

Drainage Matters

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Drainage



- 160.19 Drainage Ditch Crossing Railroad Right-of-Way
- 160.191 [Repealed, 1959 c 500 art 6 s 13]
- 160.20 Drainage.
- 160.201 Public Road Ditches.
- 161.28 Drainage System Affecting Trunk Highway.
- 163.111 Drainage Facility, Vacation.
- 163.17 Drainage System Affecting Highway; Alteration.

Drainage Ditch Crossing Railroad Right-of-Way (Minn. Stat. § 160.19)

- When a road authority constructs a drainage ditch to drain a highway over lands acquired for that purpose and the ditch crosses the right-of-way of any railroad, it shall be the duty of the railroad company upon demand of the road authority to forthwith carry the ditch under and across its right-of-way. The cost of carrying the ditch under or across the railroad shall be divided proportionately between the road authority and the railroad company on the basis of benefits accruing to each. Nothing in this section shall apply to or affect a county ditch, judicial ditch, or public drainage system.



Rail Road Bridges and Crossings



- The Federal Railroad Safety Act (“FRSA”), 49 U.S.C. § 20101 *et seq.*, mandated that the secretary of Transportation to prescribe regulations for railroad safety. (§ 20103(a)).
- The regulations require “each drainage or other water carrying facility under or immediately adjacent to the roadbed shall be maintained and kept free from obstruction, to accommodate expected water flow for the area concerned.” (49 CFR § 213.33)

Construction And Maintenance Of Bridges And Culverts (Minn. Stat. § 103E.525)

- A public or private bridge or culvert may not be constructed or maintained across or in a drainage system with less hydraulic capacity than specified in the detailed survey report, except with the written approval of the director. If the detailed survey report does not specify the hydraulic capacity, a public or private bridge or culvert in or across a drainage system ditch may not be constructed without the director's approval of the hydraulic capacity.
- Bridges and culverts on public roads required by the construction or improvement of a drainage project or system must be constructed and maintained by the road authority responsible for keeping the road in repair, except as provided in this section.



More on Minn. Stat. § 103E.525

- If required by a drainage project, the auditor must notify the state and each railroad company, corporation, or political subdivision that they are to construct a required bridge or culvert on a road or right-of-way under their jurisdiction, within a reasonable time as stated in the notice. Minn. Stat. § 103E.525, subd. 3. If the work is not done within the prescribed time, the drainage authority may order the bridge or culvert constructed as part of the drainage project construction. Minn. Stat. § 103E.525, subd. 3. The cost must be deducted from the damages awarded to the authority or collected from it as an assessment for benefits. Minn. Stat. § 103E.525, subd. 3. If the detailed survey report or viewers' report shows that the construction of the bridge or culvert is necessary, the drainage authority may, by order, retain an amount to secure the construction of the bridge or culvert from amounts to be paid to a railroad, corporation, or political subdivision. Minn. Stat. § 103E.525, subd. 3.

What is the Road Authority's Obligation

- On one hand, the drainage code says that the drainage authority can require the road authority to install the crossing. On the other hand, it says that if the road authority does not install the crossing and the drainage authority does so, the cost gets deducted from damages awarded to the road authority.
- *In re Red Lake Watershed Project # 119*, 1997 WL881169 No. C5-97-1900 (Minn. Ct. App. May 5, 1997), an unreported case from the 1997 Minnesota Court of Appeals, did discuss the issue of cost apportionment.
- *Town of Lisbon v. Yellow Medicine & Lac Qui Parle Ctys.*, 172 N.W. 125, 127 (Minn. 1919)
- *In re Judicial Ditch No. 24*, 200 N.W. 816, 817 (Minn. 1924)

Timing Matters

- when and how a culvert or bridge came to be in or across a drainage system is important. For example, highway bridges and culverts constructed on a drainage system established on or after March 25, 1947, must be maintained by the road authority charged with the duty of maintenance. Minn. Stat. § 103E.701, subd. 4(a). We believe this relates back to provisions of the code allowing for the payment of damages for the original construction of such bridges and culverts. Once the bridge was paid for in the first instance, by the award of damages in the drainage proceeding, it becomes a work of the road authority and must be maintained like any other bridge or culvert on the highway.
- March 25, 1947 was the effective date of the “act relating to public drainage systems,” which repealed Minn. Stat. §§ 105.13–.36, 106.01–.79, 106.81–.93 (1945). 1947 Minn. Laws. ch. 143. This legislation took out any express language regarding construction costs with regard to construction of a drainage project such as a bridge or culver, for example. In Minn. Stat. § 106.20 (1945), the law stated that “the cost of construction and maintenance of bridges heretofore or hereafter constructed across any such drainage system . . . shall be paid for and borne. . . .” After March 25, 1947, however, this language was removed.

Timing Still Matters

- For bridges and culverts on a drainage system established before March 25, 1947, we typically investigate to determine whether the culvert or bridge was included in the original construction of the drainage system. If it was, then our opinion is that the drainage system should pay for its replacement. If it was not, then we presume it was added after construction by the road authority as part of road construction and the maintenance obligation remains with the road authority.
- The code allows the drainage authority to exercise some discretion regarding the maintenance of bridges and culverts. For a repair of a drainage system that has had redetermination of benefits, the drainage authority may repair or rebuild existing bridges or culverts on town and home rule charter and statutory city roads constructed as part of the drainage system and any portion of the cost may be paid by the drainage system. By the plain terms of the statute, the repair is limited to township and city road culverts and bridges.

Addressing Culvert, Bridge, and Crossing Issues as Obstructions

- The drainage code prohibits the obstruction of a drainage system. Minn. Stat. § 103E.075, subd. 1. We are of the opinion that obstructions include not only materials, structures, and conditions in the ditch or tile preventing the flow of water, but also structures, materials and conditions preventing access to the drainage system for the statutorily mandated inspection and maintenance. Installation of bridges or culverts of insufficient hydraulic capacity can also be considered an obstruction. Minn. Stat. § 103E.075, subd. 1. Thus, a failing or deteriorated bridge or culvert, improperly installed (grade or elevation) or sized culvert, or a roadway constructed over a drainage system can create an obstruction.
- If the drainage authority determines that a drainage system has been obstructed, the board is required to notify the entity responsible for the obstruction as soon as possible and direct removal of the obstruction. Minn. Stat. § 103E.075, subd. 1. The responsible party may show the board why the obstruction should not be removed through a “show cause” hearing which may be done at time and location set in the notice given to the entity from the drainage authority. Minn. Stat. § 103E.075, subd. 1.

Tile Crossings Under Public Roadways

- There are two instances under which a tile will cross under a public road: (1) tile installation predates the road; or (2) the tile was installed under the road. In the first instance, unless clearly reflected in the drainage system or road establishment records, the road can be considered an obstruction of the drainage system and the drainage authority holds leverage over the road authority for the removal of the obstruction or repair of the crossing. Minn. Stat. § 103E.075, subd. 1.
- The second instance creates competing interests between the road and drainage system. General road authority law (Minn. Stat. § 160.20) allows the road authority to regulate the crossing of a public highway with a drainage tile. When a public system is established, such crossings are usually paid for by the drainage system as they are intrusions into already established infrastructure. Like the installation of culverts, it is often a practice to allow the road authority to install the crossing since a poor installation will impair the roadway

Altering Public Drainage Ditch by Trunk Highway (Minn. Stat. § 161.28)

- Upon petition of the commissioner containing a plan showing in detail the alteration or change
 - advantageous or desirable in the construction or maintenance of a trunk highway
 - minor alteration or change in a public drainage system directly affecting a trunk highway
 - will not affect the functioning or efficiency of the public drainage system
- Requires a noticed hearing of the Drainage Authority and Approval
- If and to the extent approved, the commissioner may proceed at the sole cost and expense of the state
- As built is required upon completion – record modification of drainage system
- State is subject to claims for additional damages caused by the alteration or change for a period of six years after completion of the work



Drainage System Affecting County Highway; Alteration (Minn. Stat. § 163.17)

- Upon resolution of the County Board, filed either with auditor or district court, containing a plan showing in detail the alteration or change
 - advantageous or desirable in the construction or maintenance of a highway
 - minor alteration or change in a public drainage system directly affecting a highway
 - will not affect the functioning or efficiency of the public drainage system
- Requires a noticed hearing of the Drainage Authority or Court and Approval
- If and to the extent approved, the county may proceed at the sole cost and expense of the county
- As built is required upon completion – record modification of drainage system
- No provision for additional damage claims

160.191 [Repealed, 1959 c 500 art 6 s 13]

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160.191 NATURAL DRAINAGE OF LANDS, CONNECTION WITH ROAD DRAINAGE DITCHES. Subdivision 1. When the course of natural drainage of any land runs to a public highway, the owner of such land shall have the right to enter upon the highway for the purpose of connecting his drain or ditch with any drain or ditch constructed along or across the highway, but before making such connections he shall first obtain a written permit for such connections from the highway authority having jurisdiction. Such connections shall be made in accordance with specifications set forth in such permits. The road authority shall have power to prescribe and enforce reasonable rules and regulations with reference to such connections. The highway shall be left in as good condition in every way as it was before the connection was made.

Subd. 2. If any person desires during construction or reconstruction of a highway to install a tile drain for agricultural benefits in a natural drainage line in lands adjacent to any public highway, and if a satisfactory outlet cannot be secured on the upper side of the right of way, and the tile line must be projected across the right of way to a suitable outlet, the expense of both material and labor used in installing the tile drain across the roadbed shall be paid from funds available for the roads affected. The highway department, or other governing body having jurisdiction over such roads shall install, during construction through the roadbed, a conduit of proper size and depth to satisfactorily provide for present and proposed future sub-surface agricultural drainage. This subdivision shall only apply to highways constructed or reconstructed after July 1, 1957.

[1957 c 948 s 20]

Connecting Drains to Highway Drains (Minn. Stat. § 160.20, subd. 1)

- When the course of natural drainage of any land runs to a highway, the owner of the land shall have the right to enter upon the highway for the purpose of connecting a drain or ditch with any drain or ditch constructed along or across the highway
- Shall first obtain a written permit for the connections from the road authority having jurisdiction.
- The connections shall be made in accordance with specifications set forth in the permits.
- The road authority shall have power to prescribe and enforce reasonable rules and regulations with reference to the connections.
- The highway shall be left in as good condition in every way as it was before the connection was made

Constructing Tile Drain Across Highway (Minn. Stat. § 160.20, subd. 2)

- If any person desires during construction or reconstruction of a highway to install a tile drain for agricultural benefits in a natural drainage line in lands adjacent to any highway, and if a satisfactory outlet cannot be secured on the upper side of the right-of-way and the tile line must be projected across the right-of-way to a suitable outlet, the expense of both material and labor used in installing the tile drain across the roadbed shall be paid from funds available for the roads affected provided the road authority is notified of the necessity of the tile drain in advance of the construction of the roadbed so that the drain may be placed and the roadbed constructed in the same operation

Installing Drain Tile Along or Across Highway (Minn. Stat. § 160.20, subd. 3)

- When the course of natural drainage of any land runs to a highway, the owner of the land who has been granted a permit may install drain tile along or across the highway right-of-way along the general course of the natural drainageway
- There may be no diversion of drainage waters away from the natural receiving drainageway immediately downstream from the highway
- Any installation shall be made in accordance with specifications set forth in the permit and any rules that apply to the installations
- When any installation is made pursuant to this subdivision the highway shall be left in as good condition in every respect as it was before the installation was made

Conditions for Road Authority Permits (Minn. Stat. § 160.20, subd. 4)

- A road authority may accept applications for permits for installation of drain tile along or across the right-of-way under its jurisdiction
 - The road authority may adopt reasonable rules for the installations and may require a bond before granting a permit
 - Permits for installation along a highway right-of-way must ensure that the length of the installation is restricted to the minimum necessary to achieve the desired agricultural benefits
 - A permit must not allow open trenches to be left on the right-of-way after installation of the drain tile is completed
 - A road authority that grants a permit for tile drain installation is not responsible for damage to that installation resulting from the action of the authority or any other permittee utilizing the right-of-way.
- A person who installs drain tile along or across a highway right-of-way without obtaining a permit as provided in this section is guilty of a misdemeanor

Exercise of Discretion

- **The biggest concern of the County Board.**
- the decision to maintain, how to maintain and when to maintain your public road ditches (or the roads for that matter) is 100% discretionary on the Road Authority (usually acting on the advice of its highway engineer). It is beneficial to have policy that provides some criteria for the Road Authority to consider. However, there is no statutory obligation to maintain nor any statutory definition of what is considered “in need of maintenance”.
- Roads, and their ditches, are one of those health, safety and welfare issues when it comes to maintenance. The Road Authority assumes risk, as with anything, when it lets conditions become unsafe or harmful to the traveling public or to adjacent lands. It is not a requirement that you keep your road ditches flowing or bone dry. They can hold water. A landowner can request, but not demand that the road ditch be maintained. The Road Authority is entitled to a level of immunity from lawsuit for discretionary decisions, like the maintenance of a road ditch, so long as the exercise of discretion is reasonable and so long as the exercise of discretion indicates a consideration of relevant policy factors.
- The main issues are (1) is the lack of maintenance harmful to the road and (2) does the lack of maintenance cause an objective harm to public or private interests adjacent to the roadway (i.e. a blocked culvert or obstructed ditch). Even if the answers to these questions are yes, the Road Authority may still limit the scope or timing of the repair or maintenance based on policy factors and an exercise of reasonable discretion.

Records (103E.101)

- The auditor shall keep all orders, exhibits, maps, charts, profiles, plats, plans, specifications, and records of the proceedings. These records may not be removed except when the board makes a written order to remove them. The auditor shall keep an accurate index of the proceedings and related documents in a readily usable, resilient, and secure manner.
- Field notes made by the engineer must be entered in bound field books and preserved by the engineer until they are filed with the auditor. (.271)

Reestablishing Records (103E.101)

- If, after thorough investigation of drainage system records, a drainage authority finds that records establishing the alignment, cross-section, profile, or right-of-way of a drainage system that it administers are lost, destroyed, or otherwise incomplete, it may, by order, reestablish records defining the alignment; cross-section; profile; hydraulic structure locations, materials, dimensions, and elevations; or right-of-way of the drainage system as originally constructed or subsequently improved.
- The correction of records may be initiated by the drainage authority on its own motion or be petitioned by any party affected by the drainage system.
- If the system is under the jurisdiction of a county board, the petition must be filed with the auditor. If the system is under the jurisdiction of a joint county drainage authority, the petition must be filed with the auditor of the county with the largest area of property in the drainage system.

More on Records (103E.101)

- County boards shall provide necessary filing and storage facilities to protect the files and records of all proceedings under its jurisdiction. The county boards may provide for the copying and filing of the documents and records of proceedings by photographic devices. In the event of loss of the originals, the photographic copies are originals after authentication by the auditor.

Inspection Requirement

- After the construction of a drainage system has been completed, the drainage authority shall . . . have the drainage system inspected on a regular basis by an inspection committee of the drainage authority or a drainage inspector appointed by the drainage authority.
- Inspection shall include the permanent strips of perennial vegetation.
- Open drainage ditches shall be inspected at a minimum of every five years when no grass strip violation is found and annually when a grass strip violation is found, until one year after the violation is corrected.

Right of Entry

- The engineer, the engineer's assistants, the viewers, and the viewers' assistants may enter any property to make a survey, locate a drain, examine the property, or estimate the benefits and damages. Minn. Stat. §103E.061
- It is a good practice to notify landowners before lawful entry, to document the entry and conditions, to document any damage caused during entry and to seek the assistance of the Sherriff if a landowner objects to entry, interferes with entry or demands departure.

Right of Entry

- The inspector's right of entry is based on 103E.705 which states that "the drainage authority shall have the drainage system inspected on a regular basis by an inspection committee of the drainage authority or a drainage inspector appointed by the drainage authority."
 - This obligation is reinforced by the recent court of appeals case Blaine v. City of Sartell, 865 N.W.2d 723 (Minn. Ct. App. 2015), which states that the inspection requirement is statutorily mandated. In this case, the drainage authority has ongoing work to repair the drainage system. It would be a difficult argument that the inspector is not allowed to enter property to inspect the system – so long as that entry and inspection does not cause damage.
- Moreover, to be guilty of a criminal trespass, a person must intentionally trespass (enter) on the premises of another and, without claim of right, refuse to depart from the premises on demand of the lawful possessor. Minn. Stat. §609.605, subd. 1(b)(3).

Right of Way

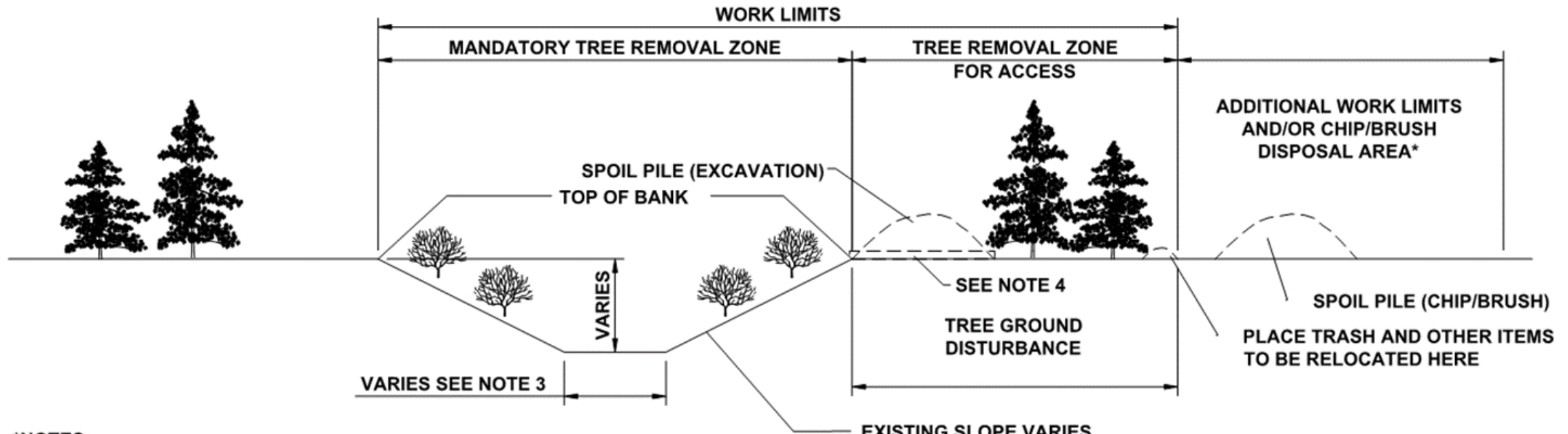
- Drainage code procedures invoke eminent domain powers – when a new drainage project is established, the drainage authority acquires an easement for construction and future maintenance of the project
- Damages are awarded by the viewers for the area occupied by the project and for temporary damages for construction and future maintenance
- Engineer's report should describe the easement area needed for construction and for future maintenance
- The easement area includes the area physically occupied by the drainage system along with the area impacted by construction, including areas cleared and grubbed of trees and the area over which the spoils were spread and leveled

Right of Way

- The Establishment Order carries with it certain secondary rights needed to enable the Drainage Authority to carry out its statutory functions. In Minnesota, these rights are described as secondary easements
- Every easement includes the implied right to do whatever is reasonably necessary in order to fully enjoy the easement itself. This implicit right is termed a secondary easement
- Secondary easements are so necessary to the exercise of other interests in the property as to constitute an essential part or element of those other interests
- The scope of a secondary easement is limited by reasonableness. Reasonableness has been held to include ingress and egress and the maintenance of vegetation outside the physical footprint of the ditch or easement area

Right of Way

- Maintenance or repair of a drainage system does not usually involve an award of damages since a repair will not affect the land through which the ditch flows other than the damage occasioned by the original establishment of the ditch for which the landowners presumably were fully compensated at the time of establishment. Johnson v. Steele Cty., 240 Minn. 154, 158, 60 N.W.2d 32, 36 (1953).
- Repair may include resloping ditches, incorporating multistage ditch cross-section, leveling spoil banks, installing erosion control, or removing trees. The drainage authority must appoint viewers to assess and report on damages and benefits if it determines that the resloping, incorporation of a multistage ditch cross-section, spoil bank leveling, installation of erosion control measures, or tree removal **will require the taking of any property not contemplated and included in the proceeding for the establishment or subsequent improvement of the drainage system**



***NOTES:**

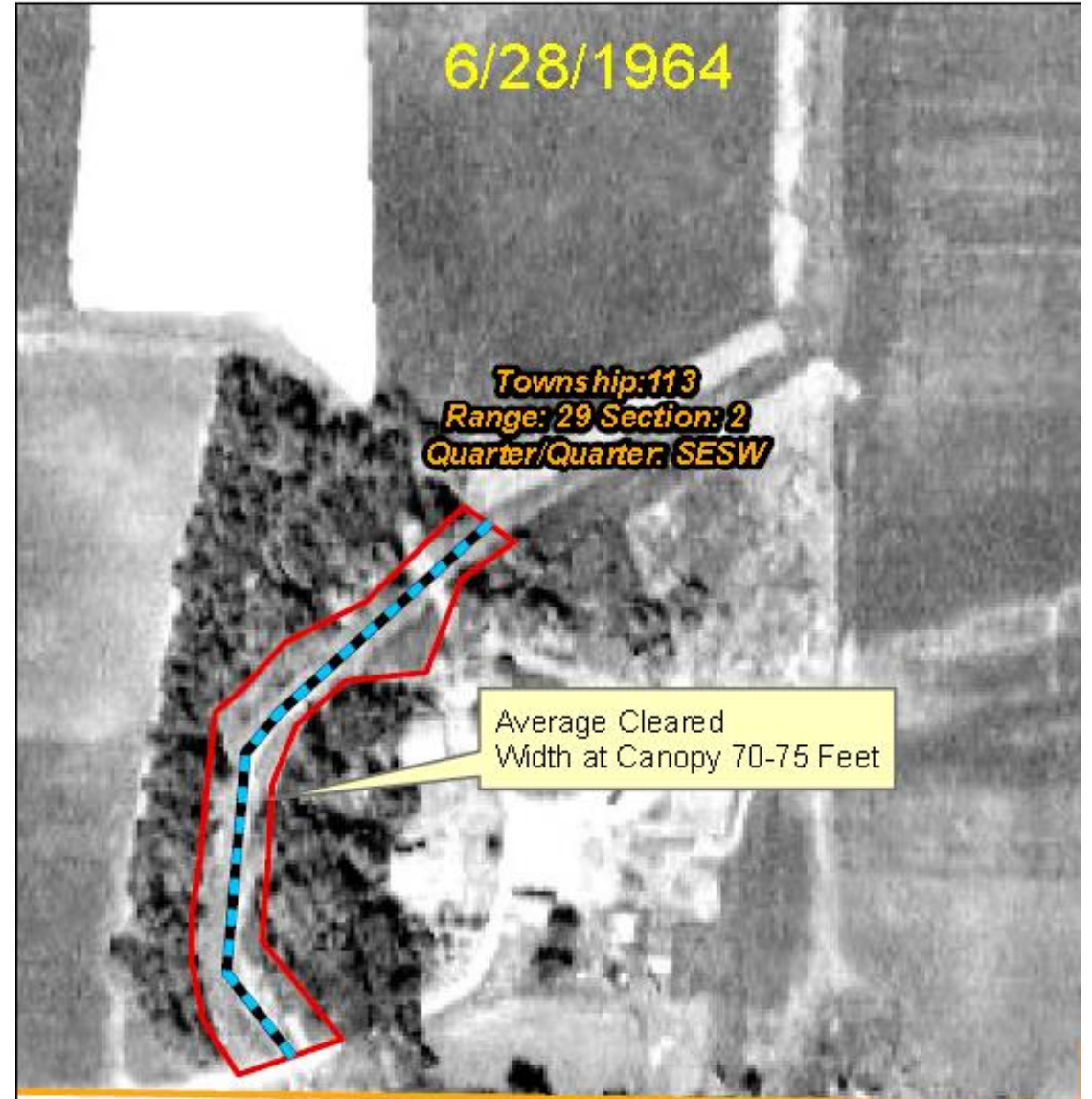
- 1) WORK LIMITS EXTEND FROM TOP OF BANK TO WORK LIMIT STAKES, ON THE DITCH SIDE NOTED IN THE PLANS.
- 2) ADDITIONAL AREA ALONG THE WORK LIMITS WILL BE UTILIZED FOR ADDITIONAL WORK LIMITS AND DISPOSAL OF CHIPS AND BRUSH WHERE APPROVED BY ENGINEER.
- 3) MATCH EXISTING OR EXCAVATE ACCORDING TO BOTTOM WIDTH TABLES
- 4) LEAVE SIDE INLET SWALE OR INSTALL SIDE INLET PIPE IN LOW AREAS TO PROVIDE DRAINAGE AND AS DIRECTED BY ENGINEER

DITCH CORRIDOR "WORK LIMITS"
NOT TO SCALE

Evidence Matters

- The District Court established Lateral G of JD 18 by order dated September 12, 1958.
- The court established Lateral G “according to the Engineer’s Report made and filed, and as amended.”
- The engineer’s report for the construction of Lateral G described the nature of the project as follows:
 - It is proposed to construct open ditches with four foot bottoms and 1 ½ to 1 slopes. Trees and debris on the right-of-way shall be disposed of. Spoil material shall be leveled to 10 to 1 slopes except through the grove in the SE ¼ of SW ¼ Section 2, T113N R29W where it is proposed to level the spoil bank to 4 to 1 slopes.
- Specifications for the construction called for the clearing and grubbing of the entire right-of-way of the ditch. All brush, timber, stumps, rocks and all other debris within the area of the leveling of the waste banks was to be disposed of by burning or burying. The contractor was instructed to “remove all bridges, trees, stumps, rocks, brush, culverts and other obstruction within the right-of-way.”.

Evidence Matters



Questions?



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