

**SPECIAL MEETING MINUTES**  
**SARGENT COUNTY WATER RESOURCE DISTRICT**  
**Tuesday, August 30th 2022**  
**Sargent County Courthouse - Forman, North Dakota**  
**8:00 A.M.**

Managers present: Chairman Luke Siemieniewski, Michael Wyum, Bruce Speich and Roger Zetocha. Also in attendance were Commissioner Richard Ruch; Abigail and William Ogdahl, landowners; Kasey Lien, Milnor Township; Scott Mund, Hall Township and Wendy Willprecht, Secretary/Treasurer. Others present via video conference were SCWRD Manager Todd Stein; Sean Fredricks of Ohnstad Twichell, P.C., the Board's Attorney; Nathan Trosen, Moore Engineering; Leon Mallberg; Matt Francis, landowner; Paul Mathews and Cassie Tostenson.

**Ogdahl/Toyne Complaint:**

Sean Fredricks explained the Board had previously issued a decision regarding the four complaints filed by the Ogdahl's and Milnor Township against James Toyne:

1. COMPLAINT FOR WATER-RELATED ISSUES filed by Ogdahl Family, LLP, dated June 15, 2022;
2. COMPLAINT FOR WATER-RELATED ISSUES filed by Daniel Ogdahl and William Ogdahl, dated June 15, 2022;
3. COMPLAINT FOR WATER-RELATED ISSUES filed by William Ogdahl, dated June 13, 2022; and
4. COMPLAINT FOR WATER-RELATED ISSUES filed by Kasey Lien on behalf of Milnor Township, dated June 15, 2022.

In all four complaints, the Ogdahl's and the Township alleged Mr. Toyne installed a "dam, dike, or other device" without a permit on the north end of Borg Lake between 2020 and 2021, in the East Half of Section 23 of Milnor Township, in violation of N.D. Cent. Code §§ 61-16.1-38 and 61-16.1-53. The Ogdahl's and Milnor Township were concerned that, as a result of this structure, water is backing up and causing significant flooding to area property, and flooding adjacent township roads.

The Board previously directed Nate Trosen and Moore Engineering to investigate the matter. Mr. Trosen submitted a written report to the Board dated July 7, 2022. In his report, Mr. Trosen indicated the structure on the north end of Borg Lake, in the East Half of Section 23 in Milnor Township qualifies as a "low-hazard dam" under Sections 89-08-01-01(3) & (12) of the North Dakota Administrative Code. As a low-hazard dam, the permitting standard for this particular dam under Section 61-16.1-38 is whether or not the dam is "capable of retaining, obstructing, or diverting more than fifty acre-feet" of water. In this case, Mr. Trosen found the dam is, in fact, capable of retaining more than 50 acre-feet of water; therefore, the dam required a permit under Section 61-16.1-38. The State's records indicate there is no permit for this dam.

The Board concurred with and adopted Mr. Trosen's findings, and issued an order directed at the Toyne's to remove the dam, in accordance with Section 61-16.1-53, under the belief that the dam was on the Toyne's property in the East Half of Section 23. Attorney Fredricks issued a Notice of Decision with the Board's order, and notified the parties of their hearing and appeal rights. The Toyne's submitted a request for a hearing and the matter was set for a hearing today, August 30. However, in preparation for the

hearing, Mr. Trosen prepared a map/exhibit with a GIS overlay of the dam and the GIS information indicated the dam is actually on property owned by Mr. Matthew Francis. A deed search confirmed the dam is on a 14-acre tract in the Southeast Quarter of Section 23 owned by Mr. Matthew Francis. The Board postponed the hearing and invited Mr. Francis, and the other parties, to the meeting today to discuss the matter further.

Mathew Francis indicated he was not aware someone had constructed a dam on his land. He hasn't been to the Borg Lake area for some time. He said approximately 8 to 10 years ago, area farmers had approached him about the possibility of installing a structure on his land that would lower the water level of the lake. At that time, he had told the farmers to go ahead, but he never heard if anything came of that proposal. Mr. Francis added that he wants to do whatever he can to *reduce* the water elevation to an acceptable level as recommended by the Board, so he was surprised to hear someone had constructed a structure on his property that is actually raising water levels. Mr. Francis noted he does have "NO TRESSPASS" signs posted on his land.

Kasey Lien said that during work this spring, he witnessed water running over the township road. He was told by locals that James Toyne filled in the Borg Lake outlet. William Ogdahl similarly indicated that everyone that he has talked to regarding the dam construction has said James Toyne constructed the dam.

Mr. Francis indicated he wants to cooperate to resolve the issue in the short-term (removal of the dam), and also asked how he can implement a long-term solution regarding lake levels. He mentioned contacting Ducks Unlimited. Chairman Siemieniewski noted that Borg Lake is not a legal assessment facility owned or managed by the Board and that, therefore, the Board would not have jurisdiction over water level decisions. That would require a permit from the Department of Water Resources, a process that could include an O&M plan for any type of structure. Scott Mund indicated he would be willing to work with Mr. Francis to remove the dam but would need to access the area through the Toyne's land.

William Ogdahl expressed the need to verify who was at fault in this matter to ensure his family and others have the option to seek civil damages. Attorney Fredricks indicated the dam complaint statute provides that the landowner is responsible for removal of a non-permitted structure; in this case, Mr. Francis was not aware of construction of the dam and had not given anyone permission to construct a dam on his property. With that in mind, someone evidently trespassed on Mr. Francis' property to construct this dam. The Board only has the jurisdiction over this dam specifically indicated in the permitting and complaint statutes, Sections 61-16.1-38, 61-16.1-53, and 61-16.1-53.1. None of those statutes give the Board any authority or jurisdiction over any damages caused by any illegally constructed dam; anyone damaged by this dam would have to pursue those damages in a separate civil action. In terms of the Board's expenses, the Board has statutory authority to assess the landowners or tenants responsible for construction of the dam. In this case, the parties have indicated that Mr. Toyne was more likely than not the party who constructed the dam; the Board could issue an order to Mr. Toyne and Mr. Francis to demand removal of the dam.

Mr. Francis said that if Scott Mund can get the structure removed, he will compensate Mund. Francis added that he is willing to pay for any improvements that will improve the area so that flooding is no longer an issue moving forward.

Francis offered to call Toyne directly to ask for access through Toyne's property to remove the illegal structure. Attorney Fredricks said that this may be worthwhile; otherwise, if necessary, the Board would have to seek a court order to compel access for removal of the structure.

The Township wants the water elevation reduced as soon as possible to protect their road. The road is passable, but the water level is just inches below the road top. Scott Mund said that he has hauled a load of rock over the road to make it more drivable.

Ogdahl said that he would like a contractor hired to remove the dam but he also wants to find out who constructed the dam in the first place. Attorney Fredricks indicated the parties are free to pursue civil remedies to determine fault and to seek damages. The Board is limited in jurisdiction; the Board can order removal of the dam but cannot issue any decisions regarding damages.

Manager Wyum noted the parties may be best served by withdrawing these complaints and pursuing Mr. Toyne civilly.

Manager Stein asked Trosen if he can provide a rough estimate for removal of the dam. Trosen said it is basically the time that it would take the contractor to remove the structure, likely around \$2,000. For now, Mr. Francis is willing to pursue removal. If the parties cannot secure approval from the Toyne's to cross their property to access Francis' property, the Board may have to become involved.

The Board revisited the potential safety issues regarding the removal of this dam. The Board is particularly concerned about the velocity of flow if anyone attempts to remove the entire structure at once. The Board once again agreed removal conducted one-foot-at-a-time would be a safer approach than complete removal at once. Mr. Fredricks will include language in the new Notice of Decision to strongly recommend hiring a contractor and to recommend incremental removal.

Manager Speich moved, and Manager Zetocha seconded the motion, to order removal of the dam installed in the Southeast Quarter of Section 23 in Milnor Township, Sargent County, North Dakota, within 30 days, with notice going to the Toyne's and to Matthew Francis. Upon roll call vote, Chairman Siemieniewski and Managers Zetocha, Stein, and Speich voted in favor of the motion. Manager Wyum voted against the motion. The motion passed.

#### **Drain No. 7:**

Nate Trosen of Moore Engineering was requesting approval to purchase the culverts needed for the Drain No. 7 project for the County Road 12 crossing. He recommended to not use polymer coating on the culverts as the coating tends to wear off over time. Coated culverts would also take longer to be fabricated, adding an additional 2-4-weeks lead time. It was Trosen's recommendation to go ahead with the corrugated steel culverts as presented. A motion was made by Manager Wyum and seconded by Manager Speich to order the dual 112" X 75" CSPA culverts. Upon roll call, the motion carried unanimously.

Trosen said that the Drain No. 7 project will be bid on September 19<sup>th</sup>, 2022.

Trosen prepared an updated cost estimate for the Project and the estimated local cost totaled approximately \$675,000. The district brings in around \$120,000 in assessments per year, which would add up to around \$720,000 over the next 6 years. The previous Drain No. 7 bond is paid off.

Manager Speich said he asked the County to bring some rock for the crossing at County Rd. 12 and Drain No. 7. Speich said there was severe erosion that was creating a safety concern on the inlet side. The County hauled in the rock. Manager Zetocha made a motion, seconded by Manager Wyum, to pay the bill for rock to Sargent County. Upon roll call, the motion carried unanimously.

#### **Drain No. 11 Reassessment:**

Trosen of Moore Engineering said that his team met with Moore's soil scientist to discuss soil types as suggested by the SCWRD to be further looked at within the reassessment matrix. Trosen said the soil scientist directed him to look at the drainage class parameter within the Web Soil Survey data that is being utilized for the reassessment as this represents the saturation of the soil during wet conditions. After further discussion, the SCWRD suggested adding another section to the reduction portion of the reassessment matrix with a reduction percentage of 15% for soils that have a drainage class classified as excessively drained or somewhat excessively drained. Trosen said he will update the matrix and proposed assessment list per the Board's instruction and will have an update on how this change will affect the assessment at the September 15<sup>th</sup>, 2022 meeting.

Meeting adjourned at 10:20 a.m.