

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

Dickey County Water Resource District

MEETING MINUTES

December 20, 2023

The Dickey County Water Resource District met at the Dickey County Courthouse in Ellendale ND at 8:00 am on Wednesday, December 20, 2023. Managers Steve Hansen, Justin Gemar and Keith Hauck were present at the Courthouse. Sean Fredricks, the board's attorney, and Nathan Trosen, Moore Engineering representative, joined via video conference. Managers John Quandt and Don Zimbleman also joined via video conference. Eric Larson, Natanya Olson and Darrell Schrum were also present at the courthouse. Chairman Hansen called the meeting to order.

***Approve the 2024 monthly meeting calendar***

Manager Gemar moved to approve the monthly meeting calendar for 2024. Manager Hauck seconded the motion. Upon roll call, the motion passed unanimously.

***ND Water Conference Update-Sean***

Manager Hansen asked Sean Fredricks, the board's attorney, to give any update or information that may be pertinent for the board, that was discussed or presented at the ND Water Conference held in Bismarck, December 5-8, 2023. Mr. Fredricks and Jack Dwyer gave a presentation on a bill from the last legislative session, SB 2372. This bill would require water resource boards to participate on basin watershed joint boards. Under the new bill, there is a handful of basin watersheds that require participation in the form of a joint water board from Water Resource Districts. Dickey County Water Resource District falls under the James River Watershed Basin but there is no James River Joint WRD at this point. Mr. Fredricks felt that there is some confusion as to the way the bill is written and feels more information or explanation needs to be addressed, before any decisions would be made on the matter. Mr. Fredricks felt that there was nothing else pressing for the Board's consideration.

***County 14A Project***

Manager Quandt gave a brief update on the progression of the project and feels that it is progressing smoothly, and he has had no complaints on the ongoing construction. Manager Hansen made mention that he was up to the project yesterday and he witnessed water flowing and felt it looked good. Mr. Hansen noted that the water level had dropped and he was encouraged that the project is doing what it should be doing. Manager Hansen informed the board that he had received a phone call from Roger Zetocha, Sargent County Water District Representative, that there is a group of people reaching out to the legislators in the area inquiring about future drainage concerns, that would drain into the Bear Creek north of Dickey County, which in turn, could affect the landowners in Dickey County. This was just informational at this point and no decisions needed to be made.

### ***Dickey County Drain #1***

Manager Gemar indicated there is no new information for the board at this point. Mr. Trosen indicated the State has not processed the surface drainage permit; the Board cannot proceed with the permit until DWR issues a Record of Decision.

### ***Administrative Code Update-Nathan***

Nathan Trosen, Moore Engineering, gave a brief update on some of the revisions to the Administrative Code proposed by DWR.

### ***Krapu/Larson complaint appeal***

#### **Gary L. Krapu-Carl D. Larson Drainage Complaint and DWR Appeal - East Half of Section 11 of Porter Township**

Mr. Gary Krapu filed five COMPLAINTS FOR WATER-RELATED ISSUES against Mr. Carl Larson in May of 2017, all regarding allegations of illegal/unpermitted drainage in Porter Township. The Board dismissed four of the complaints in July of 2017, two complaints regarding allegations of illegal/unpermitted drainage in the Northwest Quarter of Section 2, one complaint regarding allegations of illegal/unpermitted drainage in the Southeast Quarter of Section 2, and one complaint regarding allegations of an unpermitted tile system in the East Half of Section 11. Mr. Krapu did not appeal any of those decisions, the appeal period has long since expired regarding all of those complaints, and, therefore, the Board's decisions regarding each of those complaints are not subject to any further appeal and legally stand as issued.

In the fifth complaint, Mr. Krapu alleged Mr. Larson constructed ditches or ditch improvements in the East Half of Section 11. Mr. Krapu alleged the Larsons constructed these ditches in the 1970s and 1980s. Following detailed investigation by Moore Engineering, and following additional consideration by the Board after reviewing the results of Moore's investigation, the Board dismissed the Complaint regarding the East Half of Section 11, as follows:

- **Southeast Quarter of Section 11:** The Board ultimately found Mr. Larson constructed ditch improvements in the Southeast Quarter of Section 11. However, the Board further found evidence the Larsons constructed these drainage improvements in 1971 or earlier, a significant finding under North Dakota law because drainage permits were not required in Dickey County prior to 1975.
- More specifically, under North Dakota law, the law in effect at the time of the construction of any alleged surface drainage controls. Graber v. Logan County Water Resource Board, 598 N.W.2d 846, 849 (N.D. 1999). North Dakota's first drainage permitting statute went into effect on July 1, 1957. That statute, N.D. Cent. Code § 61-01-22, required any party "proposing to drain waters from a pond, slough or lake, which impounds waters gathered therein and drained from an area comprising 80 acres or more" to obtain a permit from the "State Water Conservation Commission," a precursor to the North Dakota State Water Commission. However, Section 61-01-22 further provided that the permitting requirements did *not* apply in counties with county drain boards; more specifically, Section 61-01-22 provided, in part: "The provisions of this Act . . . shall not apply to any county which has a board of drain commissioners . . ." The legislature did not amend Section 61-01-22 to eliminate the drain board exemption until 1975. In other words, from 1957 through 1975, the drainage permitting requirements in Section 61-01-22 did not apply in counties with county drain boards. The Dickey County Drain Board existed at least as far back as 1952; therefore, the drainage permitting requirements under Section 61-01-22 did not apply in Dickey County from 1957 through 1975.

- Drainage permits were not required prior to 1975 for counties with Drain Boards; Dickey County did have a Drain Board so no permits were required for ditch improvements constructed by the Larsons in 1971 or earlier.
- Therefore, because the Larsons did not need a permit to construct the drainage in the Southeast Quarter of Section 11, the Board lacked jurisdiction over those drainage activities and had no choice but to dismiss that portion of the Complaint.
- **Northeast Quarter of Section 11:** The Board found Mr. Larson had constructed drain improvements, after 1975, in the Northeast Quarter of Section 11 that drained 89.99 acres, above and beyond the 80-acre permitting threshold for surface drainage.
- More specifically, Moore Engineering found evidence the Larsons constructed drainage improvements in the Northeast Quarter of Section 11, with a watershed area of 89.99 acres, including approximately 5 acres from the Northwest Quarter of Section 12. The Larsons constructed surface drains in the Northeast Quarter of Section 11 that drain the watershed in that quarter, along with a small portion of acreage in the Northwest Quarter of Section 12, into a “slough” along the north boundary of the Northeast Quarter of Section 11. The slough in that area is a natural depression that meets the definition of a “slough” under North Dakota law. More specifically, this depression is capable of holding water from spring runoff until early summer. The Larsons previously installed two underground pipelines that drained this depression via gravity flow; one of the pipelines was a 12” line and the other was a 6” line. The pipelines ran along the north boundary of the Northeast Quarter of Section 11 to the west until discharging into “East Slough.” The series of surface ditches contributed to the slough in the North Half of the Northeast Quarter of Section 11, the slough had a watershed area greater than 80 acres, and the underground pipelines drained the slough. The Larsons later installed a tile system in this vicinity, and the tile system utilized the previously installed 12” line as its outlet. The Larsons capped the 6” line. In light of the Board’s findings that these surface improvements drained required a surface permit, the Board was prepared to order Mr. Larson to close or fill the drainage improvements.
- However, before the Board took action regarding these alleged activities, the Larsons took two steps to decrease the 89.99-acre area impacted to reduce the watershed below the 80-acre permitting threshold:
  - The Larsons applied for, and the Board approved (as required by statute), a tile permit for an 11.4-acre project in the Northeast Quarter of Section 11 to reduce the surface watershed. The Board concluded the permitted tile system effectively removed 11.4 acres from the larger 89.99-acre watershed that was the subject of the surface drainage complaint. The Board reasoned that, while those 11.4 acres still ultimately drained to East Slough via the 12” underground pipeline, the permitted tile drainage effectively separated the tile watershed and the remaining surface watershed that drained into the slough. As a result, the Board reasoned that the Larsons effectively reduced the remaining surface watershed that drains into the slough in the North Half of the Northeast Quarter of Section 11 to 78.59 acres, below the 80-acre threshold for surface permitting.
  - The Larson raised the township road along the east boundary of the Northeast Quarter of Section 11 and, as a result of the road-raise, approximately five acres from the Northwest Quarter of Section 12, acres that previously drained west and ultimately into the slough in

the North Half of the Northeast Quarter of Section 11, no longer drained west. In other words, the Larsons further reduced the surface watershed to approximately 73.59 acres.

- The Board concluded that, in light of these remedial measures, the Larsons effectively reduced the surface area drained by the surface drainage improvements in the Northeast Quarter of Section 11 to approximately 73.59 acres, below the 80-acre surface permitting threshold.
- At the Board's meeting on September 13, 2017, the Board dismissed the COMPLAINT FOR WATER-RELATED ISSUES filed by Mr. Krapu against Mr. Larson regarding allegations of illegal/unpermitted drainage in the East Half of Section 11 in Porter Township.
- The Board, through its attorney, provided a NOTICE OF DECISION dated September 25, 2017, to Mr. Krapu, Mr. Larson, and their respective attorneys.
- Mr. Krapu, through his attorney, appealed the Board's dismissal of the Complaint to the State Engineer's Office in 2017 (now known as the Department of Water Resources or "DWR").

On behalf of DWR, the North Dakota State Engineer issued Administrative Order No. 23-18, dated October 5, 2023, regarding Mr. Krapu's appeal. In the Order, DWR issued findings as follows:

- **Allegations of illegal/unpermitted drainage in the Southeast Quarter of Section 11:** DWR agreed that Mr. Larson constructed those improvements prior to 1975 and that there was no evidence of any additional improvements after 1975. With that in mind, DWR affirmed the Board's dismissal of that portion of the Complaint regarding the Southeast Quarter of Section 11.
- **Allegations of illegal/unpermitted drainage in the Northeast Quarter of Section 11:** DWR first agreed the Larsons constructed surface improvements in the Northeast Quarter after 1975. Next, DWR modified the watershed area drained by the improvements in the Northeast Quarter; the Board concluded the area impacted was 89.99 acres but DWR increased that to 92.7 acres. Next, DWR agreed that the Larson road raise reduced the watershed area impacted, and set that reduction at 5.2 acres (reducing the watershed area impacted to 87.5 acres). Finally, DWR acknowledged the tile permit approved by the Board but concluded that the tile drainage did not reduce the surface area impacted by the surface drainage improvements. Therefore, DWR concluded the surface area impacted by the ditches constructed by the Larsons after 1975 in the Northeast Quarter of Section 11 is 87.5 acres, above the 80-acre permitting threshold. DWR sent this portion of the Complaint back to the Board to "determine compliance with the Complaint and Appeal."

DWR provided the Order to the Board, and to the parties of record, including Mr. Krapu and Mr. Larson. Based on DWR's Order, the Board's order regarding the Southeast Quarter of Section 11 stands, and that matter is concluded. Further, based on DWR's findings, the drainage improvements in the Northeast Quarter of Section 11 impacted a watershed area greater than the surface drainage permitting threshold of 80 acres and, therefore, the Board would have to order Mr. Larson to close or fill the illegal/unpermitted drainage improvements in the Northeast Quarter of Section 11.

However, following DWR's service of its Order, the Larsons conducted additional remedial work to further reduce the watershed area impacted by their drainage in the Northeast Quarter of Section 11, depicted in the map below:



Nathan Trosen, engineer for the Board, reviewed the remedial work constructed by the Larsons, reviewed LiDAR and other data regarding contours in this watershed, and confirmed that the remedial work decreased the watershed area impacted by the Larsons' drainage improvements in the Northeast Quarter of Section 11 by 7.9 acres.

Under DWR's calculations, the drainage constructed by the Larsons in the Northeast Quarter of Section 11 impacted 87.5 acres. However, with the Larsons' recent remedial work, and the 7.9-acre watershed reduction, the Larsons have reduced the watershed area impacted by their drainage improvements in the Northeast Quarter of Section 11 to 79.6 acres, below the 80-acre permitting threshold.

The Board finds and concludes that, as a result of the remedial work constructed by the Larsons and the effective reduction of the watershed area by 7.9 acres, to a 79.6-acre watershed, the watershed area drained by the drainage improvements in the Northeast Quarter of Section 11 no longer drain a watershed area of 80 acres or more, and the drainage improvements in the Northeast Quarter of Section 11 no longer require a permit. With that in mind, the Board has no choice but to dismiss the Complaint regarding allegations of illegal/unpermitted drainage by the Larsons in the Northeast Quarter of Section 11.

Manager Quandt moved to dismiss the COMPLAINT FOR WATER-RELATED ISSUES filed by Gary Krapu against Carl Larson due to lack of jurisdiction under Sections 61-32-03 and 61-32-07. Manager Hauck 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, including DWR.

### ***Natanya Olson-Hutterite tile complaint***

Natanya Olson was present at the meeting to address concerns she has with a tile permit that was granted by the board to Spring Creek Colony in 2020. Sean Fredricks sent Ms. Olson copies of the permit documents the Board issued in October of 2020. He explained to Ms. Olson that the application submitted by the Colony indicated the project would include three outlets that would all discharge into natural watercourses. Under the tile permitting statute in effect at that time, the Board had to provide 30-day Notices to downstream landowners within one mile of each project outlet, unless the project discharged into a natural watercourse. In this instance, because the project application indicated the project would discharge into natural watercourses, no notices were required by law. Ms. Olson indicated that, in addition to the tile project, the Colony entered upon her property and constructed ditch improvements. Chairman Hansen indicated that Ms. Olson would have to work with the Sheriff's Office to address any trespass claims; the Board does not have any jurisdiction over trespass claims. However, Chairman Hansen also noted that Ms. Olson could file a drainage complaint against the Colony with the Board for consideration and investigation if she believed the Colony exceeded what was approved under their tile permit.

### ***Meeting Minutes***

Manager Hauck moved to approve the November 15, 2023 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 \$2244.03, ND Water Users Association of \$300, Moore Engineering of \$390, and Ellingson Drain Co of \$100,000. Secretary Hansen gave the financial report. Manager Zimbleman moved to approve 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