

MINUTES OF THE MEETING OF THE SARGENT COUNTY WATER RESOURCE BOARD HELD ON THURSDAY, OCTOBER 20, 2016 AT 8:00 A.M., IN THE COMMISSIONERS ROOM, SARGENT COUNTY COURTHOUSE, FORMAN, NORTH DAKOTA

Managers present: Luke Siemieniewski, Roger Zetocha, Richard Engst, Korey Martinson, and Todd Stein. Absent: None. Also present: Sean Fredricks, Board Attorney; Chris Gross, Board Engineer; Jeff Breker, Havana and Scott Mahrer, Forman.

STORM LAKE OUTLET PROJECT: Joining the meeting at 8:00 a.m. were the Sargent County Commissioners – Jerry Waswick, Chairman, Bill Anderson, David Jacobson and Mike Walstead. Chairman Waswick informed the water board that the commission had discussed the potential formation of the STORM LAKE DAM MAINTENANCE DISTRICT at the October 18th commission meeting. At that meeting Mr. Kent Sundseth, US Fish and Wildlife Service (USFWS) was present and stated that the USFWS does own the Storm Lake Dam structure and that there has not been any divestiture of ownership or control of the dam. The US Government, through Fish and Wildlife Service has not relinquished authority over the property and does maintain the water interest in Storm Lake at 92 feet. The USFWS sees no need for improvements on the structure at this time. The commission referred this issue back to the water board due to information received concerning the ownership, maintenance and operation of the dam structure. Attorney Fredricks quoted Section 61-16.1-40 of the North Dakota Century Code that provides if a federal agency constructs a “dam, dike, or other water control device for flood control project,” but no longer operates or maintains the project, the project automatically becomes the jurisdiction and responsibility of the water resource district where the project is located. During the public hearing on August 18th, Mr. Sundseth did not inform the water board that the USFWS had not relinquished authority over the Storm Lake Dam. Further, Water Board members were disappointed that this was not revealed at that time but are still concerned that there is nothing in writing from the USFWS on this decision. Sean Fredricks pointed out that the right of way documents showed the Department of Ag constructed the project and acquired easements and nothing on the property records indicated USF&W had any ownership interest. Sean Fredricks and Chris Gross will work with Mr. Sundseth and the State Engineer’s Office to further investigate ownership of the Dam.

JEFF BREKER: While the commissioners were still present, Jeff Breker informed them of a bridge located between the SW1/4-22 and SE1/4-21 in Tewaukon Township that should be repaired or replaced. Road Commissioner Mike Walstead will inspect and report back to the commissioners and Mr. Breker. Jeff also asked the water board for permission to remove a dike located between the NW1/4 and NE1/4 of Section 8 in Tewaukon Township. This is land owned by the water board and rented by Jeff. The Board advised Jeff to apply for a permit to remove the dike from the State Water Commission. At another location in Section 15 of Tewaukon Township Jeff would like to install a crossing and Sean said that the water board has no control since he is not installing the crossing over a legal assessment drain or a facility owned by the Board, but indicated Jeff may need a permit from the State Engineer’s Office. Jeff was advised to contact the State Engineer’s Office for their advice and guidance. Motion by Manager Stein to approve the removal of the dike pending approval from the State Engineer’s Office (if needed). Manager Martinson seconded the motion. Upon roll call vote, the motion carried unanimously.

Approve the September 15, 19 and October 6, 2016 minutes and September financial statement. Manager Zetocha moved to approve. Manager Engst seconded the motion. Upon roll call vote, the motion carried unanimously.

Manager Stein moved to approve payment of the following bills. Manager Zetocha seconded the motion. Upon roll call vote, the motion carried unanimously.

73837	Starion Financial	Dr # 4 interest and fees for bond	1404.00
73932	Crandall Construction	Dr # 12 backhoe work (twin bridges)	555.00
73933	Dickey Co. Water Board	Secretary PD & mileage and Ins. premium	3154.10
73934	Richard Engst	Travel	33.48
73935	Farmers National Co.	Dr 7 Appraisal fee	1000.00
73936	Sherry Hosford	Shortfoot Creek travel	64.80
73937	Jerry’s Backhoe Service	Dr # 9 tree removal	570.00
73938	Larson Helicopters	Spraying – Fly ditches-\$700.00; Dr#4-\$566.20; Dr#9-\$794.20; Dr#11-\$3526.40; Dr#12-\$699.20; Dr#7-\$817.00; Frenier Dam-\$490.00; Brummond-Lubke-\$490.00; Nelson Dam-\$122.50; = TOTAL	8205.50
73939	Korey Martinson	Travel	27.00
73940	Moore Eng. Inc.	Brummond-Lubke EAP-\$412.50; Nelson Dam EAP-\$412.50; Gwinner Dam-\$89.75; Shortfoot Creek-\$2385.00; General Eng. Fees-\$656.25; Dr#4-\$89.75; Dr#8-\$162.55; Julie Vculek permit-\$89.75; Bernie Vculek permit-\$89.75; Dr#7 Utilities and Right-of-way-\$5877.00; Dr#7 Engineering services-\$9298.14; Mahrer-Ellefson-\$169.75 – TOTAL	
19732.69		73941 Ohnstad Twichell	General - \$1002.50; Storm Lake
		Dam-\$90.00; Dr#4-\$1267.00; Dr 7 - \$5892.45; Dr#7 Bond - \$4500.00	= TOTAL
		12751.95	
73942	Lucas Siemieniewski	Travel	60.48

73943	Starion Bond Services	Dr # 7	900.00
73944	Todd Stein	Travel	25.92
73945	True North Steel	Dr#4 culverts	2179.32
73946	Wild Rice Soil Conservation Service – Summer youth work – Silver Lake willows – \$2496.76; Dr#9-\$713.16; Dr#7-\$289.77; Tewaukon Watershed-\$142.63 = TOTAL		3642.32
73947	Roger Zetocha	Travel	108.00
12727	Sherry Hosford	Salary less taxes	494.75
12728	Richard Engst	4 PD less 36.72 taxes	443.28
12729	Roger Zetocha	4 PD less 66.97 taxes	413.03
12730	Lucas Siemieniewski	4 PD less 36.72 taxes	443.28
12731	Korey Martinson	1 PD less 9.18 taxes	110.82
12732	Todd Stein	5 PD less 45.90 taxes	554.10
	DD Sargent County Bank	Withholding Taxes	1026.48
	Wire transfer – Starion Bond Services Dr#7 Bond interest and fees		3149.25

WILD RICE SOIL CONSERVATION SUMMER YOUTH: Raina Ruch, Supervisor of the summer youth met with the board to report on the work completed this summer. A bill was presented for a total of \$3,642.32 which included work on Drain # 9, Drain # 7; work by Wade Anderson’s in the Tewaukon Watershed and removal of many willows on the Silver Lake Dam embankment. Raina felt the work progressed nicely and the workers were able to get most of the work completed. Raina asked if board members could accompany her sometime to inspect the work completed and also possible future work.

SILVER LAKE DAM REPAIRS: Chris Gross provided an update on future funding for upcoming projects. Due to cuts in the state budget, any funding that is not spent before June 30, 2017 will be put in the General Water Management Fund and monies for dam repairs that are appropriated and not spent would be lost. Silver Lake Dam is one such project. The State Water Commission conducted a study of Silver Lake Dam and made recommendations for repairs. The Sargent County Park Board is the owner and operator of the dam and Sherry agreed to discuss the budget cuts with the commissioners and park board on November 1 to get any feedback on whether they plan to proceed with repairs to Silver Lake Dam. If the water board entered into a joint powers agreement with the park board, 75% cost share could be requested for dam repairs from the SWC.

ROGER GIBBON – DRAIN NO. 7: Roger met with the board with his concern of cattails and sediment in Drain No. 7 southeast of Milnor and the need to clean it out. Due to heavy rains last week the water is standing and not flowing through the drain. Richard Engst reported that he had removed three beaver dams from the drain but they rebuilt overnight. He has talked to Joel Lyons, USDA trapper and Joel will check on the dams. Further discussion on the cleanout raised concern from board members because they were not aware that the drain needed cleanout on the outlet. The current project for channel improvements on the inlet area and the last project for crossing improvements through Milnor City have maxed out the assessment funding for Drain No. 7. Monies collected will be allocated for these two projects to repay the bond payments. After further discussion, Manager Zetocha made a motion to authorize Richard Engst to obtain an estimate from Marshall Braaten, McLeod; not to exceed \$12,000, to begin the simple cleanout between Section 18 and 19 of Hall Township and proceed northwesterly into Section 13 (Milnor Township), continuing northwest in Section 14, crossing ND Highway 13 and thence due north ¾ of a mile until the drain turns west in Section 11 of Milnor Township. Manager Stein seconded the motion. Upon roll call vote, the motion carried unanimously.

Application to Install a Subsurface Drain for North Dakota FFA Foundation in the North Half of Section 33 in Harlem Township

The Board reviewed an *Application to Install a Subsurface Drain* dated October 17, 2016, for North Dakota FFA Foundation, submitted by Bryan Strom as Trustee/Agent; Brian Vculek was present on behalf of the Foundation to explain the project. 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 156-acre drain tile system in the North Half of Section 33 in Harlem Township, Sargent County, North Dakota. The project will include a single pump outlet that will discharge directly into Sargent County Drain 11 in the Northeast Quarter of Section 33. The Sargent County Water Resource District owns and operates Drain 11. The initial project plan includes tiling 126 acres, with the potential for the additional 30 acres (for a total of 156 acres).

Because the project will discharge directly into Drain 11, 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. Chris Gross recommended the Board require Applicant to install and maintain erosion protection to protect Drain 11.

According to records on file with the Sargent County Recorder’s Office, the North Dakota FFA Foundation, Inc., owns the North Half of Section 33 of Harlem Township.

Manager Zetocha moved, and Manager Engst seconded the motion, to approve *Application to Install a Subsurface Drain* dated October 17, 2016, for the North Dakota FFA Foundation in the North Half of Section 33 in Harlem 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 (Applicant is solely responsible for any damages to Sargent County Drain No. 11 as a result of the tile project);
- 3) That Applicant must operate the pump in the following manner:

Applicant cannot operate the pump from December 1 of each year until at least ten days after the spring runoff flood crest at the USGS flood gage in Rutland;
- 4) That Applicant notify the Sargent County Water Resource District in advance of any proposed alterations to outlet locations, or addition of any outlets;
- 5) That any time water is breaking out of Drain 11 downstream of the tile discharge into Drain 11, Applicants must turn off any pumps, or otherwise close the tile system;
- 6) That, upon a determination by, and notice from, the Sargent County Water Resource District that Drain No. 11 is full or otherwise unable to accommodate the discharge of water from Applicant's tile system, Applicant must turn off any and all pumps;
- 7) That Applicant notify the Sargent 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;
- 8) 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;
- 9) That Applicant obtain an approved *Utility Permit* from the Sargent County Water Resource District regarding any and all outlets into Sargent County Drain No. 11; and
- 10) 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.

DRAIN NO. 8: Manager Siemieniewski reported that Calvin Jacobson installed the culvert for the crossing on Drain No. 8 on the west edge of Rutland.

DRAIN 7 IMPROVEMENT PROJECT NO. 2016-01:

Chris Gross indicated Landmark Drainage, LLC, is prepared to proceed with the project; however, Landmark has not provided the requisite certificate regarding Workers' Compensation coverage. Manager Martinson moved to award the construction contract to Landmark Drainage, LLC, and to issue a Notice to Proceed to Landmark, contingent upon receipt of the requisite certificate regarding Workers' Compensation coverage. Manager Engst seconded the motion. Upon roll call vote, the motion carried unanimously.

Sherry indicated the State Water Commission forwarded a cost-share agreement for the Board's consideration regarding the cost-share previously approved by the State Water Commission (not to exceed \$202,663 (35% of the eligible design engineering costs). Manager Engst moved to approve the cost-share agreement with the State Water Commission. Manager Zetocha seconded the motion. Upon roll call vote, the motion carried unanimously.

Richard Engst pointed out the Board will have to acquire acres from him to accommodate the project. Sean Fredricks indicated potential conflicts require a specific analysis under N.D. Cent. Code § 44-04-22. Section 44-04-22 provides the relevant standard for determining whether or not a conflict exists, and how a public entity should address a conflict once identified. Section 44-04-22 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.

To justify an abstention regarding a matter before a governing entity, 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 a 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. In some situations, however, when a conflict exists, abstention is proper.

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” So 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 situation, Sean indicated acquisition of property from Manager Engst created a direct and substantial pecuniary interest. With that in mind, Mr. Fredricks advised the Board that, in his opinion, a conflict existed and Manager Engst should not participate in the Board’s regarding acquisition of his property. The next step was for the remainder of the Board to vote on whether or not Manager Engst should continue to participate in or vote regarding any of the Board’s decisions to acquire property from Manager Engst to accommodate the project. Manager Zetocha moved to conclude that, with regard to any decisions of the Board regarding acquisition of property from Manager Engst or compensation related to acquisitions, a conflict exists for Manager Engst, and that Manager Engst should not participate in or vote regarding any of those issues. Manager Stein seconded the motion. On roll call vote, the motion carried unanimously.

The Board indicated the right of way values to offer to landowners should be \$4,750 per acre for fee title for tillable acres and \$1,750 for pasture acres. Moore Engineering and Ohnstad Twichell have prepared and circulated purchase agreements to the landowners with those values. Manager Martinson moved to approve Purchase Agreements presented by Chris Gross for the following landowners: 1Ronald G. Motl; 2Ben Hofer, Trustee of Sundale Hutterian Association; Randy L. Johnson and Jennifer M. Johnson; Randy Gibbon; Dale Torreson and Luanna Torreson; Neola M. Cross Shirley Horton, Ronald A. Cross, and Carol J. Cross (Purchase and Exchange Agreement); Gary L. Wallin and Diane K. Wallin; Glen D. Koeppe and Barbara L. Koeppe; Richard Engst and Mary Engst; Milton A. Odegard, Jr.; and Allen Peterson and Joan Peterson. Manager Zetocha seconded the motion. Upon roll call vote, Chairman Siemieniewski and Managers Zetocha, Stein, and Martinson voted in favor; Manager Engst abstained. The motion carried.

CHAD AND TOM HEIMBUCH: Heimbuch Farms have applied for an “Application for Drainage Work within County Road Right-Of-Way” to install a drain tile lift station along the north side of the NE1/4 of 18-129-57 in Brampton Township. The lift station will be installed in the field and then discharge into the south side ditch on County Road #5. The county commission approved the application pending approval of the project from the water board. Chad was given the application form and other paper work to apply for a permit.

DRAIN NO. 11;

Manager Zetocha introduced the following RESOLUTION and moved its adoption:

SARGENT COUNTY WATER RESOURCE DISTRICT RESOLUTION OF NECESSITY REGARDING DRAIN 11 IMPROVEMENT PROJECT NO. 2016-01

WHEREAS, the Sargent County Water Resource District (the “District”) is a North Dakota water resource district and political subdivision under N.D. Cent. Code Chapter 61-16.1.

WHEREAS, the District, or its predecessor, previously conducted proceedings in accordance with North Dakota law to create, establish, construct, own, operate, manage, and maintain a legal assessment drain in certain portions of Sargent County, North Dakota, known as Sargent County Drain No. 11 (“Drain 11”); the District owns, operates, manages, and maintains Drain 11 for the benefits of the properties within the Drain 11 watershed and assessment district.

WHEREAS, the District has concluded drainage improvements are necessary to Drain 11 to provide increased drainage depth and capacity, enhanced control over the Drain 11 watershed, and more effective and efficient drainage for the benefit of the properties within the Drain 11 watershed.

WHEREAS, more specifically, the District has determined certain drainage improvements are necessary to Drain 11, including the preliminary analysis, design, and construction of additional channel bottom depth, capacity, and side slope improvements; relocation, installation, and improvements of intercept drainage

culverts; design, redesign, construction, and reconstruction of various crossings; purchasing and acquiring additional right of way to accommodate the drainage improvements; and other work necessary and incident to the reconstruction and improvement of Drain 11.

WHEREAS, the District refers to the proposed improvements to Drain 11 as DRAIN 11 IMPROVEMENT PROJECT NO. 2016-01; a map of the proposed project is attached as **Exhibit A** (the “Drain 11 Project”).

WHEREAS, the Drain 11 Project will not require the addition of any new properties to the existing Drain 11 assessment district.

WHEREAS, the District has concluded the Drain 11 Project will provide more effective and efficient drainage through Drain 11; increased drainage capacity through Drain 11; enhanced control over the Drain 11 watershed area; enhanced breakout protection for adjacent properties; improved drainage for the benefit of the Drain 11 watershed; and more effective and efficient operation and maintenance of Drain 11.

WHEREAS, the District has determined it could more effectively and efficiently manage, own, operate, and maintain Drain 11 as a “Project” under Chapter 61-16.1 of the North Dakota Century Code.

NOW THEREFORE, BE IT RESOLVED that the District finds, determines, and declares the necessity to develop plans and specifications regarding the design for the Drain 11 Project; to acquire right of way as necessary to accommodate the Drain 11 Project; and to ultimately construct, operate, manage, and maintain the Drain 11 Project.

BE IT FURTHER RESOLVED that the District finds, determines, and declares the Drain 11 Project will benefit the properties and property owners within the Drain 11 watershed.

BE IT FURTHER RESOLVED that the District finds, determines, and declares the Drain 11 Project will provide more effective and efficient drainage through Drain 11; increased drainage depth and capacity through Drain 11; enhanced control over the Drain 11 watershed area; enhanced breakout protection for adjacent properties; improved drainage for the benefit of the Drain 11 assessment district; and more effective and efficient operation and maintenance of Drain 11.

BE IT FURTHER RESOLVED that the District designates and authorizes Moore Engineering, Inc., and Ohnstad Twichell, P.C., respectively, to perform the following tasks on behalf of the District regarding the construction, financing, operation, management, ownership, and maintenance of the Drain 11 Project:

- a) conduct surveys as necessary for purposes of designing the Project and identifying the right of way necessary to accommodate the Project;
- b) prepare profiles, plans, and specifications for purposes of constructing the Drain 11 Project;
- c) prepare a report regarding any road or railroad crossing improvements necessary to accommodate the Drain 11 Project;
- d) identify the temporary and permanent right of way the District must acquire to accommodate the Drain 11 Project;
- e) procure appraisers to conduct real estate appraisals to identify just compensation for the temporary and permanent right of way the District must acquire to accommodate the Project, if deemed necessary by the District;
- f) negotiate with landowners and otherwise administer right of way acquisition;
- g) acquire the requisite temporary and permanent right of way to accommodate the Project, in the District’s name and at the values set by the District;
- h) coordinate utility relocations as necessary to accommodate the Project;
- i) advertise for bids regarding construction of the Drain 11 Project, as required under North Dakota law;
- j) administer bidding and construction contract administration;
- k) prepare a bond issue and otherwise secure financing regarding the Drain 11 Project;
- l) apply for and secure all necessary permits and approvals from all applicable federal and state entities, including the North Dakota State Engineer’s Office;
- m) apply for cost-share, if available, from any applicable federal, state, or local government entities; and
- n) otherwise perform all other tasks necessary to finance, fund, develop, design, construct, operate, manage, own, and maintain the Drain 11 Project.

BE IT FURTHER RESOLVED that the Drain 11 Project will not constitute construction of a “lateral drain” under North Dakota law, and construction of the Drain 11 Project does not require an excess levy vote, an additional assessment district vote, or any other additional legal proceedings under North Dakota law.

BE IT FURTHER RESOLVED that, from the date of this RESOLUTION, the District will manage, own, operate, and maintain Drain 11, including the Drain 11 Project, as a “project” under Chapter 61-16.1 of the North Dakota Century Code.

The motion for the adoption of the foregoing RESOLUTION was duly seconded by Manager Martinson. On roll call vote the following Managers voted aye: Siemieniewski, Zetocha, Engst, Stein, and Martinson. Upon roll call vote, the motion carried unanimously, and the RESOLUTION was duly adopted.

Chris informed the board that the State Water Commission did approve cost share for this project not to exceed \$1,417,967 at the October State Water Commission meeting.

A landowner meeting was scheduled to discuss Drain No. 11 Improvement Project No. 2016-01 on Tuesday, November 15, 2016 at 7:00 p.m. in the Cogswell Community Center, Cogswell, ND.

DRAIN NO. 11 CULVERT EXTENSION BETWEEN SECTION 21 AND 28 IN HARLEM TOWNSHIP:

Chris Gross updated the board on costs incurred at this location. Moore Engineering, Inc. will pay for the guards and will make an adjustment with the design billing.

DRAIN NO. 4: Sean provided an Addendum to the Purchase Agreement drafted by Ohnstad Twichell attorney Luke Andrud and sent to Forman City's attorney regarding the agreement Luke Siemieniewski and Todd Stein negotiated with the City. This Addendum incorporates the terms regarding the City's conveyance in fee to the Board; the Board's willingness to then grant the City an access easement to construct and maintain a road and the Board's willingness to pay for the culvert improvements through the road (though just the costs of purchasing; the City will pay for installation, etc.). This agreement was sent to the Forman City attorney but has not been returned as of today. Manager Engst moved to authorize the Chairman to sign the Addendum. Manager Stein seconded the motion.

Upon roll call vote, the motion carried unanimously.

RS # 1: Board members reviewed a bill to Helwig Excavating Inc. for cleaning the drain and leveling spoil piles and approved payment of the bill.

The meeting adjourned at 12:20 p.m.

LUCAS SIEMIENIEWSKI – CHAIRMAN

ATTEST:

SHERRY HOSFORD – SECRETARY-TREASURER