

Testimony by Doug Zink
Foster County Water Resource District Vice Chair
Before the Senate Political Subdivisions Committee
In Favor of SB 2324

March 10, 2021

~~Chairman Klemm~~^{Dockter} and members of the House Political Subdivisions, my name is Doug Zink. I am a farmer and landowner in Foster County, and Vice Chair of the Foster County Water Resource District and Chairman of the Tri-County Resource District comprising of Foster, Eddy, and Wells counties. I am testifying today in support of SB 2324, and to provide you examples that show why the current statute needs your help.

First, I want to acknowledge that you have a difficult task at hand: balancing the interests of private property owners with the interests of the public road authorities. The right management of water is necessary to accommodate frequent flooding, prevent damage to roads, bridges, and other infrastructure, all while ensuring property rights are protected from unreasonable flooding.

Second, I'd like to point out some aspects of current law. The Department of Transportation, county boards, and township boards, all acting as their respective road authorities' roles, have sole power over and responsibility for culverts through their roadways. The only exception is for culverts accommodating legal assessment drains.

North Dakota law has always required road authorities to design roads so as to permit the watershed that encounters the roadway to cross in a reasonable amount of time without overflowing onto upstream, adjacent land. The courts have said that this is what the constitution requires, unless the road authority buys a flowage easement from the landowner.

In 1953, the legislature put this requirement in statute and adopted Century Code section 24-03-06. In 1999, the legislature delegated authority to the Department of Transportation and State Water Commission to develop standards for calculating the reasonable discharge at road crossings—called, “the stream crossing standards.” The standards provide road authorities with certainty that, if

they follow the standard, they will be protected from liability for damages caused at the crossing to adjacent landowners. The legislature made a deal with road authorities: if you follow the stream crossing standard, we will protect you from liability.

Unfortunately, the road authority is not following the current law. I have some examples to share with you in my home county.

SB 2324 does not transfer any authority away from local townships and counties to the State Engineer. The current law already requires road authorities to install a culvert meeting the stream crossing standards upon notification from the state engineer. One can read the existing law on Line 15 of the bill which says "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.

SB2324 does not add any unfunded mandates. The bill doesn't mandate anything new. Current law requires the road authority to follow the stream crossing standards. Unfortunately, some road authorities are ignoring current law. Those following current law will be unaffected by this bill. But those that do not follow current law, could end up paying attorneys' fees if they do not have "just cause" for using the stream crossing standards.

As I said, balancing the interests of the public road authority, limited budgets for roadway infrastructure, and private property rights is always a challenge. I believe the intent behind SD 2324 is not to ask you to change the current law, but to strengthen it.

Thank you, and I stand for questions from the Committee.