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Dickey County Water Resource District

MEETING MINUTES

January 17, 2024

The Dickey County Water Resource District met at the Dickey County Courthouse in Ellendale, ND at 8:00 am on Wednesday, January 17, 2024. Managers Steve Hansen and Justin Gemar were present at the courthouse. Sean Fredricks, the board's attorney and Nathan Trosen, Moore Engineering Representative, joined via video conference as well as Managers John Quandt, Don Zimbleman and Keith Hauck. Natanya Olson, Darrell Schrum, and Arron Wipf were also present at the courthouse.

Chairman Hansen called the meeting order.

Application to Install a Subsurface Water Management System No. 2024-01 for Aaron Wipf in Section 25 in Lorraine Township

The Board next reviewed *Application to Install a Subsurface Water Management System NO. 2024-01* filed December 23, 2023, by Applicant Aaron Wipf, on behalf of Spring Creek Colony. Under *Application to Install a Subsurface Water Management System NO. 2024-01*, Mr. Wipf seeks to amend SUBSURFACE WATER MANAGEMENT PERMIT NO. 2020-10. NaTanya Olson, Darrel Schrums, and Aaron Wipf were all present to discuss the tile project and the drainage complaint filed by Ms. Olson.

The Board approved SUBSURFACE WATER MANAGEMENT PERMIT NO. 2020-10 for Aaron Wipf on October 21, 2020. The project approved under PERMIT NO. 2020-10 was for a 640-acre drain tile system in Section 25 in Lorraine Township. The project presented by Mr. Wipf in 2020, and approved by the Board under PERMIT NO. 2020-10, included six gravity outlets, all proposed to discharge into natural watercourses. Five of the outlets were proposed in the Northeast Quarter of Section 25 that would all discharge into a natural watercourse that flows to the southwest. The final outlet was proposed along the south boundary of the Southeast Quarter of Section 25 that would discharge into a different natural watercourse that flows under 101st Street SE, to the southeast, across the Northeast Quarter of Section 36.

Under *Application NO. 2024-01*, Applicant seeks approval for the same 640-acre system in Section 25 in Lorraine Township, also with six outlets. The only difference under *Application NO. 2024-01* is Applicant's sixth outlet, along the south boundary of the Southeast Quarter of the Southeast Quarter (SE $\frac{1}{4}$ of SE $\frac{1}{4}$) of Section 25, is a pump outlet instead of a gravity outlet. The Colony already installed a pump outlet at that location. Applicant's pump discharges into a natural watercourse that flows under 101st Street SE, to the southeast, across the Northeast Quarter of Section 36.

NaTanya Olson and Darrel Schrums attended the Board's December meeting and voiced their concerns and frustrations regarding the Colony's tile system in Section 25. Ms. Olson was frustrated that she did not receive any notification regarding PERMIT NO. 2020-10 in 2020. Mr. Fredricks explained that, under the law in effect at the time (N.D. Cent. Code § 61-32-03.1 as amended under 2017 legislation, since

amended in 2021), the Board had an obligation to provide THIRTY-DAY NOTICES to landowners one mile downstream of each project outlet. However, the law at the time did *not* require downstream notices for any project outlets that discharged into natural watercourses. In this case, all six of the outlets approved under PERMIT NO. 2020-10 discharged into natural watercourses and, therefore, no downstream notices were required.

At the December meeting, Ms. Olson suggested the pump should discharge into a different natural watercourse, one that does not flow across her property in Section 31 in Elm Township. The Board and Mr. Fredricks explained the Board had no authority or jurisdiction to take any action against the Colony or to investigate Ms. Olson's allegations without a drainage complaint. The Board also explained that if the Colony submitted a new application to amend PERMIT NO. 2020-10, to include a pump outlet, under N.D. Cent. Code § 61-32-03.1, the Board would have no choice but to approve the permit or the permit would be deemed automatically approved without any conditions within 30 days of its submission.

At the December meeting, Ms. Olson also suggested the Colony entered upon her property and constructed ditch improvements without permission. If the Colony entered upon Ms. Olson's property, that would be a separate trespass matter; Mr. Fredricks explained the Dickey County Water Resource District does not have any jurisdiction over trespass claims.

Following the Board's December meeting, on December 22, 2023, Ms. Olson submitted a COMPLAINT FOR WATER-RELATED ISSUES (undated) to Judy Hansen, the Board's Secretary-Treasurer. Under the Complaint, Ms. Olson noted PERMIT NO. 2020-10 did not include approval of a pump outlet. In the Complaint, Ms. Olson further reiterated her contention that the Colony should discharge into a different natural watercourse with their pump outlet, one that does not discharge upstream of her property in Section 31 in Elm Township. The Complaint does not reference Ms. Olson's allegations of trespass by the Colony.

The day after Ms. Olson submitted her Complaint, on December 23, 2023, Mr. Aaron Wipf submitted *Application No. 2024-01* to amend SUBSURFACE WATER MANAGEMENT PERMIT NO. 2020-10.

Mr. Fredricks reminded the Board that, under current law, N.D. Cent. Code § 61-32-03.1 as amended in 2021, the Board has no choice but to approve *Application No. 2024-01* or the permit will be deemed automatically approved, without any conditions, within 30 days of Mr. Wipf's submission of *Application No. 2024-01*. The Colony's discharge into a natural watercourse upstream of Ms. Olson's property is not an issue the Board can address by law. Under Section 61-32-03.1, a tile applicant can discharge into any natural watercourse; water resource districts cannot refuse any discharge into a natural watercourse and cannot force a tile applicant to discharge into a different natural watercourse. If Ms. Olson is concerned about additional flows as a result of the Colony's tile discharge into the natural watercourse upstream of Ms. Olson's property, Ms. Olson can pursue civil remedies against the Colony. Section 61-32-03.1(9) provides:

Approval of a [tile] permit under this section does not prohibit a downstream party unreasonably damaged by the discharge of water from a subsurface water management system from seeking damages in a civil action.

With that provision in mind, Ms. Olson could commence a civil action against the Colony in District Court if she wishes, but the Dickey County Water Resource District cannot force the Colony to modify the location of their tile outlet or prohibit the Colony from discharging into the natural watercourse upstream of Ms. Olson's property. Therefore, under Sections 61-32-03.1 and 61-32-07 of the Century Code, the Board cannot take any action regarding the location of the Colony's outlet under the Complaint.

With regard to the pump/gravity outlet, that is an issue the Board could address under the Complaint, in accordance with Sections 61-32-03.1 and 61-32-07. Under PERMIT NO. 2020-10, the Board did not approve a pump outlet for the Colony's tile system in Section 25 in Lorraine Township; rather, the Board approved six gravity outlets under PERMIT NO. 2020-10. Under the drainage complaint statute, Section 61-32-07, the Board has jurisdiction to order the Colony to "close or fill" unpermitted drainage. However, Mr. Wipf submitted *Application No. 2024-01* to amend PERMIT NO. 2020-10 and to seek approval of the Colony's pump outlet. Although the pump installed by the Colony is currently not a permitted outlet, because Mr. Wipf submitted a new application, under Section 61-32-03.1, the Board has no choice but to approve *Application No. 2024-01* or the permit will be deemed automatically approved, without any conditions. Therefore, the Board has no choice but to approve *Application No. 2024-01*, if the Board wants to ensure the tile permit includes conditions (e.g., erosion protection at outlets into any natural watercourses).

If the Board approves *Application No. 2024-01*, the Board will not have any jurisdiction to order Mr. Wipf or Spring Creek Colony to "close or fill" their tile system in Section 25 of Lorraine Township. Under the drainage complaint statute, Section 61-32-07, the Board only has jurisdiction to order a landowner to "close or fill" any unpermitted "drain, lateral drain, or ditch ... opened or established by a landowner or tenant contrary to this title [Title 61 of the North Dakota Century Code]." In other words, if a landowner constructs or installs a drain without a permit, as required under Title 61, a water resource district can order that party to close or fill the unpermitted drainage. However, if a party obtains a permit for any drain, the drain is no longer "contrary to" Title 61 of the Century Code. In this case, although the Colony installed the pump without a permit to do so, the tile statute, approved by the North Dakota Legislature in 2021, well after the passage of the drainage complaint statute, requires the Board to approve the new tile application submitted by the Colony. Once the Colony's pump outlet is approved and included within a valid tile permit, the Board will no longer have any jurisdiction to order or force the Colony to close or fill the tile system.

In terms of the process for the Board, Mr. Fredricks recommended that the Board approve *Application No. 2024-01*; if the Board does not approve the application today, *Application No. 2024-01* will be deemed automatically approved without any conditions 30 days after Mr. Wipf's submission of the application. If the Board approves the application with conditions, Mr. Fredricks can prepare and provide a NOTICE OF DECISION and related permit approval documents and can serve the documents as required by law.

According to records supplied by Applicant, Tom Wipf, as Trustee for Spring Creek Colony, owns all of Section 25 in Lorraine Township.

Manager Gemar moved, and Manager Quandt seconded the motion, to approve *Application to Install a Subsurface Water Management System No. 2024-01* filed December 23, 2023, for Aaron Wipf, regarding a tile project in Section 25 in Lorraine Township, and to authorize the Secretary-Treasurer to sign SUBSURFACE WATER MANAGEMENT PERMIT NO. 2024-01, subject to the following conditions:

1. Applicant will install and maintain erosion protection at any and all outlets into the natural watercourses in Section 25 in Lorraine Township.
2. Applicant will re-establish any areas disturbed installing or maintaining Applicant's tile system.
3. Applicant will turn off any pump outlets and otherwise close all outlets during "critical flood periods," as determined by the Dickey County Water Resource District.

4. Applicant will not install Applicant's tile system within 20 feet, on either side, of any rural water lines Southeast Water Users District in Section 25 in Lorraine Township under any blanket easements, or otherwise beyond the Water District's existing easement(s).
5. Applicant must apply for an amendment to SUBSURFACE WATER MANAGEMENT PERMIT NO. 2024-01 in advance of any proposed alterations to outlet locations, the addition of any outlets, or improvements or modifications to the tile system that could increase the capacity or drainage area of the tile system.

Upon roll call vote, the motion carried unanimously.

Under Section 61-32-03.1, the Board cannot attach any additional conditions to Applicant's permit. However, for Applicant's protection, and to ensure protection of Applicant's tile system, the Board recommends 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.

Sean Fredricks will provide copies of the Board's NOTICE OF DECISION and SUBSURFACE WATER MANAGEMENT PERMIT NO. 2024-01 to the Department of Water Resources and Southeast Water Users District. Applicant's detailed project design map is an exempt record, and the Board will not provide copies to any third parties. In this case, although Section 61-32-03.1 would not require service of the approval documents on NaTanya Olson, Mr. Fredricks will mail copies of the approval documents to Ms. Olson since the matter is the subject of Ms. Olson's Complaint. Applicant's detailed project design map is an exempt record, and the Board will not provide copies to any third parties.

Mr. Fredricks advised the Board to hold the Complaint for a month, to allow Mr. Fredricks to prepare and serve the tile permit approval documents. The Board can discuss the Complaint at the Board's February meeting.

Sean Fredricks, the board's attorney, addressed the board with explanation of the complaint filed by Natanya Olson against Aaron Wipf. Ms. Olson addressed the board with questions she had on the tile project and questions to Chairman Hansen about the purpose of a water board. Ms. Olson was given a lengthy description of the Board's purposes and statutory mandates. Darrell Schrum expressed his frustration that the Board was not ordering the Colony to close their tile project.

Mr. Fredricks explained to Ms. Olson the tile statute permits her to commence a private civil action against Mr. Wipf if she wishes but that the Board has a statutory obligation to follow the tile and drainage complaint statutes.

Mr. Wipf then addressed the Board on a culvert that was put in a township road in the vicinity of the project that he feels was installed too high. Chairman Hansen made Mr. Wipf aware that this is a township matter and the water board has no jurisdiction regarding culverts through township roads.

Mr. Schrum acknowledged he installed the culvert and feels it is in the correct location for it to work properly. Chairman Hansen reiterated that this is a township matter and the water board has no jurisdiction regarding culverts through township roads.

Dickey County Drain #1 permanent permit application

The Board next reviewed information from the Department of Water Resources regarding APPLICATION FOR SURFACE DRAIN NO. 6236, previously submitted by the Dickey County Water Resource District regarding DICKEY COUNTY DRAIN NO. 1 IMPROVEMENT PROJECT NO. 2023-01. The Board previously obtained EMERGENCY CONSTRUCTION PERMIT NO. 6225 from DWR in May of 2023 regarding the Board's use of two pumps at the outlet of Drain No. 1 into the Maple River to provide flood relief to properties and public infrastructure along and adjacent to Drain No. 1. Under APPLICATION FOR SURFACE DRAIN NO. 6236, the Board is seeking a permanent surface drain permit to permanently authorize two pumps that each discharge at 10 cubic feet per second, for a total discharge of 20 cfs.

When the Maple River is high, the Drain No. 1 outlet culvert and flap gate are inundated. As a result, Drain No. 1 cannot adequately outlet into the Maple River and the high water backs up and inundates properties and roads near and upstream of the Drain No. 1 outlet. The pumps have provided flood relief for crossings at 84th Street, 86th Street, 87th Street, and 95th Avenue. Several landowners and road authorities have approached the Board to request that the Board seek DWR approval for use of the pumps permanently.

EMERGENCY CONSTRUCTION PERMIT NO. 6225 will expire in November. With that in mind, Nathan Trosen has worked with DWR staff in an effort to expedite the permanent permitting process.

Moore Engineering conducted downstream analysis and concluded the 20 cfs maximum discharge will not inundate or flow over new properties not normally subject to drainage or discharge from Drain No. 1. Further, downstream landowners have indicated their support for the project. More specifically, Manager Don Zimbleman is the downstream landowner in the Northwest Quarter of Section 24 in Maple Township; Ron Haase owns the Southwest Quarter of Section 24 and the Northwest Quarter of Section 25; and Richard Gramlow owns the Southwest Quarter of Section 25. Manager Gemar previously contacted Mr. Haase and Mr. Gramlow; both have verbally approved the pumps and Manager Zimbleman previously noted his support.

Before proceeding with the permit, Sean Fredricks explained the Board must officially authorize the project and modifications to the existing assessment project. Mr. Fredricks prepared and circulated a draft RESOLUTION AUTHORIZING DICKEY COUNTY DRAIN NO. 1 IMPROVEMENT PROJECT NO. 2023-01 for the Board's consideration. Under the RESOLUTION, the Board would authorize the project, described as:

The Project will consist of installation and maintenance of two pumps in the Northwest Quarter of Section 24 in Maple Township, at the outlet of DICKEY COUNTY DRAIN NO. 1 that will discharge into the Maple River. Each pump will discharge at a rate of 10 cubic feet per second, for a total discharge of 20 cfs. The District will operate the pumps when the water surface elevation of the Maple River at the Drain No. 1 outlet is greater than the Drain No. 1 outlet culvert and flap gate and when Drain No. 1 cannot otherwise properly discharge via gravity.

Before discussing the merits of the application, Mr. Fredricks explained the conflict analysis the Board should conduct regarding Manager Zimbleman's potential conflict in the matter. Manager Zimbleman owns property downstream from the pumps and, although he supports the project, Manager Zimbleman nevertheless has a direct personal interest in the project. Mr. Fredricks explained the law in North Dakota regarding conflicts, Section 44-04-22 of the North Dakota Century Code, provides the relevant standard. 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.

The Section 44-04-22 test requires a multi-step analysis. In this case, because Manager Zimbleman owns property downstream of the project, Manager Zimbleman has a direct and substantial personal interest in the matter that creates a conflict. Manager Quandt moved to conclude that Manager Zimbleman has a conflict and should not participate in any votes regarding DICKEY COUNTY DRAIN NO. 1 IMPROVEMENT PROJECT NO. 2023-01 or regarding APPLICATION FOR SURFACE DRAIN NO. 6236. Manager Hauck seconded the motion. Upon roll call vote, Chairman Hansen and Managers Hauck, Gemar, and Quandt voted in favor of the motion. Manager Zimbleman abstained. The motion passed.

There is an additional conflict statute specific to water resource districts, Section 61-16-08.1 of the Century Code, that provides the County Commission with discretionary authority to appoint alternate water managers if a full-time member has a conflict. However, that statute was effectively superseded by Section 44-04-22 when the Legislature adopted Section 44-04-22 in 1995 (Section 61-16-08.1 went into effect in 1985). Section 61-16-08.1 does not provide a definition for what qualifies as a “conflict of interest” and does not provide a mandatory process; rather, the legislative history of Section 61-16-08.1 indicates the Legislature approved that statute to provide a process for water managers to avoid situations where they are not comfortable voting on a matter and is not a mandatory process. Conversely, the process under Section 44-04-22 is mandatory for conflict situations, provides a detailed test for determining if a conflict exists, and provides a detailed process for a Board to proceed even if a conflict does exist. The Legislature enacted Section 44-04-22 after passing the vague and optional Section 61-16-08.1 and, therefore, the process under Section 44-04-22 controls all conflict matters.

With the conflict issue concluded, the Board proceeded with discussion regarding DICKEY COUNTY DRAIN NO. 1 IMPROVEMENT PROJECT NO. 2023-01.

Manager Gemar moved to approve the RESOLUTION AUTHORIZING DICKEY COUNTY DRAIN NO. 1 IMPROVEMENT PROJECT NO. 2023-01. Manager Hauck seconded the motion. Upon roll call vote, Chairman Hansen and Managers Hauck, Gemar, and Quandt voted in favor of the motion. Manager Zimbleman abstained. The motion passed and the RESOLUTION was duly adopted. Mr. Fredricks’ office will arrange for publication of the RESOLUTION in the *Dickey County Leader*.

The Board next discussed APPLICATION FOR SURFACE DRAIN NO. 6236. DWR conducted the requisite SOV process and ultimately concluded the project is not “of statewide or interdistrict significance.” DWR did provide the following, non-binding recommendation for the Board’s consideration in DWR’s “Record of Decision”:

The DWR recommends the District consider limiting operation of outlet pumps in a manner consistent with the approved Plan of Operation for the Yorktown-Maple Drain No. 3 and Dickey County Drain No. 1 projects.

Nathan Trosen indicated the O&M plan for the Yorktown-Maple project provides for operation when the water level is below the top of the outlet pipe. Under APPLICATION FOR SURFACE DRAIN NO. 6236, the pumps will operate when the water level exceeds the inverts of the outlet pipe. The plan will not result in adverse impacts downstream.

The Board reviewed Mr. Trosen'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 for the application under Section 89-02-01-09.1(2) of the North Dakota Administrative Code; the pumps are located on the Board's Drain No. 1 right of way and will not require any additional right of way, landowners near the project support the project, road authorities in the vicinity of the pumps support the project, downstream landowners do not oppose the pumps, and the project will not result in adverse impacts to downstream landowners.

Manager Hauck moved to adopt Nathan Trosen's proposed responses to the eight elements under 89-02-01-09.2 of the North Dakota Administrative Code; to conclude no hearing is necessary under Section 89-02-01-09.1(2); to approve APPLICATION FOR SURFACE DRAIN NO. 6236 regarding DICKEY COUNTY DRAIN NO. 1 IMPROVEMENT PROJECT NO. 2023-01, subject to any conditions attached by the State Engineer; and to authorize the Secretary-Treasurer to sign PERMIT FOR SURFACE DRAIN NO. 6236. Manager Quandt seconded the motion. Upon roll call vote, Chairman Hansen and Managers Hauck, Gemar, and Quandt voted in favor of the motion. Manager Zimbleman abstained. The motion passed.

Mr. Fredricks will prepare the requisite NOTICE OF DECISION and will serve the NOD as required by law, including service to DWR and parties of record.

New Rate increases for Ohnstad Twichell and Moore Engineering

New rates were presented to the board from Sean Fredricks, the board's attorney, and Nathan Trosen, Moore Engineering representative. After a short discussion, Manager Zimbleman moved to accept the new rate increases from both Mr. Fredricks and Mr. Trosen for their work representing the Dickey County Water Resource District. Manager Gemar seconded the motion. Upon roll call, the motion passed unanimously.

Election of Offices

Sean Fredricks opened the election of officers asking for nominations for Chairman. Manager Gemar nominated Manager Steve Hansen for Chairman. Managers Gemar, Zimbleman, Hauck and Quandt voted unanimously to reelect Manager Hansen as Chairman. Chairman Hansen opened up election of officers for Vice Chairman. Manager Gemar nominated Manager Hauck as Vice Chairman. Upon roll call, Managers Hansen, Gemar, Zimbleman, and Quandt voted unanimously to reelect Manager Hauck as Vice Chairman. Manager Zimbleman cast a unanimous ballot to reelect Managers Hansen, Quandt and Gemar as appointees to the Dickey/Sargent Joint Board and Managers Zimbleman and Hauck will be alternates. Upon roll call, the motion passed unanimously.

Manager Hauck had a few questions regarding township responsibilities for Sean Fredricks.

Meeting Minutes

Manager Zimbleman moved to approve the December 20, 2023 meeting minutes. Manager Quandt seconded the motion. Upon roll call, the motion passed unanimously.

Financial Statement and bills

The board considered bills from Ohnstad Twichell of \$3444.20, Moore Engineering of \$195, ND Water Resource District of \$30, and Wendy Willprecht of \$650. Secretary Hansen gave the financial report. Manager Gemar moved to approve the financial statement and bills. Manager Hauck seconded the motion. Upon roll call, the motion passed unanimously.

There being no further business to discuss, the meeting was adjourned.

APPROVED:

Steve Hansen, Chairman

Attest:

Judy Hansen, Secretary