A wave of new legislation to hold back future flooding

"The roar of the crevasse drowned all sound. It carried up and down the river for miles and carried inland for miles. It roared like some great wild beast proclaiming its dominance. Men more miles away felt the levee vibrate under their feet and feared for their own lives."

This year marks the 90th anniversary of the Great Flood of 1927. After months of intense rains throughout the Mississippi River drainage basin, which covers a significant portion of the United States, the Mississippi and its tributaries were swollen with more water than they had ever before carried. In April that year, after several more inches of rain, Arkansas received the brunt of the cataclysmic flood waters, as levees were breached all along the White River and the Arkansas River, spilling as much as 15 feet of water across 2 million acres of land. More than 350,000 Arkansans were affected by the inundation.

There has not been a flood near the same magnitude in the Mississippi River Valley since the devastating 1927 flood, but there have been several floods in recent years that have nevertheless been destructive. Just this year storms in late April dumped several inches of rain in Arkansas, ultimately causing the flooding of nearly 1 million acres of farmland, taking nine lives statewide, and costing more than $13 million in damage across the state. The Black River in particular crested at almost 29 feet and broke through nine sections of the Running Water levee near Pocahontas, inundating the surrounding area.

Levees provide the main method of flood control in Arkansas and the rest of the Mississippi River Valley. Levees are typically mounds of earth built upon either bank of a river to help contain the river during a flood event. The use of levees to control flooding dates back thousands of years: "Babylonians leveed the Euphrates. Rome leveed the Tiber and Po." In the 1700s, Europeans built levees along the Danube, the Rhine, and the Volga, among others. The use of levees in the Mississippi River Valley became widespread in the 1800s. By 1858, there were more than 1,000 miles of levees along both sides of the Mississippi River, some as high as 38 feet. As levees were being constructed, levee districts were formed to manage them. As witnessed during the epic 1927 flood and during the many floods Arkansans have observed since then, problems occur when the levees are not able to withstand the rising flood waters.

How Levees Break and How They Can Be Fixed

There are four primary ways levees may fail: seepage, instability, erosion, and deficient height. Seepage occurs when water saturates the levee and slowly works its way to the other side, through the levee's foundation. The flow of the water seeping through the foundation typically gets wider and stronger until an entire section of a levee gives way. A break in the stability of the levee occurs when the pressure of the water against the levee is so great that part of the levee sloughs off into the water. Erosion happens over time as the river current scours away the foundation of the levee, weakening it to the point of collapse. Deficient height means the water level rises higher than the levee was built to withstand and simply pours over the top of the levee.

To prevent or mitigate levee failure, levees require a certain amount of maintenance and repair over time. The U.S. Army Corps of Engineers (USACE) has come up with different solutions for each type of levee failure. If a levee is failing because of seepage, USACE recommends constructing a seepage cutoff wall, which requires digging a deep trench in the middle of the levee and filling it with clay, concrete, or some other type of impermeable layer to stop the flow of water. If a levee is suffering because of a break in the stability, USACE says it is best to build the levee wider and flatter to fortify its structure. If the foundation of the levee is eroding, USACE suggests adding a layer of rock or concrete to the foundation to prevent the river from washing it away. If a levee has a deficient height, USACE advises building the levee higher or installing a flood wall at its apex.

The Nature of the Problem in Arkansas

Sometimes local officials and levee districts can do everything right to maintain their levees, but Mother Nature overcomes their efforts. The 8.7-mile Running Water levee system near Pocahontas was constructed in the early 1900s by USACE. In the 1930s, USACE turned maintenance of the levee over to a local levee district. In the 1960s, however, the levee district disbanded, and the levee fell into disrepair. After more than 40 years of no maintenance on the levee, the levee district was re-formed in late 2010. The new levee district took out a $1.2 million loan and assessed residents 50 cents per acre to help cover the cost of rebuilding the levee to its original, post-1927 flood design, at 28 feet. As the

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rains saturated Arkansas' rivers and streams last spring, the flood waters rose to record levels, and the Black River crested at 28.95 feet, topping the Running Water levee. This year's flood simply exceeded anyone's expectations.

The problems facing levee districts in Arkansas are not limited to levee failure and lack of levee maintenance, the problem extends to the fact that no one in Arkansas knows how many levees or levee districts there are and where they may be located.

It is virtually impossible to determine the exact number of levees and levee districts in Arkansas. Levee districts can be created in a myriad of ways. They can be established by special legislative act, by authority granted to cities and counties in general laws, and by court order or private individuals. The patchwork nature of these laws makes it difficult to know when, where, and under what legal authority the levee district was formed. Over time, just like the Running Water levee district, the original members dispersed, retired, or passed away. However, unlike the Running Water levee district, most of the time the vacancies were never filled and, once disbanded, the districts were never re-formed. Records from these levee districts are likely packed away in boxes or filing cabinets, lost, or were never filed in the first place. Without anyone to maintain the levees, the levees themselves have become overgrown, been destroyed by animal burrowing, or been concealed by new construction development.

Given the confusion surrounding how many levees there are, it should come as no surprise that more than half of Arkansas' levees have been rated "unacceptable" by USACE. People often do not realize the importance of levees and levee districts until they are desperate for help because their homes and farms are under water. Several major floods in recent years have contributed to a wave of new legislation designed to improve levee maintenance and levee district management. In fact, four bills have been passed since 2009 to establish a better system of safeguards for levee districts.

Levee District Reporting Requirements

Act 386 of 2009 requires levee districts to file reports with the county clerk. The initial report must include the name of the district; the date it was formed; the legal authority under which it was formed; a description of the district and a map of its boundaries; a map of the parcels of property located within the district; the names, addresses, and terms of the board members; vacancies on the board; and future meeting dates and times. By December 31 every year after the initial reports have been filed, levee districts are required to file less-extensive reports updating information about the current board members, any board vacancies, and meeting information.

Act 7 of the Third Extraordinary Session of 2016 added that county clerks are required to forward all such levee district reports to the Arkansas Natural Resources Commission (ANRC), which is responsible for managing and conserving the state's water resources, including flood control.

Improvement District Reporting Requirements

Act 210 of 2011 created another set of reporting requirements for levee districts. Whereas the 2009 act applied exclusively to levee districts, the 2011 act applies broadly to "all improvement or protection districts organized under Arkansas law that use the county collector for collection of ... assessments." The report must include a host of financial data, including the details of any contracts, outstanding indebtedness, and a statement of income and expenditures, and the report must be filed with the county clerk.

FOIA

Act 210 also made improvement districts explicitly subject to the Freedom of Information Act (FOIA). The provision adds "improvement district" to the list of agencies for which records are subject to disclosure to the public.

County Clerks' Reporting Duties and Publishing Requirements RE: Vacancies

If there is a vacancy on a levee board, which should be indicated in the levee board's annual reports, Act 386 and Act 7 require the county clerk to send notice to the members of the board and the county court. The clerk must also publish notice of the vacancy in a newspaper of general circulation in the county and on a county-owned or affiliated website.

If the report filed by the levee district indicates there has been a continuing vacancy, a position that remains open in consecutive reports, the county court has to hold a public hearing to fill the vacancy.

Act 7 eliminated county clerks' duty to send notice of levee board vacancies to prosecuting attorneys, and in doing so, it also got rid of prosecuting attorneys' role in investigating and filling vacancies.

Instead, county clerks must now send notice of continuing vacancies to county judges. County judges then determine the existence of the vacancy, conduct a public hearing, and enter a county order reflecting the majority vote of the landowners to fill the vacancy. The county judge may assess the district fines for any violations of these statutes and to recoup the costs of publishing the notices.

County Judges' Procedures for Audits and Filling Vacancies under Act 623

This year the legislature approved a bill that seeks to provide an even greater number of safeguards for levee districts than previous legislation. Act 623 of 2017 gives mayors and county judges the authority to do something if the levee dis-

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trict provides insufficient financial information to the public, has vacancies on its board, or is not conducting its meetings in a central and convenient location. This act applies generally to all types of improvement districts, not just to levee districts alone, and it hinges on participation from the public. In most instances, a county judge or a mayor may not act without members of the public taking the first step.

Audits

Under Act 623, a county judge may order an independent audit to be conducted of a levee district's financial situation. First, members of the public have to make a valid FOIA request for financial information from the levee district. If the information from the levee district is substantially insufficient, then at least 10 percent of the property owners in the levee district can submit a petition and an affidavit to the county judge concerning the levee district's financial affairs and showing that the information is substantially insufficient.

Upon presentation of the petition and affidavit, the county judge directs the district to comply with the FOIA request for the levee district's financial data. If within 30 days the levee board does not provide the financial data or responds that no such information exists, the county judge may then order an independent audit. The levee district is responsible for the cost of the audit.

> In the event that all of the positions on the levee board are vacant and no interested property owner is willing to serve as a board member, the county judge shall appoint an administrator to act in the place of the board.

Meeting Location

Levee district meetings are required to be held in a central and convenient location in the county where the levee district is based. If 10 percent or more of the property owners petition the county judge to do so, the county judge shall determine the meeting location.

Vacancy

Act 623 offers two alternative methods of filling vacancies in addition to the process triggered by the reporting requirements under Act 7 described above. In the event of a vacancy under Act 623, a county judge may appoint a replacement commissioner by petition of the property owners or by acting "on his or her own accord."

The petition method operates much like the reporting requirements under Act 7. A county judge does not act to fill the vacancy on a levee board until he or she receives a petition by at least 10 percent of the landowners in the levee district alleging that the levee board itself has failed to fill the position.

The method permitting a county judge to appoint someone to fill a vacancy by acting "on his or her own accord," is a fall-back provision, and should only be used by a county judge as a last resort. Essentially, if all else fails — for example, if a county judge knows that there is a vacancy on a levee board and the steps under Act 7 reporting requirements cannot be followed or the landowners do not circulate a petition to fill the vacancy under Act 623 — a county judge may act on his own accord to appoint someone to fill a vacancy on a levee board.

Appointing an Administrator

In the event that all of the positions on the levee board are vacant and no interested property owner is willing to serve as a board member, the county judge shall appoint an administrator to act in place of the board. The administrator acts as a substitute for the board until an interested property owner in the levee district steps forward to serve. This provision in Act 623 does not require property owners to act via petition or affidavit before the county judge is required to appoint an administrator.

Funding

Another major obstacle levee districts face — even if all the board members are in place, reports are being filed, meetings are being held in a central and convenient location, and so on — is obtaining sufficient funding to maintain the levees within the district. Many of the solutions proposed by USACE for repairing and maintaining failing levees do not come cheap. Levee districts derive funding from assessments on property within the district. Even in large urban levee districts that have a higher population and therefore have a greater number of property owners contributing to the levee district than rural districts, it can be difficult to make ends meet. Grants from the state and federal government are rarely available, and there is often a lack of political will from levee board members to propose raising the cost of the assessments on themselves.

Funding becomes an even greater issue if some of the prop-

erty owners are not paying their assessments. This is an ongoing issue in Pulaski County. The Bill and Hillary Clinton National Airport owns 95 parcels, or just about 10 percent of the property in the Pulaski Drainage No. 2 Improvement District. The airport does not pay property taxes, and claims the Federal Aviation Administration (FAA) prevents it from voluntarily paying improvement assessments, revenue that helps cover the costs of operating and maintaining a 7.2-mile levee and its pumps on the Arkansas River. While the Arkansas Constitution Article 16 § 5 exempts public entities from taxation, the Arkansas Supreme Court has said the revenue collected by improvement districts from those who benefit from the improvement is considered an assessment, not a tax, so the airport would not necessarily be exempt from improvement assessments. Airport representatives contend that even so, FAA regulations pre-empt state law on this issue. If the airport paid the assessments, it likely would go a long way in helping the levee district cover its costs, considering that last year the board dipped into its reserve funds to cover budget deficits.

Levee district board members may also weigh their funding options by conducting a cost-benefit analysis. They may ask themselves whether it is worth the expense to repair a levee or increase its height to certain specifications. Take the Running Water levee as an example. The levee district recently took out a $1.2 million loan to build the levee to 28 feet. Would it be worth it to build the levee to, say, 30 feet, if this year was the first time on record the river has crested at 28.95 feet? What are the chances the water would rise to that height again?

Where do we go from here?

In some ways it is difficult to figure out where we go from here. Many of the issues that plague levees and levee districts are not within the control of local, state, or federal governments. We cannot control flooding events. We cannot always secure state or federal funding. We cannot change the fact that the history of levee districts in Arkansas has resulted in a quilt-like assemblage of levees and levee districts. I was told at a retail job I worked once that it is not about the things you cannot change, it is about the things you can change. For example, after the last several legislative sessions, there are new provisions offering mayors and county judges several ways to keep track of their levee districts and to fill vacancies to promote continuity of levee boards. As long as there are people in place to monitor the levees, the likelihood decreases that the levees will fall into disrepair. Ultimately, the levee districts in Arkansas have some room for improvement, but the legislation passed in recent years should help by putting in place better safeguards for levee maintenance and levee district management.

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