

RESOLUTION # 508-01

On this 10th day of August, 2001, at a regular meeting of the Mitchell County Board of Supervisors the following Resolution was presented, moved and seconded and unanimously passed.

* * *

WHEREAS, the Iowa State Highway Commission acquired real property in Mitchell County, Iowa by contract on or about February 28, 1950 from the Danish Evangelical Lutheran Church of America in Section 10, Township 99 North, Range 15 West for the purpose of constructing a north-south state highway (State Highway 312) and the vendor of such property agreed that the Iowa State Highway Commission

“ . . . shall have the right to construct and may maintain an open ditch extending due west from Sta[tion] 176+50± thru the lowest part of the marshy land to the east $\frac{1}{4}$, $\frac{1}{4}$ line of Sec. 10-99-15 thence northwesterly approximately 400 ft. to the outlet in a natural drainage course. Above ditch to be constructed with a bottom width of 6 ft. with 3 to 1 back slopes on the banks. The [Iowa State Highway Commission] agrees to grade down the banks of the ditch to afford crossing same in location agreed upon between the [vendor] and the Engineer in charge of construction. It is further agreed that soil unfit for use in the highway grade will be wasted by spreading same over a low area approximately 600 ft. south of said ditch, as designated by the [vendor].” and

WHEREAS, thereafter, the Iowa State Highway Commission constructed State Highway 312 (a) having a right of way width of 120 feet with one-half thereof acquired by easement on the east and west sides from the centerline of such road by the respective owners thereof, (b) constructed a culvert underlying such road draining real property to the east underneath such road then westerly, (c) constructed the open ditch under the Contract of February 28, 1950 in conformity to the requirements thereof, all of such construction being completed as of December 22, 1953; and

WHEREAS, thereafter, Marvin Fisher and Doris Fisher, acquired that real property west of State Highway 312 and containing the open ditch constructed by the Iowa State Highway Commission on or before

December 22, 1953 by Warranty Deed dated March 10, 1960, "(Subject to drainage ditch easement)"; and

WHEREAS, the Iowa Department of Transportation, successor to the Iowa State Highway Commission, conveyed to Mitchell County, Iowa, State Highway 312, including the open ditch it had constructed across the real property of Marvin and Doris Fisher under the Contract of February 28, 1950, by Quit-Claim Deed on December 15, 1980 and such road is now known as "Walnut Avenue"; and

WHEREAS, Deo A. Koenigs and Joan M. Koenigs acquired by Warranty Deed of February 25, 1985 that real property lying to the east of State Highway 312 or Walnut Avenue conveyed to Mitchell County, Iowa on December 15, 1980; and

WHEREAS, the real estate presently owned by Deo A. and Joan M. Koenigs is land which is higher elevated and drains through the culvert constructed by the Iowa State Highway Commission underlying State Highway 312 then draining westerly through the drainage ditch similarly constructed by the Iowa State Highway Commission on real estate now owned by Marvin and Doris Fisher; and

WHEREAS, the drainage ditch on the real estate of Marvin and Doris Fisher has become plugged-up by accumulation of natural sedimentation accelerated by the growth of trees in such ditch since such ditch was constructed in late 1953, which has never been maintained by anyone since 1953; all of which Deo and Joan Koenigs claim, as owners of their real property, has caused ponding of water to occur with associated loss of crops; and

WHEREAS, Deo Koenigs, but not Joan Koenigs, commenced action against the Mitchell County Board of Supervisors in the Mitchell County District Court, Law Number LACV014045-1200 on December 22, 2000 claiming, *inter alia*, that the ownership in Mitchell County of the drainage easement in the ditch running westerly across the real estate of Marvin and Doris Fisher carried with it an asserted obligation to maintain and clean such ditch and remove obstructions in it for the benefit of Koenigs; and

WHEREAS, assuming that the rights acquired by Mitchell County, Iowa from the Iowa Department of Transportation under the deed of December

15, 1980 in the drainage ditch running across the Fisher real estate amount to a drainage easement in Mitchell County, Iowa, such "easement" was originally acquired for roadway construction purposes and is now owned by Mitchell County, Iowa only for roadway maintenance purposes; and

WHEREAS, after consultation with the Mitchell County Engineer it has been determined that, for roadway maintenance purposes, Mitchell County requires ownership, whether by easement or contract, of only that real property lying fully within the 120 feet right of way of Walnut Avenue as its secondary road and has never required for roadway maintenance purposes any of the easement remaining in the ditch on Fisher real estate west of 60 feet west of the centerline of Walnut Avenue; and

WHEREAS, the purpose of the Resolution is to divest Mitchell County, Iowa of any ditch "easement" ownership across the real property of Marvin and Doris Fisher so as to terminate any controversy that Mitchell County is duty bound, as owner, to clean that ditch for the benefit of dominant or subservient estate riparian owners; to terminate past, present and future claims and assertions that Mitchell County is liable in damages to dominant or subservient estate riparian owners for failure to clean, maintain or restore such ditch to that of its original construction on or before December 22, 1953; to avoid the continuing costs associated with the above referenced litigation; and to permit the dominant riparian owners (Koenigs) to deal directly and adjust their riparian rights with the subservient riparian owners (Fishers); and

WHEREAS, Iowa Code Section 306.10 (2001) grants the power to Mitchell County, Iowa on its own motion regarding its secondary road system to alter, vacate and close secondary roads or parts thereof and Iowa Code Section 306.11 specifies that

“(i)f the proposed vacation is of part of a road right-of-way held by easement and will not change the existing traveled portion of the road or deny access to the road by adjoining landowners, a hearing is not required.”

regarding vacation of such roadway easement; and

WHEREAS, the proposed vacation of Mitchell County, Iowa's assumed easement beginning at the western right of way line of Walnut Avenue and

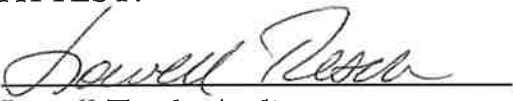
proceeding westerly across the real estate of Marvin and Doris Fisher does not involve a change of the existing traveled portion of the road nor will it deny access to the road by any adjoining landowner;

NOW, THEREFORE, BE IT HEREBY RESOLVED that Mitchell County, Iowa hereby voluntarily abandons, vacates and relinquishes all of its right, title and interest in and to a certain easement of record beginning at the westerly most right-of-way boundary of Mitchell County Road known Walnut Avenue, a boundary shared in common with Marvin and Doris Fisher, thence proceeding westerly all as more specifically set forth in that certain contract of February 28, 1950.


Chairperson, Board of Supervisors

MITCHELL COUNTY

ATTEST:


Lowell Tesch, Auditor

I, Lowell Tesch, Auditor in
and for Mitchell County, Iowa,
do certify the above to be a true
and exact copy of a resolution
passed and approved by the Board
of Supervisors of Mitchell County,
Iowa, at its meeting on

August 10, 2001


Lowell Tesch, Auditor