecessarily add excessive confusion.

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Beyond the State Engineer's concerns with utilizing a plat book as a sole measure of whether a watercourse is present, the State Engineer also has concerns about adding additional terms like "creek, river, or stream" to the watercourse definition, as those terms may require their own definitions, and their inclusion in the statute will likely create greater confusion than the bill sponsors intended. For example, there are often several varying definitions for "stream" depending on the source that is used.

As previously mentioned, the State Engineer has played a role in making watercourse determinations since the watercourse statute was amended in 1981. If requested by a county water resource board, the State Engineer will investigate to determine if a watercourse is present at a site in question. As a matter of practice, the State Engineer uses all technical references available to determine if a watercourse exists. Examples of materials used include U.S. Department of Agricultural aerial imagery, U.S. Geological Survey Quad maps, National Hydrography Dataset, Government Land Office maps, and plat books. The State Engineer will also utilize mapping and engineering software to analyze topographic data, such as LiDAR, and to perform basic engineering calculations to determine the drainage area and anticipated flows contributing to a site in question. All of these technical references and tools give the State

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Engineer's staff insight as to where to look for a watercourse if one exists. Additionally, and most importantly, the State Engineer's staff will conduct a site visit of the area in question to further support review of the available technical references.

The State Engineer believes the current process in determining if a watercourse exists works well as it affords water resource boards the flexibility to make their own independent watercourse determinations based on their own judgement and expertise without state involvement. If there is a question or uncertainty, then water resource boards may request that the state get involved by requesting a watercourse determination. The State Engineer, on average, receives approximately two to three watercourse determination requests per year, with all other determinations being informally performed by local water managers without state involvement. The State Engineer believes that this bill will cause many additional water features to be classified as watercourses when they do not meet the strict definition, and therefore, insert more government jurisdiction over private lands.

In closing, the Office of the State Engineer opposes the passage of Senate Bill 2358 as it will create greater uncertainty, not less, as to what constitutes a "watercourse" in this state. The State Engineer fully

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supports local water managers and their support staff making sound and educated decisions regarding water resources management with support from Office of the State Engineer staff.

Thank you for the opportunity to comment, and I would be happy to answer any questions you might have.

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ATTACHMENT 1

Emphasis has been added to italicize and underline the word *watercourse* for ease of reference.

North Dakota Constitution:

Article 11 § 3

All flowing streams and natural *watercourses* shall forever remain the property of the state for mining, irrigating and manufacturing purposes.

North Dakota Century Code:

Title 61 - Waters

61-01-01. Waters of the state - Public waters.

All waters within the limits of the state from the following sources of water supply belong to the public and are subject to appropriation for beneficial use and the right to the use of these waters for such use must be acquired pursuant to chapter 61-04 [Appropriation of Water]:

...

4. All waters, excluding privately owned waters, in areas determined by the state engineer to be noncontributing drainage areas. A noncontributing drainage area is any area that does not contribute natural flowing surface water to a natural stream or *watercourse* at an average frequency more often than once in three years over the latest thirty-year period.

61-01-05. Reclaiming waters turned into natural or artificial *watercourse*.

Water turned into any natural or artificial *watercourse* by any party entitled to the use of such water may be reclaimed below and diverted therefrom by such party, subject to existing rights, due allowance for losses being made, as determined by the state engineer.

61-01-06 – *Watercourse* - Definition.

A *watercourse* entitled to the protection of the law is constituted if there is a sufficient natural and accustomed flow of water to form and maintain a distinct and a defined channel. It is not essential that the supply of water should be continuous or from a perennial living source. It is enough if the

flow arises periodically from natural causes and reaches a plainly defined channel of a permanent character. If requested by a water resource board, the state engineer shall determine if a watercourse is constituted.

61-01-07. Obstruction of watercourses - Penalty.

If any person illegally obstructs any ditch, drain, or watercourse, or diverts the water therein from its natural or artificial course, the person is liable to the party suffering injury from the obstruction or diversion for the full amount of the damage done, and, in addition, is guilty of a class B misdemeanor.

61-01-08. Obstructing navigation - Penalty.

Every person who in any manner obstructs the free navigation of any navigable watercourse within this state is guilty of a misdemeanor.

61-01-23. Investigation or removal of obstruction in channel.

In order to investigate or remove obstructions from the channel or bed of any watercourse and thus prevent ice from gorging therein and to prevent flooding or pollution of such watercourse, the state water commission, any water resource district, any municipality, any board of county commissioners, and any federal agency authorized to construct works for prevention of damage by floods or for abatement of stream pollution, may enter upon lands lying adjacent to such watercourse to investigate or remove, or cause to be removed from the bed, channel, or banks of such watercourse obstructions which prevent or hinder the free flow of water or passage of ice therein. However, such entry upon adjacent lands must be by the most accessible route and the entering agency is responsible to the landowner for any damage.

61-02-23. Actions to acquire property rights.

The commission shall have full power and authority:

1. To institute, maintain, and prosecute to final determination in any of the courts of this or any other state, or in any of the federal courts, any and all actions, suits, and special proceedings that may be necessary:
 - a. To enable it to acquire, own, and develop lands for irrigation and water conservation, water distribution, and other necessary purposes. The commission may sell such lands upon such terms and conditions as it may prescribe and may own and hold title to lands

for damsites, reservoir sites, water rights, easements, and rights of way for diversion and distributing systems, lateral ditches, and other means for the distribution of waters in this state, and for any other necessary purposes.

- b. To adjudicate all water rights upon any stream, watercourse, or source of water supply from which are derived the waters for such reservoir, diversion and distributing systems, lateral ditches, and other means of distribution.
2. To join in any action any and all owners of vested water rights acquired by any person, association, corporation, or limited liability company, so that adjudication may be had of all surplus water upon all of the watercourses and sources, water supplies or any project constructed under the supervision and control of the commission.

61-03-08. Duty of state engineer to cooperate with boards of county commissioners when requested.

Whenever requested so to do by the board of county commissioners of any county of this state, the state engineer shall cooperate with such board in the engineering work required to lay out, establish, and construct any drain to be used by any county or counties or portions of the same for the purpose of diverting floodwaters, lakes, or watercourses, and in general shall aid and assist the counties of this state in making preliminary surveys and establishing systems of drainage.

61-07-04. Construction across streams, highways, railroads, and ditches - Right of way.

The board may construct irrigation works across any stream of water, watercourse, street, avenue, highway, railway, canal, ditch, flume, pipeline, or other transportation system or utility, which the route of any canal may intersect or cross in such manner as to afford security for life and property, but the board shall restore the same, when so crossed or intersected, to its former state as near as may be, or in a manner sufficient to avoid unnecessary impairment of its usefulness. Every company whose railroad or utility shall be intersected or crossed by such works shall unite with the board in forming such intersections and crossings, and shall grant the privilege aforesaid. If the board cannot agree with such railroad company, or with the owners and controllers of the property, thing, or franchise to be crossed, upon the amount to be paid on account of such crossing or the point at which or the manner in which the crossing shall be made, the same shall be ascertained and determined in all respects as is provided for the taking of land. The right of way is given, dedicated, and set apart, to locate, construct, and maintain such works over and through any of the lands which are or may be the property of the state. There are given, dedicated, and set apart, for the uses and purposes provided in this chapter [Powers of Irrigation Districts], all water and water rights owned by this state within the district.

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61-07-16. Irrigation district shall provide for proper drainage of lands - Payment.

Any irrigation district organized under the provisions of this title shall provide for the proper drainage of any and all lands embraced within its limits which are, or have been, subirrigated by reason of the lawful use of water from its canal by the owner or lessee of the lands subirrigated, or from any cause which is not the fault, or which does not have the consent, of such owner or lessee. For such purpose, such district shall have all the authority granted in this title to:

- 5. Extend such drains outside of the limits of such district for the purpose of conducting the drainage water to other lands upon which the same may be used lawfully or to return the same to some natural watercourse.

61-16.1-02. Definitions.

In this chapter [Operation of Water Resource Districts], unless the context or subject matter otherwise provides:

- 2. "Assessment drain" means any natural watercourse opened, or proposed to be opened, and improved for the purpose of drainage, and any artificial drain of any nature or description constructed for the purpose of drainage, including dikes and appurtenant works, which are financed in whole or in part by special assessment. This definition may include more than one watercourse or artificial channel constructed for the purpose of drainage when the watercourses or channels drain land within a practical drainage area.

61-16.1-09. Powers of water resource board.

Each water resource board shall have the power and authority to:

- 6. Maintain and control the water levels and the flow of water in the bodies of water and streams involved in water conservation and flood control projects within the district and regulate streams, channels, or watercourses and the flow of water therein by changing, widening, deepening, or straightening the same, or otherwise improving the use and capacity thereof.

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7. Regulate and control water for the prevention of floods and flood damages by deepening, widening, straightening, or diking the channels or floodplains of any stream or watercourse within the district, and construct reservoirs or other structures to impound and regulate such waters.

...

61-16.1-09.1. Watercourses, bridges, and low-water crossings.

1. A water resource board may undertake the snagging, clearing, and maintaining of natural watercourses and the debris removal of bridges and low-water crossings. The board may finance the project in whole or in part with funds raised through the collection of a special assessment levied against the land and premises benefited by the project. The benefits of a project must be determined in the manner provided in section 61-16.1-17. Revenue from an assessment under this section may not be used for construction of a drain or reconstruction or maintenance of an existing assessment drain. Any question as to whether the board is maintaining a natural watercourse or is constructing a drain or reconstructing or maintaining an existing assessment drain must be determined by the state engineer. All provisions of this chapter [Operation of Water Resource Districts] apply to assessments levied under this section except:

...

61-16.1-41.1. Removal or placement of fill.

Prior to removing or placing any fill adjacent to a watercourse, the person responsible shall provide written notice to the district describing the amount and type of fill to be placed or removed and the location of the activity.

...

61-16.1-51. Removal of obstructions to drain - Notice and hearing - Appeal - Injunction - Definition.

...

2. For the purposes of this section, “an obstruction to a drain” means a barrier to a watercourse, as defined by section 61-01-06, or an artificial drain, including if the watercourse or drain is

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located within a road ditch, which materially affects the free flow of waters in the watercourse or drain.

61-16.2-01. Legislative intent and purpose.

The legislative assembly finds and declares that a large portion of the state's land resources is subject to recurrent flooding by overflow of streams and other watercourses causing loss of life and property, disruption of commerce and governmental services, unsanitary conditions, and interruption of transportation and communications, all of which are detrimental to the health, safety, welfare, and property of the occupants of flooded lands and the people of this state. The legislative assembly further finds that public interest necessitates that the floodplains of this state be developed in a manner which will alleviate loss of life and threat to health, and reduce private and public economic loss caused by flooding.

It is therefore the policy of this state and the purpose of this chapter [Floodplain Management] to guide development of the floodplains of this state in accordance with the enumerated legislative findings, to reduce flood damages through sound floodplain management, stressing nonstructural measures such as floodplain zoning and floodproofing, acquisition and relocation, and flood warning practices; and to ensure as far as practicable that the channels and those portions of the floodplains of watercourses which are the floodways are not inhabited and are kept free and clear of interference or obstructions which may cause any undue restriction of the capacity of the floodways.

61-16.2-02. Definitions.

In this chapter [Floodplain Management], unless the context or subject matter otherwise provides:

3. "Conveyance" or "hydraulic conveyance" means a geometric characteristic of a river or watercourse at a given point that determines the flow-carrying capacity at that point.

6. "Floodway" or "regulatory floodway" means the channel of a river or other watercourse and the adjacent land areas that must be reserved in order to discharge the base flood without cumulatively increasing the water surface elevation more than one foot [30.48 centimeters].

61-16.2-04. Delineation of floodplains and floodways.

The state engineer shall assist communities in preparing and obtaining data and other necessary information for the delineation of floodplains and floodways. When the state engineer determines that sufficient technical information is available for the delineation of floodplains and floodways on a watercourse or lake, the state engineer shall then consult with the appropriate district and each affected community. The state engineer, the affected community, and the appropriate district shall consider flooding experiences, plans to avoid potential hazards, estimates of economic impacts of flooding on the community, both historical and prospective, and such other data as the district and community may consider appropriate. Upon obtaining and developing the necessary information for delineation of the floodplain and floodway, the state engineer and the affected community shall notify the appropriate federal agency and request that such material be used to delineate the floodplain and floodway under the national flood insurance program [42 U.S.C. 4001 et seq.]. The regulatory floodway must be able to carry the waters of the base flood without cumulatively increasing the water surface elevation of the base flood more than one foot [30.48 centimeters] at any point.

61-16.2-10. Exceptions.

This chapter [Floodplain Management] shall not apply to the following actions or construction, as long as the flood-carrying capacity within the altered or relocated portion of any watercourse is maintained, and the cumulative effect of any such action or construction will not increase the water surface elevation of the base flood more than one foot [30.48 centimeters] at any point:

61-16.2-11. Authority to enter and investigate lands or waters.

The state engineer or any community must notify all landowners prior to making any entry upon any lands and waters in the state for the purpose of making an investigation, survey, removal, or repair contemplated by this chapter [Floodplain Management]. An investigation of a nonconforming use or existing construction or structure shall be made by the state engineer either on the state engineer's own initiative, on the written request of an owner of land abutting the watercourse involved, or on the written request of a community.

61-21-01. Definitions.

In this chapter [Drainage Projects], unless the subject matter otherwise requires:

4. “Drain” means any natural watercourse opened, or proposed to be opened, and improved for drainage and any artificial drains of any nature or description constructed for that purpose, including dikes and appurtenant works. This definition may include more than one watercourse or artificial channel constructed for the aforementioned purpose when the watercourses or channels drain land within a practical drainage area as determined by the written petition called for in section 61-21-10 and the survey and examination called for in section 61-21-12.

61-21-02. Watercourses, ditches, and drains may be constructed, maintained, repaired, improved, or extended.

Watercourses, ditches, drains, and improvements thereto for the drainage of sloughs and other lowlands may be surveyed and investigated and established, constructed, maintained, repaired, improved, and cleaned out in the several counties of this state under the provisions of this chapter [Drainage Projects] wherever the same shall be conducive to the public health, convenience, or welfare. The powers conferred by this chapter and this section shall extend to and include:

61-26-01. Application for joint drain.

The governing body of any city or the board of commissioners of any water resource district desiring to use an existing drain under the jurisdiction of the county board of drainage commissioners, with or without modification, as a watercourse or channel to provide a water supply for the city or water resource district, may make application therefor to the board of drain commissioners of the county in which such drain is located. In such application there shall be set forth a comprehensive plan of joint use and of any proposed extensions, changes, connecting canals, mains, or other contrivances for conducting the flow of water in, to, or from said drain and an offer of payment by the city or water resource district in a definite sum as a proportionate share of the cost of the existing drain, and a sum certain or a percentage offer for future maintenance costs.

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61-28-02. Definitions.

As used in this chapter [Control, Prevention, and Abatement of Pollution of Surface Waters], unless the context otherwise requires:

...

15. "Waters of the state" means all waters within the jurisdiction of this state, including all streams, lakes, ponds, impounding reservoirs, marshes, watercourses, waterways, and all other bodies or accumulations of water on or under the surface of the earth, natural or artificial, public or private, situated wholly or partly within or bordering upon the state, except those private waters that do not combine or effect a junction with natural surface or underground waters just defined.

61-32-03.1. Permit to drain subsurface waters required - Permit form - Penalty.

...

2. a. The state engineer shall develop an application form for a permit required under this section. A person seeking to construct a subsurface water management system that requires a permit under this section must submit a completed application to the water resource district board within which is found a majority of the land area for consideration and approval. The water resource district board may charge permit applicants a fee up to one hundred fifty dollars. Water resource districts shall forward copies of all approved permits to the state engineer.

b. Upon submission of a completed application for a permit, the water resource district board immediately shall give notice and a copy of the submission via certified mail to each owner of land within one mile [1.61 kilometers] downstream of the proposed subsurface water management system outlet unless the distance to the nearest assessment drain, natural watercourse, slough, or lake is less than one mile [1.61 kilometers], in which case notice and a copy of the submission must be given immediately to each owner of land between the outlet and the nearest assessment drain, natural watercourse, slough, or lake. The notice requirement in this section must be waived if the applicant presents signed, notarized letters of approval from all downstream landowners entitled to notice in this subsection.
3. a. If the water resource board receives notarized letters of approval from all downstream landowners entitled to notice, the board shall approve the completed permit application as soon as practicable but no later than thirty days after receipt of the last letter. Otherwise, the water resource board shall review the completed application at its next meeting that is at least thirty days after receipt of the application. The board shall consider any written, technical evidence provided by the applicant or a landowner notified under

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subsection 2 addressing whether the land of a notified landowner will be flooded or unreasonably harmed by the proposed subsurface water management system. For purposes of this section “technical evidence” means written information regarding the proposed subsurface water management system, prepared after consideration of the design and physical aspects of the proposed system, and any adverse hydraulic effects, including erosion, flood duration, crop loss, and downstream water control device operation impacts, which may occur to land owned by a landowner provided under subsection 2. Technical evidence must be submitted to the permit applicant, notified landowners, and the board within thirty days of the receipt of the completed permit application by the board. A notified landowner may not object to the proposed system unless the landowner presents technical evidence under this subsection.

b. If the board finds, based on technical evidence, the proposed subsurface water management system will flood or unreasonably harm lands of a landowner notified under subsection 2, the board may require the applicant to obtain a notarized letter of approval before issuing a permit for the system. The board may not require a letter of approval for any land downstream of a system that outlets into an assessment drain, natural watercourse, or pond, slough, or lake if notified landowners did not provide technical evidence to the district.

Title 21 – Governmental Finance

21-03-07. Election required - Exemptions.

No municipality, and no governing board thereof, may issue bonds without being first authorized to do so by a vote equal to sixty percent of all the qualified voters of such municipality voting upon the question of such issue except:

4. The governing body of any city may also by resolution adopted by a two-thirds vote authorize and issue general obligation bonds of the city for the purpose of providing funds to pay the cost of any improvement of the types stated below, to the extent that the governing body determines that such cost should be paid by the city and should not be assessed upon property specially benefited thereby; provided that the initial resolution authorizing such bonds must be published in the official newspaper, and any owner of taxable property within the city may, within sixty days after such publication, file with the city auditor a protest against the adoption of the resolution. If the governing body finds such protests to have been signed by the owners of taxable property having an assessed valuation equal to five percent or more of the assessed valuation of all taxable property

within the city, as theretofore last finally equalized, all further proceedings under such initial resolution are barred. This procedure is authorized for the financing of the following types of improvements:

b. The construction of a bridge, culvert, overpass, or underpass at the intersection of any street with a stream, watercourse, drain, or railway, and the acquisition of any land or easement required for that purpose.

Title 24 – Highways, Bridges, and Ferries

24-03-08. Determinations of surface water flow and appropriate highway construction.

Whenever and wherever a highway under the supervision, control, and jurisdiction of the department or under the supervision, control, and jurisdiction of the board of county commissioners of any county or the board of township supervisors has been or will be constructed over a watercourse or draw into which flow surface waters from farmlands, the state engineer, upon petition of the majority of landowners of the area affected or at the request of the board of county commissioners, township supervisors, or a water resource board, shall determine as nearly as practicable the design discharge that the crossing is required to carry to meet the stream crossing standards prepared by the department and the state engineer. When the determination has been made by the state engineer, the department, the board of county commissioners, or the board of township supervisors, as the case may be, upon notification of the determination, shall install a culvert or bridge of sufficient capacity to permit the water to flow freely and unimpeded through the culvert or under the bridge. The department, county, and township are not liable for any damage to any structure or property caused by water detained by the highway at the crossing if the highway crossing has been constructed in accordance with the stream crossing standards prepared by the department and the state engineer.

Title 38 – Mining and Gas and Oil Production

38-14.1-24. Environmental protection performance standards.

General performance standards are applicable to all surface coal mining and reclamation operations and must require the permittee at a minimum to:

8. Minimize the disturbances to the prevailing hydrologic balance at the minesite and in associated offsite areas and to the quality and quantity of water in surface and ground

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water systems both during and after surface coal mining operations and during reclamation by:

a. Avoiding toxic mine drainage by such measures as, but not limited to:

(2) Treating drainage to reduce toxic content which adversely affects downstream water upon being released to watercourses.

19. Place all spoil material from the initial pit or other excess spoil material resulting from surface coal mining and reclamation activities in such a manner that all of the following requirements are met:

d. The disposal area does not contain springs, natural watercourses, or wet weather seeps unless lateral drains are constructed from the wet areas to the main underdrains in such a manner that filtration of the water into the spoil pile will be prevented.

Title 40 – Municipal Government

40-05-02. Additional powers of city council and board of city commissioners.

The city council in a city operating under the council form of government and the board of city commissioners in a city operating under the commission system of government, in addition to the powers possessed by all municipalities, shall have power:

17. Water supply. To withdraw from any stream, watercourse, or body of water within or without a city, or within or without, or bordering upon, this state, a supply of water reasonably sufficient for the needs of the inhabitants of the city, and to supply the facilities for the storage of water for all other necessary municipal purposes.

18. Dams for municipal water purposes. To erect dams upon or across streams, watercourses, or bodies of water within or without, or bordering upon, the boundaries of this state, and to improve, alter, or protect the bed, banks, or course thereof.

40-34-15. Agreements between municipalities within and without state – Acquiring property – Erecting dams – Use of Waters – Eminent Domain.

If it is deemed expedient for the safety and health of the people, municipalities of this state may enter into agreements with each other, or jointly or severally with governmental agencies or municipalities outside the state, to erect and maintain intercepting sewers and sewage treatment plants, or may enter into contracts with governmental agencies or municipalities outside the state to furnish to such extraterritorial agencies or municipalities sewage disposal for such compensation and upon such terms and conditions as the parties under such agreement may stipulate. Whenever it shall be convenient or necessary as determined by a majority vote of the governing body or the respective governing bodies of such governmental agencies or municipalities, they may acquire, purchase, own, or maintain lands and personal property within or without this state and may improve the same and erect structures thereon, including dams and damsites. If the governing body of a municipality or the respective governing bodies of municipalities shall determine to do so by a resolution adopted by a majority vote thereof, such municipalities may erect dams upon streams, watercourses, or other bodies of water located within or without this state, or constituting in whole or in part the boundary waters of this state, and may alter or improve the bed, banks, or courses of such streams, watercourses, or bodies of water. In the enjoyment of such power, municipalities may purchase and hold property within and without this state and, subject to chapter 32-15 [Eminent Domain], may exercise the right of eminent domain as provided by the laws of this state, and may enter into contracts and engagements with persons, firms, corporations, limited liability companies, or with municipalities or governmental agencies located without this state for like purposes.

Title 47 – Property

47-01-06. Appurtenances defined.

A thing is deemed to be incidental or appurtenant to land when it by right is used with the land for its benefit, as in the case of a way or watercourse, or of a passage for light, air, or heat from or across the land of another. Sluice boxes, flumes, hose, pipes, railway tracks, cars, blacksmith shops, mills, and all other machinery or tools used in working or developing a mine are deemed affixed to the mine.

Title 49 – Public Utilities

49-11-02. Railroad bridges must be in good repair.

Every railroad corporation shall maintain and keep in good repair all bridges and their abutments which the corporation shall construct for the purpose of enabling its road to pass over or under any public highway, watercourse, or other way. Railroad corporations which have transferred railway property to the public service commission in trust for the purposes of reorganization or

reopening are not liable for failure to maintain railroad bridges in good repair during the period of trust.

49-11-04. Highways and watercourses to be restored to former state.

Every corporation constructing, owning, or using a railroad shall restore every stream of water, watercourse, street, highway, or canal across, along, or upon which such railroad may be constructed to its former state or to such condition that its usefulness shall not be materially impaired and thereafter shall maintain the same in such condition against any effects in any manner produced by such railroad.

49-11-18. Construction of railroad – Crossing highway or waterway.

Subject to the provisions of section 49-11-03, a railroad corporation shall have the power to:

1. Construct its railroad across, along, or up any stream of water, watercourse, street, highway, riverfront, steamboat, or other public landing, or canal which its route shall intersect or touch.

Title 53 – Sports and Amusements

53-08-01. Definitions.

In this chapter [Limited Liability for Owner of Recreation Lands], unless the context or subject matter otherwise requires:

3. “Land” includes all public and private land, roads, water, watercourses, and ways and buildings, structures, and machinery or equipment thereon.

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North Dakota Administrative Code:

Title 89 – Water Commission

89-02-01-02. Definitions.

Unless the context otherwise requires, the following definitions apply to this article [Drainage of Water]:

...

15. "Watercourse" is defined in North Dakota Century Code section 61-01-06.

...

89-02-01-07. Filing Application.

Any person desiring a drainage permit must file an application with the state engineer on a form provided by the state engineer. If requested by the state engineer or the board, the applicant must provide an engineering analysis showing the downstream impacts of the proposed drainage. The analysis, may need to include a determination of the drain's and receiving watercourse's capacities and a volume and timing comparison of predrainage and postdrainage flows. If the application is incomplete, or the information is insufficient to enable the state engineer or board to make an informed decision on the application, it will be returned to the applicant for correction.

89-02-01-09.1. Board procedure for processing applications to drain.

1. The board must use the following procedure to process a drainage permit application of statewide or interdistrict significance:

...

c. The notice must give the essential facts of the proposed drain including:

...

(4) Watercourse into which the water will be drained;

(5) Legal description of the drain's confluence with the watercourse into which the water will be drained:

...

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89-02-01-01-09.2. Evaluation of applications – Factors considered.

All applications to drain, must consider the following factors:

1. The water volume proposed to be drained and its impact upon the watercourse into which it will be drained.

89-05-01-03. Definitions.

Unless the context otherwise requires, the following definitions apply:

3. “Dike” means an embankment constructed of earth or other suitable materials to protect agricultural lands from floods which result from overflow of watercourses or from diffused surface waters.

7. “Floodwaters” means those waters which temporarily inundate normally dry areas adjoining a watercourse. This inundation results from an overflow of the watercourse caused by excessive amounts of rainfall or snowmelt which exceed its capacity.

89-05-01-09. Application for permit.

All applications submitted by the owner to construct, to relocate, rebuild, or alter dikes shall be made on forms provided by the North Dakota state engineer and shall be accompanied by two complete sets of plans or specifications. Such plans and specifications shall include the following:

1. A general location map with a minimum scale of one inch to eight hundred feet [2.54 centimeters to 243.84 meters] showing the following:
 - a. Location of the dike with respect to the watercourse.

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89-08-01-01. Definitions.

The following definitions apply in this article [Dams, Dikes, and Other Devices]:

- 3. "Dam" means any barrier including any appurtenant works, constructed across a watercourse or an area that drains naturally to impound or attenuate the flow of water. All structures necessary to impound a single body of water are considered a single dam.
- 4. "Dike" means any artificial barrier, including any appurtenant works, constructed along a watercourse or an area that drains naturally to divert the flow of water to protect real or personal property.
- 5. "Diversion" means any open channel, culvert, or ditch constructed to reroute a watercourse as defined by North Dakota Century Code section 61-01-06.

Title 33 – State Department of Health

33-16-03.1-03. Definitions.

As used in this chapter [Control of Pollution from Animal Feeding Operations], unless the context otherwise indicates:

- 36. "Surface water" means waters of the state that are located on the ground surface, including all streams, lakes, ponds, impounding reservoirs, marshes, watercourses, waterways, and all other bodies or accumulations of water on the surface of the earth, natural or artificial, public or private.

Title 43 – Industrial Commission

43-02-02.3-11. large mining operation permit requirements.

In addition to information requirements set forth in subsections 1 through 3 of section 43-02-02.3-10, permit applications for large, noncoal, surface and subsurface mining operations and extraction facilities shall address the following:

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4. Baseline data. Descriptions, maps, drawings, or photographs shall be included as required for determination of existing conditions, operations, reclamation, and postmining use. Baseline data shall include, as applicable:

f. Surface and ground water information, including:

- (1) A map indicating the location of surface waters and the location and size of watersheds in and adjacent to the proposed permit area. The map shall depict all watercourses, lakes, natural and artificial water bodies, springs, and riparian and wetland areas. Streams shall be classified as ephemeral, intermittent, or perennial. The map shall identify all watercourses, lakes, springs, and riparian and wetland areas into which surface or pit drainage will be discharged or may possibly be expected to reach;

43-02-02.4-08. Solution mining operation permit requirements.

Permit applications for solution mining operations shall address the following:

4. Baseline data. Descriptions, maps, drawing, or photographs shall be included as required for determination of existing conditions, operations, reclamation, and postmining use. Baseline data shall include, as applicable:

f. Surface and ground water information to include:

- (1) A map indicating the location of surface waters and the location and size of watersheds in and adjacent to the proposed permit area. The map shall depict all watercourses, lakes, natural or artificial water bodies, springs, and riparian and wetland areas. Streams shall be classified as ephemeral, intermittent, or perennial. The map shall identify all watercourses, lakes, springs, and riparian and wetland areas into which surface or pit drainage will be discharged or may possibly be expected to reach;

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Title 62 – Board of Plumbing

62-03.1-03-01. General provisions.

- ...
4. All domestic sewage shall be disposed of by an approved method of collection, treatment, and effluent discharge. Domestic sewage or sewage effluent shall not be disposed of in any manner that will cause pollution of the ground surface, ground water, bathing area, lake, pond, watercourse, or create a nuisance. It shall not be discharged into any abandoned or unused well, or into any crevice, sink hole, or other opening either natural or artificial in a rock formation.

62-03.1-03-15. Septic tank pumpers.

- ...
9. Waste material collected by a pumper shall not be discharged into ditches, watercourses, lakes, ponds, tidewater, or at any point where it can pollute any water supply, bathing area, or shellfish growing area. It shall not be deposited on the surface of the ground within one thousand feet [304.8 meters] of any residence or public road.

Title 69 – Public Service Commission

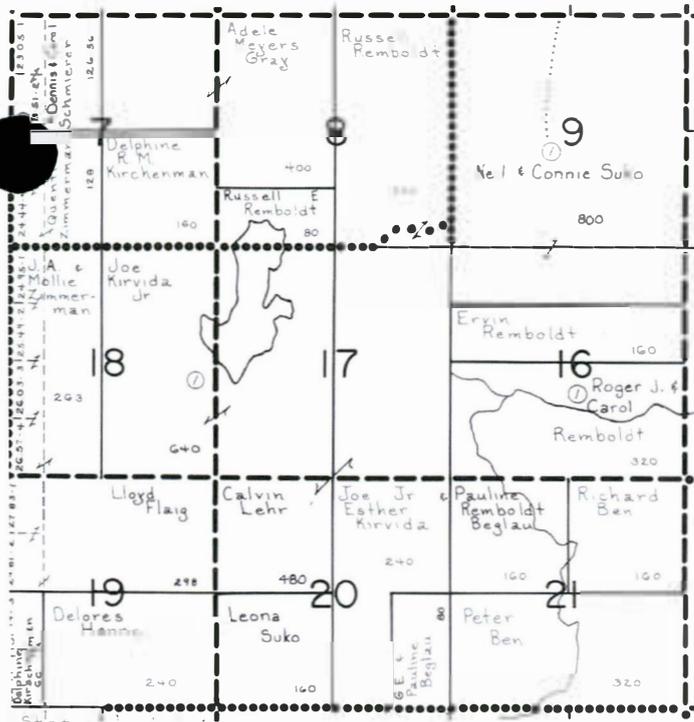
69-05.2-20-02. Performance standards – Dams and embankments constructed of or impounding coal processing waste – Site preparation.

Before coal processing waste is placed at a dam or embankment site:

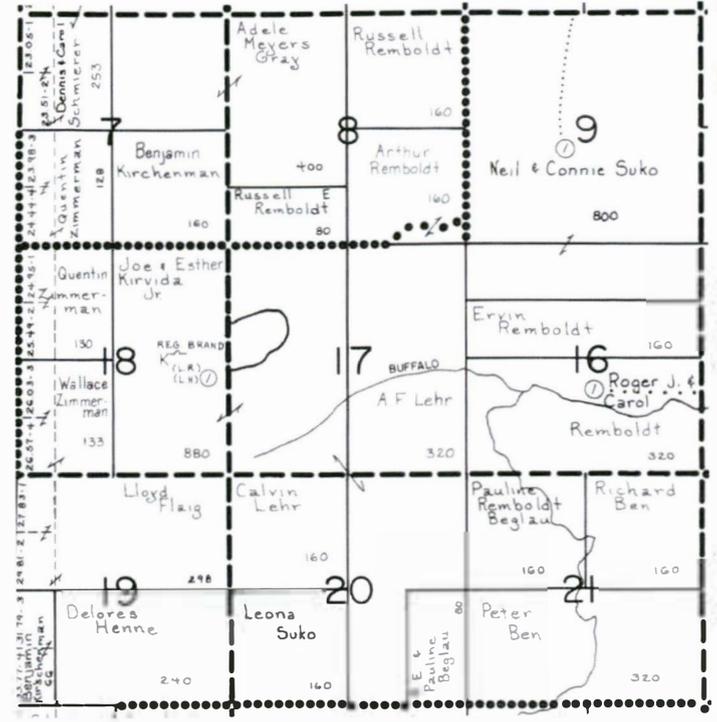
- ...
2. Surface drainage that may cause erosion to the embankment area or the embankment features, whether during construction or after completion, must be diverted by diversion ditches that comply with the requirements of section 69-05.2-16-06. Adequate outlets for discharge from these diversions must comply with section 69-05.2-16-10. Diversions to carry drainage from the upstream area away from the impoundment area and runoff from the surface of the impoundment facility must be designed to carry the peak runoff from a one hundred-year, six-hour precipitation event. The diversion must be maintained to prevent blockage, and the discharge must comply with section 69-05.2-16-10. Sediment control measures must be provided at the discharge of each diversion ditch before entry

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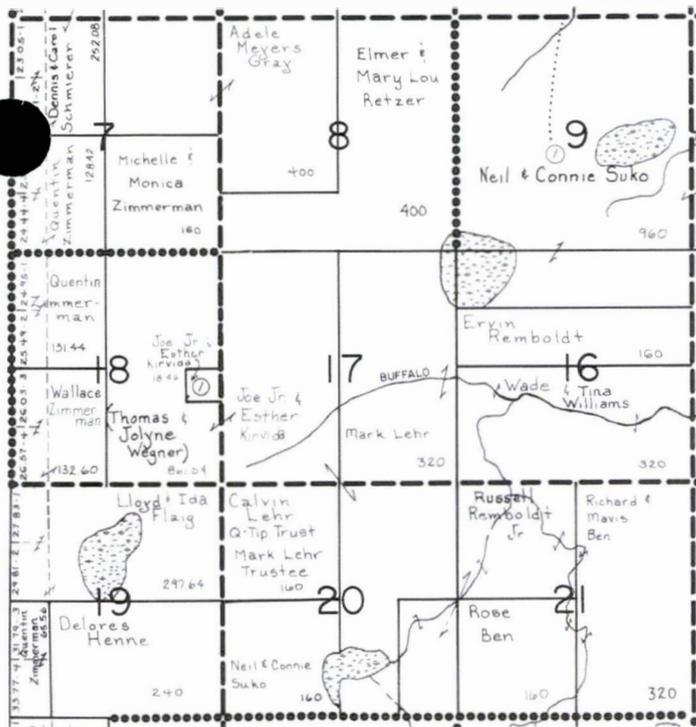
into natural watercourses according to chapter 69-05.2-16 [Performance Standards – Hydrologic Balance – General Requirements].



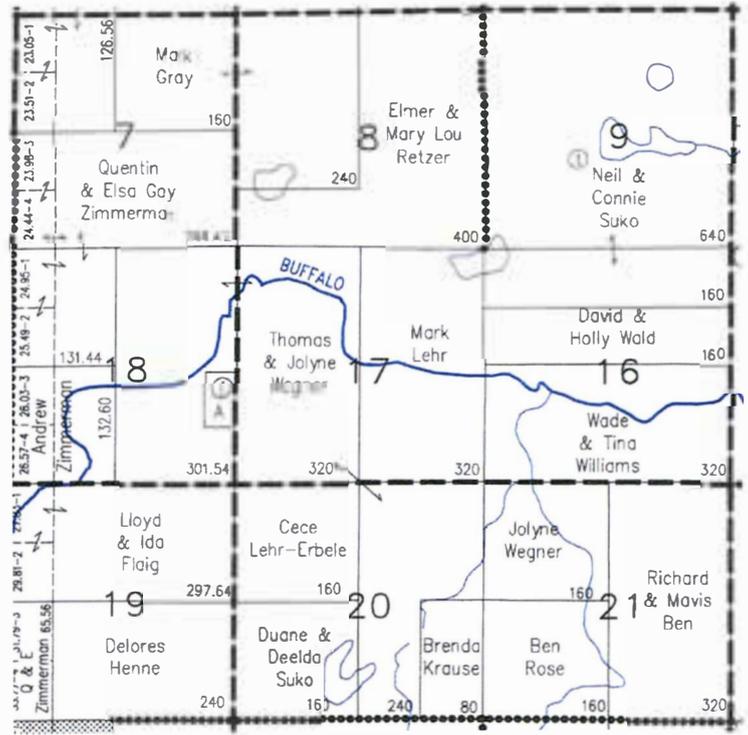
1976 Version



1981 Version



1991 Version



2004 Version

Attachment 2. Comparison of water features between 4 plat books from same company (Midland Atlas Co., LLC)

NOTE: Full plat maps attached at end of testimony.

Produced by State Engineer for testimony on SB 2358 – January 31, 2019

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PROPOSED AMENDMENT TO SENATE BILL NO. 2358

Page 2, line 28, overstrike "A creek, river, or stream appearing in a plat book must be deemed a watercourse" and immediately thereafter insert "A perennial or intermittent stream or river appearing on a USGS topography map shall be deem a natural watercourse"

February 7, 2019

SB 2358
2.14.19
#1

PROPOSED AMENDMENTS TO SENATE BILL NO. 2358

Page 1, line 1, after "A BILL" replace the remainder of the bill with "for an Act to provide for a legislative management study regarding the use of the term "watercourse" in the North Dakota Century Code.

BE IT ENACTED BY THE LEGISLATIVE ASSEMBLY OF NORTH DAKOTA:

SECTION 1. LEGISLATIVE MANAGEMENT STUDY - USE OF "WATERCOURSE" IN STATUTES. During the 2019-20 interim, the legislative management shall consider studying the use of the term "watercourse" throughout the North Dakota Century Code. The study must include consideration of the different meanings of the term and the contexts in which the term is used. The purpose of the study is to develop information that will be useful in deciding whether a new definition of "watercourse" in the North Dakota Century Code is necessary and, if so, what the new definition should be. The legislative management shall report its findings and recommendations, together with any legislation required to implement the recommendations to the sixty-seventh legislative assembly."

Renumber accordingly

1 SB 2358
3-7-19

**Testimony on SB 2358
House Energy and Natural
Resource Committee
Senator Terry Wanzek**

Good morning Chairman Representative Porter and members of the House Energy and Natural Resources Committee. I introduced SB 2358 on behalf of a constituent who is here today to share his story. He made a significant investment in engineering and surveying for permitting a tiling project on his farm.

His technical experts and attorney believed there was a natural water course to outlet his sub surface drainage. And it also showed up in the plat book and the GIS maps. It was only after spending money on the design that he later had the State Water Commission reject the project because they declared it not a water course. I believe one of his questions was, why could he not be informed sooner of the State Water Commissions ruling. Why did he have to go through the process of permitting and spending a significant amount of money before he could get a ruling from the Water Commission.

I know the bill seems like a simple approach. Maybe we should enable the State Water Commission to identify natural water courses on the maps to provide more certainty for landowners who wish to improve their soil health and soil productivity by subsurface tiling. As you can see the Senate turned the bill into a study.

I appreciate you Representatives listening to Mr. Murphy as he shares his story. I also appreciate this committee giving SB 2358 strong consideration.

#2 SB2358
3-7-19

The following is my perspective.

I am in support for the bill in its **original** form although I would like to offer an amendment to the original form so that it might be passed.

My belief is that regardless of how the current law reads, features shown as a dashed blue line on a USGS Topography map and further defined by the same as a permanent or intermittent stream should be included in the kind of landscape feature named in the current law. NDCC 61-32-03.1 paragraph 2b.

Therefore I wish to offer an amendment to the original bill as it pertains to NDCC 61-32-03.1 paragraph 2b.

Upon submission of a complete application for a permit, the water resource district board immediately shall give notice and a copy of the submission via certified mail to each owner of land with one mile downstream of the proposed subsurface water management system outlet unless the distance to the nearest *waterway depicted as a perennial or intermittent stream or river on a USGS topography map*, assessment drain, natural watercourse, slough, or lake is less than one mile. Etc. etc. etc.

The language underlined and italicized above would be an addition to the existing law and would allow such a feature as recognized by USGS as an perennial or intermittent stream.

Please review this email and offer any suggestions to the language so that it gets an appropriate view in the upcoming hearing. I plan to attend the hearing on Thursday and would like to offer my testimony.

#2 SB 2358
3-7-19

M E L V I L L E

PACIFIC

21
1580

22
1594

28
1591

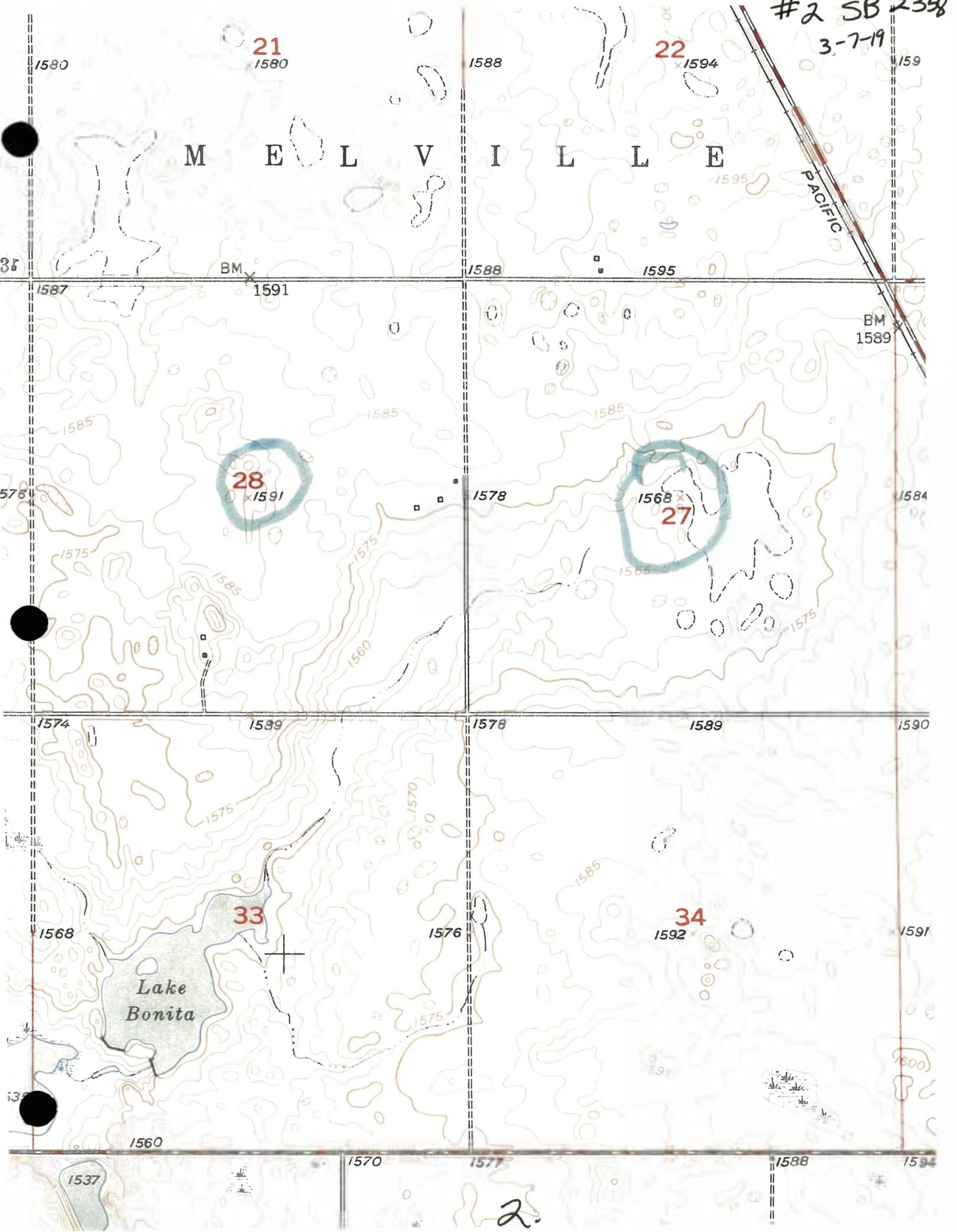
27
1568

33

34
1592

Lake Bonita

2.



#2 SB 2358
3-7-19

1

Technical Memo



Responsive partner.
Exceptional outcomes.

To: Mike Murphy
From: Joel Toso, PhD, PH, PE, Wenck Associates, Inc.
Date: November 21, 2018
Subject: Watercourse Determination – Melville Township, Foster County

The purpose of this memo is to present additional data related to the watercourse determination for the site located within the SE ¼ of Section 28 and continues southwest across Section 33, Township 145 North, Range 66 West, Melville Township, Foster County. A watercourse determination was carried out by the Office of the State Engineer (OSE) and documented in a letter to the Foster County Water Resource Board dated September 10, 2018 (copy attached). The OSE determined at that time no watercourse was located at the site. The additional data provided in this memo document a distinct and a defined channel for the OSE's consideration.

The primary additional data are video footage from the drone flight on September 26, 2018 and surveyed cross sections and observations from a site investigation on October 30, 2018. The video footage is self-explanatory and will be provided separately from this memo due to the relatively large file size. Figure 1 shows the location of six surveyed cross sections along the reach in question. An auto-level instrument and tape measure were used to document the grades at each section. A hand-held GPS documented the section locations. The results are provided in Figure 2, 3, and 4. Figures 5 and 6 present available LiDAR data to illustrate the general grades in the area. These grades were used to estimate flow depths discussed below.

As presented in the OSE's determination, North Dakota Century Code § 61-01-06 provides the definition of a watercourse, which is as follows:

A watercourse entitled to the protection of the law is constituted if there is a sufficient natural and accustomed flow of water to form and maintain a distinct and a defined channel. It is not essential that the supply of water should be continuous or from a perennial living source. It is enough if the flow arises periodically from natural causes and reaches a plainly defined channel of a permanent character.

A "distinct and a defined channel" was found during the survey on October 30th. Photos 1 through 3 below show a sinuous channel in sedge grass. The sides of the channel are easy to miss given the height of the grass. The survey data shows a definite channel especially on the upstream end of the reach. The horizontal lines in Figure 4 estimate the area of flow during a two-year rain event of 12 cfs as estimated in the OSE determination report. This flow is nearly contained within the channel shown in Cross Sections 1 and 2. The overbank areas are less defined in Cross Sections 3 and 4 and the flow remains confined within the channel. The flow spreads out as expected as it approaches Lake Bonita (see Cross Sections 5 and 6). Sediment typically drops out and forms a delta as flows approach a water body.

#2 SB2358
3-7-19

Mike Murphy
November 21, 2018
Page 3 of 3

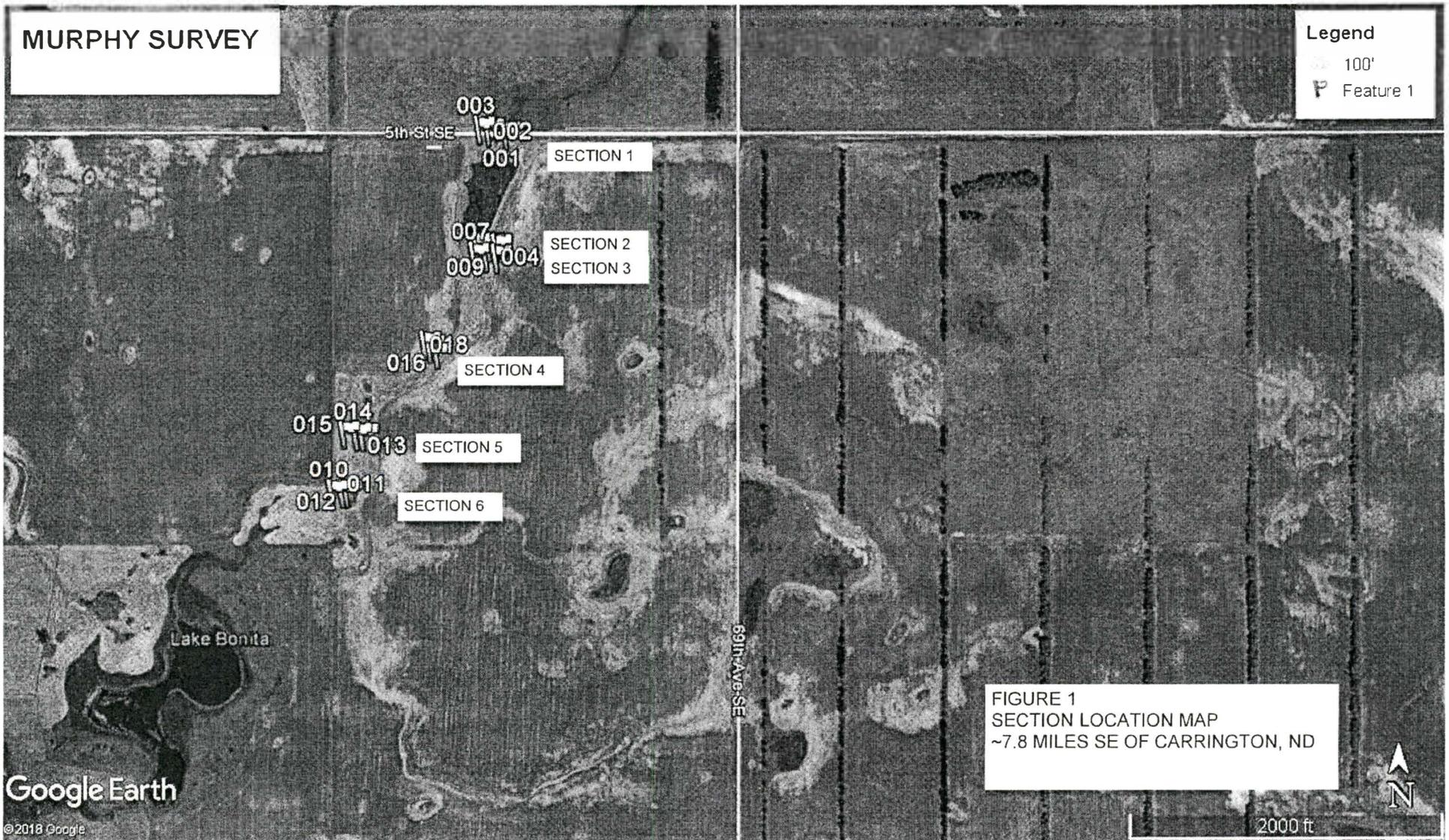


Photo 2: Taken 10-30-2018. Looking upstream at Cross Section 4. Channel in the middle in the sedge grass.

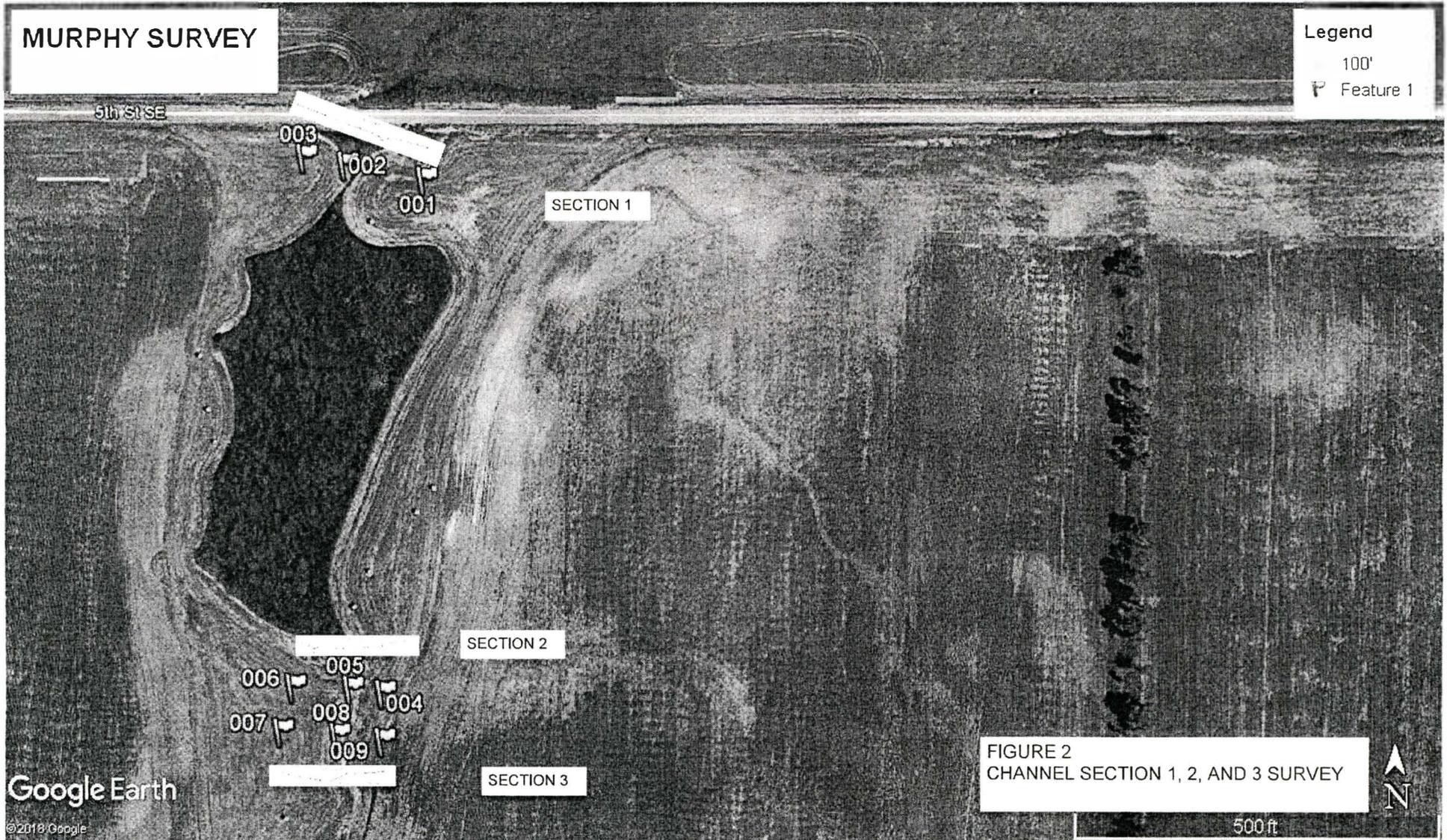


Photo 2. Taken 10-8-2018. Looking downstream between Cross Sections 3 and 4. Channel is in the sedge grass.

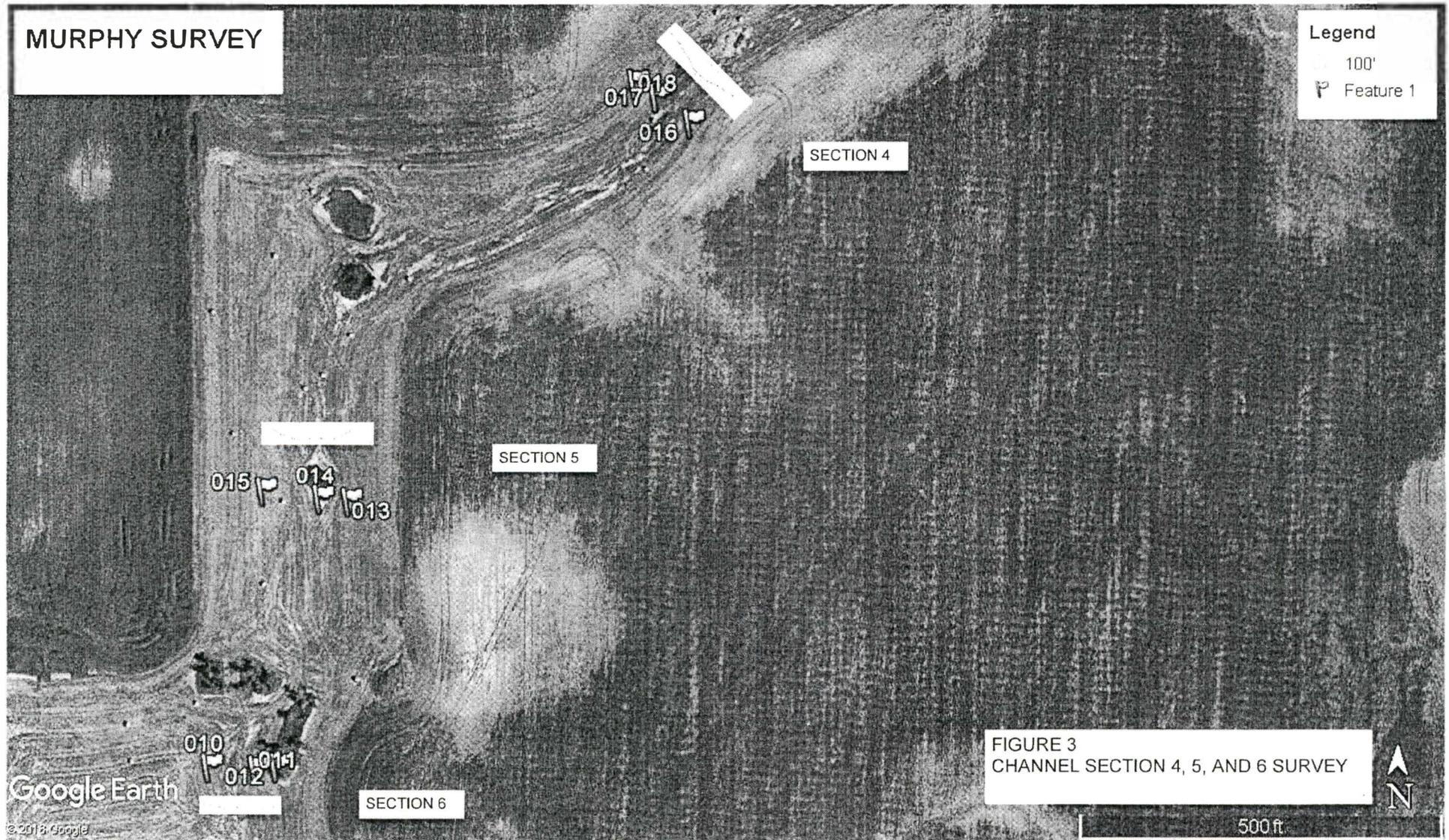
2 SB 2358
3-7-19



#2 SB 2358
3-7-19



#2 SB 2358
3-7-19



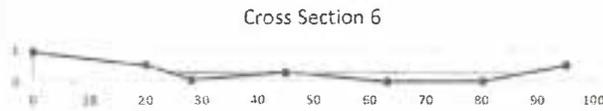
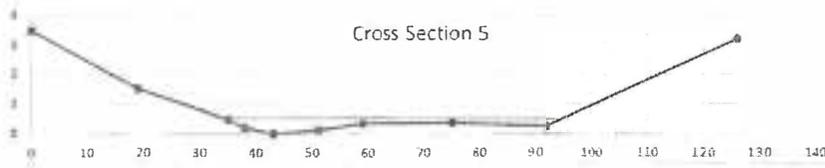
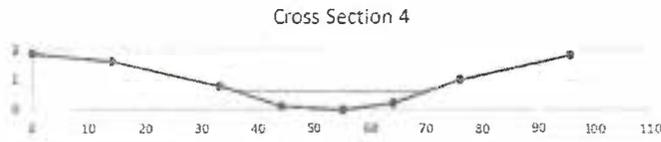
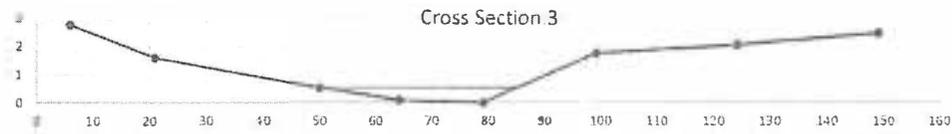
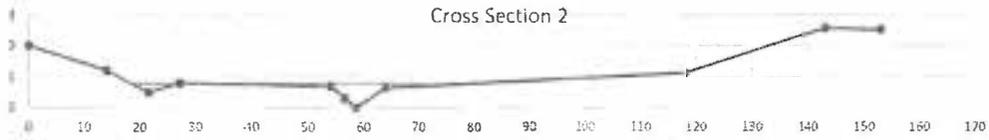
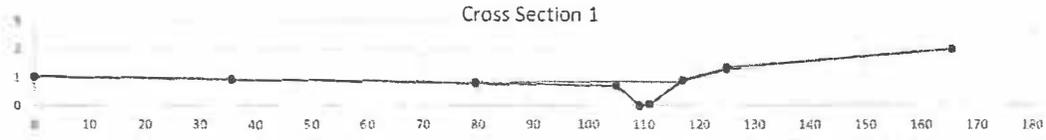


FIGURE 4
CHANNEL SECTION SURVEY RESULTS

2 SB 2358
3-7-19

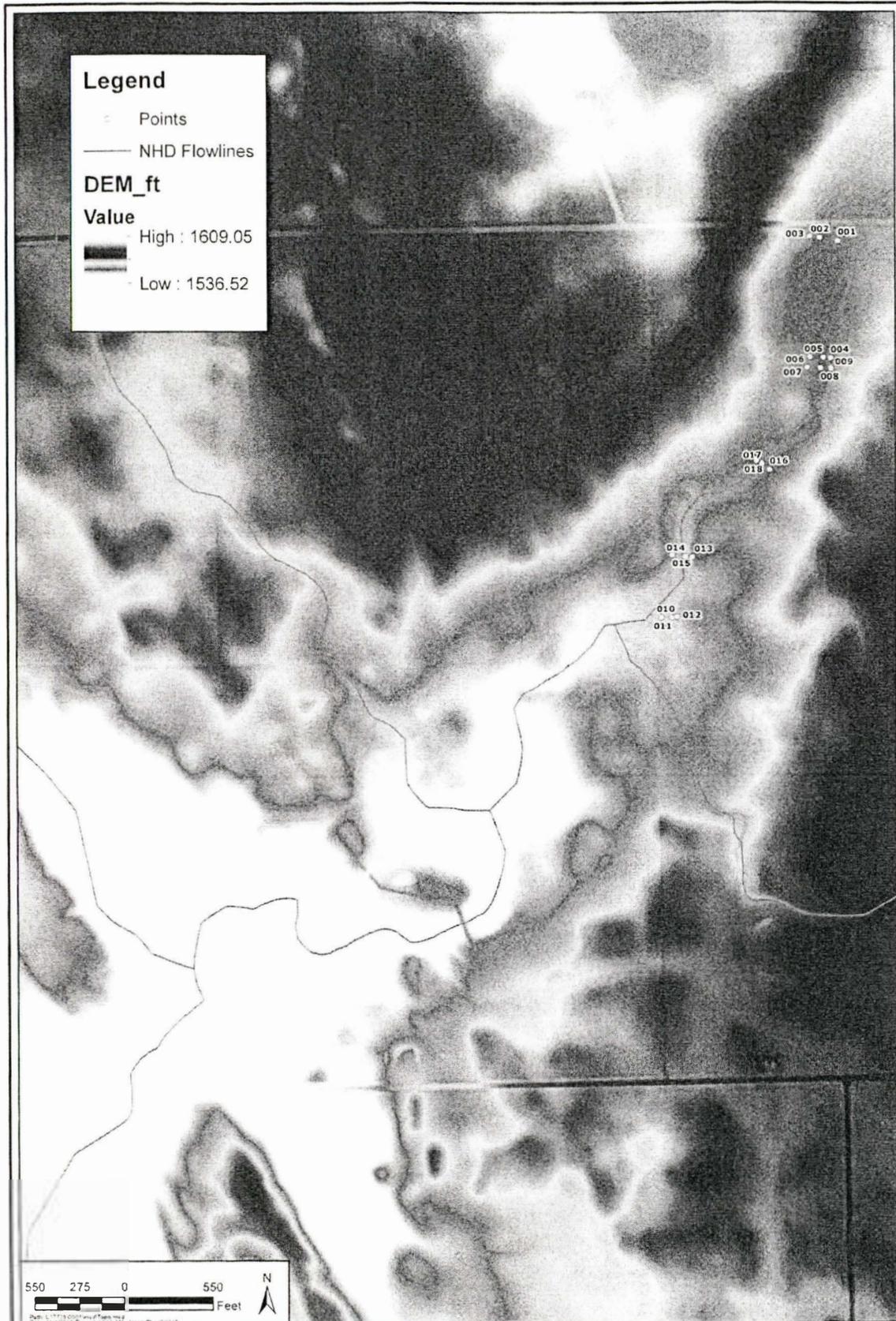


MURPHY
Topographic Map

 **WENCK**
Responsive partner. Exceptional outcomes.

OCT 2018
Figure 5

#2 SB 2358
3-7-19



MURPHY
Topographic Map



OCT 2018
Figure 6

2 SB 2358
3-7-19



State of North Dakota
Office of the State Engineer

Regulatory Division

900 EAST BOULEVARD AVE. • BISMARCK, ND 58505-0850

Regulatory Division (701) 328-2752 • FAX (701) 328-3696 • <http://swc.nd.gov>

September 10, 2018

Mr. Doug Zink, Chairman
Foster County Water Resource Board
PO Box 15
Carrington, ND 58421-0015

RE: Watercourse Determination – Melville Township, Foster County

Dear Mr. Zink:

On April 16, 2018, the Foster County Water Resource District submitted a request to the Office of the State Engineer (OSE) to perform a watercourse determination. The requested site (Site) is located within the SE ¼ of Section 28 and continues southwest across Section 33, Township 145 North, Range 66 West, Melville Township, Foster County. Pursuant to North Dakota Century Code § 61-01-06, the OSE determined that **no watercourse** was located at the Site. Please see attached memorandum and exhibits for more detailed information.

If you have any questions concerning this correspondence, please contact me at (701) 328-4288 or kahuber@nd.gov.

Sincerely,

Kelsey Huber
Water Resource Engineer

KAH:pdh/1278

cc: Cheryl Galehouse (electronic)
Mike Murphy (electronic)

GARLAND ERBELE, P.E.
SECRETARY AND STATE ENGINEER

interoffice
MEMORANDUM

To:  Garland Erbele, P.E., State Engineer

From:  John Paczkowski, P.E., Assistant State Engineer
 Aaron Carranza, P.E., Director, Regulatory Division
 Matt Lindsay, P.E., Engineering and Permitting Section Manager
 Kelsey Huber, Water Resource Engineer

Subject: Watercourse Determination, Melville Township, Foster County

Date: August 27, 2018

The Office of the State Engineer (OSE) received a request on April 16, 2018, from the Foster County Water Resource District (District) to make a watercourse determination according to North Dakota Century Code (N.D.C.C.) § 61-01-06. The requested site (Site) is located within the SE ¼ of Section 28 and continues southwest across Section 33, Township 145 North, Range 66 West, Melville Township, Foster County (see Exhibit 1).

Background

The District's request for a watercourse determination is in response to a subsurface water management permit application (Application) they received on April 10, 2018 (Exhibit 2). The Application states the outlet for the subsurface system is located in the SE ¼ of Section 28, and the District noted water from the outlet will flow southwest across Section 33, Township 145 North, Range 66 West, Melville Township, Foster County. The District has asked for the OSE to determine if a natural watercourse is constituted at the outlet.

●SE Investigation

On June 29, 2018, the OSE conducted a Site investigation to determine if a watercourse is present. During the Site investigation, the OSE observed two 24-inch CMP culverts that hydraulically connect the SE ¼ of Section 28 to the NE ¼ of Section 33 (see Exhibit 3a, b, and c). It was evident from the Site visit that the easternmost culvert (Exhibit 3c) has significantly deteriorated. Surface waters draining through these culverts flow southwest across the NE ¼ of Section 33 into Lake Bonita.

Melville Township Watercourse Determination

The OSE must determine if the location described matches the definition of a watercourse. N.D.C.C. § 61-01-06 provides the definition of a watercourse, which is as follows:

A watercourse entitled to the protection of the law is constituted if there is a sufficient natural and accustomed flow of water to form and maintain a distinct and a defined channel. It is not essential that the supply of water should be continuous or from a perennial living source. It is enough if the flow arises periodically from natural causes and reaches a plainly defined channel of a permanent character.

Given the presence of the culverts in 5th St SE (shown in Exhibit 3) and the peak-flow statistics estimated from my StreamStats analysis (see Exhibit 4), I believe there are hydrologic and hydraulic indicators that the Site experiences periodic flows. In addition to the Site investigation, I reviewed the 2011- 2013 James River Basin Phase 2 LiDAR elevation data that indicates there is a gentle slope downstream from the tile outlet that drains surface waters during times of snowmelt and heavy rain towards Lake Bonita (see Exhibit 5). The Site can be described as a natural draw, a sort of valley between gently sloping hills that tends to flatten out as it proceeds towards Lake Bonita. The Site has been used for agricultural purposes, with Exhibit 6 showing the Site being hayed multiple years, and does not possess any of the characteristics of a definite bed and banks or definite channel.

The Site appears to resemble the scenario discussed in the Supreme Court case of *Froemke v. Parker* (see *Froemke v. Parker*, 1919 ND 408, 171 N.W. 284, pg. 4), where it was noted,

The draw or runway in question is simply a natural drainage channel for such surface waters that are occasioned by winter snows or spring rains upon the tributary lands...It serves this purpose only occasionally and temporarily. It possesses none of those characteristics of a definite bed, definite channel, of a permanent source of water supply, either continuous or periodic, to establish the same as a water course.

Watercourse Determination, Melville Township, Foster County

2 SB 2358
3-7-19

Melville Township Watercourse Determination

Recommendation

While the Site may experience periodic flows, the Site resembles that of a runway or draw, lacking a definite bed or channel, further evidenced by its capability to be used for agricultural purposes. **Therefore, I recommend the State Engineer find that a watercourse, as described in N.D.C.C. § 61-01-06, does not exist within the vicinity of the SE ¼ of Section 28 and Section 33, Township 145 North, Range 66 West, Melville Township, Foster County.**

Watercourse Determination, Melville Township, Foster County

2 SB 2358
3-7-19

Foster County Water Resource Board

Paul Skadberg, Chairman

ph: (701) 653-5728 * Fax (701) 652-3668
P. O. BOX 15
CARRINGTON, ND 58421-0015
Fosterwaterboard@outlook.com

4-13-2018

ND Office of the State Engineer
900 E. Blvd. Ave.
Bismarck, ND 58505

Dear Mr. Eberle:

The Foster County Water Resource Board is requesting your office to make a determination on a natural water course. The determination is in regard to a subsurface drainage permit (see enclosed). The outlet for the permit is located in the SE ¼ of Section 28-T145N-R66W of Melville Township in Foster County. The outlet water will flow Southeast across the NE ¼ and SW ¼ of Section 33 in Melville Township. Please see the enclosed topography map, as well as the aerial photos. The water course in question is drawn in with red marker.

Thank you in advance for your prompt attention to this matter. If you have questions, please call Doug Zink at 701-653-5901.

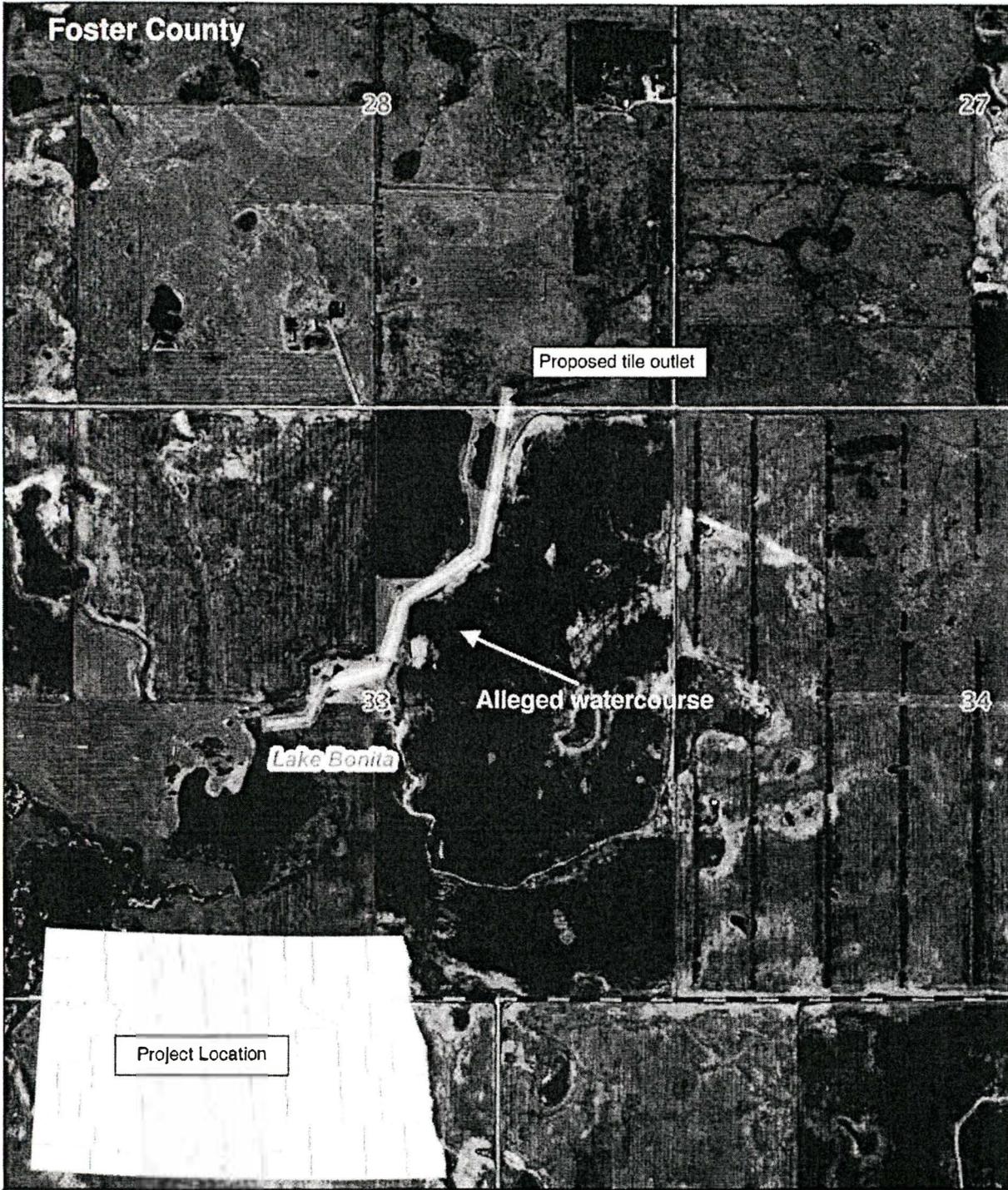
Sincerely,



Doug Zink

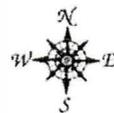
Foster County Water Resource Board

Exhibit 1. Map submitted by the Foster County Water Resource District identifying the location of the alleged watercourse in question



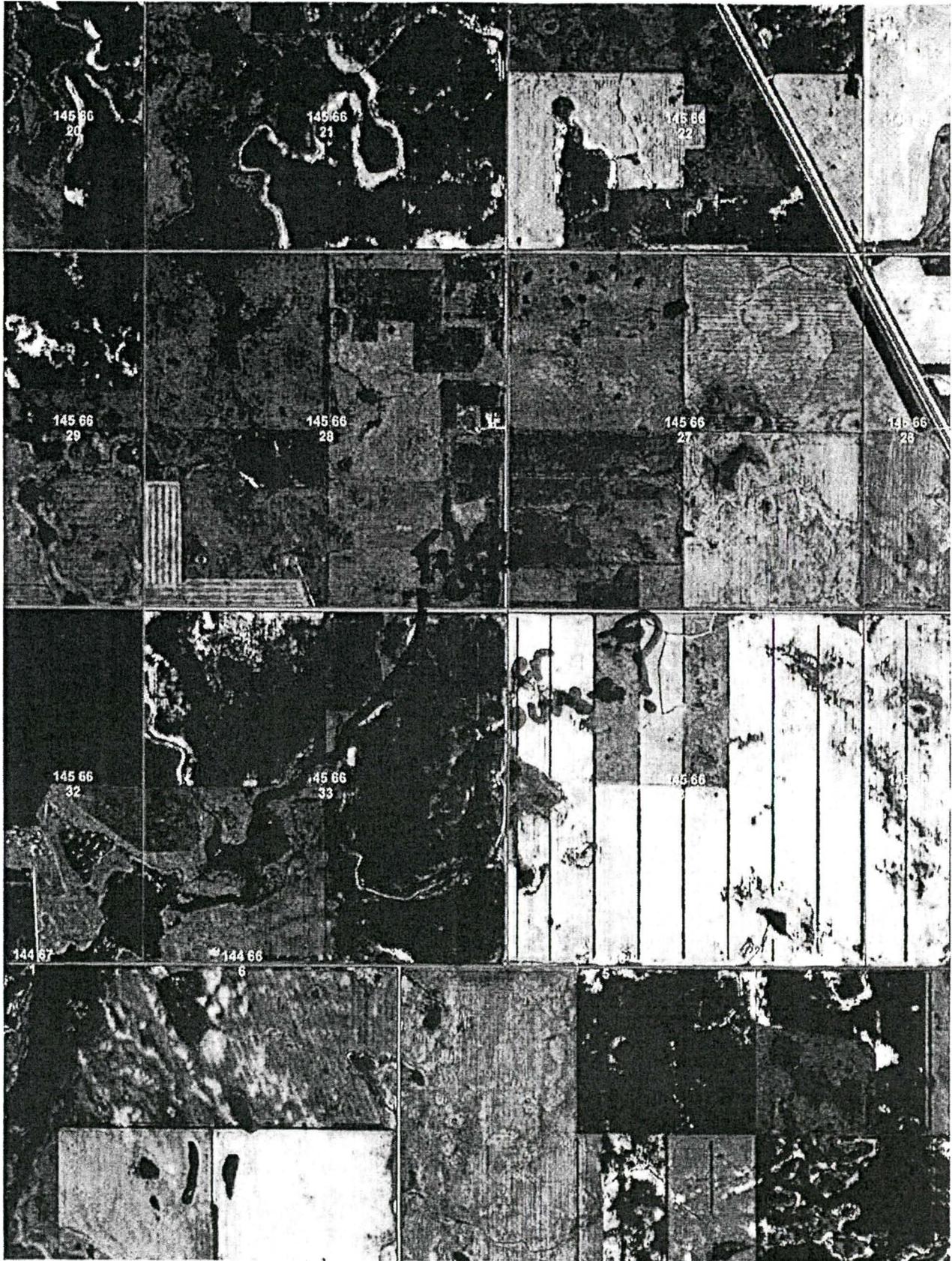
**Office of the State Engineer Interpretation of
Watercourse Determination Location,
Melville Township, Foster County**

SE 1/4 of Section 28 and Section 33, T145N, R66W, Foster County
NAIP 2014 aerial imagery



Date: 8/3/2018
Prepared by: KAH
CRS: NAD 83/UTM
zone 14N
EPSG: 26914

2 SB 2358
3-7-19



#2 SB 2358
3-7-19



APPLICATION TO INSTALL A SUBSURFACE WATER MANAGEMENT SYSTEM
OFFICE OF THE STATE ENGINEER
REGULATORY DIVISION
SFN 61244 (5/2017)

RECEIVED
APR 17 2018

Number 5124
Number
(OSE USE ONLY) (WMD USE ONLY)

WATER RESOURCE
4-10-2018
10-

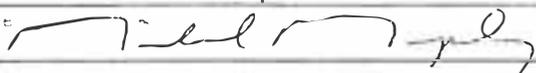
This application must be submitted to the water resource district in which the system is located (please visit <http://swc.nd.gov> for contact information). To be complete, this application must include the additional information listed in the instructions on page 3.

Water Resource District In Which System Is Located Foster County				
Location Of Land To Be Tiled				
1/4 Part of W1/2	Section 26	Township 145	Range 66	County Foster
1/4 E1/2	Section 27	Township 145	Range 66	County Foster
1/4 SW1/4	Section 27	Township 145	Range 66	County Foster
Outlet Location				
1/4 SE	Section 28	Township 145	Range 66	County Foster
Purpose				
<input checked="" type="checkbox"/> Subsurface Drainage <input type="checkbox"/> Subsurface Irrigation <input type="checkbox"/> Other (please explain) _____				
Design Data				
Total Land Area To Be Tiled (acres) 333		Drainage Coefficient Of The System (Inches/day) <input type="checkbox"/> 1/4 <input checked="" type="checkbox"/> 1/2 <input type="checkbox"/> 3/4 <input type="checkbox"/> Other _____		
Does The System's Design Include Surface Intakes <input type="checkbox"/> Yes (quantity) _____ <input checked="" type="checkbox"/> No		Type Of Surface Intakes (if applicable) <input type="checkbox"/> Open Inlet (i.e. riser) <input type="checkbox"/> Blind Inlet (i.e. gravel)		
IMPORTANT NOTE: Applications for systems that incorporate surface intakes and have an overall drainage coefficient of greater than 3/8 inches per day must be forwarded to the N.D. Office of the State Engineer (900 E Boulevard Ave, Dept. 770, Bismarck, ND 58505-0850, by fax to (701) 328-3696, or by email to swcregpermits@nd.gov) for review along with an "Application for Surface Drain." Please contact the Office of the State Engineer at 701-320-2762 for more information.				
Tile System Orientation <input type="checkbox"/> Pattern Tile (parallel) <input checked="" type="checkbox"/> Targeted Tile		Average Tile Spacing (feet, if applicable) 50	Average Tile Burial depth (feet) 3.5	
Type Of System Outlet <input checked="" type="checkbox"/> Gravity - No Control Structure <input type="checkbox"/> Gravity - With Control Structure <input type="checkbox"/> Pump			Outlet Flow Capacity (numerical value) 5.25 <input checked="" type="checkbox"/> cfs <input type="checkbox"/> gpm	
Where Does The Outlet Discharge <input type="checkbox"/> Road Ditch <input type="checkbox"/> Private Drain <input type="checkbox"/> Assessment Drain <input checked="" type="checkbox"/> Natural Waterway <input type="checkbox"/> Pond, Slough, or Lake <input type="checkbox"/> Other (please explain) _____				
Who Is Installing The System <input checked="" type="checkbox"/> Self <input type="checkbox"/> Tile Contractor (please list) _____				
Anticipated Installation Start Date Fall of 2018			Anticipated Completion Date Fall 2020	
Have You Had A Utility Locate Performed, Including Locating Rural Water Lines <input type="checkbox"/> Yes <input checked="" type="checkbox"/> No				

(continued on page 2)

Exhibit 2. Subsurface water management permit application

2 SB 2358
3-7-19

Do You Own The Land Area To Be Tiled <input type="checkbox"/> Yes <input checked="" type="checkbox"/> No			Do You Own The Land Where The Tile Outlet Is Located <input type="checkbox"/> Yes <input checked="" type="checkbox"/> No		
If NO, Have You Secured Landowner Permission <input checked="" type="checkbox"/> Yes <input type="checkbox"/> No			If NO, Have You Secured Landowner Permission <input checked="" type="checkbox"/> Yes <input type="checkbox"/> No		
If YES, Please Provide Landowner Information Below			If YES, Please Provide Landowner Information Below		
Landowner Name Michael Murphy, (James Murphy, Doug Wede)			Landowner Name Chad Bickett		
Landowner Address 55 67th Ave NE			Landowner Address 470 66th Ave SE		
City Carrington	State ND	ZIP Code 58421	City Carrington	State ND	ZIP Code 58421
Telephone Number 701 652-5753			Telephone Number 701 653-5444		
<p>Applicant's Certification:</p> <p>I, the undersigned, am applying for a permit to install a subsurface water management system on an area comprising 80 acres or more as required under North Dakota Century Code § 61-32-03.1. I understand that I must undertake and agree to provide additional information such that the water resource district considers the application complete. If the water resource district finds, based on technical evidence, that my subsurface water management system will cause unreasonable harm to a roadway or real property located within one mile downstream, I may be required to obtain a notized letter of approval from landowners entitled to notice before a permit may be issued. Additionally, I will abide by any reasonable conditions or control requirements placed on this permit by the water resource district. My signature below acknowledges that I have read and agree to these statements.</p>					
Applicant Name Michael Murphy					
Address 55 67th Ave NE			City Carrington	State ND	ZIP Code 58421
Telephone Number 701 652-5753	Cell Phone Number 701 652-5753		Email Address michaelmurphy780@gmail.com		
Signature 					Date 03/22/2018

Additional Sheets May Be Attached If Necessary.

See Instructions For Filing A Subsurface Water Management Permit Application On Page 3.

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3-7-19

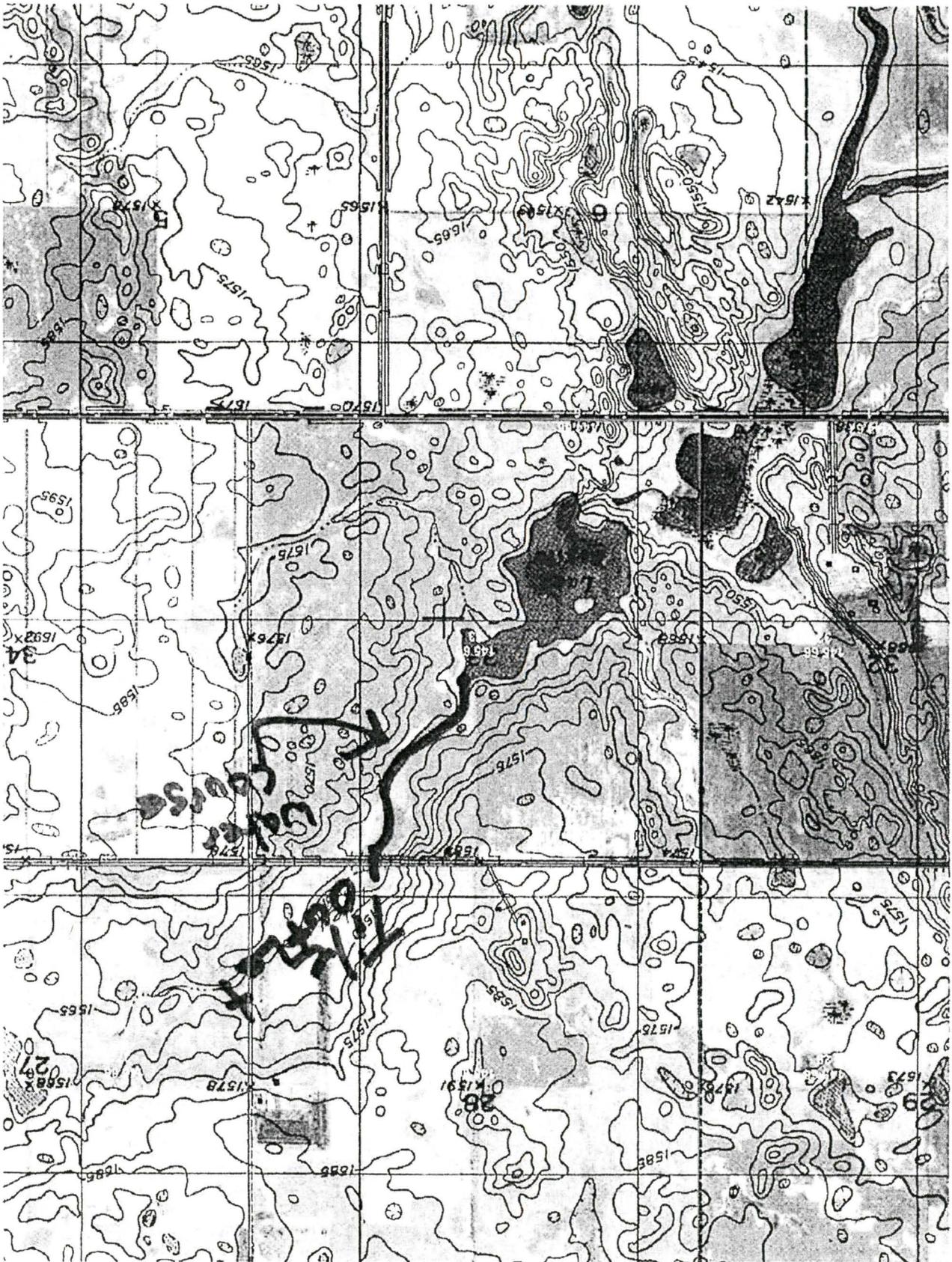


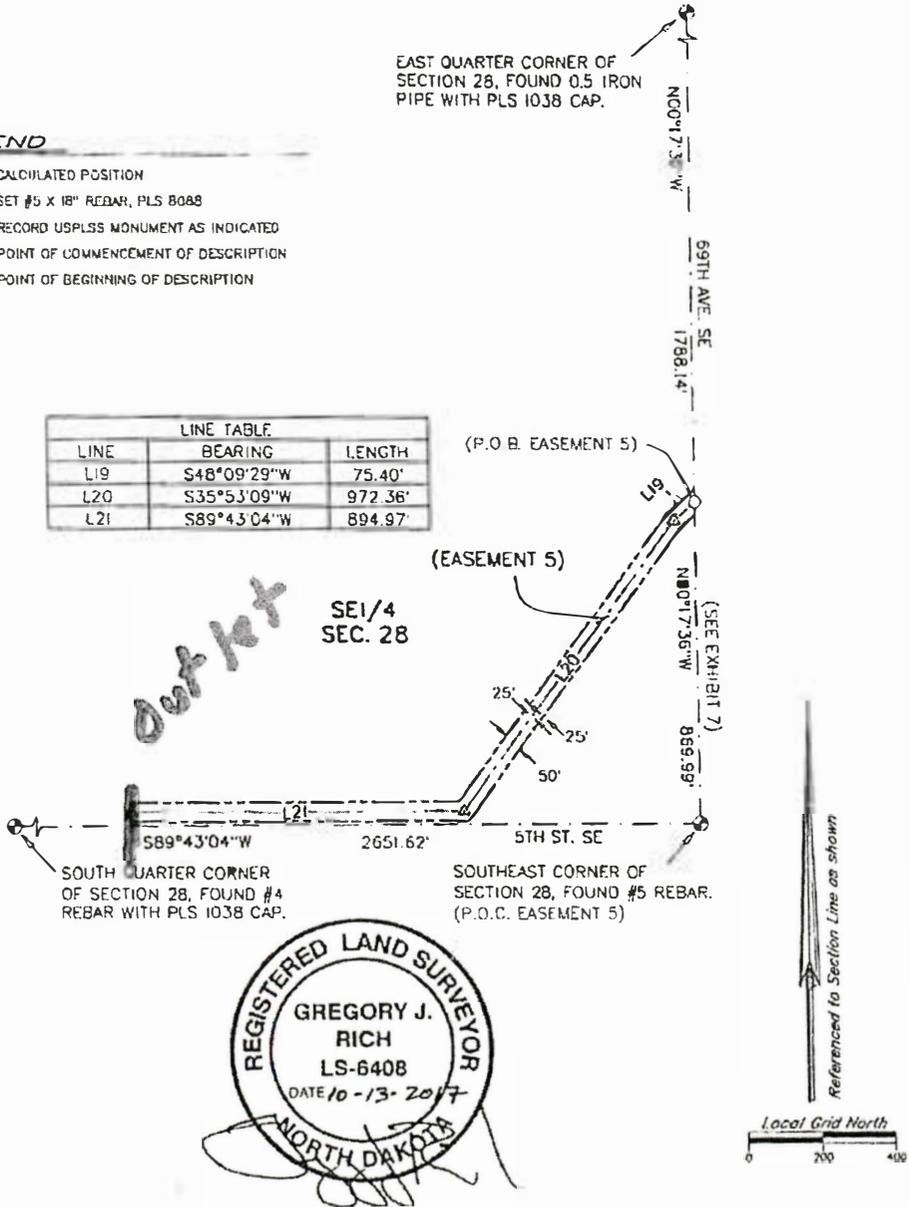
EXHIBIT 8

DETAIL OF DRAINAGE EASEMENT ACROSS THE BICKETT PROPERTY LOCATED WITHIN THE SE1/4 OF SECTION 28, T145N, R66W, FOSTER COUNTY, NORTH DAKOTA.

LEGEND

- △ CALCULATED POSITION
- SET #5 X 18" REBAR, PLS B088
- ⊕ RECORD USPLSS MONUMENT AS INDICATED
- (P.O.C.) POINT OF COMMENCEMENT OF DESCRIPTION
- (P.O.B.) POINT OF BEGINNING OF DESCRIPTION

LINE	BEARING	LENGTH
L19	S48°09'29"W	75.40'
L20	S35°53'09"W	972.36'
L21	S89°43'04"W	894.97'

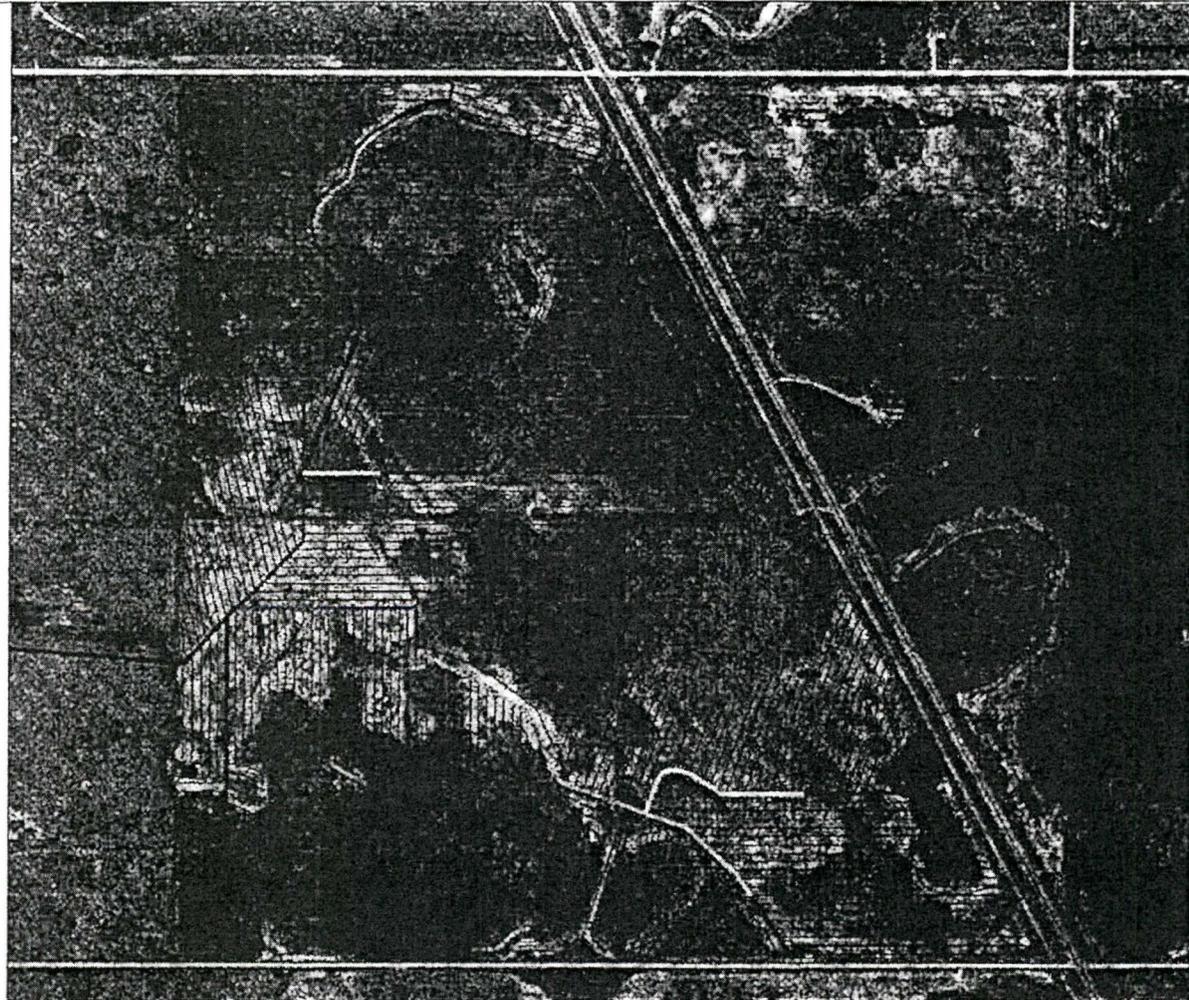


Easement 5 Description

A strip of land 50 feet wide located within the Southwest Quarter of Section 28, T145N, R66W, Foster County, North Dakota.

#2 SB2358
3-7-19

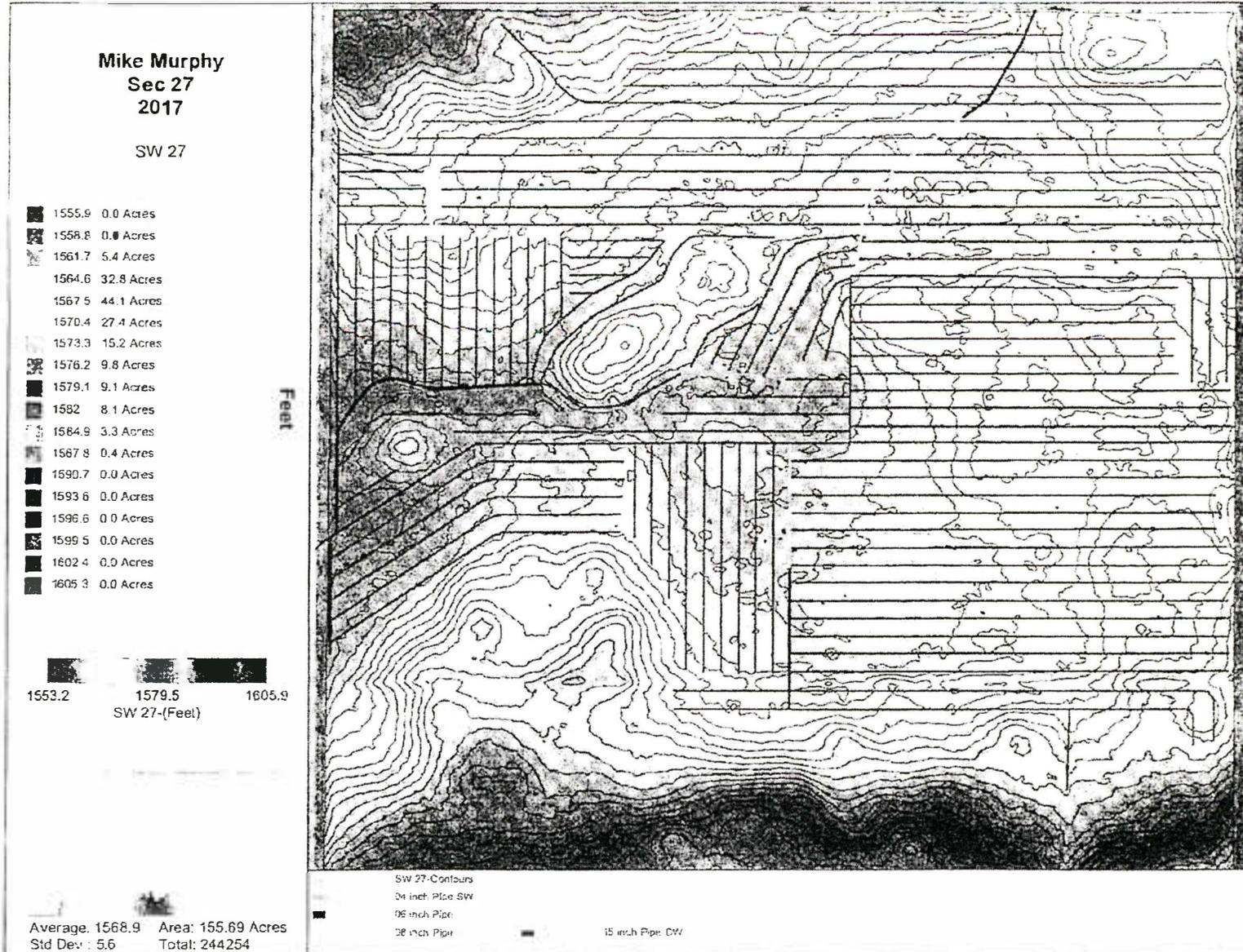
Grower
Mike Murphy
145 66 27



—	04 inch Pipe	■	12 inch Pipe DW
■	06 inch Pipe	■	12 inch Pipe
■	08 inch Pipe	■	15 inch Pipe DW
■	10 inch Pipe	■	18 inch Pipe DW

CENTROL.
Drainage

#2 SB 2358
3-7-19



#2 SB 2358
3-7-19

Exhibit 3(a). Two 24-inch CMP culverts and alleged watercourse along the path of the taller, darker, vegetation. Photo taken looking southwest at Section 33, T145N, R66W, from roadway (5th St. SE).



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3-7-19

Exhibit 3(b). One of two 24-inch CMP culverts (westernmost culvert) that hydraulically connect the SE ¼ of Section 28 to the NE ¼ of Section 33, T145N, R66W. Photo taken from roadway (5th St. SE) looking south.



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3-7-19

Exhibit 3(c). One of two 24-inch CMP culverts (easternmost culvert) that hydraulically connect the SE ¼ of Section 28 to the NE ¼ of Section 33, T145N, R66W. Photo looking northwest at culvert that passes beneath roadway (5th St. SE).



StreamStats Report

Region ID:

ND

Workspace ID:

ND20180613163948634000

Clicked Point (Latitude, Longitude):

47.34161, -99.07971

Time:

2018-06-13 11:40:06 -0500



Basin Characteristics

Parameter Code	Parameter Description	Value	Unit
DRNAREA	Area that drains to a point on a stream	3.39	square miles

<https://streamstats.usgs.gov/ss/>



Exhibit 4. StreamStats analysis results.

#2 SB 2358
3-7-19

StreamStats

6/13/18, 11:42 AM

RUGGED	Ruggedness number computed as stream density times basin relief	11.1	feet per mi
AG_OF_DA	Agricultural Land in Percentage of Drainage Area (Idaho Logistic Regression Equations SIR 2006-5035	75.7	percent
BASINPERIM	Perimeter of the drainage basin as defined in SIR 2004-5262	13.6	thousand feet
BSLDEM10M	Mean basin slope computed from 10 m DEM	1.22	percent
COMPRAT	A measure of basin shape related to basin perimeter and drainage area	2.08	dimensionless
CSL1085LFP	Change in elevation divided by length between points 10 and 85 percent of distance along the longest flow path to the basin divide, LFP from 2D grid	13.92	feet per mi
ELEV	Mean Basin Elevation	1588	feet
ELEVMAX	Maximum basin elevation	1608	feet
LC11DEV	Percentage of developed (urban) land from NLCD 2011 classes 21-24	6.54	percent
LC11IMP	Average percentage of impervious area determined from NLCD 2011 impervious dataset	0.87	percent
LFPLENGTH	Length of longest flow path	3.52	miles
MINBELEV	Minimum basin elevation	1555	feet
PRECIP	Mean Annual Precipitation	18.8	inches
SLOPERAT	Slope ratio computed as longest flow path (10-85) slope divided by basin slope	0.22	dimensionless
SOILPERM	Average Soil Permeability	2.27	inches per hour
STRMTOT	total length of all mapped streams (1:24,000-scale) in the basin	0.72	miles

<https://streamstats.usgs.gov/ss/>

2 SB2358
3-7-19

Peak-Flow Statistics Parameters [Peak Region C 2015 5096]

Parameter Code	Parameter Name	Value	Units	Min Limit	Max Limit
DRNAREA	Drainage Area	3.39	square miles	0.13	2812
RUGGED	Ruggedness_Number	11.1	feet per mi	21.3	2265

Peak-Flow Statistics Disclaimers [Peak Region C 2015 5096]

One or more of the parameters is outside the suggested range. Estimates were extrapolated with unknown errors

Peak-Flow Statistics Flow Report [Peak Region C 2015 5096]

Statistic	Value	Unit
2 Year Peak Flood	12.4	ft ³ /s
5 Year Peak Flood	34.8	ft ³ /s
10 Year Peak Flood	55.8	ft ³ /s
25 Year Peak Flood	88	ft ³ /s
50 Year Peak Flood	115	ft ³ /s
100 Year Peak Flood	146	ft ³ /s
500 Year Peak Flood	221	ft ³ /s

Peak-Flow Statistics Citations

Williams-Sether, T., 2015, Regional regression equations to estimate peak-flow frequency at sites in North Dakota using data through 2009: U.S. Geological Survey Scientific Investigations Report 2015-5096, 12 p. (<http://dx.doi.org/10.3133/sir20155096>)

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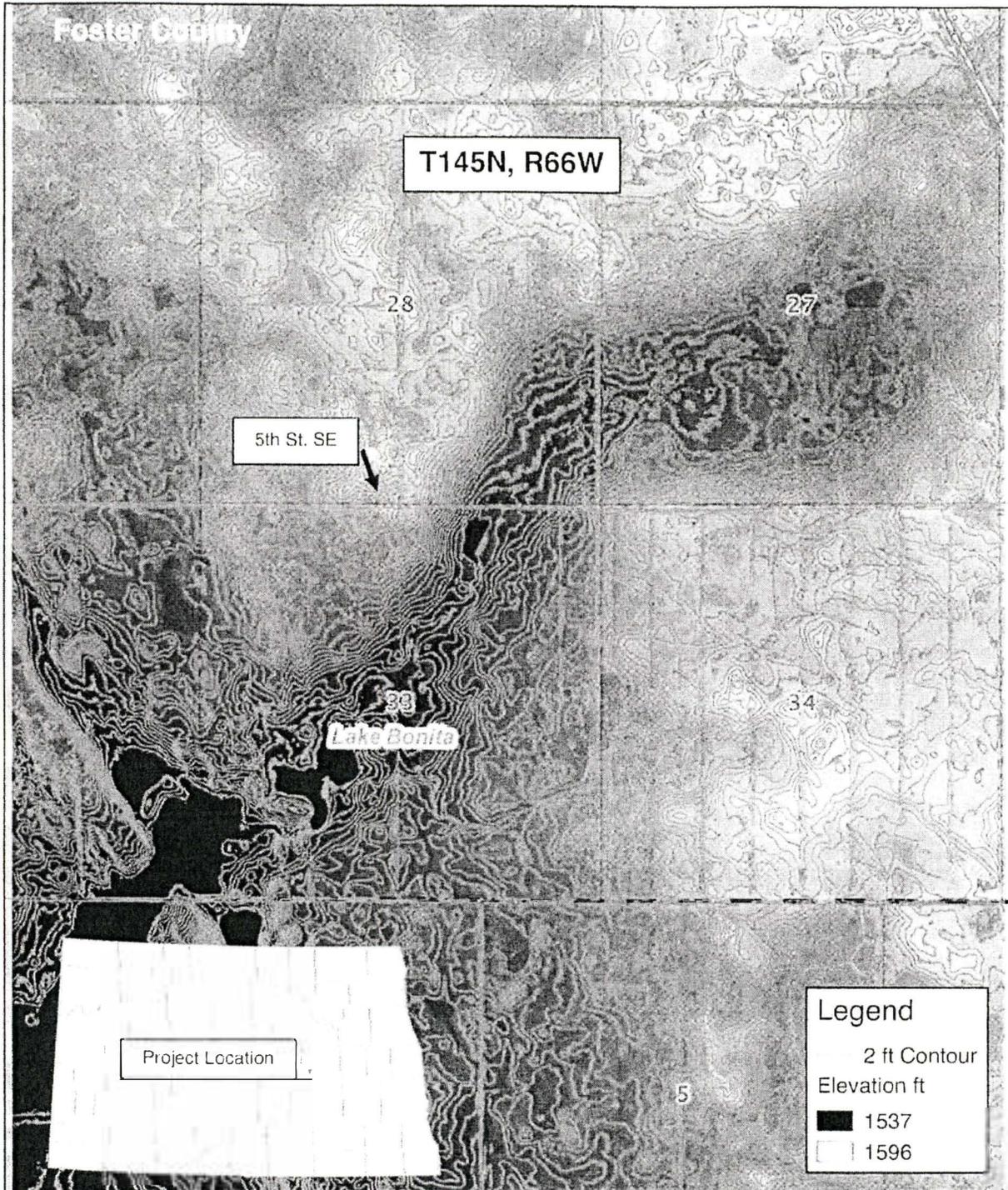
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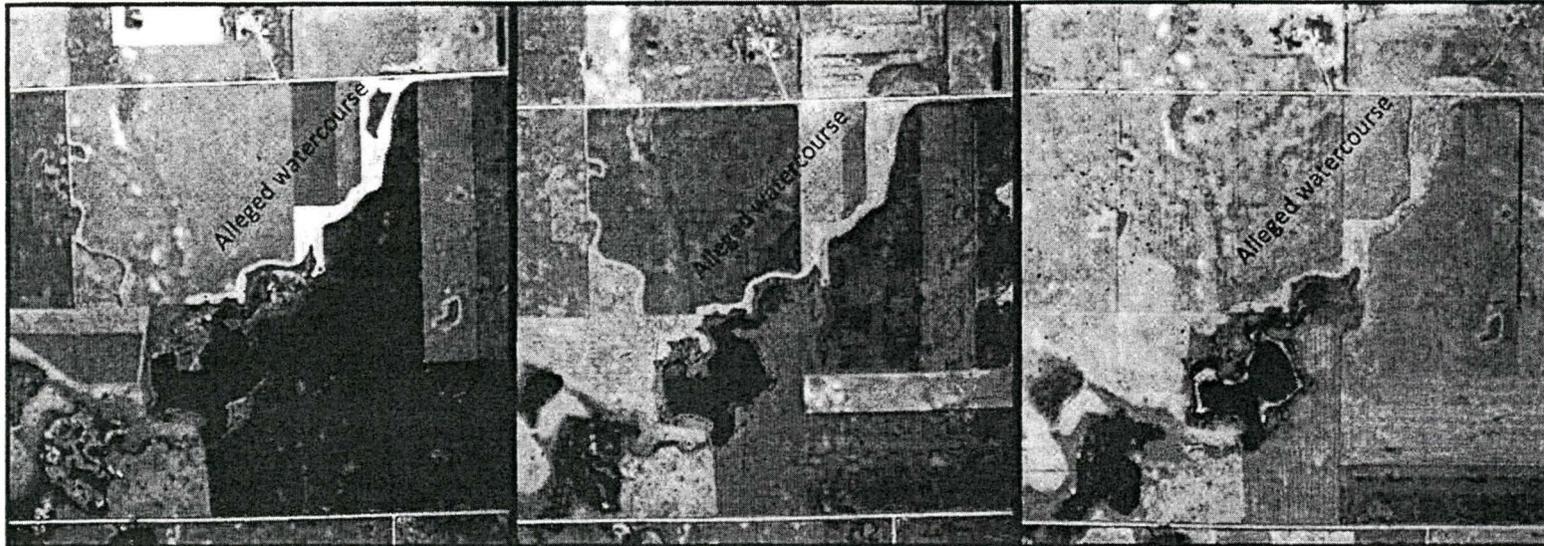


**Watercourse Determination, Melville Township,
Foster County**
SE 1/4 of Section 28 and Section 33, T145N, R66W, Foster County
LiDAR obtained from ND LiDAR Dissemination Mapservice on 6/13/2018 -
James River Basin LiDAR Phase 2
NAIP 2014 imagery at 70% transparency

Date: 6/13/2018
Prepared by: KAM
Checked by: JMM
June 13, 2018
EPSA 2018

Exhibit 5. Contour map of Site derived from LiDAR data, 2-foot contours

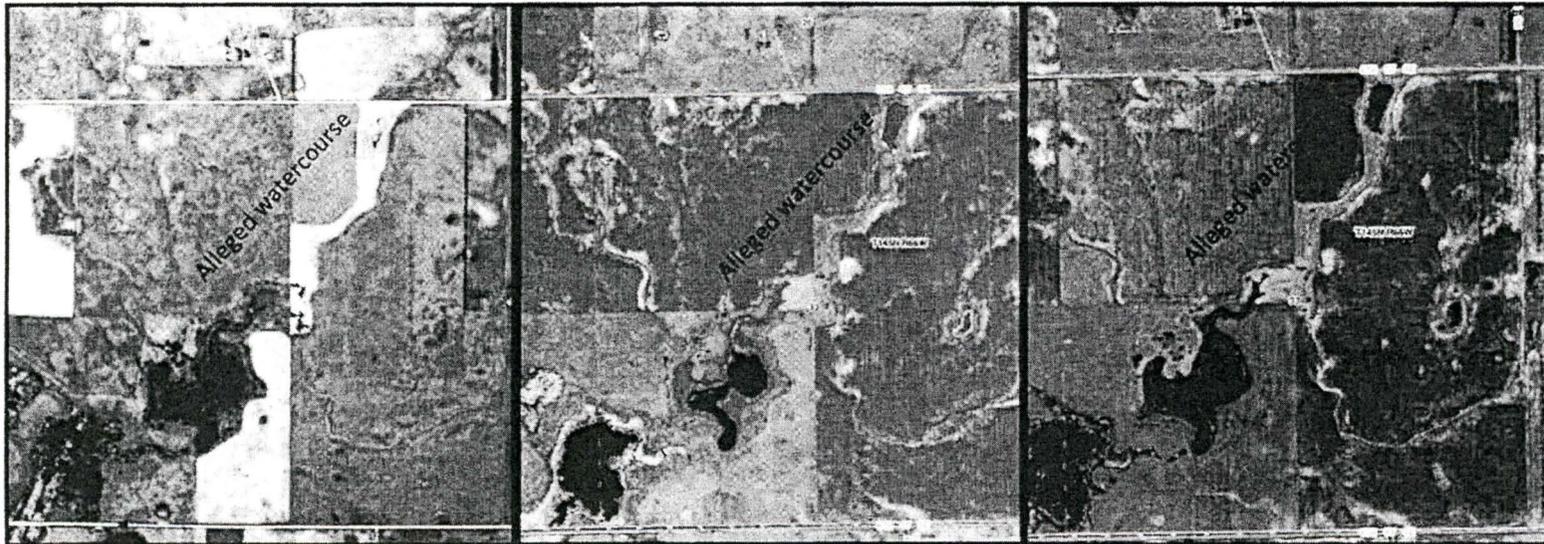
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1984

1986

1988



1997

2012

2014

Exhibit 6. Aerial photos of Site showing the alleged watercourse being hayed. Photos from 1984, 1986, 1988, and 1997 were retrieved from Farm Service Agency (FSA) imagery. Photos from 2012 and 2014 were retrieved from the ND State Water Commission Mapservice at <http://mapservice.swc.nd.gov> on August 7, 2018.

PROPOSED AMENDMENTS TO ENGROSSED SENATE BILL NO. 2358

Page 1, line 1, after "A BILL" replace the remainder of the bill with "for an Act to amend and reenact subdivision b of subsection 2 of section 61-32-03.1 of the North Dakota Century Code, relating to notice of proposed subsurface water management systems.

BE IT ENACTED BY THE LEGISLATIVE ASSEMBLY OF NORTH DAKOTA:

SECTION 1. AMENDMENT. Subdivision b of subsection 2 of section 61-32-03.1 of the North Dakota Century Code is amended and reenacted as follows:

- b. Upon submission of a completed application for a permit, the water resource district board immediately shall give notice and a copy of the submission via certified mail to each owner of land within one mile [1.61 kilometers] downstream of the proposed subsurface water management system outlet unless the distance to the nearest waterway depicted as a perennial or intermittent stream or river on a United States geological survey topography map, assessment drain, natural watercourse, slough, or lake is less than one mile [1.61 kilometers], in which case notice and a copy of the submission must be given immediately to each owner of land between the outlet and the nearest assessment drain, natural watercourse, slough, or lake. The notice requirement in this section must be waived if the applicant presents signed, notarized letters of approval from all downstream landowners entitled to notice in this subsection."

Renumber accordingly

April 15, 2019

1320

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PROPOSED AMENDMENTS TO ENGROSSED SENATE BILL NO. 2358

That the House recede from its amendments as printed on pages 1169 and 1170 of the Senate Journal and pages 1267 and 1268 of the House Journal and that Engrossed Senate Bill No. 2358 be amended as follows:

Page 1, line 1, after "A BILL" replace the remainder of the bill with "for an Act to amend and reenact section 40-33-16, subsections 11 and 27 of section 61-24-08, subdivision b of subsection 2 of section 61-32-03.1, and subsection 8 of section 61-39-05 of the North Dakota Century Code, relating to Red River valley water supply project contract terms, elimination of voter approval requirements, and notice of proposed subsurface water management systems.

BE IT ENACTED BY THE LEGISLATIVE ASSEMBLY OF NORTH DAKOTA:

SECTION 1. AMENDMENT. Section 40-33-16 of the North Dakota Century Code is amended and reenacted as follows:

40-33-16. Municipality may purchase water for distribution.

1. Any city owning a system for the distribution of water for fire protection and other public purposes and for selling water to its inhabitants and industries, but for which the water supply is unsuitable or inadequate, may contract to purchase water at wholesale for ~~such~~ those purposes from any person, firm, public or private corporation, or limited liability company able and willing to furnish the same, upon ~~such~~ the terms and during ~~such~~ the period, not exceeding forty years, as the city governing body ~~shall deem~~ deems appropriate. ~~Any such~~ The contract ~~shall~~ must be authorized by an ordinance submitted to the voters for approval by a majority of those voting on the proposition before it takes effect. ~~In and by such~~ Pursuant to the ordinance and contract, the city may bind itself:
 1. ~~a.~~ To establish and maintain rates and charges for supplying water by it to its inhabitants and industries, either according to a prescribed schedule agreed upon or sufficient to produce net stated amounts for specified periods during the life of the contract, or both, and to appropriate and use the same for payments to become due under the contract, and, if the contract so provides, the city ~~shall be~~ is obligated to pay for ~~such~~ the water solely out of ~~such~~ the net revenues;
 2. ~~b.~~ To pay, at an agreed rate or rates, for all water taken by the city under ~~such~~ the contract and not resold by it; and
 3. ~~c.~~ To do and perform any other acts or things ~~which, in the discretion of the governing body, are deemed~~ deems reasonable and appropriate for the procurement of ~~such~~ the water on the most efficient and economical basis.

2. Notwithstanding subsection 1, contracts to purchase water from the water supply system created by the Red River valley water supply project may have a term exceeding forty years and, if executed in relation to the initial construction of the system, need not be submitted to the voters for approval.
3. If any payments under any contract are to be made solely out of net revenues, the contract may fix and prescribe the method or basis on which net revenues are to be computed.

SECTION 2. AMENDMENT. Subsection 11 of section 61-24-08 of the North Dakota Century Code is amended and reenacted as follows:

11. To operate and maintain or to contract for the operation and maintenance of water supply and irrigation works serving lands and uses within or outside the district, and in connection therewith, to maintain a reserve fund to meet major unforeseen costs of operation and maintenance. The acquisition, construction, operation, and maintenance of dams, reservoirs, ground water storage areas, canals, conduits, pipelines, tunnels, and any other plants, works, facilities, improvements, or property necessary to operate or maintain water supply or irrigation works under this section are exempt from any requirements for voter approval.

SECTION 3. AMENDMENT. Subsection 27 of section 61-24-08 of the North Dakota Century Code is amended and reenacted as follows:

27. To enter water service contracts with municipalities, water districts, or other political subdivisions in this state and public utilities in Minnesota as part of the Red River valley water supply project, regardless of whether the acquisition, construction, or reconstruction of any Red River valley water supply project is actually completed and whether water actually is delivered under the contracts. These contracts with cities and water districts are authorized to be executed without limitation on term of years notwithstanding any limitation to the contrary and, if the contracts are executed in relation to the initial construction of the system, without voter approval.

SECTION 4. AMENDMENT. Subdivision b of subsection 2 of section 61-32-03.1 of the North Dakota Century Code is amended and reenacted as follows:

- b. Upon submission of a completed application for a permit, the water resource district board immediately shall give notice and a copy of the submission via certified mail to each owner of land within one mile [1.61 kilometers] downstream of the proposed subsurface water management system outlet unless the distance to the nearest waterway depicted as a perennial or intermittent stream or river on a United States geological survey topography map, assessment drain, natural watercourse, slough, or lake is less than one mile [1.61 kilometers], in which case notice and a copy of the submission must be given immediately to each owner of land between the outlet and the nearest assessment drain, natural watercourse, slough, or lake. The notice requirement in this section must be waived if the applicant presents signed, notarized letters of approval from all downstream landowners entitled to notice in this subsection.

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SECTION 5. AMENDMENT. Subsection 8 of section 61-39-05 of the North Dakota Century Code is amended and reenacted as follows:

8. Enter ~~a contract or contracts~~ to provide for a supply of bulk water from the Garrison Diversion Conservancy District which ~~contract or contracts~~ may provide for payments to fund some or all of the Garrison Diversion Conservancy District's costs of acquiring, designing, constructing, or reconstructing one or more features of a Red River valley water supply project, ~~which project the that the~~ Garrison Diversion Conservancy District may acquire, design, construct, improve, and own, as well as the Garrison Diversion Conservancy District's costs of operating and maintaining one or more Red River valley water supply projects, whether the acquisition, construction, or reconstruction of any Red River valley water supply project actually is completed and whether water actually is delivered pursuant to the ~~contract or contracts, and which contract or contracts the Garrison Diversion Conservancy District may execute.~~ Contracts executed under this subsection may be executed without limitation on the term of years and, if executed in relation to the initial construction of the system, need not be submitted to the voters for approval."

Renumber accordingly