

MINUTES OF THE MEETING OF THE SARGENT COUNTY WATER RESOURCE BOARD
HELD ON THURSDAY, NOVEMBER 17, 2011 AT 9:00 A.M. IN THE COMMISSIONERS ROOM,
SARGENT COUNTY COURTHOUSE, FORMAN, ND

Managers present: Jim Bosse, Mark Breker, Richard Engst and Chris McFarland. Absent: Roger White. Also present: Richard Ruch, Brampton; Tom Jones, NRCS; Mike Opat, Moore Engineering, Inc. and Sean Fredricks, Attorney, Onstad, Twichell.

Approve October 20 and November 3, 2011 minutes and October financial statement. (Engst/ Breker, unanimous)

Approve payment of the following bills: (Breker/Engst, unanimous)

65194 Dan Bishoff	Beaver removal – Dr # 9	50.00
65195 James Bosse	Travel	145.35
65196 Mark Breker	Travel	283.50
65197 Carton Excavating	Drain No. 9	3,937.50
65198 Crandall Construction	Rip rap-Dr # 7-\$1344.00; Tewaukon Watershed-\$853.44	
65199 EB Farms Inc.	Emeric & Ellick Erickson drain tile refund	245.26
65200 Richard Engst	Travel	82.62
65201 Hoistad Service	Beaver dam-Tewaukon Watershed	170.00
65202 Moore Engineering, Inc.	Dr # 8	5117.60
65203 Jim Nickeson	Drain tile refund	152.50
65204 Ohnstad, Twichell, P.C.	Dr # 4-\$2482.00; General \$728.40; Joe Breker land sale-\$437.60; Kevin Willprecht-\$7.20; Arlen Willprecht-\$150.00; Jim Nickeson-\$347.50; Tom Heimbuch-\$81.00	
65205 Betty Rust	Drain tile refund	185.00
65206 True North Steel	Culverts-Tewaukon Watershed/Hamilton/Breker	
		\$3817.73
65207 Arlen Willprecht	Arlen and Kevin Drain tile refund	573.80
65233 Ryan Contracting, Co.	Forman City Floodwater project #1	
		180,634.95
6446 Mark Breker	12 PD plus \$24.00 meals less 176.29 taxes	1287.71
6447 Sherry Hosford	Sec. salary less 17.89 taxes	298.78
6448 Richard Engst	5 PD less 33.90 taxes	566.10
6449 James Bosse	11 PD less 150.75 taxes	1169.25
6450 Chris McFarland	1 PD less 6.78 taxes	113.22
DD Sargent County Bank	Withholding taxes	679.79

Mark Breker reported that several projects are completed or currently being worked on including the Hamilton/Breker culvert installation, Nelson dam repairs, and the tree removal at Brummond-Lubke will be completed yet this fall. Jim reported that the tree piles on Drain # 9 have been burned and removed. Mark also has concern for a Texas crossing that is holding approximately 2 feet of water and he recommends that the contractor lower the crossing and not install a culvert. Board members will visit with Rick Hoistad to get his thoughts on a solution for this location.

Sean Fredricks informed Board members that regarding the Paul Mathews issue no one from the title standards will do a title opinion but he can request a title opinion from the Onstad, Twichell Office on the Paul Matthews land and upon completion invite Mr. Matthews to a Water Board meeting to discuss the findings.

EMERIC ERICKSON DRAINAGE APPLICATION

Chad Engels contacted John Paczkowski at the State Engineer’s office regarding Emeric Erickson’s Drainage Application. The State previously returned the Application to the Board under the impression that Emeric’s project is a tile project. Chad notified John that the Project is not a standard perforated tile project. Rather, Chad notified John that the Project is really a surface drainage project that will include underground pipe (not perforated pipe) with surface runoff inlets. The pipe is not perforated and is not designed to accept water from the soil; there is no drainage coefficient for example. Because the Project is surface runoff, the Board believes the project should be processed under the standard surface drainage procedures under N.D. Cent. Code § 61-32-03 (as opposed to the new tile statute, § 61-32-03.1).

Sean and Chad will contact John Paczkowski to check on status.

EMERIC ERICKSON – MAHRER – SCHUTT COMPLAINTS

One of the complaining parties contacted Manager Engst once again and indicated Emeric still had not yet filled in the illegal drainage. Chairman Bosse and Manager Breker inspected the site and found that there are ditches with plugs in them and that the pumps are not operating currently. However, they did note Emeric could operate the projects very easily. The Managers noted that clearly Emeric has not complied with the Board's previous Order. The Managers believed Emeric should plug the ditches until his permit is processed and approved.

Emeric arrived at the meeting, and Manager McFarland explained to him the Board's concerns regarding work he conducted following the Board's August 24 notice. Further, the plugs in the ditches now are not sufficient.

Tom Jones suggested the 150-foot standard; when someone is in violation of NRCS provisions, NRCS requires the landowner to fill in their ditches at least up to 150 feet. The Board agreed the 150-foot standard is reasonable.

Emeric agreed he would fill in the ditches up to 150 feet at a minimum. For the Board's benefit, Emeric marked the four ditches he will fill in on an aerial photograph that is on file with the Board. There is a fifth ditch adjacent to the township road where Emeric will level the spoil.

Emeric agreed he would have the work completed by 5:00 p.m. on November 28. The Board indicated if he did not have the work done by 5:00 p.m. on November 28, the Board will procure a contractor and will complete the work themselves and will assess Emeric's property. Sean Fredricks will send a letter to Emeric regarding this requirement.

Discussed the difference in fees for an Application to Drain for \$250 and Application to Drain with Drain Tile for \$500. Motion to amend the fee schedule to read "all applications for drainage" shall be \$500. (McFarland/Engst, unanimous)

David L Jacobson, county commissioner arrived at the meeting at this time.

1 **George Bishoff Drainage Complaint Against Brampton Township**

The Board next considered George Bishoff's DRAINAGE COMPLAINT against Brampton Township dated October 20, 2011. Mr. Bishoff attended the Board's meeting and explained the circumstances. In his Complaint, Mr. Bishoff alleges that Brampton Township constructed illegal drainage in the Southwest Quarter of the Southwest Quarter of Section 22 of Brampton Township.

Mr. Bishoff indicated that the township constructed certain drainage improvements in a township road ditch. Mr. Bishoff submitted a Complaint to NRCS, and Tom Jones indicated NRCS has investigated. The findings of NRCS' investigation are subject to federal privacy rules. But Mr. Bishoff concedes without question that the township constructed these drainage improvements in their own township road right of way. In addition, Chairman Bosse is a member of the Brampton Township Board, and he indicated the township did, in fact, hire someone to construct drainage improvements in the township's right of way.

The Board consulted attorney Sean Fredricks regarding the proper procedures for considering and processing the Complaint. Mr. Fredricks indicated that, before applying the appropriate elements under N.D. Cent. Code § 61-32-07 to determine if the alleged drainage is illegal, the Board should first determine if it has jurisdiction to consider the Complaint. Specifically, because a township road and township road right of way are involved, the Board should determine what jurisdiction and authority, if any, the Board has to make a decision regarding the Complaint.

Mr. Fredricks identified the following issues:

1. **Brampton Township, and not the Sargent County Water Resource District, has Sole Jurisdiction Regarding Drainage Improvements Constructed in the Township Road Ditch.**

Mr. Bishoff's Complaint involves improvements to a township road ditch performed by a contractor hired by Brampton Township. Mr. Fredricks advised the Board that Brampton Township (and not the Sargent County Water Resource District) has sole jurisdiction regarding the Township's own improvements to its own township road ditch. Brampton Township is not required to obtain a drainage permit to shape its own township road ditch.

As the Supreme Court noted in *Kadlec*, Townships have jurisdiction over construction of drainage in their township road ditches:

The board of supervisors of any township in the state has general supervision over the roads, highways, and bridges throughout the township. N.D.C.C. § 24-06-01.

"Supervise" means "to coordinate, direct, and inspect continuously and at first hand the accomplishment of," and to "oversee with the powers of direction and decision the implementation of one's own or another's intentions." Webster's Third New International Dictionary, at p. 2296 (1971). Section 24-03-06, N.D.C.C., imposes upon a board of township supervisors a duty to not construct or reconstruct a road in a way that blocks a natural watercourse:

Any and all highways of any kind hereafter constructed or reconstructed by the department, any board of county commissioners, any board of township supervisors, their contractors, subcontractors or agents, or by any individual firm, corporation, or limited liability company must be so designed as to permit the waters running into such ditches to drain into coulees, rivers, and lakes according to the surface and terrain where such highway or highways are constructed in accordance with scientific highway construction and engineering so as to avoid the waters flowing into and accumulating in the ditches to overflow adjacent and adjoining lands. In the construction of highways, as herein provided, the natural flow and drainage of surface waters may not be obstructed, but such water must be permitted to follow the natural course according to the surface and terrain of the particular terrain.

Still, the township does not act in a void.

When construction, reconstruction, or insertion of a culvert in a township road will increase surface water flow in other townships, the township must give notice to the other affected townships. See N.D.C.C. § 24-06-26.1. A township also ***has authority to construct and maintain ditches along roadways***. See N.D.C.C. §§ 24-06-11, 24-06-26, and 24-06-26.1. If a board of township supervisors denies permission to maintain a ditch, the petitioner may appeal that decision to the water resource board that has jurisdiction over the ditch. See N.D.C.C. § 24-06-26.3. ***However, a water resource board is given no appeal authority when a township proposes to install a culvert.***

(Emphasis added.) 583 N.W.2d at 821.

In this case, Brampton Township did not need to request permission to construct drainage in its own ditch; rather, Brampton Township hired a contractor to improve the township road ditch to improve drainage. Based on the North Dakota Supreme Court's rationale from the *Kadlec* case, Mr. Fredricks advised the Board that Brampton Township, and not the Sargent County Water Resource District, has jurisdiction and decision-making authority regarding its own improvements to its own township road ditches for purposes of drainage. With regard to the road ditch improvements, Mr. Fredricks advised the Board they should dismiss the Complaint due to lack of jurisdiction.

Manager Breker, seconded by Manager McFarland, moved to dismiss Mr. Bishoff's DRAINAGE COMPLAINT due to lack of jurisdiction. Upon roll call vote, the motion carried unanimously. The Board directed Sean Fredricks to prepare the requisite Notice of Decision and to send the Notice to the parties of record, including Brampton Township.

Mr. Bishoff understood why the Board had to dismiss the matter. He will follow up with NRCS and potentially with the township.

Mike and Duane Lock, Andy Hoflen and Lyle Erickson, Rutland met with the Board to discuss removing water from Sections 13-14-15-130-55 with a control structure. Dennis McLaen applied for a Subsurface permit and it was determined that a surface application is needed in this area and would require an application sent to the State Water Commission for approval. To get this project underway before freeze up it may be possible to apply for an Emergency Drain permit with the state. This Board does not have any jurisdiction unless conditions are attached by the state and this decision would be left up to the state. Mike Lock agreed to contact the State Water Commission and request an Emergency Permit to drain this water and apply for a permanent surface drainage permit after the emergency permit is in place. Mike will contact Jim Bosse when the Emergency Permit hearing is scheduled.

Mark Breker left the meeting at 11:00 a.m.

Leeann and David Even, Cogswell met with the Board to discuss water problems in Cogswell that are destroying the city's infrastructure. The city is considering a project to improve Drain No. 16 (a tile drain) to accommodate drainage from the City into Drain No. 11. The project is very expensive and the city does not have funding for this project. The city would like the Water Board to assist financially but they would take the lead. The city would like to move the water south but downstream landowners are concerned about losing their farm program payments. Tom Jones explained the

easement deeds that are recorded on this drain south of Cogswell and his concern of the problems that could occur with farm producers along this drain. Temporary construction easements could be considered. Condemning property is not an option. Various options were discussed and a suggestion to run the water along the railroad to the west that would eventually flow into Drain No. 11. Chairman Bosse asked Ms. Even to check some elevations and distances for the west project and the engineer to put together an estimate for perforated pipe. Cogswell City will be on the December 1, 2011 Special meeting agenda.

SILVER LAKE DAM

Rick Hoistad was present, and he voiced concerns regarding a flood easement he previously granted to the United States Fish and Wildlife. Rick contended U.S. Fish and Wildlife agreed they would let water off his property, but instead they placed permanent plugs on his property, and, as a result, his property is flooded virtually all the time. Sherry will look up the easement, and she and Sean will review.

DRAIN 4/FORMAN FLOOD OUTLET PROJECT

Rick Hoistad was present to discuss right-of-way issues with the Board. He contends the easement over the Northwest Quarter of Section 6 specifically requires the project to be a "closed drain." Mr. Hoistad conceded that the project has been an open ditch for a number of years, and that he has not farmed that property. However, he claims the plan that now calls for an improved open ditch across his property will prevent him from farming the property. Sean and Mike will review the right of way and will discuss this specific issue with the Board at their next meeting.

Mike Opat explained the outlet project will be completed yet this year. The City of Forman will operate the outlet project. The Board will proceed with the Drain 4 reconstruction project in the spring.

Arlen Willprecht, Cayuga, presented a Request for Drainage on Highway Right of Way in conjunction with the tile project approved earlier in the N1/2 of NW1/4-13-130-54. The Board acknowledged receipt of this request.

TOM HEIMBUCH TILE APPLICATION

At the Board's October meeting, Mr. Heimbuch indicated that they had sent out the requisite Thirty-Day Notices to downstream landowners as required under N.D. Cent. Code § 61-32-03.1. Specifically, Mr. Heimbuch indicated they provided the Notices to the Wentworth's. At the October meeting, applicant indicated they would provide copies of the Notices they sent to the Wentworth's to both Sherry and Sean as evidence they provided the requisite Notices. However, neither Sherry nor Sean received copies of those Notices. The Board will table the matter until the December meeting. If the applicant can prove they provided the Notices, the Board will approve the permit at their December meeting.

Received a quote from Industrial Building, Inc. to install sheeting and culverts on Drain No. 12 located between Section 8 and 17-129-53 LTL. This is a 2010 FEMA site and has been awaiting repairs delayed by weather conditions. The Board reviewed the quote for \$49,950 and authorized proceeding with the project. (McFarland/Engst, unanimous)

Motion to authorize Chairman to sign an Agreement for Cost-Share Reimbursement for the City of Forman Floodwater Outlet Project, which the State Water Commission shall provide an amount not to exceed \$348,070. (McFarland/Engst, unanimous)

Motion to authorize Chairman to sign an Agreement for Cost-Share Reimbursement for the Shortfoot Creek Watershed 2011 Feasibility Retention Site Identification Study, which the State Water Commission shall provide an amount not to exceed \$7,500. (Engst/McFarland, unanimous)

Meeting adjourned at 12:40 p.m.

JAMES BOSSE – CHAIRMAN

ATTEST:

SHERRY HOSFORD - SECRETARY