

RICHLAND COUNTY WATER RESOURCE DISTRICT  
Richland County Courthouse, Wahpeton, ND  
July 14, 2020

The Richland County Water Resource Board ("RCWRB") met July 14, 2020 at 8:00 AM at the Richland County Courthouse.

THOSE PRESENT: Managers Arv Burvee, Mark Fahsholz, Gary Friskop, James Haugen, Don Moffet (via telephone conference), Engineering Technician Justin Johnson, Secretary-Treasurer Monica Zentgraf, and guests Gene and Cari Wefel.

THOSE ABSENT: None

### **Approval of Agenda**

A motion was made by Mgr. Moffet, seconded by Mgr. Fahsholz, and unanimously carried to approve the order of the agenda as presented.

### **Proj #66A Culvert Replacements**

The Board discussed Drain #66A and the culvert sizing issue in Sections 15, 27, and 34, Mooreton Township. The Board previously commissioned a hydraulic study regarding the culverts along Drain #66A in the E1/2 Sections 15, 27, and 34, Mooreton Township. The hydraulic study contained the following recommendations regarding the culverts in the E1/2 Section 34 and the SE1/4 Section 27:

- SECR SE1/4 Section 34: replace two existing 48 inch culverts with two new 48 inch culverts
- SECR NE1/4 Section 34: replace three existing 48 inch culverts with two new 48 inch culverts
- SECR SE1/4 Section 27: replace two existing 54 inch culverts with two new 48 inch culverts

At the Board's meeting on June 9, 2020, Board consensus was to proceed with replacement of the culverts in Sections 15, 27, and 34, Mooreton Township, in accordance with the recommendations in the hydraulic study, with the following exceptions:

- With regard to the SECR NE1/4 Section 34, the recommendation was to replace the three existing 48 inch culverts with two new 48 inch culverts; however, Board consensus was to instead replace the three existing 48 inch culverts with two new 54 inch culverts; and
- With regard to the SECR SE1/4 Section 27, the recommendation was to replace the two existing 54 inch culverts with two new 48 inch culverts; however, Board consensus was to instead replace the two existing 54 inch culverts with two new 54 inch culverts.

The Board solicited informal bids for the project since the estimated cost was below the bidding threshold under North Dakota law and, at the Board's June 23, 2020 meeting, the Board passed a motion to award the project to Ehlert Excavating, Inc. The Board's actions were by voice vote, and not by roll call vote as required under N.D. Century Code § 44-04-21.

However, following the Board's decisions regarding replacement of the culverts in the E1/2 Section 34, Cari Wefel contacted the District to express concerns regarding the plan. Mrs. Wefel owns and farms the SE1/4 Section 34, Mooreton Township, and she is concerned water may back-up on her property following the replacement of the culverts, especially in light of the Board's decision to replace the three 48 inch culverts in the SECR NE1/4 Section 34 with two 54 inch culverts. Mrs. Wefel contends the reduction in sizing will impede her drainage off of the SE1/4 Section 34, and will ultimately result in water backing-up on her property.

Mrs. Wefel has also expressed concerns regarding potential conflict issues. The Donovan Folden Family Limited Partnership owns the NE1/4 Section 34, Mooreton Township. Chr. Friskop leases the NE1/4 Section 34 from the Foldens and he

farms the property. The Board did not previously conduct any conflict analysis regarding Chr. Friskop's interests in the NE1/4 Section 34, and Mrs. Wefel contends Chr. Friskop's participation in votes regarding the Board's project to replace culverts in Section 34 was improper.

Secretary-Treasurer Zentgraf recently consulted Sean Fredricks, the Board's attorney, regarding the conflict situation. Mr. Fredricks indicated the Board is required to conduct a conflict analysis for any Managers who have any type of personal interest in any proceedings before the Board to determine if any legal conflicts exist under North Dakota law that could preclude a Manager's participation. Mr. Fredricks explained the conflict analysis the Board should conduct regarding the potential conflicts.

Section 44-04-22 of the North Dakota Century Code provides the relevant conflict 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 North Dakota Supreme Court and the Attorney General's Office have taken narrow views of situations where a public official can abstain from participating in a matter. To justify an abstention regarding a matter before a governing entity, a public official must have a "direct and substantial personal or pecuniary interest" in the matter. The mere appearance of a conflict is not enough to allow the public official to refrain from participating, and a public official cannot unilaterally decide not to participate or to abstain from voting. The North Dakota Supreme Court adopted a "rule of necessity" that requires public officials to participate in matters before their respective boards. The public policy rationale is that public officials have a duty to vote on issues before them, and cannot avoid participation simply to avoid the appearance of impropriety. In some situations, however, when a conflict exists, abstention is proper.

The Section 44-04-22 test requires a multi-step analysis. First, a public official concerned about a conflict of interest should confer with the Board's attorney to determine if a "direct and substantial personal or pecuniary interest" conflict exists under Section 44-04-22. If the public official's review with the governing entity's attorney is not dispositive, the remainder of the governing entity's Board should vote to determine if a conflict exists by a majority vote. If the remaining members conclude a conflict does exist (or if the member and the Board's attorney concludes a conflict exists), the remainder of the Board should next vote on whether or not the public official should "participate in or vote on that particular matter . . . ." So even if a conflict does exist (even if the official does have a "direct and substantial personal or pecuniary interest" in the matter), if the governing entity concludes the public official should still participate despite the conflict, the official must participate.

With regard to Chr. Friskop's potential conflict, the question is whether or not the fact that he farms the NE1/4 Section 34 creates a conflict. Mr. Fredricks indicated that the question is if the situation creates a "direct and substantial personal or pecuniary interest" conflict under Section 44-04-22. In this case, Mr. Fredricks indicated that, in his view, Chr. Friskop does, in fact, have a "direct and substantial personal or pecuniary interest" in the matter in light of his interests in the NE1/4 Section 34; as a result, Chr. Friskop does have a legal conflict in the matter.

The next step is for the remainder of the Board to determine if Chr. Friskop should "participate in or vote on" matters related to the culverts in the E1/2 Section 34. Mgr. Haugen moved to conclude that Chr. Friskop does have a "direct and substantial personal or pecuniary interest" conflict regarding the culverts in the E1/2 Section 34, and to preclude Chr. Friskop's participation or voting in matters related to the culverts in the E1/2 Section 34 or in Section 27. Mgr. Fahsholz seconded the motion. Upon roll call vote, Mgrs. Haugen, Burvee, Moffet, and

Fahsholz voted in favor of the motion. Chr. Friskop abstained. The motion carried unanimously.

Chr. Friskop turned the meeting over to Vice Chr. Burvee at this time.

The Board's previous motion to hire a contractor to implement the Board's plan to replace the culverts in Sections 15, 27, and 34 was by voice vote, as opposed to roll call vote as required under Section 44-04-21 and the Board did not conduct any conflict analysis. In light of these issues, the Board agreed reconsideration of these issues was necessary. Mgr. Fahsholz next moved to rescind the Board's June 23, 2020, motion to hire Ehlert Excavating, Inc., regarding replacement of culverts along Drain #66A in Sections 15, 27, and 34, Mooreton Township. Mgr. Haugen seconded the motion. Upon roll call vote, Mgrs. Fahsholz, Burvee, Haugen, and Moffet voted in favor of the motion. Chr. Friskop abstained. The motion carried unanimously.

With the conflict issues concluded, the Board proceeded with discussion regarding Mrs. Wefel's concerns; Chr. Friskop did not participate in the discussion in light of the Board's previous conflict analysis.

Mr. Johnson provided an overview of Interstate Engineering's hydraulic study and recommendations for the culvert changes in the E1/2 Sections 15, 27, and 34. Vice Chr. Burvee acknowledged to Mr. and Mrs. Wefel that the Board should have gotten input from the Wefels before making their decision.

Mrs. Wefel addressed the Board at this time. She said there needed to be a line of communication and they should have been informed. She proceeded to address the issue with the three 48 inch culverts being reduced to two 54 inch culverts. She said she wants three 48 inch culverts put back in. She stated she was not sure why the three 48 inch culverts were installed and went on to say "but it works". Mrs. Wefel provided photographs of the three 48 inch culverts in the SECR NE1/4 Section 34 and the two 54 inch culverts in the SECR SE1/4 Section 27 after the recent two inch rainfall event. She explained the three 48 inch culverts were running almost full; she felt without the three culverts the water would have backed into her field.

Mgr. Fahsholz asked Mrs. Wefel why she wanted three culverts, as the photographs show the two 54 inch culverts function better, as they were only running approximately half full. Mgr. Haugen expressed concern with cornstalks plugging the smaller culverts. Mrs. Wefel indicated cornstalks are not a problem every year.

Considerable discussion followed relative to installing two culverts which would have an opening equivalent to the three 48 inch culverts. There are no two culverts which would match up exactly. Mr. Wefel commented that the change in elevation and the width of the ditch needs to be taken into consideration. Two 60 inch cmpa's would have a slightly larger total opening, however, material costs would be approximately \$4,800 more than the three 48 inch culverts.

Mgr. Fahsholz asked Mrs. Wefel if the Board puts three 48 inch culverts back in, if she would come in and complain if they don't move water like the 54's do? Mrs. Wefel responded that she would not come back in.

Mr. Wefel announced that he had to leave; but he wanted to make some comments. He commented that in the future the Board needs to make contact and that mail items should be listed on the agenda.

Mr. Wefel left the meeting.

A motion was made by Mgr. Haugen and seconded by Mgr. Moffet to install the following culverts:

- SECR SE1/4 Section 34: two 48 inch culverts

- SECR NE1/4 Section 34: three 48 inch culverts
- SECR SE1/4 Section 27: two 54 inch culverts
- SECR SE1/4 Section 15: two 54 inch culverts

and to award the work to Ehlert Excavating, Inc. Upon roll call vote, Mgrs. Moffet, Haugen, and Burvee voted in favor of the motion; Mgr. Fahsholz voted against the motion. Mgr. Friskop abstained from voting. The motion carried.

Mrs. Wefel left the meeting. (RCWRD #20-014)

Vice Chr. Burvee turned the meeting back to Chr. Friskop and a brief discussion was held regarding instances where conflict analysis is required.

### **Minutes**

The July 7, 2020 minutes were presented. A motion was made by Mgr. Haugen, seconded by Mgr. Fahsholz, and unanimously carried to approve the July 7, 2020 minutes as presented.

### **Mail**

- 1) None

### **Technician's Report**

Mr. Johnson provided the following reports:

- Proj #4(28)

Site #469: NECR NE1/4 Section 2, Ibsen Township- Erosion at both ends of 18 inch culvert

Site #470: NWCR NW1/4 Section 1, Ibsen Township- Erosion at both ends of 12 inch culvert

Scott Fixen reported the erosion and requested longer culverts be installed at both locations to accommodate semi-tractors. Mr. Johnson recommended replacing both culverts with 18 culverts, extending both pipes to 50 feet, and installing new flapgates. Mr. Fixen felt 50 foot culverts were adequate.

Appl #20-031 was completed and a motion was made by Mgr. Burvee and seconded by Mgr. Fahsholz to assign the recommended repairs to Ehlert Excavating, LLC. Upon roll call vote, the motion carried unanimously.

- Proj #4(33)

Mr. Johnson provided the results of Interstate Engineering's hydraulic study for Site #456 (SW1/4 Section 12, Ibsen Township) and Site #457 (SW1/4 Section 13, Ibsen Township). Results are as follows:

| <u>Site #</u> | <u>Minimum Size</u> | <u>Recommended Size</u> |
|---------------|---------------------|-------------------------|
| #456          | Two 42 Inch CMP     | Two 54 Inch CMP         |
| #457          | Two 36 Inch CMP     | Two 42 Inch CMP         |

The study assumes the existing 36 inch cmp through County Road #10 will remain in place. Existing culvert sizing for Site #456 is two 60 inch cmp's and Site #457 is two 48 inch cmp's. Since the study recommends downsizing the culverts at both sites Board consensus was for Mr. Johnson to contact the landowners in the E1/2 Sections 14 and 23 and the W1/2 Sections 13 and 24 for their input before a decision is made. At this time a motion was made by Mgr. Fahsholz and seconded by Mgr. Burvee to defer Appl #20-023 pending landowners input. Upon roll call vote, the motion carried unanimously.

- Proj #67-8(67)

Mr. Johnson reported the Board previously approved Frank Hlavnicka's request to have the culvert replaced in the SW1/4 Section 23, West End Township; however, Mr. Hlavnicka requested a 24 inch culvert and the Board approved an 18 inch culvert. Mr. Johnson recently inspected the site and found the existing culvert

is a 24 inch not an 18 inch, as was assumed when the Board approved the 18 inch culvert. Mr. Johnson contacted Mr. Hlavnicka; he wants a 24 inch culvert put back in.

A motion was made by Mgr. Fahsholz and seconded by Mgr. Haugen to approve a 24 inch culvert in lieu of an 18 inch culvert as approved on January 28, 2020. Upon roll call vote, the motion carried unanimously.

**Cattail Spraying.**

The Managers discussed the need for cattail spraying on the legal drains as well as the use of the herbicide Polaris. A motion was made by Mgr. Fahsholz and seconded by Mgr. Burvee authorizing Larson Helicopters, LLC, to proceed with spraying the legal drains as needed for cattails but not to spray Projs #1, 17, 19, and 41 (N1/2SE1/4 Section 1, Mooreton Township and W1/2SW1/4 Section 6, Center East Township). Upon roll call vote, the motion carried unanimously.

**2020 Drain Maintenance and Excess Levies**

The Managers reviewed the financial status of all drain maintenance accounts. Discussion was held relative to fund balances, work pending, and work anticipated. A motion was made by Mgr. Burvee and seconded by Mgr. Fahsholz to approve the 2020 drain maintenance levies for the purpose of paying for work done in 2020, anticipated expenses in 2021 and beyond, sinking funds for Drains #5, 7, 14, and the excess levy for Bond #2.

**Drain Maintenance Levies**

| <u>Drain #</u> | <u>Levy Amount</u> | <u>Drain #</u> | <u>Levy Amount</u> |
|----------------|--------------------|----------------|--------------------|
| Dr. #1         | \$4.00 Weighted    | Dr. #2         | \$4.00 Weighted    |
| Dr. #3         | \$4.00 Weighted    | Dr. #4         | \$4.00 Weighted    |
| Dr. #5         | \$4.00 Weighted    | Dr. #6         | \$4.00 Weighted    |
| Dr. #7         | \$4.00 Weighted    | Dr. #10        | \$4.00 Weighted    |
| Dr. #12        | \$4.00 Weighted    | Dr. #14        | \$4.00 Weighted    |
| Dr. #15        | \$1.00 Weighted    | Dr. #17        | \$4.00 Weighted    |
| Dr. #18        | \$4.00 Weighted    | Dr. #19        | \$2.00 Weighted    |
| Dr. #26        | \$4.00 Weighted    | Dr. #31        | \$4.00 Weighted    |
| Dr. #34        | \$3.00 Weighted    | Dr. #35        | \$4.00 Weighted    |
| Dr. #39        | \$2.00 Across Bd   | Dr. #41        | \$4.00 Weighted    |
| Dr. #48        | \$4.00 Weighted    | Dr. #55        | \$4.00 Weighted    |
| Dr. #58        | \$3.00 Weighted    | Dr. #62        | \$2.00 Weighted    |
| Dr. #63        | \$4.00 Weighted    | Dr. #65        | \$4.00 Weighted    |
| Dr. #66        | \$4.00 Weighted    | Dr. #67-8      | \$1.00 Weighted    |
| Dr. #72        | \$4.00 Weighted    | Dr. #95        | \$1.00 Across Bd   |
| Dr. #97        | \$1.00 Across Bd   | Dr. CR #1      | \$3.00 Weighted    |
| Dr. RS #1      | \$4.00 Weighted    |                |                    |

Upon roll call vote, the motion carried unanimously.

**Applications**

Appl #20-032, Klosterman Farms: NW1/4 Section 10, Barney Township- A motion was made by Mgr. Burvee and seconded by Mgr. Haugen to defer Drain Tile Appl #20-032 pending the 30 day notice to the North Dakota Department of Transportation. Upon roll call vote, the motion carried unanimously.

Obj #20-033, Antelope Township Board of Supervisors: NW1/4 Section 4, Barney Township The Managers reviewed the complaint filed by the Antelope Township Board of Supervisors against Mark Boyer, owner of the NW1/4 Section 4, Antelope Township. The Township Board contends new field ditching was done without a permit and water comes so fast (to the east) that it has washed the road out three times in the past year on the east side of the NE1/4 where the natural crosses the township road. Discussion was held regarding ditch work and a complaint the Managers dealt with involving this same location dating back from 2009 through

2011 and involving Bill Mauch (Appl #09-133) and Mark Boyer (Obj #10-10-336). It was noted that Mauch's ditch work done at that time was filled back in.

A motion was made by Mgr. Fahsholz and seconded by Mgr. Moffet to defer the objection pending input from the District's legal counsel. Upon roll call vote, the motion carried unanimously.

**Adjournment**

There being no further business to come before the Board, Chr. Friskop adjourned the meeting at 11:30 AM.

Respectfully submitted,

*Monica Zentgraf*  
Monica Zentgraf  
Secretary

*Gary Friskop*  
Gary Friskop  
Chairman of the Board