

Barnes County Water Resource District

PO Box 306

Valley City, ND. 58072

701-845-8508

Meeting Minutes

10/10/2011

Present: Chairman, Jeff McMillan
Manager, Pat Hurley
Manager, Duane Lettenmaier

Also present: See attached

Chairman McMillan called the meeting to order at 9:00 AM.

Manager Hurley moved to approve the revenue and expenditure reports. Manager Lettenmaier seconded the motion to approve. All were in favor. The motion carried.

Manager Lettenmaier moved to approve the minutes of the September meetings. Manager Hurley seconded the motion to approve the minutes. All were in favor. The motion carried.

Sanborn Lake Outlet

Discussion was held on the Sanborn Lake Outlet. Cleanout of the water course downstream of the outlet has begun. Kurt Tompkins of the USFWS was onsite during the cleanout. He approved the temporary removal of cat tails out of Vig lake area. Discussion was held on the locations of culverts under State Hwy. #1 that contribute to the Sanborn Lake compound. Manager Lettenmaier will acquire the culvert locations from the NDDOT.

Eckelson Lake Outlet

Discussion held on the Eckelson Lake Natural outlet project. A contractor will begin work on the watercourse immediately. The District is awaiting the NDDOT's response to the Emergency bids that were received.

Clausen Springs Project

Clausen Springs Dam Auxillary Spillway repair project is completed. A contractor will be hired to complete the rip rap work on the culvert located at the park's entrance (between, Oak Hill and Spring Creek Townships). The secretary will request a scope of work from the Engineer. Hurley will line up a contractor to complete the work this fall.

Hobart Lake Outlet

Hobart Lake Outlet was reviewed. Discussion was held on developing another plan for a possible outlet. Moore Engineering is currently developing one. Once a plan is developed, the Secretary will submit for cost share from the SWC once a plan is approved. CGI Elevator will be placing culverts to get water away from their office. They also requested funding assistance for lowering culverts under their rail road tracks. Chairman McMillan requested that they get an estimate for the board's consideration. Lettenmaier volunteered to talk with Minnekota power to see if they would be willing to commit funding toward an outlet.

Milo Buchholz Obstruction to Drain Complaint Against H. Myron Nelson and Mary Nelson

The Board next considered Milo Buchholz's OBSTRUCTION TO DRAIN COMPLAINT against H. Myron and Mary Nelson dated August 23, 2011. In it, Mr. Buchholz alleges the Nelsons plan to reconstruct their private driveway, and to reinstall culverts that were in the driveway, which will ultimately act as an obstruction to a drain. The Nelsons' private drive washed out in the spring of 2011. The Nelsons have not yet reconstructed their road with the preexisting culverts, but have indicated they plan to soon. Mr. Buchholz concedes the private driveway "completely washed out" in the spring of 2011. Mr. Buchholz is requesting installation of a 5' x 7' box culvert instead of the two existing culverts. The Nelsons' private driveway, and the location of the alleged obstruction, is the Northeast Quarter of Section 27 of Norma Township, Barnes County, North Dakota.

According to records on file with the Barnes County Recorder's Office, Robert M. Nelson and Jeffrey D. Nelson own the Northeast Quarter of Section 27 of Norma Township, subject to a life estate in Mary E. Nelson.

The Nelsons' private drive and the culverts through the driveway were the subject of two previous Obstruction Complaints filed by Mr. Buchholz, both in 2009. Mr. Buchholz filed a Complaint against the Barnes County Water Resource District dated December 15, 2009, in which Mr. Buchholz alleged that work conducted by the Barnes County Board in 1987 to raise the two existing culverts through the Nelson driveway created some type of obstruction. The Barnes County Water Resource District dismissed the Complaint, and notified Mr. Buchholz of its decision in a letter dated January 4, 2010, from Mr. Corey Quinton on behalf of the Board. Mr. Buchholz did not appeal the Board's decision in accordance with N.D. Cent. Code § 61-16.1-51, the statute that governs obstruction to drain complaints. Therefore, any effort to appeal the Board's decision in 2009 regarding the Complaint filed against the Board is precluded by the statute of limitations.

Also in 2009, Mr. Buchholz filed an Obstruction to Drain Complaint against H. Myron and Mary Nelson, dated November 2, 2009. In the Complaint, Mr. Buchholz alleged that the Barnes County Water Resource District's decision to elevate the two culverts through the Nelson driveway created an obstruction of some type, the identical allegation contained in Mr. Buchholz's 2009 Complaint against the Barnes County Water Resource District. The Barnes County Board considered the Complaint, including Mr. Buchholz's allegation that the Barnes County Water Resource District lacked jurisdiction to raise the two culverts, and ultimately dismissed the Complaint. In 1987, the Barnes County Board set the culvert elevations and subsequently raised the culverts according to those elevations, and Mr. Buchholz did not file or take any action until he later filed a lawsuit against both the Nelsons and the Barnes County Board, a lawsuit ultimately dismissed by the Barnes County District Court. The North Dakota Supreme Court affirmed the District Court's decision. Mr. Buchholz's next effort was to file the

2009 Complaints against the Barnes County Board and Mr. and Mrs. Nelson. Ultimately, the Barnes County Water Resource District dismissed the November 2, 2009, Obstruction Complaint against the Nelsons, after confirming that the culvert elevations were virtually identical to the elevations set by the Board in 1987. The Board dismissed the Complaint on December 14, 2009, and Mr. Buchholz did not appeal that decision within the statutory appeal period contained in Section 61-16.1-51. Therefore, Mr. Buchholz's allegations and Complaints regarding the private drive on the Nelson property and the culvert elevations through the driveway are precluded by the statute of limitations.

Under the current Complaint, Mr. Buchholz is apparently attempting to prohibit the Nelsons from reconstructing their private driveway with the existing culverts, and from installing the culverts at the identical elevations set by the Board in 1987 (and confirmed by the Board in 2009).

The Board consulted attorney Sean Fredricks regarding the proper procedures for considering and processing the Complaint. Mr. Fredricks indicated that, before applying the appropriate elements under N.D. Cent. Code § 61-16.1-51 to determine if the alleged obstruction is illegal, the Board should first consider procedural and jurisdictional issues regarding Mr. Buchholz's Complaint. Specifically, Mr. Buchholz is apparently attempting to address issues identical to those raised in his 2009 Complaints. The applicable statute of limitations contained in Section 61-16.1-51 requires an appeal within 30 days of the date of a water resource district's decision. Mr. Buchholz did not appeal the Board's decisions regarding the 2009 Complaints at all, and clearly did not do so within the 30 days provided by statute. Therefore, any efforts to once again raise these issues are precluded by the statute of limitations in Section 61-16.1-51. Further, the Board previously considered these identical issues in the 2009 Complaints; therefore, the procedural principles of *res judicata* and *collateral estoppel* prohibit Mr. Buchholz from once again filing a Complaint regarding the exact same issues.

Mr. Fredricks identified the following issues:

- 1. Mr. Buchholz acknowledges that the driveway and culverts washed out, and, therefore, Mr. Buchholz has conceded there is not even a possibility of an obstruction.**

Under N.D. Cent. Code § 61-16.1-51, the statute that governs obstruction to drain complaints, a water resource district cannot take action on a Complaint unless there is evidence that a landowner has, by "negligent act or omission," constructed or installed "a barrier to a watercourse . . . or an artificial drain." In this case, the subject of Mr. Buchholz's Complaint appears to be the Nelson private driveway and the elevation of the two culverts through the driveway. However, in the letter Mr. Buchholz submitted along with his Complaint, he freely acknowledges the driveway washed out in the spring of 2011; he therefore admits there is not even a potential obstruction in place currently. The Board considered Mr. Buchholz's letter and the fact the Nelson driveway washed out in the spring and concluded there is no "barrier to a watercourse" constructed or installed by the "negligent act or omission" of the Nelsons or any other landowner. Therefore, Mr. Fredricks advised the Board they should dismiss the Complaint due to the lack of any conceivable obstruction.

Mr. Buchholz is insistent that installation of a 5' x 7' box culvert through the private driveway will accommodate drainage through the driveway better than the two culverts previously in place. However, a request for installation of a box culvert through a driveway that does not currently exist does not create any jurisdiction under Section 61-16.1-51.

2. The 30-day statute of limitations under Section 61-16.1-51 expired regarding Mr. Buchholz's 2009 Complaints; the current Complaint alleges reconstruction of the identical private driveway and culverts would act as an obstruction, but the statute of limitations precludes the identical claim.

Apparently, Mr. Buchholz objects to the Nelsons' plan to reconstruct the private driveway with the exact same culverts at the identical elevations. In 2009, the Barnes County Water Resource District considered and dismissed both of Mr. Buchholz's Obstruction to Drain Complaints. Under Section 61-16.1-51, any party aggrieved by a decision of a water resource district regarding an obstruction to drain complaint can file an appeal with the District Court in accordance with N.D. Cent. Code § 28-34-01. Under Section 28-34-01, an aggrieved party must file their appeal within 30 days of the date of the water resource district's decision. In these instances, the Barnes County Water Resource District dismissed Mr. Buchholz's 2009 Complaints on December 14, 2009, and January 4, 2010, respectively. Mr. Buchholz did not file an appeal with Barnes County District Court within 30 days of either of those decisions. Therefore, the statute of limitations precludes any appeal by Mr. Buchholz regarding those two Complaints.

Under the current Complaint, Mr. Buchholz once again alleges that this very same driveway and the very same culverts at the same elevations would act as an obstruction. However, Mr. Buchholz cannot avoid the statute of limitations preclusion regarding his 2009 Complaints simply by filing a new Complaint regarding the identical issues. With that in mind, Mr. Fredricks advised the Board they should dismiss the Complaint.

3. The principle of collateral estoppel bars relitigation of identical issues previously decided under the previous Complaints.

The current Complaint alleges that reconstruction of the Nelson driveway with the same culverts at identical elevations will act as an obstruction; the 2009 Complaints filed by Mr. Buchholz and dismissed by the Barnes County Water Resource District alleged the exact same crossing and culverts acted as an obstruction. The Barnes County Water Resource District dismissed those Complaints in final decisions, and Mr. Buchholz neglected to file a timely appeal regarding either decision with the Barnes County District Court. Under the principle of collateral estoppel, a subset of the principle of res judicata, if Mr. Buchholz's current Complaint meets the following four elements, collateral estoppel will bar the current Complaint:

- a. Whether or not the issue decided in the previous Complaints was identical to the one presented in the current Complaint.
- b. Whether or not there was a final Judgment on the merits regarding the previous Complaints.
- c. Whether or not the parties involved in the current Complaint were parties or in privity with the parties in the previous Complaints.
- d. Whether or not the parties against whom the current Complaint is asserted had a fair opportunity to be heard on the previous Complaints.

See Gratech Co., Ltd. v. Wold Engineering, P.C., 729 N.W.2d 325, 331 (N.D. 2007); Hofsommer v. Hofsommer Excavating, Inc., 488 N.W.2d 380, 384 (N.D. 1993).

With regard to the first issue, whether or not the current Complaint addresses the same issue decided in the previous Complaints, the answer is clearly "yes." The subject of the previous Complaints was the Nelsons' private driveway and the culverts through them, including the elevations of those culverts. Under the current Complaint, Mr. Buchholz alleges that reconstruction of the Nelson driveway with the exact same culverts at the exact same elevations would serve as an obstruction. Further, Mr. Buchholz is requesting installation of a 5' x 7' box culvert as an alternative. Clearly, the current Complaint addresses the exact same issues alleged and ultimately decided in the previous Complaints.

With regard to the second element, whether or not there was a final Judgment on the merits regarding the previous Complaints, the Barnes County Water Resource District made final decisions to dismiss both of the previous Complaints and notified Mr. Buchholz of those decisions. He neglected to appeal those decisions.

With regard to the third item, whether or not the parties against whom the current Complaint is asserted (the Nelsons) were parties or parties in privity with the parties in the previous Complaints, the parties are virtually identical. Mr. Buchholz's November 2, 2009, Complaint named H. Myron and Mary Nelson, and Mr. and Mrs. Nelson are once again parties in the current Complaint. Mr. Buchholz did not name Robert or Jeffrey Nelson in his Complaint, but they are record owners of the property at issue; Mr. and Mrs. Nelson issued a Quit Claim Deed to Robert Nelson and Jeffrey Nelson regarding their remainder interests in the Northeast Quarter of Section 27, and, therefore, Robert and Jeffrey Nelson are in privity with the parties to the previous Complaints.

With regard to the fourth element, whether or not the Nelsons had an opportunity to be heard on the previous Complaints, the Nelsons were actively engaged with the Barnes County Water Resource District as the Barnes County Board considered the previous Complaints.

Clearly, all four elements regarding collateral estoppel are met, and, therefore, the principle of collateral estoppel precludes Mr. Buchholz's current Complaint since the Barnes County Board previously considered and dismissed the previous Complaints on their merits. With that in mind, Mr. Fredricks informed the Board the principle of collateral estoppel precludes the current Complaint and advised the Board to dismiss the Complaint.

4. Even if the Nelson driveway and the preexisting culverts were in place, the Barnes County Water Resource District already concluded the driveway with the culverts did not act as an obstruction.

Mr. Buchholz acknowledges the Nelson driveway is not currently in place. However, the Nelsons have indicated their intent to reconstruct the driveway with the exact same culverts at the exact same elevations. Even if the driveway and the culverts were currently in place, the Board would ultimately dismiss Mr. Buchholz's current Complaint. In processing and considering the previous Complaints, the Barnes County Water Resource District issued final decisions and concluded that the Nelson driveway with the culverts did not act as an obstruction to a drain under Section 61-16.1-51. Mr. Buchholz did not appeal those decisions. Even disregarding all of the statute of limitations and collateral estoppel issues that preclude the Board from again considering Mr. Buchholz's Complaint on the merits, if the Board had a legal obligation to reconsider the issue of whether or not the driveway and culverts act as an obstruction, the Board would conclude they do not act as an obstruction to a drain or a natural watercourse. More specifically, the Board concluded that, even if the driveway and culverts were in place, they would not "materially affect the freeflow of water," the standard under Section 61-16.1-51. The driveway and the culverts sufficiently accommodate the flow through the natural watercourse in

the Northeast Quarter of Section 27. In fact, the Board has conferred with the North Dakota State Engineer's office, and the State Engineer's office has agreed that the previous crossing was indeed sufficient.

With that in mind, if the driveway and the culverts were in place now, or if the Nelsons reconstruct the driveway with the exact same culverts at the exact same elevations, the driveway and culverts would not act as an obstruction under the elements of Section 61-16.1-51, and the Board would dismiss Mr. Buchholz's Complaint.

Manager Hurley, seconded by Manager Lettenmaier, moved to dismiss Milo Buchholz's OBSTRUCTION TO DRAIN COMPLAINT dated August 23, 2011. Upon roll call vote, the motion carried unanimously. The Board directed Sean Fredricks to prepare the requisite Notice of Decision and to send the Notice to the parties of record.

Baldwin Township Culvert Recommendation

Nyhill Burchill was present to discuss a culvert recommendation located in the SW ¼ of section 12 and the NW ¼ of section 13, Baldwin Township. Chairman McMillan completed an investigation of the area. Manager Hurley will talk to Maynerd Flatt, Baldwin Township Supervisor.

Marc Burkett- Obstruction to Drain Complaint, Section 15, Valley Township

Manager Lettenmaier reported that he had completed a re-inspection of the rail road ditch. CP Rail has completed the clean out of the ditch as requested. Manager Lettenmaier found the clean out to be satisfactory. Manager Hurley moved, and Lettenmaier seconded, to send Mr. Burkett notice that the work has been completed and found to be satisfactory. All were in favor. The motion carried.

Doug Lettenmaier Drainage Complaint, W ½ section 2, Svea Township

Mr. Lettenmaier states in his complaint that "water back feeds north of the Doug and Jenny Lettenmaier home, causing sewer to back into the basement". Lettenmaier also states that because of this they "have to pump water from the north of their home to the south west". He suggests in the complaint that to resolve this issue "the county road ditch needs to be cleaned out on the south side and the west side of section 2, Svea Township". Manager Hurley will inspect the area and follow up with Kerry Johnson, Barnes County Highway Department.

Legal Drain #2

Manager Lettenmaier reported that he has contacted a contractor to complete some clean out work on Legal Drain #2. This work will be completed this fall. Discussion was held on the locations of the gates and coordination of opening those gates in the spring. Farming/excavation of the buffer strip was discussed.

Thordenskjold Drain-extension of assessment district

Discussion was held on extending the assessment district area on the Thordenskjold drain. Moore Engineering has completed a study that indicates all land that contributes to the drain. Manager Hurley

requested that the Secretary setup a meeting in January for the purpose of extending the assessment district. The secretary is to send notice to all landowners that could be affected by the new assessment.

10 Mile Lake

The Secretary received an email from Paul Abrahamson, spokesman for the 10 Mile Lake group. Mr. Abrahamson specifically requested that "An engineer's elevation survey be done in the areas most immediately affected, i.e. the North, South and East edges of 10 Mile Lake or other appropriate areas deemed necessary for control". Discussion was held. The District has already completed a detailed survey of the area. Manager Lettenmaier will call Mr. Abramson to clarify the request.

Meadow Lake

Manager Hurley reported that he accompanied the State NRCS Director and Meadow Lake Township officers on a tour of the Meadow Lake area.

Tomahawk Dam-USFWS

Sheryl Smith and Allen Marlar were in attendance to voice concern over the additional flows into Tomahawk Dam. Discussion was held on the condition of the dam and ownership of the dam. Tomahawk is owned by the USFWS and the repair of the dam is the responsibility of the USFWS. The Board agreed to facilitate a repair plan of action with the USFWS.

Snagging and Clearing – Sheyenne River

Jim McAllister-Barnes County Weed Control Officer reported a small log jam south of Valley City on the Sheyenne River. Manager Hurley will head up this project.

Steele County Snagging and Clearing

Josh Ihrey, Steele County Water Resource District Chairman would like to meet with the board to discuss the possibility of forming a joint drain board for snagging and clearing on the Maple River. Mr. Ihrey will present this idea to the board at one of the winter meetings.

Stoney Run clean out

Jack Olson was in attendance. Mr. Olson stated that he now had NRCS approval to complete a clean out on his portion of the water course. He also reported that he identified a location to deposit the cat tails that are removed. This area is located outside of the easement area. Discussion was held on who was responsible for the cost of the clean out. Manager Lettenmaier expressed interest in cost sharing the cleanout with the landowners. Manager Hurley was opposed to a cost share, stating that it is the responsibility of the landowner to maintain their portion of the water course. Discussion was held in regards to the WPA Dam located in the S ½ of Section 11, Spring Creek Township. Manager Lettenmaier will fly the entire run to evaluate the condition of the drain and will also acquire an estimate for the cost

Barnes County Commission report

Commissioner, John Froelich reported that the County Commission approved a four (4) Mill Budget for the Water Resource District, but denied the request for an additional two (2) Mills that is allowed under

N.D.C.C. 61.16-16.1-11 for the purpose of dues for the Red River Joint Water Resource District. Commissioner Froehlich suggested that the dues would have to be taken out of the District's four (4) mill budget. When asked why the additional two (2) mills were not approved, Commissioner Froelich answered that they denied the request after receiving advice from the Barnes County State's Attorney.

Bills were reviewed. Manger Hurley moved, Manager Lettenmaier seconded, to approve the payment of the bills presented. Chairman McMillan called for a roll call vote. The results are as follows; Hurley-yes, Lettenmaier-yes, McMillan-yes. The motion to approve bills carried.

Being no further business, Manager Huley moved, Manager Lettenmaier seconded, to adjourn the meeting. All were in favor. The motion carried.

Respectfully submitted,

A handwritten signature in cursive script that reads "Jamie Smith".

Jamie Smith

Secretary

Barnes County Water Resource District

Meeting Attendance

10/10/11

Joan Franklin GC Comm

Allen Mark Rogers Trust -

Sheryl Smith Rogers

Glenn Churchill VC

Dave Luss T-R

Barry Borg VC

DAVE COCKER - CGE U.C.

DANN BRUNSON GCI VC

Dan Olson Leaf

Ryan Mott - Gavilon

Shelly Nelson BCSD Litchville

Jack Olson, LITCHVILLE