

MINUTES OF THE MEETING OF THE SARGENT COUNTY WATER RESOURCE BOARD
HELD ON THURSDAY, APRIL 18, 2013 AT 7:00 P.M., IN THE COMMISSIONERS ROOM,
SARGENT COUNTY COURTHOUSE, FORMAN, NORTH DAKOTA

Managers present: Jim Bosse, Mark Breker, and Richard Engst. Absent: Roger White and Chris McFarland. Also present: Chad Engels, Moore Engineering, Inc.; Sean Fredricks, Ohnstad Twichell; Tom Jones, NRCS and Al Carton, Forman.

Approve March 21, 2013 minutes and February financial statement. (Bosse/ Engst, unanimous)

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

67602 James Bosse	Travel	135.60
67603 Mark Breker	Travel	31.64
67604 Dyste's	Supplies	18.13
67605 Richard Engst	Travel	107.35
67606 Moore Eng, Inc.	Shortfoot Creek Study	-\$1947.50 and Drain No. 4
Hoistad matter - \$612.50 =		2560.00
67607 Ohnstad Twichell	Shortfoot Creek-\$2,020.50; Dr No. 4-Hoistad Eminent Domain-\$96.00 and Drain No. 11 Paul Mathews right of way issue -\$272.00 =	2388.50
67608 Starion Bond Services	Dr # 4 Tax Improvement Bonds	63340.33
67609 Roger White	Travel	440.81
8240 Mark Breker	4 PD less 36.72 taxes	443.28
8241 Sherry Hosford	Salary less 24.22 taxes	292.45
8242 Richard Engst	5 PD less 45.90 taxes	554.10
8243 Roger White	5 PD less 45.90 taxes	554.10
8244 Jim Bosse	9 PD less 125.45 taxes	954.55
8245 Chris McFarland	2 PD less 18.36 taxes	221.64
DD Sargent County Bank	Withholding taxes	550.90

FRENIER DAM: Chad Engels presented the list of bids received for the Frenier Dam Improvements Project. Eight bids were received and the low bidder was Comstock Construction, Inc.; Wahpeton, ND. The low bid was \$174,748.00. Mr. Engels provided further information on the total project cost to include an additional \$86,982 for engineering costs and contingencies for a total project cost of \$261,730. The ND State Water Commission has agreed to fund 65% of all eligible costs for a total of \$121,695 and the Red River Joint Water Resource District will fund \$91,023. This leaves a local share of \$49,012. Chad recommended awarding the contract to the low bidder. Motion to award the contract to Comstock Construction, Inc. (Bosse/Engst, unanimous) Discussion followed on local funding options and the Board instructed Sean Fredricks to visit with bond counsel about interim financing along the lines of a grant anticipation bond for this project.

SHORTFOOT CREEK UPDATE:

Chad Engels, Moore Engineering, Inc. updated the Board on the progress of soil borings on the Shortfoot Creek floodwater detention. Sean Fredrick's office prepared access agreements for the three landowners (Frederick and Lavon Halverson, Yorba Linda, CA; Kevin Oland, Geneseo, ND; and Marie Jensvold, Paulette Lejer, Patricia Swanson and Sandra Ohm, Lidgerwood, ND). These agreements would permit this Board and your consultants to access this property to conduct soil boring activities and other surveying activities necessary to obtain the information so this Board will need to evaluate the feasibility of the project. A response from the landowners was requested prior to May 1, 2013. Also discussed compensation for the land and various options.

APPLICATION FOR SURFACE DRAIN NO. 4162 for David Hassebroek in the Southeast Quarter of Section 3 and the Southwest Quarter of Section 2 of Brampton Township:

The Board reviewed information from the State Engineer regarding APPLICATION FOR SURFACE DRAIN No. 4162 for Applicant David Hassebroek. Under the application, Applicant seeks to install a drain pipe with a surface inlet, apparently for purposes of protecting Applicant's farmstead. The inlet location will be in the southeast corner of the Southeast Quarter of Section 3, and the inlet will include a gate; from there, Applicant will bury pipe along the south boundary of the Southwest Quarter of Section 2, in the north road ditch along the east-west township road between Sections 2 and 11; the pipe will run to the east along the south boundary of the Southwest Quarter of Section 2 for approximately 1,800 feet; from there, the pipe will discharge into the north road ditch of the township road and will flow east through the open ditch until discharging into Sargent County Drain No. 11. Applicant has indicated the pipe will not be larger than 10 inches in diameter.

According to records on file with the Sargent County Recorder's office, the David A. Hassebroek and Julie E. Hassebroek Revocable Trust own the South Half of Section 3, and the Leo F. Rust Revocable Trust owns the Southwest Quarter of Section 2 of Brampton Township.

Chad Engels prepared draft responses to the eight elements under Section 89-02-01-09.2 of the North Dakota Administrative Code; the Board agreed with and adopted the draft responses. The Board further determined no hearing was necessary under Section 89-02-01-09.1(2) of the North Dakota Administrative Code because the Board will require Applicant to obtain an easement from the owner of the Southwest Quarter of Section 2, where Applicant intends to install and maintain the buried pipe; in addition the Board will require Applicant to obtain permission from Brampton Township to install and maintain the pipe in the township's road ditch. The Board concluded that, in light of these measures, there will be no adverse impacts.

Manager Engst, seconded by Manager Bosse, moved to approve APPLICATION FOR SURFACE DRAIN No. 4162 for David Hassebroek, subject to the conditions attached by the State Engineer, and subject to the following conditions:

- 1) That Applicant obtain and record (with the Sargent County Recorder's office) an easement (and not just written consent) from the owner of the Southwest Quarter of Section 2 of Brampton Township, Sargent County, North Dakota, for purposes of installing, operating, and maintaining a buried pipe, and for purposes of discharging along the south boundary of the Southwest Quarter of Section 2;
- 2) That Applicant will not construct or improve the buried pipe in any manner that exceeds the dimensions indicated in the application, including a pipe length of 1,800 feet, and including a maximum pipe diameter of 10 inches, as indicated by Applicant;
- 3) That Applicant obtains an easement from the owner of any land, besides land owned by Applicant, on which Applicant will construct the drain;
- 4) That Applicant obtain written permission from the Brampton Township Board of Township Supervisors to install, operate, and maintain a buried pipe in its township road ditch, and to otherwise discharge through and across its township road ditch;
- 5) That Applicant notify the Sargent County Water Resource District in advance of any proposed improvements to the drain, including any increase in the capacity or drainage area affected, and, if necessary, submit an additional permit application; 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. The Board directed Sean Fredricks to prepare the requisite NOTICE OF DECISION and to provide the NOTICE to all parties of record.

APPLICATION FOR SURFACE DRAIN NO. 4171 for Dana Banish in the Northwest Quarter of Section 7 of Marboe Township:

The Board reviewed information from the State Engineer regarding APPLICATION FOR SURFACE DRAIN No. 4171 for Applicant Dana Banish. Under the application, Applicant seeks permission to operate a pump in the Northwest Quarter of Section 7 of Marboe Township, to pump water over an existing dike and into a lateral of Sargent County Drain No. 12. Additional attendees included: Dana and Sandra Banish, Cayuga; Mike Paczkowski, Cayuga, Denny Pherson, Rutland; Donald Kiefer, Cayuga; Robert Lee, Cayuga and Ms. Rosenfeldt, Attorney for Mr. Banish.

According to records on file with the Sargent County Recorder's office, Mike and Geraldine Paczkowski are the record owners of the Northwest Quarter of Section 7. Mr. Banish rents the Northwest Quarter of Section 7 from the Paczkowski's.

The pump Mr. Banish seeks to operate was the subject of a Drainage Complaint filed by Robert Lee, Denny Pherson, and Don Kiefer against Mr. Banish in 2012. In the course of investigating and processing that Complaint, the Sargent County Water Resource District concluded the following:

1. Mr. Paczkowski previously installed a pump in the Northwest Quarter of Section 7 in approximately 1962, and this pump has operated since then.
2. Neither Mr. Paczkowski nor any of his tenants have constructed any ditching in the Northwest Quarter of Section 7.

3. Mr. Paczkowski and/or his tenant or tenants previously constructed a dike in the Northwest Quarter of Section 7; the dike prevents downstream water from backing onto the Northwest Quarter of Section 7.
4. The dike in the Northwest Quarter of Section 7 encloses a natural watershed; the watershed would naturally overtop the dike when the water surface elevation is 1167 or higher, without any operation of the pump.
5. The watershed would not overtop the dike without assistance from operation of the pump when the water surface elevation is below 1167.
6. Operation of the pump at a water surface elevation of 1167 or higher is not “drainage” that would require a permit under Section 61-32-03 since operation of the pump would not manipulate natural drainage.
7. Operation of the pump at a water surface elevation below 1167 would manipulate the natural drainage patterns and would constitute “drainage” activities that would require a permit under Section 61-32-03.
8. The Sargent County Water Resource District does not have sufficient evidence that Mr. Banish, Mr. Paczkowski, or any other parties operated the pump when the water surface elevation was below 1167; with that in mind, the Sargent County Water Resource District dismissed the Drainage Complaint at its meeting on October 18, 2012.
9. However, the Sargent County Water Resource District also set a drainage permit threshold regarding water surface elevations of the natural watershed in the Northwest Quarter of Section 7, for future reference, as follows:
 - a. Operation of the pump in the Northwest Quarter of Section 7 will not require a permit when the water surface elevation is 1167 or higher;
 - b. Operation of the pump will require a permit for any operation when the water surface elevation is below 1167; and
 - c. The Board would entertain a drainage complaint regarding operation of the pump at a water surface elevation below 1167, including closing, filling, or otherwise remedying the illegal drainage, potentially including an order to remove the pump.

The Board ultimately dismissed the Complaint against Mr. Banish at its meeting on October 18, 2012. The Board notified the parties of its decision by a Notice of December October 23, 2012. None of the parties appealed the Sargent County Water Resource District’s decisions and the statutory appeal period has long since expired.

Mr. Banish’s attorney later contacted Sean Fredricks to seek clarification regarding information on how Mr. Banish could operate the pump without a permit. Mr. Fredricks indicated to Mr. Banish’s attorney that he could operate the pump without a permit to pump water above a water surface elevation of 1,167 or higher. If Mr. Banish wants to pump when the water surface elevation is below 1,167, Mr. Fredricks indicated Mr. Banish should procure an engineer who could place a stake immediately upstream of the dike near the pump, with identification of the 1,167 elevation, to allow Mr. Banish to recognition when he could operate the pump without a permit. Later, Mr. Banish submitted the Surface Permit Application.

In the days leading up to this meeting, Mr. Banish and his attorney contacted Chad Engels regarding the 1,167 elevation previously set by the Board. Mr. Banish suggested that 1,167 was not, in fact, a natural elevation of the channel below the dike and indicated he would provide evidence of a lower elevation at the Board’s meeting. Mr. Fredricks outline the Board’s decision in its NOTICE OF DECISION from October 23, 2012. Mr. Engels explained the LiDar elevations he utilized to arrive at the 1,167 channel elevation below the dike. He explained that if the dike were removed, everything higher than 1,167 would have drained naturally, and that is how the Board arrived at the 1,167 elevation where no permit would be required for pumping. Mr. Engels indicated that if the Applicant wished to shoot elevations to arrive at more accurate elevation of the channel bottom below the dike, they could certainly do that. In the meantime, the Board used the most reliable information available, LiDar. Mr. Banish did not have any additional information to disprove the 1,167 “natural” elevation; instead, he offered aerial photos with LiDar data, but the LiDar was only accurate up to two feet, whereas the LiDar utilized by Mr. Engels was accurate within one foot.

Mr. Banish and Mr. Paczkowski both indicated that the dike has been in place since at least 1937. Mr. Paczkowski indicated his father placed a pump in this location in the 1940s. Mr. Paczkowski indicated he then replaced the original pump in 1962 with a larger pump.

Mr. Banish's attorney, Ms. Rosenfeldt, indicated that if the pump required a permit, Mr. Banish is willing to construct a dike in his yard and to place a gate on the pump or to otherwise operate the pump in a manner that would not cause flooding downstream.

Tom Jones explained that NRCS declared this wetland as a "prior converted" wetland in 1990. Mr. Fredricks asked Tom about NRCS's recent comments that maps prior to 1997 were not reliable for purposes of wetland determinations; Tom indicated that, while the 1990 determination on this parcel may not be 100% reliable regarding the PC decision, the decision is pretty reliable in terms of the conclusion that this parcel was previously pumped. In addition, Tom and Mr. Banish agreed there is old tile on this parcel as well. This pump would drain approximately 85 acres.

Mr. Fredricks outlined three options at this point:

1. The applicants could certainly conduct additional investigation if they seek to disprove the Board's previous decision regarding the 1167 natural elevation; Mr. Fredricks indicated the Board should not be responsible for any survey costs regarding that elevation since the Board rendered that decision based on the most reliable information available, Mr. Banish has not offered any reliable information to rebut the Board's decision, and none of the parties timely appealed the Board's decision in 2012 setting the 1,167 elevation.
2. If the pump was in place in the 1940s, the pump would not have required a permit (the permitting law in effect at the time of construction of a drain controls whether or not a project requires a permit); however, Applicant concedes Mr. Paczkowski replaced the pump in 1962 with a larger pump. Mr. Fredricks suggested Applicant could research whether or not replacement of the pump with a larger pump in 1962 required a permit. If not, Applicant could withdraw the current permit application.
3. The Board could approve the permit with reasonable conditions, assuming a 1,167 elevation as the natural elevation point that triggers permitting requirements.

Applicant indicated that with spring coming Applicant would want to operate the pump. The parties all agreed that if the Board approved the permit, but with a condition that pumping below 1,167 would only be permissible if the water is within the channel of the Drain 12 lateral, that approval would be acceptable to all parties involved. Sean Fredricks indicated the parties could always then amend the permit later if additional elevation data showed the natural elevation of the channel was below 1,167; additionally, Applicant and the Board could ultimately withdraw the permit if the law in effect in 1962 did not require Mr. Paczkowski to obtain a permit to replace the existing pump with a larger pump.

Chad Engels offered suggested responses to the eight elements under Section 89-02-01-09.2 of the North Dakota Administrative Code; the Board adopted Chad's draft responses. The Board further determined no hearing was necessary under Section 89-02-01-09.1(2) of the North Dakota Administrative Code because the Board will place a condition on the pump that will prohibit pumping below 1,167 when water in the Drain 12 lateral is outside of the channel; in addition, the downstream parties were present at the Board's meeting and approved of the Board's proposed condition. The Board concluded that, in light of these measures, pumping will not have adverse impacts on downstream landowners.

Manager Engst, seconded by Manager Bosse, moved to approve APPLICATION FOR SURFACE DRAIN No. 4171 for Dana Banish, subject to the conditions attached by the State Engineer, and subject to the following conditions:

- 1) That Applicant obtain an easement or some other permission from the owner of the Northwest Quarter of Section 7;
- 2) That Applicant will not operate the pump below 1,167 when water in the Drain 12 lateral is outside of its channels;
- 3) That Applicant notify Sargent County Water Resource District in advance of any proposed improvements to the pump or any additional drainage, including any increase in the pumping capacity or regarding drainage area affected, and, if necessary, submit an additional permit application; and
- 4) 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. The Board directed Sean Fredricks to prepare the requisite NOTICE OF DECISION and to provide the NOTICE to all parties of record.

CITY OF FORMAN: Mark Bopp, Mayor, Forman City met with the Board to question expenses that have been sent to the city for payment on the Forman City Outlet and Reconstruction project. Attorney Sean Fredricks had prepared a letter explaining all expenses and sent to the city on April 5 and Mr. Fredricks further explained these expenses and the Joint Powers Agreement that the city entered into with this Board for the project. The City is questioning charges that should be sent to the North Dakota Insurance Reserve Fund who is representing this Board on the Hoistad matter. Mr. Fredricks will contact the attorney for NDIRF regarding Hoistad costs and reimbursement from NDIRF.

The Board received a Drainage Complaint from Gary Bohnenstingl, Lidgerwood. The site is the SE1/4-25-131-53 and according to Mr. Bohnenstingl the water reaches the driveway causing flooding over the roadway and endangering his garage and yard also causing erosion in the ditch area. The complaint was tabled until conditions allow the Board to inspect this area.

Motion to transfer \$1,528.24 from Drain No. 11 to the Water Board General Fund for charges paid out of the General Fund for the Paul Mathews right of way dispute, which charges should have been paid from Drain No. 11. (Bosse/Engst, unanimous)

The Board discussed whether to consider any additional hunting or other activities at the Head of the Mountain Nature Preserve (Frenier Dam) and agreed to leave all activities as currently listed.

Jim Bosse reported that Dakota Improvement was at a site between Section 1 and 12 in Brampton Township on April 8 to scoop snow that was causing possible flooding problems to the township road. The township road runs parallel to Drain No. 11.

The meeting adjourned at 10:10 p.m.

MARK BREKER – VICE-CHAIRMAN

ATTEST:

SHERRY HOSFORD - SECRETARY