

Barnes County Water Resource District

PO Box 306

Valley City, ND 58072

701-845-8508

December 14, 2015

MEETING MINUTES

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

Also Present: See Attached List

Chairman Hieb called the meeting to order at 9:02 am.

Manager Olauson made a motion to approve the November Minutes with correction. Manager Fehr seconded. Minutes approved as corrected.

OLD BUSINESS

Application to Install a Subsurface Drain for John Triebold, Alan Triebold, Roger Triebold, and Raymond Trautman in Section 20 and the Southwest Quarter and the South Half of the Northwest Quarter of Section 21 in Oriska Township

The Board reviewed *Application to Install a Subsurface Drain* dated September 1, 2015, for John Triebold, Alan Triebold, Roger Triebold, and Raymond Trautman. 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, Applicants seek to install a drain tile system

in all of Section 20, the Southwest Quarter of Section 21, and the South Half of the Northwest Quarter of Section 21 lying south of the railroad tracks, in Oriska Township, Barnes County, North Dakota. The project will include a pump outlet that will discharge directly into the north road ditch along Interstate 94, along the south boundary of Sections 20 and 21.

The Board previously provided a *Thirty-Day Notice* under N.D. Cent. Code § 61-32-03.1 to the North Dakota Department of Transportation regarding the tile discharge into NDDOT's I-94 right of way. The Board will require Applicants to obtain written permission from NDDOT to utilize its I-94 right of way.

According to records on file with the Barnes County Recorder's Office, Raymond Trautman owns the Northeast Quarter of Section 20; John, Alan, and Roger Triebold own the South Half of Section 20; John Triebold owns the Northwest Quarter of Section 20; and Raymond Trautman owns the Southwest Quarter and the South Half of the Northwest Quarter of Section 21 in Oriska Township.

Manager Anderson moved, and Manager Jorissen seconded the motion, to approve *Application to Install a Subsurface Drain* dated September 1, 2015, for John Triebold, Alan Triebold, Roger Triebold, and Raymond Trautman regarding Section 20, the Southwest Quarter of Section 21, and the South Half of the Northwest Quarter of Section 21 in Oriska Township, all subject to the following conditions:

- 1) That Applicants obtain easements from the owner of any land, besides land owned by Applicants, on which Applicants will construct the tile system;
- 2) That Applicants obtain written permission from the North Dakota Department of Transportation to discharge into, or otherwise utilize, any of its I-94 right of way or road ditches;
- 3) That Applicants notify the Barnes County Water Resource District in advance of any proposed alterations to outlet locations, or addition of any outlets;

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

6) That Applicants 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.

Obstruction to Drain Complaint filed by Greg Shanenko against Shawn Wittenberg

The Board next considered Greg Shanenko's OBSTRUCTION TO DRAIN COMPLAINT against Shawn Wittenberg dated October 6, 2015. Mr. Shanenko and Mr. Wittenberg were both present to discuss the matter with the Board. Under the Complaint, Mr. Shanenko alleges Mr. Wittenberg constructed a ditch block in the Southeast Quarter of Section 28 of Getchell Township, Barnes County, North Dakota, that blocks the natural flow of water in a natural drain. The Board and their engineer conducted an investigation and found Mr. Wittenberg had, in fact, installed a ditch block approximately 16 inches high that blocks a natural watercourse. Sean Fredricks informed the Board the standard regarding obstruction complaints under N.D. Cent. Code § 61-16.1-51 is whether or not the obstruction is a "barrier . . . which materially affects the free flow of waters in the watercourse . . ." In this case, the Board found the ditch block constructed by Mr. Wittenberg very clearly materially impacts the flow of water through the watercourse.

According to records on file with the Barnes County Recorder's office, Shawn Wittenberg owns the Southeast Quarter of Section 28.

The Board discussed the timing of any removal of the ditch block and concluded Mr. Wittenberg could certainly remove the ditch block over the winter. With that in mind, the Board indicated any removal should be complete by 5:00 p.m. on January 15, 2016.

Manager Anderson, seconded by Manager Olauson, moved to order Shawn Wittenberg to remove the ditch block installed in the Southeast Quarter of Section 28 in Getchell Township, Barnes County, North Dakota, by 5:00 p.m. on January 15, 2016. Upon roll call vote, the motion carried unanimously.

Greg Shanenko Drainage Complaint Filed Against Albert Wittenberg

The Board next considered Greg Shanenko's DRAINAGE COMPLAINT against Albert Wittenberg, dated October 8, 2015. Under the Complaint, Mr. Shanenko alleges Mr. Wittenberg constructed illegal drainage in the Northwest Quarter of Section 2 of Getchell Township. The parties previously attended the Board's November 9 meeting to discuss the matter. Mike Opat conducted a site visit and found Mr. Wittenberg had clearly constructed drainage improvements, including deepening and widening of existing drains and ditches. Further, Mr. Opat found the watershed area impacted by these drainage improvements was greater than 80 acres. Mr. Wittenberg indicated he constructed the drainage improvements for purposes of the 319 program. Ms. Shelly Nelson, Supervisor for Soil Conservation Office in Valley City, provided pictures of the improvements. The Board agreed the improvements are clearly deepening and widening and not mere maintenance of existing ditches or drains.

Mr. Wittenberg indicated he believed that because he had approval from Soil Conservation, he did not need any other permits from the water resource district. However, Sean Fredricks advised the Board that, even if Mr. Wittenberg had approval from Soil Conservation, he still had to comply with State drainage requirements, including surface drainage requirements under Section 61-32-03 of the North Dakota Century Code. At the November 9th meeting, the Board agreed to table the matter to allow Mr. Wittenberg to consider the possibility of submitting a drainage application.

Mr. Wittenberg indicated he had not applied for a surface drainage permit. Instead, he repeated his argument that he did not understand he needed a State drainage permit in addition to Soil Conservation approval.

Mike Opat reiterated that the Board's investigation revealed Mr. Wittenberg constructed drainage improvements, including deepening and widening of the existing ditches and drains. Mr. Wittenberg indicated the EPA program does not allow deepening but does allow slope improvements/widening. Sean Fredricks indicated that because the Board has found Mr. Wittenberg constructed deepening and widening and because the drainage impacted is greater than 80 acres, the Board has no choice under Section 61-32-07 but to order Mr. Wittenberg to close or fill the unpermitted drainage.

The Board discussed its options and terms of ordering the drainage closure filled. The Board noted that if they ordered Mr. Wittenberg to close or fill the drainage now, the remedial work would simply wash out during the spring runoff. Instead, the Board believed a June 1 deadline would be acceptable. The June 1 deadline would allow Mr. Wittenberg to construct the remedial work after the spring flooding or spring runoff. In addition, to the extent Mr. Wittenberg wished to apply for a permit in the meantime, he could do so.

Manager Anderson, seconded by Manager Olauson, moved to declare the drainage and ditch improvements constructed by Mr. Wittenberg as unpermitted and illegal drainage that impacted sheet water with a watershed greater than 80 acres that required a permit, and to order Mr. Wittenberg to close or fill the drain and ditch improvements by 5:00 p.m. on June 1, 2016, as required under North Dakota law. Upon roll call vote, the motion carried unanimously.

Shawn Anderson & Kevin Harstad Obstruction Complaint - Shawn Anderson addressed the district regarding the pipeline specifications. Discussion followed. Tabled till Fish & Wildlife and NRCS can attend the next water meeting.

Obstruction to Drain Complaint Filed by Dan Hovde Against James Storhoff

The Board next considered Dan Hovde's OBSTRUCTION TO DRAIN COMPLAINT against James Storhoff dated November 4, 2015. Mr. Hovde and Mr. Storhoff were both present to discuss the Complaint.

Mike Opat explained that Chad Engels from Moore Engineering conducted a site visit and found there is a small ditch block in the northwest corner of the Southeast Quarter of Section 11 of Thordenskjold Township, Barnes County, North Dakota. Chad found the ditch block is in a natural drain that flows from the west into Thordenskjold Drain, a legal assessment drain owned by the Barnes County Water Resource District.

Mr. Storhoff indicated he simply filled in a washout that occurred naturally, and that his work was remedial work that included replacement of dirt that washed out previously.

Manager Anderson conducted a site visit and found that the alleged obstruction is only approximately one foot deep and twenty feet wide across only a portion of the natural drain, a drain that is several feet wider than the alleged obstruction. Mr. Storhoff indicated he did not construct a full-size dike all the way across the natural drain, but only returned the area washed out to its previous condition, an area that only comprises a small portion of the natural drain width. Manager Anderson agreed that Mr. Storhoff only returned dirt previously washed out.

Sean Fredricks advised the Board the standard for Obstruction to Drain complaints under Section 61-16.1-51 of the North Dakota Century Code is whether or not an alleged obstruction "materially affects the free flow of water" in the natural drain. The Board did not believe the washout repairs conducted by Mr. Storhoff materially affect the free flow of water in the natural drain.

With that in mind, the Board had no choice but to dismiss the Complaint since there is no "barrier" or obstruction under Section 61-16.1-51.

Manager Anderson, seconded by Manager Fehr, moved to dismiss the OBSTRUCTION TO DRAIN COMPLAINT filed by Dan Hovde against James Storhoff dated November 4, 2015. Upon roll call vote, the motion carried unanimously.

Pat Hurley Complaints Against Todd and Cindy Vogel

The Board next discussed Pat Hurley's Complaints against the Vogel's. The Board previously concluded the Vogel's constructed an unpermitted and illegal dike and diversion ditch in the East Half of Section 18 of Rosebud Township in violation of

Sections 61-16.1-38 and 61-16.1-53 of the North Dakota Century Code. The Board issued a NOTICE OF DECISION regarding its findings in December of 2014. The Vogel's attempted to identify an alternative for leaving the crossing in place, but the parties could not reach an agreement on that issue. Most recently, Chairman Hieb conducted a site visit and found the Vogel's removed the crossing. Chairman Hieb spoke with Pat Hurley, and Pat indicated he was pleased with the crossing removal. With that in mind, the proceedings regarding the Dike Complaint and the Diversion Complaint are concluded.

The Board next considered Pat Hurley's DRAINAGE COMPLAINT against the Vogel's submitted in October of 2014 under N.D. Cent. Code 61-32-07. In it, Mr. Hurley alleged the Vogel's constructed drain improvements in the East Half of Section 18 in Rosebud Township. Mr. Hurley alleges the Vogel's "manipulated" wetlands and a watercourse in the East Half of Section 18. The Board considered whether or not any drainage constructed in the East Half of Section 18 was illegal or unpermitted drainage in violation of N.D. Cent. Code §§ 61-32-03 and 61-32-07.

Sean Fredricks advised the Board that if the Vogel's constructed any new ditching, or deepened or widened existing ditches, the 80-acre standard applies under Sections 61-32-03 and 61-32-07. In other words, if the watershed area drained by the new drainage or by the deepening or widening of existing drainage is 80 acres or more, the work would have required a permit under Section 61-32-03. Further, if the work was truly deepening or widening, and was beyond mere maintenance of existing ditches, the work required a permit (if the watershed area impacted is 80 acres or more).

Under North Dakota law, maintenance of an existing drain or ditch does not require a permit:

89-02-01-05. Exceptions to permit required

A drainage permit under section 89-02-01-03 is not required for maintenance of a drain.

89-02-01-02(7): "Maintenance" means removal of silt and vegetation from a drain. Maintenance does not include deepening or widening a drain.

Regardless of whether or not the watershed area is 80 acres or more, if the work was simply "maintenance" of existing ditches, the work did not require a permit and the Board must dismiss the Complaint. However, if the work was, in fact, deepening or widening, and not just silt or vegetation removal from the existing

ditches, then the work may have required a permit (if the watershed area drained is 80 acres or more).

The Board previously directed Mike Opat and Moore Engineering to investigate the East Half of the Section 18. Mike conducted an investigation and found no evidence of any ditching improvements or new ditching or drainage constructed on the East Half of Section 18.

Sean Fredricks indicated that, under Section 61-32-03, and under Chapter 89-02-01 of the North Dakota Administrative Code, a landowner need only obtain a drainage permit for improvements to an existing ditch if the improvement includes deepening or widening of the ditch; North Dakota law does not require a new permit for maintenance of an existing ditch. In this case, there is no evidence of any deepening or widening of any existing ditches, nor is there any evidence of any new ditches constructed on the East Half of Section 18. With that in mind, the Board lacks jurisdiction over maintenance of an existing ditch, and the Board has no choice but to dismiss the Complaint.

The Board's understanding was NRCS was investigating allegations of drainage violations. The Board tabled the matter to allow NRCS the opportunity to conduct their investigation. However, the Complaint is over a year old, and the Board wished to come to a final resolution regarding the DRAINAGE COMPLAINT and, based on the Board's investigation, the Board did not feel there was sufficient evidence to conclude the Vogel's constructed any new drainage. Rather than leave the matter open indefinitely to allow NRCS to complete their investigation, the Board felt compelled to act on the Complaint based on the results of their own investigation.

In light of the lack of jurisdiction over this alleged ditching, the Board determined dismissal is the only option available for the Board. Manager Olauson, seconded by Manager Jorissen, moved to dismiss the Drainage Complaint due to lack of jurisdiction under Sections 61-32-03 and 61-32-07. Upon roll call vote, the motion carried unanimously. The Board directed Sean Fredricks to prepare the requisite Notice of Decision and to send to the decision to the parties of record.

Thordenskjold Drain Extention - Sean Fredricks will prepare the resolution paper work for January's meeting.

Thordenskjold Drain Cleanout – Manager Anderson updated district on what clean out was done on drain. Discussion followed. Mike Opat, suggested this would be an opportune time to submit for a permit from the State Water Commission, as there is no permit for this drain on file. We could send a profile of the whole drain that will include the extension resolution in the permit. Manager Anderson made a motion to have Moore Engineering inspect all culverts through Thordenskjold Drain and take some elevation shots of the drain where they see fit. Manager Olauson second. Motion approved with a roll call vote.

10 Mile Lake – Paul Abrahamson updated information on the results of the water quality of 10 Mile. Classified as a Class 4 Lake and has same water quality standards as a Class 1A Stream like the Sheyenne River, which is Classified as a 1A Stream. Paul explained what the results were from the testing. Some results are that Sulfates are higher in Hobart than 10 Mile & Iron is also found higher at north end of 10 Mile than at south end, maybe caused from a spring in north side of lake. Paul showed some water elevation shots, on Smart screen, before freeze up. Lake level was 1431.4 at freeze up. Also mentioned was maybe having a meeting to form an assessment district.

Hobart Lake Update – Mike Opat said all information is in to Emergency Services and FEMA for their review for cost benefit ratio (may be a month or so). Then start working on phase 2. Manager Anderson will be the operating person with Chairman Hieb as an alternate operating person for the project.

Little Dam/Kathryn Dam – Barr Engineering should have some information in January.

Griggs/Barnes Joint WRD – Manager Fehr informed about some resistance in Barnes County on where the control gate will be located. Ballots have been sent out and a Public Form set up for 7pm January 14, 2016 in Hannaford at the Wildlife Club.

Snagging & Clearing – Chairman Hieb said Industrial Builders will be out to work when ice conditions are right. Brady with Moore Engineering has this all set up. Clean up till \$100,000 runs out.

NEW BUSINESS

Restoration of Emergency Drainage – R. Jon Fitzner addressed the district and explained where problem arises on cleanout done back in 2011. Mike Opat explained this is same issue that Shawn Anderson had a complaint earlier this fall. Discussion followed. Landowners could possibly apply for a drainage permit and possible 404 Army Corp Engineers permit would be needed.

Tim Lyter – Legal Drain 2 - Mr. Lyters questions were discussed and Mike Opat gave him map information to help him understand assessment updates. John Schwehr also addressed district regarding assessment on Legal Drain 2 and wondering about visiting with landowners that were assessed but questioned whether water would ever drain to Legal Drain 2.

Legal Drain 2 Clean Out – Manager Anderson updated on the clean out process. The bill for Klubben Excavating for \$20,125.00 for cleaning of Legal Drain 2, was excepted for 2015.

Cass County Retention Sites - Jerry Garrahy had questions about why Minnie Lake Township was in the BCWRD back in our January, 2015 meeting. Mike Opat explained that this is a potential project and that money from the farm program was being used for Upper Maple River retention study. Shawn Olauson volunteered from our district to be contact on this board.

Dave Lettenmairer - addressed the district to see if all water district information is open to the public for viewing. All maps, minutes, etc. are open to public viewing.

Bills - Manager Olauson made a motion to pay the bills totaling \$35,434.90. Manager Fehr second. Motion approved with a roll call vote.

Meeting Adjourned at 12:20 pm.

Respectfully submitted,



Linda McKenna
Secretary/Treasurer
Barnes County Water Resource Board