

MINUTES OF THE MEETING OF THE SARGENT COUNTY WATER RESOURCE BOARD HELD ON THURSDAY, NOVEMBER 17, 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; Scott Mahrer, Forman; Paul Mathews, Cogswell; Gerry Bosse, Cogswell and Robert Banderet, Cogswell.

Jeff Breker called in to the board meeting via conference call and asked the board if he could level the embankment/dike in Section 8-129-54 LTL in Tewaukon Township as discussed at the October meeting. He has been in contact with the State Water Commission (SWC) and they recommend that he remove the dike in its entirety as any portion of the dike remaining may be considered a “modification to an existing dike” and therefore, may require a construction permit. The SWC also recommended that Jeff follow the ND Dept. of Health’s Construction and Environmental Disturbances guidelines, which was provided to Jeff by the SWC. No permits were required from the SWC office but approval is needed from this board. He would like to level the dike at his expense and farm the approximately 1.5 acres at no additional rental cost to him until the next lease contract comes due. Manager Zetocha moved to allow Jeff Breker to proceed with the project at no charge to the water board and waive any rental increase until the next contract period. Manager Stein seconded the motion. Upon roll call vote, the motion carried unanimously.

Approve the October 20 and November 8, 2016 minutes and October financial statement. Manager Engst moved to approve. Manager Zetocha seconded the motion. Upon roll call vote, the motion carried unanimously.

**GWINNER DAM:** Lyle Johnson, Gwinner arrived at the meeting and Chris Gross proceeded to explain to Mr. Johnson the history of what has transpired with Gwinner Dam. The Board wanted to visit with the Johnson Brothers to see if they have any comments or interest in possibly locating a dam on a parcel of land that they own. If there is interest to provide flood protection downstream, the board would authorize the engineer to provide more information for review and start a new process of developing the district and permit process. Mr. Johnson said he has discussed this with his brothers and they all have no problem with letting the dam be breached and not pursue the flood retention project. In order to breach a dam, the board would send a letter to the SWC with a permit to remove the dam. Authorize Moore Engineering to start the process and contact SWC plus request Sean Fredricks to prepare a waiver of release from the landowners for their signatures. Chris Gross commented that the process will more than likely take place in 2018. Manager Zetocha moved to authorize Moore Engineering, Inc. to move forward with plans to breach the dam. Manager Engst seconded the motion. Upon roll call vote, the motion carried unanimously.

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

74088	Richard Engst	Travel	92.88
74089	H & S Contracting Inc.	Culvert projects Dr # 11(Swanson/Ptacek)	26,185.00
74090	Jacobson P & H	Dr # 8 culvert installation	6,000.00
74091	Landmark Drainage LLC	Dr # 7 Improvement Project	75,134.69
74092	Korey Martinson	Travel	100.44
74093	Moore Eng. Inc.	General-\$351.20; FFA permit-\$850.60; Shortfoot Creek Study-\$13,500.34; Dr#4-\$80.00; Dr#11-\$41,670.63; Dr#7-\$255.60; Dr#7I&S-\$27,686.57 = TOTAL	
\$84,394.94	74094 Ohnstad Twichell	General-\$995.10; Dr#4-\$252.00; Mahrer-Ellefson-\$428.76; Storm Lake-\$54.00; Dr#7 project-\$5791.62; Dr#11 project-\$144.00; Julie and Bernie Vculek Tile Application-\$445.94 =	TOTAL
\$8,111.42			
74095	Lucas Siemieniewski	Travel	131.76
74096	Todd Stein	Travel and Dr# 11 beaver removal	75.92
74097	Roger Zetocha	Travel	54.00
12841	Sherry Hosford	Salary less taxes	494.75
12842	Richard Engst	6 PD less 55.83 taxes	664.17
12843	Roger Zetocha	3 PD less 44.79 taxes	315.21
12844	Lucas Siemieniewski	5 PD less 45.90 taxes	554.10
12845	Korey Martinson	2 PD less 23.61 taxes	216.39
12846	Todd Stein	3 PD less 27.54 taxes	332.46
DD	Sargent County Bank	Withholding Taxes	1037.84

**DRAIN NO. 7 CLEANOUT:** As per the special meeting held on November 8, 2016, Marshall Braaten, McLeod, was awarded the contract to proceed with the cleanout on the Drain No. 7 outlet, conditioned upon his ability to provide the requisite licensing and insurance documentation; however, Mr. Braaten was unable to provide the necessary paper work. As per the motion at that meeting, JAV Construction was awarded the project for \$17,550 and JAV provided the requested paper work to the secretary. Richard Engst noted that, as of today, no work has commenced on the project and that no equipment was located at the site. JAV has indicated

that they will move multiple machines in to the project location the week of Thanksgiving and get the project completed before winter.

**DRAIN NO. 11:** Landowners present at the meeting stated their concerns about the cost of the project, project benefits, Ransom County water, and whether the landowners are in favor of the project. A request was made to conduct a vote of the assessment district members, but the board explained the vote process would take five months and is very costly to conduct. More importantly, under North Dakota law, a vote of the assessment district is not required as long as the project will not exceed the maximum maintenance levy the Board may assess per acre against the properties within the Drain 11 assessment district in any six-year period. In other words, a vote of the assessment district is only required if the cost will exceed the maximum \$4 per acre annual maintenance levy levied over a six-year period. Further, the Supreme Court and the Attorney General have concluded that water resource districts have a statutory obligation to ensure legal assessment drains remain open and in good repair for the benefit of the corresponding assessment district properties. Manager Zetocha also pointed out the safety benefits the project will provide. The Attorney General has concluded WRDs' obligation includes deepening, widening, and necessary improvements to legal assessment drains with maintenance fund dollars if necessary to ensure drainage for the benefit of the properties in the assessment district.

One landowner present, in reliance upon Section 89-02-01-02(8) of the North Dakota Administrative Code, suggested the Board may only utilize the Drain 11 "maintenance fund" for removing "silt and vegetation" from a drain, and that a Board cannot utilize maintenance levy dollars for purposes of "deepening or widening" an assessment drain. However, Sean Fredricks pointed out the definitions and provisions of Section 89-02-01-02 govern drain permitting only, and do not apply to use of maintenance assessment funds for legal assessment drains, as clearly indicated in the "Law Implemented" provisions of Section 89-02-01-02 and Chapter 89-02-01 generally. As an example, if the provisions of Section 89-02-01-02(8) applied to use of maintenance funds for legal assessment drains, WRDs could not repair assessment drain culverts since Section 89-02-01-02(8) does not include culvert repair within the definition of "maintenance."

The Board previously passed a RESOLUTION OF NECESSITY to proceed with this project because of the request from landowners over the course of many years, landowners who have requested improvements to Drain No. 11 to ensure proper drainage. Sean noted nobody timely appealed the Board's RESOLUTION OF NECESSITY to proceed. Chris pointed out that if the Board did not proceed with this project, cost-share funding that is currently available may not be available in the future.

#### **1Application to Drain No. 4857 - DRAIN 11 IMPROVEMENT PROJECT NO. 2016-01**

The Board next reviewed information from the State Engineer regarding Application for Surface Drain No. 4857, previously submitted by the Sargent County Water Resource District regarding DRAIN 11 IMPROVEMENT PROJECT NO. 2016-01. The Sargent County Water Resource District owns, operates, and maintains Sargent County Drain No. 11, a legal assessment drain.

The District previously concluded certain 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. The District is proceeding with DRAIN 11 IMPROVEMENT PROJECT NO. 2016-01, a project that will include improvements to Drain 11 in Taylor, Brampton, and Sargent Townships. The project will include 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.

The District submitted this permit application regarding the drain improvements. The State Engineer concluded the project is not "of statewide or interdistrict significance." The Board adopted Moore Engineering's proposed responses to the eight elements under 89-02-01-09.2 of the North Dakota Administrative Code. The Board further determined no hearing was necessary under 89-02-01-09.1(2) of the North Dakota Administrative Code because the Board will acquire the requisite right of way to accommodate the project, and the right of way acquisition will eliminate adverse impacts to private landowners.

Manager Engst moved to approve Application for Surface Drain No. 4857 regarding DRAIN 11 IMPROVEMENT PROJECT NO. 2016-01, subject to any conditions attached by the State Engineer. Manager Stein seconded the motion. Upon roll call vote, the motion carried unanimously. Sean Fredricks will provide the original, signed permit documents, along with the Board's NOTICE OF DECISION, to Graham Hart at the State Engineer's Office.

**DRAIN NO. 8:** Calvin Jacobson and Dennis McLaen met with the board and Calvin presented a bill for \$7320 for work he conducted on Drain No. 8 to install a culvert to an approach to provide access to a new development on the west side of Rutland. On September 15 the board approved placement of the culvert work up to \$6,000. Mr. Jacobson is asking the board to reconsider the original amount and pay him the full \$7,320. Luke commented that he feels the city should pay the \$1,320 because they are planning to develop this area and this crossing would be to their benefit. Dennis McLaen stated that the home he moved in to this area did not

need this crossing as earlier indicated because he is using the existing crossing that was always there. A suggestion for Luke and Todd to meet with Rutland City and ask them to pay the difference was agreed upon. Manager Zetocha moved to approve payment of \$6,000 to Jacobson Plumbing and Heating, Inc. Manager Stein seconded the motion. Upon roll call vote, the motion carried unanimously.

**DRAIN NO. 7 CHANNEL IMPROVEMENT PROJECT:** Brent from Landmark Drainage LLC arrived at the meeting and reported that his company is dewatering the 2<sup>nd</sup> culvert crossing and channel is done up until the north portion where it turns to the east. Currently they are moving black dirt. Depending on the weather, they plan to get the pipe bed in, start backfilling and hope to get that portion complete. Chris reported that the project looks good but timelines and weather conditions may cause some problems. The substantial completion deadline under the construction contract is tomorrow (November 18, 2016). There is one more crossing to install, the contractor had to close the road and didn't want more than one road closed. Their goal is to get the crossing done before winter; if so, the project will be complete with the exception of seeding. The crew is putting in many hours to get the road crossings done at this time. At the Board's next meeting, the Board will re-visit to ensure the contractor timely completed the project.

**DRAIN NO. 11 CULVERT PROJECTS:** Both projects have been completed between Section 4 and 9 of Harlem Township and also the culvert extension between Section 21 and 28 in Harlem Township (south of Lloyd Ptacek's). It was also noted that both locations will have guards installed on the culvert ends. The county commission will be billed 40% of the culvert cost for the extension for a total of \$5,760.

**MAHRER-ELLEFSON COMPLAINT:** In 2014, the District declared APPLICATION FOR SURFACE DRAIN NO. 4237 ineffective due to Loren Ellefson's failure to comply with all permit conditions. The Board also found the drainage system constructed in the North Half of Section 7 of Shuman Township was unpermitted, in violation of N.D. Cent. Code §§ 61-32-03 and 61-32-07; the Board ordered Mr. Ellefson to close or fill the unpermitted drainage, as required under Section 61-32-07. However, the Board afforded the parties the opportunity to resolve the issue. However, at the Board's meeting on September 15, the Board concluded that, because the parties had not reached a resolution, and the Board has an obligation under Section 61-32-07, Mr. Ellefson must plug the two pipes previously installed as components of his project by 5:00 p.m. on December 1, 2016. The Board sent a letter to all parties in this matter to notify them of the Board's decision. Richard Engst agreed to inspect this location after December 1 and report back to the board whether Mr. Ellefson has complied.

**STORM LAKE MAINTENANCE DISTRICT:** Sean reported that he and Chris have a conference call scheduled on Monday with Kent Sundseth, Manager, Tewaukon National Wildlife Refuge to obtain information on the Storm Lake Dam. The SWC changed their website to reflect the purpose of the dam to fish and wildlife use versus recreation use but still list the Sargent County Water Board as the owner. Sean indicated that, unless USF&W can demonstrate their ownership, the Board will still be legally responsible for the dam under North Dakota law, including liability (according to the State Engineer's Office). Sean and Chris will ask USF&W for some evidence of USF&W's ownership they can convey to the State. If USF&W cannot provide adequate evidence to satisfy the State, the Board will still be responsible for the dam by law.

**RS#1 COST SHARE AGREEMENT:** Board members reviewed a bill for \$291.12 to Interstate Engineering, Inc. and approved payment. An Agreement for Cost-Share Reimbursement with RS#1 and State Water Commission for pre-construction engineering on Phase II of the project was reviewed. Manager Engst moved to authorize the RS#1 Chairman to sign the agreement. Manager Martinson seconded the motion. Upon roll call vote, the motion carried unanimously.

Lucas Siemieniewski informed the board of a tile project that he is planning in the SW1/4-35 in Kingston Township. The project is 56 acres and with a single pump outlet that will discharge into the RS#1 drain. Luke indicated that, although the project is under the 80-acre threshold for tile permitting and does not require a tile permit, he was requesting a *Utility Permit* for permission to discharge into RS#1. Sean Fredricks indicated the Board should conduct conflict analysis regarding Chairman Siemieniewski's project. 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, Chairman Siemieniewski will directly benefit from the tile project and the *Utility Permit*. By statute, Sean indicated Chairman Siemieniewski's tile

project and request for a Utility Permit to discharge into RS#1 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 Chairman Siemieniewski not “participate in or vote on” issues related to his project or to his request for a *Utility Permit*. The remainder of the Board voted unanimously to declare a conflict for Chairman Siemieniewski and to preclude Chairman Siemieniewski’s participation in or voting on any items regarding his project or his request for a *Utility Permit*.

The remainder of the Board then discussed Chairman Siemieniewski’s request for a *Utility Permit* to discharge into RS#1. The Richland-Sargent Joint Water Resource District would ordinarily have to approve a Utility Permit regarding RS#1; however, the Richland-Sargent Joint Board and the two member WRDs previously concluded the two individual boards could consider and approve items of this nature, as long as the two boards concurred. With that in mind, Manager Martinson moved to approve a *Utility Permit* to permit Luke Siemieniewski to discharge into RS#1, with the standard conditions. Manager Engst seconded the motion. On roll call vote, Managers, Zetocha, Stein, Engst, and Martinson voted aye. Chairman Siemieniewski abstained. The motion passed. Sean Fredricks will send the *Utility Permit* to the Richland County Water Resource District for their consideration.

**SILVER LAKE DAM:** Sherry reported that the park board and county commissioners wish to forego the State Water Commission option for the work on the seepage to the dam. They would like to cut off the tree and put several loads of clay over the tree and see if there is still seepage. Both boards plans to work with the water board to be sure that the work is done correctly. The water board will remove Silver Lake Dam from the State Water Commission list for proposed projects requesting cost share.

**2017-2019 STATE WATER COMMISSION PROJECT INFORMATION AND PLANNING:** Chris Gross asked the board if there are any projects to consider for cost share from the SWC. He would like the board to be thinking about projects, if any, and be prepared to discuss after the first of the year. June 2017 is the deadline for submission to the SWC for funding.

**BERNARD VCULEK APPLICATION FOR SURFACE DRAIN NO. 4826:** The State Engineer has determined that this application is of “statewide or interdistrict significance.” Mr. Vculek will be invited to the December board meeting to further discuss what is involved in the statewide process and to determine if he is still interested in proceeding.

**GREG NELSON APPLICATION FOR SURFACE DRAIN NO. 4249:** The State Engineer has determined that this application is of “statewide or interdistrict significance.” Mr. Nelson will be invited to the December board meeting to further discuss what is involved in the statewide process and to determine if he is still interested in proceeding.

**2016 MAINTENANCE LEVIES:** The following amounts were considered for annual maintenance levies at the time the 2017 budget was prepared and adopted, however, the amounts were not officially approved due to the board waiting for the county commissioners to act on the Storm Lake Maintenance District. As the county commissioners have not acted on the Storm Lake district, the following maintenance levy assessment amounts were approved for each drain for 2016 taxes (these amounts are per benefited acre): Drain No. 2 - \$4.00; Drain No. 4 - \$2.00; Drain No. 8 - \$4.00; Drain No. 9 - \$2.00; Drain No. 11 - \$4.00; Drain No. 12 - \$4.00; SC Water Channel Imp. District No. 1 aka Drain No. 7 – \$4.00; Tewaukon Watershed - \$2.00. Manager Engst moved to approve the maintenance levies. Manager Zetocha seconded the motion. Upon roll call vote, the motion carried unanimously.

Meeting adjourned at 11:25 a.m.

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LUCAS SIEMIENIEWSKI – CHAIRMAN

ATTEST:

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SHERRY HOSFORD – SECRETARY-TREASURER