

**Draft: These are DRAFT minutes and subject to amendment before final approval by the Dickey County Water Resource District.**

Dickey County Water Resource District

MEETING MINUTES

June 19, 2024

The Dickey County Water Resource District met at the Dickey County Courthouse in Ellendale ND at 8:00 am on Wednesday, June 19, 2024. Managers Steve Hansen, Keith Hauck, Don Zimblemen, Justin Gemar and John Quandt were all present at the courthouse. Sean Fredricks, the board's attorney and Nathan Trosen, Moore Engineering Representative joined via video Conference.

Chairman Hansen called the meeting to order.

***Logodinski Tile App***

***Application to Install a Subsurface Water Management System No. 2024-07 for Victor Lagodinski in the South Half of Section 24 in Potsdam Township***

The Board next reviewed an *Application to Install a Subsurface Water Management System No. 2024-07* filed May 29, 2024, by Applicant Victor Lagodinski. Under the Application, Applicant seeks to install a 300-acre drain tile system in that portion of the South Half of Section 24 in Potsdam Township, Dickey County, North Dakota, lying south and west of US Highway 281. The project will include a single pump outlet near the southeast corner of Section 24; the pump will discharge into the west road ditch along US Highway 281; the discharge will flow south in the west road ditch and abandoned railroad right of way (adjacent to Highway 281), across a small portion of the Southwest Quarter of Section 29 in Valley Township and across the West Half of Section 30 in Valley Township.

According to tax information supplied by Applicant, Marie Lagodinski owns the South Half of Section 24 in Potsdam Township lying south and west of US Highway 281 where Applicant intends to install the tile system. Because the project will discharge into Highway 281 right of way, the Board will provide downstream notices to NDDOT as required under N.D. Cent. Code § 61-32-03.1. The Board will also provide notices to the downstream owners of the abandoned railroad right of way in the Southwest Quarter of Section 29 (owned by Dickey County), the Northwest Quarter of Section 29 (owned by Kenneth and Joyce Ballard) and the Southwest Quarter of Section 30 in Valley Township (owned by Lisa Beckman, subject to a life estate in Della Ham).

Manager Zimbleman moved, and Manager Gemar seconded the motion, to approve *Application to Install a Subsurface Water Management System No. 2024-07* filed May 29, 2024, for Victor Lagodinski, regarding a proposed tile project in the South Half of Section 24 in Potsdam Township, and to authorize the Secretary-Treasurer to sign SUBSURFACE WATER MANAGEMENT PERMIT NO. 2024-07, subject to the following conditions:

1. Applicant will install and maintain erosion protection at any and all outlets into NDDOT's Highway 281 right of way.
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 remove silt or vegetation, or repair erosion or scour damages *directly* caused by Applicant's tile system, but only up to one mile downstream of Applicant's pump outlet.
5. Applicant will not install Applicant's tile system within 20 feet, on either side, of any rural water lines Southeast Water Users District has in the South Half of Section 24 in Potsdam Township under any blanket easements, or otherwise beyond the Water District's existing easement(s).
6. Applicant must apply for an amendment to SUBSURFACE WATER MANAGEMENT PERMIT NO. 2024-07 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.

With regard to condition #4, Applicant's obligations to remove silt or vegetation, or to repair erosion or scour damages, will only arise upon submission of substantial evidence to the Board by downstream landowners or downstream road authorities that Applicant's tile system *directly* caused accumulation of silt or vegetation, erosion, or scouring.

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 comply with the following:

1. The Board recommends that Applicant obtain written consent from the North Dakota Department of Transportation to discharge into or otherwise utilize any Highway 281 right of way.
2. 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, SUBSURFACE WATER MANAGEMENT PERMIT NO. 2024-07, and downstream flow map to the Department of Water Resources, NDDOT, the Dickey County Highway Department, Kenneth and Joyce Ballard, Lisa Beckman, Della Ham, 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. Mr. Fredricks will also include a copy of NDDOT's REQUEST FOR DRAINAGE ON HIGHWAY RIGHT OF WAY for Applicant's convenience.

***Scott German Tile App***

***Application to Install a Subsurface Water Management System No. 2024-08 for Scott German in the Northeast Quarter of Section 25 in Kent Township***

The Board next reviewed an *Application to Install a Subsurface Water Management System No. 2024-08* filed June 18, 2024, by Applicant Scott German. Under the Application, Applicant seeks to install a 120-acre drain tile system in the Northeast Quarter of Section 25 in Kent Township, Dickey County, North Dakota. The project will include a single gravity outlet that will outlet via a pipeline that will commence at the southeast corner of Section 25; the pipeline will run diagonally to the southeast under the intersection of 102nd Avenue SE and 95th Street SE; the pipeline will then run from the northwest corner of Section 30 in Hudson Township, along the west boundary of Section 30 until daylighting and discharging into a natural watercourse, pond, lake, or slough.

According to Dickey County tax information, Scott German owns the East Half of the Northeast Quarter of Section 25 in Kent Township and the Scott M. German Revocable Living Trust owns the West Half of the Northeast Quarter of Section 25 where Applicant intends to install the tile system. Because the project will discharge into a natural watercourse, pond, lake, or slough, no downstream notices are required under N.D. Cent. Code § 61-32-03.1. However, the Board will provide notices to James and Connie Boe Quandt, the owners of the Southwest Quarter of Section 30 in Hudson Township, where Applicant intends to install his tile line and outlet.

Manager Hauck moved, and Manager Quandt seconded the motion, to approve *Application to Install a Subsurface Water Management System No. 2024-08* filed June 18, 2024, for Scott German, regarding a proposed tile project in the Northeast Quarter of Section 25 in Kent Township, and to authorize the Secretary-Treasurer to sign SUBSURFACE WATER MANAGEMENT PERMIT NO. 2024-08, subject to the following conditions:

1. Applicant will install and maintain erosion protection at any and all outlets into the natural watercourse, pond, lake, or slough in the Southwest Quarter of Section 30 in Hudson Township.
2. Applicant will re-establish any areas disturbed installing or maintaining Applicant's tile system.
3. Applicant will not install Applicant's tile system within 20 feet, on either side, of any rural water lines Southeast Water Users District has in the Northeast Quarter of Section 25 in Kent Township under any blanket easements, or otherwise beyond the Water District's existing easement(s).
4. Applicant must apply for an amendment to SUBSURFACE WATER MANAGEMENT PERMIT NO. 2024-08 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 comply with the following:

1. The Board recommends that Applicant obtain written consent from the Kent Township and Hudson Township Boards to install any project components in any of their respective road right of way.
2. The Board recommends that Applicant obtain and record a pipeline easement from the owners of the Southwest Quarter of Section 30 in Hudson Township.
3. 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, SUBSURFACE WATER MANAGEMENT PERMIT NO. 2024-08, and downstream flow map to the Department of Water Resources, NDDOT, the Kent Township Board, the Hudson Township Board, James and Connie Boe Quandt, 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.

#### ***Brademeyer Complaint***

#### **Micheal Brademeyer Drainage Complaint Against Brian Vculek - COMPLAINT FOR WATER-RELATED ISSUES**

The Board next considered Micheal Brademeyer's COMPLAINT FOR WATER-RELATED ISSUES filed against Brian Vculek, dated May 16, 2024. Under the Complaint, Mr. Brademeyer opposes the tile system that Brian Vculek plans to construct in the South Half of Section 5 in Divide Township, in close proximity to the Dickey County Highway 14A project recently constructed by Dickey County. Mr. Vculek's tile project is a permitted project under a tile permit approved by the Board, SUBSURFACE WATER MANAGEMENT SYSTEM PERMIT NO. 2024-05. The Board approved Mr. Vculek's project under PERMIT NO. 2024-05, with the following project description:

Under the Application, Applicant seeks to install a 180-acre drain tile system in the South Half of Section 5 in Divide Township, Dickey County, North Dakota. The acres in the Southwest Quarter of Section 5 will flow to a pump along the eastern edge of a pond, slough, or lake in the Southwest Quarter; the pump will lift the discharge to a gravity line; the line will extend to the southeast via a buried pipeline that will run under the intersection of North Dakota Highway 1 and 79<sup>th</sup> Street SE; the pipeline will continue to the southeast across a portion of the Northwest Quarter of Section 9 and will ultimately discharge into a tributary of Bear Creek. The 87 acres in the Southeast Quarter of Section 5 will similarly flow to a pump, this one along the southern edge of a pond, lake, or slough in the Southeast Quarter of Section 5; the pump will lift the discharge to the same gravity line that will run across a portion of the Northwest Quarter of Section 9. The 39 acres in the southeast corner of the Southeast Quarter of Section 5 will flow by gravity.

The Board's approval of PERMIT NO. 2024-05 included the following conditions:

1. Applicant will install and maintain erosion protection at any and all outlets into the tributary of Bear Creek in the Northwest Quarter of Section 9 in Divide Township.
2. Applicant will turn off any pump outlets and otherwise turn off all pumps during “critical flood periods,” as determined by the Dickey County Water Resource District.
3. Applicant will install and maintain a control structure upstream of the project pipeline intersection with North Dakota Highway 1 and 79th Street SE and will close the structure during “critical flood periods,” as determined by the Dickey County Water Resource District.
4. Applicant will re-establish any areas disturbed installing or maintaining Applicant’s tile system.
5. Applicant will not install Applicant’s tile system within 20 feet, on either side, of any rural water lines Southeast Water Users District has in the South Half of Section 5 in Divide Township under any blanket easements, or otherwise beyond the Water District’s existing easement(s).
6. Applicant must apply for an amendment to SUBSURFACE WATER MANAGEMENT PERMIT NO. 2024-05 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.

The Board approved PERMIT NO. 2024-05 at the Board’s meeting on April 17, 2024. The Board’s attorney, Sean Fredricks, provided notice regarding the Board’s approval of PERMIT NO. 2024-05 in a NOTICE OF DECISION dated April 17, 2024. Fredricks provided the NOTICE OF DECISION to Mr. Vculek and the Vculek Trusts, the owners of the property where Mr. Vculek intends to install the tile system. Fredricks also provided the NOTICE OF DECISION to the North Dakota Department of Water Resources, NDDOT, Divide Township, and Southeast Water Users District. Because the project proposed under PERMIT NO. 2024-05 will discharge into a natural watercourse, no downstream notices were necessary under N.D. Cent. Code § 61-32-03.1. However, Fredricks also provided the NOTICE OF DECISION to the Erlandsons, the landowners in the Northwest Quarter of Section 9, where Mr. Vculek intends to install pipeline components. The appeal period regarding the Board’s approval of PERMIT NO. 2024-05, under N.D. Cent. Code §§ 61-16.1-54 and 28-34-01, has expired. With that in mind, the Board’s approval of PERMIT NO. 2024-05 is no longer subject to any appeal or legal challenge.

Mr. Brademeyer is concerned Mr. Vculek’s tile project will overwhelm the County’s Highway 14A project and will flood his pasture. Water resource districts are limited in terms of what conditions they can attach to tile permits; Section 61-32-03.1, the tile permitting statute, specifically identifies those conditions water resource districts can attach to tile permits. Further, under Section 61-32-03.1, once tile discharge reaches a natural watercourse, the permitting water resource district loses jurisdiction over that discharge.

In the case of Mr. Vculek’s tile application, the Dickey County Water Resource District was aware of possible concerns downstream and attached the only conditions to PERMIT NO. 2024-05 that were permissible under Section 61-32-03.1. The following excerpts from the Board’s meeting minutes from April 17 demonstrate the Board did everything legally permissible to reduce possible downstream impacts:

Manager Quandt noted that this project is in close proximity to the Dickey County Highway 14A project constructed by the County. The O&M plan for that project required installation of a control structure upstream of highway and township right of way; under the O&M plan, that structure must be closed when the water surface elevation in the slough along County Road 14A in Section 6 has less than 3 feet of freeboard.

For Mr. Vculek's project, Mr. Quandt recommended that the Board similarly require installation of a control structure upstream of the project pipeline intersection with North Dakota Highway 1 and 79th Street SE. Under Section 61-32-03.1, the Board can mandate closure of the structure during "critical flood periods."

With those concerns in mind, the Board's attachment of the following three conditions were significant, and were as far as the Board could go to mitigate downstream impacts:

1. Applicant will install and maintain erosion protection at any and all outlets into the tributary of Bear Creek in the Northwest Quarter of Section 9 in Divide Township.
2. Applicant will turn off any pump outlets and otherwise turn off all pumps during "critical flood periods," as determined by the Dickey County Water Resource District.
3. Applicant will install and maintain a control structure upstream of the project pipeline intersection with North Dakota Highway 1 and 79th Street SE and will close the structure during "critical flood periods," as determined by the Dickey County Water Resource District.

Further, because Mr. Vculek's system will discharge directly into a natural watercourse, a tributary of Bear Creek, the Board could not do anything beyond the three conditions identified above to protect downstream landowners. 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, once any tile discharge enters a natural watercourse, water resource districts lose jurisdiction over that discharge.

The tile statute, N.D. Cent. Code § 61-32-03.1(2), defines "natural watercourse" as follows:

For purposes of this section, a "natural watercourse" includes, *in addition to watercourses defined in section 61-01-06*, any waterway depicted as a perennial or intermittent stream or river on a United States geological survey topography map.

With that in mind, if a tile project discharges into a channel that constitutes a "watercourse" under N.D. Cent. Code § 61-01-06, a water resource district must process the application as a project that discharges into a "natural watercourse" under Section 61-32-03.1. Section 61-01-06 defines "watercourse" as follows:

A watercourse entitled to the protection of the law is constituted if there is a sufficient natural and accustomed flow of water to form and maintain a distinct and a defined channel. The supply of water is not required to be continuous or from a perennial living source. The criteria for constituting a watercourse are satisfied if the flow arises periodically from natural causes and reaches a plainly defined channel of a permanent character. If requested by a water resource board, the department of water resources shall determine whether a watercourse is constituted.

In this case, Mr. Vculek's proposed pump will discharge into a tributary of Bear Creek, clearly a "watercourse" under Section 61-01-06. That finding further limited what conditions the Board could attach to Mr. Vculek's tile permit.

Under Section 61-32-03.1, the Board lacked any legal authority to deny Mr. Vculek's tile application; under Section 61-32-03.1, the Board had no choice but to approve *Application NO. 2024-05* within 30 days of its submission by Mr. Vculek or the permit would have been deemed automatically approved, ***without any conditions***. With that in mind, the Board legally had no choice but to approve PERMIT NO. 2024-05 at the Board's meeting on April 17, 2024, and the Board included those conditions permissible under the tile statute to mitigate downstream impacts (e.g., erosion protection at the outlet into the watercourses, pump condition, control structure, etc.). Again, no parties timely appealed the Board's approval of PERMIT NO. 2024-05.

The Board noted that if Mr. Brademeyer is concerned about additional flows as a result of Mr. Vculek's tile discharge into the watercourse upstream, the tile statute specifically indicates the Board's approval of PERMIT NO. 2024-05 does not preclude a private action by Mr. Brademeyer. 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, Mr. Brademeyer could commence a civil action against Mr. Vculek in District Court if he wishes, but the Dickey County Water Resource District lacked any legal authority to deny Mr. Vculek's permit, the Board could not attach any additional conditions to Mr. Vculek's tile permit, and the Board could not prohibit Mr. Vculek from discharging into the Bear Creek tributary.

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 of the Century Code, 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 not "contrary to" Title 61 of the Century Code. In this case, the tile statute, approved by the North Dakota Legislature in 2021, well after the passage of the drainage complaint statute, required the Board to approve Mr. Vculek's tile application. Mr. Vculek submitted *Application NO. 2024-05*, and the Board either had to approve that application with conditions or the application would have otherwise been deemed automatically approved without any conditions. The Board approved the application with all conditions available under the statute to mitigate any downstream impacts. With that in mind, Mr. Vculek's project is a permitted and legal project, included within a valid tile permit, and the Board lacks any jurisdiction to order or force Mr. Vculek to close or fill his tile system.

Because the tile system in the South Half of Section 5 in Divide Township is a permitted system, under Sections 61-32-03.1 and 61-32-07, the Board no longer has any jurisdiction to order Mr. Vculek to "close or fill" the system, and, therefore, the Board concluded dismissal of Mr. Brademeyer's COMPLAINT FOR WATER-RELATED ISSUES was the Board's only option.

Manager Gemar moved to dismiss Micheal Brademeyer's COMPLAINT FOR WATER-RELATED ISSUES filed against Brian Vculek, dated May 16, 2024, regarding Brian Vculek's tile system in the South Half of Section 5 in Divide Township due to lack of jurisdiction under Sections 61-32-03.1 and 61-32-07. Manager Quandt seconded the motion. 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 the parties of record, and to include language regarding Mr. Brademeyer's ability to commence a civil action in his own discretion, as permitted under the tile statute.

***Dickey County Drain #1***

Manager Gemar updated the board on the landscape/concrete pad that Dakota Improvement will be installing at the pumping site. Mr. Gemar is in contact with Pat Kelly on the project. Manager Zimbleman will be in contact with Mr. Kelly and get the scheduling handled on the project. Manager Gemar then made comment that he was worried the drain wasn't flowing but after his investigation, it was flowing just flowing slowly. Mr. Gemar did not see any real evidence of beaver dams as well. Pat Kelly has cleaned out the flop gate area for faster flowage. Mr. Gemar then inquired about the helicopter business spraying for debris growing on the drain. Manager Hansen will reach out to the helicopter business to schedule a service.

***Budget***

The board put together their budget for 2025. After some discussion of the payoff date and details on the Yorktown Maple Bond, Manager Zimbleman moved to accept the budget. Manager Gemar seconded the motion. Upon roll call, the motion passed unanimously.

***Meeting Minutes***

Manager Quandt moved to accept the May 15, 2024 meeting minutes. Manager Gemar seconded the motion. Upon roll call, the motion passed unanimously.

***Financial Statement and Bills***

The board considered bills from Ohnstad Twichell of \$463.39 and Moore Engineering of \$307.50. Secretary Hansen gave the financial report. Manager Quandt moved to accept the financial report 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:**

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Steve Hansen, Chairman

Attest:

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Judy Hansen, Secretary