

STATE OF INDIANA

IN THE TIPTON CIRCUIT COURT

SS:

COUNTY OF TIPTON

2019 TERM

KIP BERGMAN, SCOT GASHO,
JANE HARPER, PHILIP OVERDORF,
BRENT SNOW, and GEORGE TEBBE
Petitioners

CAUSE NO. 80C01-1710-MI-340

SPECIAL JUDGE MARK DUDLEY

FILED

v.

MAY 29 2019

BIG CICERO CREEK JOINT DRAINAGE
BOARD

**IN OPEN COURT
CLERK TIPTON C.C.**

Respondent

ORDER AFFIRMING RESPONDENT'S SEPTEMBER 20, 2017 DECISION

INTRODUCTION

The court's presumption is this case arose for two (2) primary reasons. The first is the petitioners, Kip Bergman, Scot Gasho, Jane Harper, Philip Overdorf, Brent Snow and George Tebbe ("Petitioners") disagree with the reconstruction plan adopted by the respondent, Big Cicero Creek Joint Drainage Board ("Board") because they feel very strongly it will not address or alleviate the flooding on Big Cicero Creek and as a corollary to this feeling is that they should not be forced to pay for it. The second reason this case arose is that the Petitioners feel that the Board was not fully transparent with its intentions. The Board's intention, in 2014, was to fund a future reconstruction of Big Cicero Creek via an increased maintenance assessment. The Board adopted a maintenance assessment in 2014 knowing that it was larger than what was needed for annual maintenance. The Board intended to create a surplus over a number of years and then transfer 75% of that surplus to use as a down payment on a partial reconstruction of Big Cicero Creek. The Petitioners, among others, paid the maintenance assessment and the Board received those payments fully intending to use them for reconstruction purposes at a later date. No one asked for judicial review or otherwise appealed the Board's 2014 increased maintenance assessment and the issue of the propriety of that increase is not at issue today. The issue is whether the Board may transfer excess from the maintenance fund to its reconstruction fund. The established statutory scheme allows the collection of up to eight (8) times the estimated annual cost of periodic maintenance of a drain and then later transfer 75% of that excess to a

reconstruction fund. Before setting forth the court's findings of fact and conclusions of law, the court shall detail the standard methods to collect maintenance and reconstruction assessments.

Assessment Collection Methods

In general, a drainage board has two (2) means to get money from landowners. It can levy a maintenance assessment for payment of ongoing maintenance expenses inherent in any drain. The second method is to levy a reconstruction assessment to pay for the reconstruction of a portion of a drain. Conceptually the distinction is maintenance costs are for ongoing obligations and reconstruction costs are for one time or infrequent repair issues. The statutory definitions for maintenance and reconstruction are located at IC 36-9-27-2 which references IC 36-9-27-34. Maintenance is:

c)A regulated drain is in need of periodic maintenance when, with or without the use of mechanical equipment, it can be made to perform the function for which it was designed and constructed, and to properly drain all affected land under current conditions, by periodically:

- (1)Cleaning it;
- (2)Spraying it;
- (3)Removing obstructions from it; and
- (4)Making minor repairs to it.

IC 36-9-27-34(c). Reconstruction is defined as

(b)A regulated drain is in need of reconstruction when:

- (1)It will not perform the function for which it was designed and constructed;
- (2)It no longer conforms to the maps, profiles, and plans prepared at the time when the legal drain was established; or
- (3)Topographical or other changes have made the drain inadequate to properly drain the lands affected without extensive repairs or changes, including:
 - (A)Converting all or part of an open drain to a tiled drain or a tiled drain to an open drain;
 - (B)Adding an open drain to a tiled drain or a tiled drain to an open drain;

- (C) Increasing the size of the tile;
- (D) Deepening or widening an open drain;
- (E) Extending the length of a drain;
- (F) Changing the course of a drain;
- (G) Constructing drainage detention basins and drainage control dams;
- (H) Providing for erosion control and for grade stabilization structures; or
- (I) Making any major change to a drainage system that would be of public utility.

IC 36-9-27-34(b).

The statutory scheme to collect money from landowners is similar for both methods. A board must give public notice, make estimates of costs, allocate these costs to affected landowners, hold a public hearing, hear objections, and then make findings. Any money collected under each method is kept in separate funds. The wrinkle at play here is a drainage board may accumulate an excess in its maintenance account per IC 36-9-27-43, which states as follows:

a) If in any year a maintenance fund established under section 44 [IC 36-9-27-44] of this chapter has an unencumbered balance equal to or greater than four (4) times the estimated annual cost of periodically maintaining the drain for which the fund was established, the annual assessment for the maintenance of that drain may be omitted for that year.

(b) The county drainage board may collect the drain assessment even though the unencumbered balance of the maintenance fund is equal to or greater than four (4) times the estimated annual cost of periodic maintenance of the drain for which the fund was established if the drainage board does the following:

(1) Conducts a public hearing in accordance with section 40 [IC 36-9-27-40] of this chapter.

(2) At the public hearing estimates what the unencumbered balance of the maintenance fund would be, as a multiple of the estimated annual cost of periodic maintenance of the drain, after the collection of the total amount that the board intends to collect in assessments.

However, the annual assessment for the maintenance of the drain shall be omitted if, according to the estimate of the board, the collection of the intended total amount of assessments would increase the unencumbered balance of the maintenance fund to equal or exceed eight (8) times the estimated annual cost of periodic maintenance of the drain for which the fund was established.

If the surveyor reports to the board that the balance in the maintenance fund is in excess of the annual maintenance costs, then the board may transfer up to 75% of the fund to its reconstruction account. IC 36-9-27-45.5 reads:

(a) This section applies when a county surveyor advises the drainage board that in the county surveyor's opinion a maintenance fund has a balance in excess of the amount reasonably needed in that fund for maintenance work in the foreseeable future.

(b) The board may transfer an amount up to a maximum of seventy-five percent (75%) of the money in the maintenance fund to a reconstruction fund that covers the same watershed as the maintenance fund from which the money is transferred.

There is no explicit statutory prohibition for a board to create a maintenance account excess with the intent to fund a future reconstruction project.

FINDINGS OF FACT

Pursuant to IC 36-9-27-14, the court has made the following findings based upon the record before the Big Cicero Creek Joint Drainage Board and filed with the court:

1. The Board was established in 1991 pursuant to IC 36-9-27-14 to govern and regulate the Big Cicero Creek drain, which affected Tipton, Boone, Clinton, and Hamilton counties. The Board regulates and governs no other drains other than the Big Cicero Creek drain. The watershed regulated by the Board consists of 85,341.18 acres, 8,338 parcels and 3,811 lots.
2. On July 23, 2014, the Board held a public meeting at which the surveyors discussed that all the county surveyors agreed for the need to raise the maintenance assessments to up to 8 times the yearly assessment. The Board passed a motion to take the surveyors' report under advisement.
3. On September 17, 2014, the surveyors of Tipton County, Hamilton County, Boone County and Clinton County submitted a report to the Board outlining their request that the Board increase the maintenance assessments as they had

not been raised in twenty-one (21) years and that the solutions for solving issues have outstripped the current maintenance funds and were not adequate to keep up with the maintenance needs of the drain. The surveyors also requested the Board increase the limitation on the maintenance fund to up to 8 times the annual maintenance assessment as allowed in Section 43 of the Indiana Drainage Code as this would allow the Board to utilize maintenance funds to fully pay or partially pay for future reconstruction projects as Section 45.5 of the Drainage Code allowed a transfer of up to 75% of the maintenance fund to pay for reconstruction projects and eliminate assessments for future reconstruction projects on Big Cicero Creek.

4. On October 17, 2014, Notice was sent to landowners stating, in relevant part "You are hereby notified that the maintenance report of the Tipton, Hamilton, Boone & Clinton County Surveyors and the schedule of assessments made by the Big Cicero Creek Drainage Board have been filed and are available for public inspection in the offices of the Tipton, Hamilton, Boone & Clinton County Surveyors." The notice also provided a link to the Surveyors' Report to the Board. The Notice also stated that a public hearing was scheduled for November 19, 2014, on the maintenance report and schedule of assessments.
5. The Board held a public hearing on November 19, 2014, and issued "Written Findings and Order" adopting and approving the maintenance report and schedule of assessments as reported by the County surveyors in their report.
6. The Record of The Big Cicero Creek Joint Drainage Board filed with the court does not contain any evidence that any petition for judicial review was filed following the November 19, 2014 "Written Findings and Order" of the Board adopting and approving the maintenance report.
7. On August 16, 2017, the Tipton County Surveyor submitted a Surveyor's Report for Partial Reconstruction of Big Cicero Creek Open Drain System stating the Board referred the Big Cicero Creek Drain to him for reconstruction and detailed the proposed plan.
8. On September 15, 2017, the Board Secretary executed an affidavit indicating she mailed notices to landowners affected of a hearing to all landowners assessed the Big Cicero Creek Watershed regarding the proposed partial reconstruction. The Secretary also ran a Notice in the newspaper indicating that the reconstruction report of the surveyor and schedule of assessments were available for public inspection.

9. On September 20, 2017, after timely notice to the public regarding reconstruction allocating current and future maintenance assessment, the Board held a public hearing regarding the surveyor's reconstruction report and schedule of assessments for a reconstruction project on the Big Cicero Creek drain.
10. The record indicates that prior to the September 20, 2017 hearing, the Board received 59 written remonstrances to the reconstruction project, representing .003 percent of the lots and 11.31 percent of the total acreage.
11. At the September 20, 2017, public hearing, Board President Mark Heirbrandt announced the Board's intent to educate the public regarding the benefits of the project, stating, in relevant part:

We're going to start this public hearing process with a number of presentations to the Board and to the public, and we thought that this would be a good way to start to provide some education about the process that we went through and the evaluation of the different projects to help to provide the best benefit that we could to the citizens in the watershed.

12. The record reveals the Board had an engineering firm conduct a study, which ultimately proposed a number of reconstruction options the Drainage Board considered. Also, the record reveals that in 2017, the Board ordered an independent study of the reconstruction options and costs. Finally, as revealed in the transcript of the September 20, 2017, public hearing, three (3) experts gave presentations to the Board and public at the September 20, 2017, hearing about the proposed reconstruction project and benefits of the proposed reconstruction. One expert, Jeff Fox of Banning Engineering, spoke at the September 20, 2017, hearing about the benefits of the project, stating, in relevant part:

So, as far as the benefits of the project go, the works are primarily an erosion reduction project. So this is going to be accomplished by reducing the stresses on the bank, flattening the slopes, implementing stabilization measures, reducing scour, and then thus ultimately producing a reduced sediment volume being contributed to the downstream areas, and then also ultimately resulting in lower costs to the Board for maintenance works that will be along this stretch.

Another kind of secondary benefit would be a reduction in flood duration for up to two days, and again, in this particular case it would be an

upstream area. In this particular case we'll see more effective drainage and a reduction to impacts of inundated areas, be they properties or roadway areas.

13. At the conclusion of the September 20, 2017, public hearing, the Board approved and adopted the surveyor's reconstruction findings and proposed a schedule of assessments.
14. On October 10, 2017, the Petitioners timely filed a Petition for Judicial Review of the Board's September 20, 2017 decision. Specifically, in their Verified Petition for Judicial Review, the Petitioners contended:
 - a. The Board should be disbanded;
 - b. The Surveyor has a Conflict of Interest;
 - c. The proposed reconstruction is not practicable and will not benefit the entire watershed;
 - d. The cost, damages, and expense of the proposed reconstruction of the drain will exceed benefits that will result to the assessed owners;
 - e. The proposed reconstruction project will not be of public utility to all the area of land assessed as benefited;
 - f. Landowners were misled by the Board that they would not be assessed for this project;
 - g. Engineering Expenses were paid out of the Maintenance Fund;
 - h. The Board failed to properly classify the drain;
 - i. The assessment amounts were intentionally overstated to accumulate funds for an ulterior use;
 - j. The use of a percentage of the maintenance funds to pay for a reconstruction project is being deliberately misapplied in this case;
 - k. The proposed financing of the project is not in compliance with Indiana Law; and
 - l. The proposed assessment is unfair and contrary to law.
15. On August 21, 2018, the Petitioners filed their Brief and a Supplemental Record of Big Cicero Creek. On October 8, 2018, the Respondents filed their Motion to Strike and a Response Brief. On October 23, 2018, the Petitioners filed their Reply Brief. On January 31, 2019, intervenors, Mark Manier, Jim Mullins, and Dennis Henderson, filed their brief in support of the Petitioners. On February 5, 2019, a hearing was held on the Petitioners' Request for Judicial Review.

CONCLUSIONS OF LAW

Based on the above findings of fact and Indiana law, this court has reached the following conclusions of law:

1. For a court to find that an agency decision is arbitrary and capricious it must find that such decision was "made without any consideration of the facts and lacks any basis that may lead a reasonable person to make the same decision made by the administrative agency. *Indiana-Kentucky Elec. Corp. v. Comm'r, Ind. Dept. of Envtl. Mgmt.*, 820 N.E.2d 771, 776 (Ind. Ct. App. 2005). An agency acts arbitrarily or capriciously if its action constitutes a willful or unreasonable action, without consideration and in disregard of the facts and circumstances of the case, or without some basis that would lead a reasonable and honest person to such action. *Indiana Bd. of Pharmacy v. Crick*, 433 N.E.2d 32, 39 (Ind. Ct. App. 1982).
2. Statutory construction requires when interpreting a statute, to give the words their plain meaning and to consider the statute as a whole. *West v. Office of Indiana Secretary of State*, 54 N.E. 3d, 349 (2016).
3. Additionally, sections of an act should be read together in order that no part is rendered meaningless if it can be harmonized with the remainder of the statute. *City of Carmel v. Steele*, 865 N.E. 2d 612.

Indiana Drainage Law

4. The Indiana Drainage statute, IC 36-9-27-1 to -114 (2007), establishes an extensive and detailed regulatory scheme for addressing drainage issues. *Crowel v. Marshall County Drainage Bd.*, 971 N.E.2d 638, 639-40 (Ind. 2012). It creates a drainage board in each county, IC 36-9-27-4, and gives the board jurisdiction over all regulated drains in the respective county, except as otherwise provided by the statute, IC 36-9-27-15. *Id.* at 640. The Drainage Law vests these boards with comprehensive regulatory authority to construct, reconstruct, and maintain public drains to alleviate problems associated with flooding, wetlands, and other accumulated surface water. IC 36-9-27-38 to -69. *Id.*
5. IC 36-9-27-14 governs the creation of joint drainage boards. In addition subsection (f) of section 14 of the Drainage Law states that a joint board is governed by the powers, duties, and procedures of a board that serves one (1) county; and (2) the rights and remedies of owners affected by the proceedings of a board that serves one (1) county.

6. Pursuant to section 107 of the Drainage Law, the procedure governing judicial review of drainage board decisions depends on the nature of the challenge. *Crowel*, 971 N.E.2d at 652. The statute provides two tracks for judicial review of drainage board decisions. *Id.* at 653. If a petitioner claims that the benefits attributed to his or her land are excessive or that the Board erred in attributing damages, he or she must proceed under subsection (a). *Id.* In a subsection (a) proceeding, the trial court or a jury considers the evidence and determines whether, as a matter of fact, the benefits attributed to the petitioner's property are excessive. *Id.* However, subsection (b) proceedings do not concern the individual plight of the petitioner so much as they concern whether the drainage board complied with the requirements of the statute. *Id.* They are decided solely on the record developed before the drainage board - the trial court does not hear any evidence but simply examines the record, much like an appellate court. *Id.*
7. In this matter, Petitioners have filed their Petition for Judicial Review under subsection (b) of IC 36-9-27-107, that the Board's September 20, 2017 decision was unlawful, and this court entered an order to that effect directing the parties to file the record with the court. Therefore, pursuant to the explicit dictates of IC 36-9-27-107(b), this court may not consider the cause de novo, but shall only consider the cause upon the record made before the board and filed with the court.
8. IC 36-9-27-106, which governs Petitions for Judicial Review of the Drainage Law orders states, in relevant part:
 - (a) Any owner of land affected by a final order or determination of a board is entitled to judicial review of that order or determination in the circuit or superior court of the county in which the board is located. The owner must file in the court a petition:
 - (1) setting out the order or determination complained of; and
 - (2) alleging specifically that the order or determination is arbitrary, capricious, unlawful, or not supported by substantial evidence; and pay the fee required under IC 33-37-4-4. If the order or determination to be appealed was made by a joint board, the petition must be filed in the circuit or superior court of the county that elected the surveyor who serves as an ex officio member of the joint board.
 - (b) A petition for judicial review under subsection (a) must be filed within twenty (20) days after:

- (1) the date of publication of notice by the board that the order or determination has been made; or
- (2) the order or determination was served on the person seeking the judicial review, if the order was served on that person.

Formation of the Big Cicero Creek Drainage Board

9. Petitioners contend that the first formal meeting of the Board took place on October 23, 1991, but the notices required pursuant to IC 36-9-27-14(a) were sent out to the affected counties on August 19, 1991. Therefore, the Board's first meeting took place 35 days after the meeting was required to take place.
10. IC 36-9-27-106, which governs Petitions for Judicial Review, requires Petitions for Judicial Review to be filed within twenty (20) days after the publication of notice by the board that the order or determination has been made.
11. Therefore, pursuant to the Indiana Drainage Law, Petitioners had 20 days after the publication of the October 23, 1991 Order establishing the Board to challenge the Order.
12. Petitioners have failed to present evidence establishing that all Petitioners were unable to timely acquire the notices or challenge the formation Order. Petitioners were able to acquire the notices when seeking them to oppose the September 20, 2017 reconstruction order. Therefore, the court concludes that Petitioners challenge to the Board's formation under the judicial review process is time-barred as Petitioners failed to file a Petition for Judicial Review within 20 days.
13. Furthermore, the Petitioners timely filed their Petition for Judicial Review to challenge the Board's September 20, 2017 Order. Therefore, section 107(b) of the Drainage Law requires this court to consider and determine this cause exclusively upon the record made before the Board and filed with the court. The Petitioners do not allege, nor have they provided any evidence, that these allegedly late notices were provided to the Board at any prior hearing or that they were ever considered by the Board at any point in conjunction with the Board's decision to approve the reconstruction report and scheduled assessments. In fact, the first appearance of these notices in regard to the reconstruction project was in the Petitioners' August 31, 2018, Supplemental Record of the Big Cicero Creek. As these notices were not part of the record before the Board in consideration of the reconstruction project under judicial review, they cannot be considered.

14. In addition to the procedural failures of the Petitioners' argument regarding the formation of the Board, the alleged August 19, 1991 notices filed with the court by the Petitioners in a Supplemental Record of Big Cicero contain hearsay, are uncertified and unauthenticated and are otherwise untrustworthy. As the Indiana Drainage Law does not authorize the parties to conduct discovery, conduct depositions of witnesses, or conduct a trial, in relation to a Petition for Judicial Review based on subsection (b) of a section 107 of the Indiana Drainage Law, these alleged notices cannot be considered as evidence by the court in the context of a Petition for Judicial Review under subsection (b) of section 107 of the Indiana Drainage Law.
15. Even if this court ignored the procedural deficiencies described above with the alleged notices filed with the court, this court finds that Indiana law does not support Petitioner's request to disband the Board 27 years after its creation over allegedly defective notices. Even if true, the Petitioners' claims are barred by the doctrine of laches as Petitioners' 27-year delay in challenging the formation of Board is inexcusable and the Board has operated for 27 years, completing maintenance and reconstruction projects on the drain, collecting maintenance funds, and has entered into a variety of contracts and other obligations such that it would be prejudiced by a disbandment. See *SMDfund, Inc. v. Fort Wayne-Allen County Airport Auth.*, 831 N.E.2d 725, 727 (Ind. 2005),
16. Therefore, this court concludes that Petitioners' contention that the Board was improperly formed due to improper notice is not supported by the record before the court on Petitioners' Petition for Judicial Review and this basis for judicial review is hereby denied.

Surveyor Conflict of Interest

17. Petitioners contend that the Tipton County Surveyor, Jason Henderson, had a conflict of interest due to his status as an "ex officio" member of the Board and his ownership of property in the watershed which rendered the Board's September 20, 2017 decision as arbitrary, capricious, unlawful, or not supported by substantial evidence. The Petitioners contend that due to the surveyor's status as an ex officio member of the Board, he should have recused himself pursuant to subsection 12(b) of the Indiana Drainage Law.
18. The Indiana Drainage Law is careful to refer to the surveyor's role on the board as an "ex officio" member of the board. Every time the surveyor's role on the board is mentioned throughout the Drainage Law, it is referred to as an "ex-

officio" role on the board. Yet, subsection 12(b) does not mention "ex officio" members of the board, only members of the board. This court concludes that if there were no differences between members of the board and "ex officio" members of the board, then the Indiana Drainage Statute would have no need to distinguish the titles as it would be redundant.

19. Furthermore, Subsection 14(b)(3) states that the surveyor in a joint board has the same duties, powers, and responsibilities the county surveyor would have if the proposed reconstruction lays solely within one county. Subsection 5(a), titled "Composition of Boards", states that "the county surveyor serves on the board as an ex officio, nonvoting member."
20. Petitioners failed to present any evidence that the surveyor in this matter actually voted at the Board's September 20, 2017, or that he improperly carried out his duties. Therefore, this court concludes that the surveyor did not have a conflict of interest rendering the Board's September 20, 2017's decision as arbitrary, capricious, unlawful, or not supported by substantial evidence.

Engineering Paid Out of the Maintenance Fund

21. Petitioners contend the Board misused the maintenance fund in violation of Section 45 of the Drainage Statute by paying engineering expenses out of the maintenance fund, rendering its September 20, 2017 decision as arbitrary, capricious, unlawful, or not supported by substantial evidence.
22. Section 45 of the Indiana Drainage Law states, in relevant part:

a maintenance fund established under section 44 of this chapter is subject to the use of the board for the necessary or proper repair, maintenance, study, or evaluation of the particular drain or combination of drains, which may be done whenever the board, upon the recommendation of the county surveyor, finds that it is necessary. The payment for all such maintenance work shall be made out of the appropriate maintenance fund.
23. This court concludes the record before the court demonstrates that the payment of engineering expenses regarding the reconstruction project was necessary for the study or evaluation of the drain, and as the explicit language of section 45 of the Indiana Drainage Law allows maintenance funds to be used for the study or evaluation of drains, the payment of engineering expenses from the maintenance

fund did not render the Board's September 20, 2017's decision as arbitrary, capricious, unlawful, or not supported by substantial evidence.

Classification Of The Drain

24. Petitioners contend the Board failed to classify the drain as in need of Reconstruction as prescribed by IC 36-9-27-34 rendering the Board's September 20, 2017's decision as arbitrary, capricious, unlawful, or not supported by substantial evidence.
25. Subsection (b) of Section 35 of the Indiana Drainage Law states that the Drainage Board may adopt the classifications and order of work priority of the county surveyor or may modify them.
26. The record of the Big Cicero Creek, filed with this court on December 22, 2017, contains the Surveyor's Report, dated August 16, 2017, (Record page 1) over one month prior to the public hearing. The Surveyor's Report states the "Big Cicero Creek Joint Drainage Board, having referred the above stated regulated drain for reconstruction of to me for preparation of the reconstruction report "
27. This record of the Big Cicero Creek demonstrates that the Board referred the drain for reconstruction to the surveyor. As subsection (b) of Section 35 allows the Board to adopt or modify the classification and work priority of the drains, this document indicates the Board properly classified the drain as in need of reconstruction prior to the public hearing. Therefore, this court concludes the Board properly classified the drain in need of reconstruction as prescribed by IC 36-9-27-34 and did not render the Board's September 20, 2017's decision as arbitrary, capricious, unlawful, or not supported by substantial evidence.

2014 Maintenance Assessment Increase

28. Petitioners claim that in 2014, the Board intentionally overstated the cost of periodic maintenance and improperly increased the maintenance assessment in 2014, thereby rendering the Board's September 20, 2017's decision as arbitrary, capricious, unlawful, or not supported by substantial evidence.
29. An examination of the Supplemental Record of the Big Cicero Creek filed by Petitioners reveals that the Board conducted a public hearing on July 23, 2014, at which meeting the Board discussed a maintenance increase. Petitioners admit, and the Supplemental Record of the Big Cicero Creek reveals, that landowners received a notice for the maintenance increase public hearing in 2014 as required by Section 40 of the Indiana Drainage Law.

30. On September 17, 2014, the surveyors of Tipton County, Hamilton County, Boone County and Clinton County submitted a report to the Board outlining their request that the Board increase the maintenance assessments as they had not been raised in twenty-one (21) years and that the solutions for solving issues have outstripped the current maintenance funds and were not adequate to keep up with the maintenance needs of the drain. The surveyors also requested the Board increase the limitation on the maintenance fund up to 8 times the annual maintenance assessment as allowed in Section 43 of the Indiana Drainage Code as this would allow the Board to utilize maintenance funds to fully pay or partially pay for future reconstruction projects as Section 45.5 of the Drainage Code allowed a transfer of up to 75% of the maintenance fund to pay for reconstruction projects and eliminate assessments for future reconstruction projects on Big Cicero Creek.
31. On October 17, 2014, the Record filed with this court indicates Notice was sent to landowners stating, in relevant part "You are hereby notified that the maintenance report of the Tipton, Hamilton, Boone & Clinton County Surveyors and the schedule of assessments made by the Big Cicero Creek Drainage Board have been filed and are available for public inspection in the offices of the Tipton, Hamilton, Boone & Clinton County Surveyors." The notice also provided a website link to the Surveyors' Report to the Board. The Notice also stated that a public hearing was scheduled for November 19, 2014, on the maintenance report and schedule of assessments.
32. The Board held a public hearing on November 19, 2014, and issued "Written Findings and Order" adopting and approving the maintenance report and schedule of assessments as reported by the County surveyors in their report.
33. Therefore, Petitioners' claims that the Board misled the public regarding the 2014 maintenance increase is simply not supported by the record filed with this court. The 2014 Surveyor's Report clearly indicates the reasons for raising the maintenance assessments and its intentions to transfer 75% of the excess maintenance to fund future reconstruction projects and each landowner was notified of the existence and location of the report.
34. However, this court concludes that regardless of the reasons for the 2014 maintenance increase, Subsection (h) of Section 40 of the Indiana Drainage Law states that "if judicial review of the findings and order of the board is not requested under section 106 [IC 36-9-27-106] of this chapter within twenty (20)

days after the date of publication of the notice, the order becomes conclusive." The evidence before the court does not reveal that Petitioners filed for judicial review of the Board's 2014 Order increasing the maintenance assessment at any point prior to this pending Petition for Judicial Review filed in 2017.

35. This court concludes that Petitioners' challenge to the 2014 maintenance increase is an impermissible attempt to collaterally attack the Board's 2014 decision on maintenance assessments. The Indiana Drainage Law explicitly required a Petition for Judicial Review to challenge the 2014 Maintenance Increase Order to be filed within twenty (20) days. As the record reveals that no petition for judicial review was filed in 2014, the Petitioners cannot now challenge the maintenance increase over three (3) years later as the Indiana Drainage Law requires the order to now be "conclusive", regardless of the reasons for the maintenance increase. To hold otherwise would subject the Board's prior orders to endless attacks and contravene the plain language of the Indiana Drainage Law.

Use of Excess Maintenance Funds for Reconstruction

36. Petitioners contend the Board's decision to transfer 75% of the excess maintenance fund to the reconstruction fund to fund the proposed reconstruction was improper, thereby rendering the Board's September 20, 2017, decision as arbitrary, capricious, unlawful, or not supported by substantial evidence.
37. Section 45.5 of the Indiana Drainage Law states:
- (a) This section applies when a county surveyor advises the drainage board that in the county surveyor's opinion a maintenance fund has a balance in excess of the amount reasonably needed in that fund for maintenance work in the foreseeable future.
 - (b) The board may transfer an amount up to a maximum of seventy-five percent (75%) of the money in the maintenance fund to a reconstruction fund that covers the same watershed as the maintenance fund from which the money is transferred.
38. Despite the explicit language of Section 45.5 of the Indiana Drainage Law, Petitioners contend the maintenance fund "was intentionally augmented to create the excess by assessing all landowners in the watershed an amount four (4) times what they had been previously paying" and that "maintenance funds cannot be increased as a plan to use for the cost of a reconstruction." Petitioners

contend the application of Section 45.5 "was only intended when an excess was created by the routine collection of assessments."

39. Petitioners have failed to cite to any authority for these opinions of their interpretation of the legislative intent. Section 45.5 of the Indiana Drainage Law is silent on the reasons a drainage board may have an excess in the maintenance fund.
40. This court concludes that Section 43 of the Drainage Law does reveal the legislature's intent to allow the Board to create an excess in the maintenance fund. Section 43 grants a drainage board discretion in collecting a maintenance assessment even if the assessment would increase the maintenance fund balance to four (4) times the annual cost of periodic maintenance or up to up to eight (8) times the annual cost of periodic maintenance (as long as a public hearing is held).
41. This court concludes that Section 43 of the Indiana Drainage Law demonstrates the legislature's intent to allow a Board to create an excess in the maintenance fund as allowing a drainage board to collect maintenance assessments up to eight (8) times the annual cost of maintenance is necessarily going to create an excess. Petitioners' argument that only maintenance assessment excesses created in the routine collection of assessments were the legislature's intent cannot be squared with this provision of the Drainage Law allowing the Board to increase the maintenance assessment up to (8) times the amount of routine maintenance assessments. Clearly, the legislature was allowing the Board to create substantial maintenance excesses.
42. Since the Indiana legislature also drafted section 45.5 of the Drainage statute, these sections of the Indiana Drainage Law demonstrate the legislature's intent to allow up to 75% of the maintenance fund excess created (by allowing up 8 times of maintenance assessments to be collected) to be transferred to the reconstruction fund. Therefore, this court concludes the Board's transfer of 75% of the maintenance assessments to the reconstruction fund was lawful under the Indiana Drainage Law and it does not render the Board's September 20, 2017, decision as arbitrary, capricious, unlawful, or not supported by substantial evidence.

All Members of the Watershed Would Benefit From the Reconstruction

43. Petitioners contend the proposed reconstruction project will not benefit all landowners in the watershed because the proposed reconstruction is confined to

a geographical area of 13,700 linear feet. Petitioners contend that "it is common sense that property owners upstream from a reconstruction project would not derive any benefit from a reconstruction project that occurs downstream from their property."

44. In *Crowel v. Marshall Cty. Drainage Bd.*, the Marshall County Drainage Board assessed costs to Crowel for the reconstruction of a regulated drain that did not touch his property, and in turn, he timely filed a petition for judicial review. 971 N.E.2d at 641. Crowel's property sat at the high end of the drain's watershed and his property had not flooded in the past. *Id.* Thus, Crowel argued that he would receive absolutely no benefits from the reconstructed drain because his land does not flood. He further argued that the drainage board cannot, as a matter of law, attribute a benefit to his land solely by virtue of the fact that his surface runoff contributes to the flooding of the lowlands and drains into the regulated drain. *Id.* at 633-634.
45. The Indiana Supreme Court, however, rejected Crowel's argument that his land did not benefit from the reconstruction. In so doing, the court reviewed section 50 of the drainage statute, which allows the board to consider the factors contained in section 112 of the Drainage statute. In looking at section 112, the *Crowel* Court determined that the statute contemplates that a parcel of land at the high end of a watershed that has adequate drainage due to natural surface-water runoff can be benefited by the reconstruction of a regulated drain at the lower end of the watershed. *Id.* at 646. The Court reasoned that the fact that the Legislature included the criteria seen in section 112 on the list expresses the Legislature's understanding that all property in a watershed is benefited when a drain serving that area is reconstructed, as well as its intent to spread the assessment across all of those benefited properties. *Id.* The Court concluded that the applicable statutes permit a drainage board to conclude that all landowners whose surface water flows into a regulated drain are benefited by the reconstruction of that drain. *Id.* at 647.
46. Petitioners further contend the Board failed to bring forth evidence of benefits particular to all property owners as required by section 50 of the Drainage code. However, in *Clouse v. Noble County Drainage Bd.*, 809 N.E.2d 849 (Ind. Ct. App. 2004), the Indiana Court of Appeals noted that nothing in section 39 (schedule of assessments) or section 112 (benefits board may consider in determining benefits or damages) of the Drainage statute requires the Board to explain or identify the specific benefits to each acre or tract of affected land. Likewise, this court concludes that the language of section 50 does not require the Board to explain or

identify the specific benefits to each acre or tract of affected land that was considered under section 112 or otherwise.

47. Despite not being required to explain or identify specific benefits, as in Clouse, this court concludes that the Record of the Big Cicero Creek indicates that the Board did carefully consider the options and benefits of the proposed reconstruction. At the September 20, 2017, Board President Mark Heirbrandt opened the public hearing announcing its intent to educate the public regarding the benefits of the project:

We're going to start this public hearing process with a number of presentations to the Board and to the public, and we thought that this would be a good way to start to provide some education about the process that we went through and the evaluation of the different projects to help to provide the best benefit that we could to the citizens in the watershed.

48. Furthermore, the Record reveals that the Board had an engineering firm conduct a large study, which ultimately proposed a large number of reconstruction options the Board considered. Also, in 2017, the Board ordered an independent study of the reconstruction options and costs. Finally, as revealed in the transcript of the September 20, 2017, public hearing, three experts gave presentations to the Board and public at the September 20, 2017, hearing about the proposed reconstruction project and benefits of the proposed reconstruction. One expert, Jeff Fox of Banning Engineering, spoke at the hearing about the benefits of the project, stating among others, in relevant part:

So, as far as the benefits of the project go, the works are primarily an erosion reduction project. So this is going to be accomplished by reducing the stresses on the bank, flattening the slopes, implementing stabilization measures, reducing scour, and then thus ultimately producing a reduced sediment volume being contributed to the downstream areas, and then also ultimately resulting in lower costs to the Board for maintenance works that will be along this stretch.

Another kind of secondary benefit would be a reduction in flood duration for up to two days, and again, in this particular case it would be an upstream area. In this particular case we'll see more effective drainage and a reduction to impacts of inundated areas, be they properties or roadway areas.

49. This court concludes that the reduction in maintenance costs explained by Mr. Fox is a benefit for all landowners, as each landowner pays maintenance assessments used in maintenance projects. Furthermore, Mr. Fox explains the benefits of reduced sediment downstream for landowners. And, as the Court in *Crowel* explains, the drainage board can conclude all landowners upstream whose surface water flows into a regulated drain, and causes the stresses along this stretch where reconstruction is now necessary, are also benefited by the reconstruction of the drain. Therefore, this court concludes that the Board adequately considered and explained the benefits to all property owners in the watershed.

Schedule of Assessments

50. The Indiana Supreme Court has held that "uniform per-acre assessments are not per-se invalid." *Crowel*, 971 N.E.2d at 651. However, here, Petitioners contend that the schedule of assessments prepared by the Board for the reconstruction project was unlawful. Petitioners argue that the landowners were misled by the Board that they would not be assessed for the reconstruction project. Specifically, Petitioners argue that all the landowners were improperly told they would be assessed \$0 for the reconstruction because the Drainage Board planned to fund the reconstructing using excess maintenance funds. Petitioners contend this procedure runs afoul of the requirements of section 50 of the Drainage Statute. Petitioners also argue that uniformly assessing all landowners in the watershed \$0 also runs afoul of Section 50 of the Drainage statute.

51. However, this court, having already determined that the Board was entitled to transfer 75% of the maintenance fund to the reconstruction fund, which would fund the reconstruction, concludes that it was not improper for the Board to provide the landowners with a \$0 assessment.

52. If the Drainage Law allows 75% of the excess maintenance fund to the reconstruction fund, then the Board will necessarily have excess reconstruction funds to expend on a reconstruction. If the Board is required to assess the specific landowner for reconstruction projects, despite the availability of excess reconstruction funds, then the Board's excess reconstruction funds could never be used. This would render Section 45.5 of the Indiana Drainage Law meaningless, a disfavored interpretation of statutes in Indiana. The watershed's landowners were already assessed via the maintenance assessment, whose excess is now being converted to reconstruction funds pursuant to section 45.5 of the Drainage code. Therefore, an additional schedule of assessments for the reconstruction is not necessary or required. Thus, this court concludes that the

Board's \$0 assessment to the landowners for the reconstruction project was not arbitrary, capricious, unlawful, or not supported by substantial evidence.

Financing of the Reconstruction Project

53. Finally, Petitioners argue that the Board's proposed financing of the project is not in compliance with Indiana law. Specifically, the Petitioners argue that if "the Board finds that the amount of a reconstruction project exceeds the amount that the owners can pay over a five (5) years period, then the only recourse is for the Board to resolve to sell bonds per IC 36-9-27-94(a)." Petitioners contend that because this mandatory statutory procedure to sell bonds was not followed, the financing of the project is "totally contradictory to the provisions of the Indiana Drainage Code."

54. IC 36-9-27-94(a) states:

(a) Whenever the board determines by resolution spread upon its minutes that the cost of constructing or reconstructing a particular drain is in excess of that amount that the owners of land to be assessed may conveniently pay in installments over a five (5) year period, it shall authorize the sale of bonds to finance the construction or reconstruction.

55. While Section 94 of the Drainage Statute requires the Board to issue bonds to finance certain reconstruction projects, this section only requires the Board to authorize the sale of bonds when the Board determines that the cost of reconstruction is in excess of the amount that owners of land to be assessed may conveniently pay in installments over a five (5) year period. This court concludes the legislative intent of this section is facially clear. Its purpose is to prevent landowners assessed for a reconstruction project from having outrageously high assessments for an expensive reconstruction project being amortized over a short five-year period.

56. Here, the court concludes the landowners were properly assessed \$0 for the proposed reconstruction due to the unambiguously permissible transfer of excess maintenance funds to the reconstruction to cover the cost of the reconstruction. Therefore, with a proper \$0 assessment to the assessed landowners for the reconstruction, in this case, there was no need for the Board to determine that the assessment was more than the amount the assessed landowners can conveniently pay in installments over a five (5) year period. Consequently, pursuant to section 94 of the Drainage Statute, there was no need for the Board to authorize the sale of bonds to finance the reconstruction.

ALL OF WHICH IS ORDERED THIS 19th DAY of May, 2019.



The Honorable Mark Dudley,
Special Judge, Tipton Circuit Court

Distribution:

Steven Holt
HOLT LEGAL GROUP
198 S. 9th St.
Noblesville, IN 46060

Brian L. Oaks
PO Box 958
515 W. Sycamore St.
Kokomo, IN 46903

Jeffrey Meunier
320 South Rangeline Road
Carmel, IN 46032

E David Coots
James Alex Emerson
255 E. Carmel Dr.
Carmel, IN 46032