

MINUTES

STUTSMAN COUNTY WATER RESOURCE BOARD

September 30, 2020

The regular meeting of the Stutsman County Water Resource Board was called to order by Chairman Joel Lees on September 30, 2020, at 9:00 a.m. in the Commissioner's Room of the Stutsman County Courthouse. Members present were Joel Lees, Arlyn Schmidt, Dennis Clark, John Schock, and Anthony Roorda. Additionally, present were Dustin Krueger of Stutsman County Soil Conservation District, Jim Collins Jr. of the North Dakota Department of Environmental Quality, BJ Kratz of the North Dakota Game and Fish, Shirly Krapp-City of Spiritwood Lake Auditor, Kirk Grimm-Mayor of City of Spiritwood Lake, Kim Hieb, Barry Hazer, Jack Dwyer representing Mr. Hazer, Joel Toso Engineer on behalf of Mr. Hazer, and Daren Peterka of Interstate Engineering. Additionally, Abbagail Geroux, Secretary for the Board, was present.

MINUTES

The first order of business was to review the minutes of the August 26, 2020, regular meeting and the special meeting minutes of September 18, 2020. Upon review, Dennis Clark moved and Arlyn Schmidt seconded a motion to approve the minutes. Motion passed.

W-624 - HAZER, Barry - COMPLAINT OF UNAUTHORIZED DRAINAGE

The next order of business was to again address the Complaint of Unauthorized Drainage by Barry Hazer. A recording of this portion of the meeting was completed.

Ms. Geroux provided an initial background on the matter discussing a 1984 Complaint and Judgment of the District Court regarding that case which mostly dealt with activity in the Southeast Quarter. Mr. Dwyer added additional factual background and provided additional documents for the Board's review. As part of Mr. Dwyer's background and initial statement he indicated that some of the items the Board will need to review is whether the Complaint and the Unauthorized Drainage should be evaluated as one drain or multiple drains. He noted that in 1984 the Water Resource Board found Unauthorized Drainage. However, when the parties could not reach a consensus and the Board requested that the particular drainage area be closed. Mr. Delton Hieb appealed. Subsequently, in that court order Mr.

Dwyer argued that the Judge got the ruling wrong. Particularly the Judge erroneously found that the Board needed to show an adverse effect. My. Dwyer indicated a finding of adverse effect is not required in drainage complaints. Mr. Dwyer further explained that the Board could have the ability to revisit the issue. He indicated that normally when a Judge makes a decision it cannot be revisited. However, these decisions can be revisited when there is a change in circumstances. Mr. Dwyer argues that a sufficient change in circumstances have occurred. Mr. Dwyer pointed to the fact that the dams have failed and that there has been additional drainage since 1984. He argued the Board can make a determination regardless of the prior order. The Board than reviewed Mr. Dwyer's packet and Dennis Clark moved and John Schock seconded a motion to approve of entering the packet from Mr. Dwyer as evidence as part of the Complaint. Motion passed.

Next, Mr. Hazer addressed the board. He expressed an emergency that exists on his dams and is concerned about his farm site. He indicated that he was not notified about the Court appeal until the case was already done. Mr. Hazer also explained that in the area of Eldon's mailbox in the Northeast Quarter of Section 5, for many years, as the cut was made deeper, eventually a culvert was put in by Mr. Eldon's mailbox to take care of the water and that was purpose of the culvert that was put in place. Mr. Hazer also presented photos from 1984 from a 35mm camera. The photographs were then passed around to the Board members and Mr. Hieb was also given an opportunity to review the photographs.

Mr. Dwyer then posed a number of questions to Mr. Hazer. First, Mr. Dwyer inquired if he observed any drainage activity after the court proceeding in the 1990's. Mr. Hazer indicated that he did not observe any of the drainage activity, but noticed that over a period of time cuts were made and the cuts that were made earlier were subsequently deepened, and you can tell that it has been cleaned out. Next, Mr. Dwyer asked if Mr. Hazer had seen any equipment being used to conduct the drainage. Mr. Hazer indicated he did not see equipment but he did see the scars in the Earth. Mr. Dwyer further inquired if Mr. Hazer saw this activity or these cuts before or after the 1984 drainage complaint. Mr. Hazer indicated it was done after because there was a heavier flow of water coming through that area. He knows these cuts were made deeper and cleaned out to make the water flow better. Mr. Dwyer further inquired if Mr. Hazer could provide a date range of the work he's alleging occurred. Mr. Hazer was unable to provide a date range.

It was further noted that the original complaint covered the East half of Section 5, and Delton Hieb admitted to engaging

in drainage activity on the Southeast half of Section 5, as evidenced by the meeting Minutes. It was further indicated that Mr. Dwyer did not observe any of this drainage activity but saw the cuts and observed the drainage, and based on that, Mr. Hazer knew that the landowner deepened and cleaned out these areas after the Complaint.

Board members inquired regarding the photographs that were presented to the Board about the date range of the photographs. It was noted one of the photographs was dated September 27, 1984, which appears to show the dams being built. At this point Joel Lees inquired with Mr. Hazer about why he did not bring a Complaint to the Board when the activity was occurring back in 1993. Mr. Hazer did not provide a specific answer, except that he received permission from the County Commissioner to put dams on his property. Mr. Lees noted that in reviewing the Minutes of the prior Board, as supplied by Mr. Dwyer, the Board was struggling whether there was Unauthorized Drainage back in 1984 and now 36 years later, Mr. Hazer is requesting the Board revisit an issue the Board struggled with back then.

Mr. Lees and some of the other Board members commented that it was their understanding after the last site visit that the Board was no longer determining a Complaint in Southeast Quarter of Section 5 where the dams were located, as the parties had come to an agreement. It was their understanding that the only matter before the Board was the activity occurred after 1984 on the Northeast Quarter of Section 5. In particular Mr. Clark, one of the Board members, wanted to see the FSA maps which Mr. Hieb indicated he was willing to provide the Water Resource Board. Mr. Dwyer indicated that the parties cannot contract around a permitting requirement from the State, and therefore, he was requesting that the Board find there is Unauthorized Drainage on both the Northeast and Southeast Quarter. He indicated that his client was not opposed to having dams placed on the property, but that it would need to be part of the permit approval process for Mr. Hieb.

The Board then inquired with Ms. Geroux regarding seeking guidance on the effect of the decision by the Judge back in 1984. Ms. Geroux first addressed the discussion happening between the parties regarding their desire to come to an agreement on the dams. Ms. Geroux indicated that it appears no agreement has been made between the parties. If they decide to engage in any further negotiations, they would need to do so outside of the meeting, as the Board would not giving its approval to any agreement. Ms. Geroux then explained to the Board that as an administrative body, they have wide latitude to determine the Complaints that come before the Board. However, any decision they make must be supported by a sufficient factual

basis. Ms. Geroux further explained that the Board could find the 1984 decision by the Stutsman County District Judge to be binding on the parties, and that the Board would only look at allegations which occurred after the alleged Complaint. Ms. Geroux also indicated the Board, if it was able to provide a sufficient factual basis to do so, could revisit the complaint presented in 1984.

Anthony Roorda indicated that the decision by the Stutsman County District Judge was final and they would not be revisiting the Complaint and the activities that occurred as part of that Complaint. Mr. Roorda indicated that matter had been settled. The parties, or even the Water Resource Board could have appealed that decision, but it was not appealed, and therefore there is no further action the Board should take regarding those matters. Any activity which occurred subsequently to those hearings on the dams was from Mother Nature. The Board does not have the authority to change what happened with Mother Nature, and therefore this Board should only focus on the pieces of the Complaint where there are allegations of Unauthorized Drainage, particularly in the area of the Northeast Quarter. Arlyn Schmidt indicated that he thought they were only having this hearing for the issues on the Northeast Quarter and that the parties had come to an agreement on the Southeast Quarter. In his mind that matter was moot.

The Board next heard from Mr. Hieb. Mr. Hieb presented a map from NRCS, in which Mr. Hieb indicates that the drainage area was a legal drain. Notably the map did not show when NRCS placed the various designations on his map regarding the drainage. He indicated that the farmland and the cuts in the Northeast Quarter have been like that since he has been farming. Mr. Lees indicated that when they did the site visit on September 18th he noted that he did not see any cattails in the area, which indicated to Mr. Lees that there was no standing water and he was unable to observe any cattails or cattail roots to indicate that there had been any activity on the Quarter to show that there was standing water which was then removed to make it flow. There was further inquiry with Mr. Hieb on when the Northeast Quarter was broken up. Mr. Hieb indicated it was likely broken up when he was about 10 years old, as that is when he remembers collecting rocks on that Quarter. There was inquiry whether that was done before 1984. Mr. Hieb said yes because he is 60 now, and that would be approximately 50 years ago. At this time, John Schock moved and Dennis Clark seconded a motion to accept the photos presented by Mr. Hazer, and also the FSA map on Section 5 presented by Mr. Hieb. Motion passed.

Next, the Board heard from Joel Toso, a Civil Engineer. He indicated that he has 35 years of experience working on water

issues. He noted that the Northeast Quarter and the Southeast Quarter appear to be part of the same larger watershed area. He noted that in particular for the Northeast Quarter, it appears to be a Watershed area of approximately 100 acres, which would meet the 80-acre threshold requirement. Mr. Toso indicated that it is his opinion that the land has been worked, as you can tell visually by looking at Google Maps. Mr. Toso indicated that he reviewed the Google Earth maps for various years, and based on that he determined the land had been modified for drainage activity. Mr. Lees inquired with Mr. Toso if he had conducted a site visit on the property. Mr. Toso indicated he did not, but that it is his recommendation that the Board hire an Engineer to have someone to physically go look at the site. Then, the Board inquired whether Mr. Toso had checked the acre-feet per square mile of water runoff for that area. Mr. Toso indicated he did not. Mr. Lees indicated that when he physically inspected the property there was no way he could tell if the area was a washout from naturally occurring water runoff or if it was cut. Mr. Hieb acknowledged flattening out the areas that affected by water runoff, but denied that he created the cut.

At this point, Anthony Roorda moved and Arlyn Schmidt seconded a motion finding no Unauthorized Drainage on the Complaint. Ms. Geroux inquired if this motion encompassed both the Northeast Quarter and the Southeast Quarter. Mr. Roorda indicated that it did, and Arlyn Schmidt indicated that was also his intent. He indicated that it was his intent to second the motion so that it would provide for further discussion of the Board. Ms. Geroux then requested that the Board have some discussion at this point on why they feel that there is no unauthorized drainage on the property. Anthony Roorda responded that for the Southeast Quarter, the Stutsman County District Judge ruled that there was no unauthorized drainage in 1984 and he saw no basis to disturb this ruling. Further, for the alleged drainage which happened in the Northeast Quarter of Section 5, he saw no evidence of mechanical action. Other board members appeared to be in agreement. After further discussion, Joel Lees called for a roll call vote. All members of the Board voted in favor of the motion. Motion passed.

SPIRITWOOD APPLICATION TO DRAIN

The next item on the agenda was to address process and procedure for the Spiritwood Lake Application to Drain. Ms. Geroux indicated that there were a few items that the Board would need to determine ahead of any hearing required by the

administrative code. Ms. Geroux explained that part of the approval process is that the Board must hold a hearing where it must determine what individuals should be notified ahead of any hearing. She also indicated that the Board would have to review a set of factors as set forth in the North Dakota Administrative Code, to determine if the application by the City of Spiritwood Lake should be approved. Part of that requires the Board to make a determination of who should be noticed, and the other is that the Board could consider hiring Daren Peterka of Interstate Engineering to conduct a review.

There was some discussion by John Schock who felt it would be appropriate to at least include notice to individuals North of the railroad bridge, that appears to be in the area that individuals have the biggest concern.

Mr. Collins of the Department of Environmental Quality then addressed the Board. He indicated that the product would not be increasing flows through the systems, and he further indicated that he is not sure of the exact location of where they will place the Hypolimnetic Drawdown structure because of the feasibility study that was initiated by the Board has not been completed and the City of Spiritwood Lake felt that they did not want to install a structure until they knew what the potential plan was consistent with the feasibility study. Mr. Collins also indicated that he provided an updated operating plan, because the operating plan based the elevation of the Lake on a different number than what is currently in use. Mr. Collins noted that the original elevation came from a survey but has been subsequently adjusted by using different surveying methods.

Mr. Peterka of Interstate Engineering also addressed the Board. He indicated that he would be willing to assist the Board in reviewing the factors. He also indicated that there were some additional documents that would be required and he anticipates would be easily obtained. He indicated that there is a good possibility that the work involved would be less than the amount he anticipated in the agreement that he presented to the Board. Mr. Peterka also explained that if the Hypolimnetic Drawdown system is operating within its operating plan, it should have no effect on the quantity of water and it should have no impact on the upstream and downstream individuals. There was some discussion that the reason why this project had to go through the approval process was that it could technically have the ability to lower the elevation of the lake.

BJ Kratz of the North Dakota Game and Fish Department also indicated that currently the water has stopped flowing out of Alkali Lake, and looking at the plans, it appeared that the amount of water discharged would be negligible. It was also noted that the city of Spiritwood Lake did not conduct a meeting

on placing the Hypolimnetic Drawdown structures in its current location, but did have meetings for its prior plan for the area of the Southwest area of the Lake, and there was significant landowner opposition to that. There was also additional discussion regarding the cost of the Engineer. There was no upward limit placed on the Engineer in the contract, but there was discussion that if Mr. Peterka anticipates that the cost would be above \$2,000 dollars, he would have to notify Ms. Geroux and the Water Resource Board.

There was also discussion that the City of Spiritwood Lake would be willing to split the cost of the Engineering fees. Mr. Grimm indicated that they would have sufficient funds to split the cost for that. Based on this, John Schock moved and Dennis Clark seconded a motion to hire Interstate Engineering for the review of the Application and to assist Ms. Geroux in identifying individuals who should be noticed ahead of the hearing.

Next, the Board addressed Ms. Geroux's concern on identifying the individuals who should be notified for the hearing. Anthony Roorda moved and Arlyn Schmidt seconded a motion authorizing Ms. Geroux in consultation with the Engineer to determine the individuals who will be adversely affected and must receive notice ahead of the hearing. Mr. Collins also indicated that the project also requires that the City of Spiritwood Lake obtain a 404 permit from the Army Corps of Engineers, and they anticipate also applying for that permit.

BILLS

Next there was discussion of regular business before the Board. There was some discussion regarding the checking account for the Water Resource Board, which has been low. It was noted that this year in particular has been a busy year for the Water Resource Board because of a large number of Emergency Applications to Drain which required a number of special meetings, and the Spiritwood Lake feasibility project and a few Complaints that have come before the Board. It was noted that the Board has a number of funds in C.D.s, and that the cost of removing those C.D.s was rather minimal, approximately a couple of dollars per C.D. There was a C.D. that contained approximately \$12,000 dollars. Anthony Roorda moved and Arlyn Schmidt seconded a motion to release the \$12,000 C.D. into the Board's checking account. Motion passed. The Board also discussed the Auditor's bill for the last two years. Ms. Geroux indicated that she reviewed the Board's checkbook along with staff, and they were unable to locate any payments to the auditor for the past couple of years. Based on that, Anthony

Roorda moved and John Schock seconded a motion to pay the Auditor's bill for the 2018 and 2019 Audit. Motion passed. The Board also reviewed the bills and financials, including the Quarterly Member Vouchers. Arlyn Schmidt moved and John Schock seconded a motion to approve the bills and financials. Motion passed.

CHECK NUMBERS

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| 1. Forum Communication Co. - \$326.00 | #2770 |
| 2. Dalsted and Ryan, P.C. - \$2,149.50 | #2771 |
| 3. Griggs County Water Resource District - \$135.00 | #2772 |
| 4. Joel Lees - \$679.23 | #2773 |
| 5. Arlyn Schmidt - \$366.64 | #2774 |
| 6. John Schock - \$551.18 | #2775 |
| 7. Anthony Roorda - \$267.93 | #2776 |
| 8. Dennis Clark - \$437.46 | #2777 |

Seeing no further business before the Board, John Schock moved and Anthony Roorda seconded a motion to adjourn. Motion passed.

RESPECTFULLY SUBMITTED:

ABBAGAIL GEROUX
Secretary

BOARD APPROVAL OF MINUTES

The board approved the minutes this ____ day of _____, 2020.

JOEL LEES, Chairman, or
ARLYN SCHMIDT, Vice-Chairman