

IN THE SUPREME COURT  
OF THE  
STATE OF SOUTH DAKOTA

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STATE OF SOUTH DAKOTA,  
DEPARTMENT OF GAME, FISH AND  
PARKS,

#27981

Appellant,

vs.

TROY TOWNSHIP, DAY COUNTY,  
SOUTH DAKOTA,

Appellee.

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STATE OF SOUTH DAKOTA,  
DEPARTMENT OF GAME, FISH AND  
PARKS,

#27982

Appellant,

vs.

TROY TOWNSHIP, DAY COUNTY,  
SOUTH DAKOTA,

Appellee.

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STATE OF SOUTH DAKOTA,  
DEPARTMENT OF GAME, FISH AND  
PARKS,

#27986

Appellant,

vs.

VALLEY TOWNSHIP, DAY COUNTY,  
SOUTH DAKOTA,

Appellee.

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STATE OF SOUTH DAKOTA,  
DEPARTMENT OF GAME, FISH AND  
PARKS,

#28008

Appellant,

vs.

BUTLER TOWNSHIP, DAY COUNTY,  
SOUTH DAKOTA,

Appellee.

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Appeal from the Circuit Court, Fifth Judicial Circuit  
Day County, South Dakota  
The Honorable Jon S. Flemmer  
Circuit Court Judge

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**APPELLANT'S BRIEF**

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Notices of Appeal were filed on August 26, 2016, September 14, 2016 and  
October 13, 2016

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**PRELIMINARY STATEMENT**

In this brief, Troy Township, Butler Township, and Valley Township, will be referred to collectively as “Townships,” or by the specific township name. Plaintiff and Appellant, State of South Dakota, Department of Game, Fish and Parks, will be referred to as “Department.” Additional references will be designated as follows:

- Day County Settled Record #14-42 and #14-48 (Troy Township).....SR1
- Day County Settled Record #14-50 (Valley Township).....SR2
- Day County Settled Record #14-51 (Butler Township) .....SR3

Citations to the specific Township Trial Transcript are denoted by the referenced Settled Record followed by “T” followed by the page number. References to the specific Township trial exhibits are designated by the specific Township Settled Record followed by “Exhibit.”

**JURISDICTIONAL STATEMENT**

This is a consolidated appeal taken from three Memorandum Decisions of the circuit court: 1) Troy Township, dated July 21, 2016, which affirmed in part and reversed in part the township’s decision to vacate public highways; 2) Valley Township, dated August 8, 2016, which affirmed the township’s decision to vacate public highways; and 3) Butler Township, dated and August 24, 2016, which affirmed the township’s decision to vacate public highways.

Department filed Notices of Appeal as follows: 1) Troy Township, filed on September 14<sup>th</sup>, 2016; 2) Valley Township, filed on August 26<sup>th</sup>, 2016; and 3) Butler Township, filed on October 13<sup>th</sup>, 2016.

## STATEMENT OF LEGAL ISSUES AND AUTHORITY

The broad issues before this Court are:

**A. Whether the circuit court erred when it placed the burden of proof on the Department at the *de novo* trials.**

The circuit court erred when it placed the burden of proof on the Department at the *de novo* trials.

**Relevant Cases:**

*Goos Rv Center v. Minnehaha County Comm'n*, 2009 S.D. 24, 764 N.W.2d 704  
*In the Matter of the Conditional Use Permit Denied to Mark Meier*, 2000 S.D. 80, 613 N.W.2d 523

**Relevant Statutes:**

SDCL 8-5-10  
SDCL 31-3-6  
SDCL 31-3-7

**B. Whether the circuit court erred by holding that vacating the public highways did not deny public access to a public resource.**

The circuit court erred by holding that vacating the public highways did not deny public access to a public resource.

**Relevant Cases**

*Parks v. Cooper*, 2004 S.D. 27, 676 N.W.2d 823  
*United Plainsmen Ass'n v. N.D. State Water Conservation Comm'n*, 247 N.W.2d 457 (N.D. 1976)  
*Shokal v. Dunn*, 109 Idaho 330, 707 P.2d 441 (1985)

**Relevant Statutes and Rules:**

SDCL 41-2-18  
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ARSD 74:51:02:01

**C. Whether the circuit court erred by holding that the public interest was better served by vacating the public highways.**

The circuit court did not conduct a *de novo* review and erred in holding that the public interest was better served by vacating the public highways.

**Relevant Cases:**

*Douville v. Christensen*, 2002 S.D. 33, 641 N.W. 2d 651  
*Willoughby v. Grim*, 1998 S.D. 68, 581 N.W.2d 165

**Relevant Statute:**

SDCL 31-3-6

**D. Whether the circuit court erred by holding that the Townships did not violate the due process rights of the Department and general public.**

The circuit court erred by holding that the Townships did not violate the due process rights of the Department and general public.

**Relevant Cases:**

*Daily v. City of Sioux Falls*, 2011 S.D. 48, 802 N.W.2d 905  
*Hanig v. City of Winner*, 2005 S.D. 10, 692 N.W.2d 202  
*Burns v. Kurtenbach*, 327 N.W.2d 636 (S.D. 1982)

**Relevant Constitutional Provisions and Statutes:**

U.S. CONST. AMEND. XIV, § 1  
S.D. CONST. ART. VI, § 2  
SDCL 8-3-4  
SDCL 8-3-15

**E. Whether the circuit court erred by holding that the Townships decisions were not arbitrary and capricious.**

The circuit court erred in holding that the Townships decisions were not arbitrary and capricious.

**Relevant Cases:**

*Certifiability of Jarman*, 2015 S.D. 8, 860 N.W.2d 1  
*Kirby v. Hoven School Dist.*, 2004 S.D. 100, 686 N.W.2d 905  
*Williams v. Wessington Tp.*, 70 S.D. 75, 14 N.W.2d 493 (1944)

**Relevant Statute:**

SDCL 31-3-6

## STATEMENT OF THE CASE AND FACTS

In 1871, the Dakota Territory Legislature passed an act, Chap. 33, Laws 1870-1871, accepting Congress's dedication of all section lines as highways. SR1 500. The South Dakota Code incorporated this legislative determination. *Douville v. Christensen*, 2002 S.D. 33, ¶11, 641 N.W.2d 651. Between 1876 and 1878, surveyors platted the section line public highways in all three townships in this appeal. SR1, Exhibit 1.

During the 2014 legislative session, Senate Bill 169 (SB 169) was introduced seeking to define which bodies of water would be open and accessible to the public. SR1, Exhibit 30. While a provision of SB 169 would have prohibited township boards from vacating public highways which provide access to public waters, it did not become law. Perceiving that the townships may lose their ability to prohibit access to bodies of water in the township, Appellees began proceedings to vacate public highways.

### **A. Troy Township**

#### **1. May 12, 2014, Petition for Vacation of Public Highway**

On April 24, 2014, the Troy Township Board met and listed highways in a petition to vacate public highways in Troy Township. SR1 182. Troy Township created the actual petition and Troy Township's clerk provided the petition to a township member for circulation. SR1 158. The petition signors were all related to members of the township board. SR1 T. 186-188. After the petition circulator obtained the signatures, it was presented to Troy Township board members, wherein they swore to the following:

“We, the undersigned, having been first duly sworn, on oath depose and say: That they have read the above and foregoing Petition and know the contents thereof; and that the same is true of their own knowledge, except as to matters therein stated upon information and belief, and as to such matters, they believe the same to be true.” SR1, Exhibit 19, Appendix pgs. 120-128.

The petition stated that “it would be in the best interest of the public that these portions of the section line highways be vacated.” SR1, Exhibit 19.

A hearing on the petition was held on May 27, 2014. SR1 T. 197. No petition signers were present. *Id.* The Department filed a letter with Troy Township objecting to vacating the public highways. SR1 Exhibit 8. Chris Hesla, Executive Secretary with the South Dakota Wildlife Federation, appeared at the May 27, 2014, hearing and objected to vacating the public highways. SR1 500. Troy Township “tabled” the motion only to readdress it on June 26, 2014, at which time the township voted to vacate the public highways. SR1, Exhibit 13. Although the “Notice of Hearing” for Township’s June 26, 2014 meeting referenced the prior hearing held on May 27, 2014, the notice did not list the highways it sought to vacate. *Id.* Further, the Affidavit of Publication failed to verify that the Notice of Hearing was published as required by law, since the affidavit was signed and sworn to prior to the second publication. SR1, Exhibit 22.

On August 5, 2014, the Department appealed Troy Township’s June 26, 2014 decision to vacate the public highways in Troy Township. SR1 1.

## **2. July 9, 2014, Petition for Vacation of Public Highways**

On July 7, 2014, Troy Township held a special meeting, placing additional highways on a petition to vacate. SR1, Exhibit 14. Notice of that special meeting was never published. SR1 T. 157. Once again, Troy Township created the petition, sought an individual to circulate the petition, and signed an affirmation under oath attesting to the truthfulness of the petition. SR1, Exhibit 20. Publication of the Notice was provided in the Reporter & Farmer, but the Affidavit of Publication was signed and sworn to prior to the second publication. SR1, Exhibit 21. The Department filed an objection to the

vacating of the public highways. SR1, Exhibit 9. The evening before the July 22, 2014 hearing, Troy Township held a special meeting, without notice, wherein they removed certain highways from the petition that provided access to public lands. SR1, Exhibit 15.

On July 22, 2014, Troy Township held its hearing, removing certain highways from the vacation list and passed a resolution to vacate other public highways. SR1 Exhibit 16. Steve Kjellsen and Jim Stoudt, residents of Watertown, South Dakota, attended the hearing and testified against the proposed vacations. SR1 T. 45, 50. After the hearing, Troy Township board member Thad Duerre summarized the true reasons for vacating public highways when he told Jim Stoudt, “[t]his is our land, these are our roads, this is our water and these are our fish and you’re not going to have access to them.” SR1 T. 53. On August 18, 2014, the Department appealed Troy Township’s decision to vacate public highways. SR1 1.

The two Troy Township appeals were combined for trial on September 24, 2015, in the Day County Courthouse in Webster, South Dakota. SR1 160. In its decision, the circuit court affirmed in part and reversed in part Troy Township’s decision to vacate public highways within Troy Township. SR1 504. This appeal follows.

**B. Valley Township**

Valley Township commenced three separate proceedings to vacate public highways. SR2, Exhibit 2. Only the proceedings to vacate public highways related to the July 21, 2014 petition are subject to this appeal. SR2, Exhibit 10.

The Valley Township board members decided which public highways to vacate. SR2 T. 29. Valley Township created the petition and provided it to a township resident to circulate. SR2 T. 28. After the petition was circulated, Valley Township board members executed an affirmation attesting to the truthfulness of the petition exactly as the Troy

Township board members referenced above. SR2, Exhibit 12. The Notice of Hearing on the petition was purportedly published in the Reporter and Farmer on July 28, 2014 and August 4, 2014. SR2, Exhibit 12. A hearing on the petition was held on August 5, 2014, wherein the Township decided to vacate the public highways in the petition. SR2, Exhibit 9.

No petition signers appeared at the hearing to provide testimony or evidence in support of the vacation petition. SR2 T. 18. The Notice of Hearing did not give an address, and instead indicated that the hearing would be held at the “Home of Brent Zimmerman.” SR2, Exhibit 12. The Affidavit of Publication failed to verify that the Notice of Hearing was published as required by law, since the affidavit was signed and sworn to prior to the second publication. SR2, Exhibit 12. The Department filed a letter with Valley Township objecting to the vacation of public highways. SR2, Exhibit 7. On August 26, 2014, the Department appealed Valley Township’s decision to vacate public highways. SR2 1.

A trial commenced on October 22, 2015, at the Day County Courthouse in Webster, South Dakota. SR2 117. At the commencement of trial, without waiving its due process and arbitrary and capricious arguments, the Department indicated that it would not contest that a public interest existed to vacate five sections of highway, listed as the third to seventh description in the resolution. SR2 T. 4-5, Exhibit 14. The circuit court affirmed Valley Township’s vacation of public highways. SR2 333. This appeal follows.

### **C. Butler Township**

On March 6, 2014, at Butler Township’s annual meeting, the board was advised that board member Wes Nolte had been contacted by Valley Township regarding the vacating of public highways. SR3, Exhibit 7. During Butler Township’s Board of

Equalization meeting on March 18, 2014, it discussed vacating public highways. SR3, Exhibit 8. On June 24, 2014, Butler Township further discussed vacating highways. SR3, Exhibit 9. After this meeting, Butler Township prepared a petition to vacate public highways and sought out an individual to circulate the petition. SR3 T. 26-27.

The Notice of Hearing on the petition was purportedly published in the Reporter and Farmer on August 4, 2014 and August 11, 2014. SR3, Exhibit 13. A hearing on the petition was held on August 11, 2014. SR3, Exhibit 10. The Affidavit of Publication fails to verify that the Notice of Hearing was published as required by law, since the affidavit was signed and sworn to prior to the second publication. SR3, Exhibit 13. Further, the purported second publication took place on August 11, 2014, the same day the hearing took place. SR3, Exhibit 13.

No petition signers appeared at the hearing. SR3 T. 29. The published Notice of Hearing failed to give an address for the hearing, only stating the hearing would be held at “Dennis Johnson’s shop.” SR3, Exhibit 13. The Department filed a letter with the Township objecting to the vacation of public highways. SR3, Exhibit 6. On September 2, 2014, the Department appealed the Township’s August 11, 2014 decision to vacate certain public highways in Butler Township. SR3 1.

A trial commenced on October 22, 2015 in the Day County Courthouse in Webster, South Dakota. SR3 102. At the commencement of trial, without waiving its due process and arbitrary and capricious arguments, the Department indicated that it would not contest that a public interest existed to vacate two sections of highway, listed as a portion of the second description and the fifth description in the resolution. SR3 T. 5,

Exhibit 15. The circuit court affirmed Butler Township’s decision to vacate public highways. SR3 330. This appeal follows.

**D. Objections to the Scope and Burden of Proof**

Prior to each separate trial, the Department sought a ruling regarding the scope of the appeal from the townships’ decisions and the burden of proof at trial. *See* SR1 44, 86, 131, 206; SR2 43, 58; SR3 43, 58. The circuit court ruled that, “[a]s the appealing party that takes issue with the decision of the appellee to vacate roads, appellant shall have the burden of proof at trial.” *Id.* The Department renewed its objection just prior to each trial. SR1 T. 5, 6; SR2 T. 5; SR3 T. 4.

**STANDARD OF REVIEW**

The standard of review for factual findings of the circuit court is clear error, and the standard of review for legal conclusions is *de novo*. “When [the South Dakota Supreme Court] review[s] such actions of a board of county commissioners after an appeal to the circuit court, we apply the clearly erroneous standard to factual findings, but accord no deference to the legal conclusions of the circuit court.” *Gregoire v. Iverson*, 1996 S.D. 77, ¶ 14, 551 N.W.2d 568, 570.

**ARGUMENT**

The circuit court erred when it placed the burden of proof on the Department at the *de novo* trials. The Department presented sufficient proof of public interest in keeping the section line public highways open. Should this Court determine that the Townships provided unbiased competent evidence that the public highways should be vacated, irrespective of the fact that the burden of proof was wrongly placed on the Department, the circuit court erred when it determined that the Department’s due process rights were not violated. Finally, the Townships acted in an arbitrary and capricious manner.

**A. The circuit court erred when it placed the burden of proof on the Department at the *de novo* trials.**

The Department was incorrectly ascribed the burden of proof for each trial. SR1 131; SR2 58; SR3 58. Appeals from a township's decision are heard and determined *de novo*. SDCL 8-5-10; SDCL 2-14-2.1. A hearing *de novo* is defined as, "A reviewing court's decision of a matter anew, giving no deference to a lower court's finding; a new hearing of a matter, conducted as if the original hearing had not taken place." *Black's Law Dictionary*, 738 (8th ed. 2004).

SDCL 8-5-10 is similar to SDCL 7-8-30, which sets the burden of proof for an appeal of a county commission's decision. *See generally*, SDCL 7-8-30; *Goos Rv Center v. Minnehaha County Comm'n*, 2009 S.D. 24, ¶ 8, 764 N.W.2d 704, 707. This Court held:

"...appeals to the circuit court from a decision by the county board 'shall be heard and determined *de novo*.' ... 'the circuit court should determine anew the question...independent of the county commissioner's decision.' *In re Conditional Use Permit Denied to Meier*, 2000 S.D. 80, ¶ 21, 613 N.W.2d 523, 530. In addition, 'the trial court should determine the issues...on appeal *as if they had been brought originally*. The court must review the evidence, make findings of fact and conclusions of law, and render judgment independent of the agency proceedings.' *Id.* 'If the court finds the decision was arbitrary or capricious, it should reverse the decision and remand...Otherwise, it must affirm.' *Id.* ¶ 22." *Goos, supra.*, ¶ 8, 764 N.W.2d at 707, *emphasis added*.

This Court's precedent works in unison with the statutes that allocate the burden of proof. *See* SDCL 31-3-6, -7. The evidence presented to the township boards at a properly noticed hearing held on a vacation petition must show that vacating public highways will serve the public interest. *Id.*

The circuit court erroneously placed the burden of proof on the Department at all the trials involved in this appeal. The burden of proof is statutorily placed upon the township boards seeking to vacate the public highways, and requires the boards to show

how vacating public highways are in the public interest. SDCL 31-3-6, -7. If an appeal is taken, the circuit court must determine the matter anew, independent of the township boards' decision, and as if it is originally before that court. SDCL 8-5-10; *Goos, supra*.

The Townships have the burden of proof at the trial *de novo*, no deference is given to the original proceedings, and the matter is heard anew. Due to the circuit court error, the Department was unduly burdened and requested a continuance which was denied. SR1 149; SR2 76; SR3 82. Accordingly, this Court should reverse and remand.

**B. The circuit court erred by holding that vacating the public highways did not deny public access to a public resource.**

The circuit court erred when it ruled that the townships' vacation of public highways did not deny public access to a public resource. The circuit court failed to address rulings from the U.S. Supreme Court, the Water Rights Act, the Administrative Rules, the Public Trust Doctrine, persuasive authority from our sister states, and it incorrectly applied this Court's holding in *Parks*. SDCL 46-1 *et seq.*; *Parks, infra*.

The U.S. Supreme Court has held that the scope of "the public trust doctrine remains a matter of state law[.]" *PPL Montana, LLC v. Montana*, 565 U.S. 576, 132 S.Ct. 1215, 182 L.Ed.2d 77 (2012). Yet, the U.S. Supreme Court recognized a recreational component to the public trust doctrine. See *Illinois Cent. R. Co. v. Illinois*, 146 U.S. 387, 452, 13 S.Ct. 110, 36 L. Ed. 1018 (1892) (finding that water was held in public trust so the people "may enjoy the navigation of the waters, carry on commerce over them, and have liberty of fishing therein, freed from the obstruction or interference of private parties.")

The Water Rights Act also highlights the importance placed upon the waters found in South Dakota. SDCL 46-1 *et seq.* provides that the people of this State have a

paramount interest in the use of all the water, that the protection in the development of the water resources is of vital concern, that all water is the property of the people, that the water resources of this State be put to beneficial use, that the conservation of such water is to be exercised with a view to the reasonable and beneficial use of the water in the interest of the people, and for the public welfare. SDCL 46-1 *et seq.* These statutes are prospectively written for the development of the water for public benefit. *Id.*

The waters also fall within the purview of ARSD 74:51:01:01 and 74:51:02:01. The waters situated within the Townships meet the definition of a “lake” per ARSD 74:51:01:01. As the waters situated within the Townships are lakes, then they are assigned the beneficial use of recreation. ARSD 74:51:02:01.

Further, the circuit court incorrectly applied this Court’s holding in *Parks v. Cooper*. SR1 504; SR2 330; SR3 333; *Parks v. Cooper*, 2004 S.D. 27, 676 N.W.2d 823. This Court held in *Parks*, “the public trust doctrine imposes an obligation on the State to preserve water for public use. It provides that the people of the State own the waters themselves, and that the State...as a trustee, controls the water for the benefit of the public...However, it is ultimately up to the Legislature to decide how these waters are to be beneficially used in the public interest.” *Parks, supra.*, ¶ 53, 676 N.W.2d at 841.

The concept of preserving the public’s right to access the public water aligns with the *Parks* holding. *Id.* This Court squarely placed South Dakota with her sister states that allow for public access to public water. *Id.* ¶ 46, 676 N.W.2d at 838. *See also*, Idaho Code Ann. § 42-1501 (*but see* Idaho Code Ann. § 58-1203); *Shokal v. Dunn*, 109 Idaho 330, 707 P.2d 441; Iowa Code § 466B.4(e) (2008); Utah Code Ann. §§ 73-29-103; -203; Minn. Stat. § 116B03; MONT. CONST. ART. 9 § 3, PARA. 3; N.D. CONST. ART. XI, § 3;

N.D. Cent. Code § 61-01-26; *United Plainsmen Ass'n v. N.D. State Water Conservation Commission*, 247 N.W.2d 457 (N.D. 1976). This spirit of access runs throughout the *Parks* holding and in our sister states. *Parks, supra.* at ¶ 46, 676 N.W.2d at 838.

The public's right to access public water is found in U.S. Supreme Court case law, the Water Rights Act, the Administrative Rules, the Public Trust Doctrine, persuasive authority from our sister states, and this Court's holding in *Parks*. Further, the public's right to access to the public's water is found throughout the South Dakota statutes. *See generally*, SDCL §§ 43-17-29, 34A-2-1, 41-2-18, 46A-2-2. When water is held in trust for the public, but the public's access is removed and curtailed, all the aforementioned law is violated. The State holds the water in trust for the public, and as a trustee, it must allow the public to maintain its access to those waters held in trust.

### **1. Troy Township**

The evidence demonstrated that due to the vacation of public highways, several bodies of water are now inaccessible by the public. The body of water known as "Welcome Lake" is now inaccessible by the public. SR1, Exhibits 3, 4. A body of water to the northwest of Welcome Lake is now inaccessible by the public. *Id.* An additional body of water to the northwest of Duerre Slough is now inaccessible by the public. *Id.* Further, public access to both Jesse Lake and Duerre Slough is now severely curtailed. *Id.* The only public access that remains is in the southwest and northern shoreline. This severely curtails the public's access to Jesse Lake, and deprives the public from accessing Duerre Slough unless they have some type of watercraft.

The circuit court held, "at least one...highway...could also provide access to a non-meandered body of water." SR1 504. One unnamed highway leading to a single non-

meandered body of water in an area containing some of the best public recreational opportunity in South Dakota does not constitute access. The circuit court clearly erred when it held that the vacation of public highways did not deny public access to a public resource. The trial testimony and exhibits show how several bodies of water were accessible via public highways, but due to the vacated public highways, the public's access to these bodies of water has been removed. Access to Jesse Lake is severely curtailed and Duerre Slough is privatized. Eliminating this access is not in the public interest. It frustrates the Water Rights Act, the Public Trust Doctrine, the Administrative Rules, and runs counter to this Court's holding in *Parks*. *Parks, supra*. Such actions cannot stand. This Court should reverse and vacate the circuit court's order.

## **2. Valley Township**

The circuit court found that some of the vacated roads traveled to non-meandered bodies of water within Valley Township. SR2 330. However, the circuit court also stated that the vacating of public highways did not materially alter public access available to the non-meandered bodies of water in Valley Township. *Id.*

Notwithstanding the circuit court's contradictory statements, the trial evidence demonstrated that vacating public highways curtails access to bodies of water and makes at least one body of water inaccessible by the public. The largest body of water in Valley Township ("Bohn Slough") straddles the Township's border and is an active fishery. SR2 117. In vacating these public highways, this substantial body of water is publicly inaccessible from the eastern side of Valley Township.

Other roads vacated by Valley Township curtail the public's access to the waters. The public highways leading to the Lundeen Wildlife Production Area (WPA) were

addressed by the circuit court on partial Summary Judgment. SR2 115. The circuit court held that the southern highway leading to the Lundeen WPA did not provide access directly to those public lands. *Id.* However, the vacating of public highways curtails access to the body of water that leads into the Lundeen WPA.

In sum, the circuit court clearly erred when it ruled that public access to public resources was not being denied. Access to a substantial body of water on the eastern side of Valley Township is now denied, and access to the water feeding into the Lundeen WPA has been curtailed. These bodies of water were accessible by the public via the Valley Township's public highways. However, because Valley Township vacated public highways, the public's right to access these bodies of water is now removed.

This is not in the public interest, it runs contrary to the Water Rights Act, the Public Trust Doctrine, the Administrative Rules, and runs counter to this Court's holding in *Parks*. *Parks, supra*. This Court should reverse and vacate the circuit court's order.

### **3. Butler Township**

The circuit court acknowledged that some of the vacated roads travel to the edge of non-meandered bodies of water within Butler Township while at the same time holding that the vacating of public highways will not alter public access available to the non-meandered bodies of water in the Township. SR3 333. Notwithstanding the circuit court's contradictory holdings, the trial evidence demonstrated that vacating public highways will curtail public access to bodies of water and make other bodies of water totally inaccessible by the public.

Butler Township's decision to vacate public highways makes several bodies of water inaccessible by the public. As noted above, Bohn Slough straddles the border

between Butler and Valley Township. Bohn Slough is an area actively utilized by sportspersons. SR3 T. 33. Because of Butler Township's decision to vacate the public highways, all eastern access to Bohn Slough has been eliminated. SR3, Exhibit 3. Due to the two-fold vacation proceedings by Butler and Valley Township, Bohn Slough is inaccessible by the public. Further, Butler Township has eliminated public access to a body of water to the northeast of Bohn Slough.

Butler Township curtailed public access to "Buck Slough," a body of water situated on the eastern side of Butler Township. SR3 T. 35, Exhibit 3. Lastly, as evidenced by the township map documenting the proposed vacated public highways, public access to several bodies of water located in the center of Butler Township is curtailed. SR3, Exhibit 3.

The circuit court erred in holding that public access to a public resource was not being denied. As shown from the trial evidence, several bodies of water were accessible via public highways, including Bohn Slough. Because Butler Township vacated public highways, the public's right to access these bodies of water is removed. Access to Buck Slough is curtailed. Another body of water to the northeast of Bohn Slough is privatized. This is not in the public interest, it runs contrary to the Water Rights Act, the Public Trust Doctrine, the Administrative Rules, and runs counter to this Court's holding in *Parks*. *Parks, supra*. This Court should reverse and vacate the circuit court's order.

**C. The circuit court erred by holding that the public interest was better served by vacating the public highways.**

The circuit court erred as a matter of law when holding that the public interest was better served by vacating public highways. A township can only vacate a highway if the public interest will be better served by the proposed vacation. SDCL 31-3-6. Further,

when a petition is brought, a hearing must be held to determine whether the public interest will be better served by that petition. SDCL 31-3-7.

In determining whether the public's interest is better served by vacating public highways, this Court held, "...As noted above, section lines, by operation of law, are open to passage by the general public. While the Legislature did not impose upon townships the duty to open, improve, and maintain every section line for the purpose of vehicular travel, it nonetheless requires townships to act as trustees in guarding section line rights-of-way for free public access." *Douville, supra.*, ¶ 12, 641 N.W.2d 651. Further, "The right of travelers to accessible township roads surpasses mere privilege." *Willoughby v. Grim*, 1998 S.D. 68, ¶8, 581 N.W.2d 165, 168.

The townships failed to gauge public interest and fulfill its responsibility as trustees. *Douville, supra.* Rather, the township board members in each township appeal determined which roads to place on a petition, drafted petitions to vacate public highways, and swore oaths that the roads should be vacated prior to any public hearing. No testimony or evidence in support of the petition to vacate the public highways was presented at the public hearings. Further, the circuit court incorrectly ascribed all testimony presented against vacating the public highways into the "hunters or fishers" category. However, when the circuit court's decisions are compared with the testimony at the separate trials, it is clear that the townships abandoned their duties as trustees in guarding free public access.

### **1. Troy Township**

At its May 27, 2014 hearing, Troy Township did not examine whether public interest was better served by the requested road vacations. SR1 T. 40-41. The township

board cast off its duties as trustee because of the specter of legislation. SR1 T. 8-10; 239, 262. The township board indicated it did not need to provide public access to the waters held in public trust. SR1 T. 40-41. Moreover, no petition signers were present at any public hearing to present evidence or voice their opinion. SR1 T. 197.

By stark contrast, the evidence presented by the Department demonstrated a public interest in the proposed public highways sought to be vacated. John Cooper provided a historical perspective of public interest as well as examples of the public utilizing these specific highways. SR1 T. 123-153. Both Conservation Officer Blake Yonke and Wildlife Investigator Robert Losco testified about public interest in specific locations in Troy Township impacted by the public highway vacations. SR1 T. 82-96, 96-123 respectively.

The Troy Township board had actual knowledge about the public interest. Public interest was shown at the hearing and the vacation of public highways should not have occurred. Troy Township wrongly cast off its duties as trustee and did not gauge public interest. Accordingly, this Court should reverse and vacate the circuit court's ruling.

## **2. Valley Township**

At the August 5, 2014 hearing to vacate public highways, Valley Township did not examine whether the public interest was better served by vacating public highways. Rather, Valley Township cast off its duty as trustee. *Douville, supra*. No petition signers were present at the August 5, 2014 hearing. SR2 T. 18. In contrast, the testimony highlighted public interest. Wildlife Investigator Robert Losco and Conservation Officer Blake Yonke testified to public interest in specific locations in the township impacted by the public highway vacation. SR2 T. 60-61; 51-55. In addition, Michael Herr testified

that individuals commonly drive around the posted signage, with Brent Zimmerman and Wesley Jensen agreeing. SR2 102-103; 113-114.

The Valley Township board had actual knowledge about public interest. As no public interest to vacate the public highways was shown, no vacation of the public highways should have occurred. Valley Township wrongly cast off its trustee duties and did not gauge public interest, *ergo*, its decision to vacate the public highways cannot be upheld. This Court should reverse and vacate the circuit court's ruling.

### **3. Butler Township**

At the August 11, 2014 hearing to vacate public highways, Butler Township did not gauge whether the public interest was better served by vacating the public highways. No signatories to the petition were present at the hearing. SR3 T. 29-30. The evidence shows how Butler Township cast off its duties as trustee simply because, "Someone finally figured out how to do it." SR3 T. 94.

By contrast, the evidence provided many instances of public interest in these public highways. Wildlife Investigator Robert Losco and Conservation Officer Blake Yonke testified about the public interest in specific areas impacted by the proposed public highway vacations. SR3 T. 33-36, 46-57. The common occurrence of persons driving around posted signage as acknowledged by township board member Steve Witt, demonstrates a public interest in utilizing these public highways. SR3 173.

The Butler Township board had actual knowledge about the public interest. Moreover, no public interest was shown at the hearing to vacate the public highways. Accordingly, the vacation of the public highways should not have occurred. Butler Township cast off its duties as trustee and did not gauge public interest. Therefore, its

decision to vacate the public highways should not be upheld. This Court should reverse and vacate the circuit court's ruling.

**D. The circuit court erred by holding that the Township did not violate the due process rights of the Department and general public.**

**1. The Townships Violated Constitutional Articles and Statutes**

The circuit court erroneously ruled that the Townships did not violate the due process rights of the Department and the general public. The Fourteenth Amendment to the United States Constitution and Article VI, § 2 of the South Dakota Constitution both provide that no person shall be deprived of life, liberty, or property without due process of law. U.S. CONST. AMEND. XIV, § 1; S.D. CONST. ART. VI, § 2.

The requirements of due process apply to adversarial administrative proceedings of local units of government. *Hanig v. City of Winner*, 2005 S.D. 10, 692 N.W.2d 202, ¶ 10, 205-06 (quoting *Strain v. Rapid City Sch. Bd.*, 447 N.W.2d 332, 336 (S.D. 1989)). Further, "[t]o establish a procedural due process violation, [an individual] must demonstrate that he has a protected property or liberty interest at stake and that he was deprived of that interest without due process of law." *Daily v. City of Sioux Falls*, 2011 S.D. 48, 802 N.W.2d 905. The test applied in order to determine whether an individual received a fair and impartial hearing is whether there was actual bias or an unacceptable risk of actual bias. *Hanig, supra.*, ¶ 11, 692 N.W.2d at 206. "When a due process violation exists because of a board member's disqualifying interest, the remedy is to 'place the complainant in the same position had the lack of due process not occurred.'" *Armstrong v. Turner Co. Board of Adjustment*, 2009 S.D. 81, ¶ 32, 772 N.W.2d 643, 654 (quoting *Hanig, supra.*, ¶ 22, 692 N.W.2d at 210).

The Department and the general public are entitled to all due process protections with Townships subject to all the Constitutional mandates. There is clear Legislative guidance for following the procedural requirements, and failure to adhere to these statutes lays out due process violations.

## **2. The Townships' Common Violations**

### **a. Predetermined Outcomes**

Prior to the respective public hearings, the three townships listed public highways in a petition, found an individual to circulate the petition, and signed an oath attesting to the truthfulness of the petition. SR1 182, 158, Exhibits 19, 20, 21; SR2 T. 28, 29, Exhibit 12; SR3 T. 26-27, Exhibit 13. The petitions for each township indicated that “it would be in the best interest of the public that these portions of the section line highways be vacated.” *Id.* Each township board had already made up its mind to vacate the public highways prior to any hearing. Thus, the Department did not receive a fair and impartial hearing. The decision of the township board members to vacate the public highways, when those township board members already predetermined which public highways should be vacated, violated the Department’s and public’s due process rights.

### **b. Troy Township’s Bias**

The circuit court erred in holding that the Department received, or could have received, a fair and impartial hearing. “A fair trial in a fair tribunal is a basic requirement of due process.” *Daily, supra.* ¶ 29, 802 N.W.2d at 917 (*quoting In Re Murchison*, 349 U.S. at 136, 75 S.Ct. at 625). “A fair trial in a fair tribunal is a basic requirement of due process. Fairness...requires an absence of actual bias in the trial of cases. But our system of law has always endeavored to prevent even the probability of unfairness. To this end, no man can be a judge in his own case and no man is permitted to try cases where he has

an interest in the outcome.” *Murchison, supra*. The elements of government that perform hearings act as tribunals and must adhere to the tenets of due process and fairness.

The evidence shows how Troy Township board members’ families benefited from the vacation of public highways. Notably, Thad Duerre placed his own driveway on the petition and voted for its vacation. SR1 504. The circuit court erred when it speculated as to how much of the now-vacated road would be tillable and when it found no personal benefit to Thad Duerre existed in the now-privatized driveway. *Id.*

The township created and maintained Thad Duerre’s now-privatized driveway for years. The township brought the roadbed to grade, determined slope to divest water from the roadway, laid and packed the underlayment, and it graveled the road on a regular basis. Following the public hearing on July 22, 2014, Thad Duerre told Jim Stoudt that, “These are our roads, our land, our fish, and our water and you’re not gonna [sic] be using them.” SR1 T. 257. Thad Duerre’s vote to vacate these public highways inured to his benefit.

The Troy Township board members obtained land, free of the public highway created by operation of law. SDCL 31-18-1. While no evidence was presented as to the tillable nature of these returned lands, the vacation of public highways naturally increases tillable acres, excludes the public, and affords more rights than previously enjoyed. This establishes bias on the part of the board members.

**c. SDCL 8-3-4; SDCL 8-3-15; SDCL 8-5-9**

First, all three townships violated SDCL 8-3-4. Troy Township held special meetings on April 24, July 7, and July 21, 2014, but did not follow the statutory publishing requirement and did not publish notice of these three meetings whatsoever.

SDCL 8-3-4; SR1 T. 156; SR1, Exhibit 11. Valley Township held a special meeting on August 5, 2014, but did not give a physical address was given for the meeting, only the “home of Brent Zimmerman.” SR2, Exhibit 12. Butler Township held a special meeting on August 11, 2014, but the second date of publication was August 11, 2014, the same date of the special meeting, with the only location given being “Dennis Johnson’s Shop.” SR3, Exhibit 13; SR3 T. 14.

Second, all three townships violated the requirements for township elections. SDCL 8-3-15. SR1 504; SR2 330; SR3 333. The circuit court gave two rationales for disregarding these violations: 1) it seemed “rather wasteful,” and 2) that this appeal was an inappropriate proceeding. *Id.* This is statutorily incorrect as compliance with the statute is mandatory. SDCL 8-3-15; SDCL 2-14-2.1. Further, the circuit court misinterprets *Burns v. Kurtenbach*, 327 N.W.2d 636 (S.D. 1982).

This Court held in *Kurtenbach*, “When a nominating statute plainly states its requirements, those wishing to benefit from the statute must substantially comply...[H]owever attractive it might be to liberally construe a statute to avoid a result that may appear harsh, we will not so act when such action would do violence to the plain language of the statute.” *Id.* at 638. The circuit court avoided what it calls a “wasteful” result, but in doing so, disregards the plain language of the statute. SDCL 8-3-15. *See also, State v. Jensen*, 2003 S.D. 55, ¶ 23, 662 N.W.2d 643, 650 (holding that *Kurtenbach* requires compliance with explicit statutory requirements).

The circuit court acknowledged that all three townships violated SDCL 8-5-9. SR1 504; SR2 330; SR3 333. Once again, however, the circuit court did not mandate compliance with the statutory requirements. SDCL 8-5-9; SDCL 2-14-2.1.

### **3. Troy Township's Additional Statutory Violations**

The circuit court acknowledged that Troy Township violated SDCL 8-3-1, but failed to find that it constituted a due process violation even when considered in conjunction with the other statutory violations. SR1 504; SDCL 8-3-1, SDCL 2-14-2.1.

The circuit court erred when it held that Troy Township did not violate SDCL 31-3-6 by failing to list each landowner's name with each corresponding section of vacated highway, notwithstanding the statute's explicit requirement. SR1 504. Further, the circuit court erred when it held that the township did not violate SDCL 31-3-7, by failing to publish in its notice the public highways subject to the vacation proceeding for the continued May 27, 2014 vacation hearing. *Id.* The circuit court found that Troy Township removed three designated descriptions from the petitions, and that it was different from previously published petition. *Id.* By altering the petition, the township was required to republish the notice with a full listing of the public highways it sought to vacate. SDCL 31-3-7. The township's failure violated due process rights of the Department and the public at large.

### **4. Valley Township's Additional Statutory Violations**

Valley Township violated SDCL 8-5-1 by failing to provide an address for the location of the public hearing. SR2 333. This was recognized by the circuit court. *Id.* In allowing this violation, the circuit court reasoned that the statutorily mandated notice of meeting requires a location, not an address. *Id.* The circuit court's logic does not pass muster. It is plain that the statute requires the Township to state in the notice an address where the meeting is to be held. SDCL 8-5-1; SDCL 8-3-1. Interestingly, the circuit court held that, "[it took] two minutes...to obtain that address from the local phone book." SR2 333. This shows

the circuit court itself needed to resort to an address to ascertain the meeting location. Such rationalization changes the onus of statutory compliance and would require the Department and the general public to look up an address when Valley Township failed to comply with its statutory obligation.

#### **5. Butler Township's Additional Statutory Violations**

Butler Township did not provide adequate statutory notice for its August 11, 2014 hearing. Notice must be given by publication for at least two consecutive weeks. SDCL 31-3-7. The Township purportedly published notice on August 4, and August 11. The Court erred when it held that even though Monday, August 11, 2014 was the official publication date of the Reporter & Farmer, the paper would have been available to and received in the mail by county residents on Saturday, August 9, 2014. SR3 330. That reasoning fails to acknowledge the *prima facie* evidence that the publication occurred on August 11, 2014, as required by SDCL 17-2-22.1. Notably, the affidavit of publication was signed by the publisher on August 4, 2014, prior to the second publication taking place. *Id.* This is similar to the affidavits of publication for the other townships which likewise were signed prior to the second required publication.

The circuit court held that Butler Township failed to comply with SDCL 8-3-1 in 2014. SDCL 8-3-1; SR3 330. However, the circuit court failed to require the Township to abide by the plain statutory language. *Id.* The Township has no discretion in complying with SDCL 8-3-1. SDCL 2-14-2.1; *Id.* Again, the circuit court relies upon *Kurtenbach* without the underlying rationale. *Kurtenbach, supra; Jensen, supra.*

**E. The circuit court erred by holding that the Townships' decisions were not arbitrary and capricious**

**1. Standard**

Even if this Court determines that the public highway vacations served the public interest and that the due process violations against the Department and general public does not require reversal, this Court should reverse the townships' decisions since they were based upon personal, selfish, fraudulent motives, false information, or a lack of relevant or competent information. *Meier, supra.*, ¶ 21, 613 N.W.2d at 530.

**2. Argument**

The Townships' decisions to vacate public highways were arbitrary and capricious. A decision is arbitrary and capricious when it is based upon personal, selfish, fraudulent motives, false information, not governed by fixed rules or standards, or a lack of relevant and competent evidence. *See Certifiability of Jarmen*, 2015 S.D. 8, 860 N.W.2d 1; *Kirby v. Hoven School Dist.*, 2004 S.D. 100, 686 N.W.2d 905.

**3. Troy Township**

**a. Personal, Selfish, Fraudulent Motives, False Information, Lack of Relevant or Competent Information**

Troy Township's decision to vacate public highways was based on personal, selfish, fraudulent motives, false information, or a lack of relevant and competent evidence. *Jarmen, supra.* Personal or selfish motives was evidenced by Township board member Duerre's statement of "These are our roads, our land, our fish, and our water and you're not gonna [sic] be using them." SR1 T. 257. In February 2015, Duerre called Department employee Scott Lindgren to inquire about an incident concerning individuals ice fishing on Duerre Slough. SR1 T. 10-11. During that phone call, Duerre told Lindgren that "if vacating the roads didn't work to keep people out, he'd find another way to do

that.” *Id.* Township board members and their families benefitted from vacating the public highways, as shown by increased farmland, privatized bodies of public water, and private driveways. SR1 193-94, 252, 244. The Township’s decisions were made to the detriment and exclusion of the general public. The Township’s board members decided what public highways to vacate, created the petition, found an individual to circulate the same, and affirmed under oath that the petition was true prior to any hearings.

Duerre desired to vacate the public highway leading to his residence and he requested that public highway be added to the list of public highways to vacate, notwithstanding that the public highway had been maintained by Troy Township for years. SR1 T. 189-190, Exhibit 3. Board member Larry Herr also benefited from vacating public highways. The vacated public highways are adjacent to property owned by Herr, and as such, the public no longer has access. SR1 T. 190. Board member Daniel Grode has family members that will benefit from vacating the public highways. Certain vacated public highways are adjacent to Grode’s property and now the public no longer has access to those public highways. SR1, Exhibit 2 (Directly south of photo point #3 (owned by Donald Grode); East of photo point 35 (owned by Robert Grode)).

Troy Township Clerk Steve Witt personally benefits from vacating the public highways. Certain public highways are adjacent to Witt’s property and now the public no longer has access. SR1 T. 167-170. Further, the Township Treasurer Robert Duerre (Thad Duerre’s father) benefits in that the public highway leading to Thad Duerre’s residence also provides access to Robert Duerre’s residence.

Fraudulent motives or false information was evidenced by Troy Township’s real motivation to keep sportspersons away and its fear of future legislation akin to SB 169.

SR1 T. 47, 239, 262. The Township claims that liability exists if these public highways are not vacated is mistaken. Well established legal principals demonstrate the Township's fallacy regarding purported liability, not to mention that the Township maintains liability insurance. SR1, Exhibit 7. Townships, as quasi-public corporations, are instrumentalities of the State for the purpose of carrying into effect the functions of government and are not liable for damages caused by negligent performance of such duties unless a cause of action is expressly given by statute. *Jensen v. Juul*, 66 S.D. 1, 5, 278 N.W. 6, 8 (1938). Townships are political subdivisions of the State or quasi corporations exercising part of the State's sovereign power and are not liable in the absence of a statute imposing liability for injuries caused by defective highways. *Williams v. Wessington Tp.*, 70 S.D. 75, ¶ 77, 14 N.W.2d 493, 494 (1944). Actions by a township to vacate a public highway are discretionary matters and liability does not exist simply because a township does not vacate a public highway.

No requirement exists for a township to maintain a passable public highway on every section line. *Douville, supra.* at ¶13. No affirmative action is necessary to open a section line for public use. The public's right to pass is not diminished merely because townships are not required to improve every section line for vehicular travel. Section lines, by operation of law, are open to passage by the public. *Id.* ¶ 12. While the Legislature did not impose upon townships the duty to open every section line for vehicular travel, it does require townships to act as trustees in guarding section line rights-of-way for public access. *Id.*

A lack of relevant or competent information is evidenced by Troy Township's failure to provide a transcript of the hearing, failure to provide a defensible reason why

vacating the public highways better serves the public interest, and its failure to analyze public interest. In fact, the testimony indicates otherwise. SR1 T. 226.

**4. Valley Township**

**a. Personal, Selfish, Fraudulent Motives, False Information, Lack of Relevant or Competent Information**

Valley Township's decision to vacate public highways was based on personal, selfish, fraudulent motives, false information, or a lack of relevant and competent evidence. *Jarmen, supra*. Personal or selfish motives was evidenced by the method in which the road vacations commenced. The township board determined what public highways to vacate, drafted the petition, and found an individual to circulate the same. SR2 T. 15. No petition signers showed up at the August 5th, 2014 hearing in support of the petition and no evidence was presented at the hearing that the public interest would be better served by vacating the public highways. SR2 T. 18. Nevertheless, Valley Township approved the petition. SR2, Exhibit 12. The Township clerk personally paid the recording fee for the Resolution and Order to Vacate Roadways when the Township had close to \$30,000 in its bank account. SR2, T. 18, 19, 23. Vacating public highways only furthered the interests of the township board members.

Fraudulent motives or false information was evidenced by Valley Township's decision to vacate public highways because of a concern about possible legislation and in order to give property back to landowners. SR2 T. 32, 34. Those facts fail to demonstrate that a public interest existed to vacate these public highways. SDCL 31-3-6. Valley Township is protected from liability by the principle of sovereign immunity. *Juul; Williams, supra*. Valley Township is not required to maintain every public highway in the

township, but it is required to act as a trustee to protect public access and use of these highways. *Douville, supra.*, at ¶ 12, 13.

A lack of relevant or competent information is evidenced by Valley Township's failure to provide a transcript of its hearing, to show how public interest was better served by vacating public highways, and to conduct any public interest analysis. SDCL 31-3-6. In fact, it was only in preparing for the underlying trial that Valley Township Chairman Herr physically walked the public highways to look at their conditions. SR2, T. 39.

## **5. Butler Township**

### **a. Personal, Selfish, Fraudulent Motives, False Information, Lack of Relevant or Competent Information**

Butler Township's decision to vacate public highways was based on personal, selfish, fraudulent motives, false information, or a lack of relevant and competent evidence. *Jarmen, supra.* Personal or selfish motives was evidenced by Butler Township's decision arising from persons who were not part of the Township. SR3 T. 17. Further, the township board determined which public highways to vacate, drafted the petition, and found an individual to circulate the same. SR3 T. 26-29. No petition singers showed up at the August 11, 2014 hearing to present testimony or evidence in support of the petition. SR3 T. 29. Nevertheless, the Township approved the petition. SR3, Exhibit 10. This all occurred because, "someone finally figured out how to do it." SR3 T. 94.

Fraudulent motives or false information was evidenced by Butler Township's decision to vacate public highways being based upon potential cost of maintenance, population, and usage. SR3 T. 76, 86, 90. None of those factors are relevant for vacating a public highway. SDCL 31-3-6. Potential maintenance was confused with current

liability to maintain. In addition, neither population nor usage is relevant in determining whether the public interest is better served by vacating the public highway. SDCL 31-3-6.

Butler Township's claim that liability exists if these public highways remain open is unsupported. The Township has not been faced with any situation in which the public has driven through barricades and ended up with a vehicle in the water. SR3, T. 84.

Well established legal principals demonstrate the Township's fallacy regarding purported liability, not to mention the fact that the Township maintains liability insurance. *Juul, supra. Williams, supra.* Actions by a township to vacate a public highway are discretionary matters and liability does not exist simply because a township does not vacate a public highway. A township need not maintain a passable public highway on every section line. *Douville, supra.* at ¶13. No affirmative action is necessary to open a section line for public use. The general public's right to pass is not diminished merely because townships are not required to improve every section line for vehicular travel. Section lines, by operation of law, are open to passage by the public. *Id.* ¶ 12. While the Legislature did not impose on townships the duty to open, improve, and maintain every section line for vehicular travel, it requires townships act as trustees in guarding section line rights-of-way for free public access. *Id.*

A lack of relevant or competent information is evidenced by Butler Township's failure to provide a transcript of the hearing, no underlying reasoning, and no public interest analysis for vacating the public highways. Further, the Township never received complaints from landowners about a need to vacate public highways. SR3 T. 91.

## II. CONCLUSION

The Department requests that this Court reverse the circuit court's Order affirming the Townships' Final Decision on several grounds. First, the Department asks

this Court to conclude, as a matter of law, that a public interest exists to not vacate the public highways in question. The circuit court clearly erred in that public access to a public resource was denied. Next, the Department asks this Court to conclude, as a matter of law, that the circuit court erred in determining that the Department's due process rights were not violated and that the Township's decisions was arbitrary and capricious. Finally, the circuit court misinterpreted the plain language of SDCL 8-5-10 and this Court's precedent, that the Department was wrongly ascribed the burden of proof at the *de novo* trial, reverse the circuit Court's Order, and remand the case for consistent proceedings.

Dated this 28<sup>th</sup> day of December, 2016.

RESPECTFULLY SUBMITTED:

STATE OF SOUTH DAKOTA, DEPARTMENT  
OF GAME, FISH AND PARKS, APPELLANT

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IN THE SUPREME COURT  
OF THE  
STATE OF SOUTH DAKOTA

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STATE OF SOUTH DAKOTA,  
DEPARTMENT OF GAME, FISH AND  
PARKS,

#27981

Appellant,

vs.

TROY TOWNSHIP, DAY COUNTY,  
SOUTH DAKOTA,

Appellee.

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STATE OF SOUTH DAKOTA,  
DEPARTMENT OF GAME, FISH AND  
PARKS,

#27982

Appellant,

vs.

TROY TOWNSHIP, DAY COUNTY,  
SOUTH DAKOTA,

Appellee.

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STATE OF SOUTH DAKOTA,  
DEPARTMENT OF GAME, FISH AND  
PARKS,

#27986

Appellant,

vs.

VALLEY TOWNSHIP, DAY COUNTY,  
SOUTH DAKOTA,

Appellee.

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STATE OF SOUTH DAKOTA,  
DEPARTMENT OF GAME, FISH AND  
PARKS,

#28008

Appellant,

vs.

BUTLER TOWNSHIP, DAY COUNTY,  
SOUTH DAKOTA,

Appellee.

**CERTIFICATE OF SERVICE**

---

The undersigned hereby certifies that two true and correct copies of Appellant's Brief in the above-referenced case were served upon the following persons by electronic mail and by U.S. Mail at the addresses listed below:

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and the original and 2 copies were hand delivered to the South Dakota Supreme Court, 500 East Capitol, Pierre, South Dakota 57501, as well as filing by electronic service in Word format to the Clerk of the South Dakota Supreme Court at: [SCClerkBriefs@ujs.state.sd.us](mailto:SCClerkBriefs@ujs.state.sd.us) on the 28<sup>th</sup> day of December, 2016.

STATE OF SOUTH DAKOTA, DEPARTMENT  
OF GAME, FISH AND PARKS, APPELLANT

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# **APPENDIX**

**APPENDIX**

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reference, and entered Findings of Fact and Conclusions of Law this same date, which are incorporated herein by this reference, it is now

ORDERED as follows:

1. Township's decision to vacate a section of highway located on the east side of the northeast quarter of section twelve in Troy Township, and a section of highway on the east side of the east half of section thirteen in Troy Township is reversed. Because a like resolution was not passed by both Troy and York townships, the vacation of those highway sections by Troy Township must be reversed and remanded for further action by Township.

2. Township's decision to vacate all other portions of highway is affirmed.

Attest  
Jessica Saltier  
Clerk/Deputy



Signed: 8/17/2016 9:59:52 AM  
BY THE COURT:

A handwritten signature in black ink, appearing to read "Jim S. Lemman", is written over a horizontal line.

Circuit Court Judge



herein by this reference, the Court now makes and enters the following:

**FINDINGS OF FACT**

**A. BACKGROUND**

1. Township's Board, acting under its statutorily granted authority, accepted two petitions from the voters of Township seeking to vacate rights-of-way.

2. After the petitions were prepared, they were circulated and signed by Township's registered voters.

3. Attached to each petition was a statement signed, under oath, by the two supervisors and the chairman, indicating they had reviewed the petition, knew its contents, and believed the people listed signed the petition and sought to vacate the highways listed therein.

4. Township noticed and subsequently held hearings on each petition.

5. Because of input from the Department, the board of supervisors removed certain highways from the proposed vacation list and, ultimately, refrained from vacating those highways since they provided access to public lands.

6. Township adopted a corresponding resolution of vacation for each petition.

7. The first resolution vacated twelve portions of the Township's highways, see Ex. 24, while the second resolution

vacated eight additional portions, see Ex. 25. The first resolution was adopted on June 26, 2014, and the second resolution was adopted on July 22, 2014.

8. In response to these decisions, Department timely filed a Notice of Appeal as to each resolution, and the appeals were combined for trial.

**B. PUBLIC INTEREST**

9. Some of the vacated portions of highway would allow travel to the edge of non-meandered bodies of water within the Township. Department argues that the Township sought to deny access to these bodies.

10. It is clear from the evidence that, despite any of the twenty highway vacations, there will still be public access available to the non-meandered bodies of water in Troy Township. Several examples were provided as to highways that allow access to non-meandered bodies of water that were not vacated because they also provide access to farmland and a cemetery. There is, moreover, at least one Day County highway that could also provide access to a non-meandered body of water.

11. While witnesses for Department testified they had, on various occasions, come into contact with sportsmen on some of the highways at issue, it is evident that none of these highways provide access to travel through the township, because they are either covered or damaged by high waters.

12. At best, the highways at issue provide access to landowners of adjoining land – access that would continue if the highways were vacated and the land subsequently reverted to the adjoining landowners.

13. The vacated highways do not help the traveling public traverse the township.

14. In order to have the vacation issues brought before the board, a petition was prepared by Steve Witt, Township Clerk, with assistance from a neighboring township's clerk. Another resident circulated the petition and gathered six other signatures from Township residents.

15. According to the Day County Auditor, as of June 1, 2016, there were twenty active voters in Troy Township and one inactive voter. Six of those voters signed the petition, a seventh circulated the petition, and three others are Township supervisors. Steve Witt, Township Clerk, is the eleventh resident of Township. Robert Duerre is Township Treasurer. This means that at least twelve of the twenty active voters in Township were involved in the vacation process.

16. The majority of Township's residents live there because they farm or have family members involved in farming. It is therefore not shocking to the Court that the highways at issue adjoin land owned by members of Township's board of supervisors and others involved in circulating and signing the petition.

17. Based upon the photos admitted at trial, very little of the vacated highways is useable as tillable acres without investing considerable time and money to make the strips tillable.

18. Consequently, any attempt to ascribe private gain as a motive for vacation of the highways at issue is folly and without merit.

19. While the members of the public that attended the township meetings where vacation was discussed all favored keeping the highways open, their purpose was singular: to maintain access for hunting and fishing.

20. Likewise, Department's only interest is unfettered access for hunting and fishing at both Township's and public safety's expense.

21. Department's witnesses acknowledged that a duck or a pheasant could land almost anywhere and, if that were the only criteria evaluated, then no highways could be vacated.

22. Former Secretary of Game, Fish & Parks, John Cooper, also acknowledged that "[s]afety issues are a legitimate issue, I think, for all agencies and for townships."

23. Township officials testified there was concern that many of the highways being vacated would lead members of the traveling public to "pinch points" where they would be required to turn around as best they could and then retrace their tracks,

because they could not get to another intersection on that particular highway.

24. There was also testimony concerning washouts, flooded highways, and other perils situated on the highways at issue.

25. In weighing the issues and proceeding with the resolutions to vacate the highways, Township determined the public interest would be better served by proceeding with vacation, as opposed to leaving dangerous and unused section line highways open for public travel, especially when those highways do not allow any traveler to reach any intersecting highway due to their condition.

26. There could be litigation against the Township in the event of accidents on the highways the Township sought to vacate. In that case, the Township would incur expenses defending itself before that litigation was resolved, which would result in expenses that could be avoided.

27. Whether Township may ultimately avoid liability (and incur needless and potentially crippling expenses) does not mean it should ignore situations that could cause harm to the traveling public.

28. Although SB 169's introduction certainly factored into Township's decision to proceed with its resolutions, that fact does not mean Township did not have the public interest in

mind when vacating what it perceived to be dangerous highways, rather than delaying that decision and, possibly, forfeiting the opportunity to rectify that dangerous situation.

29. A review of the testimony and evidence presented at trial illustrates that Township carefully considered which portions of highways should be vacated.

30. Township listened to input from Department and removed those portions of the proposed highways that provided access to public land.

31. Township weighed the interests of sportsmen to have use of section line highways for road hunting and access to non-meandered bodies of water against providing for the safety of all the traveling public within its borders, as well as the financial cost associated with maintaining little used highways.

32. After weighing the evidence, Township determined public safety, and more specifically protecting the traveling public, outweighed Department's and sportsmen's interest to access section line highways for hunting and fishing.

33. This determination does not mean that sportsmen and Department lack a public interest in accessing the section line highways – they do have a public interest. Township, too, has a public interest in public safety, specifically keeping the traveling public safe, as well as managing financial commitments.

C. DUE PROCESS

34. With regard to Department's arguments concerning a lack of notice of special township meetings, minutes from the special meetings show no action was taken at these meetings, though there were discussions about proposed highway vacations.

35. With regard to Department's argument that Township failed to properly elect officers by paper ballot, the minutes from Township annual meeting, held on March 4, 2014, establish that three people were present: Daniel Grode, Thad Duerre, and Steve Witt. See Ex. 10 (Minutes from March 4, 2014 meeting). A motion was made to re-elect the present officers and that motion carried. There was only one candidate for each office. Therefore, the use of any type of ballot seems rather wasteful.

36. With regard to Department's argument that Township failed to properly give notice for the 2014 Annual Meeting, no evidence was presented that anyone who resided in Township that would have been eligible to participate in the 2014 annual meeting was deprived of an opportunity to be heard at that meeting. The same officers were re-elected at the 2014 annual meeting as had previously served. Even if this Court were to nullify the action taken at the 2014 annual meeting, it would appear that those same officers would continue in their positions until replacements were elected.

37. With regard to Department's argument that Township failed to republish descriptions of the highways it intended to vacate in its notice for the meeting held on June 26, 2014, the June meeting was held because the board of supervisors decided to continue the meeting held May 27, 2014.

38. The Affidavit of Publication and Notice of Hearing published following that decision had previously been noticed by publication and was published on June 16, 2014, and June 23, 2014. It removed three designated descriptions from the petition but did not add any additional highways to be vacated. The notice indicates the board of supervisors refused to vacate certain portions of highways leading to the Lily Game Production Area, as well as two separate parcels in that notice that had previously been included in a notice for hearing on petition for vacation of public highway published on May 19, 2014, and May 26, 2014.

39. The notice further specifically stated a vote on the remaining portions of the highways described in the petition was to be tabled and that a meeting would be held to take further action on June 26, 2014, at 1:00 o'clock p.m. at Larry Herr's home.

40. The reason for publishing the notice following the continued hearing was twofold: first, to advise the public of Township's decision not to proceed on vacation of three parcels;

and second, to inform the public when further action would be taken.

41. With regard to Department's argument that Township failed to provide a verbatim transcript of the vacation proceedings, townships do not employ court reporters or recorders to take down and transcribe township meetings.

42. In Day County Civil Number 14-42, an Affidavit of Steven Witt dated August 28, 2014, was filed with the Clerk on September 2, 2014. Attached to that affidavit is a copy of the resolution and order to vacate roadways executed by the board of supervisors on June 26, 2014, together with an Affidavit of Publication dated June 30, 2014, and a copy of the resolution as it was published in the local newspaper. A copy of a letter to the Clerk of Courts from Attorney Neill and a Sheriff's return, indicating service of a Notice of Appeal had been completed on Duerre, was also attached to that affidavit.

43. With regard to Day County Civil Number 14-42, at trial, the parties stipulated to the submission of the type-written minutes of the meeting held June 26, 2014 - including the resolution and order to vacate highways, handwritten notes made at that meeting by Township Clerk Witt, additional handwritten notes by Township Clerk Witt, a list of those individuals in attendance, and a motion made by Grode.

44. With regard to Day County Civil Number 14-48, the Court admitted the minutes of the Troy Township meeting held July 22, 2014; the Resolution and Order to Vacate Roadways Meeting, as well as a copy of a motion made by Grode on July 22, 2014, not to vacate certain highways; a motion made by Grode on July 22, 2014, to vacate certain roadways having determined the public's interest will be better served by the proposed vacation; and a list of those individuals who attended the July 22, 2014, meeting. See Ex. 16. The Court further admitted a copy of the Resolution and Order to Vacate Roadways as filed with the Day County Register of Deeds on July 23, 2014. See Ex. 25. And finally, the Court admitted the Affidavit of Publication of Notice for Hearing of the July 22 meeting. See Ex. 21.

45. The petition presented at the meeting held on June 26, 2014, and the resolution adopted that day contain the names of the owners of the land through which the highways pass. See Ex. 24.

46. The petition presented at the meeting held on July 22, 2014, and the resolution adopted that day list the names of the owners of the land through which the highways pass. See Ex. 25.

47. Department presented absolutely no evidence that any supervisor acted on the petition because they would personally benefit from the highways being vacated.

48. With regard to the Department's argument that Thad Duerre personally benefitted from the highway vacation leading to his farm, Duerre testified he is the only individual that uses the highway, and as such, he did not feel it was necessary for the township to continue maintenance on what was essentially his driveway.

49. Although Duerre will certainly receive the real estate upon which that highway sat, unencumbered by a section line highway after the vacation, if he owns the adjoining land, he will also now be burdened by additional obligations to maintain the vacated highway, without any monetary assistance from Township. That does not constitute a benefit to Duerre.

50. Although the board of supervisors selected the highways it thought most beneficial to vacate, the petitions were circulated by a non-board member.

51. Township's registered voters individually choose whether to sign the petition or to refrain.

**D. ARBITRARY AND CAPRICIOUS**

52. Since this is a rural area, it is not surprising that most of Township's residents are somehow involved in farming and, as a result, own land within Township.

53. It is also not surprising, given the Township's character and population, that any decision to vacate highways would result in some board supervisors, if they owned the

adjoining land, receiving the alleged "benefit" of an additional thirty-three foot parcel of very little tillable land resulting from the vacation.

54. In most cases, adjoining landowners already enjoy the "benefit" of paying taxes on the thirty-three foot strip of land regardless of its use.

55. Simply because a board supervisor receives possession of this thirty-three foot strip of land does not mean it is immediately available for growing crops.

56. Department's only support for this "benefit" are its allegations, which are not evidence.

57. The record contains no evidence indicating any individual, including board supervisors, would benefit economically or otherwise from any highway vacation. Nor is there any evidence establishing that those non-existent benefits caused them to vacate the highways at issue. Department's allegations are absurd.

58. Department also avers the decision to vacate was made to the "detriment and exclusion of all others in the community." This is simply not true.

59. The testimony indicates the Board reviewed the condition of the highways within its borders and identified those areas that no longer served the public interest in expending Township resources to improve or maintain. If the highways at

issue were not vacated, then Township could potentially be required to maintain or improve the highways in the future.

60. Many of these highways were no longer useable due to the high water that has been in the area for over twenty years.

61. Moreover, the vacation eliminates the potential for an unsuspecting driver to suddenly find himself engulfed by water in the middle of the night.

62. Sufficient documentation was provided concerning actions taken at the two meetings where the resolutions were adopted. Township's board of supervisors also provided testimony explaining why they believed the listed highways should be vacated. Further, the petition and resolution set forth reasons for the vacation.

63. Township had relevant and competent information to make its decision in adopting the two resolutions.

**E. ADJOINING TOWNSHIP VACATIONS**

64. Chelsea Krause, a Department employee, was called as a witness at trial. Krause helped make exhibits and map the legal descriptions contained in the petitions.

65. In her testimony, she stated that two sections of highway sharing a section line with York Township, which were vacated by Troy Township, were not included in resolutions adopted by York Township vacating those highways in its township.

66. Those sections of highway are located on the east side of the northeast quarter of section twelve in Troy Township, and on the east side of the east half of section thirteen in Troy Township.

67. The corresponding highways on the west side of the northwest quarter of Section seven in York Township and the west half of Section eighteen in York Township were not included in petitions for highways vacated by York Township.

68. A third portion of highway vacated by Troy Township was also located on the township line with York Township. But that description was included in a like resolution adopted by York Township.

#### **CONCLUSIONS OF LAW**

1. Any of the foregoing Findings of Fact that contain Conclusions of Law or are a mixture of fact and law are by this reference incorporated herein.

2. This Court has jurisdiction of the subject matter and of the parties.

3. In South Dakota, there is, by operation of law, a public highway along every section line, unless a portion of a section line is lawfully vacated or relocated. SDCL 31-18-1.

4. Townships are not required to open, improve, and maintain a passable highway on every section line. Douville v. Christensen, 2002 S.D. 33, ¶ 12, 641 N.W.2d 651, 655.

5. A township board of supervisors is required to construct, repair, and maintain all township roads. SDCL 31-13-1.

6. The board of supervisors for an organized township is authorized to vacate or relocate any section line highway under its jurisdiction. SDCL 31-18-3.

7. The power to vacate or relocate a section line highway has two conditions before it can be wielded: first, the board of supervisors must receive a petition of two or more voters of the organized township; and second, the public interest must be better served by the proposed vacation or relocation. SDCL 31-3-6.

8. One aspect of public interest Township must consider is its duty to maintain township highways for the traveling public. This is done to protect the traveling public and keep them safe from any defects in the highways. Further, this obligation to provide maintenance must be accomplished within the budget -- a budget funded by Troy Township taxpayers.

9. A petition for vacation must "set forth the beginning, course, and termination of the highway proposed to be located, changed, or vacated, together with the names of the owners of the land through which the highway may pass." Id.

10. The statement attached to the petitions in this case did not indicate that Township's board of supervisors believed by signing the oath the highways should be vacated.

Rather, it simply indicated that the Township's board of supervisors believed the people signing the petition sought to vacate the designated highways. It indicated the supervisors believed the individuals wanted to go forward with the process.

11. In no way do the signatures mean the two supervisors and chairman had already made a decision on whether to vacate the highways. This is especially true when several highways initially included in the petition were removed from the proposed vacation list and not vacated. It would belie the evidence presented to this Court to conclude otherwise.

12. Under Parks v. Cooper, 2004 S.D. 27, ¶ 46, 676 N.W.2d 823, 838, the State of South Dakota holds all waters in trust for the public. However, also in that case, the South Dakota Supreme Court determined that it was up to the South Dakota Legislature to determine what bodies of water are open for recreational use. Id. at ¶¶50-51, 676 N.W.2d at 840-41.

13. Department's assertion that the Township sought to deny access to non-meandered bodies of water is not supported by the evidence presented at trial.

14. Department's definition of public interest is too narrow: it only considers individuals that desire to use the highways for access to hunting and fishing. Township must instead consider all aspects of public interest, not just an agency advocating hunting and fishing rights.

15. In considering vacation, the Township must consider all aspects of public interest, including safety. The Township must balance the resources it has to maintain the more traveled township highways against the loss of some access to non-meandered bodies of water and hunting opportunities on portions of little used highways.

16. The Township is not required to wait for an accident to happen before taking remedial action to protect the traveling public from the accumulated water on the section lines Township has neither the intent nor the resources to improve or maintain.

17. Department's argument that the Township and its board of supervisors sought to privately profit from vacating the highways is meritless.

18. The Court cannot find, based on the evidence presented, that the public interest would be better served by keeping the vacated portions of highways open for sportsmen, thereby exposing the traveling public to dangerous highway conditions while also taking valuable resources away from highways that are regularly used. Township did not err in voting to vacate the proposed portions of highways.

19. Department's due process rights were not violated by a failure to publish notice of three special meetings on April

24, 2014, July 7, 2014, and July 21, 2014, where the Township took no action.

20. This appeal is not the appropriate proceeding to challenge the ability of Township's officials to hold office. Burns v. Kurtenbach, 327 N.W.2d 636 (S.D. 1982). The township supervisors' authority is not a proper issue for determination in this appeal. The election method used at the annual meeting did not violate the Department's due process rights in this proceeding.

21. Likewise, the failure to provide proper notice of an annual meeting, in which vacation of highways was discussed but no action was taken, did not violate Department's due process rights in this appeal.

22. There is no violation of Department's due process rights by publication of Exhibit 22, which was the notice of hearing published following the board of supervisors' decision to continue the hearing held May 27, 2014. The notice does not violate SDCL 31-3-7 in that there had already been two prior publications of the notice of hearing on petition for vacation of public highways.

23. The transcript referred to in SDCL 8-5-9 is a requirement that any documentation presented at a township meeting, any minutes of that meeting, and any resolutions adopted there must be filed with the Clerk of Courts.

24. The Affidavit of Steven Witt being filed with the Clerk of Courts is sufficient to meet the transcript requirements of SDCL 8-5-9 for Day County Civil Number 14-42.

25. Even if a similar Affidavit of Steven Witt was not filed in Day County Civil Number 14-48, it is clear that Department received all of the documentation relevant to the petition, notice of meeting, action taken at the meeting, and publication of the resolution in each case.

26. The purpose of SDCL 8-5-9 is to ensure that the issues are sufficiently settled and framed so the issues can be tried. If the necessary information was not timely provided, then the appropriate action would have been to delay the trial on the issues. However, Department chose not to pursue that action. Instead, it is clear from the motions, briefs, and testimony provided by Department that it had sufficient information to raise and try numerous issues.

27. Although Township may not have technically complied with SDCL 8-5-9 in Day County Civil Number 14-48, it appears to the Court that sufficient documentation was provided for the Department to go forward with trial and appeal. Thus, Township substantially complied with the statute's provision. See Wagner v. Truesdell, 1998 S.D. 9, ¶ 7, 574 N.W.2d 627, 629 (holding substantial compliance means actual compliance in

respect to the substance essential to every reasonable objective of the statute).

28. Because Department was provided with sufficient documentation and SDCL 8-5-9 does not require a verbatim transcript, Township did not violate Department's due process rights by failing to file an affidavit or verbatim transcript.

29. Department's interpretation of SDCL 31-3-6 would inject an additional requirement, namely that each landowner's name for each section of highway to be vacated must be listed with the corresponding section of highway. SDCL 31-3-6 does not mandate that additional requirement.

30. The two petitions presented and resolutions adopted all fully comply with SDCL 31-3-6. Consequently, Township did not violate Department's due process rights.

31. The record is devoid of evidence evincing the procedure employed by Township with respect to the initiation of the petition was improper or illegal.

32. Township did not violate Department's due process rights. Department had actual notice of the hearings; Department provided documentation opposing both petitions; and Department had representatives at one hearing. Consequently, Department received all its due process rights as required by law.

33. Township's thought process and decision took into account all aspects of the public interest. The fact that

Township favored public safety over sportsmen's opportunities on certain sections of the highways does not mean that it was an arbitrary and capricious decision.

34. The board of supervisors did not exercise personal and selfish motives in reaching the decision to adopt the two resolutions to vacate.

35. Township's board of supervisors did not use fraudulent or false motives when it reached its decision to vacate the highways listed in the two petitions. Instead, Township's board inspected the township highways, made a determination on which highways no longer needed to be a part of Township's highway system, and moved forward by taking the appropriate action to vacate the selected highways. These actions are not arbitrary and capricious.

36. Township had relevant and competent information to make its decision in adopting the two resolutions. Its decision was not arbitrary and capricious.

37. SDCL 31-3-13 provides, in relevant part, that in order to vacate a highway located upon a township line, it is necessary that the board of supervisors of the adjoining civil township pass a like resolution and enter an order vacating said highway. Thus, for a township to legally vacate a section line highway on a township line, it is necessary for both township

boards of supervisors to pass like resolutions vacating the highway.

38. The last two legal descriptions set forth in the Notice of Appeal filed in Day County Civil Number 14-48, cannot be legally vacated at this time. Because a like resolution was not passed by both townships, the vacation of those highway sections by Troy Township must be reversed and remanded for further action by Township.

39. A third portion of highway vacated by Troy Township was also located on the township line with York Township. But that description was included in a like resolution adopted by York Township. That vacation complied with the statutory mandates for vacation and therefore is affirmed.

40. Township followed all appropriate procedures in adopting the two resolutions based upon the two petitions filed with the board of supervisors.

41. Township did not seek to deny public access to a public resource and considered all aspects of the public interest, including the Department's and sportsmen's interests, in determining which highways to vacate.

42. Township did not violate Department's due process rights in vacating the designated highways: Department had actual notice of all hearings in which decisions were made by Township to vacate highways; Department participated in the process

through correspondence and by having members of Department present at a hearing; and Department fully participated in the process before Township's board, culminating with this appeal.

43. Township's actions were not driven by personal and selfish motives in vacating the portions of highways, nor did Township have fraudulent motives or base decisions on false information.

44. Township possessed relevant and competent information based upon the board's investigation of Township's highways and years of involvement with Township's highways.

45. Township's decision to vacate the portions of the highways in question was not arbitrary and capricious.

46. With the exception of the two highways vacated along the section line with York Township, Township's decision to vacate the remainder of highways correctly followed statutory requirements.

47. An Order consistent with these findings and conclusions shall be entered.

Attest:  
Jessica Sattler  
Clerk/Deputy



Signed: 8/17/2016 9:59:29 AM  
BY THE COURT:

A handwritten signature in black ink, appearing to read "John L. J. Lemmon", written over a horizontal line.

Circuit Court Judge

STATE OF SOUTH DAKOTA

IN CIRCUIT COURT

COUNTY OF DAY

FIFTH JUDICIAL CIRCUIT

STATE OF SOUTH DAKOTA,  
DEPARTMENT OF GAME, FISH, & PARKS

Appellant,

v.

TROY TOWNSHIP, DAY COUNTY,  
SOUTH DAKOTA,

Appellee.

CIV. 14-42

&

CIV. 14-48

**MEMORANDUM DECISION**

The above-entitled matter currently pending before the Court is an appeal brought by the South Dakota Department of Game, Fish, & Parks (“Department”) from a decision by the Board of Supervisors of Troy Township to vacate certain public highways in two files, Day County Civil Number 14-42 and Day County Civil Number 14-48. Department timely filed its Notice of Appeal in each file. A *de novo* trial was then held in the Day County Courthouse on September 24, 2015. At trial, Department appeared through Special Assistant Attorneys General, Paul E. Bachand and Richard J. Neill, while Troy Township (“Township”) appeared through its supervisors and counsel, Jack H. Hieb and Zachary E. Peterson. The Court heard testimony from thirteen witnesses and received thirty exhibits into evidence. Upon its conclusion, the Court reserved ruling, allowing counsel to file written argument. The Court has now had an opportunity to review, with care, counsel’s written argument, the exhibits and testimony presented at trial, and the trial transcript. This Memorandum Decision constitutes the Court’s ruling on Department’s appeals.

**BACKGROUND**

This action began after Township adopted two resolutions vacating portions of certain highways within its jurisdiction. In South Dakota, there is, by operation of law, a public highway along every section line, unless a portion of a section line is lawfully vacated or relocated.<sup>1</sup> SDCL 31-18-1. The board of supervisors for an organized township is authorized to vacate or relocate any section line highway under its jurisdiction. SDCL 31-18-3. That power, however, has two conditions before it can be

<sup>1</sup> A township board of supervisors is required to construct, repair, and maintain all township roads. SDCL 31-13-1.

wielded: first, the board of supervisors must receive a petition of two or more voters of the organized township; and second, the public interest must be better served by the proposed vacation or relocation. SDCL 31-3-6. A petition for vacation must “set forth the beginning, course, and termination of the highway proposed to be located, changed, or vacated, together with the names of the owners of the land through which the highway may pass.” *Id.*

Troy Township’s Board, acting under its statutorily granted authority, accepted two petitions from the voters of Township and adopted a corresponding resolution of vacation for each petition.<sup>2</sup> The first resolution vacated twelve portions of Township’s highways, *see* Ex. 24, while the second resolution vacated eight additional portions of Township’s highways, *see* Ex. 25. In response to these decisions, Department timely filed a Notice of Appeal as to each resolution, and the appeals were combined for trial.

Prior to trial, the Court ruled on a number of motions. One of these was Department’s Motion for Declaratory Ruling Regarding Scope of Appeal and Burden of Proof. Following a hearing on August 25, 2015, the Court entered an Order Regarding Appellant’s Motion For Declaratory Ruling Regarding Scope of Appeal And Burden of Proof, determining that South Dakota statutes called for a *de novo* review by the Circuit Court. This means that the Court is bound to determine anew all matters of fact without ascribing any presumption of correctness to Township’s findings on the evidence; once the Court determines the facts, it would next decide whether the actions of Township were “[b]ased on personal, selfish, or fraudulent motives, or on false information, [or] . . . characterized by a lack of relevant and competent evidence to support the action taken”; and as the party taking issue with Township’s decision to vacate the highways, Department shall have the burden of proof at trial. Department raises five issues with Township’s decision to vacate the twenty sections of highway in the two resolutions. Each issue is addressed in turn below.

### ANALYSIS AND DECISION

#### **I. Did Township seek to deny public access to a public resource?**

Department initially asserts Township sought to deny public access to a public resource: non-meandered bodies of water. It does not appear there is any dispute that some of the vacated portions of highway would allow travel to the edge of non-meandered bodies of water within Township. Under *Parks v. Cooper*, 2004 S.D. 27, ¶ 46, 676 N.W.2d 823, 838, the State of South Dakota holds all waters in trust for the public. However, also in that case, the South Dakota Supreme Court determined that it was up to the South Dakota Legislature to determine what bodies of water are open for recreational use. *Id.* ¶¶ 50-

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<sup>2</sup> The first resolution was adopted on June 26, 2014, and the second resolution was adopted on July 22, 2014.

51, 676 N.W.2d at 840-41. At the present time, the Legislature has not made any determination as to the recreational use of non-meandered bodies of water within Troy Township. It is also clear from the evidence that, despite any of the twenty highway vacations, there will still be public access available to the non-meandered bodies of water in Troy Township. Several examples were provided as to highways that allow access to non-meandered bodies of water that were not vacated because they also provide access to farmland and a cemetery. There is, moreover, at least one Day County highway that could also provide access to a non-meandered body of water. As such, Department's initial assertion is not supported by the evidence presented at trial.

**II. Is there a public interest to maintain the right of public access to the proposed vacations?**

Department's second argument is that public interest exists to maintain the right of public access to the vacated highways. Essentially, Department's argument is that the public interest is not better served by vacating the highways at issue. However, Department's definition of public interest is too narrow: it only considers individuals that desire to use the highways for access to hunting and fishing. Township must instead consider all aspects of public interest, not just an agency advocating hunting and fishing rights. One aspect of public interest Township must consider is its duty to maintain township highways for the travelling public. *See* SDCL 31-13-1. This is done to protect the travelling public and keep them safe from any defects in the highways. Further, this obligation to provide maintenance must be accomplished within the budget—a budget funded by Troy Township taxpayers.

Townships are not required to open, improve, and maintain a passable highway on every section line. *Douville v. Christensen*, 2002 S.D. 33, ¶ 12, 641 N.W.2d 651, 655. Indeed, a township is not prohibited from closing a section line highway to vehicular traffic if that highway is unsafe for such travel. SDCL 31-18-3. As mentioned above, Township must consider all aspects of public interest, including safety.<sup>3</sup> Township must balance the resources it has to maintain the more traveled township highways against the loss of some access to non-meandered bodies of water and hunting opportunities on portions of little used highways. While witnesses for Department testified they had, on various occasions, come into contact with sportsmen on some of the highways at issue, it is evident that none of these highways provide access to travel through the township, because they are either covered or damaged by high waters. At best, then, these highways provide access to landowners of adjoining land—access that

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<sup>3</sup> Again, Department's argument only accounts for the segment of the public that wishes to hunt or fish and not for the overall public interest.

would continue if the highways were vacated and the land subsequently reverted to the adjoining landowners. The vacated highways thus do not help the travelling public traverse the township.

Department asserts Township's inability to maintain road closed barricades on some portions of the highways at issue over the recent past supports its argument that there is public interest in keeping those portions open. Department further asserts those failures indicate that closing the highways for safety reasons has not been successful. Township, however, is not required to wait for an accident to happen before taking remedial action to protect the travelling public from the accumulated water on the section lines Township has neither the intent nor the resources to improve or maintain.

Department next contends that Township did not have the public interest in mind when it voted to vacate certain portions of highways adjoining land owned by members of Township's board of supervisors and that the only people interested in vacation were the same supervisors. There is testimony indicating discussions on highway vacations were had at township meetings. In order to have that matter brought before the board, a petition was prepared by Steve Witt, Township Clerk, in conjunction with a neighboring township's clerk. Another resident circulated that petition and gathered six other signatures from Township residents. Department focuses its ire on the familial relationship among Township's board of supervisors, petition circulator, and Township residents that signed the petition. According to the Day County Auditor, as of June 1, 2016, there were twenty active voters in Troy Township and one inactive voter. Six of those voters signed the petition, a seventh circulated the petition, and three are Township's supervisors. Steve Witt, Township Clerk, would be the fourteenth resident of Township. Robert Duerre is Township's Treasurer. This means that at least fifteen of the twenty active voters in Township were involved in the vacation process.

The majority of Township's residents live there because they farm or have family members involved in farming. It is therefore not shocking to the Court that the highways at issue adjoin land owned by members of Township's board of supervisors and others involved in circulating and signing the petition. Department argues this demonstrates Township and its board of supervisors sought to privately profit from vacating the highways. This argument is meritless. Under SDCL 31-18-2, a section line highway is sixty-six feet wide, with thirty-three feet taken from each side of the section line. Adjoining landowners continue to pay taxes on the thirty-three foot strip of land regardless of its use—i.e., even if it

is used as a section line highway.<sup>4</sup> Furthermore, based upon the photos admitted at trial, very little of the vacated highways is useable as tillable acres without investing considerable time and money to make the strips tillable. Consequently, any attempt to ascribe private gain as a motive for vacation of the highways at issue is folly and without merit.

Department further contends the members of the public that attended these meetings where vacation was discussed all favored keeping the highways open. While this may be true, there is no question their purpose was singular: to maintain access for hunting and fishing. As discussed earlier, Township must evaluate *all* aspects of public interest, not just a single public interest.<sup>5</sup> Township officials testified there was concern that many of the highways being vacated would lead members of the travelling public to "pinch points" where they would be required to turn around as best they could and then retrace their tracks, because they could not get to another intersection on that particular highway. There was also testimony concerning washouts, flooded highways, and other perils situated on the highways at issue.

Department next avers Township should not fear liability for any potential injury caused by the flooded and damaged highways being kept open, because it has insurance and would have immunity in certain lawsuits. Despite Department's omniscience about possible future lawsuits, there could still be litigation to determine those issues. In that case, Township would incur expenses defending itself before that litigation was resolved—expenses that could have been avoided. Nevertheless, whether Township may ultimately avoid liability (and incur needless and potentially crippling expenses) does not mean it should ignore situations that could cause harm to the travelling public.

Department also argues that Township's sole motivation for vacating the highways at issue was the introduction of Senate Bill 169 ("SB 169") in the Legislature.<sup>6</sup> SB 169, if passed, would have prohibited Township from vacating certain portions of the highways at issue because they gave access to public waters. Although SB 169's introduction certainly factored into Township's decision to proceed with its resolutions, that fact does not mean Township did not have the public interest in mind when vacating what it perceived to be dangerous highways, rather than delaying that decision and, possibly, forfeiting the opportunity to rectify that dangerous situation. Township had previously considered

<sup>4</sup> Upon vacation of a highway, the land embodied therein shall revert to the original owners or their successors in interest. SDCL 31-3-10. Thus, an individual owning land adjoining a vacated section of highway would receive a strip of land thirty-three feet wide for the length of the portion of the vacated highway.

<sup>5</sup> Again, like earlier, Department is essentially advocating that public safety must always yield to hunting and fishing access—an absurd argument. See SDCL 31-18-3 (noting that a township may close a section line highway if the highway is unsafe for vehicle traffic).

<sup>6</sup> The bill did not become law.

vacating portions of the highways at issue, but choose against acting at that time. SB 169's introduction motivated Township to rectify the dangerous situation before it potentially lost its ability to protect the public.

Furthermore, as stated previously, Township, in making its decision, must weigh the interest of sportsmen to have the access they demanded against the safety of all the travelling public and its ability to budget and use its financial resources to maintain those highways most often used by the travelling public. Department's only interest is unfettered access for hunting and fishing at both Township's and public safety's expense. In weighing these issues and proceeding with the resolutions to vacate the highways, Township determined the public interest would be better served by proceeding with vacation, as opposed to leaving dangerous and unused section line highways open for public travel, especially when those highways do not allow any traveler to reach any intersecting highway due to their condition.

Department's next argument is that Township's board of supervisors had already chosen to vacate the highways at issue prior to voting on the petitions. Department alleges this is true for two reasons: first, some board supervisors helped select the highways included on the petitions; and second, the board supervisors and chairman swore oaths attesting that the highways should be vacated prior to having any hearings. The board of supervisors are charged with the duty to construct, improve, and maintain the Township's highways. *See* SDCL 31-13-1. It would therefore have an intimate knowledge of the Township's highways and their condition. Not surprisingly, the board of supervisors is the body best suited to determine whether a highway should or should not be vacated within its borders. After the petition was prepared, it was circulated and signed by Township's registered voters. Attached to the petition was a statement signed, under oath, by the two supervisors and the chairman, indicating they had reviewed the petition, knew its contents, and believed the people listed signed the petition and sought to vacate the highways listed therein. The statement simply indicated that the Township's board of supervisors believed the people signing the petition sought to vacate the designated highways. It did not indicate that Township's board of supervisors believed by signing the oath that the highways should be vacated; instead, it simply indicated they believed the individuals wanted to go forward with the process.

Township then noticed and subsequently held the hearings, where the board of supervisors received input on the petitions, including from Department. Because of that input, the board of supervisors removed certain highways from the proposed vacation list and, ultimately, refrained from vacating those highways as they provided access to public lands. In no way do the signatures mean the two supervisors and chairman had already made a decision on whether to vacate the highways. This is

especially true when several highways initially included in the petition were removed from the proposed vacation list and not vacated. It would belie the evidence presented to this Court to conclude otherwise.

Indeed, a review of the testimony and evidence presented at trial illustrates that Township carefully considered which portions of highways should be vacated. Township listened to input from Department and removed those portions of the proposed highways that provided access to public land. Township weighed the interests of sportsmen to have use of section line highways for road hunting and access to non-meandered bodies of water against providing for the safety of all the travelling public within its borders, as well as the financial cost associated with maintaining little used highways. After weighing the evidence, Township determined public safety, and more specifically protecting the travelling public, outweighed Department's and sportsmen's interest to access section line highways for hunting and fishing. This determination does not mean that sportsmen and Department lack a public interest in accessing the section line highways—they do have a public interest. Township, too, has a public interest in public safety, specifically keeping the travelling public safe, as well as managing financial commitments. As such, the Court cannot find, based on the evidence presented, that the public interest would be better served by keeping the vacated portions of highways open for sportsmen, thereby exposing the travelling public to dangerous highway conditions while also taking valuable resources away from highways that are regularly used. Township did not err in voting to vacate the proposed portions of highways.

### **III. Did Township violate Department's due process rights?**

Department's third argument asserts Township violated Department's due process rights in eight ways by failing to follow numerous statutory requirements. First, Department alleges Township failed to follow state law on publication of meetings for the meetings held April 24, 2014, July 7, 2014, and July 21, 2014; second, Department avers that Township officers were not properly elected by paper ballot; third, Department asserts notice of the 2014 annual meeting was not proper; fourth, Department contends Township failed to republish descriptions of the highways to be vacated in its notice for the June 24, 2014 meeting after the meeting was continued from May 27, 2014; fifth, Department alleges Township failed to provide transcripts of the vacation proceedings; sixth, Department avers Township failed to list the names of landowners which the vacated highways passed through; seventh, Department asserts Township had actual bias because the Board's decision to vacate the highways at issue was pre-determined; and eighth, Department contends the petition was improperly initiated by the Board instead of a public petitioner.

**a. Failure to notice meetings held on April 7, 2014, July 7, 2014, and July 21, 2014**

Department first complains that Township failed to provide published notice of special meetings held on April 24, 2014, July 7, 2014, and July 21, 2014. No proof of publication notice for these meetings was admitted into evidence. From the testimony, it appears that no such notice was given. However, the minutes from those three meetings were entered into evidence, along with the minutes from the special meeting held on April 24, 2014. *See* Ex. 11 (April 24, 2014), Ex. 14 (July 7, 2014), and Ex. 15 (July 21, 2014). Together these minutes show no action was taken at these meetings, though there were discussions about proposed highway vacations.

At the July 21, 2014, special meeting—apparently held in connection with a response received from Department after notification of the petition to vacate had been published—there was discussion about not vacating certain highways due to the issue of access to public lands. However, no action was taken by Township at that meeting. Township admits that notice of these hearings was not published and that vacation of highways was discussed at each of these meetings. It is nevertheless difficult to see how Department's due process rights could have been violated by the lack of publication, since the only action taken at the July 21, 2014, special meeting was to address letters of opposition, one of which came from Department. Department's due process rights were therefore not violated by a failure to publish notice of these three special meetings.

**b. Failure to properly elect Township officials by paper ballot**

Department's second argument is that its due process rights were violated because Township failed to properly elect officers by paper ballot at the annual meeting held on March 4, 2014. Under SDCL 8-3-15, township supervisors, treasurers, clerks, and constables must be elected by ballot. The minutes from that meeting establish that three people were present: Daniel Grode, Thad Duerre, and Steve Witt. *See* Ex. 10 (Minutes from March 4, 2014 meeting). A motion was made to re-elect the present officers and that motion carried. There was only one candidate for each office. Therefore, the use of any type of ballot seems rather wasteful. In addition, it does not appear this appeal is the appropriate proceeding to challenge the ability of Township's officials to hold office. *Burns v. Kurtenbach*, 327 N.W.2d 636 (S.D. 1982). As such, the township supervisor's authority is not a proper issue for determination in this appeal. It does not appear the election method used at the annual meeting violated the Department's due process rights in this proceeding.

**c. Failure to properly notice the 2014 annual meeting**

Department's third allegation is that Township failed to properly give notice for the 2014 annual meeting. Under SDCL 8-3-1, publication of the annual meeting of the township board of supervisors, including the location, shall be established by resolution. Notice of the time and place of the meeting shall be given by publication for three consecutive days in a daily newspaper or for two consecutive weeks in a weekly newspaper beginning not less than twelve calendar days prior to the meeting. *Id.* Township does not dispute this was not done for the 2014 annual meeting and possibly prior annual meetings. However, this is, again, not the correct proceeding to challenge the ability of Township's officials to hold office. *Burns*, 327 N.W.2d 636. No evidence was presented that anyone, who resided in Township that would have been eligible to participate in the 2014 annual meeting, was deprived of an opportunity to be heard at that meeting. As set forth above, the same officers were re-elected at the 2014 annual meeting as had previously served. Even if this Court were to nullify the action taken at the 2014 annual meeting, it would appear that those same officers would continue in their positions until replacements were elected. Again, it is difficult to see how conduct during an annual meeting, in which vacation of highways was discussed but no action was taken, violated Department's due process rights in this appeal.

**d. Failure to republish highway descriptions for the meeting held on June 26, 2014**

The fourth argument put forth by Department is that Township failed to include descriptions of the highways it intended to vacate in its notice for the meeting held on June 26, 2014. That meeting was held because the board of supervisors decided to continue the meeting held May 27, 2014. The Affidavit of Publication and Notice of Hearing published following that decision had previously been noticed by publication and was published on June 16, 2014, and June 23, 2014. *See Ex. 22.* It removed three designated descriptions from the petition but did not add any additional highways to be vacated. The notice indicates the board of supervisors refused to vacate certain portions of highways leading to the Lily Game Production Area, as well as two separate parcels in that notice that had previously been included in a notice for hearing on petition for vacation of public highway published on May 19, 2014, and May 26, 2014. The notice further specifically stated a vote on the remaining portions of the highways described in the petition was to be tabled and that a meeting would be held to take further action on June 26, 2014, at 1 p.m. at Larry Herr's home.

Department has not provided any authority that would require Township to republish its notice of the original petition after it had already done so twice and then noticed that further action would be taken

at the meeting held June 26, 2014. *See* Ex. 22. It appears the reason for publishing the notice following the continued hearing was twofold: first, to advise the public of Township's decision not to proceed on vacation of three parcels; and second, to inform the public when further action would be taken. The notice does not violate SDCL 31-3-7 in that there had already been two prior publications of the notice of hearing on petition for vacation of public highways. Again, there is no violation of Department's due process rights by publication of Exhibit 22.

**e. Failure to provide transcripts of the vacation proceedings**

Department's fifth argument asserts Township failed to provide a transcript of the vacation proceedings in violation of SDCL 8-5-9. That statute provides:

Within thirty days after the service of such notice of appeal, the board of supervisors of the township shall cause to be filed with the clerk of courts a transcript of the proceedings of such board relative to the decision, order, or resolution being appealed, which transcript shall be certified to by the township clerk as being correct. The issue shall be deemed to have been joined from the time of filing of such transcript and the matter may be brought on for trial in the same manner as provided for in civil cases. If the issues do not sufficiently appear from the notice of appeal and such transcript, the court may, upon notice to the parties, settle and frame the issues to be tried.

SDCL 8-5-9. Department interprets this statute to require a verbatim transcript of the meeting held on June 26, 2014. This would necessarily require a court reporter to transcribe the proceedings. That interpretation, however, is too strict. Townships do not employ court reporters or recorders to take down and transcribe township meetings. Instead, the transcript referred to in SDCL 8-5-9 is a requirement that any documentation presented at a township meeting, any minutes of that meeting, and any resolutions adopted there must be filed with the Clerk of Courts.

Although not designated as a transcript, an Affidavit of Steven Witt dated August 28, 2014, was filed with the Clerk on September 2, 2014. Attached to that affidavit is a copy of the resolution and order to vacate roadways executed by the board of supervisors on June 26, 2014, together with an Affidavit of Publication dated June 30, 2014, and a copy of the resolution as it was published in the local newspaper. A copy of a letter to the Clerk of Courts from Attorney Neill and a Sheriff's return, indicating service of a Notice of Appeal had been completed on Duerre, was also attached to that affidavit. At trial, the parties stipulated to the submission of the typewritten minutes of the meeting held June 26, 2014—including the resolution and order to vacate highways, handwritten notes made at that meeting by Township Clerk Witt, additional handwritten notes by Township Clerk Witt, a list of those individuals in attendance, and a

motion made by Grode. See Ex. 13. While it is unclear when this additional documentation was shared by the parties, it certainly appears the Affidavit of Steven Witt being filed with the Clerk of Courts is sufficient to meet the transcript requirements of SDCL 8-5-9 for Day County Civil Number 14-42.

A similar Affidavit by Witt was not found by the Court in Day County Civil Number 14-48. This could mean that such an affidavit was never filed or, perhaps, the Court may not be able to access the document because of the migration to the Odyssey System at that time. Despite missing such an affidavit, the Court admitted the minutes of the Troy Township meeting held July 22, 2014; the Resolution and Order to Vacate Roadways Meeting, as well as a copy of a motion made by Grode on July 22, 2014, not to vacate certain highways; a motion made by Grode on July 22, 2014, to vacate certain roadways having determined the public's interest will be better served by the proposed vacation; and a list of those individuals who attended the July 22, 2014, meeting. See Ex. 16. The Court further admitted a copy of the Resolution and Order to Vacate Roadways as filed with the Day County Register of Deeds on July 23, 2014. See Ex. 25. And finally, the Court admitted the Affidavit of Publication of Notice for Hearing of the July 22 meeting. See Ex. 21. Thus, even if a similar Affidavit of Steven Witt was not filed in Day County Civil Number 14-48, it is clear that Department received all of the documentation relevant to the petition, notice of meeting, action taken at the meeting, and publication of the resolution in each case.

The purpose of SDCL 8-5-9 is to ensure that the issues are sufficiently settled and framed so the issues can be tried. If the necessary information was not timely provided, then the appropriate action would have been to delay the trial on the issues. However, Department chose not to pursue that action. Instead, it is clear from the motions, briefs, and testimony provided by Department that it had sufficient information to raise and try numerous issues. Although Township may not have technically complied with SDCL 8-5-9 in Day County Civil Number 14-48, it appears to the Court that sufficient documentation was provided for the Department to go forward with trial and appeal. Thus, Township substantially complied with the statute's provision. See *Wagner v. Truesdell*, 1998 S.D. 9, ¶ 7, 574 N.W.2d 627, 629 (holding substantial compliance means actual compliance in respect to the substance essential to every reasonable objective of the statute).<sup>7</sup>

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<sup>7</sup> The Court elaborated on its holding:

It means that a court should determine whether the statute has been followed sufficiently so as to carry out the intent for which it was adopted. Substantial compliance with a statute is not shown unless it is made to appear that the purpose of the statute is shown to have been served. What constitutes substantial compliance with a statute is a matter depending on the facts of each particular case.

*Wagner v. Truesdell*, 1998 S.D. 9, ¶ 7, 574 N.W.2d 627, 629.

Because Department was provided with sufficient documentation and the statute does not require a verbatim transcript, Township did not violate Department's due process rights by failing to file an affidavit or verbatim transcript.

**f. Failure to list the names of owners of land through which the vacated highways passed**

Department's sixth argument alleges that its due process rights were violated when Township failed to comply with SDCL 31-3-6—i.e., Township failed to list the landowner's names through which vacated highways passed. That statute requires a petition for vacation to set forth the beginning, course, and termination of the highway proposed to be located, changed, or vacated, together with the names of the owners of the land through which the highway may pass. SDCL 31-3-6. However, Township complied with the statute as the petition presented at the meeting held on June 26, 2014, and resolution adopted that day contain the names of the owners of the land through which the highways pass. *See Ex. 24.* Furthermore, the petition presented at the meeting held on July 22, 2014, and the resolution adopted that day list the names of the owners of the land through which the highways pass. *See Ex. 25.* Department's interpretation of the SDCL 31-3-6 would inject an additional requirement, namely that each landowner's name for each section of highway to be vacated must be listed with the corresponding section of highway. SDCL 31-3-6 does not mandate that additional requirement. The two petitions presented and resolutions adopted all fully comply with SDCL 31-3-6. Consequently, Township did not violate Department's due process rights.

**g. Actual bias in that the decision to vacate was pre-determined**

Department's penultimate argument that its due process rights were violated concerns an allegation that the board of supervisors had actual bias against Department, as it had pre-determined the issue of highway vacation, thereby depriving Department of a fair hearing. The Court previously indicated it is unsurprised that the board of supervisors—the entity charged with maintenance and improvement of township highways—would have an intimate knowledge of the Township's highways and their conditions; and, as a result, would be the best suited and logical body to determine how to fulfill its obligations. Department presented absolutely no evidence that any supervisor acted on the petition because they would personally benefit from the highways being vacated. The Court has previously addressed this issue. Nonetheless, Department now argues Duerre personally benefitted from the highway vacation leading to his farm. Duerre testified he is the only individual that uses the highway, and as such, he did not feel it was necessary for the township to continue maintenance on what was

essentially his driveway. Although he will certainly receive the real estate upon which that highway sat, unencumbered by a section line highway after the vacation, if he owns the adjoining land; he will also now be burdened by additional obligations to maintain the vacated highway, without any monetary assistance from Township. That does not constitute a benefit to Duerre.

**h. Failure to properly initiate the petition**

Department's final argument for violation of its due process rights is that the petition was improperly initiated by the board of supervisors instead of a public petitioner. Although the board of supervisors selected the highways it thought most beneficial to vacate, the petition was circulated by a non-board member. Township's registered voters individually choose whether to sign the petition or to refrain. Indeed, the record is devoid of evidence evincing the procedure employed by Township was improper or illegal. Department conflates mere disagreement with a violation of due process. Township made two proposals to vacate certain highways. Department opposed those vacations and pointed out certain proposed vacations that affected access to public land. Based upon that information, Township removed those highways from the proposed vacation list. Township representatives listened and considered the information presented at the township meetings by those concerned about the sportsmen's interest in the use of the highways for access to hunting and fishing. However, as previously pointed out by the Court, Township must consider *all* aspects of public interest, not just Department's interest.

Based on the above analysis, Township did not violate Department's due process rights. Department had actual notice of the hearings; Department provided documentation opposing both petitions; and Department had representatives at one hearing. Consequently, Department received all its due process rights as required by law.

**IV. Was Township's decision arbitrary and capricious?**

The fourth issue raised by Department is that Township's decision to vacate the highways at issue was the product of personal and selfish motives, fraudulent motives or false information, and a lack of relevant or competent information, thereby rendering the decision arbitrary and capricious. Additionally, Department renews its argument that Township's decision gave board supervisors increased land for farming, private access to public bodies of water, and private driveways. Although the Court has previously addressed these issues in this Memorandum Decision, it will nonetheless briefly address them yet again because Department continues to spew forth these allegations.

A township is commonly referred to as the smallest unit of a democratic government. It generally consists of an area encompassing thirty-six square miles, excluding municipalities within the township

borders. As previously set forth, the Day County Auditor's records indicated Township had twenty active voters within its thirty-six square miles as of June 1, 2016. Under SDCL 8-3-6 and SDCL 8-3-7, in order to vote at a township meeting or serve as a township officer, an individual must be a registered voter and a resident of the township. Since this is a rural area, it is not surprising that most of Township's residents are somehow involved in farming and, as a result, own land within Township. It is also not surprising, given the Township's character and population, that any decision to vacate highways would result in some board supervisors, if they owned the adjoining land, receiving the alleged "benefit" of an additional thirty-three foot parcel of very little tillable land resulting from the vacation. In most cases, adjoining landowners already enjoy the "benefit" of paying taxes on the thirty-three foot strip of land regardless of its use. Simply because a board supervisor receives possession of this thirty-three foot strip of land does not mean it is immediately available for growing crops. Department's only support for this "benefit" are its allegations, which are not evidence. Indeed, the record contains no evidence indicating any individual, including board supervisors, would benefit economically or otherwise from any highway vacation. Nor is there any evidence establishing that those non-existent benefits caused them to vacate the highways at issue. Department's allegations are absurd.

Department also avers the decision to vacate was made to the "detriment and exclusion of all others in the community." This is simply not true. The testimony indicates the Board reviewed the condition of the highways within its borders and identified those areas that no longer served the public interest in expending Township resources to improve or maintain. If the highways at issue were not vacated, then Township could potentially be required to maintain or improve the highways in the future. Many of these highways were no longer useable due to the high water that has been in the area for over twenty years. Moreover, the vacation eliminates the potential for an unsuspecting driver to suddenly find himself engulfed by water in the middle of the night. This desire to maintain public safety is certainly a justifiable and noble decision. As such, Township's thought process and decision took into account all aspects of the public interest. The fact that Township favored public safety over sportsmen's opportunities on certain sections of the highways does not mean that it was an arbitrary and capricious decision.

Again, while Duerre will now have possession of a township highway that leads only to his farm, he will also be burdened by the additional obligation to maintain that highway, without any monetary assistance from Township. If Township is not allowed to vacate any highways where a board supervisor owns the adjoining land, then all townships would have difficulty vacating any highways. At least two-

thirds of the voting residents of Troy Township were involved in this decision. The board of supervisors' primary responsibility is to maintain the roads for public safety, and more specifically the travelling public. Township residents constitute part of the travelling public. The Board did not exercise personal and selfish motives in reaching the decision to adopt the two resolutions to vacate.

Department next contends Township based its decision on fraudulent motives or false information. Department argues that, because Township would most likely avoid liability for any injuries caused by failing to vacate a highway, it should therefore refrain from vacating the highways at issue. As discussed earlier, notwithstanding Department's omniscience about possible future lawsuits, there could still be litigation to determine those issues. In that case, Township would incur expenses defending itself before that litigation was resolved—expenses that could not only be avoided but also potentially bankrupt Township. Nevertheless, whether Township may ultimately avoid liability (and incur needless and potentially crippling expenses) does not mean it should ignore situations that could cause harm to the travelling public.

Also as stated earlier, if Township vacates a highway, it is no longer obligated to expend resources to maintain or improve that highway. However, if Township does not vacate a highway, then the possibility for future financial expenditure looms as it is obligated to maintain or improve the highways. The highways at issue were selected by members of the board of supervisors. In selecting these highways, the supervisors cited a lack of public travel on those highways, being inundated by water, and the inability to traverse the township by accessing these highway.<sup>8</sup> The board of supervisors, however, carefully considered information provided by Department regarding vacation. A highway that lead to smaller fields, a cemetery, and a non-meandered body of water was spared from vacation because it still served the public interest and was the only way to access certain land.

In their testimony, board supervisors freely admitted they were aware of SB 169 and its potential effect on their ability to vacate highways. However, awareness does not mean that they had fraudulent motives in pursuing the vacations. They also clearly testified they wanted to protect the travelling public by avoiding dangerous situations, like drivers unknowingly driving into a water-filled highway. The action taken by Township did not remove all public access to non-meandered bodies of water. Additionally, even Department's witnesses acknowledged that a duck or a pheasant could land almost anywhere and, if that were the only criteria evaluated, then no highways could be vacated. Former

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<sup>8</sup> The highways at issue only provide access to landowners of adjoining land—access that would continue if the highways were vacated and the land subsequently reverted to the adjoining landowners

Secretary of Game, Fish & Parks, John Cooper, also acknowledged that “[s]afety issues are a legitimate issue, I think, for all agencies and for townships.”

Township’s board of supervisors did not use fraudulent or false motives when it reached its decision to vacate the highways listed in the two petitions. Instead, Township’s board inspected the township highways, made a determination on which highways no longer needed to be a part of Township’s highway system, and moved forward by taking the appropriate action to vacate the selected highways. These actions are not arbitrary and capricious.

Department’s next contention is that Township’s decision is characterized by a lack of relevant and competent information to support the action. The Court has already determined that sufficient documentation was provided concerning actions taken at the two meetings where the resolutions were adopted. Township’s board of supervisors also provided testimony explaining why they believed the listed highways should be vacated. Further, the petition and resolution set forth reasons for the vacation. Township weighed the public interest expressed by Department and sportsmen against issues of the use of public resources to maintain and improve highways and the safety of the travelling public. Township had relevant and competent information to make its decision in adopting the two resolutions.<sup>9</sup> Its decision was not arbitrary and capricious.

**V. Was the action by the adjoining township necessary to vacate highways located on a shared border?**

Department’s fifth and final argument is that certain portions of the highways at issue located on the section line dividing Troy Township and York Township required York Township to likewise pass a resolution vacating that section of highway. SDCL 31-3-13 provides, in relevant part, that in order to vacate a highway located upon a township line, it is necessary that the board of supervisors of the adjoining civil township pass a like resolution and enter an order vacating said highway. Thus, for a township to legally vacate a section line highway on a township line, it is necessary for both township boards of supervisors to pass like resolutions vacating the highway.

Chelsea Krause, an employee of the Department of Game, Fish & Parks, was called as a witness at trial. Krause helped make exhibits and map the legal descriptions contained in the petitions. In her testimony, she stated that two sections of highway sharing a section line with York Township, which were

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<sup>9</sup> Department also asserts the cost of signage factored into Township’s decision. No Township board member testified this was a reason for vacation. It does, however, appear that Township will not be required to place signs on the vacated portions of highways, thereby potentially providing some savings, but this potential savings is negligible. In any event, there is no testimony supporting this was a reason for the vacation.

vacated by Troy Township, were not included in resolutions adopted by York Township vacating those highways in its township. Those sections of highway are located on the east side of the northeast quarter of section twelve in Troy Township, and on the east side of the east half of section thirteen in Troy Township. After reviewing the Notice of Appeal filed in *State of South Dakota, Department of Game, Fish & Parks v. York Township, Day County, South Dakota*, Day County Civil Number 15-17, it is evident the corresponding highways on the west side of the northwest quarter of Section seven in York Township and the west half of Section eighteen in York Township were not included in petitions for highways vacated by York Township. Thus, it appears those two descriptions, which correspond to the last two legal descriptions set forth in the Notice of Appeal filed in Day County Civil Number 14-48, cannot be legally vacated at this time. Because a like resolution was not passed by both townships, the vacation of those highway sections by Troy Township must be reversed and remanded for further action by Township.

A third portion of highway vacated by Troy Township was also located on the township line with York Township. But that description was included in a like resolution adopted by York Township. That vacation complied with the statutory mandates for vacation and therefore is affirmed.

#### CONCLUSION

Township's decision to vacate portions of highways within its jurisdiction is affirmed, with the exception of two portions of township line highway shared with York Township because no like resolution to vacate those highways was passed. Township followed all appropriate procedures in adopting the two resolutions based upon the two petitions filed with the board of supervisors. Township did not seek to deny public access to a public resource and considered all aspects of the public interest, including the Department's and sportsmen's interests, in determining which highways to vacate. Township did not violate Department's due process rights in vacating the designated highways; Department had actual notice of all hearings in which decisions were made by Township to vacate highways; Department participated in the process through correspondence and by having members of Department present at a hearing; and Department fully participated in the process before Township's board, culminating with this appeal.

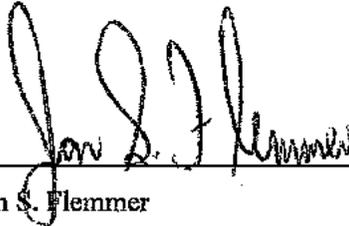
Township's actions were not driven by personal and selfish motives in vacating the portions of highways, nor did Township have fraudulent motives or base decisions on false information. Township possessed relevant and competent information based upon the board's investigation of Township's highways and years of involvement with Township's highways. Township's decision to vacate the

portions of the highways in question was not arbitrary and capricious. Finally, with the exception of the two highways vacated along the section line with York Township, Township's decision to vacate the remainder of highways correctly followed statutory requirements and is hereby affirmed.

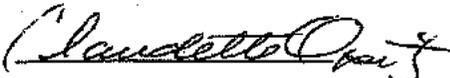
Counsel for Township shall draft an Order consistent with, as well as incorporating, this Memorandum Decision, reversing and remanding the Township's decision with respect to the two parcels improperly vacated on the township line with York Township and affirming the balance of Township's decision. Additionally, Counsel for Township shall, unless waived by Department, prepare Findings of Facts and Conclusions of law, incorporating this Memorandum Decision by reference.

DATED this 21<sup>st</sup> day of July, 2016 at Webster, South Dakota.

BY THE COURT:



Jon S. Flemmer  
Circuit Judge



Claudette Opitz, Clerk of Courts

STATE OF SOUTH DAKOTA)  
: SS.  
COUNTY OF DAY)

IN CIRCUIT COURT  
FIFTH JUDICIAL CIRCUIT

\*\*\*\*\*

STATE OF SOUTH DAKOTA, DEPARTMENT OF GAME, FISH AND PARKS,	*	File 18CIV14-50
	*	
Appellant,	*	
-vs-	*	<b>ORDER AFFIRMING DECISION</b>
	*	<b>OF THE VALLEY TOWNSHIP</b>
VALLEY TOWNSHIP, DAY COUNTY, SOUTH DAKOTA,	*	<b>BOARD OF SUPERVISORS</b>
	*	
Appellee.	*	
	*	

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Appellant, State of South Dakota, Department of Game, Fish & Parks ("Department"), appealed the decision of the Valley Township Board of Supervisors ("Township") to vacate certain public highways. The matter came on for trial *de novo* before the Honorable Jon S. Flemmer, Circuit Court Judge, presiding, on October 22, 2015. The Department appeared through its attorneys, Paul E. Bachand and Richard J. Neill. The Township appeared through its attorneys, Jack H. Hieb and Zachary W. Peterson.

Having conducted a review of this matter under the *de novo* standard of review, having considered the evidence and testimony presented at trial, having considered the written arguments of counsel, having rendered its Memorandum Decision, which was filed August 8, 2016, and is incorporated herein by this reference, and entered Findings of Fact and Conclusions of

Law this same date, which are incorporated herein by this reference, it is now

ORDERED that, with the exception of the portion of 142<sup>nd</sup> Street from 42100 142<sup>nd</sup> Street to 42300 142<sup>nd</sup> Street, on which the Department was previously granted partial summary judgment, Township's decision to vacate the remaining portions of highways is in all respects AFFIRMED.

Attest  
Jessica Sattler  
Clerk/Deputy



BY THE COURT:  
Signed: 8/26/2016 10:59:05 AM

A handwritten signature in black ink, appearing to read "Jim S. Hemmen".

\_\_\_\_\_  
Circuit Court Judge

Filed on: 08/26/2016 DAY

2

County, South Dakota 18CIV14-000050

STATE OF SOUTH DAKOTA)  
: SS.  
COUNTY OF DAY)

IN CIRCUIT COURT  
FIFTH JUDICIAL CIRCUIT

\* \* \* \* \*  
\*  
STATE OF SOUTH DAKOTA, \* File 18CIV14-50  
DEPARTMENT OF GAME, FISH \*  
AND PARKS, \*  
\*  
Appellant, \*  
-vs- \* FINDINGS OF FACT AND  
\* CONCLUSIONS OF LAW  
VALLEY TOWNSHIP, DAY COUNTY, \*  
SOUTH DAKOTA, \*  
\*  
Appellee. \*  
\*  
\* \* \* \* \*

Appellant, State of South Dakota, Department of Game, Fish & Parks ("Department"), appealed the decision of the Valley Township Board of Supervisors ("Township") to vacate certain public highways. The matter came on for trial *de novo* before the Honorable Jon S. Flemmer, Circuit Court Judge, presiding, on October 22, 2015. The Department appeared through its attorneys, Paul E. Bachand and Richard J. Neill. The Township appeared through its attorneys, Jack H. Hieb and Zachary W. Peterson.

Having conducted a review of this matter under the *de novo* standard of review, having considered the evidence and testimony presented at trial, having considered the written arguments of counsel, and having rendered its Memorandum Decision, which was filed August 8, 2016, and is incorporated

herein by this reference, the Court now makes and enters the following:

**FINDINGS OF FACT**

**A. BACKGROUND**

1. Township's Board, acting under its statutorily granted authority, accepted a petition from the voters of Township seeking to vacate rights-of-way.

2. After the petition was prepared, it was circulated and signed by Township's registered voters.

3. Attached to the petition was a statement signed, under oath, by the two supervisors and the chairman, indicating they had reviewed the petition, knew its contents, and believed the people listed signed the petition and sought to vacate the highways listed therein.

4. Township noticed and subsequently held a hearing on the petition.

5. Township adopted a resolution of vacation on August 5, 2014.

6. The resolution vacated ten portions of the Township's highways. See Ex. 14.

7. In response to the decision, Department timely filed a Notice of Appeal as to the ten portions in the resolution. The Court previously granted partial summary judgment in favor of the Department on the portion of 142<sup>nd</sup>

Street from 42100 142<sup>nd</sup> Street to 42300 142<sup>nd</sup> Street, which is the first description listed in the resolution. See Ex. 14. Therefore, nine remaining portions were at issue at trial.

**B. PUBLIC INTEREST**

8. At the commencement of trial, Department indicated that it would not be contesting that a public interest existed to vacate five sections of highway vacated by Township's resolution. These are the third through seventh descriptions listed in the resolution. See Ex. 14.

9. Some of the vacated portions of highway would allow travel to the edge of non-meandered bodies of water within the Township. Department argues that the Township sought to deny access to these bodies.

10. It is clear from the evidence that the ten highway vacations will not materially alter public access available to any non-meandered bodies of water in Valley Township.

11. No evidence was presented as to how vacating the five remaining portions of highway at issue would negatively affect any public interest sportsmen may have in road hunting in Township. A duck or a pheasant could land almost anywhere and, if that were the only criteria evaluated, then no highways could ever be vacated.

12. While witnesses for Department testified they had, on various occasions, come into contact with sportsmen on some of

the highways at issue, it is evident that none of these highways provide access to travel through the township, because they are either covered or damaged by high waters.

13. At best, the highways at issue provide access to landowners of adjoining land – access that would continue if the highways were vacated and the land subsequently reverted to the adjoining landowners.

14. The vacated highways do not help the traveling public traverse the township.

15. In order to have the vacation issues brought before the board, a petition was prepared by Paul Halvorsen, Township Clerk. Another resident circulated the petition and gathered eight other signatures from Township residents.

16. According to the Day County Auditor, as of August 3, 2016, there were twenty-six voters in Valley Township. Eight of those voters signed the petition, a ninth circulated the petition, and three others are Township supervisors. Paul Halvorsen is the Township's Clerk and Nick Jensen is the Township's Treasurer. This means that at least 14 of the 26 voters in Township were involved in the vacation process.

17. The majority of Township's residents live there because they farm or have family members involved in farming. It is therefore not shocking to the Court that the highways at issue

adjoin land owned by members of Township's board of supervisors and others involved in circulating and signing the petition.

18. Based upon the photos admitted at trial, very little of the vacated highways is useable as tillable acres without investing considerable time and money to make the strips tillable.

19. Consequently, any notion that Township's board members abandoned their duties and made a decision to seek private gain as a motive for vacation of the highways at issue is folly and without merit.

20. No one for or against the petition attended the August 5, 2014 meeting where the resolution was adopted.

21. Department's concern regarding the vacation encompassed only a singular public interest in hunting and fishing.

22. Likewise, Department's only interest is unfettered access for hunting and fishing at both Township's and public safety's expense.

23. Township officials testified as to their reasons for vacating the highways, which reasons were supported by the evidence produced at trial.

24. There was also testimony concerning washouts, flooded highways, and other perils situated on the highways at

issue that would prevent travelers from getting to another intersecting highway.

25. In weighing the issues and proceeding with the resolutions to vacate the highways, Township determined the public interest would be better served by proceeding with vacation, as opposed to leaving dangerous and unused section line highways open for public travel, especially when those highways do not allow any traveler to reach any intersecting highway due to their condition.

26. There could be litigation against the Township in the event of accidents on the highways the Township sought to vacate. In that case, the Township would incur expenses defending itself before that litigation was resolved, which would result in expenses that could be avoided.

27. Whether Township may ultimately avoid liability (and incur needless and potentially crippling expenses) does not mean it should ignore situations that could cause harm to the traveling public.

28. Although SB 169's introduction certainly factored into Township's decision to proceed with its resolutions, that fact does not mean Township did not have the public interest in mind when vacating what it perceived to be dangerous highways, rather than delaying that decision and, possibly, forfeiting the opportunity to rectify that dangerous situation.

29. A review of the testimony and evidence presented at trial illustrates that Township carefully considered which portions of highways should be vacated.

30. Township weighed the interests of sportsmen to have use of section line highways for road hunting and access to non-meandered bodies of water against providing for the safety of all the traveling public within its borders, as well as the financial cost associated with maintaining little used highways.

31. After weighing the evidence, Township determined public safety, and more specifically protecting the traveling public, outweighed Department's and sportsmen's interest to access section line highways for hunting and fishing.

32. This determination does not mean that sportsmen and Department lack a public interest in accessing the section line highways – they do have a public interest. Township, too, has a public interest in public safety, specifically keeping the traveling public safe, as well as managing financial commitments.

**C. DUE PROCESS**

33. With regard to Department's arguments concerning the publication of notice of the August 5, 2014 meeting, an Affidavit of Publication for the August 5, 2014, special meeting was introduced into evidence at trial as Ex. 12.

34. The Affidavit of Publication shows publication of the Notice of Hearing on July 28, 2014, and August 4, 2014.

35. The Affidavit was signed by the publisher on July 29, 2014, before the second publication. This obviously was not an action taken by Township.

36. No evidence was presented at trial that the August 4, 2014, publication did not take place.

37. With regard to Department's argument that Township failed to properly elect officers by paper ballot, the minutes from Township annual meeting, held on March 4, 2014, establish that three people were present: Brent Zimmerman, Paul Halvorsen, and Michael Herr. See Ex. 8 (Minutes from March 4, 2014 meeting). A motion was made to nominate one person to each of the three positions to be filled by election. A motion was then made to cease nominations and cast a unanimous ballot. All present voted aye. Therefore, the use of any type of ballot seems rather wasteful.

38. With regard to Department's argument that Township failed to provide proper notice regarding the time and place of regular meetings, the August 5, 2014 meeting was a special meeting, not one enumerated in SDCL 8-5-1.

39. The notice that was published, see Ex. 12, indicated that the hearing to consider the vacation of the highways would be held on Tuesday, August 5, 2014, at 1:00 pm at the home of Brent Zimmerman. While it did not give a street address for Brent Zimmerman's home, it took no more than two

minutes for the Court to obtain that address from the local phone book. Hopefully, it would not take Department's staff, or anyone else who had wanted to attend the meeting, much longer than that to find Brent Zimmerman's home.

40. No evidence was presented at trial that Department representatives, or any other member of the public, wanted to attend the hearing, but couldn't figure out how to get to Brent Zimmerman's home.

41. With regard to Department's argument that Township failed to provide a verbatim transcript of the vacation proceedings, townships do not employ court reporters or recorders to take down and transcribe township meetings.

42. By agreement of the parties, the Court admitted: minutes of the Valley Township Special Meeting held August 5, 2014, see Ex. 9; the Petition For Vacation Of Roads, verified on July 21, 2014, see Ex. 10; the Affidavit of Publication of Notice for Hearing of the August 5, 2014, meeting, see Ex. 12; the Affidavit of Publication of the Resolution to Vacate Roadways, see Ex. 13; and the Resolution & Order to Vacate Roadways as filed with the Day County Register of Deeds on August 6, 2014, see Ex. 14.

43. With regard to Department's argument that its due process rights were violated by Township's treasurer failing to

prepare an annual financial statement, no evidence or argument was offered on this issue.

44. The minutes of the Annual Meeting held March 4, 2014, included the treasurer's report containing information required by SDCL 8-10-30, see Ex. 8, as did the minutes of the Annual Meeting held on March 3, 2015, see Ex. 11.

45. Although the board of supervisors selected the highways it thought most beneficial to vacate, the petitions were circulated by a non-board member.

46. Township's registered voters individually choose whether to sign the petition or to refrain.

47. No one filed any objections to the petition or appeared at the noticed meeting.

48. Township representatives used their collective knowledge of Township's roads to consider all aspects of public interest, not just Department's interest.

**D. ARBITRARY AND CAPRICIOUS**

49. Since Valley Township is a rural area, it is not surprising that most of Township's residents are somehow involved in farming and, as a result, own land within Township.

50. It is also not surprising, given the Township's character and population, that the final decision on the passage of the Resolution falls upon the Township's board of supervisors, since that is the process prescribed by statute.

51. Department's argument that the decision to vacate was made to the "detriment and exclusion of all others in the community" is simply not true. The testimony indicates that the Board reviewed the condition of the highways within its borders and identified those areas that no longer serve the public interest in expending Township resources to improve or maintain.

52. If the highways at issue were not vacated, then Township could potentially be required to maintain or improve the highways in the future.

53. Many of the highways are no longer usable due to the high water that has been in the area for over twenty years. The vacation eliminates the potential for an unsuspecting driver to suddenly find himself engulfed by water in the middle of the night.

54. Sufficient documentation was provided concerning actions taken at the meeting where the resolution was adopted. Township's board of supervisors also provided testimony explaining why they believed the listed highways should be vacated. Further, the petition and resolution set forth reasons for the vacation.

55. Township had relevant and competent information to make its decision in adopting the resolution.

### CONCLUSIONS OF LAW

1. Any of the foregoing Findings of Fact that contain Conclusions of Law or are a mixture of fact and law are by this reference incorporated herein.

2. This Court has jurisdiction of the subject matter and of the parties.

3. In South Dakota, there is, by operation of law, a public highway along every section line, unless a portion of a section line is lawfully vacated or relocated. SDCL 31-18-1.

4. Townships are not required to open, improve, and maintain a passable highway on every section line. Douville v. Christensen, 2002 S.D. 33, ¶ 12, 641 N.W.2d 651, 655.

5. A township board of supervisors is required to construct, repair, and maintain all township roads. SDCL 31-13-1.

6. The board of supervisors for an organized township is authorized to vacate or relocate any section line highway under its jurisdiction. SDCL 31-18-3.

7. The power to vacate or relocate a section line highway has two conditions before it can be wielded: first, the board of supervisors must receive a petition of two or more voters of the organized township; and second, the public interest must be better served by the proposed vacation or relocation. SDCL 31-3-6.

8. One aspect of public interest Township must consider is its duty to maintain township highways for the traveling public. This is done to protect the traveling public and keep them safe from any defects in the highways. Further, this obligation to provide maintenance must be accomplished within the budget - a budget funded by Valley Township taxpayers.

9. A petition for vacation must "set forth the beginning, course, and termination of the highway proposed to be located, changed, or vacated, together with the names of the owners of the land through which the highway may pass." Id.

10. The statement attached to the petitions in this case did not indicate that Township's board of supervisors believed by signing the oath the highways should be vacated. Rather, it simply indicated that the Township's board of supervisors believed the people signing the petition sought to vacate the designated highways. It indicated the supervisors believed the individuals wanted to go forward with the process.

11. In no way do the signatures mean the two supervisors and chairman had already made a decision on whether to vacate the highways. It would belie the evidence presented to this Court to conclude otherwise.

12. Under Parks v. Cooper, 2004 S.D. 27, ¶ 46, 676 N.W.2d 823, 838, the State of South Dakota holds all waters in trust for the public. However, also in that case, the South

Dakota Supreme Court determined that it was up to the South Dakota Legislature to determine what bodies of water are open for recreational use. Id. at ¶¶50-51, 676 N.W.2d at 840-41. At present time, the Legislature has not made any determination as to the recreational use of non-meandered bodies of water within Valley Township.

13. Department's assertion that the Township sought to deny access to non-meandered bodies of water is not supported by the evidence presented at trial.

14. Department's definition of public interest is too narrow: it only considers individuals that desire to use the highways for access to hunting and fishing. Township must instead consider all aspects of public interest, not just an agency advocating hunting and fishing rights.

15. In considering vacation, the Township must consider all aspects of public interest, including safety. The Township must balance the resources it has to maintain the more traveled township highways against the loss of some access to non-meandered bodies of water and hunting opportunities on portions of little used highways.

16. Township is not required to wait for an accident to happen before taking remedial action to protect the traveling public from the accumulated water on the section lines Township has neither the intent nor the resources to improve or maintain.

17. Department's argument that the Township and its board of supervisors sought to privately profit from vacating the highways is meritless.

18. The Court cannot find, based on the evidence presented, that the public interest would be better served by keeping the vacated portions of highways open for sportsmen, thereby exposing the traveling public to dangerous highway conditions while also taking valuable resources away from highways that are regularly used. Township did not err in voting to vacate the proposed portions of highways.

19. Publication on two consecutive weeks is required by SDCL 31-3-7. Department's due process rights were not violated by the publisher executing the Affidavit of Publication before the second publication.

20. This appeal is not the appropriate proceeding to challenge the ability of Township's officials to hold office. Burns v. Kurtenbach, 327 N.W.2d 636 (S.D. 1982). The township supervisors' authority is not a proper issue for determination in this appeal. The election method used at the annual meeting did not violate the Department's due process rights in this proceeding.

21. SDCL 8-5-1, which specifies the notice to be given for the three regular meetings mandated by that statute, does not

apply, because the August 5, 2014 hearing was not one of the three meetings to which SDCL 8-5-1 applies.

22. SDCL 31-3-7 requires that the notice of hearing when a petition to vacate is filed must "state the purpose, date, time, and *location* of the hearing . . . ." (emphasis added). The statute does not require an address in the notice; it requires a location. A location, namely Brent Zimmerman's home, was provided.

23. Department's due process rights were not violated by the notice given.

24. The transcript referred to in SDCL 8-5-9 is a requirement that any documentation presented at a township meeting, any minutes of that meeting, and any resolutions adopted there must be filed with the Clerk of Courts.

25. Even if a transcript of the vacation proceedings was not prepared and filed with the Clerk, it is clear that Department received all of the documentation relevant to the petition, notice of meeting, action taken at the meeting, and publication of the resolution.

26. The purpose of SDCL 8-5-9 is to ensure that the issues are sufficiently settled and framed so the issues can be tried. If the necessary information was not timely provided, then the appropriate action would have been to delay the trial on the issues. However, Department chose not to pursue that action.

Instead, it is clear from the motions, briefs, and testimony provided by Department that it had sufficient information to raise and try numerous issues.

27. Although Township may not have technically complied with SDCL 8-5-9, it appears to the Court that sufficient documentation was provided for the Department to go forward with trial and appeal. Thus, Township substantially complied with the statute's provision. See Wagner v. Truesdell, 1998 S.D. 9, ¶ 7, 574 N.W.2d 627, 629 (holding substantial compliance means actual compliance in respect to the substance essential to every reasonable objective of the statute).

28. Because Department was provided with sufficient documentation and SDCL 8-5-9 does not require a verbatim transcript, Township did not violate Department's due process rights by failing to file an affidavit or verbatim transcript.

29. Department has completely failed to establish what information is lacking in the annual financial statement, if any; how Township failed to comply with SDCL 8-10-30; and how any alleged deficiencies in the annual financial statement denied Department any due process rights. Consequently, Township's actions concerning the annual financial statement did not violate Department's due process rights.

30. The record is devoid of evidence evincing the procedure employed by Township with respect to the initiation of the petition was improper or illegal.

31. Township's thought process and decision took into account all aspects of the public interest. The fact that Township favored public safety over sportsmen's opportunities on certain sections of the highways does not mean that it was an arbitrary and capricious decision.

32. The board of supervisors did not exercise personal and selfish motives in reaching the decision to adopt the resolution to vacate.

33. Township's board of supervisors did not use fraudulent or false motives when it reached its decision to vacate the highways listed in the petition. Instead, Township's board inspected the township highways, made a determination on which highways no longer needed to be a part of Township's highway system, and moved forward by taking the appropriate action to vacate the selected highways. These actions are not arbitrary and capricious.

34. Township had relevant and competent information to make its decision in adopting the resolution. Its decision was not arbitrary and capricious.

35. Township followed all appropriate procedures in adopting the resolution based upon the petition filed with the board of supervisors.

36. Township did not seek to deny public access to a public resource and considered all aspects of the public interest, including the Department's and sportsmen's interests, in determining which highways to vacate.

37. Township did not violate Department's due process rights in vacating the designated highways: Department had actual notice of all hearings in which decisions were made by Township to vacate highways; and Department fully participated in this appeal.

38. Township's actions were not driven by personal and selfish motives in vacating the portions of highways, nor did Township have fraudulent motives or base decisions on false information.

39. Township possessed relevant and competent information based upon the board's investigation of Township's highways and years of involvement with Township's highways.

40. Township's decision to vacate the portions of the highways in question was not arbitrary and capricious.

41. Township's decision to vacate the highways correctly followed statutory requirements and is affirmed.

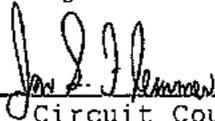
42. An Order consistent with these findings and conclusions shall be entered.

BY THE COURT:

Signed: 8/26/2016 10:57:51 AM

Attest:  
Claudette Opitz  
Clerk/Deputy



  
\_\_\_\_\_  
Circuit Court Judge

STATE OF SOUTH DAKOTA

IN CIRCUIT COURT

COUNTY OF DAY

**FILED**

FIFTH JUDICIAL CIRCUIT

**AUG 8 2016**

STATE OF SOUTH DAKOTA,  
DEPARTMENT OF GAME, FISH, & PARKS

CLAUDETTE ÖPITZ  
DAY CO. CLERK OF COURTS

CIV. 14-50

Appellant,

v.

**MEMORANDUM DECISION**

VALLEY TOWNSHIP, DAY COUNTY,  
SOUTH DAKOTA,

Appellee.

The above-entitled matter currently pending before the Court is an appeal brought by the South Dakota Department of Game, Fish, & Parks ("Department") from a decision by the Board of Supervisors of Valley Township to vacate certain public highways in file, Day County Civil Number 14-50. Department timely filed its Notice of Appeal. A *de novo* trial was then held in the Day County Courthouse on October 22, 2015. At trial, Department appeared through Special Assistant Attorneys General, Paul E. Bachand and Richard J. Neill, while Valley Township ("Township") appeared through its supervisors and counsel, Jack H. Hieb and Zachary E. Peterson. The Court heard testimony from seven witnesses and received 54 exhibits into evidence. Upon the trial's conclusion, the Court reserved ruling, allowing counsel to file written argument. The Court has now had an opportunity to review, with care, counsel's written argument, the exhibits and testimony presented at trial, and the trial transcript. This Memorandum Decision constitutes the Court's ruling on Department's appeal.

**BACKGROUND**

This action began after Township adopted a resolution vacating portions of certain highways within its jurisdiction. In South Dakota, there is, by operation of law, a public highway along every section line, unless a portion of a section line is lawfully vacated or relocated.<sup>1</sup> SDCL 31-18-1. The board of supervisors for an organized township is authorized to vacate or relocate any section line highway under its jurisdiction. SDCL 31-18-3. That power, however, has two conditions before it can be wielded: first, the board of supervisors must receive a petition of two or more voters of the organized

<sup>1</sup> A township board of supervisors is required to construct, repair, and maintain all township roads. SDCL 31-13-1.

township; and second, the public interest must be better served by the proposed vacation or relocation. SDCL 31-3-6. A petition for vacation must “set forth the beginning, course, and termination of the highway proposed to be located, changed, or vacated, together with the names of the owners of the land through which the highway may pass.” *Id.*

Valley Township’s Board, acting under its statutorily granted authority, accepted a petition from the voters of Township and adopted a corresponding resolution of vacation for the petition.<sup>2</sup> The resolution vacated ten portions of Township’s highways, *see* Ex. 14. In response to this decision, Department timely filed a Notice of Appeal as to the resolution. At the commencement of trial, Department indicated it would not be contesting that a public interest existed to vacate five of the ten sections of highway vacated by Township’s resolution. These are the third through seventh descriptions listed in the resolution, *see* Ex. 14.

Prior to trial, the Court ruled on a number of motions. One of these was Department’s Motion for Declaratory Ruling Regarding Scope of Appeal and Burden of Proof. Following a hearing on August 25, 2015, the Court entered an Order Regarding Appellant’s Motion For Declaratory Ruling Regarding Scope of Appeal And Burden of Proof, determining that South Dakota statutes called for a *de novo* review by the Circuit Court. This means that the Court is bound to determine anew all matters of fact without ascribing any presumption of correctness to Township’s findings on the evidence; once the Court determines the facts, it would next decide whether the actions of Township were “[b]ased on personal, selfish, or fraudulent motives, or on false information, [or] . . . characterized by a lack of relevant and competent evidence to support the action taken”; and as the party taking issue with Township’s decision to vacate the highways, Department shall have the burden of proof at trial. Department raises four issues with Township’s decision to vacate the remaining five sections of highway in the resolution. Each issue is addressed in turn below.

### ANALYSIS AND DECISION

#### **I. Did Township seek to deny public access to a public resource?**

Department initially asserts Township sought to deny public access to a public resource: non-meandered bodies of water. It does not appear there is any dispute that some of the vacated portions of highway would allow travel to the edge of non-meandered bodies of water within Township. Under *Parks v. Cooper*, 2004 S.D. 27, ¶ 46, 676 N.W.2d 823, 838, the State of South Dakota holds all waters in trust for the public. However, also in that case, the South Dakota Supreme Court determined that it was up to

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<sup>2</sup> The resolution was adopted on August 5, 2014.

the South Dakota Legislature to determine what bodies of water are open for recreational use. *Id.* ¶¶ 50-51, 676 N.W.2d at 840-41. At the present time, the Legislature has not made any determination as to the recreational use of non-meandered bodies of water within Valley Township. It is also clear from the evidence that the ten highway vacations will not materially alter public access available to any non-meandered bodies of water in Valley Township. Additionally, no evidence was presented as to how vacating the five remaining portions of highway at issue would negatively affect any public interest sportsmen may have in road hunting in Township. As such, Department's initial assertion is not supported by the evidence presented at trial.

**II. Is there a public interest to maintain the right of public access to the proposed vacated highways?**

Department's second argument is that public interest exists to maintain the right of public access to the vacated highways. Essentially, Department's argument is that the public interest is not better served by vacating the highways at issue. However, Department's definition of public interest is too narrow: it only considers individuals that desire to use the highways for access to hunting and fishing. Township must instead consider all aspects of public interest, not just an agency advocating hunting and fishing rights. One aspect of public interest Township must consider is its duty to maintain township highways for the travelling public. *See* SDCL 31-13-1. This is done to protect the travelling public and keep them safe from any defects in the highways. Further, this obligation to provide maintenance must be accomplished within the budget—a budget funded by Valley Township taxpayers.

Townships are not required to open, improve, and maintain a passable highway on every section line. *Douville v. Christensen*, 2002 S.D. 33, ¶ 12, 641 N.W.2d 651, 655. Indeed, a township is not prohibited from closing a section line highway to vehicular traffic if that highway is unsafe for such travel. SDCL 31-18-3. As mentioned above, Township must consider all aspects of public interest, including safety.<sup>3</sup> Township must balance the resources it has to maintain the more traveled township highways against the loss of some access to non-meandered bodies of water and hunting opportunities on portions of little used highways. While witnesses for Department testified they had, on various occasions, come into contact with sportsmen on some of the highways at issue, it is evident that none of these highways provide access to travel through the township, because they are either covered or damaged by high waters or have never been used for public travel. At best, then, these highways provide access to

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<sup>3</sup> Again, Department's argument only accounts for the segment of the public that wishes to hunt or fish and not for the overall public interest.

landowners of adjoining land—access that would continue if the highways were vacated and the land subsequently reverted to the adjoining landowners. The vacated highways thus do not help the travelling public traverse the township.

Department asserts Township's inability to maintain road closed barricades on some portions of the highways at issue over the recent past supports its argument that there is public interest in keeping those portions open. Department further asserts those failures indicate that closing the highways for safety reasons has not been successful. Township, however, is not required to wait for an accident to happen before taking remedial action to protect the travelling public from the accumulated water on the section lines Township has neither the intent nor the resources to improve or maintain.

Department next contends that Township did not have the public interest in mind when members of Township's board of supervisors voted to vacate certain portions of highways and that the only people interested in vacation were the supervisors. There is testimony indicating discussions on highway vacations were had at township meetings. In order to have that matter brought before the board, a petition was prepared by Paul Halvorsen, Township Clerk. Another resident circulated that petition and gathered eight signatures from other Township residents. Department focuses its ire on the fact that the board of supervisors initiated this process by having the petition drafted, but presents absolutely no evidence of any statutory prohibition against a board starting the process to address highway vacation issues they believe should be discussed. According to the Day County Auditor, as of August 3, 2016, there were twenty-six voters in Valley Township. Eight of those voters signed the petition, a ninth circulated the petition, and three are Township's supervisors. Paul Halvorsen is Township's Clerk and Nick Jensen is Township's Treasurer. This means that at least fourteen of the twenty-six voters in Township were involved in the vacation process.

The majority of Township's residents live there because they farm or have family members involved in farming. It is therefore not shocking to the Court that the highways at issue adjoin land owned by members of Township's board of supervisors and others involved in circulating and signing the petition. Department argues that this demonstrates Township and its board of supervisors sought to privately profit from vacating the highways and have thereby abandoned their duties to the public. This argument is meritless. Under SDCL 31-18-2, a section line highway is sixty-six feet wide, with thirty-three feet taken from each side of the section line. Adjoining landowners continue to pay taxes on the

thirty-three foot strip of land regardless of its use—i.e., even if it is used as a section line highway.<sup>4</sup> Furthermore, based upon the photos admitted at trial, very little of the vacated highways will be useable as tillable acres without investing considerable time and money to make the strips tillable. Consequently, any notion that Township's board members abandoned their duties and made a decision to seek private gain as a motive for vacation of the highways at issue is folly and without merit.

No one for or against the petition attended the August 5, 2014, meeting where the resolution was adopted. Department's concern encompassed only a singular public interest in hunting and fishing. As discussed earlier, Township must evaluate *all* aspects of public interest, not just a single public interest.<sup>5</sup> Township officials testified as to their reasons for vacating the highways; reasons that were supported by the evidence produced at trial. There was also testimony concerning washouts, flooded highways, and other perils situated on the highways at issue that would prevent travelers from getting to another intersecting highway.

Department next avers Township should not fear liability for any potential injury caused by the flooded and damaged highways if they were kept open, because it has insurance and would have immunity in certain lawsuits. Despite Department's omniscience about possible future lawsuits, there could still be litigation to resolve those lawsuits. In that case, Township would incur expenses defending itself before that litigation was resolved—expenses that could have been avoided. Nevertheless, whether Township may ultimately avoid liability (and incur needless and potentially crippling expenses) does not mean it should ignore situations that could cause harm to the travelling public.

Department also argues that an underlying reason for Township to vacate the highways at issue was the introduction of Senate Bill 169 ("SB 169") in the Legislature.<sup>6</sup> SB 169, if passed, would have prohibited Township from vacating certain portions of the highways at issue because they gave access to public waters. Although SB 169's introduction certainly factored into Township's decision to proceed with its resolution, that fact does not mean Township did not have the public interest in mind when vacating what it perceived to be dangerous highways, rather than delaying that decision and, possibly, forfeiting the opportunity to rectify a dangerous situation. SB 169's introduction motivated Township to rectify the dangerous situation before it potentially lost its ability to protect the public.

<sup>4</sup> Upon vacation of a highway, the land embodied therein shall revert to the original owners or their successors in interest. SDCL 31-3-10. Thus, an individual owning land adjoining a vacated section of highway would receive a strip of land thirty-three feet wide for the length of the portion of the vacated highway.

<sup>5</sup> Again, like earlier, Department is essentially advocating that public safety must always yield to hunting and fishing access—an absurd argument. See SDCL 31-18-3 (noting that a township may close a section line highway if the highway is unsafe for vehicle traffic).

<sup>6</sup> The bill did not become law.

Furthermore, as stated previously, Township, in making its decision, must weigh the interest of sportsmen to have the access Department demands against the safety of all the travelling public and Township's ability to budget and use its financial resources to maintain those highways most often used by the travelling public. Department's only interest is unfettered access for hunting and fishing at both Township's and public safety's expense. In weighing these issues and proceeding with the resolution to vacate the highways, Township determined the public interest would be better served by proceeding with vacation, as opposed to leaving dangerous and unused section line highways open for public travel, especially when those highways do not allow any traveler to reach any intersecting highway due to their condition. Department's next argument is that Township's board of supervisors had already chosen to vacate the highways at issue prior to voting on the petitions. Department alleges this is true for three reasons: first, the board of supervisors selected the highways included on the petition; second, the board of supervisors arranged for the circulation of the petition; and third, the board of supervisors voted to adopt the resolution approving the petition without any of the petitioners present. The board of supervisors is charged with the duty to construct, improve, and maintain the Township's highways. See SDCL 31-13-1. It would therefore have an intimate knowledge of the Township's highways and their condition. Not surprisingly, the board of supervisors is the body best suited to determine whether a highway should or should not be vacated within its borders.

After the petition was prepared, it was circulated and signed by registered voters of Township. Attached to the petition was a statement signed, under oath, by the two supervisors and the chairman, indicating they had reviewed the petition, knew its contents, and believed the people listed signed the petition and sought to vacate the highways listed therein. The statement simply indicated that the Township's board of supervisors believed the people signing the petition sought to vacate the designated highways. It did not indicate that Township's board of supervisors believed by signing the oath that the highways should be vacated; instead, it simply indicated they believed the individuals wanted to go forward with the process. Township then noticed and subsequently held the meeting where the board of supervisors adopted the resolution. In no way do the signatures mean the two supervisors and chairman had already made a decision on whether to vacate the highways. It would belie the evidence presented to this Court to conclude otherwise.

Indeed, a review of the testimony and evidence presented at trial illustrates that Township carefully considered which portions of highways should be vacated. Township weighed the interests of sportsmen to have use of section line highways for road hunting and access to non-meandered bodies of

water against providing for the safety of all the travelling public within its borders, as well as the financial cost associated with maintaining little used highways. After weighing the evidence, Township determined public safety, and more specifically protecting the travelling public, outweighed Department's and sportsmen's interest to access section line highways for hunting and fishing. This determination does not mean that sportsmen and Department lack a public interest in accessing the section line highways—they do have a public interest. Township, too, has a public interest in public safety, specifically keeping the travelling public safe, as well as managing financial commitments. As such, the Court cannot find, based on the evidence presented, that the public interest would be better served by keeping the vacated portions of highways open for sportsmen, thereby exposing the travelling public to dangerous highway conditions while also taking valuable resources away from highways that are regularly used. Township did not err in voting to vacate the proposed portions of highways.

### **III. Did Township violate Department's due process rights?**

Department's third argument asserts Township violated Department's due process rights in six ways by failing to follow numerous statutory requirements; a.) Department alleges Township failed to follow SDCL 8-3-4 in publishing notice of the special meeting held August 5, 2014; b.) Department avers that Township officers were not properly elected by paper ballot; c.) Department asserts SDCL 8-5-1 was not followed to give notice of time and place of regular meetings; d.) Department alleges Township failed to provide transcripts of the vacation proceedings; e.) Department avers Township failed to follow the requirement that the township treasurer prepare the annual financial statement as required by SDCL 8-10-30; and f.) Department again contends the petition was improperly initiated by the Board instead of a public petitioner.

#### **a. Failure to notice special meeting held on August 5, 2014**

Department first complains that Township failed to follow SDCL 8-3-4 in publishing notice of the special meeting held on August 5, 2014. An Affidavit of Publication for the August 5, 2014, special meeting was introduced into evidence at trial as Ex. 12. It shows publication of the Notice of Hearing on July 28, 2014, and August 4, 2014. Publication on two consecutive weeks is required by SDCL 31-3-7. The Affidavit was signed by the publisher on July 29, 2014, before the second publication. This obviously was not an action taken by Township. No evidence was presented at trial that the August 4, 2014, publication did not take place. Department's due process rights were therefore not violated by the publisher executing the Affidavit before the second publication.

**b. Failure to properly elect Township officials by paper ballot**

Department's second argument is that its due process rights were violated because Township failed to properly elect officers by paper ballot at the annual meeting held on March 4, 2014. Under SDCL 8-3-15, township supervisors, treasurers, clerks, and constables must be elected by ballot. The minutes from that meeting establish that three people were present: Brent Zimmerman, Paul Halvorson and Michael Herr. *See* Ex. 8 (Minutes from March 4, 2014 meeting). A motion was made and seconded to nominate one person to each of the three positions to be filled by election. A motion was then made to cease nominations and cast a unanimous ballot. All present voted aye. Therefore, the use of any type of ballot seems rather wasteful. In addition, it does not appear this appeal is the appropriate proceeding to challenge the ability of Township's officials to hold office. *Burns v. Kurtenbach*, 327 N.W.2d 636 (S.D. 1982). As such, the township supervisor's authority is not a proper issue for determination in this appeal. The election method used at the annual meeting did not violate the Department's due process rights in this proceeding.

**c. Failure to follow SDCL 8-5-1 for time and place of regular meetings**

Department's third allegation is that Township failed to properly give notice of the location of regular meetings. SDCL 8-5-1 specifies the notice to be given for the three regular meetings mandated by that statute. The August 5, 2014, hearing was not one of the three meetings set forth in SDCL 8-5-1 and that statute is not applicable in this case. Notice of the August 5, 2014, meeting at which the Resolution & Order To Vacate was adopted is specified under SDCL 31-3-7. That statute requires that the notice of hearing when a petition to vacate is filed must "state the purpose, date, time, and *location* of the hearing ... ." (emphasis added).

The notice that was published, *see* Ex. 12, indicated that the hearing to consider the vacation of the highways would be held on Tuesday, August 5, 2014, at 1:00 pm at the home of Brent Zimmerman. While it did not give a street address for Brent Zimmerman's home, it took no more than two minutes for the Court to obtain that address from the local phone book. Hopefully, it would not take Department's staff, or anyone else who had wanted to attend the meeting, much longer than that to find Brent Zimmerman's home. The statute does not require an address in the notice; it requires a location. Brent Zimmerman's home is a location. No evidence was presented at trial that Department representatives, or any other member of the public, wanted to attend the hearing, but couldn't figure out how to get to Brent Zimmerman's home. Department's due process rights were not violated by the notice given.

**d. Failure to provide transcripts of the vacation proceedings**

Department's fourth argument asserts Township failed to provide a transcript of the vacation proceedings in violation of SDCL 8-5-9. That statute provides:

Within thirty days after the service of such notice of appeal, the board of supervisors of the township shall cause to be filed with the clerk of courts a transcript of the proceedings of such board relative to the decision, order, or resolution being appealed, which transcript shall be certified to by the township clerk as being correct. The issue shall be deemed to have been joined from the time of filing of such transcript and the matter may be brought on for trial in the same manner as provided for in civil cases. If the issues do not sufficiently appear from the notice of appeal and such transcript, the court may, upon notice to the parties, settle and frame the issues to be tried.

SDCL 8-5-9. Department interprets this statute to require a verbatim transcript of the meeting held on August 5, 2014. This would necessarily require a court reporter to transcribe the proceedings. That interpretation, however, is too strict. Townships do not employ court reporters or recorders to take down and transcribe township meetings. Instead, the transcript referred to in SDCL 8-5-9 is a requirement that any documentation presented at a township meeting, any minutes of that meeting, and any resolutions adopted there must be filed with the Clerk of Courts, if a decision of the board is appealed.

It does not appear that any of the documentation that was used by Township in adopting the Resolution & Order To Vacate Roadways on August 5, 2014, was initially filed with the Clerk of Courts when this appeal was commenced. Despite this lack of filing, by agreement of the parties, the Court admitted the minutes of the Valley Township Special Meeting held August 5, 2014, *see* Ex. 9; the Petition For Vacation Of Roads, verified on July 21, 2014, *see* Ex. 10; the Affidavit of Publication of Notice for Hearing of the August 5, 2014, meeting. *See* Ex. 12; the Affidavit of Publication of the Resolution to Vacate Roadway, *see* Ex. 13; and the Resolution & Order to Vacate Roadways as filed with the Day County Register of Deeds on August 6, 2014, *See* Ex. 14. Thus, even if a transcript of the vacation proceedings was not prepared and filed with the Clerk, it is clear that Department received all of the documentation relevant to the petition, notice of meeting, action taken at the meeting, and publication of the resolution.

The purpose of SDCL 8-5-9 is to ensure that the issues are sufficiently settled and framed so the issues can be tried. If the necessary information was not timely provided, then the appropriate action would have been to delay the trial on the issues. However, Department chose not to pursue that action.

Instead, it is clear from the motions, briefs, and testimony provided by Department that it had sufficient information to raise and try numerous issues. Although Township may not have technically complied with SDCL 8-5-9, it appears to the Court that sufficient documentation was provided for the Department to go forward with the appeal and this trial. Thus, Township substantially complied with the statute's provision. *See Wagner v. Truesdell*, 1998 S.D. 9, ¶ 7, 574 N.W.2d 627, 629 (holding substantial compliance means actual compliance in respect to the substance essential to every reasonable objective of the statute).<sup>7</sup>

Because Department was provided with sufficient documentation and the statute does not require a verbatim transcript, Township did not violate Department's due process rights by failing to file a verbatim transcript.

**e. Failure to follow the requirement that the township treasurer prepare the annual financial statement as required by SDCL 8-10-30**

Department's fifth argument alleges that its due process rights were violated by Township's treasurer failing to prepare an annual financial statement. SDCL 8-10-30 sets forth the requirements for a township treasurer's annual financial statement. No evidence was presented or argument offered on this issue. There was no separate exhibit admitted at trial purporting to be the annual financial statement for Township. However, the minutes of the Annual Meeting held March 4, 2014, included the treasurer's report containing information required by SDCL 8-10-30, *see* Ex. 8, as did the minutes of the Annual Meeting held on March 3, 2015, *see* Ex. 11. Department has completely failed to establish what information is lacking, if any; how Township failed to comply with the statute and how any alleged deficiencies in the annual financial statement denied Department any due process rights. Consequently, Township did not violate Department's due process rights.

**f. Failure to properly initiate the petition**

Department's final argument for violation of its due process rights is that the petition was improperly initiated by the board of supervisors instead of a public petitioner. Although the board of supervisors selected the highways it thought most beneficial to vacate, the petition was circulated by a non-board member. Township's registered voters individually chose whether to sign the petition or to

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<sup>7</sup> The Court elaborated on its holding:

It means that a court should determine whether the statute has been followed sufficiently so as to carry out the intent for which it was adopted. Substantial compliance with a statute is not shown unless it is made to appear that the purpose of the statute is shown to have been served. What constitutes substantial compliance with a statute is a matter depending on the facts of each particular case.

*Wagner v. Truesdell*, 1998 S.D. 9, ¶ 7, 574 N.W.2d 627, 629.

refrain. Indeed, the record is devoid of any evidence evincing that the procedure employed by Township was improper or illegal. Department conflates mere disagreement with a violation of due process. Township received a petition to vacate certain highways and gave notice of a meeting set for the purpose of considering that petition. No one filed any objections to that petition or appeared at the noticed meeting. Township representatives used their collective knowledge of Township's roads to consider *all* aspects of public interest, not just Department's interest. No evidence was presented to show that Township was legally prohibited from initiating the vacation process. Based on the above analysis, Township did not violate Department's due process rights.

#### **IV. Was Township's decision arbitrary and capricious?**

The fourth issue raised by Department is that Township's decision to vacate the highways at issue was the product of personal and selfish motives, fraudulent motives or false information, and a lack of relevant or competent information, thereby rendering the decision arbitrary and capricious. Although the Court has previously addressed these issues in this Memorandum Decision, it will nonetheless briefly address them yet again because Department continues to spew forth these allegations.

A township is commonly referred to as the smallest unit of a democratic government, although apparently in Department's view that makes it "a relatively inconsequential segment of governance." (Rebuttal Argument p.4). It generally consists of an area encompassing thirty-six square miles, excluding municipalities within the township borders. As previously set forth, the Day County Auditor's records indicated Township had twenty-six active voters within its thirty-six square miles as of August 3, 2016. Under SDCL 8-3-6 and SDCL 8-3-7, in order to vote at a township meeting or serve as a township officer, an individual must be a registered voter and a resident of the township. Since this is a rural area, it is not surprising that most of Township's residents are somehow involved in farming and, as a result, own land within Township. It is also not surprising that the final decision on the passage of the Resolution falls upon Township's board of supervisors, since that is the process prescribed by statute. However, more than 50% of the registered voters in Township participated in the vacation process.

Department also avers the decision to vacate was made to the "detriment and exclusion of all others in the community." This is simply not true. The testimony indicates the Board reviewed the condition of the highways within its borders and identified those areas that no longer served the public interest in expending Township resources to improve or maintain. If the highways at issue were not vacated, then Township could potentially be required to maintain or improve the highways in the future. Many of these highways were no longer useable due to the high water that has been in the area for over

twenty years. Moreover, the vacation eliminates the potential for an unsuspecting driver to suddenly find himself engulfed by water in the middle of the night. This desire to maintain public safety is certainly a justifiable and noble decision. As such, Township's thought process and decision took into account all aspects of the public interest. The fact that Township favored public safety over sportsmen's opportunities on certain sections of the highways does not mean that it was an arbitrary and capricious decision. The board of supervisors' responsibility is to maintain the roads for public safety, and more specifically the travelling public. Township residents constitute part of the travelling public. The Board did not exercise personal and selfish motives in reaching the decision to adopt the resolution to vacate.

Department next contends Township based its decision on fraudulent motives or false information. Department argues that, because Township would most likely avoid liability for any injuries caused by failing to vacate a highway, it should therefore refrain from vacating the highways at issue. As discussed earlier, notwithstanding Department's omniscience about possible future lawsuits, there could still be litigation to determine those issues. In that case, Township would incur expenses defending itself before that litigation was resolved—expenses that could not only be avoided but also potentially bankrupt Township. Nevertheless, whether Township may ultimately avoid liability (and incur needless and potentially crippling expenses) does not mean it should ignore situations that could cause harm to the travelling public.

Also as stated earlier, if Township vacates a highway, it is no longer obligated to expend resources to maintain or improve that highway. However, if Township does not vacate a highway, then the possibility for future financial expenditure looms as it is obligated to maintain or improve the highways. The highways at issue were selected by members of the board of supervisors. In selecting these highways, the supervisors cited a lack of public travel on those highways, being inundated by water, and the inability to traverse the township by accessing these highways.<sup>8</sup>

In their testimony, board supervisors freely admitted they were aware of SB 169 and its potential effect on their ability to vacate highways. However, awareness does not mean that they had fraudulent motives in pursuing the vacations. They also clearly testified they wanted to protect the travelling public by avoiding dangerous situations, like drivers unknowingly driving into a water-filled highway. The action taken by Township did not remove all public access to non-meandered bodies of water in Valley

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<sup>8</sup> The highways at issue only provide access to landowners of adjoining land—access that would continue if the highways were vacated and the land subsequently reverted to the adjoining landowners

Township. A duck or a pheasant could land almost anywhere and, if that were the only criteria evaluated, then no highways could ever be vacated.

Township's board of supervisors did not use fraudulent or false motives when it reached its decision to vacate the highways listed in the petition. Instead, Township's board inspected the township highways, made a determination on which highways no longer needed to be a part of Township's highway system, and moved forward by taking the appropriate action to vacate the selected highways. These actions are not arbitrary and capricious.

Department's next contention is that Township's decision is characterized by a lack of relevant and competent information to support the action. The Court has already determined that sufficient documentation was provided concerning actions taken at the meeting where the resolution was adopted. Township's board of supervisors also provided testimony explaining why they believed the listed highways should be vacated. Further, the petition and resolution set forth reasons for the vacation. Township weighed the public interest expressed by Department and sportsmen against issues of the use of public resources to maintain and improve highways and the safety of the travelling public. Township had relevant and competent information to make its decision in adopting the resolution.<sup>9</sup> Its decision was not arbitrary and capricious.

#### CONCLUSION

Township's decision to vacate portions of highways within its jurisdiction is affirmed. Township followed all appropriate procedures in adopting the resolution based upon the petition filed with the board of supervisors. Township did not seek to deny public access to a public resource and considered all aspects of the public interest, including the Department's and sportsmen's interests, in determining which highways to vacate. Township did not violate Department's due process rights in vacating the designated highways: Department had actual notice of all hearings in which decisions were made by Township to vacate highways; and Department fully participated in this appeal.

Township's actions were not driven by personal and selfish motives in vacating the portions of highways, nor did Township have fraudulent motives or base decisions on false information. Township possessed relevant and competent information based upon the board's investigation of Township's highways and years of involvement with Township's highways. Township's decision to vacate the

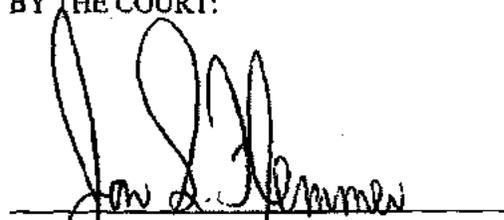
<sup>9</sup> Department also asserts the cost of signage factored into Township's decision. No Township board member testified this was a reason for vacation. It does, however, appear that Township will not be required to place signs on the vacated portions of highways, thereby potentially providing some savings, but this potential savings is negligible. In any event, there is no testimony supporting this was a reason for the vacation.

portions of the highways in question was not arbitrary and capricious. Finally, Township's decision to vacate the highways correctly followed statutory requirements and is hereby affirmed.

Counsel for Township shall draft an Order consistent with, as well as incorporating, this Memorandum Decision, affirming Township's decision. Additionally, Counsel for Township shall, unless waived by Department, prepare Findings of Facts and Conclusions of law, incorporating this Memorandum Decision by reference.

Dated this 8<sup>th</sup> day of August, 2016 at Webster, South Dakota.

BY THE COURT:



Jon S. Hemmer  
Circuit Judge

ATTEST:



Claudette Opitz, Clerk of Courts

STATE OF SOUTH DAKOTA)  
: SS.  
COUNTY OF DAY)

IN CIRCUIT COURT  
FIFTH JUDICIAL CIRCUIT

\* \* \* \* \*

STATE OF SOUTH DAKOTA, DEPARTMENT OF GAME, FISH AND PARKS,	*	File 18CIV14-51
	*	
	*	
Appellant,	*	
-vs-	*	<b>ORDER AFFIRMING DECISION</b>
	*	<b>OF THE BUTLER TOWNSHIP</b>
BUTLER TOWNSHIP, DAY COUNTY, SOUTH DAKOTA,	*	<b>BOARD OF SUPERVISORS</b>
	*	
Appellee.	*	

\* \* \* \* \*

Appellant, State of South Dakota, Department of Game,  
Fish & Parks ("Department"), appealed the decision of the Butler  
Township Board of Supervisors ("Township") to vacate certain  
public highways. The matter came on for trial *de novo* before the  
Honorable Jon S. Flemmer, Circuit Court Judge, presiding, on  
October 22, 2015. The Department appeared through its attorneys,  
Paul E. Bachand and Richard J. Neill. The Township appeared  
through its attorneys, Jack H. Hieb and Zachary W. Peterson.

Having conducted a review of this matter under the *de  
novo* standard of review, having considered the evidence and  
testimony presented at trial, having considered the written  
arguments of counsel, having rendered its Memorandum Decision,  
which was filed August 24, 2016, and is incorporated herein by  
this reference, and entered Findings of Fact and Conclusions of

Law this same date, which are incorporated herein by this reference, it is now

ORDERED that Township's decision to vacate the portions of highways is in all respects AFFIRMED.

Attest:  
Jessica Sattler  
Clerk/Deputy



BY THE COURT  
Signed: 2/21/2016 1:41:24 PM

Handwritten signature of John D. Flemer in black ink.

\_\_\_\_\_  
Circuit Court Judge



herein by this reference, the Court now makes and enters the following:

**FINDINGS OF FACT**

**A. BACKGROUND**

1. Township's Board, acting under its statutorily granted authority, accepted a petition from the voters of Township seeking to vacate rights-of-way.

2. After the petition was prepared, it was circulated and signed by Township's registered voters.

3. Attached to the petition was a statement signed, under oath, by the two supervisors and the chairman, indicating they had reviewed the petition, knew its contents, and believed the people listed signed the petition and sought to vacate the highways listed therein.

4. Township noticed and subsequently held a hearing on the petition.

5. Township adopted a resolution of vacation on August 11, 2014.

6. The resolution vacated ten portions of the Township's highways. See Ex. 15.

7. In response to the decision, Department timely filed a Notice of Appeal as to the ten portions in the resolution.

**B. PUBLIC INTEREST**

8. At the commencement of trial, Department indicated that it would not be contesting that a public interest existed to vacate two sections of highway vacated by Township's resolution. These are a portion of the second description and the fifth description listed in the resolution. See Ex. 15.

9. Some of the vacated portions of highway would allow travel to the edge of non-meandered bodies of water within the Township. Department argues that the Township sought to deny access to these bodies.

10. It is clear from the evidence that the ten highway vacations will not materially alter public access available to any non-meandered bodies of water in Butler Township. Testimony indicated there would still be other routes to access the non-meandered bodies of water referred to as Bohn Slough and Buck Slough should they be opened to recreational use by the South Dakota Legislature in the future.

11. No evidence was presented as to how vacating the ten portions of highway at issue would negatively affect any public interest sportsmen may have in road hunting on other highways within Township that will still be open to travel.

12. Other than testimony by Department's witnesses describing limited contact with sportsmen on the contested highways, there was no evidence to indicate those sporting

experiences were so unique that they could not be encountered on other highways in Township. A duck or a pheasant could land almost anywhere and, if that were the only criteria evaluated, then no highways could ever be vacated.

13. While witnesses for Department testified they had, on various occasions, come into contact with sportsmen on some of the highways at issue, it is evident that none of these highways provide access to travel through the township, because they are either covered or damaged by high waters or have never been used for public travel.

14. At best, the highways at issue provide access to landowners of adjoining land – access that would continue if the highways were vacated and the land subsequently reverted to the adjoining landowners.

15. The vacated highways do not help the traveling public traverse the township.

16. In order to have the vacation issues brought before the board, a petition was prepared by Township board members. A Township resident circulated the petition and gathered six signatures from other Township residents.

17. According to the Day County Auditor, as of August 3, 2016, there were forty-one registered voters in Butler Township. Six of those voters signed the petition, a seventh circulated the petition, and five are Township officers. This

means that at least 12 of the 41 voters in Township were involved in the vacation process.

18. The majority of Township's residents live there because they farm or have family members involved in farming. It is therefore not shocking to the Court that the highways at issue adjoin land owned by members of Township's board of supervisors and others involved in circulating and signing the petition.

19. Based upon the photos admitted at trial, very little of the vacated highways is useable as tillable acres without investing considerable time and money to make the strips that are above water tillable.

20. Consequently, any notion that Township's board members abandoned their duties and made a decision to seek private gain as a motive for vacation of the highways at issue is folly and without merit.

21. No one for or against the petition attended the August 11, 2014 meeting where the resolution was adopted.

22. In response to the publication of the Notice Of Hearing, Department submitted to Township an August 6, 2014, letter from Jeffrey R. Vonk, Department Secretary, opposing the petition. Department opposed the entire list of highways proposed to be vacated.

23. Department's concern regarding the vacation encompassed only a singular public interest in hunting and fishing.

24. Likewise, Department's only interest is unfettered access for hunting and fishing at both Township's and public safety's expense.

25. Township officials testified as to their reasons for vacating the highways, which reasons were supported by the evidence produced at trial.

26. There was also testimony concerning washouts, flooded highways, and other perils situated on the highways at issue that would prevent travelers from getting to another intersecting highway.

27. In weighing the issues and proceeding with the resolutions to vacate the highways, Township determined the public interest would be better served by proceeding with vacation, as opposed to leaving dangerous and unused section line highways open for public travel, especially when those highways do not allow any traveler to reach any intersecting highway due to their condition.

28. One reason Township gave for vacating the highways was to preserve their future resources and avoid financial obligations.

29. Township officers did not indicate in their testimony that they were vacating highways to avoid future litigation. Nonetheless, there could be litigation against the Township in the event of accidents on the highways the Township sought to vacate. In that case, the Township would incur expenses defending itself before that litigation was resolved, which would result in expenses that could be avoided.

30. Whether Township may ultimately avoid liability (and incur needless and potentially crippling expenses) does not mean it should ignore situations that could cause harm to the traveling public.

31. Although SB 169's introduction certainly factored into Township's decision to proceed with its resolutions, that fact does not mean Township did not have the public interest in mind when vacating what it perceived to be dangerous highways, rather than delaying that decision and, possibly, forfeiting the opportunity to rectify that dangerous situation. SB 169's introduction motivated Township to rectify the dangerous situation before it potentially lost its ability to protect the public.

32. A review of the testimony and evidence presented at trial illustrates that Township carefully considered which portions of highways should be vacated.

33. Township weighed the interests of sportsmen to have use of section line highways for road hunting and access to non-meandered bodies of water against providing for the safety of all the traveling public within its borders, as well as the financial cost associated with maintaining little used highways.

34. After weighing the evidence, Township determined public safety, and more specifically protecting the traveling public, outweighed Department's and sportsmen's interest to access section line highways for hunting and fishing.

35. This determination does not mean that sportsmen and Department lack a public interest in accessing the section line highways -- they do have a public interest. Township, too, has a public interest in public safety, specifically keeping the traveling public safe, as well as managing financial commitments.

**C. DUE PROCESS**

36. With regard to Department's arguments concerning the publication of notice of the August 11, 2014 meeting, an Affidavit of Publication for the August 11, 2014, special meeting was introduced into evidence at trial as Ex. 13.

37. The Affidavit of Publication was signed by the publisher on August 4, 2014, before the second publication. This obviously was not an action taken by Township.

38. Following the August 4 publication, Department was able to prepare the objection set forth in Secretary Vonk's August 6 letter. See Ex. 6.

39. No evidence was presented at trial that Department representatives, or anyone else, wanted to attend the August 11 meeting, but missed it due to an improper notice. Department clearly had actual notice of the hearing, since it filed an objection.

40. With regard to Department's argument that Township failed to properly elect officers by paper ballot, the minutes from Township's annual meeting, held on March 6, 2014, establish that five people were present: Lori Ash, Del Compaan, Brian Guthmiller, and Dennis Johnson. See Ex. 7 (Minutes from March 6, 2014 meeting). A motion was made and unanimously approved to elect each of the five people present to one of the five positions to be filled by election. Therefore, there was only one candidate for each position and the use of any type of ballot seems rather wasteful.

41. The Department also raises arguments concerning the content of the published notice relating to the August 11, 2014 hearing. The notice that was published, see Ex. 13, indicated that the hearing to consider the vacation of the highways would be held on Monday, August 11, 2014, at 1:00 pm at Dennis Johnson's shop. While it did not give a street address

for Dennis Johnson's shop, it took no more than two minutes for the Court to obtain Dennis Johnson's address from the local phone book. Hopefully, it would not take Department's staff, or anyone else who had wanted to attend the meeting, much longer than that to find Dennis Johnson's address.

42. Department also complains that two separate hearing locations were given based on Ex. 13 stating Dennis Johnson's shop; Ex. 9, the minutes of an August 4, 2014, Township board meeting, referring to the Dennis Johnson farm; and Ex. 10, the minutes of the August 11, 2014, meeting referring to the Dennis Johnson Farm. Again, it would appear to be pretty certain to everyone, but Department, that the Dennis Johnson shop is at the Dennis Johnson Farm and it is located at 42839 143rd Street, Webster, just as the phone book states.

43. Only the Dennis Johnson shop was given as the location in the Notice that was published. Therefore, the public was never presented with alternative locations. If someone wanted to attend the meeting and was confused about the location, the Notice gave the address for Lori Ash. Her phone number is also listed under Bristol in the phone book.

44. No evidence was presented at trial that Department representatives, or any other member of the public, wanted to attend the hearing, but couldn't figure out how to get to Dennis Johnson's shop.

45. With regard to Department's argument that Township failed to provide a verbatim transcript of the vacation proceedings, townships do not employ court reporters or recorders to take down and transcribe township meetings.

46. By agreement of the parties, the Court admitted: minutes of the Butler Township meetings, see Exs. 7, 8, 9, and 10; a discovery document, see Ex. 11; the Petition For Vacation Of Roads, verified on July 29, 2014, see Ex. 12; the Affidavit of Publication of Notice for Hearing of the August 11, 2014, meeting, see Ex. 13; the Motion to Vacate with vote attached, see Ex. 14; the Resolution & Order to Vacate Roadways as filed with the Day County Register of Deeds on October 3, 2014, see Ex. 15; and the Affidavit of Publication of the Resolution to Vacate Roadway, see Ex. 17.

47. Although the board of supervisors selected the highways it thought most beneficial to vacate, the petitions were circulated by a non-board member.

48. Township's registered voters individually choose whether to sign the petition or to refrain.

49. Objections to the petition were filed and considered. No one appeared at the noticed meeting to object. The petition circulator was present as well as several individuals from other townships.

50. Township representatives used their collective knowledge of Township's roads to consider all aspects of public interest, not just Department's interest.

**D. ARBITRARY AND CAPRICIOUS**

51. Since Butler Township is a rural area, it is not surprising that most of Township's residents are somehow involved in farming and, as a result, own land within Township.

52. It is also not surprising, given the Township's character and population, that the final decision on the passage of the Resolution falls upon the Township's board of supervisors, since that is the process prescribed by statute.

53. Department's argument that the decision to vacate was made to the "detriment and exclusion of all others in the community" is simply not true. The Board received two objections and removed three portions of highway from the vacation list. The testimony indicates that the Board reviewed the condition of the highways within its borders and identified those areas that no longer serve the public interest in expending Township resources to improve or maintain.

54. If the highways at issue were not vacated, then Township could potentially be required to maintain or improve the highways in the future.

55. Many of the highways are no longer usable due to the high water that has been in the area for over twenty years.

The vacation eliminates the potential for an unsuspecting driver to suddenly find himself engulfed by water in the middle of the night.

56. Sufficient documentation was provided concerning actions taken at the meeting where the resolution was adopted. Township's board of supervisors also provided testimony explaining why they believed the listed highways should be vacated. Further, the petition and resolution set forth reasons for the vacation.

57. Township had relevant and competent information to make its decision in adopting the resolution.

#### CONCLUSIONS OF LAW

1. Any of the foregoing Findings of Fact that contain Conclusions of Law or are a mixture of fact and law are by this reference incorporated herein.

2. This Court has jurisdiction of the subject matter and of the parties.

3. In South Dakota, there is, by operation of law, a public highway along every section line, unless a portion of a section line is lawfully vacated or relocated. SDCL 31-18-1.

4. Townships are not required to open, improve, and maintain a passable highway on every section line. Douville v. Christensen, 2002 S.D. 33, ¶ 12, 641 N.W.2d 651, 655.

5. A township board of supervisors is required to construct, repair, and maintain all township roads. SDCL 31-13-1.

6. The board of supervisors for an organized township is authorized to vacate or relocate any section line highway under its jurisdiction. SDCL 31-18-3.

7. The power to vacate or relocate a section line highway has two conditions before it can be wielded: first, the board of supervisors must receive a petition of two or more voters of the organized township; and second, the public interest must be better served by the proposed vacation or relocation. SDCL 31-3-6.

8. One aspect of public interest Township must consider is its duty to maintain township highways for the traveling public. This is done to protect the traveling public and keep them safe from any defects in the highways. Further, this obligation to provide maintenance must be accomplished within the budget - a budget funded by Butler Township taxpayers.

9. A petition for vacation must "set forth the beginning, course, and termination of the highway proposed to be located, changed, or vacated, together with the names of the owners of the land through which the highway may pass." Id.

10. The statement attached to the petitions in this case did not indicate that Township's board of supervisors believed by signing the oath the highways should be vacated.

Rather, it simply indicated that the Township's board of supervisors believed the people signing the petition sought to vacate the designated highways. It indicated the supervisors believed the individuals wanted to go forward with the process.

11. In no way do the signatures mean the two supervisors and chairman had already made a decision on whether to vacate the highways. It would belie the evidence presented to this Court to conclude otherwise.

12. Under Parks v. Cooper, 2004 S.D. 27, ¶ 46, 676 N.W.2d 823, 838, the State of South Dakota holds all waters in trust for the public. However, also in that case, the South Dakota Supreme Court determined that it was up to the South Dakota Legislature to determine what bodies of water are open for recreational use. Id. at ¶¶50-51, 676 N.W.2d at 840-41. At present time, the Legislature has not made any determination as to the recreational use of non-meandered bodies of water within Butler Township.

13. Department's assertion that the Township sought to deny access to non-meandered bodies of water is not supported by the evidence presented at trial.

14. Department's definition of public interest is too narrow: it only considers individuals that desire to use the highways for access to hunting and fishing. Township must

instead consider all aspects of public interest, not just an agency advocating hunting and fishing rights.

15. In considering vacation, the Township must consider all aspects of public interest, including safety. The Township must balance the resources it has to maintain the more traveled township highways against the loss of some access to non-meandered bodies of water and hunting opportunities on portions of little used highways.

16. Township is not required to wait for an accident to happen before taking remedial action to protect the traveling public from the accumulated water on the section lines Township has neither the intent nor the resources to improve or maintain.

17. Department's argument that the Township and its board of supervisors sought to privately profit from vacating the highways is meritless.

18. The Court cannot find, based on the evidence presented, that the public interest would be better served by keeping the vacated portions of highways open for sportsmen, thereby exposing the traveling public to dangerous highway conditions while also taking valuable resources away from highways that are regularly used. Township did not err in voting to vacate the proposed portions of highways.

19. Publication of notice on two consecutive weeks is required by SDCL 31-3-7. Department's due process rights were

not violated by the publisher executing the Affidavit of Publication before the second publication.

20. This appeal is not the appropriate proceeding to challenge the ability of Township's officials to hold office. Burns v. Kurtenbach, 327 N.W.2d 636 (S.D. 1982). The township supervisors' authority is not a proper issue for determination in this appeal. The election method used at the annual meeting did not violate the Department's due process rights in this proceeding.

21. SDCL 31-3-7 requires that the notice of hearing when a petition to vacate is filed must "state the purpose, date, time, and location of the hearing . . . ." (emphasis added). The statute does not require an address in the notice; it requires a location. A location, namely Dennis Johnson's shop, was provided.

22. Department's due process rights were not violated by the notice given.

23. The transcript referred to in SDCL 8-5-9 is a requirement that any documentation presented at a township meeting, any minutes of that meeting, and any resolutions adopted there must be filed with the Clerk of Courts.

24. Even if a transcript of the vacation proceedings was not prepared and filed with the Clerk, it is clear that Department received all of the documentation relevant to the

petition, notice of meeting, action taken at the meeting, and publication of the resolution.

25. The purpose of SDCL 8-5-9 is to ensure that the issues are sufficiently settled and framed so the issues can be tried. If the necessary information was not timely provided, then the appropriate action would have been to delay the trial on the issues. However, Department chose not to pursue that action. Instead, it is clear from the motions, briefs, and testimony provided by Department that it had sufficient information to raise and try numerous issues.

26. Although Township may not have technically complied with SDCL 8-5-9, it appears to the Court that sufficient documentation was provided for the Department to go forward with trial and appeal. Thus, Township substantially complied with the statute's provision. See Wagner v. Truesdell, 1998 S.D. 9, ¶ 7, 574 N.W.2d 627, 629 (holding substantial compliance means actual compliance in respect to the substance essential to every reasonable objective of the statute).

27. Because Department was provided with sufficient documentation and SDCL 8-5-9 does not require a verbatim transcript, Township did not violate Department's due process rights by failing to file an affidavit or verbatim transcript.

28. The record is devoid of evidence evincing the procedure employed by Township with respect to the initiation of

the petition was improper or illegal. Although the board of supervisors selected the highways it thought most beneficial to vacate, the petition was circulated by a non-board member. Township's registered voters individually chose whether to sign the petition or to refrain.

29. Township's thought process and decision took into account all aspects of the public interest. The fact that Township favored public safety over sportsmen's opportunities on certain sections of the highways does not mean that it was an arbitrary and capricious decision.

30. The board of supervisors did not exercise personal and selfish motives in reaching the decision to adopt the resolution to vacate.

31. Township's board of supervisors did not use fraudulent or false motives when it reached its decision to vacate the highways listed in the petition. Instead, Township's board inspected the township highways on June 24, 2014, see Ex. 9, made a determination on which highways no longer needed to be a part of Township's highway system, and moved forward by taking the appropriate action to vacate the selected highways. These actions are not arbitrary and capricious.

32. Township had relevant and competent information to make its decision in adopting the resolution. Its decision was not arbitrary and capricious.

33. Township followed all appropriate procedures in adopting the resolution based upon the petition filed with the board of supervisors.

34. Township did not seek to deny public access to a public resource and considered all aspects of the public interest, including the Department's and sportsmen's interests, in determining which highways to vacate.

35. Township did not violate Department's due process rights in vacating the designated highways: Department had actual notice of all hearings in which decisions were made by Township to vacate highways; and Department fully participated in this appeal.

36. Township's actions were not driven by personal and selfish motives in vacating the portions of highways, nor did Township have fraudulent motives or base decisions on false information.

37. Township possessed relevant and competent information based upon the board's investigation of Township's highways and years of involvement with Township's highways.

38. Township's decision to vacate the portions of the highways in question was not arbitrary and capricious.

39. Township's decision to vacate the highways correctly followed statutory requirements and is affirmed.

40. An Order consistent with these findings and conclusions shall be entered.

Attest:  
Jessica Sattler  
Clerk/Deputy



BY THE COURT  
Signed: 3/21/2016 1:40:59 PM

A handwritten signature in black ink, appearing to read "Jim S. Flemmer".

Circuit Court Judge

STATE OF SOUTH DAKOTA

**FILED**

IN CIRCUIT COURT

COUNTY OF DAY

**AUG 24 2016**

FIFTH JUDICIAL CIRCUIT

STATE OF SOUTH DAKOTA,  
DEPARTMENT OF GAME, FISH, & PARKS

CLAUDETTE OPITZ  
DAY CO. CLERK OF COURTS

Appellant,

**CIV. 14-51**

v.

**MEMORANDUM DECISION**

BUTLER TOWNSHIP, DAY COUNTY,  
SOUTH DAKOTA,

Appellee.

The above-entitled matter currently pending before the Court is an appeal brought by the South Dakota Department of Game, Fish, & Parks (“Department”) from a decision by the Board of Supervisors of Butler Township to vacate certain public highways in file, Day County Civil Number 14-51. Department timely filed its Notice of Appeal. A *de novo* trial was then held in the Day County Courthouse on October 22, 2015. At trial, Department appeared through Special Assistant Attorneys General, Paul E. Bachand and Richard J. Neill, while Butler Township (“Township”) appeared through its supervisors and counsel, Jack H. Hieb and Zachary E. Peterson. The Court heard testimony from six witnesses and received 24 exhibits into evidence. Upon the trial’s conclusion, the Court reserved ruling, allowing counsel to file written argument. The Court has now had an opportunity to review, with care, counsel’s written argument, the exhibits and testimony presented at trial, and the trial transcript. This Memorandum Decision constitutes the Court’s ruling on Department’s appeal.

**BACKGROUND**

This action began after Township adopted a resolution vacating portions of certain highways within its jurisdiction. In South Dakota, there is, by operation of law, a public highway along every section line, unless a portion of a section line is lawfully vacated or relocated.<sup>1</sup> SDCL 31-18-1. The board of supervisors for an organized township is authorized to vacate or relocate any section line highway under its jurisdiction. SDCL 31-18-3. That power, however, has two conditions before it can be wielded: first, the board of supervisors must receive a petition of two or more voters of the organized

<sup>1</sup> A township board of supervisors is required to construct, repair, and maintain all township roads. SDCL 31-13-1.

township; and second, the public interest must be better served by the proposed vacation or relocation. SDCL 31-3-6. A petition for vacation must “set forth the beginning, course, and termination of the highway proposed to be located, changed, or vacated, together with the names of the owners of the land through which the highway may pass.” *Id.*

Butler Township’s Board, acting under its statutorily granted authority, accepted a petition from the voters of Township and adopted a corresponding resolution of vacation for the petition.<sup>2</sup> The resolution vacated ten portions of Township’s highways, *see* Ex. 15. In response to this decision, Department timely filed a Notice of Appeal as to the resolution. At the commencement of trial, Department indicated it would not be contesting that a public interest existed to vacate portions of two of the ten sections of highway vacated by Township’s resolution. These are a portion of the second description and the fifth description listed in the resolution, *see* Ex. 15.

Prior to trial, the Court ruled on a number of motions. One of these was Department’s Motion for Declaratory Ruling Regarding Scope of Appeal and Burden of Proof. Following a hearing on August 25, 2015, the Court entered an Order Regarding Appellant’s Motion For Declaratory Ruling Regarding Scope of Appeal And Burden of Proof, determining that South Dakota statutes called for a *de novo* review by the Circuit Court. This means that the Court is bound to determine anew all matters of fact without ascribing any presumption of correctness to Township’s findings on the evidence; once the Court determines the facts, it would next decide whether the actions of Township were “[b]ased on personal, selfish, or fraudulent motives, or on false information, [or] . . . characterized by a lack of relevant and competent evidence to support the action taken”; and as the party taking issue with Township’s decision to vacate the highways, Department shall have the burden of proof at trial. Department raises four issues with Township’s decision to vacate the remaining sections of highway in the resolution. Each issue is addressed in turn below.

### **ANALYSIS AND DECISION**

#### **I. Did Township seek to deny public access to a public resource?**

Department initially asserts Township sought to deny public access to a public resource: non-meandered bodies of water and roads that could be used for various sportsmen activities. It does not appear there is any dispute that some of the vacated portions of highway would allow travel to the edge of non-meandered bodies of water within Township. Under *Parks v. Cooper*, 2004 S.D. 27, ¶ 46, 676 N.W.2d 823, 838, the State of South Dakota holds all waters in trust for the public. However, also in that

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<sup>2</sup> The resolution was adopted on August 11, 2014.

case, the South Dakota Supreme Court determined that it was up to the South Dakota Legislature to determine what bodies of water are open for recreational use. *Id.* ¶¶ 50-51, 676 N.W.2d at 840-41. At the present time, the Legislature has not made any determination as to the recreational use of non-meandered bodies of water within Butler Township. It is also clear from the evidence that the ten highway vacations will not materially alter public access available to any non-meandered bodies of water in Butler Township. Testimony indicated there would still be other routes to access the non-meandered bodies of water referred to as Bohn Slough and Buck Slough should they be opened to recreational use by the South Dakota Legislature in the future. Additionally, no evidence was presented as to how vacating the ten portions of highway at issue would negatively affect any public interest sportsmen may have in road hunting on other highways within Township that would still be open to travel. Other than testimony by Department's witnesses describing limited contact with sportsmen on the contested highways, there was no evidence to indicate those sporting experiences were so unique that they could not be encountered on other highways in Township. As such, Department's initial assertion is not supported by the evidence presented at trial.

**II. Is there a public interest to maintain the right of public access to the proposed vacated highways?**

Department's second argument is that public interest exists to maintain the right of public access to the vacated highways. Essentially, Department's argument is that the public interest is not better served by vacating the highways at issue. However, Department's definition of public interest is too narrow: it only considers individuals that desire to use the highways for access to hunting and fishing. Township must instead consider all aspects of public interest, not just an agency advocating hunting and fishing rights. One aspect of public interest Township must consider is its duty to maintain township highways for the travelling public. *See* SDCL 31-13-1. This is done to protect the travelling public and keep them safe from any defects in the highways. Further, this obligation to provide maintenance must be accomplished within the budget—a budget funded primarily by Butler Township taxpayers.

Townships are not required to open, improve, and maintain a passable highway on every section line. *Douville v. Christensen*, 2002 S.D. 33, ¶ 12, 641 N.W.2d 651, 655. Indeed, a township is not prohibited from closing a section line highway to vehicular traffic if that highway is unsafe for such travel. SDCL 31-18-3. As mentioned above, Township must consider all aspects of public interest,

including safety.<sup>3</sup> Township must balance the resources it has to maintain the more traveled township highways against the loss of some access to non-meandered bodies of water and hunting opportunities on portions of little used highways. While witnesses for Department testified they had, on various occasions, come into contact with sportsmen on some of the highways at issue, it is evident that none of these highways provide access to travel through the township, because they are either covered or damaged by high waters or have never been used for public travel. At best, then, these highways provide access to landowners of adjoining land—access that would continue if the highways were vacated and the land subsequently reverted to the adjoining landowners. The vacated highways thus do not help the travelling public traverse the township.

Department asserts Township's inability to maintain road closed barricades on some portions of the highways at issue over the recent past supports its argument that there is public interest in keeping those portions open. Department further asserts those failures indicate that closing the highways for safety reasons has not been successful. Township, however, is not required to wait for an accident to happen before taking remedial action to protect the travelling public from the accumulated water on the section-line highways Township has neither the intent nor the resources to improve or maintain.

Department next contends that Township did not have the public interest in mind when members of Township's board of supervisors voted to vacate certain portions of highways and that the only people interested in vacation were the supervisors. There is testimony indicating discussions on highway vacations were had at township meetings. In order to have that matter brought before the board, a petition was prepared by board members. A resident of Township circulated that petition and gathered six signatures from other Township residents. Department focuses its ire on the fact that the board of supervisors initiated this process by drafting the petition, but presents absolutely no evidence of any statutory prohibition against a board starting the process to address highway vacation issues they believe should be discussed. According to the Day County Auditor, as of August 3, 2016, there were forty-one voters registered in Butler Township. Six of those voters signed the petition, a seventh circulated the petition, and five are Township officers. This means that at least twelve of the forty-one voters in Township were involved in the vacation process.

The majority of Township's residents live there because they farm or have family members involved in farming. It is therefore not shocking to the Court that the highways at issue adjoin land

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<sup>3</sup> Again, Department's argument only accounts for the segment of the public that wishes to hunt or fish and not for the overall public interest.

owned by members of Township's board of supervisors and others involved in circulating and signing the petition. Department argues that this demonstrates Township and its board of supervisors sought to privately profit from vacating the highways and have thereby abandoned their duties to the public. This argument is meritless. Under SDCL 31-18-2, a section line highway is sixty-six feet wide, with thirty-three feet taken from each side of the section line. Adjoining landowners continue to pay taxes on the thirty-three foot strip of land regardless of its use—i.e., even if it is used as a section line highway.<sup>4</sup> Furthermore, based upon the photos admitted at trial, very little of the vacated highways will be useable as tillable acres without investing considerable time and money to make those portions of the strips that are above water tillable. Consequently, any notion that Township's board members abandoned their duties and made a decision to seek private gain as a motive for vacation of the highways at issue is folly and without merit.

No one for or against the petition attended the August 11, 2014, meeting where the resolution was adopted. However, in response to the publication of the Notice Of Hearing, Department submitted to Township an August 6, 2014, letter from Jeffrey R. Vonk, Department Secretary, opposing the petition. Department opposed the entire list of highways proposed to be vacated. Department's concern encompassed only a singular public interest in hunting and fishing. As discussed earlier, Township must evaluate *all* aspects of public interest, not just a single public interest.<sup>5</sup> Township officials testified as to their reasons for vacating the highways; reasons that were supported by the evidence produced at trial. There was also testimony concerning washouts, flooded highways, and other perils situated on the highways at issue that would prevent travelers from getting to another intersecting highway.

Department next avers Township should not fear liability for any potential injury caused by the flooded and damaged highways if they were kept open, because it has insurance and would have immunity in certain lawsuits. Despite Department's omniscience about possible future lawsuits, there could still be litigation to resolve those lawsuits. In that case, Township would incur expenses defending itself before that litigation was resolved—expenses that could have been avoided. Township officers did not indicate in their testimony that they were vacating highways to avoid future litigation. One reason they did give for taking this action was to preserve their future resources and avoid financial obligations

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<sup>4</sup> Upon vacation of a highway, the land embodied therein shall revert to the original owners or their successors in interest. SDCL 31-3-10. Thus, an individual owning land adjoining a vacated section of highway would receive a strip of land thirty-three feet wide for the length of the portion of the vacated highway.

<sup>5</sup> Again, like earlier, Department is essentially advocating that public safety must always yield to hunting and fishing access—an absurd argument. See SDCL 31-18-3 (noting that a township may close a section line highway if the highway is unsafe for vehicle traffic).

to maintain roads that were not useful for the travelling public. Nevertheless, whether Township may ultimately avoid liability (and incur needless and potentially crippling expenses) does not mean it should ignore situations that could cause harm to the travelling public.

Department also argues that an underlying reason for Township to vacate the highways at issue was the introduction of Senate Bill 169 (“SB 169”) in the Legislature.<sup>6</sup> SB 169, if passed, would have prohibited Township from vacating certain portions of the highways at issue because they gave access to public waters. Although SB 169’s introduction certainly factored into Township’s decision to proceed with its resolution, that fact does not mean Township did not have the public interest in mind when vacating what it perceived to be dangerous highways, rather than delaying that decision and, possibly, forfeiting the opportunity to rectify a dangerous situation. SB 169’s introduction motivated Township to rectify the dangerous situation before it potentially lost its ability to protect the public.

Furthermore, as stated previously, Township, in making its decision, must weigh the interest of sportsmen to have the access Department demands against the safety of all the travelling public and Township’s ability to budget and use its financial resources to maintain those highways most often used by the travelling public. Department’s only interest is unfettered access for hunting and fishing at both Township’s and public safety’s expense. In weighing these issues and proceeding with the resolution to vacate the highways, Township determined the public interest would be better served by proceeding with vacation, as opposed to leaving dangerous and unused section line highways open for public travel, especially when those highways do not allow any traveler to reach any intersecting highway due to their condition.

Department’s next argument is that Township’s board of supervisors had already chosen to vacate the highways at issue prior to voting on the petitions. Department alleges this is true for three reasons: first, the board of supervisors selected the highways included on the petition; second, the board of supervisors arranged for the circulation of the petition; and third, the board of supervisors voted to adopt the resolution approving the petition without any of the petitioners present. The board of supervisors is charged with the duty to construct, improve, and maintain the Township’s highways. See SDCL 31-13-1. It would therefore have an intimate knowledge of the Township’s highways and their condition. Not surprisingly, the board of supervisors is the body best suited to determine whether a highway should or should not be vacated within its borders.

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<sup>6</sup> The bill did not become law.

After the petition was prepared, it was circulated and signed by registered voters of Township. Attached to the petition was a statement signed, under oath, by the two supervisors and the chairman, indicating they had reviewed the petition, knew its contents, and believed the people listed signed the petition and sought to vacate the highways listed therein. The statement simply indicated that the Township's board of supervisors believed the people signing the petition sought to vacate the designated highways. It did not indicate that Township's board of supervisors believed by signing the oath that the highways should be vacated; instead, it simply indicated they believed the individuals wanted to go forward with the process. Township then noticed and subsequently held the meeting where the board of supervisors adopted the resolution. In no way do the signatures mean the two supervisors and chairman had already made a decision on whether to vacate the highways. It would belie the evidence presented to this Court to conclude otherwise.

Indeed, a review of the testimony and evidence presented at trial illustrates that Township carefully considered which portions of highways should be vacated. Township considered Department's letter in opposition to the vacation and carefully weighed the interests of sportsmen to have use of section line highways for road hunting and access to non-meandered bodies of water against providing for the safety of all the travelling public within its borders, as well as the financial cost associated with maintaining little used highways. Township also received correspondence from three landowners objecting to the inclusion of three of the highways listed in the petition. After considering this written objection, the board voted to remove three of the thirteen descriptions listed in the petition and proceeded to vacate the remaining ten portions of highway.

After weighing the evidence, Township determined public safety, and more specifically protecting the travelling public, outweighed Department's and sportsmen's interest to access section line highways for hunting and fishing. This determination does not mean that sportsmen and Department lack a public interest in accessing the section line highways—they do have a public interest. Township, too, has a public interest in public safety, specifically keeping the travelling public safe, as well as managing financial commitments. As such, the Court cannot find, based on the evidence presented, that the public interest would be better served by keeping the vacated portions of highways open for sportsmen, thereby exposing the travelling public to dangerous highway conditions while also taking valuable resources away from highways that are regularly used. Township did not err in voting to vacate the proposed portions of highways.

### **III. Did Township violate Department's due process rights?**

Department's third argument asserts Township violated Department's due process rights in five ways by failing to follow numerous statutory requirements; a.) Department alleges Township failed to follow SDCL 8-3-4 in properly publishing notice of the special meeting held August 11, 2014; b.) Department avers that Township officers were not properly elected by paper ballot as required by SDCL 8-3-15; c.) Department asserts SDCL 31-3-7 was not followed to give notice of time and place of the August 11, 2014 meeting; d.) Department alleges Township failed to provide transcripts of the vacation proceedings; and e.) Department again contends the petition was improperly initiated by the Board instead of a public petitioner.

**a. Failure to properly notice special meeting held on August 11, 2014, under SDCL 8-3-4**

Department first complains that Township failed to follow SDCL 8-3-4 in publishing notice of the special meeting held on August 11, 2014. An Affidavit of Publication for the August 11, 2014, special meeting was introduced into evidence at trial as Ex. 13. It shows publication of the Notice of Hearing on August 4, 2014, and August 11, 2014. Publication on two consecutive weeks is required by SDCL 31-3-7 before a hearing can be held on a petition to vacate highways. The Affidavit was signed by the publisher on August 4, 2014, before the second publication. This obviously was not an action taken by Township. No evidence was presented at trial that the August 11, 2014, publication did not take place. Apparently, following the August 4 publication, Department was able to prepare the objection set forth in Secretary Vonk's August 6 letter, *see* Ex. 6.

Department previously addressed the issue of publication of the notice of the August 11, 2014, hearing through a Motion For Summary Judgment heard on October 21, 2015. In denying that motion the Court found that although Monday, August 11, 2014, was the official publication date of the *Reporter & Farmer*, the paper would actually have been available to and received in the mail by county residents on Saturday, August 9, 2014. No evidence was presented at trial that Department representatives, or anyone else, wanted to attend the August 11 meeting, but missed it due to an improper notice. Department clearly had actual notice of the hearing, since it filed an objection. Department's due process rights were therefore not violated by the publisher executing the Affidavit before the second publication.

**b. Failure to properly elect Township officials by paper ballot under SDCL 8-3-15**

Department's second argument is that its due process rights were violated because Township failed to properly elect officers by paper ballot at the annual meeting held on March 6, 2014. Under SDCL 8-3-15, township supervisors, treasurers, clerks, and constables must be elected by ballot. The minutes from that meeting establish that five people were present: Lori Ash, Del Compaan, Brian

Guthmiller and Dennis Johnson. *See* Ex. 7 (Minutes from March 6, 2014 meeting). A motion was made and unanimously approved to elect each of the five people present to one of the five positions to be filled by election. Therefore, there was only one candidate for each position and the use of any type of ballot seems rather wasteful. In addition, it does not appear this appeal is the appropriate proceeding to challenge the ability of Township's officials to hold office. *Burns v. Kurtenbach*, 327 N.W.2d 636 (S.D. 1982). As such, the township supervisor's authority is not a proper issue for determination in this appeal. The election method used at the annual meeting did not violate the Department's due process rights in this proceeding.

Department also seems to take issue with the date of the annual meeting, but very little testimony was presented on this issue. Under SDCL 8-3-1, township annual meetings are to be held on the first Tuesday of March. March 6, 2014, was a Thursday. While the statute does provide for alternate meeting dates due to inclement weather, no testimony about the reason for the meeting being held on Thursday was presented. There was also no evidence presented on how the date of the 2014 annual meeting caused any prejudice to Department. Again, under *Burns*, *supra*, this is not the proper proceeding for this challenge. The actions taken by Township in conducting the 2014 annual meeting did not violate Department's due process rights.

**c. Failure to follow SDCL 31-3-7 for time and place of August 11, 2014 meeting**

Department's third allegation is that Township failed to properly give notice of the location of the special meeting held on August 11, 2014. SDCL 31-3-7 requires that the notice of hearing when a petition to vacate is filed must "state the purpose, date, time, and *location* of the hearing ... ." (emphasis added). The notice that was published, *see* Ex. 13, indicated that the hearing to consider the vacation of the highways would be held on Monday, August 11, 2014, at 1:00 pm at Dennis Johnson's shop. While it did not give a street address for Dennis Johnson's shop, it took no more than two minutes for the Court to obtain Dennis Johnson's address from the local phone book. Hopefully, it would not take Department's staff, or anyone else who had wanted to attend the meeting, much longer than that to find Dennis Johnson's address. While there is the possibility that the shop is not located at the address given for Dennis Johnson that would certainly be a good place to start. The statute does not require an address in the notice; it requires a location. Dennis Johnson's shop is a location. No evidence was presented at trial that Department representatives, or any other member of the public, wanted to attend the hearing, but couldn't figure out how to get to Dennis Johnson's shop.

Department also complains that two separate hearing locations were given based on Ex. 13 stating Dennis Johnson's shop; Ex. 9, the minutes of an August 4, 2014, Township board meeting, referring to the Dennis Johnson farm; and Ex. 10, the minutes of the August 11, 2014, meeting referring to the Dennis Johnson Farm. Again, it would appear to be pretty certain to everyone, but Department, that the Dennis Johnson shop is at the Dennis Johnson Farm and it is located at 42839 143<sup>rd</sup> Street, Webster, just as the phone book states.

Only the Dennis Johnson shop was given as the location in the Notice that was published. Therefore, the public was never presented with alternative locations. If someone wanted to attend the meeting and was confused about the location, the Notice gave the address for Lori Ash. Her phone number is also listed under Bristol in the phone book. Again, no evidence was presented that Department's staff, or anyone else, tried to attend the meeting, but couldn't find Dennis Johnson's shop. Department's due process rights were not violated by the notice given.

**d. Failure to provide transcripts of the vacation proceedings pursuant to SDCL 8-5-9**

Department's fourth argument asserts Township failed to provide a transcript of the vacation proceedings in violation of SDCL 8-5-9. That statute provides:

Within thirty days after the service of such notice of appeal, the board of supervisors of the township shall cause to be filed with the clerk of courts a transcript of the proceedings of such board relative to the decision, order, or resolution being appealed, which transcript shall be certified to by the township clerk as being correct. The issue shall be deemed to have been joined from the time of filing of such transcript and the matter may be brought on for trial in the same manner as provided for in civil cases. If the issues do not sufficiently appear from the notice of appeal and such transcript, the court may, upon notice to the parties, settle and frame the issues to be tried.

SDCL 8-5-9. Department interprets this statute to require a verbatim transcript of the meeting held on August 11, 2014. This would necessarily require a court reporter to transcribe the proceedings. That interpretation, however, is too strict. Townships do not employ court reporters or recorders to take down and transcribe township meetings. Instead, the transcript referred to in SDCL 8-5-9 is a requirement that any documentation presented at a township meeting, any minutes of that meeting, and any resolutions adopted there must be filed with the Clerk of Courts, if a decision of the board is appealed.

It does not appear that any of the documentation that was used by Township in adopting the Resolution & Order To Vacate Roadways on August 11, 2014, was initially filed with the Clerk of Courts when this appeal was commenced. Despite this lack of filing, by agreement of the parties, the Court

admitted the minutes of numerous Butler Township meetings, *see* Ex. 7, Ex. 8, Ex. 9 and Ex.10; a discovery document, *see* Ex. 11; the Petition For Vacation Of Roads, verified on July 29, 2014, *see* Ex. 12; the Affidavit of Publication of Notice for Hearing of the August 11, 2014, meeting, *See* Ex. 13; the Motion To Vacate with vote attached, *see* Ex. 14; the Resolution & Order to Vacate Roadways as filed with the Day County Register of Deeds on October 3, 2014, *See* Ex. 15; and the Affidavit of Publication of the Resolution to Vacate Roadway, *see* Ex. 17. Thus, even if a transcript of the vacation proceedings was not prepared and filed with the Clerk, it is clear that Department received all of the documentation relevant to the petition, notice of meeting, action taken at the meeting, and publication of the resolution.

The purpose of SDCL 8-5-9 is to ensure that the issues are sufficiently settled and framed so the issues can be tried. If the necessary information was not timely provided, then the appropriate action would have been to delay the trial on the issues. However, Department chose not to pursue that action. Instead, it is clear from the motions, briefs, and testimony provided by Department that it had sufficient information to raise and try numerous issues. Although Township may not have technically complied with SDCL 8-5-9, it appears to the Court that sufficient documentation was provided for the Department to go forward with the appeal and this trial. Thus, Township substantially complied with the statute's provision. *See Wagner v. Truesdell*, 1998 S.D. 9, ¶ 7, 574 N.W.2d 627, 629 (holding substantial compliance means actual compliance in respect to the substance essential to every reasonable objective of the statute).<sup>7</sup>

Because Department was provided with sufficient documentation and the statute does not require a verbatim transcript, Township did not violate Department's due process rights by failing to file a verbatim transcript.

**e. Failure to properly initiate the petition**

Department's final argument for violation of its due process rights is that the petition was improperly initiated by the board of supervisors instead of a public petitioner. Although the board of supervisors selected the highways it thought most beneficial to vacate, the petition was circulated by a non-board member. Township's registered voters individually chose whether to sign the petition or to refrain.

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<sup>7</sup> The Court elaborated on its holding:

It means that a court should determine whether the statute has been followed sufficiently so as to carry out the intent for which it was adopted. Substantial compliance with a statute is not shown unless it is made to appear that the purpose of the statute is shown to have been served. What constitutes substantial compliance with a statute is a matter depending on the facts of each particular case.

*Wagner v. Truesdell*, 1998 S.D. 9, ¶ 7, 574 N.W.2d 627, 629.

Indeed, the record is devoid of any evidence evincing that the procedure employed by Township was improper or illegal. Department conflates mere disagreement with a violation of due process.

Township received a petition to vacate certain highways and gave notice of a meeting set for the purpose of considering that petition. Objections to the petition were filed and considered. No one appeared at the noticed meeting to object. The petition circulator was present as well as several individuals from other townships. Township representatives used their collective knowledge of Township's roads to consider *all* aspects of public interest, not just Department's interest. No evidence was presented to show that Township was legally prohibited from initiating the vacation process. Based on the above analysis, Township did not violate Department's due process rights.

#### **IV. Was Township's decision arbitrary and capricious?**

The fourth issue raised by Department is that Township's decision to vacate the highways at issue was the product of personal and selfish motives, fraudulent motives or false information, and a lack of relevant or competent information, thereby rendering the decision arbitrary and capricious. Although the Court has previously addressed these issues in this Memorandum Decision, it will nonetheless briefly address them yet again because Department continues to spew forth these allegations.

A township is commonly referred to as the smallest unit of a democratic government, although apparently in Department's view that makes it "a relatively inconsequential segment of governance." (Rebuttal Argument p.5). It generally consists of an area encompassing thirty-six square miles, excluding municipalities within the township borders. As previously set forth, the Day County Auditor's records indicated Township had forty-one registered voters within its thirty-six square miles as of August 3, 2016. Under SDCL 8-3-6 and SDCL 8-3-7, in order to vote at a township meeting or serve as a township officer, an individual must be a registered voter and a resident of the township. Since this is a rural area, it is not surprising that most of Township's residents are somehow involved in farming and, as a result, own land within Township. It is also not surprising that the final decision on the passage of the Resolution falls upon Township's board of supervisors, since that is the process prescribed by statute, *see* SDCL 31-3-6. However, more than 29% of the registered voters in Township participated in the vacation process.

Department also avers the decision to vacate was made to the "detriment and exclusion of all others in the community." This is simply not true. The board received two objections and removed three portions of highway from the vacation list. The testimony indicates the Board reviewed the condition of the highways within its borders and identified those areas that no longer served the public interest in

expending Township resources to improve or maintain. If the highways at issue were not vacated, then Township could potentially be required to maintain or improve the highways in the future. Many of these highways were no longer useable due to the high water that has been in the area for over twenty years. Moreover, the vacation eliminates the potential for an unsuspecting driver to suddenly find himself engulfed by water in the middle of the night. This desire to maintain public safety is certainly a justifiable and noble decision. As such, Township's thought process and decision took into account all aspects of the public interest. The fact that Township favored public safety over sportsmen's opportunities on certain sections of the highways does not mean that it was an arbitrary and capricious decision. The board of supervisors' responsibility is to maintain the roads for public safety, and more specifically the travelling public. Township residents constitute part of the travelling public. The Board did not exercise personal and selfish motives in reaching the decision to adopt the resolution to vacate.

Department next contends Township based its decision on fraudulent motives or false information. Department argues that, because Township would most likely avoid liability for any injuries caused by failing to vacate a highway, it should therefore refrain from vacating the highways at issue. As discussed earlier, notwithstanding Department's omniscience about possible future lawsuits, there could still be litigation to determine those issues. In that case, Township would incur expenses defending itself before that litigation was resolved—expenses that could not only be avoided but also potentially bankrupt Township. Nevertheless, whether Township may ultimately avoid liability (and incur needless and potentially crippling expenses) does not mean it should ignore situations that could cause harm to the travelling public.

Also as stated earlier, if Township vacates a highway, it is no longer obligated to expend resources to maintain or improve that highway. However, if Township does not vacate a highway, then the possibility for future financial expenditure looms as it is obligated to maintain or improve the highways. The highways at issue were selected by members of the board of supervisors. In selecting these highways, the supervisors cited a lack of public travel on those highways, being inundated by water, and the inability to traverse the township by accessing these highways.<sup>8</sup>

In their testimony, board supervisors freely admitted they were aware of SB 169 and its potential effect on their ability to vacate highways. However, awareness does not mean that they had fraudulent motives in pursuing the vacations. They also clearly testified they wanted to protect the travelling public

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<sup>8</sup> The highways at issue only provide access to landowners of adjoining land—access that would continue if the highways were vacated and the land subsequently reverted to the adjoining landowners

by avoiding dangerous situations, like drivers unknowingly driving into a water-filled highway. The action taken by Township did not remove all public access to non-meandered bodies of water in Butler Township. A duck or a pheasant could land almost anywhere and, if that were the only criteria evaluated, then no highways could ever be vacated.

Township's board of supervisors did not use fraudulent or false motives when it reached its decision to vacate the highways listed in the petition. Instead, Township's board inspected Township's highways on June 24, 2014, *see* Ex. 9; made a determination on which highways no longer needed to be a part of Township's highway system and moved forward by taking the appropriate action to vacate the selected highways. These actions are not arbitrary and capricious.

Department's next contention is that Township's decision is characterized by a lack of relevant and competent information to support the action. The Court has already determined that sufficient documentation was provided concerning actions taken at the meeting where the resolution was adopted. Township's board of supervisors also provided testimony explaining why they believed the listed highways should be vacated. Further, the petition and resolution set forth reasons for the vacation. Township weighed the public interest expressed by Department and sportsmen against issues of the use of public resources to maintain and improve highways and the safety of the travelling public. Township had relevant and competent information to make its decision in adopting the resolution.<sup>9</sup> Its decision was not arbitrary and capricious.

### CONCLUSION

Township's decision to vacate portions of highways within its jurisdiction is affirmed. Township followed all appropriate procedures in adopting the resolution based upon the petition filed with the board of supervisors. Township did not seek to deny public access to a public resource and considered all aspects of the public interest, including the Department's and sportsmen's interests, in determining which highways to vacate. Township did not violate Department's due process rights in vacating the designated highways: Department had actual notice of all hearings in which decisions were made by Township to vacate highways; and Department fully participated in this appeal.

Township's actions were not driven by personal and selfish motives in vacating the portions of highways, nor did Township have fraudulent motives or base decisions on false information. Township

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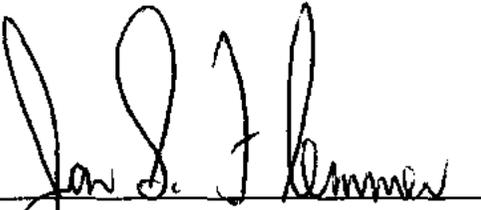
<sup>9</sup> Department also asserts the cost of signage factored into Township's decision. No Township board member testified this was a reason for vacation. It does, however, appear that Township will not be required to place signs on the vacated portions of highways, thereby potentially providing some savings, but this potential savings is negligible. In any event, there is no testimony supporting this was a reason for the vacation.

possessed relevant and competent information based upon the board's investigation of Township's highways and years of involvement with Township's highways. Township's decision to vacate the portions of the highways in question was not arbitrary and capricious. Finally, Township's decision to vacate the highways correctly followed statutory requirements and is hereby affirmed.

Counsel for Township shall draft an Order consistent with, as well as incorporating, this Memorandum Decision, affirming Township's decision. Additionally, Counsel for Township shall, unless waived by Department, prepare Findings of Facts and Conclusions of law, incorporating this Memorandum Decision by reference.

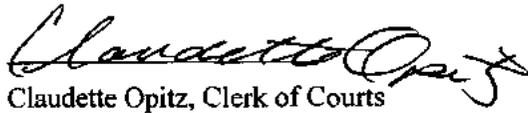
Dated this 24<sup>th</sup> day of August, 2016 at Webster, South Dakota.

BY THE COURT:



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Jon S. Flemmer  
Circuit Judge



Claudette Opitz, Clerk of Courts



Vacate ↓



**PETITION FOR VACATION OF ROADS**

TO THE HONORABLE BOARD OF THE TOWNSHIP OF TROY, DAY COUNTY,  
SOUTH DAKOTA:

That the petitioners herein respectfully represent that they are the electors residing in the organized civil township of Troy, county of Day, State of South Dakota; and that as residents and electors of said township, they feel that the public convenience and necessity will be better served by the vacation of roadways or highways that they are seeking to have vacated are described as being located, to-wit:

That existing public right-of-way which includes the statutory right of way and any right of way acquired by Deed (s) lying on the section line highways described as follows:

A portion of 148th St. from 41925 148th St. to 441975 148th St. bordered on the north by the S1/2SW1/4 and the SW1/4SE1/4 32-121-58; and on the south by Lots 2, 3 and 4 Sec. 5-120-58. Said road is approximately 66 feet in width and approximately three quarters (3/4) mile in length.

A portion of 148th St. from 42025 148th St. to 42150 148th St. bordered on the north by Lot 1 and the S1/2 SW 1/4 except Lot 1, and the S1/2 SE1/4 33-121-58, the SW1/4SW1/4 and the SE1/4SW1/4 34-121-58; and on the south by Lots 1, 2, 3 and 4 4-120-58 and Lots 3 and 4 3-120-58. Said road is approximately 66 feet in width and approximately one and one-fourth (1 1/4) miles in length.

A portion of 421st Ave from 41800 421st Ave. to 41850 421st Ave. bordered on the west by Lot 1 and the SE1/4NE1/4 4-120-58; and on the east by Lot 4 and the SW1/4NW1/4 3-120-58. Said road is approximately 66 feet in width and approximately one half (1/2) mile in length.

A portion of 149A St. from 42200 149A St. to 42250 149A St. bordered on the north by S1/2NW1/4 11-120-58; and on the south by the NW1/4SW1/4, the W1/2NE1/4SW1/4, and the E1/2NE1/4SW1/4 11-120-58. Said road is approximately 66 feet in width and approximately one half (1/2) mile in length.

A portion of 424th Ave from 14900 424th Ave. to 14950 424th Ave. bordered on the west by the E1/2NE1/4 12-120-58; and on the east by the W1/2NW1/4 7-120-57. Said road is approximately 66 feet in width and approximately one half (1/2) mile in length.

A portion of 150th St from 42200 150th St to 42400 150th St. bordered on the north by the SW1/4SW1/4, the SE1/4SW1/4, the S1/2SE1/4 11-120-58, the S1/2SW1/4 and the S1/2SE1/4 12-120-58; and on the south by the N1/2NW1/4, the N1/2NE1/4 14-120-58, the N1/2NW1/4, the NW1/4NE1/4, and the NE1/4NE1/4 13-120-58. Said road is approximately 66 feet in width and approximately two (2) miles in length.

A portion of 151st St. from 41800 151st St to 42008 151st St. bordered on the north by the S1/2SW1/4, the S1/2SE1/4 18-120-58, the S1/2SW1/4, the S1/2SE1/4 17-120-58, and the SW1/4SW1/4 16-120-58; and on

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the south by the N1/2N1/2 19-120-58, the N1/2NW1/4, N1/2NE1/4 20-120-58 and the NW1/4NW1/4 21-120-58. Said road is approximately 66 feet in width and approximately two and one-tenth (2 1/10) miles in length.

A portion of 151<sup>st</sup> St from 42072 151<sup>st</sup> St. to 42250 151<sup>st</sup> St. bordered on the north by the E1/2SW1/4SE1/4, the SE1/4SE1/4 16-120-58; the S1/2SW1/4, the S1/2SE1/4 15-120-58; S1/2SW1/4 14-120-58; and on the south by the E1/2NW1/4NE1/4, the NE1/4NE1/4 21-120-58; the N1/2NW1/4, NW1/4NE1/4, the NE1/4NE1/4 22-120-58; the N1/2NW1/4 23-120-58. Said road is approximately 66 feet in width and approximately one and seven eighths (1 7/8) miles in length.

A portion of 420<sup>th</sup> Ave from 15093 420<sup>th</sup> Ave. to 15138 420<sup>th</sup> Ave. bordered on the west by the SE1/4SE1/4 17-120-58, NE1/4NE1/4, and the N1/2SE1/4NE1/4 20-120-58; and on the east by SW1/4SW1/4 16-120-58, NW1/4NW1/4 and the N1/2 SW1/4NW1/4 21-120-58. Said road is approximately 66 feet in width and approximately one-half (1/2) mile in length.

A portion of 423<sup>rd</sup> Ave from 15200 423<sup>rd</sup> Ave. to 15300 423<sup>rd</sup> Ave. bordered on the west by E1/2E1/2 26-120-58; and on the east by W1/2NW1/4 and W1/2SW1/4 25-120-58. Said road is approximately 66 feet in width and approximately one (1) mile in length.

A portion of 153<sup>rd</sup> St from 41800 153<sup>rd</sup> St to 42000 153<sup>rd</sup> St. bordered on the north by the S1/2SW1/4, the S1/2SE1/4 30-120-58; the S1/2SW1/4, the S1/2SE1/4 29-120-58; and on the south by the NW1/4NW1/4, the NE1/4NW1/4, the N1/2NE1/4 31-120-58; the N1/2NW1/4, the N1/2NE1/4 32-120-58. Said road is approximately 66 feet in width and approximately two (2) miles in length.

A portion of 153<sup>rd</sup> St from 42050 153<sup>rd</sup> St. to 42100 153<sup>rd</sup> St. bordered on the north by the S1/2SE1/4 28-120-58 and on the south by the N1/2NE1/4 33-120-58. Said road is approximately 66 feet in width and approximately one half (1/2) mile in length.

A portion of 153<sup>rd</sup> St. from 42200 153<sup>rd</sup> St. to 42225 153<sup>rd</sup> St. bordered on the north by SW1/4SW1/4 26-120-58; and on the south by NW1/4NW1/4 35-120-58. Said road is approximately 66 feet in width and approximately one fourth (1/4) mile in length.

A portion of 153<sup>rd</sup> St. from 42300 153<sup>rd</sup> St. to 42350 153<sup>rd</sup> St. bordered on the north by the S1/2SW1/4 25-120-58; and on the south by the N1/2NW1/4 36-120-58. Said road is approximately 66 feet in width and approximately one half (1/2) mile in length.

A portion of 420<sup>th</sup> Ave from 15300 420<sup>th</sup> Ave. to 15400 420<sup>th</sup> Ave. bordered on the west by the E1/2NE1/4, the NE1/4SE1/4, the SE1/4SE1/4 32-120-58 and on the east by the W1/2NW1/4, the W1/2SW1/4 33-120-58. Said road is approximately 66 feet in width and approximately one (1) mile in length.

These roadways have not been in use for a number of years, and due to the safety issues associated with them and the expense of development as a roadway, your petitioners feel it will never be feasible or practical to develop, nor do your petitioners feel it will ever be further developed due to the terrain and limited use of the highways; and further your petitioners believe that it would be in the best interests of the public that these portions of the section line highways be vacated:

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That existing public right-of-way which includes the statutory right of way and any right of way acquired by Deed (s) lying on the section line highways described as follows:

A portion of 148<sup>th</sup> St. from 41925 148<sup>th</sup> St. to 441975 148<sup>th</sup> St. bordered on the north by the S1/2SW1/4 and the SW1/4SE1/4 32-121-58; and on the south by Lots 2, 3 and 4 Sec. 5-120-58. Said road is approximately 66 feet in width and approximately three quarters (3/4) mile in length.

A portion of 148<sup>th</sup> St. from 42025 148<sup>th</sup> St. to 42150 148<sup>th</sup> St. bordered on the north by Lot 1 and the S1/2 SW 1/4 except Lot 1, and the S1/2 SE1/4 33-121-58, the SW1/4SW1/4 and the SE1/4SW1/4 34-121-58; and on the south by Lots 1, 2, 3 and 4 4-120-58 and Lots 3 and 4 3-120-58. Said road is approximately 66 feet in width and approximately one and one-fourth (1 1/4) miles in length.

A portion of 421<sup>st</sup> Ave from 41800 421<sup>st</sup> Ave. to 41850 421<sup>st</sup> Ave. bordered on the west by Lot 1 and the SE1/4NE1/4 4-120-58; and on the east by Lot 4 and the SW1/4NW1/4 3-120-58. Said road is approximately 66 feet in width and approximately one half (1/2) mile in length.

A portion of 149A St. from 42200 149A St. to 42250 149A St. bordered on the north by S1/2NW1/4 11-120-58; and on the south by the NW1/4SW1/4, the W1/2NE1/4SW1/4, and the E1/2NE1/4SW1/4 11-120-58. Said road is approximately 66 feet in width and approximately one half (1/2) mile in length.

A portion of 424<sup>th</sup> Ave from 14900 424<sup>th</sup> Ave. to 14950 424<sup>th</sup> Ave. bordered on the west by the E1/2NE1/4 12-120-58; and on the east by the W1/2NW1/4 7-120-57. Said road is approximately 66 feet in width and approximately one half (1/2) mile in length.

A portion of 150<sup>th</sup> St from 42200 150<sup>th</sup> St to 42400 150<sup>th</sup> St. bordered on the north by the SW1/4SW1/4, the SE1/4SW1/4, the S1/2SE1/4 11-120-58, the S1/2SW1/4 and the S1/2SE1/4 12-120-58; and on the south by the N1/2NW1/4, the N1/2NE1/4 14-120-58, the N1/2NW1/4, the NW1/4NE1/4, and the NE1/4NE1/4 13-120-58. Said road is approximately 66 feet in width and approximately two (2) miles in length.

A portion of 151<sup>st</sup> St. from 41800 151<sup>st</sup> St to 42008 151<sup>st</sup> St. bordered on the north by the S1/2SW1/4, the S1/2SE1/4 18-120-58, the S1/2SW1/4, the S1/2SE1/4 17-120-58, and the SW1/4SW1/4 16-120-58; and on the south by the N1/2N1/2 19-120-58, the N1/2NW1/4, N1/2NE1/4 20-120-58 and theNW1/4NW1/4 21-120-58. Said road is approximately 66 feet in width and approximately two and one-tenth (2 1/10) miles in length.

A portion of 151<sup>st</sup> St from 42072 151<sup>st</sup> St. to 42250 151<sup>st</sup> St. bordered on the north by the E1/2SW1/4SE1/4, the SE1/4SE1/4 16-120-58; the S1/2SW1/4, the S1/2SE1/4 15-120-58; S1/2SW1/4 14-120-58; and on the south by the E1/2NW1/4NE1/4, the NE1/4NE1/4 21-120-58; the N1/2NW1/4, NW1/4NE1/4, the NE1/4NE1/4 22-120-58; the N1/2NW1/4 23-120-58. Said road is approximately 66 feet in width and approximately one and seven eighths (1 7/8) miles in length.

A portion of 420<sup>th</sup> Ave from 15093 420<sup>th</sup> Ave. to 15138 420<sup>th</sup> Ave. bordered on the west by the SE1/4SE1/4 17-120-58, NE1/4NE1/4, and the N1/2SE1/4NE1/4 20-120-58; and on the east by SW1/4SW1/4 16-120-58, NW1/4NW1/4 and the N1/2 SW1/4NW1/4 21-120-58. Said road is approximately 66 feet in width and approximately one-half (1/2) mile in length.

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A portion of 423<sup>rd</sup> Ave from 15200 423<sup>rd</sup> Ave. to 15300 423<sup>rd</sup> Ave. bordered on the west by E1/2E1/2 26-120-58; and on the east by W1/2NW1/4 and W1/2SW1/4 25-120-58. Said road is approximately 66 feet in width and approximately one (1) mile in length.

A portion of 153<sup>rd</sup> St from 41800 153<sup>rd</sup> St to 42000 153<sup>rd</sup> St. bordered on the north by the S1/2SW1/4, the S1/2SE1/4 30-120-58; the S1/2SW1/4, the S1/2SE1/4 29-120-58; and on the south by the NW1/4NW1/4, the NE1/4NW1/4, the N1/2NE1/4 31-120-58; the N1/2NW1/4, the N1/2NE1/4 32-120-58. Said road is approximately 66 feet in width and approximately two (2) miles in length.

A portion of 153<sup>rd</sup> St from 42050 153<sup>rd</sup> St. to 42100 153<sup>rd</sup> St. bordered on the north by the S1/2SE1/4 28-120-58 and on the south by the N1/2NE1/4 33-120-58. Said road is approximately 66 feet in width and approximately one half (1/2) mile in length.

A portion of 153<sup>rd</sup> St. from 42200 153<sup>rd</sup> St. to 42225 153<sup>rd</sup> St. bordered on the north by SW1/4SW1/4 26-120-58; and on the south by NW1/4NW1/4 35-120-58. Said road is approximately 66 feet in width and approximately one fourth (1/4) mile in length.

A portion of 153<sup>rd</sup> St. from 42300 153<sup>rd</sup> St. to 42350 153<sup>rd</sup> St. bordered on the north by the S1/2SW1/4 25-120-58; and on the south by the N1/2NW1/4 36-120-58. Said road is approximately 66 feet in width and approximately one half (1/2) mile in length.

A portion of 420<sup>th</sup> Ave from 15300 420<sup>th</sup> Ave. to 15400 420<sup>th</sup> Ave. bordered on the west by the E1/2NE1/4, the NE1/4SE1/4, the SE1/4SE1/4 32-120-58 and on the east by the W1/2NW1/4, the W1/2SW1/4 33-120-58. Said road is approximately 66 feet in width and approximately one (1) mile in length.

The owners of the land through which these roads pass are: Darwin Peckham, Donald Grode, Larry Herr, Theodore Myron, Michael Herr, Lauren Johnson, Stephen Witt, Daniel Grode, Elizabeth Korf, Jerry Busch, Lyle Busch, Daniel Ash, LaRon Herr, Leo Warrington, Jacquelyn Duerre, Mary Johnson, Robert Duerre, Thad Duerre, James Duerre Family Trust, Marcella Duerre, Linda Witt, Eugene Ausland, Lori Ash, Randy Peterson, Dwight Wookey, Carmen Wika Trust, Mark Schutz, Clinton Duerre, Francis James, Gary Anderson, Damon Witt, Beverly Ohleen, Charles Vehe Family Trust, Anderson's Spring Valley Ranch, LLC

WHEREAS, said petitioners request the Board of Supervisors of Troy Township to vote on this proposed vacation at the next regular meeting, or a special meeting called for the purpose; and petitioners herein state that the public convenience or necessity will better be served by this proposed vacating. This Petition is submitted pursuant to SDCL 31-3-6.

WHEREFORE, your petitioners pray that the Board of Supervisors of Troy Township, by resolution, determine that the public interest will be better served by the vacating of the highways described as:

A portion of 148<sup>th</sup> St. from 41925 148<sup>th</sup> St. to 441975 148<sup>th</sup> St. bordered on the north by the S1/2SW1/4 and the SW1/4SE1/4 32-121-58; and on the south by Lots 2, 3 and 4 Sec. 5-120-58. Said road is approximately 66 feet in width and approximately three quarters (3/4) mile in length.

A portion of 148<sup>th</sup> St. from 42025 148<sup>th</sup> St. to 42150 148<sup>th</sup> St. bordered on the north by Lot 1 and the S1/2 SW ¼ except Lot 1, and the S1/2 SE1/4 33-121-58, the SW1/4SW1/4 and the SE1/4SW1/4 34-121-58; and

**TWP 224**

on the south by Lots 1, 2, 3 and 4 4-120-58 and Lots 3 and 4 3-120-58. Said road is approximately 66 feet in width and approximately one and one-fourth (1 1/4) miles in length.

A portion of 421<sup>st</sup> Ave from 41800 421<sup>st</sup> Ave. to 41850 421<sup>st</sup> Ave. bordered on the west by Lot 1 and the SE1/4NE1/4 4-120-58; and on the east by Lot 4 and the SW1/4NW1/4 3-120-58. Said road is approximately 66 feet in width and approximately one half (1/2) mile in length.

A portion of 149A St. from 42200 149A St. to 42250 149A St. bordered on the north by S1/2NW1/4 11-120-58; and on the south by the NW1/4SW1/4, the W1/2NE1/4SW1/4, and the E1/2NE1/4SW1/4 11-120-58. Said road is approximately 66 feet in width and approximately one half (1/2) mile in length.

A portion of 424<sup>th</sup> Ave from 14900 424<sup>th</sup> Ave. to 14950 424<sup>th</sup> Ave. bordered on the west by the E1/2NE1/4 12-120-58; and on the east by the W1/2NW1/4 7-120-57. Said road is approximately 66 feet in width and approximately one half (1/2) mile in length.

A portion of 150<sup>th</sup> St from 42200 150<sup>th</sup> St to 42400 150<sup>th</sup> St. bordered on the north by the SW1/4SW1/4, the SE1/4SW1/4, the S1/2SE1/4 11-120-58, the S1/2SW1/4 and the S1/2SE1/4 12-120-58; and on the south by the N1/2NW1/4, the N1/2NE1/4 14-120-58, the N1/2NW1/4, the NW1/4NE1/4, and the NE1/4NE1/4 13-120-58. Said road is approximately 66 feet in width and approximately two (2) miles in length.

A portion of 151<sup>st</sup> St. from 41800 151<sup>st</sup> St to 42008 151<sup>st</sup> St. bordered on the north by the S1/2SW1/4, the S1/2SE1/4 18-120-58, the S1/2SW1/4, the S1/2SE1/4 17-120-58, and the SW1/4SW1/4 16-120-58; and on the south by the N1/2N1/2 19-120-58, the N1/2NW1/4, N1/2NE1/4 20-120-58 and the NW1/4NW1/4 21-120-58. Said road is approximately 66 feet in width and approximately two and one-tenth (2 1/10) miles in length.

A portion of 151<sup>st</sup> St from 42072 151<sup>st</sup> St. to 42250 151<sup>st</sup> St. bordered on the north by the E1/2SW1/4SE1/4, the SE1/4SE1/4 16-120-58; the S1/2SW1/4, the S1/2SE1/4 15-120-58; S1/2SW1/4 14-120-58; and on the south by the E1/2NW1/4NE1/4, the NE1/4NE1/4 21-120-58; the N1/2NW1/4, NW1/4NE1/4, the NE1/4NE1/4 22-120-58; the N1/2NW1/4 23-120-58. Said road is approximately 66 feet in width and approximately one and seven eighths (1 7/8) miles in length.

A portion of 420<sup>th</sup> Ave from 15093 420<sup>th</sup> Ave. to 15138 420<sup>th</sup> Ave. bordered on the west by the SE1/4SE1/4 17-120-58, NE1/4NE1/4, and the N1/2SE1/4NE1/4 20-120-58; and on the east by SW1/4SW1/4 16-120-58, NW1/4NW1/4 and the N1/2 SW1/4NW1/4 21-120-58. Said road is approximately 66 feet in width and approximately one-half (1/2) mile in length.

A portion of 423<sup>rd</sup> Ave from 15200 423<sup>rd</sup> Ave. to 15300 423<sup>rd</sup> Ave. bordered on the west by E1/2E1/2 26-120-58; and on the east by W1/2NW1/4 and W1/2SW1/4 25-120-58. Said road is approximately 66 feet in width and approximately one (1) mile in length.

A portion of 153<sup>rd</sup> St from 41800 153<sup>rd</sup> St to 42000 153<sup>rd</sup> St. bordered on the north by the S1/2SW1/4, the S1/2SE1/4 30-120-58; the S1/2SW1/4, the S1/2SE1/4 29-120-58; and on the south by the NW1/4NW1/4, the NE1/4NW1/4, the N1/2NE1/4 31-120-58; the N1/2NW1/4, the N1/2NE1/4 32-120-58. Said road is approximately 66 feet in width and approximately two (2) miles in length.

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A portion of 153<sup>rd</sup> St from 42050 153<sup>rd</sup> St. to 42100 153<sup>rd</sup> St. bordered on the north by the S1/2SE1/4 28-120-58 and on the south by the N1/2NE1/4 33-120-58. Said road is approximately 66 feet in width and approximately one half (1/2) mile in length.

A portion of 153<sup>rd</sup> St. from 42200 153<sup>rd</sup> St. to 42225 153<sup>rd</sup> St. bordered on the north by SW1/4SW1/4 26-120-58; and on the south by NW1/4NW1/4 35-120-58. Said road is approximately 66 feet in width and approximately one fourth (1/4) mile in length.

A portion of 153<sup>rd</sup> St. from 42300 153<sup>rd</sup> St. to 42350 153<sup>rd</sup> St. bordered on the north by the S1/2SW1/4 25-120-58; and on the south by the N1/2NW1/4 36-120-58. Said road is approximately 66 feet in width and approximately one half (1/2) mile in length.

A portion of 420<sup>th</sup> Ave from 15300 420<sup>th</sup> Ave. to 15400 420<sup>th</sup> Ave. bordered on the west by the E1/2NE1/4, the NE1/4SE1/4, the SE1/4SE1/4 32-120-58 and on the east by the W1/2NW1/4, the W1/2SW1/4 33-120-58. Said road is approximately 66 feet in width and approximately one (1) mile in length.

And make its Order vacating the same.

**TWP 226**

INSTRUCTIONS TO SIGNERS:

1. Signers of this petition must individually sign their names in the form in which they are registered to vote or as they usually sign their names.
2. Before the petition is filed, each signer or the circulator must add the residence address of the signer and the date of signing. If the signer is a resident of a second or third class municipality, a post office box may be used for the residence address.
3. Before the petition is filed, each signer or the circulator must print the name of the signer in the space provided and add the township of voter registration.
4. Abbreviations of common usage may be used. Ditto marks may not be used.
5. Failure to provide all information requested may invalidate the signature.

<u>NAME</u>		<u>RESIDENCE</u>	<u>DATE/TOWNSHIP</u>
SIGN	<i>Shawn Witt</i>	STREET 14953 419th Av	DATE OF SIGNING 5-12-14
PRINT	Shawn Witt	CITY Bristol	TOWNSHIP OF REGISTRATION Troy
SIGN	<i>Jennifer Witt</i>	STREET 14953 419th Ave	DATE OF SIGNING 5-12-14
PRINT	Jennifer Witt	CITY Bristol	TOWNSHIP OF REGISTRATION Troy
SIGN	<i>Linda J. Witt</i>	STREET 14957 447th Ave	DATE OF SIGNING 5-12-14
PRINT	Linda J. Witt	CITY Bristol	TOWNSHIP OF REGISTRATION Troy
SIGN	<i>Carol J. Flattam</i>	STREET 14827 423rd Ave	DATE OF SIGNING 5-12-14
PRINT	Carol J. Flattam	CITY Bristol	TOWNSHIP OF REGISTRATION Troy
SIGN	<i>Lalitha</i>	STREET 15053 420th Ave	DATE OF SIGNING 5-12-14
PRINT	Lalitha	CITY Bristol SD5729	TOWNSHIP OF REGISTRATION Troy
SIGN	<i>Jolene Herr</i>	STREET 15053 420th Ave	DATE OF SIGNING 5-12-14
PRINT	Jolene Herr	CITY Bristol SD 5729	TOWNSHIP OF REGISTRATION Troy

TWP 227

**VERIFICATION OF PERSON CIRCULATING PETITION**

**INSTRUCTIONS TO CIRCULATOR:** This section must be completed following circulation and before filing.

DONLEY L FLATTUM      14827      423+114th      PERRISDA      SD  
Print name of circulator      Residence Address      City      State

I, under oath, state that I circulated the above petition, that each signer personally signed this petition in my presence, and that either the signer or I added the printed name, the residence address of the signer, the date of the signing, and the township of voter registration.

Donley L Flattum  
Signature of Circulator

Subscribed and sworn to before me this 12<sup>th</sup> day of May, 2014.



Connie L Wagner  
Notary Public, SD  
My comm. exp.: March 27, 2017

**TWP 228**

STATE OF SOUTH DAKOTA    )  
  :SS  
COUNTY OF DAY            )

We, the undersigned, having been first duly sworn, on oath depose and say: That they have read the above and foregoing Petition and know the contents thereof; and that the same is true of their own knowledge, except as to those matters therein stated upon information and belief, and as to such matters, they believe the same to be true.

<u>Larry Herr</u> Name	<u>Supervisor</u>
<u>Donald R. Thak</u> Name	<u>Supervisor</u>
<u>Yld. Stuel</u> Name	<u>Chairman</u>

Subscribed and sworn to before me this 13<sup>th</sup> day of May, 2014

Barbara J. [Signature]  
Notary Public, SD  
My comm. exp.: 4-10-20

Vacate II

PETITION FOR VACATION OF ROADS

TO THE HONORABLE BOARD OF THE TOWNSHIP OF TROY, DAY COUNTY, SOUTH DAKOTA:

That the petitioners herein respectfully represent that they are the electors residing in the organized civil township of Troy, county of Day, State of South Dakota; and that as residents and electors of said township, they feel that the public convenience and necessity will be better served by the vacation of roadways or highways that they are seeking to have vacated are described as being located, to-wit:

That existing public right-of-way which includes the statutory right of way and any right of way acquired by Deed (s) lying on the section line highways described as follows:

1 A portion of 149<sup>th</sup> St from 42150 149<sup>th</sup> St. to 42400 149<sup>th</sup> St. bordered on the north by the S1/2SE1/4 3-120-58, S1/2SW1/4 and the S1/2SE1/4 2-120-58, and the S1/2S1/2 1-120-58; and on the south by the N1/2NE1/4 10-120-58, the N1/2NW1/4 and the N1/2NE1/4 11-120-58, the N1/2NW1/4 and the N1/2NE1/4 12-120-58. Said road is approximately 66 feet in width and approximately two and one-half (2 1/2) miles in length.

2 A portion of 150th St. from 41800 150<sup>th</sup> St to 41900 150<sup>th</sup> St. bordered on the north by the S1/2SW1/4 and the S1/2SE1/4 7-120-58; and on the south by the N1/2NW1/4 and the N1/2NE1/4 18-120-58. Said road is approximately 66 feet in width and approximately One (1) mile in length.

3 A portion of 151st St. from 42250 151<sup>st</sup> St. to 42400 151<sup>st</sup> St. bordered on the north by the S1/2SE1/4 14-120-58; S1/2SW1/4, SW1/4SE1/4, SE1/4SE1/4 13-120-58; and on the south by N1/2NE1/4 23-120-58, the N1/2NW1/4 and the N1/2NE1/4 24-120-58. Said road is approximately 66 feet in width and approximately One and one-half (1 1/2) miles in length.

4 A portion of 421<sup>st</sup> Ave. from 14900 421<sup>st</sup> Ave. to 15175 421<sup>st</sup> Ave. bordered on the west by E1/2E1/2 9-120-58; E1/2NE, NE1/4SE1/4, SE1/4SE1/4 16-120-58; the E1/2NE1/4 and the NE1/4SE1/4 21-120-58; and on the east by the W1/2NW1/4, and the W1/2SW1/4 10-120-58; the W1/2NW1/4 and the W1/2SW1/4 15-120-58; the NW1/4NW1/4, the SW1/4NW1/4, and the NW1/4SW1/4 22-120-58. Said road is approximately 66 feet in width and approximately Two and three-fourths (2 3/4) miles in length.

5 A portion of 421<sup>st</sup> Ave. from 15300 421<sup>st</sup> Ave. to 15400 421<sup>st</sup> Ave. bordered on the west by the E1/2E1/2 33-120-58; and on the east by the W1/2W1/2 34-120-58. Said road is approximately 66 feet in width and approximately One (1) mile in length.

6 A portion of 423<sup>rd</sup> Ave. from 15000 423<sup>rd</sup> Ave. to 15300 423<sup>rd</sup> Ave. bordered on the west by the E1/2E1/2 14-120-58, the E1/2NE1/4, and the E1/2SE1/4 23-120-58, the E1/2E1/2 26-120-58; and on the east by the W1/2NW1/4, and the W1/2SW1/4 13-120-58, the W1/2W1/2 24-120-58, the W1/2NW1/4 and the W1/2SW1/4 25-120-58. Said road is approximately 66 feet in width and approximately three (3) miles in length.

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7  
A portion of 424th Ave. from 15000 424th Ave. to 15300 424th Ave. bordered on the west by the E1/2E1/2 13-120-58; the E1/2NE1/4, Part of E1/2SE1/4 (64.03 acres) and E1/2SE1/4 Ex deeded pts (15.97 acres) 24-120-58; the E1/2NE1/4 and the E1/2SE1/4 25-120-58; and on the east by the W1/2NW1/4, the W1/2SW1/4 18-120-57, the W1/2W1/2 19-120-57, the W1/2NW1/4 and the W1/2SW1/4 30-120-57. Said road is approximately 66 feet in width and approximately three (3) miles in length.

These roadways have not been in use for a number of years, and due to the safety issues associated with them and the expense of development as a roadway, your petitioners feel it will never be feasible or practical to develop, nor do your petitioners feel it will ever be further developed due to the terrain and limited use of the highways; and further your petitioners believe that it would be in the best interests of the public that these portions of the section line highways be vacated:

That existing public right-of-way which includes the statutory right of way and any right of way acquired by Deed (s) lying on the section line highways described as follows:

A portion of 149<sup>th</sup> St from 42150 149<sup>th</sup> St. to 42400 149<sup>th</sup> St. bordered on the north by the S1/2SE1/4 3-120-58, S1/2SW1/4 and the S1/2SE1/4 2-120-58, and the S1/2S1/2 1-120-58; and on the south by the N1/2NE1/4 10-120-58, the N1/2NW1/4 and the N1/2NE1/4 11-120-58, the N1/2NW1/4 and the N1/2NE1/4 12-120-58. Said road is approximately 66 feet in width and approximately two and one-half (2 1/2) miles in length.

A portion of 150<sup>th</sup> St. from 41800 150<sup>th</sup> St to 41900 150<sup>th</sup> St. bordered on the north by the S1/2SW1/4 and the S1/2SE1/4 7-120-58; and on the south by the N1/2NW1/4 and the N1/2NE1/4 18-120-58. Said road is approximately 66 feet in width and approximately One (1) mile in length.

A portion of 151<sup>st</sup> St. from 42250 151<sup>st</sup> St. to 42400 151<sup>st</sup> St. bordered on the north by the S1/2SE1/4 14-120-58; S1/2SW1/4, SW1/4SE1/4, SE1/4SE1/4 13-120-58; and on the south by N1/2NE1/4 23-120-58, the N1/2NW1/4 and the N1/2NE1/4 24-120-58. Said road is approximately 66 feet in width and approximately One and one-half (1 1/2) miles in length.

A portion of 421<sup>st</sup> Ave. from 14900 421<sup>st</sup> Ave. to 15175 421<sup>st</sup> Ave. bordered on the west by E1/2E1/2 9-120-58; E1/2NE, NE1/4SE1/4, SE1/4SE1/4 16-120-58; the E1/2NE1/4 and the NE1/4SE1/4 21-120-58; and on the east by the W1/2NW1/4, and the W1/2SW1/4 10-120-58; the W1/2NW1/4 and the W1/2SW1/4 15-120-58; the NW1/4NW1/4, the SW1/4NW1/4, and the NW1/4SW1/4 22-120-58. Said road is approximately 66 feet in width and approximately Two and three-fourths (2 3/4) miles in length.

A portion of 421<sup>st</sup> Ave. from 15300 421<sup>st</sup> Ave. to 15400 421<sup>st</sup> Ave. bordered on the west by the E1/2E1/2 33-120-58; and on the east by the W1/2W1/2 34-120-58. Said road is approximately 66 feet in width and approximately One (1) mile in length.

A portion of 423<sup>rd</sup> Ave. from 15000 423<sup>rd</sup> Ave. to 15300 423<sup>rd</sup> Ave. bordered on the west by the E1/2E1/2 14-120-58, the E1/2NE1/4, and the E1/2SE1/4 23-120-58, the E1/2E1/2 26-120-58; and on the east by the W1/2NW1/4, and the W1/2SW1/4 13-120-58, the W1/2W1/2 24-120-58, the W1/2NW1/4 and the W1/2SW1/4 25-120-58. Said road is approximately 66 feet in width and approximately three (3) miles in length.

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A portion of 424th Ave. from 15000 424th Ave. to 15300 424th Ave. bordered on the west by the E1/2E1/2 13-120-58; the E1/2NE1/4, Part of E1/2SE1/4 (64.03 acres) and E1/2SE1/4 Ex deeded pts (15.97 acres) 24-120-58; the E1/2NE1/4 and the E1/2SE1/4 25-120-58; and on the east by the W1/2NW1/4, the W1/2SW1/4 18-120-57, the W1/2W1/2 19-120-57, the W1/2NW1/4 and the W1/2SW1/4 30-120-57. Said road is approximately 66 feet in width and approximately three (3) miles in length.

The owners of the land through which these roads pass are: Shawn Witt, Glen Flattum, Myrtle Reece, Lauren Johnson, Robert Grode, Lester Herr, Leo Warrington, Blake Duerre, Daniel Ash, Stephen Witt, Linda Witt, Robert Duerre, James Duerre, Marcella Duerre, Thad Duerre, Gary Anderson, La Ron Herr, Hansmeier & Son, Inc., Theodore Myron, Daniel Grode, Dwight Wookey, US Wildlife, Larry Herr, Steven Headley, Garry Lone, Francis James, Mark Schmidt, Ricky Buhler, Brad Mercer, Austin Schiley, Randy Peterson, and Barbara James.

WHEREAS, said petitioners request the Board of Supervisors of Troy Township to vote on this proposed vacation at the next regular meeting, or a special meeting called for the purpose; and petitioners herein state that the public convenience or necessity will better be served by this proposed vacating. This Petition is submitted pursuant to SDCL 31-3-6.

WHEREFORE, your petitioners pray that the Board of Supervisors of Troy Township, by resolution, determine that the public interest will be better served by the vacating of the highways described as:

A portion of 149<sup>th</sup> St from 42150 149<sup>th</sup> St. to 42400 149<sup>th</sup> St. bordered on the north by the S1/2SE1/4 3-120-58, S1/2SW1/4 and the S1/2SE1/4 2-120-58, and the S1/2S1/2 1-120-58; and on the south by the N1/2NE1/4 10-120-58, the N1/2NW1/4 and the N1/2NE1/4 11-120-58, the N1/2NW1/4 and the N1/2NE1/4 12-120-58. Said road is approximately 66 feet in width and approximately two and one-half (2 1/2) miles in length.

A portion of 150th St. from 41800 150<sup>th</sup> St. to 41900 150<sup>th</sup> St. bordered on the north by the S1/2SW1/4 and the S1/2SE1/4 7-120-58; and on the south by the N1/2NW1/4 and the N1/2NE1/4 18-120-58. Said road is approximately 66 feet in width and approximately One (1) mile in length.

A portion of 151st St. from 42250 151<sup>st</sup> St. to 42400 151<sup>st</sup> St. bordered on the north by the S1/2SE1/4 14-120-58; S1/2SW1/4, SW1/4SE1/4, SE1/4SE1/4 13-120-58; and on the south by N1/2NE1/4 23-120-58, the N1/2NW1/4 and the N1/2NE1/4 24-120-58. Said road is approximately 66 feet in width and approximately One and one-half (1 1/2) miles in length.

A portion of 421<sup>st</sup> Ave. from 14900 421<sup>st</sup> Ave. to 15175 421<sup>st</sup> Ave. bordered on the west by E1/2E1/2 9-120-58; E1/2NE, NE1/4SE1/4, SE1/4SE1/4 16-120-58; the E1/2NE1/4 and the NE1/4SE1/4 21-120-58; and on the east by the W1/2NW1/4, and the W1/2SW1/4 10-120-58; the W1/2NW1/4 and the W1/2SW1/4 15-120-58; the NW1/4NW1/4, the SW1/4NW1/4, and the NW1/4SW1/4 22-120-58. Said road is approximately 66 feet in width and approximately Two and three-fourths (2 3/4) miles in length.

A portion of 421<sup>st</sup> Ave. from 15300 421<sup>st</sup> Ave. to 15400 421<sup>st</sup> Ave. bordered on the west by the E1/2E1/2 33-120-58; and on the east by the W1/2W1/2 34-120-58. Said road is approximately 66 feet in width and approximately One (1) mile in length.

**TWP 233**

A portion of 423<sup>rd</sup> Ave. from 15000 423<sup>rd</sup> Ave. to 15300 423<sup>rd</sup> Ave. bordered on the west by the E1/2E1/2 14-120-58, the E1/2NE1/4, and the E1/2SE1/4 23-120-58, the E1/2E1/2 26-120-58; and on the east by the W1/2NW1/4, and the W1/2SW1/4 13-120-58, the W1/2W1/2 24-120-58, the W1/2NW1/4 and the W1/2SW1/4 25-120-58. Said road is approximately 66 feet in width and approximately three (3) miles in length.

A portion of 424th Ave. from 15000 424th Ave. to 15300 424th Ave. bordered on the west by the E1/2E1/2 13-120-58; the E1/2NE1/4, Part of E1/2SE1/4 (64.03 acres) and E1/2SE1/4 Ex deeded pts (15.97 acres) 24-120-58; the E1/2NE1/4 and the E1/2SE1/4 25-120-58; and on the east by the W1/2NW1/4, the W1/2SW1/4 18-120-57, the W1/2W1/2 19-120-57, the W1/2NW1/4 and the W1/2SW1/4 30-120-57. Said road is approximately 66 feet in width and approximately three (3) miles in length.

And make its Order vacating the same.

**TWP 234**

**INSTRUCTIONS TO SIGNERS:**

1. Signers of this petition must individually sign their names in the form in which they are registered to vote or as they usually sign their names.
2. Before the petition is filed, each signer or the circulator must add the residence address of the signer and the date of signing. If the signer is a resident of a second or third class municipality, a post office box may be used for the residence address.
3. Before the petition is filed, each signer or the circulator must print the name of the signer in the space provided and add the township of voter registration.
4. Abbreviations of common usage may be used. Ditto marks may not be used.
5. Failure to provide all information requested may invalidate the signature.

<u>NAME</u>	<u>RESIDENCE</u>	<u>DATE/TOWNSHIP</u>
SIGN <i>Carol Flattum</i>	STREET 14827 423rd Ave	DATE OF SIGNING 7-8-14
PRINT Carol Flattum	CITY Bristol SD 57219	TOWNSHIP OF REGISTRATION Troy
SIGN <i>Beth Duerre</i>	STREET 15007 423rd Ave	DATE OF SIGNING 7/8/14
PRINT Beth Duerre	CITY Bristol, SD 57219	TOWNSHIP OF REGISTRATION Troy
SIGN <i>Victoria L Duerre</i>	STREET 15024 423 Ave	DATE OF SIGNING 7-8-14
PRINT Victoria L Duerre	CITY Bristol, SD 57219	TOWNSHIP OF REGISTRATION Troy
SIGN <i>Jennifer Witt</i>	STREET 14953 419th Ave	DATE OF SIGNING 7-8-14
PRINT Jennifer Witt	CITY Bristol, SD 57219	TOWNSHIP OF REGISTRATION Troy
SIGN <i>Shawn Witt</i>	STREET 14953 419th Ave.	DATE OF SIGNING 7-8-14
PRINT Shawn Witt	CITY Bristol, SD 57219	TOWNSHIP OF REGISTRATION Troy
SIGN <i>Linda J. Witt</i>	STREET 14957 419th Ave	DATE OF SIGNING 7-8-14
PRINT Linda J. Witt	CITY Bristol, SD 57219	TOWNSHIP OF REGISTRATION Troy

**TWP 235**

And make its Order vacating the same.

**VERIFICATION OF PERSON CIRCULATING PETITION**

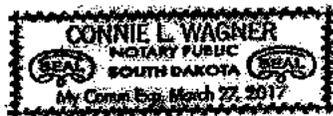
**INSTRUCTIONS TO CIRCULATOR:** This section must be completed following circulation and before filing.

Dorley L. Slattum      14827 42nd Ave      Bristol      SD  
Print name of circulator      Residence Address      City      State

I, under oath, state that I circulated the above petition, that each signer personally signed this petition in my presence, and that either the signer or I added the printed name, the residence address of the signer, the date of the signing, and the township of voter registration.

Dorley L. Slattum  
Signature of Circulator

Subscribed and sworn to before me this 9th day of July, 2014.



Connie L. Wagner  
Notary Public, SD  
My comm. exp.:





**PETITION FOR VACATION OF ROADS**

TO THE HONORABLE BOARD OF THE TOWNSHIP OF VALLEY, DAY COUNTY, SOUTH DAKOTA:

That the petitioners herein respectfully represent that they are the electors residing in the organized civil township of Valley, county of Day, State of South Dakota; and that as residents and electors of said township, they feel that the people of Valley Township will be better served by the vacation of roadways or highways that they are seeking to have vacated are described as being located, to-wit:

That existing public right-of-way which includes the statutory right of way and any right of way acquired by Deed (s) lying on the section line highways described as follows:

A portion of 142<sup>nd</sup> St. from 42100 142<sup>nd</sup> St. to 42300 142<sup>nd</sup> St. bordered on the north by the S1/2SW1/4, and the S1/2S1/2SE1/4 34-122-58, the S1/2SW1/4 and S1/2SE1/4 35-122-58; and on the south by the N1/2NW1/4, and the N1/2NE1/4 3-121-58, the N1/2NW1/4, and the N1/2NE1/4 2-121-58. Said road is approximately 66 feet in width and approximately two (2) miles in length.

A portion of 143<sup>rd</sup> St. from 42300 143<sup>rd</sup> St. to 42400 143<sup>rd</sup> St. bordered on the north by the S1/2SW1/4 and the S1/2SE1/4 1-121-58 and on the south by the N1/2N1/2 12-121-58. Said road is approximately 66 feet in width and approximately one (1) mile in length.

A portion of 146<sup>th</sup> St. from 41850 146<sup>th</sup> St to 41900 146<sup>th</sup> St. bordered on the north by the S1/2SE1/4 19-121-58 and on the south by the N1/2NE1/4 30-121-58. Said road is approximately 66 feet in width and approximately one-half (1/2) mile in length.

A portion of 418<sup>th</sup> Ave. from 14440 418<sup>th</sup> Ave. to 14600 418<sup>th</sup> Ave. bordered on the west by the SE1/4NE1/4 and the E1/2SE1/4 13-121-59, and the E1/2E1/2 24-121-59; and on the east by the SW1/4NW1/4, W1/2SW1/4 18-121-58, the W1/2 NW1/4 and the W1/2SW1/4 19-121-58. Said road is approximately 66 feet in width and approximately one and six-tenths (1 6/10) miles in length.

A portion of 418<sup>th</sup> Ave. from 14700 418<sup>th</sup> Ave to 14800 418<sup>th</sup> Ave. bordered on the west by the E1/2NE1/4 and the E1/2SE1/4 36-121-59; and on the east by the W1/2NW1/4 and the W1/2SW1/4 31-121-58. Said road is approximately 66 feet in width and approximately one (1) mile in length.

A portion of 421<sup>st</sup> Ave. from 14200 421<sup>st</sup> Ave to 14500 421<sup>st</sup> Ave. bordered on the west by the E1/2NE1/4, E1/2SE1/4 4-121-58, the E1/2NE1/4, the E1/2SE1/4 9-121-58, the E1/2NE1/4, the NE1/4SE1/4, the SE1/4SE1/4 16-121-58; and on the east by W1/2NW1/4, W1/2SW1/4 3-121-58, the W1/2NW1/4, the W1/2SW1/4 10-121-58, and the W1/2W1/2 15-121-58. Said road is approximately 66 feet in width and approximately three (3) miles in length.

**TWP 235**

A portion of 421<sup>st</sup> Ave. from 14750 421<sup>st</sup> Ave to 14800 421<sup>st</sup> Ave. bordered on the west by the E1/2SE1/4 33-121-58 and on the east by the W1/2SW1/4 34-121-58. Said road is approximately 66 feet in width and approximately one-half (1/2) mile in length.

A portion of 422<sup>nd</sup> Ave from 14200 422<sup>nd</sup> Ave. to 14300 422<sup>nd</sup> Ave. bordered on the west by the E1/2E1/2 3-121-58 and on the east by the W1/2W1/2 2-121-58. Said road is approximately 66 feet in width and approximately one (1) mile in length.

A portion of 424<sup>th</sup> Ave. from 14200 424<sup>th</sup> Ave to 14475 424<sup>th</sup> Ave. bordered on the west by the W1/2W1/2 1-121-58, NE1/4NE1/4, SE1/4NE1/4, N1/2NE1/4SE1/4, S1/2NE1/4SE1/4, SE1/4SE1/4, 12-121-58, the E1/2NE1/4, NE1/4SE1/4 13-121-58; and on the east by W1/2NW1/4, W1/2SW1/4 6-121-57, W1/2W1/2 7-121-57, Lots 1, 2 & 3 Bohm Lake Addn in NW & Parcel 1 Flood Plain Easement in W1/2 18-121-57. Said road is approximately 66 feet in width and approximately two and three-fourths (2 3/4) miles in length.

A portion of 424<sup>th</sup> Ave. from 14700 424<sup>th</sup> Ave to 14800 424<sup>th</sup> Ave. bordered on the west by the E1/2NE1/4, NE1/4SE1/4, SE1/4SE1/4 36-121-58; and on the east by the NW corner NW1/4, Lots 1, 2, 3 & 4 EX W 60 rods of Lot 1, 31-121-57. Said road is approximately 66 feet in width and approximately one (1) mile in length.

The owners of the land through which these roads pass are Benjamin Johnson, USA, Michael Herr, Aaron Johnson, Peterson Farms, Inc., Harold Orr, Marcia Lindquist, Wesley Jensen, Halvorsen Farm Inc., Peter Gusenius, Nola Roitsch, Donald Martin, Jerry Roitsch, Diane Warrington, Hansmeier & Son, Inc., Russel Schaeffer, Alger Roseth, Jackson Herr, Donald Grode, Eugene Raap, Jon Raap, Kevin Anderson, James Valley Farms, LP, Eric Hayenga, Gail Formanack, Kevin and Donna Anderson, LP, Bethesda Nursing Home, Sun Dial Manor Foundation, Kurt Myron, Kiley Buettner, Zimmerman Real Estate, LP, Venona Ash, Donley Flattum, and David Sigdestad.

These roadways have not been in use for a number of years, and due to the safety issues associated with them and the expense of development as a roadway, your petitioners feel it will never be feasible or practical to develop, nor do your petitioners feel it will ever be further developed due to the terrain and limited use of the highways; and further your petitioners believe that it would be in the best interests of the public that these portions of the section line highways be vacated:

WHEREAS, said petitioners request the Board of Supervisors of Valley Township to vote on this proposed vacation at the next regular meeting, or a special meeting called for the purpose; and petitioners herein state that the public convenience or necessity will better be served by this proposed vacating. This Petition is submitted pursuant to SDCL 31-3-6.

WHEREFORE, your petitioners pray that the Board of Supervisors of Valley Township, by resolution, determine that the public interest will be better served by the vacating of the highways described as:

A portion of 142<sup>nd</sup> St. from 42100 142<sup>nd</sup> St. to 42300 142<sup>nd</sup> St. bordered on the north by the S1/2SW1/4, and the S1/2S1/2SE1/4 34-122-58, the S1/2SW1/4 and S1/2SE1/4 35-122-58; and on the south by the N1/2NW1/4, and the N1/2NE1/4 3-121-58, the N1/2NW1/4, and the N1/2NE1/4 2-121-58. Said road is approximately 66 feet in width and approximately two (2) miles in length.

**TWP 236**

A portion of 143<sup>rd</sup> St. from 42300 143<sup>rd</sup> St. to 42400 143<sup>rd</sup> St. bordered on the north by the S1/2SW1/4 and the S1/2SE1/4 1-121-58 and on the south by the N1/2NE1/4 12-121-58. Said road is approximately 66 feet in width and approximately one (1) mile in length.

A portion of 146<sup>th</sup> St. from 41850 146<sup>th</sup> St to 41900 146<sup>th</sup> St. bordered on the north by the S1/2SE1/4 19-121-58 and on the south by the N1/2NE1/4 30-121-58. Said road is approximately 66 feet in width and approximately one-half (1/2) mile in length.

A portion of 418<sup>th</sup> Ave. from 14440 418<sup>th</sup> Ave. to 14600 418<sup>th</sup> Ave. bordered on the west by the SE1/4NE1/4 and the E1/2SE1/4 13-121-59, and the E1/2E1/2 24-121-59; and on the east by the SW1/4NW1/4, W1/2SW1/4 18-121-58, the W1/2 NW1/4 and the W1/2SW1/4 19-121-58. Said road is approximately 66 feet in width and approximately one and six-tenths (1 6/10) miles in length.

A portion of 418<sup>th</sup> Ave. from 14700 418<sup>th</sup> Ave to 14800 418<sup>th</sup> Ave. bordered on the west by the E1/2NE1/4 and the E1/2SE1/4 36-121-59; and on the east by the W1/2NW1/4 and the W1/2SW1/4 31-121-58. Said road is approximately 66 feet in width and approximately one (1) mile in length.

A portion of 421<sup>st</sup> Ave. from 14200 421<sup>st</sup> Ave to 14500 421<sup>st</sup> Ave. bordered on the west by the E1/2NE1/4, E1/2SE1/4 4-121-58, the E1/2NE1/4, the E1/2SE1/4 9-121-58, the E1/2NE1/4, the NE1/4SE1/4, the SE1/4SE1/4 16-121-58; and on the east by W1/2NW1/4, W1/2SW1/4 3-121-58, the W1/2NW1/4, the W1/2SW1/4 10-121-58, and the W1/2W1/2 15-121-58. Said road is approximately 66 feet in width and approximately three (3) miles in length.

A portion of 421<sup>st</sup> Ave. from 14750 421<sup>st</sup> Ave to 14800 421<sup>st</sup> Ave. bordered on the west by the E1/2SE1/4 33-121-58 and on the east by the W1/2SW1/4 34-121-58. Said road is approximately 66 feet in width and approximately one-half (1/2) mile in length.

A portion of 422<sup>nd</sup> Ave from 14200 422<sup>nd</sup> Ave. to 14300 422<sup>nd</sup> Ave. bordered on the west by the E1/2E1/2 3-121-58 and on the east by the W1/2W1/2 2-121-58. Said road is approximately 66 feet in width and approximately one (1) mile in length.

A portion of 424<sup>th</sup> Ave. from 14200 424<sup>th</sup> Ave to 14475 424<sup>th</sup> Ave. bordered on the west by the W1/2W1/2 1-121-58, NE1/4NE1/4, SE1/4NE1/4, N1/2NE1/4SE1/4, S1/2NE1/4SE1/4, SE1/4SE1/4, 12-121-58, the E1/2NE1/4, NE1/4SE1/4 13-121-58; and on the east by W1/2NW1/4, W1/2SW1/4 6-121-57, W1/2W1/2 7-121-57, Lots 1, 2 & 3 Bohn Lake Addn in NW & Parcel I Flood Plain Easement in W1/2 18-121-57. Said road is approximately 66 feet in width and approximately two and three-fourths (2 3/4) miles in length.

A portion of 424<sup>th</sup> Ave from 14700 424<sup>th</sup> Ave. to 14800 424<sup>th</sup> Ave. bordered on the west by the E1/2NE1/4, the NE1/4SE1/4, the SE1/4SE1/4 36-121-58; and on the east by the NW1/4NW1/4, SW1/4NW1/4, W1/2SW1/4 31-121-57. Said road is approximately 66 feet in width and approximately one (1) mile in length.

And make its Order vacating the same.

**INSTRUCTIONS TO SIGNERS:**

1. Signers of this petition must individually sign their names in the form in which they are registered to vote or as they usually sign their names.
2. Before the petition is filed, each signer or the circulator must add the residence address of the signer and the date of signing. If the signer is a resident of a second or third class municipality, a post office box may be used for the residence address.
3. Before the petition is filed, each signer or the circulator must print the name of the signer in the space provided and add the township of voter registration.
4. Abbreviations of common usage may be used. Ditto marks may not be used.
5. Failure to provide all information requested may invalidate the signature.

<u>NAME</u>	<u>RESIDENCE</u>	<u>DATE/TOWNSHIP</u>
SIGN <i>Gaila Henriksen</i>	STREET 473 AV	DATE OF SIGNING 7-21-14
PRINT Gailand Henriksen	CITY Bristol	TOWNSHIP OF REGISTRATION Valley
SIGN <i>Deb Henriksen</i>	STREET 14149-423 Ave.	DATE OF SIGNING 7/21/14
PRINT Deb Henriksen	CITY Bristol	TOWNSHIP OF REGISTRATION Valley
SIGN <i>Lester Herr</i>	STREET 14660 420th ave	DATE OF SIGNING 7-21-14
PRINT LESTER HERR	CITY BRISTOL	TOWNSHIP OF REGISTRATION VALLEY
SIGN <i>Raymond Schiley</i>	STREET 41840 - 144th st	DATE OF SIGNING 7-21-14
PRINT Raymond Schiley	CITY Bristol	TOWNSHIP OF REGISTRATION Valley
SIGN	STREET	DATE OF SIGNING
PRINT	CITY	TOWNSHIP OF REGISTRATION
SIGN	STREET	DATE OF SIGNING
PRINT	CITY	TOWNSHIP OF REGISTRATION

**TWP 238**

**VERIFICATION OF PERSON CIRCULATING PETITION**

**INSTRUCTIONS TO CIRCULATOR:** This section must be completed following circulation and before filing.

Derek Wickre                      14561 419<sup>th</sup> Ave                      Bristol                      SD  
Print name of circulator                      Residence Address                      City                      State

I, under oath, state that I circulated the above petition, that each signer personally signed this petition in my presence, and that either the signer or I added the printed name, the residence address of the signer, the date of the signing, and the township of voter registration.

*[Signature]*  
Signature of Circulator

Subscribed and sworn to before me this 21<sup>st</sup> day of July, 2014

*[Signature]*  
Robin K. Anderson

Notary Public, SD  
My comm. exp.: 6-15-16

**TWP 239**

STATE OF SOUTH DAKOTA )  
 ) :SS  
COUNTY OF DAY )

We, the undersigned, having been first duly sworn, on oath depose and say: That they have read the above and foregoing Petition and know the contents thereof; and that the same is true of their own knowledge, except as to those matters therein stated upon information and belief, and as to such matters, they believe the same to be true.

<u><i>Grant Zimmerman</i></u> Name	<u><i>Chairman</i></u>
<u><i>Michael Her</i></u> Name	<u><i>Supervisor</i></u>
<u><i>Wesley Jensen</i></u> Name	<u><i>Supervisor</i></u>

Subscribed and sworn to before me this *27<sup>th</sup>* day of *July*, *2014*.

*Robin K. Anderson*  
Notary Public, SD  
My comm. exp.: *6-15-16*

**TWP 240**

**PETITION FOR VACATION OF ROADS**

TO THE HONORABLE BOARD OF THE TOWNSHIP OF BUTLER, DAY COUNTY, SOUTH DAKOTA:

That the petitioners herein respectfully represent that they are the electors residing in the organized civil Township of Butler, County of Day, State of South Dakota; and that as residents and electors of said township, they feel that the public convenience and necessity will be better served by the vacation of roadways or highways that they are seeking to have vacated are described as being located, to-wit:

That existing public right-of-way which includes the statutory right of way and any right of way acquired by Deed (s) lying on the section line highways described as follows:

A portion of 424<sup>th</sup> Ave. from 14200 424<sup>th</sup> Ave to 14500 424<sup>th</sup> Ave. bordered on the west by the E1/2E1/2 1-121-58, NE1/4NE1/4, SE1/4NE1/4, N1/2NE1/4SE1/4, S1/2NE1/4SE1/4, SE1/4SE1/4, 12-121-58, the E1/2NE1/4, E1/2SE1/4 EX deeded pts., 13-121-58; and on the east by W1/2NW1/4, W1/2SW1/4 6-121-57, W1/2W1/2 7-121-57, Lots 1, 2 & 3 Bohn Lake Addn in NW & Parcel 1 Flood Plain Easement in W1/2 18-121-57. Said road is approximately 66 feet in width and approximately three (3) miles in length.

A portion of 424<sup>th</sup> Ave. from 14600 424<sup>th</sup> Ave to 14800 424<sup>th</sup> Ave. bordered on the west by the E1/2E1/2 25-121-58, E1/2NE1/4, NE1/4SE1/4, SE1/4SE1/4 36-121-58; and on the east by the W1/2NW1/4, W1/2SW1/4 30-121-57, NW corner NW1/4, Lots 1, 2, 3 & 4 EX W 60 rods of Lot 1, 31-121-57. Said road is approximately 66 feet in width and approximately two (2) miles in length.

A portion of 426<sup>th</sup> Ave. from 14465 426<sup>th</sup> Ave to 14575 426<sup>th</sup> Ave. bordered on the west by the S1/2NE1/4SE1/4, SE1/4SE1/4 17-121-57, E1/2NE1/4, NE1/4SE1/4 20-121-57; and on the east by the S1/2NW1/4SW1/4, SW1/4SW1/4 16-121-57, W1/2NW1/4, NW1/4SW1/4 21-121-57. Said road is approximately 66 feet in width and approximately one and one-eighth (1 1/8) miles in length.

A portion of 428<sup>th</sup> Ave. from 14600 428<sup>th</sup> Ave to 14700 428<sup>th</sup> Ave. bordered on the west by the E1/2NE1/4, NE1/4SE1/4, SE1/4SE1/4 27-121-57; and on the east by W1/2W1/2 26-121-57. Said road is approximately 66 feet in width and approximately one (1) mile in length. *out*

A portion of 429<sup>th</sup> Ave. from ~~14550~~<sup>14450</sup> 429<sup>th</sup> Ave to 14500 429<sup>th</sup> Ave. bordered on the west by the SE1/4 EX N 850 feet of the E 845 feet of the NE1/4SE1/4, the N 850 feet of the E 845 feet of the NE1/4SE1/4 (16.49 A) 11-121-57, E1/2NE1/4, E1/2SE1/4 14-121-57; and on the east by Parcels 1, 3 & 4 of SW1/4, Parcel 2 of the SW1/4 12-121-57, W1/2NW1/4, W1/2SW1/4 13-121-57. Said road is approximately 66 feet in width and approximately one and one-half (1 1/2) miles in length.

A portion of 430<sup>th</sup> Ave. from 14415 430<sup>th</sup> Ave to 14600 430<sup>th</sup> Ave. bordered on the west by the S1/2NE1/4NE1/4, SE1/4NE1/4, E1/2SE1/4 13-121-57, E1/2NE1/4, E1/2SE1/4 24-121-57; and on the east by the S1/2NW1/4NW1/4, SW1/4NW1/4, W1/2SW1/4 18-121-56, W1/2NW1/4, NW1/4SW1/4, SW1/4SW1/4 19-121-56. Said road is approximately 66 feet in width and approximately one and seven-eighths (1 7/8) miles in length. *out*

A portion of 142<sup>nd</sup> St. from 42850 142<sup>nd</sup> St. to 43000 142<sup>nd</sup> St. bordered on the north by the S1/2SE1/4 35-122-57, S1/2SW1/4, SW1/4SE1/4, SE1/4SE1/4 36-122-57; and on the south by the N1/2NE1/4 2-121-57, NW1/4NW1/4, NE1/4NW1/4, N1/2NE1/4 1-121-57. Said road is approximately 66 feet in width and approximately one and one-half (1 1/2) miles in length.

A portion of 143<sup>rd</sup> St. from 42400 143<sup>rd</sup> St. to 42450 143<sup>rd</sup> St. bordered on the north by the S1/2SW1/4 6-121-57; and on the south by the N1/2NW1/4 7-121-57. Said road is approximately 66 feet in width and approximately one half (1/2) mile in length.

A portion of 143<sup>rd</sup> St. from 42600 143<sup>rd</sup> St. to 42800 143<sup>rd</sup> St. bordered on the north by the S1/2SW1/4, S1/2SE1/4 4-121-57, S1/2SW1/4, S1/2SE1/4 3-121-57; and on the south by the N1/2NW1/4, N1/2NE1/4 9-121-57, N1/2NW1/4, NW1/4NE1/4, NE1/4NE1/4 10-121-57. Said road is approximately 66 feet in width and approximately two (2) miles in length.

A portion of 144<sup>th</sup> St. from 42400 144<sup>th</sup> St. to 42425 144<sup>th</sup> St. bordered on the north by the SW1/4SW1/4 7-121-57; and on the south by Lots 1, 2 & 3 Bohn Lake Addn in NW & Parcel 1 Flood Plain Easement in W1/2 18-121-57. Said road is approximately 66 feet in width and approximately one-fourth (1/4) mile in length.

✓ A portion of 144<sup>th</sup> St. from 42850 144<sup>th</sup> St. to 42950 144<sup>th</sup> St. bordered on the north by the S1/2SE1/4, 11-121-57, by Parcels 1, 3 & 4 of SW1/4, SE1/4SW1/4 12-121-57; and on the south by the NW1/4NE1/4, NE1/4NE1/4 14-121-57; N1/2NW1/4 13-121-57. Said road is approximately 66 feet in width and approximately one (1) mile in length. *out*

A portion of 145<sup>th</sup> St. from 42400 145<sup>th</sup> St. to 42450 145<sup>th</sup> St. bordered on the north by Lots 1, 2 & 3 Bohn Lake Addn in NW & Parcel 1 Flood Plain Easement, the E1/2SW1/4 & Lots 3 & 4 EX Parcel 1 Flood Plain Easement 18-121-57; and on the south by N1/2NW1/4 19-121-57. Said road is approximately 66 feet in width and approximately one half (1/2) mile in length.

A portion of 145<sup>th</sup> St. from 42600 145<sup>th</sup> St. to 42700 145<sup>th</sup> St. bordered on the north by S1/2SW1/4 and S1/2SE1/4 16-121-57; and on the south by N1/2NW1/4 and N1/2NE1/4 21-121-57. Said road is approximately 66 feet in width and approximately one (1) mile in length.

The owners of the land through which these roads pass are: Wesley Jensen, Halvorsen Farm Inc., Larry Herr, Michael Herr, Kiley Buettner, Zimmerman Real Estate LP, Muriel Vehe, Vickie Tierney, Marcia Lindquist, Larry Buettner, David Sigdestad, Verona Ash, Lorraine Anderson, Erwin Petrich Trust, Evelyn Coyne, Vera Parks, Claire Hanson trust, Glenn Plattum, Wayne Nolte, Burdell Bohn, James Walter, Marvin Bury Trust, Gerald Schmitz, USA, Dennis Reiprich, Kenneth Rogatzke, Robert Whitmyre, Dari Schlotte, Curtis Reiprich, and Karen Nolte.

These roadways have not been in use for a number of years, and due to the safety issues associated with them and the expense of development as a roadway, your petitioners feel it will never be feasible or practical to develop, nor do your petitioners feel it will ever be further developed due to the terrain and limited use of the highways; and further your petitioners believe that it would be in the best interests of the public that these portions of the section line highways be vacated.

WHEREAS, said petitioners request the Board of Supervisors of Butler Township to vote on this proposed vacation at the next regular meeting, or a special meeting called for the purpose; and petitioners herein state that the public convenience or necessity will better be served by this proposed vacating. This Petition is submitted pursuant to SDCL 31-3-6.

WHEREFORE, your petitioners pray that the Board of Supervisors of Butler Township, by resolution, determine that the public interest will be better served by the vacating of the highways described as:

A portion of 424<sup>th</sup> Ave. from 14200 424<sup>th</sup> Ave to 14500 424<sup>th</sup> Ave. bordered on the west by the E1/2E1/2 1-121-58, NE1/4NE1/4, SE1/4NE1/4, N1/2NE1/4SE1/4, S1/2NE1/4SE1/4, SE1/4SE1/4, 12-121-58, the E1/2NE1/4, E1/2SE1/4 EX deeded pts, 13-121-58; and on the east by W1/2NW1/4, W1/2SW1/4 6-121-57, W1/2W1/2 7-121-57, Lots 1, 2 & 3 Bohn Lake Addn in NW & Parcel 1 Flood Plain Easement in W1/2 18-121-57. Said road is approximately 66 feet in width and approximately three (3) miles in length.

A portion of 424<sup>th</sup> Ave. from 14600 424<sup>th</sup> Ave to 14800 424<sup>th</sup> Ave. bordered on the west by the E1/2E1/2 25-121-58, E1/2NE1/4, NE1/4SE1/4, SE1/4SE1/4 36-121-58; and on the east by the W1/2NW1/4, W1/2SW1/4 30-121-57, NW corner NW1/4, Lots 1, 2, 3 & 4 EX W 60 rods of Lot 1, 31-121-57. Said road is approximately 66 feet in width and approximately two (2) miles in length.

A portion of 426<sup>th</sup> Ave. from 14465 426<sup>th</sup> Ave to 14575 426<sup>th</sup> Ave. bordered on the west by the S1/2NE1/4SE1/4, SE1/4SE1/4 17-121-57, E1/2NE1/4, NE1/4SE1/4 20-121-57; and on the east by the S1/2NW1/4SW1/4, SW1/4SW1/4 16-121-57, W1/2NW1/4, NW1/4SW1/4 21-121-57. Said road is approximately 66 feet in width and approximately one and one-eighth (1 1/8) miles in length.

A portion of 428<sup>th</sup> Ave. from 14600 428<sup>th</sup> Ave to 14700 428<sup>th</sup> Ave. bordered on the west by the E1/2NE1/4, NE1/4SE1/4, SE1/4SE1/4 27-121-57; and on the east by W1/2W1/2 26-121-57. Said road is approximately 66 feet in width and approximately one (1) mile in length.

A portion of 429<sup>th</sup> Ave. from 14350 429<sup>th</sup> Ave to 14500 429<sup>th</sup> Ave. bordered on the west by the SE1/4 EX N 850 feet of the E 845 feet of the NE1/4SE1/4, the N 850 feet of the E 845 feet of the NE1/4SE1/4 (16.49 A) 11-121-57, E1/2NE1/4, E1/2SE1/4 14-121-57; and on the east by Parcels 1, 3 & 4 of SW1/4, Parcel 2 of the SW1/4 12-121-57, W1/2NW1/4, W1/2SW1/4 13-121-57. Said road is approximately 66 feet in width and approximately one and one-half (1 1/2) miles in length.

A portion of 430<sup>th</sup> Ave. from 14415 430<sup>th</sup> Ave to 14600 430<sup>th</sup> Ave. bordered on the west by the S1/2NE1/4NE1/4, SE1/4NE1/4, E1/2SE1/4 13-121-57, E1/2NE1/4, E1/2SE1/4 24-121-57; and on the east by the S1/2NW1/4NW1/4, SW1/4NW1/4, W1/2SW1/4 18-121-56, W1/2NW1/4, NW1/4SW1/4, SW1/4SW1/4 19-121-56. Said road is approximately 66 feet in width and approximately one and seven-eighths (1 7/8) miles in length.

A portion of 142<sup>nd</sup> St. from 42850 142<sup>nd</sup> St. to 43000 142<sup>nd</sup> St. bordered on the north by the S1/2SE1/4 35-122-57, S1/2SW1/4, SW1/4SE1/4, SE1/4SE1/4 36-122-57; and on the south by the N1/2NE1/4 2-121-57, NW1/4NW1/4, NE1/4NW1/4, N1/2NE1/4 1-121-57. Said road is approximately 66 feet in width and approximately one and one-half (1 1/2) miles in length.

A portion of 143<sup>rd</sup> St. from 42400 143<sup>rd</sup> St. to 42450 143<sup>rd</sup> St. bordered on the north by the S1/2SW1/4 6-121-57; and on the south by the N1/2NW1/4 7-121-57. Said road is approximately 66 feet in width and approximately one /half (1/2) mile in length.

A portion of 143<sup>rd</sup> St. from 42600 143<sup>rd</sup> St. to 42800 143<sup>rd</sup> St. bordered on the north by the S1/2SW1/4, S1/2SE1/4 4-121-57, S1/2SW1/4, S1/2SE1/4 3-121-57; and on the south by the N1/2NW1/4, N1/2NE1/4 9-121-57, N1/2NW1/4, NW1/4NE1/4, NE1/4NE1/4 10-121-57. Said road is approximately 66 feet in width and approximately two (2) miles in length.

A portion of 144<sup>th</sup> St. from 42400 144<sup>th</sup> St. to 42425 144<sup>th</sup> St. bordered on the north by the SW1/4SW1/4 7-121-57; and on the south by Lots 1, 2 & 3 Bohn Lake Addn in NW & Parcel 1 Flood Plain Easement in W1/2 18-121-57. Said road is approximately 66 feet in width and approximately one-fourth (1/4) mile in length.

A portion of 144<sup>th</sup> St. from 42850 144<sup>th</sup> St. to 42950 144<sup>th</sup> St. bordered on the north by the S1/2SE1/4, 11-121-57, by Parcels 1, 3 & 4 of SW1/4, SE1/4SW1/4 12-121-57; and on the south by the NW1/4NE1/4, NE1/4NE1/4 14-121-57, N1/2NW1/4 13-121-57. Said road is approximately 66 feet in width and approximately one (1) mile in length.

A portion of 145<sup>th</sup> St. from 42400 145<sup>th</sup> St. to 42450 145<sup>th</sup> St. bordered on the north by Lots 1, 2 & 3 Bohn Lake Addn in NW & Parcel 1 Flood Plain Easement, the E1/2SW1/4 & Lots 3 & 4 EX Parcel 1 Flood Plain Easement 18-121-57; and on the south by N1/2NW1/4 19-121-57. Said road is approximately 66 feet in width and approximately one /half (1/2) mile in length.

A portion of 145<sup>th</sup> St. from 42600 145<sup>th</sup> St. to 42700 145<sup>th</sup> St. bordered on the north by S1/2SW1/4 and S1/2SE1/4 16-121-57; and on the south by N1/2NW1/4 and N1/2NE1/4 21-121-57. Said road is approximately 66 feet in width and approximately one (1) mile in length.

And make its Order vacating the same.

**INSTRUCTIONS TO SIGNERS:**

1. Signers of this petition must individually sign their names in the form in which they are registered to vote or as they usually sign their names.
2. Before the petition is filed, each signer or the circulator must add the residence address of the signer and the date of signing. If the signer is a resident of a second or third class municipality, a post office box may be used for the residence address.
3. Before the petition is filed, each signer or the circulator must print the name of the signer in the space provided and add the township of voter registration.
4. Abbreviations of common usage may be used. Ditto marks may not be used.
5. Failure to provide all information requested may invalidate the signature.

NAME	RESIDENCE	DATE/TOWNSHIP
SIGN Mavis Witchey PRINT	STREET 42569 144 <sup>th</sup> St CITY	DATE OF SIGNING 7-27-2014 TOWNSHIP OF REGISTRATION
SIGN Mavis Witchey PRINT	STREET Webster, S.D. 57274 CITY	DATE OF SIGNING Butler TOWNSHIP OF REGISTRATION
SIGN Wallace L. Hanson PRINT	STREET 42596 144 <sup>th</sup> St CITY	DATE OF SIGNING BUTLER 7-27-2014 TOWNSHIP OF REGISTRATION
SIGN WALLACE L. HANSON PRINT	STREET 4259 WEBSTER, S.D. CITY	DATE OF SIGNING 7-27-2014 TOWNSHIP OF REGISTRATION
SIGN Rob Ash PRINT	STREET 14308 425th ave CITY	DATE OF SIGNING Butler TOWNSHIP OF REGISTRATION
SIGN Rob Ash PRINT	STREET Bristol 505704 CITY	DATE OF SIGNING 7-27-14 TOWNSHIP OF REGISTRATION
SIGN Melanie Johnson PRINT	STREET Webster, CO CITY	DATE OF SIGNING Butler TOWNSHIP OF REGISTRATION
SIGN Melanie Johnson PRINT	STREET 42840 143 <sup>rd</sup> St CITY	DATE OF SIGNING 7-27-14 TOWNSHIP OF REGISTRATION
SIGN Herbert Nolbe PRINT	STREET 42898 143 St CITY	DATE OF SIGNING Butler TOWNSHIP OF REGISTRATION
SIGN Herbert Nolbe PRINT	STREET WEBSTER, S.D. 57274 CITY	DATE OF SIGNING 7-28-14 TOWNSHIP OF REGISTRATION
SIGN Mank A. Uebe PRINT	STREET 42467 143 St CITY	DATE OF SIGNING Butler TOWNSHIP OF REGISTRATION
SIGN Mank A. Uebe PRINT	STREET Bristol CITY	DATE OF SIGNING 7-28-14 TOWNSHIP OF REGISTRATION

**VERIFICATION OF PERSON CIRCULATING PETITION**

**INSTRUCTIONS TO CIRCULATOR:** This section must be completed following circulation and before filing.

MATTHEW E Johnson      42840 143rd St      Webster      SD  
Print name of circulator      Residence Address      City      State

I, under oath, state that I circulated the above petition, that each signer personally signed this petition in my presence, and that either the signer or I added the printed name, the residence address of the signer, the date of the signing, and the township of voter registration.

Matthew E. Johnson  
Signature of Circulator

Subscribed and sworn to before me this 29<sup>th</sup> day of July, 2014.

Robin K. Anderson  
Notary Public, SD  
My comm. exp.: 6-15-16



8-3-1. Time and place of annual meeting--Publication of notice. The citizens of each organized civil township qualified to vote at general elections shall annually assemble and hold a township meeting on the first Tuesday of March. The township board of supervisors shall by resolution establish the location where the annual township meeting shall be held. The location of the annual meeting shall be in the county where the township is located. Notice of the time and place of such township meeting shall be given by the publication thereof for three consecutive days in a daily, or for two consecutive weeks in a weekly newspaper of general circulation in the township beginning not less than twelve calendar days prior to such meeting. In case of inclement weather, any required township meeting may be rescheduled for the following Tuesday at the same place and location without additional publication in the newspaper and meeting requirements provided in § 1-25-1.1. If the board of supervisors requires nominating petitions pursuant to § 8-3-1.1, the notice required by this section shall include the names and the office they seek of those who have filed nominating petitions pursuant to § 8-3-1.2.

**Source:** SL 1872-3, ch 51, § 11; PolC 1877, ch 23, § 11; SL 1883, ch 112, subch 1, § 11; CL 1887, § 714; SL 1899, ch 85, § 1; RPolC 1903, § 1006; RC 1919, § 6047; SDC 1939, § 58.0301; SL 1963, ch 451, § 1; SL 1989, ch 70, § 1; SL 1990, ch 56, § 4; SL 1992, ch 58, § 1; SL 2014, ch 48, § 3.

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8-3-4. Recording and publication of notice of special meeting--Exception. Every township clerk with whom such statement is filed as required in § 8-3-3 shall record the same and immediately cause notice to be published in the same manner as provided for the publication of notice of the annual township meeting. However, in a township with a population of twenty or fewer resident voters, the notice of the time and place of any special meeting need not be published more than once in any publication, shall be provided not less than three days before the special meeting, and may be provided by first class mail in lieu of publication.

**Source:** SDC 1939, § 58.0307; SL 1963, ch 451, § 1; SL 2002, ch 44, § 3.

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8-3-15. Method of electing officers. The supervisors, treasurer, clerk, and constable in each township shall be elected by ballot. All other officers, if not otherwise provided by law, shall be chosen either by yeas and nays or by a division, as the voters determine.

**Source:** SL 1883, ch 112, subch 1, § 24; CL 1887, § 725; RPolC 1903, § 1017; RC 1919, § 6062; SDC 1939, § 58.0314; SL 1981, ch 44, § 14.

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8-5-1. Time and place of regular meetings. The township board of supervisors shall hold regular meetings on the last Tuesday of February, the last Tuesday of March, and the last Tuesday of October, of each year. The meetings shall be held at the office of the township clerk or the location established in § 8-3-1 at a time determined by the board. If any two supervisors submit a written statement signed by them not less than twelve days before the meeting requesting that the next regular meeting be held at a different time, the township clerk shall give notice of the time and place of the meeting as provided by § 8-3-1. In case of inclement weather, any required township meeting may be rescheduled for the following Tuesday at the same place and location without additional publication in the newspaper and meeting requirements provided in § 1-25-1.1.

**Source:** SL 1887, ch 155, §§ 1, 2; CL 1887, §§ 765, 766; SL 1899, ch 85, § 1; RPolC 1903, §§ 1057, 1058; SL 1907, ch 242; RC 1919, §§ 6080, 6081; SL 1931, ch 261, § 2; SDC 1939, § 58.0501; SL 1955, ch 426; SL 1981, ch 62; SL 1989, ch 70, § 2; SL 2014, ch 48, § 8.

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8-5-9. Transcript filed by board on appeals--Settlement and framing of issues. Within thirty days after the service of such notice of appeal, the board of supervisors of the township shall cause to be filed with the clerk of courts a transcript of the proceedings of such board relative to the decision, order, or resolution being appealed, which transcript shall be certified to by the township clerk as being correct. The issue shall be deemed to have been joined from the time of filing of such transcript and the matter may be brought on for trial in the same manner as provided for in civil cases. If the issues do not sufficiently appear from the notice of appeal and such transcript, the court may, upon notice to the parties, settle and frame the issues to be tried.

**Source:** SL 1961, ch 454, § 2.

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31-3-6. Power of county commissioners and township supervisors to vacate, change, or locate highway on petition--Contents of petition. Upon receiving the petition of two or more voters of an organized civil township or of the number of voters equal to or greater than one percent of the ballots cast for the last gubernatorial election in the affected county, the board of supervisors of the township or the board of county commissioners wherein the highway is located or is proposed to be located may, except as provided in §§ 31-3-12 and 31-3-44, vacate, change, or locate any highway located or to be used within the township or county, if the public interest will be better served by the proposed vacating, changing, or locating of the highway. The petition of the voters shall set forth the beginning, course, and termination of the highway proposed to be located, changed, or vacated, together with the names of the owners of the land through which the highway may pass.

**Source:** SDC 1939, § 28.0410; SL 1984, ch 208, § 2; SL 1985, ch 233, § 1.

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31-3-7. Public hearing--Notice--Affirmative resolution of board--Order. In case of the filing of a petition described in § 31-3-6, the board shall, after giving notice of a public hearing, hold a public hearing called for the purpose of receiving public testimony about the action proposed by the petition. The board shall give notice of the public hearing by publication in the official newspaper of said township, if any, otherwise in the nearest legal newspaper of said county, once each week for at least two consecutive weeks. The notice of the public hearing shall state the purpose, date, time, and location of the hearing and a legal description of the location of the highway and the action proposed by the petition and how information, opinions, and arguments may be presented by any person unable to attend the hearing. The board shall, by resolution, determine whether the public interest will be better served by such proposed vacating, changing, or locating of the highway in question, and upon resolution in the affirmative, shall make its order that such highway be vacated, changed, or located.

**Source:** SDC 1939, § 28.0411; SL 1951, ch 138, § 1; SL 1985, ch 233, § 2.

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46-1-1. Use of water of state--Paramount interest of people--Conversion to public use. It is hereby declared that the people of the state have a paramount interest in the use of all the water of the state and that the state shall determine what water of the state, surface and underground, can be converted to public use or controlled for public protection.

**Source:** SL 1955, ch 430, § 1; SDC Supp 1960, § 61.0101 (3).

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46-1-2. Development of water resources for public benefit. It is hereby declared that the protection of the public interest in the development of the water resources of the state is of vital concern to the people of the state and that the state shall determine in what way the water of the state, both surface and underground, should be developed for the greatest public benefit.

**Source:** SL 1955, ch 430, § 1; SDC Supp 1960, § 61.0101 (4); SL 1972, ch 237, § 1; SL 1978, ch 323, § 1.

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46-1-3. Water as property of people--Appropriation of right to use. It is hereby declared that all water within the state is the property of the people of the state, but the right to the use of water may be acquired by appropriation as provided by law.

Source: SL 1955, ch 430, § 1; SDC Supp 1960, § 61.0101 (2); SL 1983, ch 314, § 1.

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46-1-4. Beneficial use of water resources--Prevention of waste--Right to water from natural stream or watercourse. It is hereby declared that, because of conditions prevailing in this state, the general welfare requires that the water resources of the state be put to beneficial use to the fullest extent of which they are capable, and that the waste or unreasonable method of use of water be prevented, and that the conservation of such water is to be exercised with a view to the reasonable and beneficial use of the water in the interest of the people and for the public welfare. The right to water or to the use or flow of water in or from any natural stream or watercourse in this state is limited to an amount of water reasonably required for the beneficial use to be served, and such right does not extend to the waste or unreasonable use or unreasonable method of diversion of water.

**Source:** SL 1955, ch 430, § 1; SDC Supp 1960, § 61.0101 (1); SL 2011, ch 165, § 254.

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**74:51:01:01. Definitions.** Words and phrases defined in SDCL 34A-2-2, have the same meaning when used in chapters 74:51:01 to 74:51:03, inclusive. Terms and abbreviations which are not specifically defined shall be construed in conformance with the context and in relation to the applicable section of the standards or the statute concerned. In addition, terms used in chapters 74:51:01 to 74:51:03, inclusive, are defined as follows:

(1) "Attainable beneficial uses," those beneficial uses which, at a minimum, can be achieved by the imposition of effluent limits required under §§ 74:51:01:07, 74:51:01:08, and 74:51:01:17 to 74:51:01:21, inclusive, and cost-effective and reasonable best management practices for nonpoint source control;

(2) "Aquatic life," an organism dependent on the water environment to either propagate or survive, or both;

(3) "Aquatic community," an association of interacting populations and stages of aquatic life in a given water body or habitat;

(4) "Best management practices," "BMPs," schedules of activities, prohibitions of practice, maintenance procedures, and other management practices to prevent or reduce the pollution of surface waters of the state on a voluntary basis, including treatment requirements, operating procedures, and practices to control site runoff, spillage or leaks, sludge, waste disposal, or drainage from raw material storage;

(5) "Bioaccumulative pollutants," those pollutants which are taken up, retained, or accumulated in the bodies of organisms and are transferred by ingestion in increasing concentrations in the predator organisms to the point that one or more organisms in the food chain suffer significant harm;

(6) "Bioassay," a procedure in which the responses of organisms are used to detect or measure the presence or effect of one or more substances, wastes, effluents, or environmental factors, alone or in combination;

(7) "Biochemical oxygen demand," a standardized laboratory test used to determine the relative oxygen requirements of waters and wastewaters;

(8) "Biological integrity," the ability to support and maintain a balanced, integrated, adaptive community of organisms having a species composition, diversity, and functional organization comparable to that of the natural habitat of the region;

(9) "Black Hills Trout Management Area," defined by the South Dakota Department of Game, Fish and Parks as all the waters in the Black Hills within the following boundary: from the South Dakota-Wyoming state line and the Redwater River (inclusive) to U.S. Highway 85, then south on U.S. Highway 85 to I-90, then southeast on I-90 to U.S. Highway 16T (16B in Rapid City), then south on U.S. Highway 16T to S.D. Highway 79, then south on S.D. Highway 79 to Maverick Junction, then west on Highway 18 to Edgemont, then northwest along the Burlington Northern Railroad to the South Dakota-Wyoming state line, then north along the state line to the point of the beginning;

(10) "Board," Water Management Board;

(11) "°C," degrees centigrade, a measure of temperature;

(12) "Coldwater aquatic life," aquatic life including fish of the family Salmonidae, for example, trout and salmon;

(13) "Coldwater marginal fish life propagation," a beneficial use assigned to surface waters of the state which support aquatic life and are suitable for stocked catchable-size coldwater fish during portions of the year, but which, because of critical natural conditions including low flows, siltation, or warm temperatures, are not suitable for a permanent coldwater fish population. Warmwater fish may also be present;

(14) "Coldwater permanent fish life propagation," a beneficial use assigned to surface waters of the state which are capable of supporting aquatic life and are suitable for supporting a permanent population of coldwater fish from natural reproduction or fingerling stocking. Warmwater fish may also be present;

(15) "Commerce and industry," a beneficial use assigned to surface waters of the state which are suitable for use as cooling water, industrial process water, navigation, and production of hydroelectric power;

(16) "Criterion," a designated concentration of a substance, measure of a physical factor, or narrative statement that, when not exceeded, will protect an organism, a biological community, or a prescribed beneficial use or water quality;

(17) "Designated beneficial uses," those beneficial uses specified in chapters 74:51:02 and 74:51:03 for each water body or segment whether or not they are being attained;

(18) "Domestic water supply," a beneficial use assigned to surface waters of the state which are suitable for human consumption, culinary or food processing purposes, and other household purposes after suitable conventional treatment;

(19) "EPA methods," **Methods for Chemical Analysis of Waters and Wastes**, 1983, Environmental Protection Agency, Analytical Quality Control Laboratory;

(20) "Epilimnion," in a thermally-stratified waterbody, the upper stratum of the water column. This layer is generally above the thermocline and is typically uniformly warm, circulating, and well mixed;

(21) "Existing beneficial uses," those uses actually attained in surface waters of the state on March 27, 1973, whether or not they are so designated;

(22) "°F," degrees Fahrenheit, a measure of temperature;

(23) "Fish and wildlife propagation, recreation, and stock watering," a beneficial use classification assigned to all surface waters of the state that may support recreation in and on the water and fish and aquatic life, when sufficient quantities of water are present for sufficient duration to support those uses; that provide habitat for aquatic and semiaquatic wild animals and fowl; that provide natural food chain maintenance; and that are of suitable quality for watering domestic and wild animals;

(24) "Geometric mean," the nth root of a product of n factors;

(25) "Handbook 69," **Maximum Permissible Body Burdens and Maximum Permissible Concentrations of Radionuclides in Air and in Water for Occupational Exposure**, recommendations of the National Committee on Radiation Protection, **National Bureau of Standards Handbook 69**, (August 1963);

(26) "Hypolimnion," in a thermally-stratified waterbody, the bottom layer of water column. This layer is generally below the thermocline and is typically less well mixed (at times, stagnant), colder than the epilimnion, and often of essentially uniform temperature;

(27) "Immersion recreation," a beneficial use assigned to surface waters of the state which are suitable for uses where the human body may come in direct contact with the water, to the point of complete submersion and where water may be accidentally ingested or where certain sensitive organs such as the eyes, ears, and nose may be exposed to water;

(28) "Impact," a man-induced change in the chemical, physical, or biological quality or condition of surface waters of the state;

(29) "Impairment," a detrimental effect on the aquatic community caused by an impact that prevents attainment of the designated use;

(30) "Irrigation," a beneficial use assigned to surface waters of the state which are suitable for irrigating farm lands, ranch lands, gardens, and recreational areas;

(31) "Lake," a pond, reservoir, or other body of water, created by either natural or artificial means, but not a pond or appurtenance that is used for the treatment and disposal of wastes and that is permitted for such uses;

(32) "Limited-contact recreation," a beneficial use assigned to surface waters of the state which are suitable for boating, fishing, and other water-related recreation other than immersion recreation where a person's water contact would be limited to the extent that infections of eyes, ears, respiratory or digestive systems, or urogenital areas would normally be avoided;

(33) "Metalimnion," in a thermally stratified waterbody, the middle layer of a water column generally encompassing the thermocline, is typically somewhat mixed and influenced by the epilimnion;

- (34) "µg/L," micrograms per liter, a measure of concentration;
- (35) "mg/L," milligrams per liter, a measure of concentration;
- (36) "micromhos/cm," micromhos per centimeter, a measure of electrical conductivity;
- (37) "Nonpoint source," a source of pollution that is not defined as a point source;
- (38) "Parameter," a chemical, physical, or biological characteristic which affects the use of surface waters of the state;
- (39) "pCi/L," picocuries per liter, a measure of radioactive concentration;
- (40) "Segment," a continuous stretch of water found between two points in the bed of a stream;
- (41) "Sodium adsorption ratio," a calculated value that evaluates the sodium hazard of irrigation water based on the Gapon equation and expressed by the mathematical expression:

$$\text{Sodium Adsorption Ratio} = \frac{\text{Na}^+}{\sqrt{\frac{\text{Ca}^{+2} + \text{Mg}^{+2}}{2}}}$$

where  $\text{Na}^+$ ,  $\text{Ca}^{+2}$ , and  $\text{Mg}^{+2}$  are expressed as milliequivalents per liter;

- (42) "Spawning bed," a place where fish spawn;

(43) "Stream," a river, creek, tributary, or other watercourse;

(44) "Surface water of the state," lakes, ponds, streams, rivers, wetlands, and any other body or accumulation of water on the land surface that is considered to be waters of the state, but not waste treatment systems, including treatment ponds, lagoons, leachate collection ponds, or stormwater retention ponds designed to meet the requirements of the CWA;

(45) "Thermocline," in a thermally-stratified waterbody, the depth range characterized by a rapid change in temperature with depth. A thermocline generally separates a well-mixed surface layer (epilimnion) and a more uniform bottom layer (hypolimnion);

(46) "Thirty-day average," the arithmetic mean of a minimum of 3 consecutive grab or composite samples taken on separate weeks in a 30-day period;

(47) "Toxic pollutant," a pollutant or combination of pollutants, including disease-causing agents, which, upon exposure, ingestion, inhalation, or assimilation into an organism, either directly from the environment or indirectly by ingestion through food chains, will, on the basis of information available, cause death, disease, behavioral abnormality, cancer, genetic mutation, physiological malfunctions including reproductive malfunction, or physical deformity, in an organism or its offspring;

(48) "Warmwater aquatic life," aquatic life including the Ictaluridae, Centrarchidae, and Cyprinidae families of fish, for example, catfish, sunfish, and minnows, respectively;

(49) "Warmwater marginal fish life propagation," a beneficial use assigned to surface waters of the state which will support aquatic life and more tolerant species of warmwater fish naturally or by frequent stocking and intensive management but which suffer frequent fish kills because of critical natural conditions;

(50) "Warmwater permanent fish life propagation," a beneficial use assigned to surface waters of the state which support aquatic life and are suitable for the permanent propagation or maintenance, or both, of warmwater fish. Stocked coldwater fish may also be present;

(51) "Warmwater semipermanent fish life propagation waters," a beneficial use assigned to surface waters of the state which support aquatic life and are suitable for the propagation or

maintenance, or both, of warmwater fish but which may suffer occasional fish kills because of critical natural conditions;

(52) "Weekly average temperature," the mathematical mean of multiple, equally spaced daily temperature measurements over a 7-day consecutive period, with a minimum of three data points equally spaced throughout each day;

(53) "Wetlands," those areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions including swamps, marshes, bogs, and similar areas;

(54) "Zone of mixing," an area in a stream where an effluent or discharge mixes with the upstream water.

**Source:** SL 1975, ch 16, § 1; 4 SDR 32, effective December 4, 1977; 5 SDR 21, effective September 21, 1978; transferred from § 34:04:02:01, effective July 1, 1979; 10 SDR 145, effective July 4, 1984; 13 SDR 129, 13 SDR 141, effective July 1, 1987; 14 SDR 86, effective December 24, 1987; 19 SDR 111, effective January 31, 1993; transferred from § 74:03:02:01, July 1, 1996; 24 SDR 10, effective July 20, 1997; 25 SDR 98, effective January 27, 1999; 31 SDR 29, effective September 13, 2004; 35 SDR 253, effective May 12, 2009; 41 SDR 109, effective January 12, 2015.

**General Authority:** SDCL 34A-2-93.

**Law Implemented:** SDCL 34A-2-93.

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**74:51:02:01. Beneficial use of fish and wildlife propagation, recreation, and stock watering assigned to lakes.** The beneficial uses of fish and wildlife propagation, recreation, and stock watering are assigned to all lakes in the state.

**Source:** SL 1975, ch 16, § 1; transferred from § 34:04:03:01, effective July 1, 1979; 13 SDR 129, 13 SDR 141, effective July 1, 1987; transferred from § 74:03:03:01, July 1, 1996; 25 SDR 98, effective January 27, 1999.

**General Authority:** SDCL 34A-2-93.

**Law Implemented:** SDCL 34A-2-10, 34A-2-11.

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IN THE SUPREME COURT  
OF THE  
STATE OF SOUTH DAKOTA

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STATE OF SOUTH DAKOTA, DEPARTMENT OF  
GAME, FISH AND PARKS,

**APPELLANT,**

vs.

TROY TOWNSHIP, DAY COUNTY, SOUTH DAKOTA,

**APPELLEE.**

Appeal No. 27981

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STATE OF SOUTH DAKOTA, DEPARTMENT OF  
GAME, FISH AND PARKS,

**APPELLANT,**

vs.

TROY TOWNSHIP, DAY COUNTY, SOUTH DAKOTA,

**APPELLEE.**

Appeal No. 27982

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STATE OF SOUTH DAKOTA, DEPARTMENT OF  
GAME, FISH AND PARKS,

**APPELLANT,**

vs.

VALLEY TOWNSHIP, DAY COUNTY, SOUTH DAKOTA,

**APPELLEE.**

Appeal No. 27986

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STATE OF SOUTH DAKOTA, DEPARTMENT OF  
GAME, FISH AND PARKS,

**APPELLANT,**

vs.

BUTLER TOWNSHIP, DAY COUNTY, SOUTH DAKOTA,

**APPELLEE.**

Appeal No. 28008

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APPEAL FROM THE CIRCUIT COURT  
FIFTH JUDICIAL CIRCUIT  
DAY COUNTY, SOUTH DAKOTA

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THE HONORABLE JON S. FLEMMER,  
CIRCUIT COURT JUDGE

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**APPELLEES' BRIEF**

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NOTICES OF APPEAL FILED ON AUGUST 26, 2016;  
SEPTEMBER 14, 2016; AND OCTOBER 13, 2016

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## PRELIMINARY STATEMENT

In this brief, the appellant, State of South Dakota, Department of Game, Fish and Parks will be referred to as "GFP." The appellees will be referred to collectively as "Townships" or by their individual township name. The Day County Clerk of Courts' Records will be referred to as follows: Day County Civ. #14-42 (Troy): "SR1"; Day County Civ. #14-48 (Troy): "SR2"; Day County Civ. #14-50 (Valley): "SR3"; Day County Civ. #14-51 (Butler): "SR4." Citations to the specific Trial Transcripts are denoted by the name of the Township, followed by "T," followed by the corresponding page number. References to the specific Township trial exhibits are designated by the name of the Township followed by "Ex." The Townships adopt GFP's jurisdictional statement.

## QUESTIONS PRESENTED

### I. **WHETHER THE CIRCUIT COURT CORRECTLY DETERMINED THAT GFP HAD THE BURDEN OF PROOF.**

The Circuit Court concluded that, as the appealing party taking issue with the Townships' decisions to vacate the roads, GFP had the burden of proof at the trials.

Coyote Flats, L.L.C. v. Sanborn Cty. Comm'n, 1999 S.D. 87, 596 N.W.2d 347.

Chokecherry Hills Estates, Inc. v. Deuel County, 294 N.W.2d 654 (S.D. 1980).

City of Madison v. Clarke, 288 N.W.2d 312 (S.D. 1980).

**II. WHETHER THE CIRCUIT COURT CORRECTLY DETERMINED THAT VACATING THE RIGHTS-OF-WAY WOULD NOT DENY ACCESS TO A PUBLIC RESOURCE.**

The Circuit Court recognized that, at the present time, the South Dakota Legislature has not made any determination as to the recreational use of the non-meandered bodies of water covering private land within these Townships. The Circuit Court also concluded that it is clear from the evidence that the highway vacations will not materially alter public access available to the non-meandered bodies of water.

PPL Montana, LLC v. Montana, 132 S.Ct. 1215 (2012).

Parks v. Cooper, 2004 S.D. 27, 676 N.W.2d 823.

**III. WHETHER THE CIRCUIT COURT CORRECTLY DETERMINED THAT THE PUBLIC INTEREST IS BETTER SERVED BY VACATING THE RIGHTS-OF-WAY.**

The Circuit Court reviewed the evidence *de novo* and concluded that the Townships did not err in finding that the vacation of the proposed rights-of-way was in the public interest.

SDCL 31-13-1.

SDCL 31-18-3.

SDCL 31-3-6.

**IV. WHETHER THE CIRCUIT COURT CORRECTLY DETERMINED THAT THE PROCEDURES FOLLOWED BY THE TOWNSHIPS MET THE REQUIREMENTS OF DUE PROCESS.**

The Circuit Court found that GFP was afforded the process to which it was due, and the Townships substantially complied with the applicable statutes.

Grant Cnty. Concerned Citizens v. Grant Cnty. Bd. of Adjustment, 2015 S.D. 54, 866 N.W.2d 149.

Burns v. Kurtenbach, 327 N.W.2d 636 (S.D. 1982).

Wagner v. Truesdell, 1998 S.D. 9, 574 N.W.2d 627.

SDCL 31-3-6.

SDCL 31-3-7.

**V. WHETHER THE CIRCUIT COURT CORRECTLY DETERMINED THAT THE TOWNSHIPS' DECISIONS WERE NOT ARBITRARY AND CAPRICIOUS.**

The Circuit Court concluded that the Townships' decisions to vacate the various rights-of-way were not arbitrary and capricious.

In the Matter of the Conditional Use Permit Denied to Meier, 2000 S.D. 80, 613 N.W.2d 523.

**STATEMENT OF THE CASE**

This is a consolidated appeal from three decisions of the Circuit Court, the Honorable Jon S. Flemmer, presiding. In total, there were four appeals brought by GFP under SDCL 31-3-9 and SDCL 31-3-34 to challenge the Townships' decisions to vacate certain rights-of-way. (SR1 1; SR2 1; SR3 1; SR4 1.)

There were two cases involving vacations in Troy Township. They were tried together on September 24, 2015, at the Day County Courthouse. The Circuit Court entered a Memorandum Decision on July 21, 2016, in which it announced its decision to affirm Troy Township's decision to vacate the selected portions of highways within its jurisdiction, with the exception of two portions of highway shared with York Township because there was no corresponding resolution to vacate

highways passed in York Township. (SR1 578; SR2 504.) On August 17, 2016, the Circuit Court entered Findings of Fact and Conclusions of Law and an Order Affirming in Part and Reversing in Part the Decision of the Troy Township Board of Supervisors. (SR1 623, 647; SR2 549, 573.)

In the Valley Township case, following GFP's summary judgment motion, Valley Township conceded that the right-of-way described in the first paragraph of its Resolution (Valley Ex. 14), the portion of 142nd Street from 42100 142nd Street to 42300 142nd Street, should not be vacated. (SR3 89.) Pursuant to the Circuit Court's Order Granting in Part and Denying in Part Appellant's Motion for Summary Judgment, Valley Township's vacation of that stretch of section-line highway was set aside. (SR3 115.) With respect to the remainder of the highways, the appeal came on for trial *de novo* on October 22, 2015, at the Day County Courthouse. The Circuit Court entered a Memorandum Decision on August 8, 2016, in which it announced its decision to affirm Valley Township's decision to vacate the selected portions of highways within its jurisdiction. (SR3 333.) On August 26, 2016, the Circuit Court entered Findings of Fact and Conclusions of Law and an Order Affirming the Decision of the Valley Township Board of Supervisors. (SR3 360, 380.)

The Butler Township case also came on for trial *de*

novo on October 22, 2015, at the Day County Courthouse. The Circuit Court entered a Memorandum Decision on August 24, 2016, in which it announced its decision to affirm Butler Township's decision to vacate the selected portions of highways within its jurisdiction. (SR4 330.) On September 22, 2016, the Circuit Court entered Findings of Fact and Conclusions of Law and an Order Affirming the Decision of the Butler Township Board of Supervisors. (SR4 359, 380.)

#### **STATEMENT OF FACTS**

##### **A. Troy Township.**

On or about May 13, 2014, a Petition for Vacation of Roads was presented to Troy Township. (Troy Ex. 19.) Troy Township caused a Notice of Hearing to be published on May 19, 2014 and May 26, 2014, which stated the legal descriptions of the locations of the highways sought to be vacated at the May 27, 2014 hearing. (Troy Ex. 23.)

GFP wrote to Troy Township's clerk on May 19, 2014, and acknowledged its awareness of the petition to vacate and recited specific sections of roads to which it objected because they led to the Lily Game Production Area (GPA). (Troy Ex. 8.) GFP's representative, Scott Lindgren, attended the May 27, 2014 meeting. (Troy Ex. 12.) GFP was, therefore, on actual notice of the pending Petition, the roads subject to vacation, the

roads leading to Lily GPA that Troy Township elected not to vacate, and the action taken on May 27, 2014 to table the vote on the remaining roads for approximately 30 days. (Id.)

Troy Township published Notices of Hearing on June 16 and June 23, 2014, which served the sole purpose of notifying the public that Troy Township was no longer seeking to vacate the roads leading to the Lily GPA, as requested by GFP. (Troy Ex. 22.) The June 16, 2014 Notice of Hearing states that “[a] motion was made and passed to table the vote on the remaining portions of roadways described in the Petition published in this paper on May 19, 2014, and May 26, 2014,” and “[n]otice is hereby given that the Board of Supervisors of Troy Township will hold a public hearing to take action on the request to vacate the remainder of the roadways or portions of roadways described in the aforementioned Petition.” (Id.)

GFP notes that the Affidavit of Publication relating to the Notice of Hearing published on June 16 and June 23, 2014, was signed and sworn prior to the second publication.

(Appellant’s Brief, pg. 5.) Troy Township has no control over how the local newspapers handle affidavits of publication. GFP did not present any evidence at trial showing that the second publication did not occur. Ultimately, on June 26, 2014, the Board of Supervisors voted to vacate 12 portions of Troy

Township highways. (Troy Ex. 24.) The Troy Township supervisors testified at trial about the condition of the roads and why they were selected for vacation.<sup>1</sup>

On or about July 9, 2014, a second Petition for Vacation of Roads was presented to Troy Township. (Troy Ex. 20.) Troy Township caused a Notice of Hearing to be published on July 14, 2014 and July 21, 2014, which stated the legal descriptions of the locations of the highways sought to be vacated at the July 22, 2014 hearing. (Troy Ex. 21.)

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<sup>1</sup> Troy Exhibits 3 and 4 includes maps of Troy Township marked with numbered "picture points" depicting the condition of the vacated rights-of-way in Troy Township. The numbered photos follow the maps. Troy Township's Trial Brief includes descriptions of each of the vacated rights-of-way and the reasons they were vacated. (SR1 522-539; SR2 448-465.) In the interest of brevity, the Townships will not repeat all of that content here.

GFP wrote to Troy Township on July 15, 2014, and acknowledged its awareness of the petition to vacate and recited specific sections of rights-of-way to which it objected because they led to Lily GPA and to two U.S. Fish and Wildlife Service Waterfowl Production Areas. (Troy Ex. 9.) Based on the letters of opposition from Secretary Jeff Vonk and Connie Mueller of the Waubay National Wildlife Refuge, which identified certain public lands that could be accessed by roads subject to vacation, Troy Township determined that certain rights-of-way should not be vacated. (Troy Exs. 15 and 16.)

The public hearing was held as scheduled on July 22, 2014, and Mark Ermer from GFP attended. (Troy Ex. 16.) After removing the rights-of-way subject to objections concerning access to public lands, the Township voted in favor of vacating the others identified in the Petition. (Troy Ex. 25.) Once again, the vacated highways consist of right-of-ways covered by bodies of water or are unimproved section lines. (Troy Ex. 4.)

**B. Valley Township.**

On or about July 21, 2014, a Petition for Vacation of Roads was presented to Valley Township. (Valley Ex. 10.) Valley Township caused a Notice of Hearing to be published on

July 28 and August 4, 2014, which stated the legal descriptions of the locations of the highways sought to be vacated at the August 5, 2014 hearing. (Valley Ex. 12.)

Although GFP notes that no petition signers appeared at the August 5, 2014 hearing, it also bears mentioning that GFP did not object to the vacations in Valley Township that are involved in this case. GFP's factual recitation is misleading in this regard. On page 7 of Appellant's Brief, GFP asserts that "[t]he Department filed a letter with Valley Township objecting to the vacation of the public highways," and cites to Valley Exhibit 7. Valley Exhibit 7 is a letter from Secretary Vonk to the Valley Township clerk dated *May 19, 2014*. It concerns a prior petition to vacate, which is now final because it was not appealed. To be perfectly clear, GFP neither submitted a written objection nor attended the August 5, 2014 hearing to resist the Petition which it now appeals. (Valley Ex. 7.) In fact, Valley Township received no objections. (Valley Ex. 9.)

On August 5, 2014, Valley Township held its hearing and determined that the public interest would be served by vacating the rights-of-way identified in the petition. (Id.) In its minutes, Valley Township cited a number of factors that supported the vacation of the rights-of-ways. (Id.)

Following the August 5, 2014 hearing, a Resolution and Order to Vacate Roadways was recorded with the Day County Register of Deeds on August 6, 2014. (Valley Ex. 14.) The Resolution identified 10 rights-of-ways. (Id.) As noted above, one right-of-way was removed in response to GFP's summary judgment motion. At trial, GFP confined its argument that vacating is not in the public interest to five of the nine remaining rights-of-way. (Valley T5-6.) Although GFP does not challenge the public interest as to the other rights-of-way, at trial, Valley Township Supervisor Michael Herr articulated Valley Township's reasons for vacating all of the rights-of-way set forth in the Petition. (Valley T79-105.)<sup>2</sup>

**C. Butler Township.**

On or about July 29, 2014, a Petition for Vacation of Roads was presented to Butler Township. (Butler Ex. 12.) Butler Township caused a Notice of Hearing to be published on August 4, 2014 and August 11, 2014, which stated the legal

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<sup>2</sup> Valley Exhibit 4 includes maps of Valley Township marked with numbered "picture points" depicting the condition of the vacated rights-of-way in Valley Township. The numbered photos follow the maps. Valley Township also introduced a number of Exhibits depicting the conditions of the vacated rights-of-way. (Valley Ex. B, F, K, X, Y, AA, EE.) Valley Township's Trial Brief includes descriptions of each of the vacated rights-of-way and the reasons they were vacated. (SR3 306-312.) In the interest of brevity, the Townships will not repeat all of that content here.

descriptions of the locations of the highways sought to be vacated at the August 11, 2014 hearing. (Butler Ex. 13.)

GFP states that "the purported second publication took place on August 11, 2014, the same day the hearing took place." (Appellant's Brief, pg. 8.) However, rural delivery of the August 11, 2014, publication of the Reporter & Farmer was completed the Saturday before the publication date. (Butler Ex. 10; SR4 89.) No evidence was presented at trial that GFP representatives, or anyone else, wanted to attend the August 11 meeting, but missed it due to an improper notice. (SR4 367.)

GFP objected to the Petition in a letter dated August 6, 2014. (Butler Ex. 6.) GFP's objection did not specify any particular rights-of-way to which it objected. Rather, it registered a blanket objection to the entire vacation process. The Township also received a written objection from Reuben, Ordean, and Vera Parks, which asked the Township to leave open certain rights-of-way which provided them with access. (Butler T20-21; Butler Ex. 13.) The Township acquiesced in this request and removed two rights-of-way from consideration. (Id.)

On August 11, 2014, the Township held its hearing. A motion was made by Wes Nolte and seconded by Dennis Johnson

to vacate 10 stretches of rights-of-way, based upon the finding that the public interest would be better served by the proposed vacation. (Butler Exs. 13 and 14.) Following the August 11, 2014 hearing, a Resolution and Order to Vacate Roadways was recorded with the Day County Register of Deeds. (Butler Ex. 15.) The Resolution identified the 10 vacated rights-of-way. (Id.)

At trial, GFP confined its argument that vacating is not in the public interest to nine of the ten rights-of-way. (Butler T5.) Wes Nolte articulated the Township's reasons for vacating all of the rights-of-way set forth in the Petition. (Butler T63-82.)<sup>3</sup>

#### **ARGUMENT**

##### **A. AS THE APPEALING PARTY, GFP WAS PROPERLY DESIGNATED AS THE PARTY BEARING THE BURDEN OF PROOF.**

The Townships do not dispute that SDCL 8-5-10 and SDCL 31-3-34 call for a *de novo* review by the circuit court. Nor do the Townships take issue with the notion that the Circuit Court is not to ascribe any presumption of correctness to the

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<sup>3</sup> Butler Exhibit 3 includes a map of Butler Township marked with numbered "picture points" depicting the condition of the vacated rights-of-way in Butler Township. The numbered photos follow the maps. Butler Township's Trial Brief includes descriptions of each of the vacated rights-of-way and the reasons they were vacated. (SR4 304-310.) In the interest of brevity, the Townships will not repeat all of that content here.

Townships' findings regarding the evidence. However, GFP has cited no authority for the proposition that the Townships bear the burden of proof, and this argument should be deemed waived. See Veith v. O'Brien, 2007 S.D. 88, ¶ 50, 739 N.W.2d 15, 29 (“[appellant] waives this issue on appeal . . . for failure to cite authority in violation of SDCL 15-26A-60(6)”).

This Court has decided on multiple occasions that the *appellant* challenging a tribunal's decision has the burden. In Coyote Flats, L.L.C. v. Sanborn Cty. Comm'n, 1999 S.D. 87, 596 N.W.2d 347, the party that appealed the zoning commission's decision to the circuit court, *Coyote Flats*, argued that the commission had the burden of proof before the circuit court. This Court flatly rejected that proposition, citing its prior decisions, and noting that the “assailing party was *Coyote Flats*, and therefore it had the burden of proof.” Id. at ¶8, 596 N.W.2d at 349-50 (emphasis added) (citing Chokecherry Hills Estates, Inc. v. Deuel County, 294 N.W.2d 654, 656 (S.D. 1980) (appellant must meet the burden in a challenge to the application of a zoning ordinance); City of Madison v. Clarke, 288 N.W.2d 312, 314 (S.D. 1980) (person appealing from the board of adjustment has to meet the burden of proof)).

GFP is the appealing or “assailing” party. Under the guidance of Coyote Flats and the cases decided before it, the

Circuit Court correctly determined that GFP has the burden of proof.

**B. THE TOWNSHIPS' VACATION OF FLOODED RIGHTS-OF-WAY DID NOT DENY ACCESS TO A PUBLIC RESOURCE, BECAUSE THE SOUTH DAKOTA LEGISLATURE HAS NEVER EXTENDED THE PUBLIC TRUST DOCTRINE TO PERMIT RECREATIONAL USE OF NON-MEANDERED BODIES OF WATER.**

The Townships vacated several rights-of-way that are submerged by water. In some cases, the rights-of-way have been under several feet of water since the late 1990's. GFP believes these rights-of-way should be kept open - and, therefore, committed to the Townships' expense and responsibility - so that the public can gain access to non-meandered bodies of water and recreate upon them. GFP's position severely misconstrues this Court's prior holding Parks v. Cooper, 2004 S.D. 27, 676 N.W.2d 823, and the current status of the law regarding non-meandered bodies of water covering private land.

The public trust doctrine is a matter of state law and "[u]nder accepted principles of federalism, the States retain residual power to determine the scope of the public trust over waters within their borders." PPL Montana, LLC v. Montana, 132 S.Ct. 1215, 1235 (2012). In 2004, this Court decided Parks, and recognized for the first time that all waters in South Dakota, not just those considered navigable under the

federal test, are held in trust for the people in accordance with the public trust doctrine. In addition, the Parks decision affirmed that landowners hold title to their private property, including submerged private lands beneath non-meandered bodies of water held in trust for the public by the State. Id. at ¶ 25, 676 N.W.2d at 831.

GFP argues that the Parks decision, combined with other statutes and administrative rules, stands for the proposition that the public has an unfettered right to access all water for recreation. GFP believes the public trust doctrine applies to all non-meandered bodies of water covering private land within the Townships. The Parks decision, however, flatly rejected GFP's recreational use argument. Id. at ¶¶ 47-53, 676 N.W.2d at 839-41.

Rather, this Court emphasized that "although state law in both South and North Dakota makes all water public property, neither state has gone so far as to hold that non-meandered lakes navigable under the state test are open for public recreational uses." Id. at ¶ 49, 676 N.W.2d at 839. As a result, the Court explained, "it is not for us now to proclaim the highest and best use of these public waters in the interest of the 'general health, welfare and safety of the people.'" Id.

at ¶ 51, 676 N.W.2d at 841. Instead, “[d]ecisions on beneficial use belong ultimately to the Legislature.” Id. (citing SDCL 46-2-11).

GFP cites to the Water Rights Act in support of its argument. But, as determined by the Legislature, the highest and best use for water is domestic use. Id. at ¶ 50, 676 N.W.2d at 840 (citing SDCL 46-1-5); SDCL 46-1-1. Unfettered public recreational use of private flooded lands has never been authorized under the law. Id. at ¶ 49, 676 N.W.2d at 839.

The Parks decision held that it is the province of the South Dakota Legislature to determine the extent of the public's right to use non-meandered bodies of water. None of the applicable laws, regulations, or rules cited by GFP have changed in any material way since Parks. In more than a decade since that decision, the South Dakota Legislature has never granted any right to members of the general public to use non-meandered bodies of water that lie over private property for recreational uses such as hunting, fishing, snowmobiling, or setting up ice shacks. Consequently, the Circuit Court did not err in concluding that the Townships' vacations did not impact a public resource.

**C. EVEN IF THE PUBLIC HAS THE RIGHT TO RECREATE ON NON-MEANDERED BODIES OF WATER COVERING PRIVATE LAND, SUCH BODIES OF WATER REMAIN ACCESSIBLE, AND GFP DOES**

**NOT HAVE THE RIGHT TO DICTATE TO THE TOWNSHIP HOW IT EXERCISES ITS DISCRETIONARY AUTHORITY.**

While the Townships make no concessions about the public's ability to recreate on non-meandered bodies of water covering private land, the undisputed trial testimony was that, even with the road vacations in question, the bodies of water at the heart of GFP's concerns remain accessible. Even if the Court agrees with GFP on the public resource issue, GFP cannot show that the Circuit Court clearly erred by finding that access to the non-meandered bodies was not materially affected.

The Townships have the statutory right to vacate rights-of-way. SDCL 31-18-3. GFP wants to see all rights-of-way leading to non-meandered bodies of water open and improved at the Townships' expense. This would make things easier on the fishing and hunting public and GFP's budget. But this is not the Townships' responsibility. GFP, through this lawsuit or otherwise, should not be permitted to dictate how Townships exercise their discretionary decision-making with respect their road systems.

The South Dakota Legislature did not give GFP "veto power" vis-a-vis the Township's decisions as the local highway authority. The Legislature was very clear in the type of access it was willing to protect from the vacation process, namely,

access to public lands. SDCL 31-3-6.1. The Townships honored this law, and removed rights-of-way arguably transgressing SDCL 31-3-6.1 from the list of those being vacated. The Legislature did not, however, limit the Township's ability to vacate section lines that are unfit for the traveling public based upon the chance that they might lead to non-meandered bodies covering private land, or that ducks, geese, or pheasants might be shot while resting on them.

**1. Troy Township.**

GFP argues that "Welcome Lake" is now inaccessible, citing to Troy Exhibits 3 and 4. First, citing to two maps that do not identify the body of water at issue does not establish anything. GFP cites no testimony introduced at trial confirming that there is no longer access to this body of water. Additionally, by looking at Exhibits 3 and 4, it would appear that Welcome Lake remains accessible from the south via 419<sup>th</sup> Avenue, which is not vacated.

GFP also points to a body of water northwest of Welcome Lake. Presumably, this is the body of water that lies west of picture point 34. (Troy Ex. 4, pg. 2.) In this location, the so-called "access" to the unnamed slough is 150<sup>th</sup> Street: a one-mile stretch of completely unimproved section line, which runs through a pasture. (Id.; Troy T241.) The

testimony at trial regarding the slough covering 150<sup>th</sup> Street revealed that it is not used for hunting or fishing. (Troy T241.)

Finally, GFP argues that “public access to both Jesse Lake and Duerre Slough is now severely curtailed,” again citing to the maps. (Appellant’s Brief, pg. 13.) The trial testimony, including testimony from GFP’s own agents, confirmed that these bodies of water remain accessible through at least three different accesses: (1) a county road on the southwest side of Jesse Lake; (2) by accessing Lily Lake (since the bodies are all connected); or (3) by 153<sup>rd</sup> Street, a road that Troy Township *did not* vacate. (Troy T84, T88-89, T92, T203-204, T224, T236-237, Ex. 3, pg. 1, Exs. 28 and 29.)

GFP cannot create an unfunded mandate requiring Troy Township to ensure that the fishing and hunting public has access to non-meandered bodies of water on private property by using Troy Township’s roads. This is particularly true when the rights-of-way GFP complains about are hazardous and impossible to maintain. Nonetheless, assuming *arguendo* there is a public interest in access, the Circuit Court did not clearly err in finding that public access to these non-meandered bodies has not been materially affected. GFP’s argument to the contrary is simply a distortion of the record.

**2. Valley Township.**

It is unclear how the rights of fishermen would be adversely affected by the vacations in Valley Township. From the standpoint of fishing access, GFP acknowledges that there was only one active fishery located in Valley Township that was discussed at the trial. (Valley T76.) It sits over the border between Valley Township and Butler Township, and can be seen on Valley Exhibit 4, at picture point 62. Neither Officer Blake Yonke nor Officer Robert Losco recalled the public utilizing the section lines that Valley Township vacated to access the body of water. (Valley T56, T70-71.) Moreover, contrary to GFP's argument, Officer Losco confirmed that it remains possible to access this body of water. (Valley T69.)

GFP's only other argument centers on the Lundeen WPA. GFP's position on this misguided, for three reasons. First, SDCL 31-3-6.1 and SDCL 31-18-3 prohibit townships from vacating a highway which "provides access to public lands." The Lundeen WPA, the public land identified by GFP, is situated north of the border of Valley Township in Bristol Township, which is created by 142<sup>nd</sup> Street. The vacated portion of 422<sup>nd</sup> Avenue is south of 142<sup>nd</sup> Street. Lundeen WPA is north of 142<sup>nd</sup> Street. (SR3 90.) Lundeen WPA does not abut the vacated portion of 422<sup>nd</sup> Avenue, and 422<sup>nd</sup> Avenue does not provide access to it.

Second, traveling the vacated portion of 422<sup>nd</sup> Avenue does not provide access to Lundeen WPA. There is no way to

travel 422<sup>nd</sup> Avenue north from picture point 9 on Valley Exhibit 4 and reach 142<sup>nd</sup> Street without going around or through the body of water that covers 422<sup>nd</sup> Avenue. (Valley T98; SR3 90-98.) It simply does not provide access to the public land lying further north, across 142<sup>nd</sup> Street. Vacating the one mile stretch of 422<sup>nd</sup> Avenue does not violate either SDCL 31-3-6.1 or SDCL 31-18-3.

Third, GFP tries to enlarge the provisions of SDCL 31-3-6.1 and 31-18-3 with the argument that "the vacating of public highways curtails access to the body of water that leads into the Lundeen WPA." (Appellant's Brief, pg. 15.) In other words, GFP reads the statutes to apply not just to public land, but to water on private land that touches public land. There is no sound basis for this construction of those statutes, and there is no citation to the record supporting the proposition that the water covering 422<sup>nd</sup> Avenue actually leads into the Lundeen WPA.

### **3. Butler Township.**

The non-meandered body of water sitting at the border with Valley Township, know as "Bohn Slough," has already been discussed. GFP argues that the vacation of roads in Butler Township "curtails" access to a non-meandered body of water known as "Buck Slough" and other unnamed bodies of water. Once again, the fact that GFP would prefer that Butler Township

continue to maintain gravel roads that terminate in water should not alter Butler Township's ability to exercise its discretion as the local road authority.

**D. THE PUBLIC INTEREST IS SERVED BY THE VACATION OF DANGEROUS, FLOODED RIGHTS-OF-WAY THAT LEAD THE TRAVELING PUBLIC NOWHERE AND CANNOT BE MAINTAINED.**

"There is along every section line in this state a public highway located by operation of law, *except where some portion of the highway along such section line has been heretofore vacated or relocated by the lawful action of some authorized public officer, board, or tribunal.*" SDCL 31-18-1 (emphasis added). In these cases, the Townships lawfully vacated several section line highways in accordance with SDCL 31-3-6, as they found that the public interest would be better served if the rights-of-way were vacated.

Although GFP repeatedly touts the Townships' obligation to act as trustees in guarding section lines for public access, citing Douville v. Christensen, 2002 S.D. 33, ¶ 12, 641 N.W.2d 651, the Townships have even more compelling obligations to ensure that the traveling public is not endangered by roads that have become inherently unsafe and to preserve scarce Township resources. As the Court will quickly surmise upon reviewing the trial exhibits in each case, the section lines that form the subject matter of these cases bear

one of the following characteristics: they are submerged under water; they are impassable due to vegetative growth or structural failure; they have never been improved whatsoever; or they ultimately lead to nowhere.

The Circuit Court correctly recognized that, in each of these cases, GFP's view of the public interest was incredibly narrow. (SR1 657; SR2 583; SR3 364; SR4 364.) GFP presented evidence related only to those members of the public who seek hunting and fishing opportunities, particularly on water located on private property, whether authorized under the law or not. Indeed, the transcript citations found on pages 17-20 of Appellant's Brief are all in reference to hunting and fishing in the vicinity of the vacated rights-of-way. While sportsmen constitute one segment of the public, the Circuit Court recognized that the Townships considered the *overall* public interest in making their decisions. The Circuit Court did not err in concluding that the public interest is better served with these dangerous, impassable, unimproved, or unsuitable roads vacated.

GFP argues that the Townships did not utilize the public interest as its governing standard in determining whether the roads should be vacated. The testimony at trial shows that GFP is completely wrong. In vacating the

rights-of-way, the Townships were predominantly concerned about two things: (1) keeping people off of unsafe rights-of-way; and (2) preserving the Townships' resources for use on roads within the Townships that are used and needed. These concerns fall squarely within the service of the public interest.

Troy Township's resolution expressly stated its reasons for vacating the rights-of-way: ". . .these roadways have not been in use for a number of years and due to the safety issues associated with them and the expense of development it will never be feasible or practical to develop, nor will ever be further developed due to the terrain and limited use of the highways; and further believe that it would be in the best interests of the general public that these portions of the section line highways be vacated." (Troy Ex. 13.)

GFP takes unforgivable liberty with the trial testimony on page 17 of Appellant's Brief when it states that, "[a]t its May 27, 2014 hearing, Troy Township did not examine whether public interest was better served by the requested vacations." GFP cites to Chris Hesla's testimony to support its summation. While Mr. Hesla was critical of the supervisors for their views regarding access to non-meandered bodies of

water<sup>4</sup>, he also acknowledged that the Township supervisors discussed safety and a lack of money to maintain the roads: "[T]he main reason that was stated at first was it was due to safety issues, it had nothing to do with access issues, it was only due to safety issues and the lack of money that the townships had to maintain the roads." (Troy T40.)

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<sup>4</sup> Mr. Hesla also testified that his review of unidentified history books shows that section lines were created so that folks could walk them and shoot pheasants and ducks on the way to Church on Sundays. (Troy T43.)

Troy Township's supervisors recognize an obligation to ensure that people traveling in the township are not harmed by driving in dangerous places. (Troy T207-208, T249.) They believe they have an ethical and community responsibility to look after the safety of people traveling on township roads, and that is why they decided to vacate these particular roads. (Id.) Concerns about safety are legitimate, considering the condition of these rights-of-way. While GFP cites John Cooper's lengthy historical account of how the area was utilized long before the flood waters of the 1990's showed up, Mr. Cooper also acknowledged that "[s]afety issues are a legitimate issue, I think, for all agencies and for townships." (Troy T152.)

Similarly, the minutes from Valley Township's August 5, 2014 hearing reveal a number of reasons the Township supervisors felt the selected roads should be vacated: the rights-of-way have not been in use for a number of years; safety issues associated with the use of the rights-of-way; the expense and feasibility of developing the rights-of-way; inability to further develop the rights-of-way due to the terrain. (Valley Ex. 9.) Valley Township simply wanted to remove rights-of-way that terminate in water, dead end, or could not be safely traveled. (Valley T104.)

Butler Township's minutes also show that it based its

decision on the public interest. (Butler Ex. 10.) Supervisor Wes Nolte testified at length about the condition of the various rights-of-way that Butler Township vacated. The photographs of the rights-of-way (or what's left of them) speak volumes about how useful they are and the threat they pose to people trying to navigate them. (Butler Ex. 4.) The testimony and evidence also portrayed something even more obvious - repairing or improving the nine Butler Township roads at issue is neither practical nor possible.

GFP argues that, because people have ignored signs and barricades and driven down the roads, there is a public interest in keeping them open. The exact opposite is true. GFP's argument would make sense if two things were true: (1) the roads were even marginally safe to travel; and (2) the Townships had unlimited resources to maintain the roads. That is not reality. In reality, the closed roads subject to vacation are not structurally sound and would need to be rebuilt to facilitate safe travel. In reality, the Townships have limited resources and cannot keep up with the roads that are open and in use.

The simple fact is that people have serially ignored or destroyed signs designed to protect them from traveling on poor roads leading to water or other hazards in these Townships.

(Troy T249; Butler T66-67.) Since closing the roads is ineffective, and the Townships lack the resources or practical ability to rebuild many of these roads, they were left in the position of either vacating the rights-of-way or waiting for something tragic to occur.

GFP's singular concern about hunting and fishing opportunities is just one aspect of the public interest. The Townships took their actions based upon broader concerns for safety and for preserving Township resources. The Circuit Court did not err in concluding that the public interest would be better served with the various rights-of-way removed from the Townships' road systems.

**E. GFP WAS AFFORDED APPROPRIATE DUE PROCESS.**

The Appellant's Brief takes a scattershot approach on Due Process. Noticeably absent from GFP's argument is any tie between the claimed statutory infractions and some prejudice to GFP's ability to be heard on the road vacations that occurred.

"Due process requires adequate notice and an opportunity for meaningful participation.'" Grant Cnty. Concerned Citizens v. Grant Cnty. Bd. of Adjustment, 2015 S.D. 54, ¶ 31, 866 N.W.2d 149, 160 (quoting Osloond v. Farrier, 2003 S.D. 28, ¶ 19 n.4, 659 N.W.2d 20, 25 n.4). Procedural due

process "is flexible and requires only such procedural protections as the particular situation demands." Tri Cty. Landfill Ass'n v. Brule Cty., 2000 SD 148, ¶ 13, 619 N.W.2d 663, 668 (quoting Knowles v. United States, 1996 SD 10, ¶ 79, 544 N.W.2d 183, 201).

In terms of "adequate notice," SDCL 31-3-6 requires that notice of the public hearing be published once each week for two successive weeks. SDCL 31-3-7 describes the type of participation that makes up the public hearing phase of the vacation process, consisting of oral presentations and written submissions. It discusses the Township "receiving public testimony about the action proposed by the petition." SDCL 31-3-7 also permits the presentation of "information, opinions and arguments" by any person unable to attend the hearing.

As more particularly described in the Statement of Facts section of this Brief, each of the Townships honored all of these procedural rights. The Townships provided the statutorily required notice. In the Troy and Butler Township proceedings, GFP availed itself of the statutory mechanisms by which it could be heard, i.e., attending the hearings and/or submitting written information. GFP also availed itself of another statutory mechanism: an appeal where each matter was heard and determined by the Circuit Court *de novo*. SDCL

31-3-34.

**1. The Outcome Was Not Predetermined.**

GFP makes much of the fact that the Townships took steps toward initiating the vacation process, including the Townships' involvement in the drafting of the petitions. GFP cites to no authority that suggests that a township's governing board must have no input in the origination of a petition to vacate roads within the township. Realistically, as the governing highway authority, the Townships' board members are most acutely aware of the state of the Townships' roads. As the people making the decisions regarding road construction, repair, and maintenance, see SDCL 31-13-1, they would have the most knowledge about the township's roads.

GFP also argues that, by way of the petitions, the Township board members swore oaths in favor of vacating and had made up their minds prior to each hearing. (Appellant's Brief, pg. 21.) This is incorrect. The oath acknowledged that the board members knew the content of the petition and believed that the people listed did, in fact, sign it, and wanted to seek the vacation of the roads. (Troy T200.) The Circuit Court appropriately rejected this argument in the Troy Township trial. (Troy T211.)

Finally, GFP's entire argument about these matters

being predetermined by the Townships ignores the fact that the Townships listened to and considered the complaints raised by GFP and others. Where appropriate, the Townships removed certain rights-of-way from the vacation proceedings. For instance, Troy Township removed certain roads from the list to be vacated based upon GFP's contention that the roads accessed public lands. (Troy Exs. 12, 15, 16, 22.) Butler Township acknowledged concerns voiced by township residents, Ordean, Reuben and Vera Parks, and removed rights-of-way. (Butler Ex. 13.) The fact that the Townships disagreed with GFP's blanket objections regarding all of the roads does not mean that the Townships failed to comply with the procedures laid out in SDCL Chapter 31-3.

**2. GFP Failed To Prove Troy Township's Bias.**

GFP argues that it established bias on the part of Troy Township, pointing to Thad Duerre's "driveway" and comments made to attendees at the May 27, 2014 hearing.

The testimony at trial actually shows that Thad Duerre's motives with respect to the "driveway" were unselfish. People going to the Duerre property are the only ones who use it, other than people who errantly drive down it and have to turn around. (Troy T201.) After a certain point, the road terminates into water, and would not take a traveler anywhere.

(Troy Ex. 4, picture point 39.) Prior to being vacated, the Township performed the general maintenance on this road. (Troy T244.) Rather than requiring the Township to continue to maintain this stretch of roadway - which only benefits the Duerres - Thad Duerre requested that it be vacated so that the maintenance and expense of graveling it would be his responsibility, not the Township's responsibility. (Troy T200-202.)

With respect to Duerre's comments, it was clarified at trial that Duerre was speaking specifically about Duerre Slough, a non-meandered body of water sitting over his private land, when he was talking about keeping people from accessing it. (Troy T48.) As argued previously, the South Dakota Legislature has never granted the public a right to recreate on Duerre Slough or any other non-meandered body of water covering private land.

Finally, while Duerre's comments may have been off-putting, GFP presented no evidence that the other supervisors shared Duerre's sentiments.

**3. These Appeals Are Not The Proper Mechanism For Challenging The Election Of Township Officers.**

GFP argues that the Townships violated requirements for township elections under SDCL 8-3-15 by failing to use

ballots in their uncontested elections. Appeals relating to road vacations are not the proper action to challenge the township supervisors' rights to hold office. SDCL 21-28-2(1) authorizes an action "by any person who has a special interest in the action, on leave granted by the circuit court or judge thereof" when a person unlawfully holds public office. This Court has held that "quo warranto is the proper proceeding to determine title to and possession of a public office." Burns v. Kurtenbach, 327 N.W.2d 636, 638 (S.D. 1982). GFP neither sought leave of Court, nor brought an action to challenge the Township officials' authority to hold office, nor received a writ under the provisions of SDCL Chapter 21-28. The Township supervisors' authority was not a proper issue for determination in this appeal.

**4. GFP Had Every Document Related To These Appeals.**

GFP argues that the Circuit Court found that the Townships violated SDCL 8-5-9, requiring a transcript, and that should have been a basis for reversal. This is incorrect. In each case, the Circuit Court found that GFP received all of the documentation relevant to the petitions, the notices of the meetings, the actions taken at the meetings, and the publications of the resolutions. (SR1 662-663; SR2 588-589; SR3 368-369; SR4 389.) Thus, the Circuit Court found that the

Townships substantially complied with the statute's provision. See Wagner v. Truesdell, 1998 S.D. 9, ¶ 7, 574 N.W.2d 627, 629 (holding substantial compliance means actual compliance in respect to the substance essential to every reasonable objective of the statute).

GFP neglects to identify even a single document that it lacked during the prosecution of any of the appeals. It had everything. GFP was not only able to prepare for these trials; it was able to utilize the information provided by the Townships and create a fully interactive web-based demonstrative exhibit that led the Court and counsel on a photographic tour of each of the picture points on the map. To suggest that the objective of SDCL 8-5-9 was not met is ludicrous. There is no basis for reversal.

**5. Troy Township's Alleged Violations Are Illusory.**

GFP first raises an issue relating to Troy Township's 2014 annual meeting held on March 4, 2014.<sup>5</sup> This annual meeting occurred several weeks before the first Petition to Vacate was circulated. It is irrelevant to this appeal. While the dilapidated and submerged rights-of-way were discussed at the

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<sup>5</sup> GFP also raises this issue with respect to Butler Township.

annual meeting, Troy Township took no formal action to vacate anything at that meeting.

GFP also argues that Troy Township failed to ensure compliance with SDCL 31-3-6. GFP is attempting to add a requirement to SDCL 31-3-6 that is not in its text, namely, that the Petition be formatted so that the landowner names are linked to each individual stretch of road being vacated. SDCL 31-3-6 does not require this, and the petitions contained everything required by law.

Finally, GFP targets the June 16, 2014 Notice of Hearing for failing to re-list all legal descriptions that appeared in the May 2014 notices. Considering that GFP was on *actual notice* of the Township's petition to vacate the day the first May 2014 notice was published, this argument hardly calls for Troy Township's decision to be reversed. The purpose of notice requirements, in any context, is merely to afford an opportunity to be heard. See Madison v. Clarke, 288 N.W.2d 312, 313 (S.D. 1980). The roads subject to vacation were specifically identified in a published notice prior to the June 26, 2014 hearing. GFP's May 19, 2014 letter and Mr. Lindgren's testimony conclusively demonstrate that GFP was on notice of the specific roads at issue. The previously published notices

were specifically incorporated by reference in the June 16, 2014 Notice of Hearing. Nothing about the June 16, 2014 Notice of Hearing calls for reversal.

**6. Valley Township's Alleged Violations Are Illusory.**

The Circuit Court correctly found that the August 5, 2014 meeting was a special meeting, not one enumerated in SDCL 8-5-1. The Circuit Court also found that SDCL 8-5-1 requires a location not a specific address. More importantly, the Circuit Court correctly noted that no evidence was presented at trial that GFP representatives, or any other member of the public, wanted to attend the hearing, but couldn't figure out how to get to Brent Zimmerman's home. (SR3 368.)

**7. Butler Township's Alleged Violations Are Illusory.**

GFP argues that Butler Township failed to provide statutory notice of its meeting where the road vacations occurred. It cites to SDCL 17-2-22.1 for the proposition that the publisher's affidavit is "prima facie" evidence that a second publication occurred on August 11, 2014, which was the same day as the hearing. "Prima facie" is Latin for "at first look" or "on its face."<sup>6</sup> This evidence can be rebutted, and,

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<sup>6</sup> <http://legal-dictionary.thefreedictionary.com/prima+facie>.

in this case, it was. The township clerk, Lori Ash, testified that delivery of the local newspaper occurred the *weekend before* August 11, 2014. (SR4 89.) Recipients of the newspaper would have been on notice prior to the August 11, 2014 meeting. The Circuit Court correctly rejected GFP's motion for summary judgment on this basis.

In reality, the discussion over the timing of the second publication is purely academic. GFP was on *actual notice* of the Butler Township petition which was scheduled to be heard on August 11, 2014. Indeed, the first line of former GFP Secretary Vonk's letter reads: "South Dakota Department of Game, Fish, and Parks is aware of a petition to vacate several section lines in Butler Township, Day County, pursuant to SDCL 31-3-6. I write you today in opposition to this petition." (Butler Ex. 6.)

Even assuming there is some impropriety associated with the timing of the second notice, GFP cites no authority for the proposition that a failure to strictly comply with statutory notice requirements would render Butler Township's actions void. To the contrary, where a party is on actual notice and participated in the proceedings, it has no basis to complain. See In re McGlynn, 974 A.2d 525, 534 (Pa. Commw. Ct. 2009) (upholding township's decision in spite of technically defective publication, and finding that "[a]bsent a showing of

discernible harm, a denial of due process claim must fail.”). GFP does not even attempt to argue that its due process rights were violated by the timing of the second published notice, or that it suffered any prejudice whatsoever. Nor could it. GFP was aware of the hearing, submitted a letter objecting to the proposed action, and chose not to attend the hearing.

**F. THE TOWNSHIPS’ DECISIONS WERE NOT ARBITRARY AND CAPRICIOUS.**

GFP largely repackages its previous argument and argues that the Townships, variously, acted arbitrarily and capriciously. Rather than revisiting each and every position already discussed, the Townships will focus on a few of the overriding themes. GFP failed to meet its burden to show that the Townships’ actions were “based on personal, selfish, or fraudulent motives, or on false information, [or] . . . characterized by a lack of relevant and competent evidence to support the action taken.” In the matter of the Conditional Use Permit Denied to Meier, 2000 S.D. 80, ¶ 22, 613 N.W.2d 523, 530.

GFP’s makes an *a fortiori* argument about claimed “benefits” to the Township board members. Essentially, its position is that, if a vacated road borders property, the adjoining property owners must benefit from the vacation.

The Circuit Court wisely rejected this line of thinking. Just by looking at the photos entered into evidence, it is readily apparent that GFP's position about benefits to adjoining landowners does not square with reality. A lot of the areas vacated simply are not very useful - for anything, let alone access. GFP argues about the exclusive use of the land, without acknowledging that many of the areas it points to have not historically been right-of-ways used for *anything*.

The Circuit Court had the opportunity to listen to the testimony, review the photographs of the rights-of-way, and determine whether there was any basis for the idea that the township board members sought to gain for themselves by vacating the rights-of-way. The Circuit Court made factual findings that "any notion that Township's board members abandoned their duties and made a decision to seek private gain as a motive for vacation of the highways at issue is folly and without merit," and even referred to GFP's allegations to this effect as "absurd." (SR1 657, 665; SR2 583, 591; SR3 364; SR4 363.) These findings were not clearly erroneous; rather, they properly encapsulated the evidence at trial.

GFP also sets up straw men concerning two things to suggest that the Townships had something other than the public interest in mind when they vacated rights-of-way: legal

liability and Senate Bill 169.

The Townships do not dispute that, generally speaking, they are protected from liability insofar as their decisions concerning roads are concerned, and they further acknowledge that they carry liability insurance to protect them against lawsuits. Nonetheless, there could be litigation against the Townships in the event of accidents on the highways the Townships sought to vacate. In that case, the Townships would incur expenses defending themselves before that litigation was resolved, which would result in expenses that could be avoided.

More importantly, whether the Townships may ultimately avoid liability does not mean they should ignore situations that could cause harm to the traveling public. As already highlighted, the Township supervisors who testified acknowledged having an obligation that goes beyond monetary responsibility. They also believe they have a responsibility to look after the safety of people traveling on township roads, and that is why they decided to vacate several of the roads.

Finally, the Circuit Court correctly surmised that, although SB 169's introduction certainly factored into the Townships' decision to proceed with its resolutions, that fact does not mean Townships did not have the public interest in mind

when vacating what they perceived to be dangerous highways, rather than delaying that decision and, possibly, forfeiting the opportunity to rectify that dangerous situation. SB 169's introduction merely motivated the Townships to rectify the dangerous situation before they potentially lost their ability to protect the public.

The Circuit Court found that the evidence and testimony at trial showed that the Townships carefully considered which portions of highways should be vacated; and that the Townships carefully reviewed the conditions of the rights-of-way and identified those that no longer served the public interest. (SR1 659, 665; SR2 585, 591; SR3 366, 370; SR4 365, 371.) The evidence at trial showed that each of the township supervisors who voted to vacate the roads has been serving on the Township boards for, literally, decades. With few exceptions, these individuals have lived in these Township their entire lives. GFP's argument about a lack of relevant and competent information is specious.

#### **CONCLUSION**

For these reasons, the Townships respectfully urge the Court to affirm the Circuit Court's decisions.

Respectfully submitted this 14<sup>th</sup> day of February, 2016.

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**CERTIFICATE OF COMPLIANCE**

The undersigned hereby certifies that this Brief complies with SDCL 15-26A-66(4). This Brief is 40 pages long, exclusive of the Table of Contents, Table of Authorities, Certificate of Compliance and Certificate of Service, is typeset in Courier New (12 pt.) and contains 8,412 words. The word processing software used to prepare this Brief is Word Perfect.

Dated this 14<sup>th</sup> day of February, 2017.

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**CERTIFICATE OF SERVICE**

The undersigned, one of the attorneys for Appellees, hereby certifies that on the 14<sup>th</sup> day of February, 2016, a true and correct copy of **APPELLEES' BRIEF** was electronically transmitted to:

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and the original and two copies of **APPELLEES' BRIEF** were mailed by first-class mail, postage prepaid, to Ms. Shirley Jameson-Fergel, Clerk of the Supreme Court, Supreme Court of South Dakota, State Capitol Building, 500 East Capitol Avenue, Pierre, SD 57501-5070. An electronic version of the Brief was also electronically transmitted in Word Perfect format to the Clerk of the Supreme Court.

Dated at Aberdeen, South Dakota, this 14<sup>th</sup> day of February, 2017.

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IN THE SUPREME COURT  
OF THE  
STATE OF SOUTH DAKOTA

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STATE OF SOUTH DAKOTA,  
DEPARTMENT OF GAME, FISH AND  
PARKS,

#27981

Appellant,

vs.

TROY TOWNSHIP, DAY COUNTY,  
SOUTH DAKOTA,

Appellee.

---

STATE OF SOUTH DAKOTA,  
DEPARTMENT OF GAME, FISH AND  
PARKS,

#27982

Appellant,

vs.

TROY TOWNSHIP, DAY COUNTY,  
SOUTH DAKOTA,

Appellee.

---

STATE OF SOUTH DAKOTA,  
DEPARTMENT OF GAME, FISH AND  
PARKS,

#27986

Appellant,

vs.

VALLEY TOWNSHIP, DAY COUNTY,  
SOUTH DAKOTA,

Appellee.

---

STATE OF SOUTH DAKOTA,  
DEPARTMENT OF GAME, FISH AND  
PARKS,

#28008

Appellant,

vs.

BUTLER TOWNSHIP, DAY COUNTY,  
SOUTH DAKOTA,

Appellee.

---

Appeal from the Circuit Court, Fifth Judicial Circuit  
Day County, South Dakota  
The Honorable Jon S. Flemmer  
Circuit Court Judge

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**APPELLANT'S REPLY BRIEF**

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Notices of Appeal were filed on August 26, 2016, September 14, 2016 and  
October 13, 2016

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## ARGUMENTS

Appellant hereby incorporates all arguments set forth in the initial brief and further provides the following discussion in support of its positions.

### **1. The circuit court erred when it placed the burden of proof on the Department at the *de novo* trials.**

Department cited authority for the proposition that the circuit court erred in placing the burden of proof upon the Department at the *de novo* trials. Twp. Br. pg. 12. The Townships argue that *if* there was a failure to cite to authority, *then* the Department's argument should be deemed waived. *Id.* In its brief, the Department cited to multiple state statutes and case law. *Id.* The Department cited to this Court's holding in *Goos Rv Center v. Minnehaha County Comm'n*, 2009 S.D. 24, 764 N.W.2d 704. *Id.* This Court's opinion in *Goos Rv* subsumes that of *Coyote Flats, LLC v. Sanborn Cty. Comm'n*, 1999 S.D. 87, 596 N.W.2d 347, a case relied upon by the Townships. *Goos, supra.* ¶ 9, 764 N.W.2d at 707; Twp. Br. pg. 13. In short, the Townships allege that the Department failed to cite to any authority, yet in the same breath, the Townships utilize case law subsumed within the Department's legal argument *on that very issue.*

The circuit court erred by placing the burden of proof on the Department at the *de novo* trial. Such error runs counter to the plain statutory language and interpretive case law. SDCL 8-5-10; *Goos, supra.*, Dept. Br. pg. 10-11.

### **2. The circuit court erred by holding that vacating the public highways did not deny public access to a public resource.**

The circuit court erred by allowing the Townships to vacate public highways which denies public access to a public resource held in trust. In *Parks v. Cooper*, 2004 S.D. 27, ¶ 22, 676 N.W.2d 823, 829, this Court adhered to the opinion of *Illinois Central R. Co. v. Illinois*, 146 U.S. 387, 458, 13 S.Ct. 110, 36 L.Ed. 1018 (1892).

Eight years after this Court's decision in *Parks*, the U.S. Supreme Court handed down *PPL Montana, LLC v. Montana*, 132 S.Ct. 1215 (2012). In that opinion, the Court reiterated its adherence to *Illinois Central. Id.*, 132 S.Ct. at 1235. In short, the U.S. Supreme Court reiterated that there is a recreational component to the public trust doctrine. Further, the Court delineated that the public trust doctrine is founded upon the common law. *Id.* Put plainly, the U.S. Supreme Court has stated that there is a recreational component to the public trust doctrine and that the public trust doctrine's origins are founded in judicial decisions. *Id.*

Nevertheless, the Townships misconstrue the legal argument surrounding this issue. Twp. Br. 13-16. The Townships would propose that this Court once again defer the issue of the recreational use component of the public trust doctrine, irrespective of the persuasive authority found in our sister states, the opinion of the U.S. Supreme Court, or that the public trust doctrine is a creature of the judicial (rather than legislative) branch of government. Dept. Br. pg. 12-13; *PPL Montana*, 132 S.Ct. at 1235.

**a. The Townships' exercise of authority**

The Department does not expect the Townships to improve and maintain every township road. Multiple statutory methods exist for any township to decrease cost and responsibilities for township roads while still providing public access. Conspicuously absent from the Townships' brief is any mention regarding these methods. *See generally*, SDCL 31-18-3 (closing a section-line highway); SDCL 31-13-1.1 (declare a minimum maintenance road); SDCL 31-13-1.4 (declare a no maintenance section line); SDCL 31-13-1.6 (declare a no maintenance road). As trustees in guarding section line rights-of-way, the townships must set aside their personal interests for those of the public because

“[T]he right of travelers to accessible township roads surpasses mere privilege.”

*Willoughby v. Grim*, 1998 S.D. 68, ¶8, 581 N.W.2d 165, 168.

**b. Accessibility of the waters**

**i. Troy Township**

First, it is important to note that the Townships admit that they have deprived access to a public resource in Troy Township. Twp. Br. pg. 18, ¶ 2. Second, as noted in Department’s brief, Welcome Lake is inaccessible. Dept. Br. pg. 13. The southern access of 419<sup>th</sup> Avenue does not run to Welcome Lake, but turns west to a residence after crossing over 152<sup>nd</sup> Street. Third, the Townships admit that without some type of watercraft, Duerre Slough is inaccessible. Twp. Br. pg. 18-19.

**ii. Valley Township**

The primary loss of access in this township occurs with Bohn Slough. Dept. Br. pg. 14. As noted, access to this body of water was vacated in all directions. SR2 Exhibit 4, SR3 Exhibit 3. The testimony of Officer Losco was that he had checked people shore fishing from Bohn Sough’s southern access (424<sup>th</sup> Avenue; a public highway vacated by Valley Township). SR2 T. 61. Moreover, the reliance of the Townships upon Officer Losco’s recollection of “access” is hardly clear. SR2 T. 69. Further, the Department’s May 19, 2014 letter to Valley Township expressed the Department’s objection to any actions by the township to vacate roads providing public access to the waters of South Dakota. SR2 Exhibit 7.

**iii. Butler Township**

As discussed with Valley Township, Butler Township vacated all access to Bohn Slough. SR2 Exhibit 4, SR3 Exhibit 3. Further, the Townships do not dispute that Butler

Township has eliminated public access to a body of water northeast of Bohn Slough.  
Twp. Br. pg. 21; SR3 Exhibit 3.

**3. The circuit court erred by holding that the public interest was better served by vacating the public highways.**

Instead of requiring the Townships to bear the burden of establishing that the public interest was better served by vacating the public highways, the Department was required to prove the contrary. The circuit court erred by holding that the public interest was better served by the Townships vacating the public highways. As noted by the Department, each township vacation proceeding has similar undertones. Each township board was to act in a quasi-judicial function, with the heightened duty of a trustee. Dept. Br. pg. 17-19; *Douville v. Christensen*, 2002 S.D. 33, 641 N.W.2d 651. No petition signers were present at any public hearing to present evidence or voice their support. Dept. Br. pg. 18-19. Further, each township had actual knowledge of persons driving around posted signage to utilize the public highways. *Id.*, SR1 T. 89.

Notwithstanding the above-listed facts and duties, the Townships' attempt to disguise their rationales as focused on "keeping people off of unsafe rights-of-way; and...preserving the Townships' resources for use on [other] roads." Twp. Br. pg. 23. However, a review of the transcripts shows that those rationales were not the driving force behind the Townships' road vacations. Troy Township's rational is best shown by Chairmen Duerre's covetous declaration: "[t]hese are our roads, our land, our fish, and our water and you're not gonna [sic] be using them." Dept. Br. pg. 22; SR1 T. 257.

In Valley Township, Wesley Jensen admitted that he had conversations with other township board members regarding public highway road vacations, and these conversations *were not* concerned with public safety nor the preservation of the

Township's assets. SR2 T. 117. Rather, the conversations show that the real need to vacate these public highways were because people, "block the roads with their vehicles and are careless with their trash." *Id.* Further, Larry Herr admitted that he only walked the roads *after* the August 5, 2014 vacation proceeding. SR2 T. 106. In Butler Township, the roads were vacated because, "someone finally figured out how to do it." Dept. Br. pg. 19. Safety and resources had nothing to do with the Townships' decisions to vacate the public highways. In reality, the Townships simply want any and all South Dakotans to keep clear of this public resource, no matter how it is done.

**4. The circuit court erred by holding that the Townships did not violate the due process rights of the Department and general public.**

The circuit court erred by holding that the Townships did not violate the due process rights of the Department and general public. The circuit court recognized these due process violations. Dept. Br. pgs. 20-25. And while the Townships' attempt to cast a pejorative light on these violations as "scattershot," their left-handed compliment belies the truth: that multiple due process violations occurred that affected not only the Department, but also the general public.

The Department outlined that due process, impartiality, bias, and the remedy therefore, are all applicable to the Townships. Dept. Br. pg. 20. As noted, no petition signers showed up to present evidence at any of the Townships' hearings. Dept. Br. pg. 18-19. If each township is to be impartial and bears the heightened duty of trustee, and if no person showed up to move the public highway vacation petition forward, then how did the petitions prevail? The only logical deduction is that the township board members had more than a probability of bias; they were biased. This runs contrary to the basic requirement of fairness and impartiality. *In Re Murchison*, 349 U.S. 133, 136 (1955).

Another overarching theme within the circuit court's opinions and the Townships' brief is a burden-switching tactic that would relieve the Townships of their duty to comply with plain statutory language. Dept. Br. pgs. 21-24; Twp. Br. pgs. 27-40. The Townships attempt to cast the burden of statutory compliance upon the Department, rather than where it correctly lay.

The circuit court and the Townships opine that it is the Department who needed to present evidence that persons wanted to attend the Townships respective hearings, but were unable to do so. Twp. Br. pgs. 33, 35-36. Again, this places the Townships' burden of statutory compliance upon the Department. Conspicuously absent from the Townships' brief is any legal authority for this concept. By contrast, the plain language of the statutes is mandatory, and the legislature has taken painstaking efforts to avoid any confusion surrounding the word, "shall." Dept. Br. pgs. 21-24; SDCL 2-14-2.1.

Further, the Townships and circuit court assert that the statutory notice requirements were followed by Butler Township. SR3 330; Twp. Br. pg. 35. However, when looking at the deposition transcript of Lori Ash, she was not even sure if her own paper was delivered on a Friday or Saturday, and she certainly did not know when the folks in Webster received their copy. SR4 89. Further, the Township elicited no testimony at trial from Lori Ash indicating that the delivery of the local newspaper occurred the weekend before August 11, 2014. SR3 T. 8-22. Such an assertion hardly rebuts the plain evidence that an August 11, 2014 publication date, and August 11, 2014 meeting, do not follow the statute's mandatory notice requirements. SDCL 31-3-7.

**5. The Townships decisions were arbitrary and capricious.**

The circuit court erred in holding that the Townships' decisions were not arbitrary and capricious. The Department presented this issue thoroughly in its underlying brief. Dept. Br. pgs. 26-31; *Certifiability of Jarmen*, 2015 S.D. 8, 860 N.W.2d 1. To summarize, each Townships' board members drafted the petitions to vacate public highways, utilized strawmen petition signers and circulators, and affirmed under oath that the petition was true prior to any hearings. SR1 T. 157-159; SR2 T. 15; SR3 T. 26-29. The Townships' brief fails to acknowledge the actual oath signed by the township board members. The oath was as follows:

“We, the undersigned, having been first duly sworn, on oath depose and say: That they have read the above and foregoing Petition and know the contents thereof; and that the same is true of their own knowledge, except as to matters therein stated upon information and belief, and as to such matters, they believe the same to be true.”

Nowhere in the oath is it acknowledged, as suggested by Townships, that the board members believed that the people listed did, in fact, sign the petition. A plain reading of the oath shows the Townships' predetermined the outcome of the underlying road vacation proceedings.

Township board member Thad Duerre encapsulates a prime example of arbitrary and capricious governance. Board member Duerre seeks to stop all South Dakotans from accessing and using a public resource. SR1 T. 257. He will block a road with hay bales (illegally) to further this goal. SR1 T. 173. Ominously, board member Duerre has flatly stated that if this process does not work, he will find another way to keep South Dakotans from these waters. SR1 T. 10-11. This arbitrary and capricious governance infected the entire board when board member Duerre put his own driveway onto the petition to vacate public highways. Dept. Br. pg. 27. Rather than calling for conflicts which the remainder

of Troy Township's Board Members *should have* done, they allowed board member Duerre to remain, to place his driveway on the petition to vacate public highways, to vote on the same, and then the board members voted in similar fashion. SR1 T. 189-190. Such bias should neither be tolerated nor sanctioned by this Court.

Valley and Butler Townships likewise engaged in arbitrary and capricious governance. In Valley Township, the board members' concerns were where people parked and what people did with their trash. SR2 T. 117. Butler Township had no metric whatsoever; it simply was content until someone figured out how to vacate the public highways. Dept. Br. pg. 19.

The assertions that these Townships were not arbitrary and capricious in their decision-making process simply falls flat. Plainly put, the Townships want to prevent South Dakotans from accessing and using a public resource. The Townships want to isolate these waters and they seek to do so in any way possible. In this approach, the Townships are legally and governmentally flawed.

## CONCLUSION

The Department incorporates by reference the conclusion and requested relief in Department's brief. Dept. Br. pgs. 31-32.

Dated this 6<sup>th</sup> day of March, 2017.

RESPECTFULLY SUBMITTED:

STATE OF SOUTH DAKOTA, DEPARTMENT  
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**CERTIFICATE OF SERVICE**

