

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

**February 12, 2021**

Chairman Burckhard, Vice Chairman Anderson, and members of the Senate Political Subdivisions Committee, my name is Doug Zink. I am a farmer and landowner in Foster County, and Vice Chair of the Foster County Water Resource District. I am testifying today in support of SB 2324, and to provide you of 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.

Current law allows a majority of landowners affected or the local water board to request the State Engineer conduct a stream crossing study and provide the discharge rate to the road authority. This discharge rate can be used by an engineer to calculate the appropriate culvert size. The very statute this bill seeks to amend (24-03-08) already states that “upon notification of the determination, [the road authority] 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.”

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

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 SB 2324 is not to ask you to change the current law, but to strengthen it.

SB 2324 could be improved even more:

First, on Line 15, do not change the word "When" to "If." The word "If" implies that the State Engineer may elect when and when not to do a crossing determination.

Second, similar to current statute provisions for condemnation law, a party who has to bring legal action to enforce the current law should be entitled to reasonable attorneys' fees. In order to balance the public's budget interests, I propose an amendment to the bill that allows recovery of attorneys' fees upon successful enforcement of this statute if the road authority fails to install a culvert or bridge of sufficient capacity within one-year of notification.

"The department, county, or township's failure to install a culvert or a bridge of sufficient capacity within one-year of notification of the determination shall be considered a willful violation of this section, and the court shall award a party the reasonable expenses of maintaining an action to enforce this section against the department, county, or township, including reasonable attorneys' fees.

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