

MINUTES FOR MARCH 14, 2011
COLUMBUS, KANSAS, CHEROKEE COUNTY
OFFICE OF THE COUNTY CLERK
CRYSTAL L. GATEWOOD

The Cherokee County Commissioners met March 14, 2011. Commissioners Collins, Garner, and Hilderbrand were present. The Pledge of Allegiance was said by all. Commissioner Collins made a motion to approve the minutes as presented by County Clerk Gatewood for March 7, 2011; his motion was seconded by Commissioner Hilderbrand with Commissioners Garner, Collins, and Hilderbrand voting in favor. Commissioners Garner, Collins, Hilderbrand, and County Clerk Crystal Gatewood signed off on the approved meeting minutes. Commissioner Garner made a motion to approve and pay March 2011 Mid-Month Accounts Payables, his motion was seconded by Commissioner Hilderbrand; with Commissioners Garner, Collins, and Hilderbrand voting in favor. Commissioners Collins, Garner, Hilderbrand, and County Clerk Crystal Gatewood signed off on the documentation.

EXECUTIVE SESSIONS CALLED BY COMMISSION

Commissioner Hilderbrand made a motion to go into **Executive Session for twenty minutes for Attorney/Client Privilege** with himself, Commissioners Collins, Garner, and County Counselor Kevin Cure; his motion was seconded by Commissioner Collins, with Commissioners Collins, Garner, and Hilderbrand voting in favor. They went in at 10:23 AM and returned at 10:48 AM.

MOTIONS MADE BY COMMISSION

Commissioner Garner made a motion to take a break at 9:45 AM; his motion was seconded by Commissioner Collins; with Commissioners Hilderbrand, Collins, and Garner voting in favor. The commission resumed the meeting at 10:05 AM.

Commissioner Collins made a motion to recess for lunch; his motion was seconded by Commissioner Hilderbrand; with Commissioners Collins, Garner, and Hilderbrand voting in favor.

Commissioner Hilderbrand made a motion to amend the February 28, 2011 minutes with a written statement by Register of Deeds Christy Grant, his motion died for a lack of a second.

Commissioner Garner made a motion to attach a portion of Deputy Paula Cheney's hand written minutes regarding the Register of Deeds' statement to the February 28, 2011 minutes; his motion was seconded by Commissioner Hilderbrand; with Commissioners Garner, Hilderbrand, and Collins voting in favor.

Commissioner Collins made a motion regarding the negotiations for the decision by the commission for the fence viewing, with Bob Lucian paying \$2,100.00 for the bulldozing of trees and the five strand fence and materials requested by John Gaither. Both parties will continue hereafter to maintain their sides of the fence located 3 ½ miles West on Highway 160 and Highway 7; as approved by the findings from County Counselor Kevin Cure; his motion was seconded by Commissioner Garner; with Commissioners Garner, Collins, and Hilderbrand voting in favor.

OTHER BUSINESS

Raymond Griffith came before the commission to discuss a personal property problem. Mr. Griffith said he would get back with the clerk.

Road and Bridge Supervisor Leonard Vanatta and Gene Langerot and updated the commission on general road, bridge, and county maintenance.

Brenda Clugston of the Cherokee County Health Department brought yearly grant paperwork which Cherokee County Chairman Jack Garner signed off on for the year. She also submitted voucher #5099 to Proc CT for two computers to be purchased by the Health Department for the amount of \$2,076.00. Commissioners Garner, Hilderbrand, and Collins signed off on the voucher.

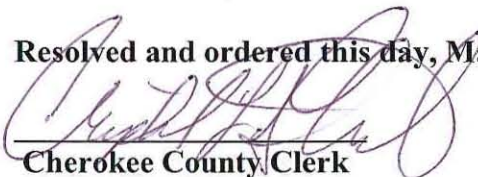
The Fence Viewing Hearing was held with the following individuals present for the discussion with the Commissioners and County Counselor Kevin Cure: Janice, Jim and John Gaither, Attorney Larry Prauser, and Jim Lucian. Attached to the minutes is the determination of costs and procedures developed by County Counselor Kevin Cure and Attorney Larry Prauser and those present for the discussion.

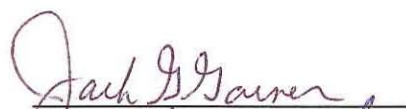
Commissioner Garner postponed the discussion involving the county pay plan, pay scale and the Business License Resolution until next week.

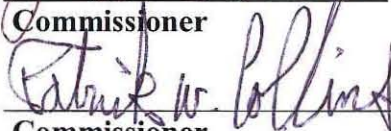
ADJOURNMENT

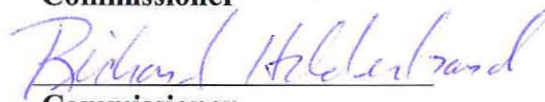
Commissioner Garner made a motion to adjourn at 1:53PM; his motion was seconded by Commissioner Collins with Commissioners Garner, Collins, and Hilderbrand voting in favor. The next Cherokee County Commission meeting will be held March 21, 2011 at 9:00 AM in the Cherokee County Courthouse in Columbus, Kansas.

Resolved and ordered this day, March 21, 2011


Cherokee County Clerk


Commissioner


Commissioner


Commissioner

To Commissioners – Log of March 7-11, 2011

Monday, March 7, 2011. I received a phone call from the Cherokee County Clerk's office. The call was made on behalf of the Cherokee County Commissioners. The call indicated that I should be available Monday, March 14, 2011 for a conference with Commissioners. The notice indicated that the conference was intended to discuss the recent Fence Viewings involving my property. *I have since learned that there may have been as many as three other fence viewings of my property. I was never informed of the viewings prior to their occurrence. I had been informed via letter from Mr. Kevin Cure on January 10, 2011 that a fence viewing had occurred apparently on December 13, 2010. That was the first time that I had been notified of the Viewing. I had never heard of a second Viewing that perhaps took place in January, 2011.* I asked the Clerk's office to relay a request to the Commissioners to request a rescheduling of the proposed March 14, 2011 meeting. As my wife has serious health issues (MS, Lupus, other) that require us to be in Houston next week, I would not be available March 14. The County Clerks office kindly indicated that they would relay my message, and that I would receive a return call.

Tuesday, March 8, 2011. At about 4:30 p.m., I called the County Clerks office. I was informed that the Commissioners had asked the County Clerk's office to contact Mr. Kevin Cure. Mr. Cure would handle my request. I was told that the Clerk's office had made that contact. It was my understanding that Mr. Cure would advise the County Clerk's office by noon on March 9, 2011 of a decision regarding my request.

Wednesday, March 9, 2011. About 4:00 p.m., I called the County Clerk's office. I was informed that Mr. Cure had not returned phone calls regarding my request for rescheduling the March 14, 2011 meeting. At about 4:40 p.m., I called Mr. Cure's office, and was told that he had left the office for the rest of the day. I indicated my need to speak with him as soon as possible. I indicated that I would be out of the office for medical appointments between 9 a.m. – 1:30 p.m. on Thursday, but would otherwise be available.

Thursday, March 10, 2011. I called the County Clerk's office at about 4:45 p.m. to check on a response from Mr. Cure. He had not returned a call to the County Clerk, nor had he returned a call to me. I quickly called Mr. Cure's office. There was no answer. I left another message regarding the fact that I would not be available Monday, March 11, 2011, and repeated my medical reasons. In my message, I requested a meeting with the Commissioners prior to the proposed meeting. I first wanted a telephone conference without Mr. Gaither or his legal representative, as I knew that Mr. Gaither had met multiple times with the Commissioners without my presence. My request seems to me not to be unreasonable. As of March 10, 2011, and beginning with my receipt on January 12, 2011 of Mr. Cure's January 10, 2011 letter, I have never received a phone call from Commissioners. This is spite of the fact that I had left numerous phone mail messages with either Mr. Cure or the Commissioners. Mr. Cure's letter of January 10, 2011 had invited me to discuss questions and concerns regarding a specific proposal, and asked that I respond to Mr. Cure by Friday, January 21, 2011. Mr. Cure's offer had apparently not been a serious invitation. On Friday, January 21, 2011, unable to discuss my concerns with anyone representing the Commissioners, I faxed a letter to Mr. Cure's office rejecting their proposal. As soon as I sent my fax to Mr. Cure, I called Mr. Cure's office. The phone was answered by a lady who verified that my fax had been received.

I had not heard anything further from the Commissioners or Mr. Cure between January 21 and March 7, prior to the afternoon conversation with the County Clerk's office. As of that time, I had not been contacted by phone or by anyone representing the County Commissioners Fence Viewings. I remain concerned that no one has allowed me to discuss my issues, yet the Commissioners appeared ready to perhaps make a decision regarding my fencing issue on March 14, 2011. My brother, James Lucian, was contacted the morning of the March 7, 2011 fence viewing, although the fence viewing had apparently been

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scheduled one week earlier. I was not contacted, and my brother does not represent me by default, as may have been incorrectly assumed.

Thursday, March 10, 2011. I attempted to contact Commissioners individually, and also Mr. Cure. I was unable to leave a message with Mr. Hilderbrand, but did leave messages with Commissioners Garner and Collins, and Mr. Cure. Prior to 9 p.m., I received a cell phone call from Mr. Garner, who was calling from out of town. I expressed my concerns regarding the proposed March 14 meeting. I indicated that I understood that Mr. Cure had been asked to handle my request, but that I had heard nothing. I mentioned my request for a phone conference with the Commissioners, without Mr. Gaither or his attorney. Repeating a comment from earlier in this log, I had not been invited to previous meetings/fence viewings with the Commissioners, which were presumably initiated by Mr. Gaither's interests. I gave Mr. Garner a few of my concerns that I wished to discuss with the Commissioners. I indicated that I had other concerns and would discuss those when it was more convenient to Mr. Garner. Mr. Garner indicated that he would have me discuss my request with Mr. Cure, and that he would contact Mr. Cure. He would request Mr. Cure to call me at noon, March 11, 2011.

Friday, March 11, 2011. I learned that Mr. Cure has indicated that not only will there be a decision regarding fencing responsibilities, but that the Commission can control removal of trees. Removal of those trees could result in economic damages to my property. I HAVE NOT, AND WILL NOT, ever agree to removal of those trees. As I mentioned to Mr. Garner, any required fencing can be attached to those trees, and there is no need for their removal.

It is now almost 4:00 p.m. on the afternoon of March 11, 2011. I have not yet heard from Mr. Cure. I did receive a call in the last hour from Mr. Collins office. That call acknowledged receipt of my March 10, 2011 phone message. Mr. Collins himself would not be available until Monday, March 14, 2011. I am faxing this document to the County Clerk's office, to be given to the Commissioners. I want this letter to document the fact that I feel that as of this date, I have been denied the right to a fair discussion with the Commissioners regarding my concerns. I am also concerned that because Mr. Cure refuses to have discussions with me, he in fact may have already aligned with Mr. Gaither.

As a last note, I am aware of the difficulty facing the Commissioners regarding this fence issue. There seems to be few cases in the state of Kansas that have attempted to invoke the Kansas Fence Law. The Law itself seems to invoke multiple, vague and inconsistent interpretations. I personally find it difficult to understand that someone wanting to install a fence for their sole, personal gain, actually expects someone to share their cost without receiving any benefit in return. I also personally don't believe that the Kansas Fence Law ever intended to penalize the objecting party to a future economic loss.

On a positive note, I am encouraged by Mr. Garner's phone call last night. I truly appreciate finally having the opportunity to let someone know that there are two sides to the Fencing issue.

Respectfully,



Robert J. Lucian

Proposed written version of findings for review and approval by the County Commission on March 21, 2010.

On March 7, 2011, the Board of County commissioners of Cherokee County Kansas, met at a location approximately 3 to 4 miles west of the intersection of Highway 7 and Highway 160 in Cherokee County, Kansas. Present were Commissioners Collins, Hilderbrand, and Garner. Also present were John Gaither, who appeared with his counsel Larry Prauser, and Jim Lucian, brother of Robert Lucian, speaking on behalf of the interest of Robert Lucian.

The property is more specifically described as all of the North and South common boundary between land owned by John Gaither adjoining the common boundary on its West side and Robert Lucian who owns the land adjoining the common boundary on its East side, with Mr. Lucian's land being legally described as the SE Quarter of Section 9, Township 33, Range 23 East, Cherokee County, Kansas, and Mr. Gaither's land being described as the East half of the Southwest Quarter of Section 9, Township 33, Range 23 East, Cherokee County, Kansas. The deeds of record that have conveyed the lands described herein to their respective owners shall be attached to these findings and incorporated by reference as though fully set forth herein.

The County Commissioners in performing its duties as fence viewers under the Kansas statutes then reviewed the entire fence line described above. It also solicited at length the input of Jim Lucian and John Gaither.

The parties present stipulated to the following:

1. There is no oral agreement, nor written agreement, recorded in the Register of Deeds Office, that describes the duties of the respective landowners to maintain the subject fence.
2. The South half of the fence runs along the common boundary of the parties and has been recently installed and paid for solely by John Gaither without contribution from Robert Lucian.
3. That farming operations are performed by Robert Lucian, or his lessee, on his property.
4. That farming operations are performed by John Gaither on his property.
5. The land of John Gaither and Robert Lucian is not used in common between them.
6. The parties cannot come to an agreement as to how to handle the sharing of responsibilities with respect to the fence that John Gaither has proposed to build.
7. The fence traces, for the most part, the common boundary of Robert Lucian and John Gaither at the above described location.

The County Commissioners observed and found the following additional conditions to exist:

1. The South half of the fence along the common boundary is a sufficient fence meeting at least the minimum requirements of Kansas law.

2. The North half of the fence along the common boundary is not a sufficient fence meeting at least the minimum requirements of Kansas law. This fence is built along a hedgerow, has insufficient height, insufficient strands of fencing, does not exist in some places, and does not always trace the North half of the aforesaid common boundary without significant variation.

3. Jim Lucian stated that he hunts on his property, is concerned about erosion if the hedgerow along the common boundary is removed, conducts farming operations on this property, and has Walnut trees that would lose protection from strong winds if the hedgerow is removed to construct the fence, and the trees along the fence row have their own value.

4. John Gaither announced that he wishes to conduct cattle operations in his subject property and that enclosure with a sufficient fence is needed.

5. There is a need to remove the hedgerow along the common boundary so that a sufficient fence can be constructed on the North half of the common boundary. The current fence is not kept in good repair, and the parties have not otherwise agreed to not keep it in good repair.

6. Robert Lucian's land sharing the common boundary is not otherwise fenced on its other boundaries that are not the common fence of Robert Lucian and John Gaither.

7. John Gaither's land sharing the common boundary is otherwise fenced on its other boundaries that are not the common boundary of Robert Lucian and John Gaither.

8. K.S.A. 29-309 requires Robert Lucian to contribute to the partition fence as he uses his land otherwise than in common. Robert Lucian conducts farming operations on his property herein.

9. That John Gaither's proposal for a new fence to be constructed upon the common boundary is as stated in a letter written by Kevin Cure, legal counsel to the Board of County Commissioners, dated January 10, 2011, that was previously provided to Robert Lucian and to which Robert Lucian rejected the proposal. This letter is incorporated into these findings as though fully set forth herein.

10. That John Gaither shall be responsible for the maintenance of the recently constructed fence along the South half of the aforesaid common boundary. That such fence is sufficient in its current state.

11. That Robert Lucian shall be responsible for the maintenance of a sufficient fence along the North half of the aforesaid common boundary as such fence is not sufficient in its current state.

12. It is unlikely that Robert Lucian would promptly commence and complete the maintenance of the portion of the fence along the common boundary assigned to him as aforesaid based upon previous history of dealings concerning this controversy between adjoining landowners.

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Cure Law Office

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13. That John Gaither shall commence and perform with due diligence the removal of the hedgerow along the common boundary, and replace the remnants of the existing partition fence, with a new fence of the quality as stated in the aforementioned January 10, 2011, letter. Mr. Gaither shall also place one-half of the trees removed on each side of the common boundary.

14. The actual costs to be assigned to Robert Lucian of such removal of the hedgerow and construction of the new fence shall not exceed the following: bulldozing costs of \$600.00, material of \$900.00, and labor to construct the fence of \$600.00. Any excess costs shall be paid for by John Gaither over the said sums. The actual cost to be assigned to Robert Lucian, as aforesaid, shall become a lien against the property on the West side of the aforementioned common boundary until satisfied.

15. Thereafter, any owner of the East half of the land along the common boundary shall be responsible for the maintenance of the North half of the aforesaid fence.

16. Thereafter, any owner of the West half of the land along the common boundary shall be responsible for the maintenance of the South half of the aforesaid fence.

On March 14, 2011, the Board met in regular session, and after considering all the information provided to it determine the actual findings shall become its order, in full. The Board also found these findings shall be recorded in the Office of the Register of Deeds of Cherokee County, Kansas.