

## ***Barnes County Water Resource District***

*PO Box 306*

*Valley City, ND 58072*

701-845-8508

August 10, 2015

### **MEETING MINUTES**

PRESENT MEMBERS: Chairman Jerry Hieb; Manager Bruce Anderson, Manager Shawn Olauson; Manager Bret Fehr; Manager Dale Jorissen; Mike Opat and Joshua Hassell – Moore Engineering; Sean Fredricks – Ohnstad Twichell P.C.; Commissioner John Froelich

Also Present: See Attached List

Chairman Hieb called the meeting to order at 9:00 am.

Manager Olauson made a motion to approve the July 10, 2015 meeting minutes with corrections. Manager Jorissen seconded. Motion approved.

### **OLD BUSINESS**

Chairman Hieb informed the managers that there is a budget meeting at the county courthouse this afternoon and wanted to get input for this meeting and if any manager wanted to accompany him.

### ***Julius Heinze Complaint of Illegal Drainage Against Bill Trader and Dennis Smith***

Julius Heinze was present to discuss his Drainage Complaint with the Board. Mike Opat reported that he and Josh Hassell conducted a site inspection of the alleged drainage and found no evidence of any new drains or drainage improvements constructed by Mr. Trader or Mr. Smith along Highway 32 on the east side of

Oriska. Mr. Heinze's Drainage Complaint alleges the drainage was constructed in the 1960s; upon further inquiry of Mr. Heinze, he indicated the Highway 32 road ditches and adjacent township road ditches are causing flooding. Mr. Heinze contends both Highway 32 and the township road require larger culverts. Mr. Opat sought clarification, and Mr. Heinze indicated the road ditches and the lack of adequate culverts is really the issue.

Mike Opat reiterated that there is no evidence in that vicinity of any new ditching or any drainage improvements. With regard to the water draining into those ditches, Mr. Opat indicated that because of the natural topography in the area, water in this vicinity would drain into these highway ditches anyway, even if Mr. Trader and Mr. Smith had constructed new ditches or drainage improvements. Further, Mr. Opat noted that this particular area has less than an 80-acre watershed.

Mr. Heinze indicated the Highway 32 road ditch should be wider and indicated the adjacent township road ditch has a similar issue.

The Board indicated they are sensitive to his situation but noted that the Board cannot order NDDOT or a township to install larger culverts in the absence of a legal assessment drain.

In light of the lack of any drainage improvements and the Board's lack of jurisdiction over NDDOT or a township regarding the width of their highway ditches or the size of their culverts, Manager Fehr moved, and Manager Jorissen seconded the motion, to dismiss Mr. Heinze's Drainage Complaint for lack of jurisdiction. Upon roll call vote, the motion carried unanimously.

**David Lettenmaier** – No update at this meeting and to wait to hear from Lettenmaiers.

**Roxann Fritz** – The secretary had contacted Ms. Fritz and gave her information to former BCWRD manager, Pat Hurley to contact Ms. Fritz and explained what went on in this situation.

### **Shawn Anderson Dam/Dike Complaint Against Brad Bellmore and Brian Kreie**

Josh Hassell reported that he spoke with Brad Bellmore, and Brad inquired into what he could do to remedy the situation. Mr. Bellmore offered the possibility of replacing the crossing with a bridge. The Board discussed the possibility of replacement of the crossing with a bridge and the possibility of a requirement for a permit from the State Engineer's office for a bridge under Section 61-16.1-38 of the North Dakota Century Code.

The Board recognized that, even if Mr. Bellmore is willing to replace the crossing with a bridge, the Board has to take action on the Complaint. With that in mind, Mike Opat indicated that, as a result of their field inspection, Moore Engineering concluded this crossing does qualify as a low hazard "dam" as defined under

Section 89-08-01-01 of the North Dakota Administrative Code. Further, Moore Engineering concluded the crossing is capable of retaining, obstructing, or diverting at least 50 acre-feet of water. Sean Fredricks indicated that, in light of those findings, the crossing required a permit and, therefore, the Board had no choice but to order removal of the crossing. Sean also indicated Brian Kreie owns a half interest in the Southwest Quarter of Section 7, and Brad and Lynn Bellmore own the other half interest in the Southwest Quarter of Section 7, the location of the crossing.

Manager Jorissen moved to order Brad Bellmore and Brian Kreie to remove the crossing within 60 days. Manager Olauson seconded the motion. Upon roll call vote, the motion carried unanimously.

Sean Fredricks will prepare a Notice of Decision to provide to the parties, and the notice will include language to notify Mr. Kreie and the Bellmores that if they replace the crossing with a bridge, the bridge may require a permit from the North Dakota State Engineer's office.

### **Dorothy Orts Complaint of Illegal Drainage Against Wade Bruns**

Dorothy Orts previously submitted a Drainage Complaint against Wade Bruns regarding tile drainage installed by Mr. Bruns in the Northwest Quarter of Section 18 of Weimer Township in Barnes County, North Dakota. Ms. Orts alleges Mr. Bruns installed unpermitted tile in the Northwest Quarter of Section 18 in 2013 and 2014 in violation of N.D. Cent. Code §§ 61-32-03.1 and 61-32-07. Linda McKenna previously sent a letter to Mr. Bruns to request information regarding his project; Mr. Bruns subsequently provided information, including a map, to the Board for review. Moore Engineering utilized the information provided by Mr. Bruns to prepare a more detailed map that outlines the tile footprints of the projects, as indicated by Mr. Bruns.

The Board noted Mr. Bruns installed two tile projects, both under 80 acres; the permitting threshold under Section 61-32-03.1 is 80 acres. Further, even together, the two projects (one at 53.05 acres and one at 18.38 acres) are less than the 80-acre permitting threshold. Ms. Orts did not provide any additional information to rebut the information provided by Mr. Bruns. Based on all of the information available, the Board concluded the tile projects installed by Mr. Bruns did not require a permit under Section 61-32-03.1 because the projects, even together, do not meet the 80-acre permitting threshold.

In light of the Board's lack of jurisdiction over Mr. Bruns tile projects, the Board had no choice but to dismiss Ms. Orts' Complaint. Manager Jorissen moved, and Manager Olauson seconded the motion, to dismiss Ms. Orts' Drainage Complaint for lack of jurisdiction. Upon roll call vote, the motion carried unanimously.

**Legal Drain 2 Reassessment** – Sean Fredricks explained about the procedure of notification for special meetings. Josh Hassell handed out three maps and went over comments from special meeting, in July, so managers can make final percentage adjustments and decisions for Legal Drain 2 Reassessment. Joshua Hassell will make changes to Legal Drain 2 Reassessment district for approval at September meeting.

### **HOBART LAKE OUTLET IMPROVEMENT PROJECT**

The Board next discussed the HOBART LAKE OUTLET IMPROVEMENT PROJECT. At the Board's previous meeting, the Board addressed comments that Manager Anderson has a conflict of interest and should not be voting on the project. Mr. Fredricks was not present during the previous discussion, but he indicated that the Board could conduct a conflict analysis to determine if Manager Anderson does, in fact, have a conflict. Mr. Fredricks indicated WRDs typically conduct assessment analyses for all assessment projects but that, because this project does not include a special assessment district, the Board did not conduct the analysis earlier; however, the Board could certainly conduct the analysis at this time. Manager Anderson indicated he owns pasture land that is currently under the footprint of Hobart Lake.

Mr. Fredricks explained the conflict analysis the Board should conduct regarding Manager Anderson's potential conflict. Section 44-04-22 of the North Dakota Century Code provides the relevant standard. That statute provides:

A person acting in a legislative or quasi-legislative or judicial or quasi-judicial capacity for a political subdivision of the state who has a direct and substantial personal or pecuniary interest in a matter before that board, council, commission, or other body, must disclose the fact to the body of which that person is a member, and may not participate in or vote on that particular matter without the consent of a majority of the rest of the body.

Mr. Fredricks indicated the North Dakota Supreme Court and the Attorney General's Office have taken a narrow view of situations where a public official can abstain from participating in a matter. A public official must have a direct and substantial personal or pecuniary interest in the matter. The mere appearance of a conflict is not enough to allow the public official to refrain from participating. The North Dakota Supreme Court adopted a rule of necessity that requires public officials to participate in matters before their respective boards. The public policy rationale is that public officials have a duty to vote on issues before them, and cannot avoid participation simply to avoid the appearance of impropriety.

The Section 44-04-22 test requires a multi-step analysis. First, a public official concerned about a conflict of interest should confer with the Board's attorney to determine if a direct and substantial personal or pecuniary interest conflict exists under Section 44-04-22. If the public official's review with the governing entity's attorney is not dispositive, the remainder of the governing entity's Board should vote to determine if a conflict exists by a majority vote. If the remaining members conclude a conflict does exist (or if the member and the Board's attorney concludes a conflict exists), the remainder of the Board should next vote on whether or not the public official should participate in or vote on that particular matter. In other words, even if a conflict does exist (even if the official does have a direct and substantial personal or pecuniary interest in the matter), if the governing entity concludes the public official should still participate despite the conflict, the official must participate.

With regard to the land Manager Anderson owns, Mr. Fredricks indicated the situation likely creates a legal conflict situation since the project could potentially benefit Manager Anderson's property. However, the remaining members of the Board voted unanimously to require Manager Anderson to continue to participate in all project-related matters. The Managers noted that Manager Anderson is familiar with the area and with the proposed project, he understands the local issues better than any other managers, he knows the landowners in the area, and the Board did not believe Manager Anderson's personal interest in land has in the past or would in the future impact Manager Anderson's judgment. Specifically, Chairman Hieb, Manager Olauson, Manager Fehr, and Manager Jorissen all voted to require Manager Anderson to continue to participate.

Josh is working on final design and specifications for Phase 1 to be turned into FEMA by the 21<sup>st</sup> of this month and also submit to Corp of Engineers for their review. Dept of Health will have a final say for the project plan.

BCWR District will have to start Right of Way conversation with landowners for next month.

There were comments from the audience ranging from the **possibility** of upcoming drought conditions, to the water quality draining from Hobart Lake . All issues that are being discussed have been brought before the Regulatory Agencies of the State.

**VC Little Dam** – Mike Opat reported that Barr Engineering had information for this project and Mike will work on an update for the October meeting.

**Thordenskjold Extention** – Josh Hassell has a copy of the signed agreement, waiting for the original to get to his office.

**10 Mile Lake** – Paul Abrahamson is hoping to meet with the Corp of Engineers and ND Dept of Health. Two major goals are Jurisdiction of the Corp of Engineers and water quality of 10 Mile Lake. NRCS will mitigate average wet years from 2009 – 2011 and determination will be sent to the Cooperstown office. Cost benefit for east or south exit is the next consideration for 10 Mile Lake. Resolution to ultimately have high level impact plan to have the water flow east & then it would naturally flow east and then south. Discussion followed. Manager Jorissen made a motion to table any decisions till we know where jurisdiction is decided and think about where we, as a district, want to go with this project. Manager Fehr seconded. Motion approved with a roll call vote.

**Griggs/Barnes WRD – Silver Creek** - Barry Ronningen represented Griggs County WRD. Bond issue was discussed and that we need to follow the assessment process. No discussion on Hannaford meeting. Joint Powers is still being discussed. Need to make sure that all landowners in this specific water shed are included in assessment process. Our Bond council will have to approve the bonding process. Stutsman County WRD needs to be informed of what is being discussed for Silver Creek. Discussion followed. Manager Anderson made a motion to have Moore Engineering take a look at this map and verify this is the water shed boundary for the proposed Silver Creek assessment district. Manager Fehr seconded motion. Motion approved with a roll call vote.

## **NEW BUSINESS**

### **Application to Install a Subsurface Drain for Mark Winter in the Northwest Quarter of Section 25 in Noltimier Township**

The Board reviewed *Application to Install a Subsurface Drain* dated July 17, 2015, for Mark Winter. The Board reviewed the criteria in Section 89-02-01-09 of the North Dakota Administrative Code and concluded the project does not meet any of the “statewide” elements, and the Board concluded therefore the application does not propose drainage of statewide significance, so the Board has jurisdiction to approve the permit (without forwarding to the State Engineer’s Office to consider and approve). Under the application, Applicant seeks to install a drain tile system in the Northwest Quarter of Section 25 in Noltimier Township, Barnes County, North Dakota. The project will include a gravity outlet that will discharge directly into a natural watercourse in the Northwest Quarter of Section 25.

The Board's engineer reviewed the application and indicated the project will discharge directly into natural watercourse; the Board's engineer recommended that the Board should require Applicant to install and maintain erosion protection in the natural watercourse. Because the proposed project will discharge directly into a natural watercourse, the application did not require a *Thirty-Day Notice* under N.D. Cent. Code Section 61-32-03.1, and the Board cannot require Applicant to obtain any flowage easements from downstream landowners.

According to records on file with the Barnes County Recorder's Office, the Winter Farm Trust owns the Northwest Quarter of Section 25 of Noltimier Township.

Manager Anderson moved, and Manager Fehr seconded the motion, to approve *Application to Install a Subsurface Drain* dated July 17, 2015, for Mark Winter in the Northwest Quarter of Section 25 in Noltimier Township, subject to the following conditions:

1) That Applicant obtain easements from the owner of any land, besides land owned by Applicant, on which Applicant will construct the tile system;

2) That Applicant provide and maintain adequate erosion protection at any and all outlets into the natural watercourse along the Northwest Quarter of Section 25 in Noltimier Township;

3) That Applicant notify the Barnes County Water Resource District in advance of any proposed alterations to outlet locations, or addition of any outlets;

4) That Applicant notify the Barnes County Water Resource District in advance of any proposed improvements to the tile system, or any proposed increase in the capacity or drainage area of the tile system and, if necessary, submitting an additional permit application;

5) That Applicant must close all outlets during flood occurrences or under conditions that may cause adverse impacts to downstream landowners, as determined by the Board; and

6) That Applicant obtain all other necessary and requisite licenses, permits, registrations, and/or approvals from all applicable federal, state, county, and municipal governments, and any other applicable governmental entities.

Upon roll call vote, the motion carried unanimously.

**Drain Tile Notifications** – Discussion how this would help our District so we know what tiling is being done in Barnes County, even if it is under the 80 acres rule. Sean will put together a Drain Application Notice and managers will review at

Sept. meeting. Discussion about putting this notice with county tax statements so all county tax payers will be aware of what the water district would like for tile application purposes and maybe send out to drain tile installers also.

**Eckelson Lake Outlet** – John Schwehr addressed the district regarding the cleanout maintenance (quarter mile) for Eckelson Lake drainage. No current Legal Drain for this area. Discussion on assessment district, snagging and clearing district and other options for Eckelson Lake overflow drainage. Sean Fredricks will check into what the state has for documentation on this outlet. (T-141-N R- 60-W NE Sec 21) Manager Anderson asked if Moore Engineering will look into their files for Eckelson Lake drainage.

**Wimbledon RR Crossing** - Manager Jorissen informed the district of a new side crossing going in at Wimbledon and it is going to affect culverts in the area. Manager Jorissen got information from the Minneapolis RR Engineer and he is up to listening to what else could be done in area. Moore Engineering was given information.

**Hannaford RR Joint Meeting** - Manager Fehr gave Joe Pesek's name to BNSF representative to help with their complaint with BNSF.

**Mike Clemens** - Brought in information of drain tile installation that is under 80 acres. For district information only.

**Bills** - Manger Anderson made a motion to pay the bills 16,736.35. Manager Fehr seconded motion. Motion approved with a roll call vote.

Manager Fehr made a motion to adjourn with a second from Manager Olauson. Motion approved.

Respectfully submitted,



Linda McKenna

Secretary

Barnes County Water Resource Board