

Barnes County Water Resource District

PO Box 306

Valley City, ND 58072

701-845-8508

September 12, 2016

Meeting Minutes

Members Present: Chairman Jerry Hieb, Manager Bruce Anderson, Manager Shawn Olauson, Manager Dale Jorissen, Manager Brett Fehr, Sean Fredricks- Ohnstad Twichell & Mike Opat- Moore Engineering

Also Present: See attached list

Chairman Hieb called the meeting to order.

Manager Olauson moved to approve minutes as corrected, Manager Anderson seconded motion. Motion approved.

Old Business

Pross Complaint: Manager Jorissen suggested to look for someone else to look at taking care of drain as Wade Klubben may be behind schedule this fall. The Board Decided to let the ditch dry out and get a hold of Wade to see if he can do it at that time. Anderson was going to get a hold of Scott Cummings to see what his schedule looked like for this fall.

Obstruction to Drain Complaint Filed by Kevin Harstad against Brad Bellmore and the North Dakota Game and Fish - Complaint for Water-Related Issues filed by Matt Legge Against Brad Bellmore

The Board considered the OBSTRUCTION COMPLAINTS filed by Kevin Harstad and Matt Legge against Brad Bellmore. Mr. Harstad filed his OBSTRUCTION COMPLAINT in August of 2015 (prior to the State's issuance of the new COMPLAINT FOR WATER-RELATED ISSUES complaint form). Mr. Legge submitted his Complaint in February of 2016 on the new State-issued COMPLAINT FOR WATER-RELATED ISSUES; Mr. Legge indicated on the Complaint form that his Complaint was regarding an obstruction under Section 61-16.1-51 of the Century Code. At any rate, both Complaints alleged obstruction of a natural watercourse or artificial drain in violation of Section 61-16.1-51 on the Southwest Quarter of Section 7 of Stewart Township in Barnes County, North Dakota.

The Board considered these Complaints for several months and has attempted to resolve these issues amicably and without having to issue any order. Alliance Pipeline, a natural

gas pipeline company, has an easement on the Southwest Quarter of Section 7 across and through the natural drain near Eckelson Lake. U.S. Fish and Wildlife Department has indicated its intent to obtain an easement over this property but has not yet secured an easement as far as the Board is aware. Some party or entity cleaned out the natural drain in the Southwest Quarter of Section 7. However, Mr. Bellmore later filled the sediment back into the natural drain to avoid any potential Swampbuster issues, though NRCS never initiated an enforcement action, and to comply with the wishes of U.S. Fish and Wildlife.

In addition, the complaining parties contend the Alliance Pipeline and the cover above the pipeline are too high and similarly causing an obstruction. Further, the Board considered whether or not it had any authority to compel Alliance Pipeline to lower its pipeline on Mr. Bellmore's property in light of the fact that the pipeline company had an easement; in other words, the Board questioned whether or not it could force a pipeline company to act despite the company's easement rights.

The Board negotiated with the various parties for several months and ultimately directed Moore Engineering to conduct a survey.

Moore Engineering's survey revealed that neither the sediment nor the pipeline present a barrier or obstruction. The survey revealed the elevation decreases across the entire stretch of the natural drain, with minor fluctuations in the channel bottom as would be common in a natural drain; in fact, there is a foot of drop from the location of the pipeline to Mr. Bellmore's east property line and a one foot difference between the location of the pipeline and the point where the channel leaves the large wetland basin upstream. In Mike Opat's opinion, water is moving downhill without any noticeable obstruction, based on these survey results.

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. Based on Moore Engineering's survey and Mike's opinion, neither the sediment nor the pipeline creates an obstruction or barrier that "materially affect the free flow of water" in the natural drain.

With that in mind, even though the Board would like to resolve some of the drainage issues in the area, under the legal standard, there is no obstruction; and, therefore, the Board cannot compel removal of any sediment or any relocation by the pipeline company. 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 Olauson, seconded by Manager Jorissen, moved to dismiss the OBSTRUCTION TO DRAIN COMPLAINT filed by Kevin Harstad against Brad Bellmore and U.S. Fish and Wildlife, and to dismiss the COMPLAINT FORM WATER-RELATED ISSUES filed by Matt Legge against Brad Bellmore. Upon roll call vote, the motion carried unanimously.

Sean Fredricks will provide a NOTICE OF DECISION to all parties of record.

S. Wittenberg/Shanenko complaint: Manager Anderson visited the site. Sean Fredricks said that Wittenberg withdrew the appeal. Sean F will notify Wittenberg by letter that will state it has to be removed by October 9th or the water board will hire a contractor to remove it.

Snagging & Clearing update: Work can be started as soon as it is wanted. Mike Opat says he can have Brady look into it.

Thordenskjold Drain: Hieb says the extension is done. The 3 culverts have been lowered. Scott Cummings did the work. Scott said he could do the last stretch for about \$2000. Manager Olason made the motion to have him finish cleaning out drain from Section 24 Thordenskjord township, range 137-57. 2nd by Manager Fehr, roll call vote, motion carried.

Chairman Hieb recessed the meeting at 9:29 and opened up the hearing at 9:30 for Shanenko & A Wittenberg hearing.

Public Hearing - SURFACE DRAIN PERMIT APPLICATION NO. 4833

The Board is currently processing Albert Wittenberg's application, SURFACE DRAIN PERMIT APPLICATION NO. 4833. Under the application, Mr. Wittenberg seeks a permit regarding his project in the Northwest Quarter of Section 2 of Getchell Township, a project he is constructing under the EPA 319 program. The project is the subject of a drainage complaint filed by Greg Shanenko. The Board previously concluded Mr. Wittenberg's project did, in fact, require a surface permit under N.D. Cent. Code §§ 61-32-03 and 61-32-07; the project included deepening and widening of the existing ditches and drains on Mr. Wittenberg's property, and the project drains a watershed greater than 80 acres. The Board ordered Mr. Wittenberg to close or fill the unpermitted drainage, but held the order in abeyance while Mr. Wittenberg sought an after-the-fact surface permit.

The State reviewed Application No. 4833 and concluded the project is not "of statewide or interdistrict significance." With that in mind, the Board must process the application in accordance with N.D. Admin. Code § 89-02-01-09.1(2). Under Section 61-32-03, the Board must determine if the project proposed under the Application will "flood or adversely affect downstream lands"; if so, the District must require the Applicant to obtain flowage easements from downstream landowners. After reviewing Application No. 4833, the Board made a preliminary finding that the project will not likely result in adverse impacts to downstream landowners. However, in accordance with Section 89-02-01-09.1(2), the Board concluded a public meeting would be appropriate to further consider the project, and to allow downstream landowners the opportunity to express any concerns they might have regarding potential impacts. The Board set the hearing for September 12, and provided notices to downstream landowners regarding the hearing.

Chairman Hieb opened the hearing. Mr. Wittenberg described his project, and he read a letter from Lori Frank from Soil Conservation.

Mike Opat and Sean Fredricks indicated the State Engineer's Office recommended the Board require applicant to obtain permission from the townships regarding any work in their right of way.

With regard to easement requirements, the State simply reiterated the Board's obligation to determine if the project will result in adverse impacts to downstream landowners.

Chairman Hieb opened the floor to questions or comments from downstream landowners. Greg Shanenko owns land in the East Half of Section 2 of Getchell Township. Mr. Shanenko contended drainage of Mr. Wittenberg's slough will result in new water that would not normally flow over his property. In addition, he contended the water will be high salinity water. In addition, Mr. Shanenko suggested Mr. Wittenberg's project has already resulted in damages to the downstream township road.

Steve Winter farms property in the North Half of Section 11. He expressed his concerns about additional water.

There was discussion about the possibility of a tile line being installed through the Shanenko property, and possibly the Winter property so that it wouldn't have as much of an impact on those two properties.

Chairman Hieb closed the hearing and indicated the Board will take the matter under advisement.

Hobart Lake Update: Mike Opat spoke to this. Moore Engineering has the legal descriptions set up and ready to go working with Sean's office now to get amounts on the easements. Just waiting on those to come back. Josh has been in contact with land owner as far as his stock pond on what to be done there. Darren Bjornson spoke with concern for water by bunker at Peavy.

Kathryn Dam: Mike gave update and handed out a Memorandum subject of Considerations regarding dam repair and rock ramp addition at Kathryn Dam.

10 mile Lake: Paul Abrahamson shared concern about high water level in ground. Lake level is at 1431.6 msl. Manager Anderson will give Paul 2 names of soil testing people to do independent studies. Discussion followed.

Griggs/Barnes WRD: Manager Fehr reported no head way with it yet. Have to set a deadline by October 18, which is court date. Fehr will have more update at next meeting.

New Business:

The Board next considered Dan Hovde's complaint against James and Marilyn Storhoff. Jonathan Garaas submitted a COMPLAINT FOR WATER-RELATED ISSUES on behalf of Mr. Hovde dated August 2, 2016 (the "Complaint"). In the Complaint, Mr. Hovde alleged construction of an illegal or unpermitted dam, dike, or other device in violation of N.D.

Cent. Code § 61-16.1-53; and he alleged construction of an obstruction to a drain or watercourse in violation of N.D. Cent. Code § 61-16.1-51. Mr. Garaas and Mr. Hovde were present, as were Mr. and Mrs. Jim Storhoff.

In 2015, Mr. Hovde submitted an OBSTRUCTION TO DRAIN COMPLAINT against Mr. Storhoff on the old state OBSTRUCTION TO DRAIN COMPLAINT form, dated November 4, 2015. In the 2015 complaint, Mr. Hovde alleged Mr. Storhoff caused an obstruction to a natural drain in the Southeast Quarter of Section 11 of Thordenskjold Township; James and Marilyn Storhoff own the Southeast Quarter of Section 11 as co-Trustees of the James E. Storhoff Revocable Living Trust. Dan Hovde owns the Southwest Quarter of Section 11, property adjacent to the Storhoff property.

With regard to the 2015 complaint, Mr. Storhoff previously contended he simply filled in a washout that occurred naturally, and that he simply replaced dirt that had washed out; Manager Bruce Anderson conducted a site visit in 2015 and confirmed that Mr. Storhoff had only replaced dirt that had washed out naturally. Further, Chad Engels from Moore Engineering conducted a site visit in 2015 and found the remedial work by Mr. Storhoff did not materially impact the flow of water through the natural drain on the Southeast Quarter of Section 11. In light of the inspections and findings by Manager Anderson and Chad Engels, the Board concluded Mr. Storhoff's washout repair did not constitute a "barrier" to a natural drain, the standard for an obstruction under Section 61-16.1-51. At its meeting on December 14, 2015, the Board dismissed Mr. Hovde's OBSTRUCTION TO DRAIN COMPLAINT.

Sean Fredricks notified Mr. Hovde and Mr. Storhoff of the Board's decision to dismiss Mr. Hovde's 2015 complaint by a NOTICE OF DECISION dated December 23, 2015. In the NOTICE, Mr. Fredricks notified the parties that any party could appeal the decision of the Board to Barnes County District Court under N.D. Cent. Code §§ 61-16.1-54 and 28-34-01, the only appeal opportunity available regarding obstruction complaints under Section 61-16.1-54. Mr. Hovde did not appeal the Board's decision to Barnes County District Court within the required 30-day deadline and all appeal periods have expired regarding the 2015 complaint.

With regard to the new Complaint, Mike Opat provided a copy of a report he prepared. Mike explained the report and explained the investigation Moore Engineering conducted as requested by the Board at its August meeting. Moore Engineering conducted an aerial drone inspection, and Mike reported the drone video showed no sign of any recent grading or filling activity on the Storhoff property. In addition to the drone inspection, Chad Engels, Mike Opat, and Manager Anderson conducted a site visit on August 19, 2016. Mike, Chad, and Manager Anderson found no evidence of any additional fill material placed at the location of the alleged obstruction; Mike noted the area was currently covered by soybeans. Further, Mike, Chad, and Manager Anderson noted that water from the drain on Mr. Hovde's property was still able to overflow and cross the Storhoff property once the water reached a certain elevation. Without any evidence of any additional fill placed in the natural drain on Mr. Storhoff's land, Mike concluded there was no evidence of any legal obstruction under Section 61-16.1-51.

With regard to the dam/dike portion of the Complaint, Mike again noted that there was no evidence that Mr. Storhoff had done anything more than simply repair a washout that had occurred in the natural waterway on his property back in 2015. However, even considering the dam/dike elements under Sections 61-16.1-38 and 61-16.1-53, along with the relevant provisions of Section 89-08-01-01 of the North Dakota Administrative Code, Mike indicated there was no evidence of any dam or dike that would meet the 50 acre-feet standard required to trigger a permit requirement. More specifically, Mike noted that even if the fill placed on Mr. Storhoff's property was something more than just a repair of a washout in a natural watercourse, the 50 acre-feet standard would apply since that type of a "structure" would qualify as a "dam" as opposed to a "dike." Mike further noted that a dam in this area would classify as a "low-hazard dam," and would only require a permit if it retained, diverted, or obstructed 50 acre-feet. In this case, Mike indicated Moore found the alleged dam would not retain, divert, or obstruct 50 acre-feet of water or more, so no permit would have been required anyway under Sections 61-16.1-38 and 61-16.1-53. Mike's report contains more detailed findings regarding both the obstruction and dam/dike allegations and Moore's analysis.

Mr. Garaas claimed Mr. Storhoff did, in fact, install or insert additional material on his property in the Southeast Quarter of Section 11; the Complaint alleges Mr. Storhoff must have installed the additional fill "sometime after BCWRD investigation [Fall, 2015] and May or June, 2016." Mr. Garaas contended that, because ponding occurs on Mr. Hovde's property on the Southwest Quarter of Section 11, that alone is sufficient evidence that Mr. Storhoff inserted additional fill on his property. Further, Mr. Garaas alleged that ponding occurring at the section line was proof that Mr. Storhoff had, in fact, installed additional fill within a natural watercourse, in violation of Section 61-16.1-51.

Mike Opat noted that, in his report, Moore provided details of a drain on Mr. Hovde's property in the Southwest Quarter of Section 11. More specifically, the NRCS documents provided by Mr. Hovde to support his Complaint provide evidence of drain manipulation on the Southwest Quarter of Section 11. In other words, the drain on Mr. Hovde's property was artificially modified prior to 1985, at the very least, and may have been modified after 1985. Mike's report further noted there are no valid drainage permits on the Southwest Quarter of Section 11 on Mr. Hovde's property. With these facts in mind, Mike noted that the manipulated drain on Mr. Hovde's property could most certainly be lower and deeper than the natural drain on Mr. Storhoff's property. Mr. Garaas alleged the Board previously concluded the drain on Mr. Hovde's property was a natural watercourse; however, Mike pointed out that the Board's NOTICE OF DECISION only noted the existence of a "natural drain" in the Southeast Quarter of Section 11, Mr. Storhoff's property, and did not opine as to the nature of the drain on Mr. Hovde's property in the Southwest Quarter of Section 11, and certainly did not identify the drain on Mr. Hovde's property as a "natural" drain. At any rate, Mike noted the deepening or manipulation of the drain on the Hovde property by itself could result in ponding on the Hovde property; in other words, the presence of ponding is not, by itself, sufficient evidence of additional fill on Mr. Storhoff's property.

Mr. Storhoff contended Mr. Hovde did, in fact, deepen the drain on his property and that Mr. Hovde's renter, Mr. Vogel, previously acknowledged to Storhoff that Hovde directed Vogel to deepen the natural drain on the Southwest Quarter of Section 11.

Sean Fredricks reminded Mr. Garaas the Board would not reconsider the obstruction complaint elements under 61-16.1-51 for anything installed on Mr. Storhoff's property since the Board's decision on the 2015 complaint. Mr. Fredricks noted the principle of administrative *res judicata* precluded Mr. Hovde or Mr. Garaas from raising the same arguments in this Complaint alleged in the 2015 complaint. In other words, without any evidence of additional dirt placed on the Southeast Quarter of Section 11, the Board would not have enough evidence to support a conclusion that Mr. Storhoff had, in fact, constructed an obstruction in violation of Section 61-16.1-51.

Mr. Fredricks asked Mr. Garaas if he had any evidence that Mr. Storhoff had installed any additional fill since the Board's dismissal of Mr. Hovde's 2015 complaint. Mr. Garaas alleged once again that ponding occurring on the Southeast Quarter of Section 11 was alone evidence of additional fill placed by Mr. Storhoff.

Manager Anderson and Mike once again noted they found no evidence of any additional fill on the Southeast Quarter of Section 11. Further, Chairman Hieb noted that the Board dismissed Mr. Hovde's 2015 complaint on December 14, 2015. Any additional work or fill placed by Mr. Storhoff would have had to have been in the spring of 2016; Chairman Hieb noted the spring was wet, and any additional work would have resulted in tracks, marks, or some indicator of additional work by Mr. Storhoff. In light of the lack of any evidence of any work conducted in the spring, and in light of the lack of any evidence of additional fill, Chairman Hieb noted that, in his opinion, the Board had no choice but to dismiss the Complaint.

Mr. Storhoff presented pictures that, in his opinion, demonstrated that Mr. Hovde deepened the drain on his property to drain a slough. The Board has copies of Mr. Storhoff's pictures on file.

Manager Olauson noted that, in light of Mike Opat's report, Manager Anderson's inspection with Chad Engels and Mike Opat, and the lack of any additional evidence or proof that Mr. Storhoff placed any additional fill in the Southeast Quarter of Section 11, the Board would have to dismiss the Complaint. Manager Olauson moved to enter a finding that there was no evidence the Storhoffs installed or constructed a "barrier" to a natural watercourse or artificial drain on the Southeast Quarter of Section 11 that materially affects the free flow of water; to enter a finding that there was no evidence the Storhoffs constructed a dam, dike, or other device on the Southeast Quarter of Section 11 that was capable of retaining, diverting, or obstructing 50 acre-feet of water; and to dismiss Mr. Hovde's Complaint. Manager Anderson seconded the motion. Upon roll call vote, the motion carried unanimously.

Sean Fredricks noted he would provide a NOTICE OF DECISION to Mr. Garaas and the Storhoffs.

Tim and Diana Logan Drainage Complaint:

Chairman Hieb spoke on Logan's behalf. Stating back pond overflows anytime there is over a 2 inch rain possibly because of development on winter show road. Sean F stated we need a party to make a complaint against. Which we don't currently have. Jerry is going to visit with him about withdrawing it and going to the city with it. Decided to table it until the next meeting.

Dakota Plains: They have been asked by the city to move their propane tanks from Valley City. Looking to move their tanks onto a wetland. Need to check into what kind of permit is needed.

Stewart Drain: Slide on the SW branch coming out of there. 100 yards of wash off on both sides. Need to get Klubben in to clean it up before freeze up. Manager Jorriison will talk to Wade.

Application to Install a Subsurface Drain for Bruce Anderson in the West Half of Section 34 in Hobart Township

Before the Board reviewed a tile application from Manager Bruce Anderson, Sean Fredricks indicated the Board would have to conduct conflict analysis. Sean explained that Section 44-04-22 of the North Dakota Century Code provides the relevant standard for conflict of interest situations. 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.

Sean 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. In this case, Manager Anderson will directly benefit from the tile project proposed under the tile application. By

statute, Sean indicated Manager Anderson's tile project and permit application would raise a "direct and substantial personal or pecuniary interest" conflict under Section 44-04-22. Sean indicated that, with that in mind, he recommended that Manager Anderson not "participate in or vote on" issues related to his permit application or his project. The remainder of the Board voted unanimously to declare a conflict for Manager Anderson and to preclude Manager Anderson's participation in or voting on any items regarding his permit application or his project.

The remainder of the Board next reviewed *Application to Install a Subsurface Drain* dated September 7, 2016, for Bruce Anderson. 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 West Half of Section 34 of Hobart Township, Barnes County, North Dakota. The project will include a single pump outlet that will discharge directly into a slough on Section 34.

Mike Opat reviewed the application and indicated that because the project will discharge directly into a slough, no *Thirty-Day Notice* was necessary under N.D. Cent. Code Section 61-32-03.1, and the Board cannot require Applicant to obtain any flowage easements from downstream landowners. Further, Mike suggested the Board require Applicant to install and maintain erosion protection at the outlet.

According to records on file with the Barnes County Recorder's Office, Kathy Anderson, Applicant's wife, owns the Southwest Quarter of Section 34; Bruce and Kathy Anderson own the West Half of the Northwest Quarter of Section 34; and Bruce Anderson leases the East Half of the Northwest Quarter of Section 34 from D & J Anderson Farms, Inc.

Manager Fehr moved, and Manager Jorissen seconded the motion, to approve *Application to Install a Subsurface Drain* dated September 7, 2016, for Bruce Anderson in the West Half of Section 34 in Hobart Township, all 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 slough in the West Half of Section 34;
- 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. Manager Anderson did not vote as it pertained to him.

Bills: Manager Anderson made a motion to pay the August Bills. Bills were approved as presented. Chairman Hieb 2nd. Roll call vote all in favor. Passed.

Adjourned at 12:20

Respectfully submitted,

Sarah Halverson
Secretary
BC Water Resource District