

**TRAILL COUNTY WATER RESOURCE DISTRICT
REGULAR MEETING
AUGUST 1, 2017 ~ HILLSBORO, ND**

The District Board convened on this date and came to order at 7:00am at the office of the Traill County Water Resource District in Hillsboro, ND. Managers present were: Andy Neset, Joel Halvorson, and Gary Thompson with Vice-Chairman Jason Lovas presiding. Also present were: Attorney Sean Fredricks, and Robert Boone.

Manager Lovas moved to accept the **agenda** as amended. Manager Neset seconded the motion. Upon roll call vote, the motion carried unanimously.

Manager Neset moved to approve the July 11th and July 18th, 2017 **meeting minutes** as presented. Manager Halvorson seconded the motion. Upon roll call vote, the motion carried unanimously.

Bills: It was moved by Manager Neset and seconded by Manager Halvorson to approve payment of the July 19th, 2017 – August 1st, 2017 bills and the electronic funds transfers, as presented. Upon roll call vote, the motion carried unanimously.

Punch list items for the **Buxton Drain 68 Project** have mostly been addressed. We are waiting for the grass to grow before issuing the next payment application.

Discussion was held on the status of the **Thoreson Drain 64 Project**. Bob Boone stated that the Project is complete, but the seeding has not been established yet. The Board is awaiting an estimate from Chad's Excavation for the tiling of the bottom of the drain.

Updates to the **Stavanger-Belmont Drain 52, Carson Drain 10 and Murray Drain 17 projects** were discussed. Construction has commenced with Drains 10 and 52 but Drain 17 is having issues with the start of construction due to the ground being saturated.

Plans and specs for the **Norway Drain 38** project have been completed. Informal bids will be obtained in the near future from 4 to 5 contractors.

Joel Halvorson stated that **Harlan Erickson** has been in contact with him regarding water standing in a large area of his field in the SE ¼ of the NE corner of Section 1 in Galesburg Township (**Red Owl Drain 55**). He believes there is a **possible blockage** which is causing this. The Board directed Bob Boone to look at the drain and report back to us with his findings.

The Board reviewed a **cost-share application for preliminary engineering** for the potential **Camrud Drain No. 79 Improvement Project**. After further discussion, Manager Halvorson moved to approve the cost-share application request and submit it to the State Water Commission for their approval. Manager Neset seconded the motion. Upon roll call vote, the motion carried unanimously.

Application to Install a Subsurface Drain No. 2017-6 for Richard Moen in the Northeast Quarter of Section 29 in Morgan Township

The Board reviewed an *Application to Install a Subsurface Drain No. 2017-6* dated July 31, 2017, for Richard Moen; Mr. Moen was present to discuss the project with the Board. Under the application, Applicant seeks to install a drain tile system in the Northeast Quarter of Section 29 in Morgan Township, Traill County, North Dakota. The project will include a gravity outlet that will discharge along the east boundary of the Northeast Quarter of Section 29, through a new culvert installed through 152nd Avenue NE, into North Mayville Drain No. 8 on the east side of the township road. The Traill County Water Resource District owns and operates North Mayville Drain No. 8 as a legal assessment drain.

Because the project will discharge directly into a legal assessment drain, no THIRTY-DAY NOTICE was necessary to downstream landowners under N.D. Cent. Code § 61-32-03.1. Under the tile law passed during the 2017 Legislative session, the Board can attach conditions to protect its drain, including erosion protection requirements. In this instance, the Board discussed the necessity for erosion protection, and Mr. Moen agreed to install riprap to protect the drain.

According to records on file with the Traill County Recorder's Office, Paul Moen and Richard Moen each own undivided one-half interests in the Northeast Quarter of Section 29 of Morgan Township, all subject to a life estate in Carol Moen.

It was moved by Manager Neset and seconded by Manager Thompson to approve *Application to Install a Subsurface Drain No. 2017-6* dated July 31, 2017, for Richard Moen in the Northeast Quarter of Section 29 in Morgan Township, subject to the following conditions:

- 1) That Applicant provide, install, and maintain adequate erosion protection at any and all outlets into North Mayville Drain No. 8;
- 2) That any and all outlets into North Mayville Drain No. 8 must be located at least one foot above the bottom of the drain;
- 3) That Applicant notifies the Traill County Water Resource District in advance of any proposed alterations to outlet locations, or addition of any outlets;
- 4) That Applicant install and maintain flags or signs to mark any and all outlets into North Mayville Drain No. 8; and
- 5) That Applicant must reseed any of the District's right of way disturbed by Applicant's activities, and must maintain any reseeded areas for a period of one year from the date of completion to ensure the seeding adequately repairs any disturbed areas.

Upon roll call vote, the motion carried unanimously.

Under Section 61-32-03.1, the District cannot attach any additional conditions to Applicant's permit. However, for Applicant's protection, and to ensure protection of Applicant's tile system, the District will recommend that Applicant consider complying with the following:

- 1) That Applicant obtain permission from Paul Moen, the other owner of the Northeast Quarter of Section 29, to install, construct, operate, and maintain a tile system on the Northeast Quarter of Section 29;
- 2) That Applicant obtain written permission from the Morgan Township Board of Township Supervisors to install a culvert through its township road and to otherwise utilize any of its township road right of way;
- 3) That Applicant notify the Traill 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; 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.

Application to Install a Subsurface Drain No. 2017-4 for James Kirkeide in the Northeast Quarter of Section 31 in Buxton Township

The Board reviewed an *Application to Install a Subsurface Drain No. 2017-4* dated June 5, 2017, for James Kirkeide. Under the application, Applicant seeks to install a drain tile system in the Northeast Quarter of Section 31 in Buxton Township, Traill County, North Dakota. The project will include a pump outlet in the northwest corner of the Northeast Quarter that will discharge into the south road ditch along County Road 21. From there, the tile discharge will flow through county highway right of way for approximately half-a-mile until discharging into the east lateral of Morgan Drain No. 36, a legal assessment drain owned by the Traill County Water Resource District.

The District provided a THIRTY-DAY NOTICE to the Traill County Highway Department as required under N.D. Cent. Code § 61-32-03.1. The County Highway Department did not submit any “technical evidence,” as that phrase is defined under Section 61-32-03.1, and therefore the District cannot require Applicant to obtain written permission from Traill County as a condition to the permit. However, the District can require Applicant to install and maintain erosion protection in the county’s highway right of way. The Board discussed the project and concluded the project could result in erosion in the County Road 21 road ditch, and, with that in mind, the District will require Applicant to install riprap to protect the road ditch.

According to records on file with the Traill County Recorder’s Office, James Kirkeide owns all of the Northeast Quarter of Section 31, less 8.598 acres owned by David and Faye Hunt; Applicant does not intend to install tile on the parcel owned by the Hunts.

It was moved by Manager Halvorson and seconded by Manager Thompson to approve *Application to Install a Subsurface Drain No. 2017-4* dated June 5, 2017, for James Kirkeide in the Northeast Quarter of Section 31 in Buxton Township, subject to the following condition:

- 1) That the Applicant provide, install, and maintain riprap or other ditch stabilization materials satisfactory to Traill County at any and all outlets into Traill County’s road right of way.

Upon roll call vote, the motion carried unanimously.

Under Section 61-32-03.1, the District cannot attach any additional conditions to Applicant's permit. However, for Applicant's protection, and to ensure protection of Applicant's tile system, the District will recommend that Applicant consider complying with the following:

- 1) That Applicant obtains easements from the owner of any land, besides land owned by Applicant, on which Applicant will construct the tile system;
- 2) That Applicant obtains written permission from Traill County to discharge into, or otherwise utilize, any of its County highway ditches;
- 3) That Applicant notify the Traill 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; 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.

COMPLAINT FOR WATER-RELATED ISSUES filed by Ray Zajac Against the Florence D. McMillan Trust

The Board next discussed Ray Zajac's Complaint against the Florence D. McMillan Trust regarding allegations of an illegal structure in the West Half of Section 7 of Bohnsack Township. Records on file with the Traill County Recorder's office confirm that Florence D. McMillan, as Trustee of the Florence D. McMillan 1997 Trust dated August 22, 1997, owns the West Half of Section 7 of Bohnsack Township.

Moore Engineering previously investigated this matter and concluded the McMillan Trust had, in fact, constructed an illegal dam, dike, or other device without a permit in violation of N.D. Cent. Code § 61-16.1-53. However, the Board sought to resolve this matter amicably and without the necessity for issuance of an Order; various members of the Board approached the McMillan Trust principals to discuss the possibility of voluntary removal. The McMillan Trust, however, declined and suggested the structure in the West Half of Section 7 is not a manmade structure but, rather, the result of natural buildup of sediment and other materials. Sean Fredricks indicated that the Board has already exceeded the 120-day requirement in terms of issuance of a notice under Section 61-16.1-53.1 of the Century Code; Sean did note, however, that the remedy for violation of the 120-day requirement is removal of the appeal to the State Engineer's office. To Sean's knowledge, nobody has appealed to the State Engineer's office and, therefore, the Board must make a decision on the Complaint. However, before proceeding with discussion or analysis of the Complaint, Jason Lovas indicated he may have some type of conflict in this matter since he rents property from the Dalrymple family, the principals of the McMillan Trust.

Sean advised the Board that Manager Lovas' potential conflict requires conflict 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 Manager Lovas does not have a specific interest in the West Half of Section 7 of Bohnsack Township, the property at issue in this matter; however, Manager Lovas’ relationship with the McMillan Trust (the Dalrymple family) could be impacted one way or another as a result of the Board’s potential actions regarding this Complaint. With that in mind, Sean indicated the remainder of the Board should vote to determine if a conflict exists. Manager Thompson, Manager Halvorson, and Manager Neset all voted in favor of concluding that Manager Lovas does, in fact, have a conflict in this matter. The next step is for the remainder of the Board to vote on whether or not Manager Lovas should continue to participate in or vote regarding any of the Board’s decisions with respect to Mr. Zajac’s Complaint. In light of the conflict, Manager Thompson, Manager Halvorson, and Manager Neset all voted to preclude Manager Lovas from voting regarding the Board’s determinations on Mr. Zajac’s Complaint.

At this point, Chris Gross called in to the meeting to discuss Moore Engineering’s findings, and to discuss the McMillan Trust’s contentions that the structure in the West Half of Section 7 is the result of natural buildup and is not a manmade structure that required a permit under Section 61-16.1-53. With regard to the McMillan Trust’s recent allegations that this structure is a natural buildup, Chris countered that Moore Engineering investigated and found the structure

was clearly constructed in a manner that includes 90-degree angles and straight lines that suggest this was a manmade structure. Chris indicated this L-shaped berm that would not have naturally occurred.

Next, Chris explained Moore Engineering's specific findings regarding the elements under Section 61-16.1-53 and the relevant provisions of the North Dakota Administrative Code regarding dams, dikes, or other devices. Chris referred to Moore Engineering's written report, prepared by Josh Hassell, dated April 3, 2017.

Before Chris explained the report, Sean explained he had advised Moore Engineering that, under North Dakota law, and specifically under the Supreme Court's case in Douville v. Pembina County Water Resource District, 612 N.W.2d 270 (N.D. 2000), the permitting law in effect at the time of the construction of a dam, dike, or other device controls. Sean indicated that Moore's report dated April 3 erroneously provides that the permitting threshold in effect between 1961 and 1981 was 12.5 acre-feet. Actually, between 1957 and 1967, the law in effect did not include any acre-foot threshold; in other words, *all* dams and other devices constructed between 1957 and 1967 required permits, regardless of any acre-foot threshold. In 1967, the legislature amended Section 61-16-15 to include a 12.5 acre-foot standard for all "dams or other devices"; the statute did not specifically include "dikes." However, Sean indicated that in the Douville case, the North Dakota Supreme Court held that the language, "no dams or other devices for water conservation, flood control regulation, water improvement or storage of water," was broad enough to include dikes. In summary, between 1957 and 1967, *all* dams, dikes, and other devices required permits. Beginning in 1967, the legislature added the 12.5 acre-foot threshold, so dams, dikes, and other devices capable of retaining more than 12.5 acre feet of water required permits. That standard was in effect through 1981 and beyond. Section 61-16-15, enacted in 1967, provided:

No dams or other devices for water conservation, flood control regulation, watershed improvement or storage of water *which are capable of retaining more than twelve and one-half acre-feet of water* shall be constructed within any water management district except in accordance with the provisions of this chapter. (Emphasis added.)

The 1967 legislation amended the language enacted in 1957, which provided:

No dams or other devices for water conservation, flood control regulation, watershed improvement or storage of water shall be constructed within any water conservation and flood control district except in accordance with the provisions of this Act.

Chris explained the structure qualifies unequivocally as a "dam" under the definition in current law, Section 89-08-01-01(3) of the Administrative Code. More specifically, the structure obstructs a "stream channel, watercourse, or an area that drains naturally." Further, based upon the elevation of the top of the dam, the structure is capable of retaining 34.4 acre-feet of water, well beyond the 12.5 acre-foot threshold applicable from 1967 through 1981. The structure also qualifies as a "low-hazard dam," as that term is defined under Section 89-08-01-01(12) of the Administrative Code:

"Low-hazard dam" means a dam located in a rural or agricultural area where there is little possibility of future development. Failure of low-hazard dams may result in damage to agricultural land, township and county roads, and farm buildings other than residences. No loss of life is expected if the dam fails.

In this case, the berm is in an agricultural area, and its failure would only damage ag land. Sean noted the Administrative Code was not applicable until November 1, 1989, and so the dam need not qualify as a "low-hazard dam," need not meet the 50-acre feet standard, and need not meet the other provisions in the Administrative Code, but the definitions in Chapter 89-08-01 provide helpful guidance regarding the definition of a "dam."

In this case, Sean noted the structure meets the criteria in effect between 1961 and 1981 regarding dams since the berm is capable of retaining more than 12.5 acre-feet (the threshold in effect from 1967 to 1981), and it certainly meets the law in effect from 1957 to 1967 (no acre-foot threshold; all dams required permits).

By law, if the structure met the permitting threshold in effect at the time of construction, and the landowner or party responsible for construction did not obtain a permit, the Board must order removal of the device under Section 61-16.1-53. The Supreme Court held in Douville that removal of an unauthorized or unpermitted dam, a dam that required a permit under previous permitting statutes, is the appropriate remedy under Section 61-16.1-53. The Board cannot require removal less than 15 days from the date of the notice, but can afford the landowner a reasonable amount of time to remove the structure. In this case, the Board noted there are crops on the property, and consensus among Managers Thompson, Halvorson, and Neset was that affording the McMillan Trust until 5:00 p.m. on October 31 would provide sufficient opportunity for the landowner to remove crops before removing the structure.

Manager Halvorson moved to conclude the structure in the West Half of Section 7 is a "dam," capable of retaining more than 12.5 acre-feet of water; that the dam required a permit at the time of its construction; that the structure is a manmade structure; and to order the Florence D. McMillan Trust to remove the structure by 5:00 p.m. on October 31, 2017. Manager Neset seconded the motion. Upon roll call vote, Managers Halvorson, Thompson, and Neset voted in favor of the motion; Manager Lovas abstained.

Sean Fredricks will prepare a Notice of Decision to provide to the parties; the notice will indicate that the parties can contact Sean or Chris Gross if they have any questions.

The parties agree the relevant statutory provision governing the legality of these dikes is N.D.C.C. § 61-16-15 as it existed at the time the dikes were constructed. At all relevant times that statute provided, in part:

No dams or other devices for water conservation, flood control regulation, watershed improvement or storage of water which are capable of retaining more than twelve and one-half acre-feet of water shall be constructed within any water management district except in accordance with the provisions of this chapter.

The statute required application to, and approval by, the Water Resource Board and the State Water Commission before any such water control device could be built. N.D.C.C. § 61-16-15.

Luke Andrud joined the meeting by phone to discuss the **Mayville Airport issues**. Brad Tykeson, one of the members of the Mayville Airport Authority Board, was also present. Sean Fredricks explained that the ownership of right of way northwest of Highway 18, east of Drain 9, is somewhat cloudy. Luke sent letters to everyone with interests in the property on July 26, along with Quit Claim Deeds, to the Traill County Water Resource District. Luke explained the idea is to ask everyone with any type of remaining interest in any of the property to convey what they have to the Board. The Board can then clean up ownership and convey what the Board does not need for operation and maintenance of Drain 9 to those landowners.

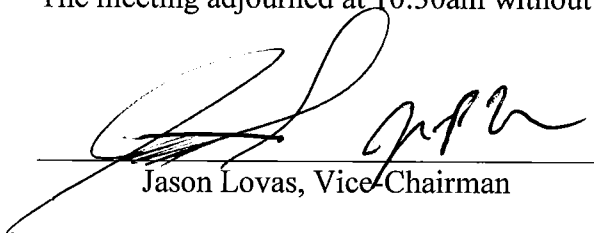
The Board obtained a significant portion of the right of way in 2002 via a "Right of Way Deed." The Board later attempted to convey fee ownership of a portion of that property via Warranty Deed, even though the Board did not have fee ownership. In addition, there is a strip within the township right of way the Board never obtained. The Board agreed that if everyone executes and returns Quit Claim Deeds to the Board, the Board will then retain the west 200 feet along the drain and will convey the remainder to those landowners. In the meantime, Luke will send out a new letter to the landowners to explain the Board's proposal in more detail.

With regard to the Airport Authority, the Board will deal with property west of the drain later.

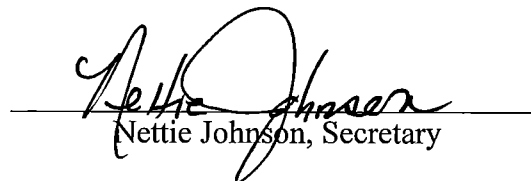
At 9:30am, Wayne Larson, Darrell Larson, Trevor Larson, Ken Knudson and Aaron Rogenes met with the Board to discuss the possible **re-routing of the outlet on the Stavanger-Belmont Drain No. 52**. The attendees are concerned about an area that sits full of water and snow every year and negatively affects farmsteads. There is a lot of erosion occurring because of this. Discussion was held on the possibility of removing additional dirt and trees. The swapping of land was also considered. Talk was held on possibly adding this work on the current Drain No. 52 project which is in progress at this time. Potential culvert work was also talked about. Corey Martin, Traill County Highway Department Supervisor, commented that they may be able to help out with installing rip rap around the culverts. Since the Board's engineer was not at the meeting, it was decided that a special meeting with Wayne Larson and township officers will be called for this Thursday at 1:00pm to discuss this subject further when engineer Chris Gross and contractor Jim Viele can be present to offer their advice and opinions.

Discussion was held on the **BNSF's crossing pertaining to the Buxton Drain No. 68 project**. The Board has completed their work there and is awaiting a signed agreement and release from BNSF. Attorney Sean Fredricks again described the contents within the agreement and said that he has been in contact with Mark Hanson, BNSF representative, and will keep us updated to the status of this agreement. Manager Halvorson moved to have the Board sign the BNSF Agreement. Manager Thompson seconded the motion. Upon roll call vote, the motion carried unanimously.

The meeting adjourned at 10:30am without objection.



Jason Lovas, Vice Chairman



Nettie Johnson, Secretary