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

*PO Box 306*

*Valley City, ND 58072*

701-845-8508

September 14, 2015

### **MEETING MINUTES**

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

Absent: Manager Bret Fehr

Also Present: See Attached List

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

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

### **OLD BUSINESS**

**Anderson/Kreie Dike Complaint** - Chairman Hieb brought up the 60 days for removal of this dike and that when Brad Bellmore received the letter on 9-2-15, the letter referenced that dike was to be removed by 9/9/15, which is hard to meet and Chairman Hieb agreed. A different date will be set up for him to have it removed and still within the 60 day time period.

**10 Mile Lake** – Dale Jorissen reported for Paul Abrahamson. Paul would like permission to test for water quality of 10 Mile Lake. This testing has to be taken at 3 different areas of the lake and taken at different levels and sent to an EPA testing facility for results. Paul also would like to form a *High Level Impact Committee*, in case 10 Mile Lake would get to emergency levels again. Discussion followed. Manager Olauson made a motion to allow Paul Abrahamson to take lake samples and send in for testing Manager Anderson seconded, but after discussion, Manager Olauson withdrew his motion. The district gave Paul Abrahamson the okay to do testing on his own and to set up an impact committee. The district will get involved when necessary. Manager Jorissen will take information back to Paul Abrahamson.

**Eckelson Lake Natural Drain** - John Schwehr informed the district that Eckelson Lake is not naturally flowing, it is just sitting west of Gerry Gerntholz. Anderson Twp (T-141 R-60-W) Sec 16. Discussion followed. Water District has no cost share available for maintenance on a water way. Landowner is okay to clean out as long as no alteration is done to water way. Landowners still need to notify NRCS and Fish & Wildlife.

**Legal Drain 2 Reassessment** – Joshua Hassell – Moore Engineering came forward and summarized what was done at the special hearing in July. Discussion from the audience followed. Manager Anderson made a motion to approve the Final Resolution for the Final Assessment List. Manager Olauson seconded motion. Motion approved with 3 Yes votes and 1 Nay vote.

**Hobart Lake** – Joshua Hassell informed the district of the State Health Dept. letter that needed clarifications on the water testing for the Hobart Lake Project and other items. Permit status is out of the primary review hands and working its way up the ladder for completion. It did not make it for our FEMA Funding contract expiration date for Phase 1, so Josh submitted another extension to FEMA and the extension has been approved till end of November. Discussion followed regarding the project.

**Little Dam/Kathryn Dam** - Mike Opat handed out a memo from Barr Engineering. Mike explained we have a deadline of October 15<sup>th</sup> to get back to US Fish & Wildlife on what was going to be done at Kathryn Dam. Mike went over hand out regarding the three different options and the approximate costs. Managers will invite interested parties (list from first meeting), to the October meeting for input. BCWRD will have to make a decision of what option we are going to go with at our October meeting.

**Thordenskjold Extention** – Josh is expecting signed extention, from the City of Nome, in his mail.

**Drain Tile Notification** – Sean Fredricks handed out a draft for Drain Tile Application Information that managers would like to go out with county tax billing. Manager Olauson made a motion to approve the draft for Surface and Subsurface Application Information, with a couple additions Mr. Fredricks will make additions. Manager Jorissen seconded motion. Motion approved with a roll call vote.

**Voting Conflict of Interest** - This was discussed at August meeting. Was decided to handle these conflicts as they come up at our meetings.

**Griggs/Barnes WRD** – Discussion on a Joint WRD for Silver Creek Project. Secretary will post the meeting time & date where necessary for the upcoming meeting at Cooperstown.

## **NEW BUSINESS**

**Shawn Anderson & Kevin Harstad – Obstruction Complaint** - There was discussion of what was actually cleaned out back in 2011. No one measured the sediment that was cleaned in Stewart Twp. Section 7 in 2011. NRCS & Fish & Wildlife say there could be violations on this area. More discussion followed. Landowners next step is to check out pipeline responsibility, the pipeline may or may not have an easement. District has to decide obstruction complaint (before the board) or maybe a dike complaint. Table for October meeting.

**Paul Stenshoel** – Complaint (email) not an official complaint. Sean Fredricks discussed his email and the requested information. Linda will send off an email to Paul with information.

**Wimbledon RR Crossing** – Josh explained the siding expansion project and that they are going to replace two smaller culverts with one larger culvert (72"). Pierce Township officers had some questions, but all has worked out. Wimbledon expansion for CP Railroad has no permit application with BCWRD so work has been going forward.

A permit letter, for Cuba Township from CP Railroad siding expansion was received after August BCWRD meeting and now the BCWRD has to act on this permit. Manager Jorissen made a motion to APPROVE the CP Railroad expansion permit for Cuba Township. Manager Anderson seconded motion. Motion approved with a roll call vote.

**Obstruction to Drain Complaint Filed by Arvid Winkler Against Louis Nicoli, John Kohler, Kory Kunze, Shawn Olauson, Ken Kohler, and Scott Cummings**

The Board next considered Arvid Winkler's OBSTRUCTION TO DRAIN COMPLAINT against Louis Nicoli, John Kohler, Kory Kunze, Shawn Olauson, Ken Kohler, and Scott Cummings dated September 9, 2015. Mr. Fredricks indicated the Board should conduct a conflict analysis regarding Manager Shawn Olauson since Mr. Winkler named Manager Olauson in the Complaint.

Mr. Fredricks explained the conflict analysis the Board should conduct regarding Manager Olauson'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.

In this instance, Mr. Fredricks indicated the Complaint most certainly creates a legal conflict situation since the Complaint names Manager Olauson; and, therefore, Manager Olauson has a very direct personal interest in the outcome of the Complaint. The remaining members of the Board agreed and voted unanimously that the matter created a conflict situation and that Manager Olauson should not participate in votes regarding the Complaint. Specifically, Chairman Hieb, Manager Anderson, and Manager Jorissen all voted to identify the Complaint as a conflict situation for Manager Olauson, and to prohibit Manager Olauson from voting in all matters regarding the Complaint.

Arvid Winkler was present to discuss the situation. Arvid explained his Complaint is with regard to a township road and lack of sufficient culvert crossing capacity. More specifically, Arvid alleges the township road along the boundary of the Southwest Quarter of Section 18 of Cuba Township and the Southeast Quarter of Section 13 of Marsh Township does not contain sufficient culvert capacity in accordance with the North Dakota Stream Crossing Standards; he further alleges the township boards have not followed the relevant ditch construction standards regarding this road.

Sean Fredricks advised the Board the North Dakota Supreme Court has held on several occasions that the road authority with jurisdiction over a road has sole decision-making authority and jurisdiction regarding culvert installation and placement, and regarding compliance with the North Dakota Stream Crossing Standards. Water resource districts do not have jurisdiction over culverts through township roads, nor do water resource districts have jurisdiction regarding a township's ditch construction standards. The Supreme Court has held on more than one occasion that townships have jurisdiction over culverts through their roads and drainage in their ditches; unless a legal assessment drain is involved, townships, not water resource districts, have sole decision-making authority and jurisdiction regarding drainage through their roads. Kadlec v. Greendale Township Board of Township Supervisors, 583 N.W.2d 817, 822 (N.D. 1998); Ness v. Ward County Water Resource District, 585 N.W.2d 793, 795-96 (N.D. 1998). The Barnes County Water Resource District lacks jurisdiction to order either Cuba Township or Marsh Township to modify their road ditches or to install larger culverts, except to accommodate legal assessment drains, and this situation does not impact a legal assessment drain.

Sean further indicated the obstruction complaint statute, N.D. Cent. Code § 61-16.1-51, does not grant water resource districts jurisdiction over township decisions regarding compliance with the Stream Crossing Standards or regarding their ditch maintenance. With that in mind, Sean indicated the Board lacks jurisdiction in this matter, and he recommended that the Board dismiss Mr. Winkler's OBSTRUCTION TO DRAIN COMPLAINT.

Manager Anderson moved to dismiss Mr. Winkler's OBSTRUCTION TO DRAIN COMPLAINT due to lack of jurisdiction. Manager Jorissen seconded the motion. Upon roll call vote, Chairman Hieb, Manager Anderson, and Manager Jorissen all voted in favor of the motion; Manager Olauson abstained. Sean will provide notice to the parties of record.

**RRJB Dues** - Discussion on the mills and payment to RRJB. Table till January 2016 meeting.

**Kent Sortland Tile Information** – Kent turned in a map for tile he is putting in for less than 80 acres. This is information only for BCWRD.

**Greg Shanenko Dike Complaint** - Manager Anderson received information regarding a dike complaint from Mr. Shanenko. Discussion on whether this is a dike or obstruction complaint. Manager Anderson will visit with Mr. Shanenko.

**Manager Anderson** told district of Marty Udem wanting information regarding Drain Tile Application. Manager Anderson will visit with Mr. Udem.

**BILLS** - Manager Olauson made a motion to pay the bills in the amount of \$39,094.04. Manager Anderson seconded motion. Motion approved with a roll call vote.

Manager Jorissen - Talked to Managers regarding Gene Jewett and Kent Harstads water back up. 3 culverts are plugged going under CP railroad and need cleaning out. Manager Jorissen will talk to a local CP railroad employee about what could be done about getting this cleaned out.

Discussion for the area of maintenance of Legal Drain 2.

Chairman Hieb adjourned the meeting at 12:35 pm.

Respectfully submitted,

A handwritten signature in cursive script that reads "Linda McKenna". The signature is written in black ink and is positioned above the printed name.

Linda McKenna

Secretary

Barnes County Water Resource Board