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1. DITCH—JOINT BOARD OF COUNTY COMMISSIONERS OF JOINT COUNTY DITCH PROJECT—MAY DESIGNATE COUNTY ENGINEER IN ANY ONE OF COUNTIES INTERESTED, TO SURVEY AND DO NECESSARY FIELD WORK.
2. WHERE NO AGREEMENT ON ONE OF SUCH ENGINEERS, COUNTY ENGINEER OF COUNTY IN WHICH PETITION FOR PROJECT IS FILED, MUST MAKE SURVEY AND DO FIELD WORK.
3. NO AUTHORITY TO EMPLOY ANY OTHER ENGINEER.
4. WHERE DITCH OBSTRUCTED AND WATER BACKED UP AND OVERFLOWED LANDS IN ANOTHER WATERSHED—LANDS NOT BENEFITED BY CONSTRUCTION OF DITCH CANNOT BE ASSESSED A PART OF COST OF REMOVAL OF SUCH OBSTRUCTION AND CLEANING OF DITCH.

## SYLLABUS:

1. The joint board of county commissioners of a joint county ditch project may designate the county engineer of any one of the counties interested in said project to do surveying and field work necessary for such project.

2. If said board does not agree on one of such county engineers to do such work, the county engineer of the county in which the petition for the project is filed, must make such survey and do such field work.

3. Said board does not have the authority to employ any other engineer to make such survey or do such field work.

4. Where a county ditch has become obstructed, causing the water which naturally flowed through it to back up and overflow lands which lay in another watershed and do not drain into said ditch and which are not benefited by its construction, such lands cannot be assessed a part of the cost of the removal of said obstruction and the cleaning of said ditch.

Columbus, Ohio, June 5, 1943.

Hon. William J. Hunter, Prosecuting Attorney,  
Upper Sandusky, Ohio.

Dear Sir:

This will acknowledge receipt of your request for my opinion which reads as follows:

"The Joint Board of County Commissioners of Hancock and Wyandot Counties request your Opinion on questions arising in a ditch proceeding as follows:

1. When a ditch petition has been filed on a Joint County ditch improvement project, is it mandatory on the part of the Joint Board to engage the services of the County Engineer of either Hancock or Wyandot Counties to do the surveying on this ditch project or may the Joint Board employ a competent surveyor of their own choice to do the engineering work?

2. If an outside surveyor may be so employed does the County Engineer have any control over the proceedings or any responsibility in connection with the engineering reports filed with the Joint Board on such a ditch project?

3. Where an established Joint County drainage ditch has become obstructed or plugged so that the water which would normally drain through it is forced to overflow onto the lands which lie in another established drainage area, can assessments be made against the land which lies in such other established drainage area even though said lands would not be affected except for the obstruction which causes the overflow from the separate and independent drainage project? Can such lands lying outside of the drainage area established by the Joint County ditch project be assessed for the cost of improving and cleaning out the Joint County ditch even though such outside lands may benefit some by the project which removes the obstruction thereby preventing the water from overflowing onto a different water shed? Said lands which lie in a different established drainage area have already been assessed in establishing and maintaining a drainage system

within their own area and they can now again be assessed for a project which lies entirely within a different drainage area but which affects them by reason of the fact that obstructions have caused water to flow from one drainage area to another?"

Your first question is answered by Section 6541 of the General Code which provides:

"If the joint board of county commissioners finds for the improvement and orders the surveyor to make a survey, reports and schedules, *the board may designate the surveyor of any one of the interested counties to do the field work, and make the survey and estimates*; but the surveyor of each county interested shall assist in making the reports and schedules; *if the joint board does not agree on a surveyor, the surveyor of the county in which the petition is filed shall do the field work and make the survey*. All the reports and schedules of the surveyor shall be signed and approved by all the surveyors of the several counties interested, and shall be filed with the auditor with whom the petition is filed; if the surveyors of the several counties interested do not concur in the reports or schedules, separate reports or schedules may be filed by one or more of such surveyors, and the costs thereof shall be paid the same as other surveyors' costs. In making up the schedules and reports the surveyors shall proceed to make such schedules and reports of such improvement the same as if the improvement were an improvement within a county of the size of the several counties interested in the proposed improvement. The surveyors who do not make the survey may make such observations and take such levels as they may deem necessary to assist them in making their schedules and in arriving at the proper amount to be assessed against each tract of land.

The surveyor who did the field work and made the survey shall let the contract, inspect the progress of the work, and make estimates and reports on the progress of the work, accept the work and material for the improvement, issue certificates therefor, as in single county improvements, and shall do all things to be done by a surveyor after the letting of the contracts."

(Emphasis the writer's.)

Section 2782-1, General Code, reads as follows:

"The title of county surveyor shall be changed to that of county engineer. Wherever the words 'county surveyor' are found in any section of the General Code, not herein amended or repealed, they shall, after the taking effect of this act, be read 'county engineer'."

In accordance with the foregoing, it is my opinion that the joint board of commissioners may designate either the Hancock County Engi-

neer or the Wyandot County Engineer to do the field work and make the survey and estimates required by your joint county ditch project but that if the joint board of commissioners does not agree that one of these county engineers shall do such work, then it is the mandatory duty of the county engineer of the county in which the petition for the project was filed to do said field work and make said survey. Therefore, the joint board of commissioners does not have the authority to employ any other surveyor to perform such duties.

In view of the answer to your first question, the condition upon which your second question is predicated cannot exist and consequently the question itself cannot arise.

Your third question involves a consideration of those sections of the General Code pertaining to the cleaning and repairing of drains and watercourses. In so far as is pertinent hereto, they read as follows :

Section 6691.

“In any township or townships in which a ditch, drain or watercourse or part thereof has been or may hereafter be located and constructed, the county commissioners for the purpose of keeping such ditches, drains or watercourses clean and in repair, may delegate such duty to the county surveyor who shall execute the necessary work and assess the cost thereof in accordance with the provisions of this chapter as they relate to the duties of a ditch supervisor, or employ a ditch supervisor for such township; \* \* \*

Where the term ditch supervisor is used in this chapter and the duties of ditch supervisor are being performed by the county surveyor, the term ‘ditch supervisor’ shall be construed to refer to county surveyor.”

Section 6693.

“The ditch supervisor shall have supervision of the cleaning out or repair of all ditches, drains or watercourses located and constructed in his township or townships, which have theretofore been located and constructed by township trustees, or by county commissioners as single county ditches, or by county commissioners as joint county ditches, and shall at all times be under the direction and control of the commissioners. The ditch supervisor is authorized to repair tile that are broken, uncovered, or stopped up; to open the outlet of tile; to repair any abutment, catch basin, or retaining wall that has been constructed on any ditch, drain or watercourse; and to clean out and keep ditches, drains or watercourses in repair as provided by law; \* \* \*”

## Section 6696.

"If the land benefited by the cleaning or repairing of a ditch, drain or watercourse is located in two or more townships in which there are different ditch supervisors, or is located in two or more counties, the ditch supervisors of the townships in which the land is located, as a joint board of ditch supervisors, shall do and perform all the work which may be done by a ditch supervisor on a ditch, drain, or watercourse, which drains land located only in his own township or townships. \* \* \*"

## Section 6697.

"The ditch supervisor or supervisors for the township or townships through which a ditch, drain or watercourse runs, for the purpose of cleaning it or keeping it in repair, shall divide it into working sections and apportion such sections to the owners of lands according to the benefits that will be received by such cleaning or repair, provided, however, on petition of the owners of two-thirds in amount of the apportionment of the work to clean out or repair any ditch, the ditch supervisor may cause the work to be done as a unit in accordance with sections 6700 and 6701 of this chapter, and shall apportion the costs of such work among the owners of land affected thereby, according to benefits. All working sections allotted to each owner shall be on, or as near as practicable to his land. The surveyor shall, if the ditch supervisor so requests and if so ordered by the commissioners, cooperate with the ditch supervisor in making the apportionment. When the ditch supervisor has completed the apportionment according to benefits, he shall file such apportionment with the auditor who shall file the same with the original papers of the improvement. \* \* \*"

From the foregoing it is evident that the land which you describe can be assessed a part of the cost of the cleaning and repairing of the ditch which has become obstructed only if said land is benefited by the work which is done.

I am unable to visualize any situation in which land which did not drain into a ditch as originally constructed and therefore was not benefited by it and could not have been assessed a part of the cost of such original construction can now be held to be benefited by the cleaning and repair of that same ditch.

The land lying in the second watershed is not servient to the land in the first and of course has no duty to receive water from the land in the first watershed. The only possible "benefit" to such land would consist in the removal of a damage caused by water it had no duty to receive.

In the case of *May v. Plymouth Township*, 10 N. P. (n. s.) 337, the Common Pleas Court of Richland County considered the question of whether land, the natural drainage of which was away from a proposed ditch cleaning improvement, was benefited by said improvement because said ditch would intercept and carry off water which would otherwise flow over said land. It was pointed out therein, as it is in your third question, that the ditch which was to be cleaned afforded no *direct* drainage to the property in question. In the opinion of the Court, beginning on page 342, it is stated:

“\* \* \* and it would also seem that where a ditch is constructed, which intercepts the waters of the dominant estate, but which offers no direct drainage to the servient estate, that the mere fact that waters, but for such intercepting ditch, would naturally flow off the dominant estate onto the servient estate, affords no sufficient reason to hold that the servient estate would be benefited by reason of such ditch. It is true that such ditch relieves to a greater or less extent, the burden that otherwise would naturally fall upon the servient estate, but this would be true of each parcel of land in the watershed lying below the intercepting ditch, and to ascertain the benefit to such possible lower servient estate by reason of the construction of said ditch would present a situation that in the end would be almost impossible of calculation, and would result possibly in a more inequitable ascertainment of benefits than would be to hold to a rule which was absolutely certain and which in a fair measure was consistent with the benefits to be derived. \* \* \*”

Specifically answering your third question, it is therefore my opinion that where a county ditch has become obstructed, causing the water which naturally flowed through it to back up and overflow lands which lay in another watershed and do not drain into said ditch and which are not benefited by its construction, such lands cannot be assessed a part of the cost of the removal of said obstruction and the cleaning of said ditch.

Respectfully,

THOMAS J. HERBERT,  
Attorney General.