

RICHLAND COUNTY WATER RESOURCE DISTRICT
Richland County Courthouse, Wahpeton, ND
August 2, 2016

The Richland County Water Resource Board (RCWRB) met August 2, 2016 at 8:00 AM at the Richland County Courthouse, Wahpeton, North Dakota.

THOSE PRESENT: Managers Arv Burvee, Gary Friskop, James Haugen, Don Moffet, Robert Rostad, Engineering Technician Justin Johnson, and Secretary-Treasurer Monica Zentgraf.

Minutes

A motion was made by Mgr. Burvee and seconded by Mgr. Friskop to approve the minutes of the July 26, 2016 meeting as presented. The motion carried unanimously.

Financial Reports

A motion was made by Mgr. Rostad and seconded by Mgr. Haugen to accept the July 2016 financial reports as presented. The motion carried unanimously.

Mail

- 1.) Minnesota Department of Natural Resources- Request for comments on the Fargo-Moorhead diversion channel and dam safety- construction in Clay County, Minnesota. The notice was forwarded to the District's legal counsel (for the Fargo-Moorhead Diversion Project), David Bliss.
- 2.) Interstate Engineering- Recommendation for cleanout and culvert work on the outlet end of Proj #18. The Managers directed a meeting be scheduled with all parties involved. (Hoefs & Group #16-005)

Cattail Spraying

A motion was made by Mgr. Haugen and seconded by Mgr. Burvee authorizing Larson Helicopters to spray the drains for cattails. Spraying to be done as needed with the exception of no spraying on Projs #1, 2, 5(27), 10, 17, 19, 37A, 41, and 48. The motion carried unanimously. A motion was made by Mgr. Burvee and seconded by Mgr. Rostad authorizing Gary Friskop to spray Proj #41. Mgrs. Haugen, Moffet, Rostad and Burvee voted in favor of said motion; Mgr. Friskop abstained from voting. The motion carried.

Proj #14 Reconstruction

Discussion was held relative to setting deadlines for completion of permit applications (i.e. State Water Commission and US Army Corps of Engineers) and the bid opening for the reconstruction of Proj #14. Consensus of the Managers was to notify Engineer Bassingthwaite that the Board wants all applications for permits submitted to the appropriate agencies no later than October 1, 2016 and bid opening in early February 2017. (RCWRD #11-001)

Fargo-Moorhead Flood Diversion Project

A conference call was held with Mr. Bliss for the purpose of consulting with Mr. Bliss on the Fargo-Moorhead Flood Diversion Project. The Managers were provided with a draft copy of the appeal to the ND State Engineer over the Engineer signing the permit for the diversion inlet structure. Discussion was held with Mr. Bliss regarding the appeal process and content of the document. A motion was made by Mgr. Burvee and seconded by Mgr. Rostad to move forward with the appeal of the State Engineer's granting of the permit for the Fargo-Moorhead Flood Diversion inlet structure. Upon roll call vote, Mgrs. Haugen, Friskop, Moffet, Rostad, and Burvee voted in favor of said motion; the motion carried unanimously. A copy of the "Notice of Appeal and Request for Hearing", "Appeal From Decision of State Engineer", and press release are provided herein.

STATE OF NORTH DAKOTA

IN DISTRICT COURT

COUNTY OF BURLEIGH

SOUTH CENTRAL JUDICIAL DISTRICT

CIVIL NO.:

Richland County Water Resource District,)
)
 Complainant,)
 vs.)
)
 North Dakota State Engineer,)
)
 Respondent.)

NOTICE OF APPEAL AND REQUEST FOR HEARING

PLEASE TAKE NOTICE that Complainant Richland County Water Resource District (“the District”), by and through its counsel, David R. Bliss, hereby appeals the State Engineer’s July 8, 2016 grant of Dam Permit 2489, and requests a hearing pursuant to N.D.C.C. 61-03-22.

This request is based upon the attached complaint, and all of the records and files in this case.

Dated this 4th day of August, 2016.

DAVID R. BLISS
BLISS LAW FIRM, LLC
 Attorneys for Plaintiffs
 400 E Broadway, Suite 308
 P.O. Box 4126
 Bismarck, ND 58502-4126
 PH: (701) 223-5769
 FX: (701) 222-3586
dbliss@blisslaw.com

/s/ David R. Bliss
By: David R. Bliss (#04729)

STATE OF NORTH DAKOTA

IN DISTRICT COURT

COUNTY OF BURLEIGH

SOUTH CENTRAL JUDICIAL DISTRICT

CIVIL NO.:

Richland County Water Resource District,)
)
 Complainant,)
 vs.)
)
)
 North Dakota State Engineer,)
)
 Respondent.)

APPEAL FROM DECISION OF STATE ENGINEER

Complainant Richland County Water Resource District (“District”) hereby appeals a final decision made by Respondent North Dakota State Engineer (“State Engineer”) to grant Permit No. 2489.

I. INTRODUCTION AND SUMMARY

- (1) The District is a political subdivision organized under the laws of the State of North Dakota.
- (2) The State Engineer is appointed by the state water commission and serves as secretary and chief engineer of the commission.
- (3) Permittee Metro Flood Diversion Authority and the Cass County Joint Water Resource District are member entities of the Diversion Authority (“the Diversion Authority”) which consists of political subdivisions from both Minnesota and North Dakota, including the Cass County Joint Water Resource District.
- (4) On March 17, 2016, State Engineer Todd Sando sent a letter to the Diversion Authority which acknowledged the State Engineer’s receipt of a February 22, 2016 draft construction permit along with detailed plans and specifications for the diversion inlet structure from Terry Williams, United States Army Corps of Engineers (“USACE”) by which the State Engineer noted that “...approximately 10,380 acres of the [permitted] area in North Dakota inundated by the FM Dam below 925 feet NAVD 88 are within Richland County.”

- (5) Under N.D.C.C. 61-16.1-38, the State Engineer must complete the State Engineer's initial review of the application and forward the application, along with any changes, conditions, or modifications within 45 days to the water resource board of the district in which the contemplated project is located.
- (6) Neither the USACE's draft construction permit nor its detailed plans and specifications for the diversion inlet structure, together with the State Engineer's initial review of any changes or amendments to USACE's draft construction permits, were forwarded to the Richland County Water Resource District as required by N.D.C.C. 61-16.1-38.
- (7) In his March 17, 2016 letter to the USACE, State Engineer Sando stated that "[A]s Richland County is not a member of the Diversion Authority, it is uncertain whether the Diversion Authority has the power of eminent domain in Richland County" pursuant to the requirements of N.D.A.C 89-08-02-02.
- (8) In his March 17, 2016 letter to the USACE, State Engineer Sando stated that "the Diversion Authority must provide evidence establishing a property rights for the lands inundated by the FM Dam below the elevation of 925 feet NAVD 8," lands which include 10,380 acres of Richland County land.
- (9) On April 21, 2016, the Diversion Authority replied to State Engineer Sando that N.D.C.C. 61-16.1, 61-16.1-09(2), (5) and (12) constituted evidence establishing its property right over lands subject to its Diversion project.
- (10) The Diversion Authority offered no direct evidence that the Diversion Authority had actually established any property right to such property.
- (11) On May 5, 2016, counsel for State Engineer Sando replied that the State Engineer accepted the Diversion Authority's statutory references as "evidence of establishing a property right" but that "[T]he state takes no position regarding the legal viability of the Diversion Authority's justification of eminent domain authority."
- (12) On May 25, 2016, the State Engineer gave notice to the Cass County Water Resource District that the State Engineer had received the Diversion Authority's permit application, and that "[Y]our board, according to North Dakota

Century Code Chapter 61-16.1-38, must consider the Application within 45 days and suggest any changes, conditions, or modifications to the State Engineer.”

(13) The Richland County Water Resource District, whose citizens will have 10,380 acres of land inundated by the Diversion Authority’s proposed project, received no such notice from the State Engineer of the Diversion Authority’s project application nor an opportunity to comment on the project.

(14) On July 8, 2016, State Engineer Garland Erbele granted the Diversion Authority’s application for a permit.

II. SPECIFICATIONS OF ERROR

COUNT I

(15) The District restates and re-alleges the allegations set forth in Paragraphs 1 through 14 above as though fully set forth herein and further states and alleges as follows:

(16) On March 17, 2016, State Engineer Todd Sando sent a letter to the Diversion Authority which acknowledged the State Engineer’s receipt of a February 22, 2016 draft construction permit along with detailed plans and specifications for the diversion inlet structure from Terry Williams, USACE, by which the State Engineer noted that “...approximately 10,380 acres of the [permitted] area in North Dakota inundated by the FM Dam below 925 feet NAVD 88 *are within Richland County.*” Emphasis added.

(17) As defined by N.D.C.C. 61-16.1-02(7), the term “project” means “any undertaking for....flood control...watershed improvement, drainage of surface... or any combination thereof, *including incidental features of any such undertaking.*” Emphasis added.

(18) Under N.D.C.C. 61-16.1-38, the State Engineer must complete the State Engineer’s initial review of the application and forward the application, along with any changes, conditions, or modifications, to the water resource board of the district *in which the contemplated project is located.* Emphasis added.

(19) On May 25, 2016, the State Engineer gave notice to the Cass County Water Resource District that the State Engineer had received the Diversion Authority’s permit application, and that “[Y]our board, according to North Dakota

Century Code Chapter 61-16.1-38, must consider the Application within 45 days and suggest any changes, conditions, or modifications to the State Engineer.”

(20) Neither the USACE’s draft construction permit nor its detailed plans and specifications for the diversion inlet structure, together with the State Engineer’s initial review of any changes or amendments to USACE’s draft construction permits, were forwarded to the Richland County Water Resource District within forty-five days as required by N.D.C.C. 61-16.1-38.

(21) As a result of the State Engineer’s omission, the State Engineer violated the Richland County Water Resource District’s right to due process of law to which it is entitled under N.D.C.C. 61-16.1-38 by denying the District proper notice of the Diversion Authority’s permit application and the District’s opportunity for comment on the Diversion Authority’s application.

COUNT II

(22) The District restates and re-alleges the allegations set forth in Paragraphs 1 through 21 above as though fully set forth herein and further states and alleges as follows:

(23) On March 17, 2016, State Engineer Todd Sando sent a letter to the Diversion Authority which acknowledged the State Engineer’s receipt of a February 22, 2016 draft construction permit along with detailed plans and specifications for the diversion inlet structure from Terry Williams, USACE, by which the State Engineer noted that “...approximately 10,380 acres of the [permitted] area in North Dakota inundated by the FM Dam below 925 feet NAVD 88 are within Richland County.”

(24) In his March 17, 2016 letter to the USACE, State Engineer Sando stated that “[A]s Richland County is not a member of the Diversion Authority, it is uncertain whether the Diversion Authority has the power of eminent domain in Richland County” pursuant to the requirements of N.D.A.C 89-08-02-02.

(25) In his March 17, 2016 letter to the USACE, State Engineer Sando stated that “the Diversion Authority must provide evidence establishing a property rights for the lands inundated by the FM Dam below the elevation of 925 feet NAVD

8,” lands which include 10,380 acres of Richland County land. See Paragraph (4) above.

(26) On April 21, 2016, the Diversion Authority replied to State Engineer Sando that N.D.C.C. 61-16.1, 61-16.1-09(2), (5) and (12) constituted evidence establishing its property right over lands subject to its Diversion project.

(27) The Diversion Authority offered no direct evidence that the Diversion Authority had actually established or obtained any property right to such property.

(28) On May 5, 2016, counsel for State Engineer Sando replied that the State Engineer accepted the Diversion Authority’s statutory references as “evidence of establishing a property right” but that “[T]he state takes no position regarding the legal viability of the Diversion Authority’s justification of eminent domain authority.”

(29) Under Section 2232 of Chapter 33 of the federal Water Resource Development Act, a “non-Federal interest” shall obtain any permit or approval required in connection with the project or separable element under Federal or State law before carrying out a water resources development project, or separable element thereof.

(30) The State Engineer’s decision to accept the Diversion Authority’s bare reference to state statutes as constituting “evidence of establishing a property right” to landowners’ property in the path of the Diversion Authority’s project does not itself constitute a “property right” and is in violation of the requirements of N.D.A.C 89-08-02 and Section 2232 of Chapter 33 of the federal Water Resource Development Act.

COUNT III

(31) The District restates and re-alleges the allegations set forth in Paragraphs 1 through 30 above as though fully set forth herein and further states and alleges as follows:

(32) On March 17, 2016, State Engineer Todd Sando sent a letter to the Diversion Authority which acknowledged the State Engineer’s receipt of a February 22, 2016 draft construction permit along with detailed plans and specifications for the diversion inlet structure from Terry Williams, USACE, by

which the State Engineer noted that "...approximately 10,380 acres of the [permitted] area in North Dakota inundated by the FM Dam below 925 feet NAVD 88 *are within Richland County.*" Emphasis added.

(33) On May 25, 2016, the State Engineer gave notice to the Cass County Water Resource District that the State Engineer had received the Diversion Authority's permit application, and that "[Y]our board, according to North Dakota Century Code Chapter 61-16.1-38, must consider the Application within 45 days and suggest any changes, conditions, or modifications to the State Engineer."

(34) Under N.D.C.C. 61-16.1-38, the State Engineer must complete the State Engineer's initial review of the application and forward the application, along with any changes, conditions, or modifications, to the water resource board of the district *in which the contemplated project is located.* Emphasis added.

(35) Neither the USACE's draft construction permit nor its detailed plans and specifications for the diversion inlet structure, together with the State Engineer's initial review of any changes or amendments to USCOE's draft construction permits, were forwarded to the Richland County Water Resource District within forty-five days as required by N.D.C.C. 61-16.1-38.

(36) On July 8, 2016, the State Engineer granted the Diversion Authority's application for a permit.

(37) Under N.D.C.C. 61-16.1-38, the State Engineer shall refuse to allow the construction of any unsafe or improper dike, dam, or other device which would interfere with "the orderly control of the water resources of the district."

(38) Under N.D.C.C. 61-16.1-09(6), a water resource district has the power and authority to maintain and control the water levels and the flow of water and streams involved in flood control projects within the district and regulate streams, channels, or watercourses and the flow of water therein.

(39) The State Engineer failed to provide proper notice to the Richland County Water Resource District of the Diversion Authority's permit and permitted the Diversion Authority's project contrary to and in violation of the Richland County Water Resource District's statutory authority to regulate and control flood control projects in its own district as set forth above.

COUNT IV

- (40) The District restates and re-alleges the allegations set forth in Paragraphs 1 through 39 above as though fully set forth herein and further states and alleges as follows:
- (41) The Diversion Authority consists of political subdivisions from both Minnesota and North Dakota, including the Cass County Joint Water Resource District.
- (42) On May 13, 2015, the court in *Richland/Wilkin Joint Powers Authority v. United States Corps of Engineers, John McHugh, Jo-Ellen Darcy and Dan Koprowski, Defendants, and Fargo-Moorhead Flood Diversion Board of Authority*, Civil No. 13-2262 (JRT/LIB), enjoined further construction of the Oxbow Hickson Bakke ring levee (“OHB”) until a Minnesota Environmental Impact Statement (EIS) had been completed, noting “the difficulty of stopping a bureaucratic steam roller, once started,” wherein a state “with more lenient environmental laws, or that has more political will behind a project, could run amok and wreak havoc on the environmental review regime of a state with more stringent regulations.”
- (43) On May 16, 2016, the Minnesota Department of Natural Resources (MDNR) issued its Final Environmental Impact Statement (FEIS) and despite “serious concerns,” declared the Diversion Authority’s project “adequate.” However, the Minnesota EIS is not a decision document, and the MDNR permitting process, which has decision-making authority, has just begun, amid clear statements from MDNR and Minnesota Governor Mark Dayton that the Diversion Authority’s project may or may not be permitted. Nonetheless, the Diversion Authority has indicated that it intends to pursue immediate construction and the taking of lands for the Diversion Authority project.
- (44) Under N.D.C.C. 61-16.1-38, the State Engineer shall refuse to allow the construction of any unsafe or *improper* dike, dam, or other device which would interfere with “the orderly control of the water resources of the district.” Emphasis added.

(45) Because the MDNR may permit an alternative project to the Diversion Authority's project, it is improper for the State Engineer to allow any immediate construction work done on the Diversion Authority's project prior to the conclusion of the Minnesota permitting process.

III. PRAYER FOR RELIEF

(46) The Richland County Water Resource District respectfully requests the following relief:

- a. For a determination that the State Engineer failed to provide notice to and opportunity for comment by the Richland County Water Resource District on the Diversion Authority's permit application in violation of N.D.C.C. 61-16.1-38;
- b. For a determination that the State Engineer must recognize the Richland County Water Resource District as a water resource district which is entitled by law to receive all notices and information required to be given by the State Engineer in regard to the Diversion Authority's permit application under NDCC 61-16.1-38, to provide comment on the same, and to be afforded the right to exercise all rights and privileges under this statute;
- c. For a determination that the State Engineer erred when the State Engineer determined that the Diversion Authority's statutory citations were sufficient evidence establishing a property right under N.D.A.R. 89-08-02-02;
- d. For a determination that the State Engineer violated the rights and legal authority of the Richland County Water Resource District to regulate and control flood control projects within its own district by permitting the Diversion Authority project, and by allowing the immediate construction of the project's first phase despite the fact that Minnesota's permitting process has yet to be completed`.
- e. For all attorneys fees and costs incurred by the Richland County Water Resource District in the prosecution of this action pursuant to N.D.C.C 28-32-50; and

f. For such other and further relief as the Court deems equitable and fair.

Dated this 3rd day August, 2016.

DAVID R. BLISS
BLISS LAW FIRM, LLC
Attorneys for Complainant
400 E Broadway, Suite 308
P.O. Box 4126
Bismarck, ND 58502-4126
PH: (701) 223-5769
FX: (701) 222-3586
dbliss@blisslaw.com

/s/ David R. Bliss
By: David R. Bliss (#04729)

PRESS RELEASE

A water resource district south of Fargo whose citizens will see more than 10,000 acres of their land flooded by the proposed Fargo diversion project have appealed the North Dakota State Engineer's July 8, 2016 decision to approve the massive dam project.

"They didn't give us notice, which is required by law," said Richland County Water Resource District Chairman Don Moffet, whose board voted unanimously to appeal the State Engineer's decision. Moffet said that the FM dam project's draft application stated that approximately 10,380 acres of Richland County land would be flooded by the project, yet the water district was shut out of getting notice of the permit application because the district's projected flooding wasn't considered a part of the bricks and mortar of the project.

"I'd say that getting 10,000 acres of our land flooded makes us a part of the project," said Moffet.

The Richland County board also objected to the State Engineer's giving a green light to immediate construction on the project's inlet structure despite the fact that the State of Minnesota has yet to weigh in on whether the FM dam project will be permitted by Minnesota.

"If Minnesota doesn't permit this project, all this construction will be a massive waste of taxpayer money," said Moffet. The board has alleged that it was improper for the State Engineer to have allowed such construction before Minnesota has concluded its permitting process.

Chairman Moffet stated "The Richland County Water Resource District is not opposed to flood protection for the Fargo-Moorhead area, but not to the detriment of Richland County."

Technician's Report

Mr. Johnson provided a report on culverts he inspected on Proj #31. The landowner in the SE1/4 Section 7, Lamars Township, would like the culvert lowered and flap gate repaired. Mr. Johnson also reported the culvert in the NWCR Section 22, Devillo Township, needs to be replaced. Appl #16-059 was completed and a motion was made by Mgr. Burvee and seconded by Mgr. Friskop to defer the application pending a hydraulic study by Interstate Engineering for the culvert in the NWCR Section 22, Devillo

Township and receipt of NRCS "O26" or NRCS 026 Waivers from the landowners for lowering both culverts. The motion carried unanimously.

Applications

Appl #16-060, Dean & Matt Swenson: SE1/4 Sec 23, Viking Twp A motion was made by Mgr. Rostad and seconded by Mgr. Burvee authorizing JAV Construction to lower the culvert in the SE1/4 Sec 23, Viking Twp. Work at Proj #14 expense. Completion date 10-31-2016. The motion carried unanimously.

Appl #16-061, Dean Reiland: NE1/4 Sec 36, Dexter Twp Application was referred to the Dexter and Liberty Grove Township Boards of Supervisors, as work is within township r-o-w and under the jurisdiction of the Township Boards.

2017 Budget

Various budget issues were discussed.

Adjournment

There being no further business to come before the Board, Chr. Moffet adjourned the meeting at 11:45 AM.

Respectfully submitted,

Monica Zentgraf
Secretary

Don Moffet
Chairman of the Board