

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

*PO Box 306*

*Valley City, ND 58072*

701-845-8508

September 8, 2014

### **MEETING MINUTES**

PRESENT MEMBERS: Chairman Jerry Hieb; Manager Bruce Anderson; Manager Shawn Olauson; Manager Bret Fehr; Manager Dale Jorissen; Commissioner John Froelich; and Mike Opat – Moore Engineering

Also Present: See Attached List

Chairman Jerry Hieb called the meeting to order at 9:03 am.

Manager Anderson made a motion to approve the August BCWRD minutes and 10 Mile Lake Special Meeting as written. Manager Fehr seconded motion. Motion approved.

**BNSF Railroad Permit** - Sean Fredricks was unable to be at this meeting because of Red River Joint Special Meeting. Mike Opat explained about the surface permit application and Mike addressed the two new complaints from Dwight Grotberg and Joe Peske, that were turned in this morning. Dwight and Joe addressed the district with their concerns about the water that is backing up now (it is migrating under the railroad now) and will have no place to go when they put in the railroad spur. Kerry Johnson, BC Highway Dept. superintendent, also added his concerns and support for Dwight and Joe complaints. Mike Opat informed the district, we could put conditions on the permit, for the railroad to install a culvert, and it

would be up to the railroad to install or go with the federal law. Discussion followed.

Manager Anderson made a motion to put a condition on the surface permit, that the water resource district is requesting a culvert be installed through the existing railroad bed and extending through the new railroad spur. Manager Fehr seconded motion. Motion approved with a roll call vote.

**VC LITTLE DAM** - Mike Opat had no update at this time, but will try to get a survey crew out for October meeting update. Mike Opat is hoping to sit down with Barr Engineering also and move along with this project.

**MAPLE RIVER PROJECT** - Mike Opat updated district that they are still plugging away with the right of way, and about ½ way done with easements. Hope to start bidding project in December 2014 with construction to start Spring of 2015.

#### **Dam/Dike Complaint Filed by Barnes County Commission Against Kirk Mundal**

The Board next reviewed the Dam/Dike Complaint filed by the Barnes County Commission against Kirk Mundal. At the Board's August meeting, Mr. Mundal was present, and the parties reviewed the history of this Complaint. At the August meeting, Mr. Mundal once again explained that before he constructed his ring dike on his property, he approached the Barnes County Water Resource District to inquire into whether or not he needed any type of permit or any other approvals. Barnes County Water Resource District staff indicated that if his project would retain or divert more than 50 acre-feet of water, the project would require a state permit under N.D. Cent. Code § 61-16.1-38. Beyond that, the Board's staff indicated they had no other jurisdiction over any ring dike. What the Board did not know at that time was that the Barnes County Commission had previously (in 2008) "appointed" the Barnes County Water Resource District as the Barnes County floodplain administrator. The Commission once again attempted to "appoint" the Barnes County Water Resource District as the County's floodplain administrator in 2013. At the time, the County was not aware they lacked authority to appoint the Barnes County Water Resource District without a petition from the Board, which the Board did not submit.

Meanwhile, following his discussions with Barnes County Water Resource District staff, Mr. Mundal contacted the North Dakota State Engineer's office regarding the possible necessity for a permit under Section 61-16.1-38 regarding his ring dike. Mr. Ed Gall, Regulatory Section for the North Dakota State Engineer's office, responded by providing a letter to Mr. Mundal dated February 6, 2012. In that letter, Mr. Gall indicated Mr. Mundal's project would not, in fact, require a permit since it would not retain 50 acre-feet of water. Mr. Mundal relied on Mr. Gall's letter and proceeded with construction of his ring dike.

The County enacted its floodplain ordinance in accordance with the National Flood Insurance Program (the “NFIP”) under 42 U.S.C. §§ 4001-4128. To qualify for flood insurance, any “community” must enact a floodplain ordinance and must regulate development in any floodplain and must prohibit development in any floodway, except as permitted under the terms of the NFIP and, in turn, in accordance with the County’s floodplain ordinance. A portion of Mr. Mundal’s ring dike appears to be within the designated “floodway” under Barnes County’s floodplain ordinance. With that in mind, if any portion of the dike is within the “floodway” or even within the “floodplain,” under the terms of the County’s floodplain ordinance, Mr. Mundal may have been required to obtain a floodplain development permit prior to construction of the ring dike. Further, because the County had previously attempted to appoint the Barnes County Water Resource District as the County’s floodplain administrator, Mr. Mundal was purportedly required to obtain the floodplain development permit from the Barnes County Water Resource District.

The parties have discussed floodplain jurisdiction over the course of several months, and, most recently, the County recognized its lack of authority to appoint or designate the Barnes County Water Resource District as the County’s floodplain administrator. The County has since designated its own floodplain administrator.

Mr. Mundal has alleged that, in light of Mr. Ed Gall’s letter from February of 2012, his ring dike did not require a state permit. Further, Mr. Mundal has alleged that neither the County Commission nor the Barnes County Water Resource District has any jurisdiction over his ring dike with regard to floodplain administration. The Board previously directed its engineer, Mr. Mike Opat, and its attorney, Mr. Sean Fredricks, to investigate these matters. Mr. Fredricks has worked with the Barnes County State’s Attorney regarding the floodplain administration issues.

With regard to the dam/dike complaint issue, Mike Opat investigated the retention or diverting capacity of Mr. Mundal’s ring dike, including Mr. Gall’s previous determinations. Mr. Opat agrees that the ring dike is a “dike” as defined under Section 89-08-01-01(4) because the project is an “embankment . . . constructed to protect real or personal property.” The purpose of the ring dike is to protect Mr. Mundal’s residence. Next, Mr. Opat investigated and considered whether or not the ring dike is “capable of retaining, obstructing, or diverting more than fifty acre-feet . . . of water” in accordance with Section 61-16.1-38. Mr. Gall of the North Dakota State Engineer’s office previously determined the project would have “an interior capacity of less than 50 acre-feet of water.” Mr. Opat conducted his own analysis, based on LiDAR data, and Mr. Opat ultimately concurs with Mr. Gall’s determination. With that in mind, the ring dike did not require a permit under Section 61-16.1-38. In the absence of any permitting requirement, the Board lacks jurisdiction to order its removal under Section 61-16.1-53. With regard to the ring dike, the Board has no choice but to dismiss the County Commission’s Complaint.

In the course of the parties’ discussions regarding the County’s Complaint against Mr. Mundal, the County Commission also raised objections regarding Mr. Mundal’s private driveway and alleged that the driveway itself is a dike or dam that required a permit under Section 61-16.1-38. The Board considered whether or not the private drive is a “dike” under Section 89-08-01-01(4) of the North Dakota Administrative Code; under that provision, a “dike” means an “embankment

... constructed to protect real or personal property.” Mr. Fredricks has previously indicated this definition includes an intent determination. In other words, if Mr. Mundal constructed the driveway “to protect real or personal property,” the private driveway may in fact qualify as a “dike” under North Dakota law. Mr. Fredricks has indicated the intent determination is difficult in this matter especially since the driveway includes culverts. In Mr. Fredricks’ view, the Board would have difficulty proving the driveway is, in fact, a “dike” under applicable North Dakota law because of the culverts through the driveway and because there is no evidence Mr. Mundal constructed the driveway to protect his property.

Further, even if the private driveway does qualify as a “dike” under Section 89-08-01-01(4), Mr. Opat conducted an off-site analysis based on LiDAR surface data and aerial imagery and determined the private driveway, when acting alone, is not “capable of retaining, obstructing, or diverting more than 50 acre-feet” as required under Section 61-16.1-38 (the permitting threshold). With that in mind, Mr. Fredricks and Mr. Opat have advised the Board that the private driveway is not a “dike” under North Dakota law, the private driveway does not meet the 50 acre-feet requirement, and the Board therefore lacks any jurisdiction over the private driveway. In addition, Mr. Opat discussed the driveway issue with the State Engineer’s Office and learned the driveway was noted on the original permit application for the ring dike and the State Engineer’s Office determined construction of the driveway did not require a permit. With that in mind, the Board has no choice but to dismiss the Complaint to the extent it applies to the private driveway.

Manager Bret Fehr, seconded by Manager Dale Jorissen, moved to dismiss the Barnes County Commission’s Dam/Dike Complaint against Mr. Kirk Mundal. Upon roll call vote, the motion carried unanimously. The Board will direct Sean Fredricks to prepare the requisite notice and to provide it to the parties of record.

With regard to the floodplain matter, the dismissal of the Dam/Dike Complaint under North Dakota law does not resolve any of the floodplain/floodway issues. The Dam/Dike Complaint is a statutory complaint strictly under North Dakota law, specifically Section 61-16.1-53. The floodplain and floodway issues are completely separate from the complaint issues. Federal law (specifically the NFIP), state floodplain law (including Chapter 61-16.2 of the North Dakota Century Code), and the County’s floodplain ordinance will regulate any of the floodway issues.

**Thordenskjold Drain** – Mike Opat has been working on legal description and is running into a snag with a parcel of land owned by the City of Nome. Waiting to hear from the Mayor of Nome to find out the owner of the land. No other information at this time.

**Sanborn Lake** – Commissioner Froelich updated the easement process. Manager Anderson informed district that Jorissen’s Crossing is washing away a little and needs more fill, and also blade work is needed for the spoil area. Manager Anderson, has been unsuccessful with contacting the job contractor. District may need to contact someone else to do the finish landscaping project. Amanda Brandt with NRCS had talked to Brian and Walter, and they had deepened the ditch in this area, and this needs to be corrected. Amanda recommended the water district talk with Jorissen. Kurt Tompkins also mentioned another area of spoils that needs to be leveled out. Amanda and Kurt came forward and pointed out different areas on Sanborn Lake Outlet that were in question.

**10 Mile Lake** - Dale Jorissen updated managers on the special meeting that was held in August. The concerned citizen group would like the BCWRD do an elevation shot in the spring and fall to get an idea of how the water level changes in a year. Discussion of where water is coming into 10 Mile and also about a culvert that was washed out in 2011, between townships. Mike Opat did not see any problem with the elevation information being done, as he has enough projects in the area to get this done also. Mike Opat suggested that a gage be put in for the citizens group to monitor. Manager Anderson made a motion for Mike Opat to put a gage in 10 Mile Lake and have (NEW) Manager Jorissen monitor gage and report to the district at the monthly meetings. Manager Fehr seconded motion. Motion approved with a roll call vote.

**Hobart Lake** - Mike Opat wanted to know if the managers had any comments on the Joint Powers Agreement, for Sean Fredricks, so it can be sent off to the BC Commission. No comments were added.

Mike is also gearing up for the permitting process of Hobart Lake. This is a lengthier process for the State Wide Significance Permit. RRJB is obligated to help this district out with the permitting process and Sean Fredricks, will try setting up a special meeting before November Executive Meeting. Manager Anderson will plan to attend that meeting.

Testing results of Hobart Lake were sent off to the state. Mike read a letter, from the state, stating a few of the concerns of sulfates and chlorides in the results and

also some of the exceptions in the laws for what we can do on a project like this. Mike wants to impress to them that this water is already going into the Sheyenne River. These are just a few items to clear up on this project. Manager Anderson took around both easements to all landowners, upstream and downstream, for Hobart Lake Project. He explained the easements and asked them all to look over and that this would be discussed at the next water district meeting. Larry Miller brought up some questions on the flowage easement. Barry Borg and Keith Colville were also present with concerns on this project. Discussion followed on the project.

**Griggs/Barnes** – Silver Creek/Rose Slough is the concern for both water districts. Griggs Engineer and Griggs water district manager are present and came forward with a map for all managers to look at. Located control structure at elevation of 14.64.21 in the road. Next step is to get some surveying done in the area. NRCS has main interest in this area. Discussion followed. Joint board needs to be addressed.

## **NEW BUSINESS**

**Dr. Luke & Tyler Jacobson** – Tyler Jacobson handed out information for the district to consider. Dr Luke explained that the Park District is applying for a 319 EPA grant for the erosion/flood protection at Bjornson Municipal Golf Course, south of Valley City. They would like to get a letter of support from the BCWRD to help with this grant request. Manager Fehr made a motion to write a letter of support for the park stabilization project. Also, approve for when Dr. Luke requests a letter of support for the Heritage Fund and the Mitigation Money, she would not have to come back and address the district. Manager Olauson seconded motion. Motion approved.

**Marc Bush Drainage Complaint** - BCWRD does not have a completed complaint to act upon.

**City of VC Application #2446** – Mike Opat handed out the Levy Application and flood control map from the City of Valley City. In light of the latest floodway/floodplain controversy, Sean and Mike suggest that we just turn it over to the Floodplain Coordinator, Betty Koslofsky and she could maintain that this is in compliance with the County Floodplain Ordinance.

## **Steve Winter Drain Tile Application**

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

The Board reviewed *Application to Install a Subsurface Drain* dated August 19, 2014, for Steve 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 single gravity outlet that will discharge directly into a natural watercourse.

The Board’s engineer reviewed the application and indicated the project will discharge directly into a 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, Richard Winter is the record owner of 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 August 19, 2014, for Steve 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 at the discharge point in the Northwest Quarter of Section 25;
  
- 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.

## **Bonde-Gast Drain Tile Application**

### **Application to Install a Subsurface Drain for Arlen Bonde and Matt Gast in the South Half of Section 29 and the North Half of the North Half of Section 32 in Nelson Township**

The Board reviewed *Application to Install a Subsurface Drain* dated July 20, 2014, for Arlen Bonde and Matt Gast. 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 the South Half of Section 29 and the North Half of the North Half of Section 32 in Nelson Township, Barnes County, North Dakota. The project will include a single gravity outlet that will discharge directly into a natural watercourse in the South Half of Section 29; the project will include a tile line through the Section 29/32 township road to connect tile systems on both parcels.

The Board’s engineer reviewed the application and indicated the project will discharge directly into a natural watercourse; the Board’s engineer recommended that the Board should require Applicants 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 Applicants to obtain any flowage easements from downstream landowners.

According to records on file with the Barnes County Recorder's Office, Arlen and Michelle Bonde own the South Half of Section 29, and Matthew and Casandra Gast own the North Half of the North Half of Section 32 of Nelson Township.

Manager Bruce Anderson moved, and Manager Dale Jorissen seconded the motion, to approve *Application to Install a Subsurface Drain* dated July 20, 2014, for Arlen Bonde and Matt Gast in the South Half of Section 29 and the North Half of the North Half of Section 32 in Nelson Township, 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 provide and maintain adequate erosion protection at the point of discharge into the natural watercourse in the South Half of Section 29;
- 3) That Applicants obtain written permission from the Nelson Township Board of Township Supervisors to discharge into, or otherwise utilize, any of its township road ditches, or to bore through its township road;
- 4) That Applicants notify the Barnes County Water Resource District in advance of any proposed alterations to outlet locations, or addition of any outlets;
- 5) 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;
- 6) 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; and
- 7) 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.

**Charles Pederson** – Jerry Hieb had a call from Mr. Pederson. Chairman Hieb gave this call to Manager Olauson to check out. Manager Olauson reported that Mr. Pederson was looking for more of a retention for his stock pond. There is a creek/coolie that is flooding or full to the brim effecting his stock pond. (NE of Nome - east side of Hwy 32) Water District cannot help him with this problem as it is a natural waterway.

**Budget Request** - Managers discussed previous budget requests and what projects we may have coming up this next year. (4 Mill Levy = \$276,000) Last year budget was \$ 351,423.00

**John Froelich** - BC Commission is still handling Mundal floodplain complaint through the State's Attorney's Office.

Commissioner Froelich informed the district that 25% of the property taxes come from the City of Valley City.

**Bills** – Manager Olauson made a motion to pay \$7,478.04 for the August Bills. Bruce Anderson seconded motion. Motion approved with a roll call vote.

Manager Olauson made a motion to adjourn, Manager Fehr second. Adjourned at 12:04 pm.

Respectfully

Linda McKenna

Secretary/Treasurer

BC Water Resource District.

