

Barnes County Water Resource District

PO Box 306

Valley City, ND 58072

701-845-8508

December 12, 2016

Meeting Minutes

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

Chairman Jerry Hieb (absent) Manager Brett Fehr (Absent)

Also Present: See attached list

Manager Bruce Anderson called the meeting to order.

Manager Olauson moved to approve minutes as presented, Manager Jorissen seconded motion. Motion approved.

Old Business

Pross Complaint: Discussion was held. Will proceed with flap gate. Would like to do this in Spring. The earliest that the weather will allow.

S. Wittenberg/Shanenko complaint

Obstruction to Drain Complaint filed by Greg Shanenko against Shawn Wittenberg

The Board next considered Greg Shanenko's 2015 OBSTRUCTION TO DRAIN COMPLAINT against Shawn Wittenberg. At the Board's November meeting, the Board approved FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER under which the Board directed assessments against Mr. Wittenberg's property in the amount of \$8,000, in accordance with N.D. Cent. Code § 61-16.1-51. Under the FINDINGS, the Board directed assessments against Mr. Wittenberg's property for the significant legal, engineering, and contractor expenses incurred investigating the Complaint and ultimately removing the obstruction when Wittenberg failed to comply with the District's orders.

Following the Board's November meeting, Mr. Wittenberg contacted Chairman Hieb and alleged his attorney did not communicate any of the Board's directives to him, and Mr. Wittenberg contends he should not be liable for the Board's expenses as a result. Sean Fredricks indicated he communicated with Mr. Bill Brudvik on several occasions, by email and by phone, and Sean was

confident Mr. Brudvik had, in fact, communicated the Board's various directives to Mr. Wittenberg.

Manager Jorissen moved to rescind the previous Motion to approve the FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER, approved at the Barnes County Water Resource District's meeting on November 14, 2016, and to table the matter for further discussion at the Board's meeting on January 9, 2017. Manager Olauson seconded the motion. On roll call vote, the motion carried unanimously.

Snagging & Clearing update: Mike Opat said Jerry is communicating with Brady and coordinating with landowners.

Hobart Lake Update: No update until new business.

Kathryn Dam: Discussion was held. No action was taken.

10 mile Lake: Paul Abrahamson reported Lake level is at 1431.5 msl. Discussion was held.

Griggs/Barnes WRD: Manager Olauson reported the Corp has not rendered any decision.

Stewart Drain: Manager Anderson reported that Wade Klubbens did clean out drain in the SW branch this week. Discussion was held that the water is not draining very fast because of cat tails.

Hovde Complaint: No update. There will be a hearing on this at the March meeting.

Thordenskjold Drain update: Manager Anderson reported everything is paid and done, the whole thing is cleaned out. Discussion was held on wing walls depending on funds.

Shawn Wittenberg Complaint: **Shawn Wittenberg Drainage Complaint Against Greg Shanenko dated November 13, 2016**

The Board next considered Shawn Wittenberg's Drainage Complaint against Greg Shanenko dated November 13, 2016. In the Complaint, Wittenberg alleges Greg Shanenko constructed illegal drainage in the Northeast Quarter of Section 28 of Getchell Township in violation of N.D. Cent. Code §§ 61-32-03 and 61-32-07. The Board dismissed Shawn Wittenberg's Drainage Complaint against Mr. Shanenko dated October 15, 2015, regarding the same property and the same allegations. At the Board's November meeting, the Board directed Mike Opat to investigate the 2016 Complaint, and to determine if the 2016 Complaint alleges anything different from the 2015 Complaint.

Mike Opat conducted an investigation and concluded the 2016 Complaint submitted by Mr. Wittenberg contains the exact same allegations contained in Mr. Wittenberg's 2015 Complaint against Mr. Shanenko. Mike reminded the Board that the Board dismissed Mr. Wittenberg's 2015 Complaint following Mike's investigation revealed no evidence of any manmade drainage improvements constructed by Mr. Shanenko on the Northeast Quarter of Section 28. In September of 2015, Mike reported to the Board that excess water from a natural depression on the Northeast Quarter of Section 28 sometimes overflows naturally, but there was no evidence Mr. Shanenko constructed any improvements. The Board revisited its minutes from September of 2015, and those minutes provided as follows:

Sean Fredricks advised the Board that if Mr. Shanenko 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 any 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.

1. 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).

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 surface drainage permit for maintenance of an existing ditch, nor does North Dakota law require a permit for natural overflows of natural depressions. 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 Northeast Quarter of Section 28. In addition, Mr. Wittenberg has conceded the watershed area impacted by any

alleged drainage is only 25 acres, far less than the 80-acre permitting threshold under Section 61-32-03. With that in mind, the Board lacks jurisdiction over the Complaint, and the Board has no choice but to dismiss the Complaint.

In light of the lack of jurisdiction over this Complaint, the Board determined dismissal is the only option available for the Board. Manager Anderson, 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.

The Board provided a NOTICE OF DECISION to the parties dated November 12, 2015, to notify the parties of the Board's decision to dismiss Mr. Wittenberg's 2015 Complaint. The NOTICE OF DECISION notified Mr. Wittenberg of his appeal rights under North Dakota law. Sean noted Mr. Wittenberg did not appeal the Board's 2015 decision. Mike Opat noted there is no new evidence of any manmade improvements on the Northeast Quarter of Section 28. With that in mind, the Board has no jurisdiction under Section 61-32-07 over natural overflows of a natural depression. In light of the lack of jurisdiction over this 2016 Complaint, the Board concluded dismissal is the only option available.

The Board asked Sean Fredricks how the Board could collect its costs incurred in investigating and reacting to this Complaint in light of the fact that it contains the exact same allegations contained in Mr. Wittenberg's 2015 Complaint. Sean explained that Section 61-32-07 affords the Board the authority to declare a complaint "frivolous" as defined under N.D. Cent. Code § 61-16.1-02(7). In this case, Mr. Wittenberg's 2016 Complaint contained the exact same allegations contained in Mr. Wittenberg's 2015 Complaint, which the Board dismissed. Further, Mr. Wittenberg had every opportunity to appeal the Board's dismissal of the 2015 Complaint, and he neglected to do so, and instead submitted his 2016 Complaint with the exact same allegations. The Board agreed the allegations contained in Mr. Wittenberg's 2016 Complaint lacked any reasonable cause whatsoever, and the Board concluded Mr. Wittenberg could not have submitted this Complaint in good faith in light of the absence of any new evidence of any manmade improvements in the Northeast Quarter of Section 28.

Manager Olauson moved to dismiss Mr. Wittenberg's Drainage Complaint dated November 13, 2016, against Greg Shanenko due to lack of jurisdiction under Sections 61-32-03 and 61-32-07; and to declare the Complaint "frivolous" under North Dakota law. Manager Jorissen seconded the motion. Upon roll call vote, the motion carried unanimously.

Sean Fredricks will prepare a NOTICE OF DECISION to provide the parties notice, including notice of the Board's "frivolous" finding. Following the expiration of all appeal periods, the Board will be in a position to calculate its total expenses incurred regarding this Complaint, and the Board can issue an order to direct Mr. Wittenberg to reimburse the Board. If Mr. Wittenberg refuses, the Board will have legal authority to assess his property.

Steve Winter Culvert drain concern: Discussion was held. Manager Jorissen will do some checking into this and bring it to the next meeting.

New Business:

Miller Family Hobart Drain Concern: Discussion was held.

Bills: Manager Olauson made a motion to pay the November Bills. Bills were approved as presented. \$19,237.37 Chairman Jorissen 2nd. Roll call vote all in favor. Passed.

Adjourned at 10:30

Respectfully submitted,

Sarah Halverson
Secretary
BC Water Resource District