

RICHLAND COUNTY WATER RESOURCE DISTRICT  
Richland County Courthouse, Wahpeton, ND  
July 28, 2020

The Richland County Water Resource Board ("RCWRB") met July 28, 2020 at 8:00 AM at the Richland County Courthouse.

THOSE PRESENT: Managers Arv Burvee, Mark Fahsholz, Gary Friskop, James Haugen, Don Moffet, 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.

### **Minutes**

The July 14, 2020 minutes were presented. A motion was made by Mgr. Haugen, seconded by Mgr. Moffet, and unanimously carried to approve the July 14, 2020 minutes as presented.

### **Financial Matters**

●Vouchers- Vouchers for the month of July 2020 were presented for the Board's review and approval. A motion was made by Mgr. Burvee and seconded by Mgr. Moffet to approve Vouchers #18392 through # 18414 and the electronic funds transfers for the IRS and Job Service payments. Upon roll call vote, the motion carried unanimously.

### **Mail**

- 1) Richland County Commission- Minutes of the June 2020 meetings.

### **Technician's Report**

Mr. Johnson provided the following reports:

●Proj #3 Bridge and Low Water Crossing- Houston Engineering's hydraulic analysis for the bridge located in the SW1/4 Section 6, Fairmount South Township, was presented to the Board. Three alternatives were included for replacing the bridge; costs range between \$100,000 and \$360,000 depending on the alternative. Per the Board's June 23, 2020 teleconference with Gabe Bladow, of Houston Engineering, the Board felt it was cost prohibitive to replace the bridge. At that time the Managers discussed replacing the damaged low water crossing, located in the middle of Section 6, in lieu of replacing the bridge. They felt a texas crossing would not require as much maintenance as a low water crossing and requested Mr. Bladow provide a recommendation for a texas crossing. Two options for a texas crossing were included with the hydraulic report for the bridge. The options consisted of a rock crossing and a concrete mat crossing.

After considering the two options, a motion was made by Mgr. Burvee to replace the low water crossing with a rock crossing and to assign the project to JBX, LLC. After additional discussion it seemed more logical to install a concrete mat as it should require less maintenance than a rock crossing. Mgr. Burvee amended his motion to replace the low water crossing with an ACM 70 concrete mat crossing and to assign the project to JBX, LLC. The motion was seconded by Mgr. Fahsholz and upon roll call vote, the motion carried unanimously. (RCWRD #20-018)

●Proj #3 Damages

Site #472: SWCR SW1/4 Section 36, Devillo Township- One 24 inch x 38 foot culvert rusted out.

Site #473: NWCR NW1/4 Section 1, Lamars Township- Erosion at inlet end of culvert.

Appl #20-034 was completed and a motion was made by Mgr. Burvee and seconded by Mgr. Moffet to defer the application pending a hydraulic analysis by Interstate Engineering for Site #472. Upon roll call vote, the motion carried unanimously.

●Proj #55- Interstate Engineering's hydraulic report for replacing the two 48 inch x 40 foot culverts, located in the NE1/4 Section 19, Summit East Township, was reviewed with the Managers. Mr. Bassingthwaite indicated in his report that the culverts were only 14 years old and the culverts in this particular area have been deteriorating more rapidly than usual. Because of this he provided information for various alternatives to try to extend the life of the culverts. His recommendation was to use poly coated culverts at this site, which would cost an additional \$1,715.

After considerable discussion, a motion was made by Mgr. Moffet and seconded by Mgr. Burvee to approve two 48 inch poly coated corrugated metal culverts with Mr. Johnson assigning the project to a contractor of his choosing, based on availability. Upon roll call vote, the motion carried unanimously. (RCWRD #20-028)

●Proj #63

Site #471: NE1/4 Section 33, Nansen Township- Erosion at outlet end of mainline culvert. During discussion of this damage site, it was noted that several years ago a culvert was installed and is bringing unassessed water from Section 34 to Proj #63.

Appl #20-035 was completed and a motion was made by Mgr. Haugen and seconded by Mgr. Fahsholz authorizing JBX, LLC to install riprap at the outlet end of the culvert. Upon roll call vote, the motion carried unanimously. A subsequent motion was made by Mgr. Burvee and seconded by Mgr. Fahsholz authorizing Interstate Engineering to provide a report on what portion of Section 34, Nansen Township, is draining to Proj #63. Upon roll call vote, the motion carried unanimously.

**Proj #66A**

Some landowners within the Drain #66A assessment district recently approached various Board Members with concerns about the functionality of portions of Drain #66A and flooding of some of their cropland as a result of issues both on and off of the legal drain. The Board wanted to address the issues raised by the landowners. However, before proceeding with any further discussion of the issues associated with Drain #66A and the watershed, Chr. Friskop indicated he owns property immediately downstream of the outlet that could be impacted by a project. More specifically, Chr. Friskop owns land in the N1/2SW1/4 of Section 11 and in the SW1/4NE1/4 Section 11, in Mooreton Township. In addition, Chr. Friskop farms his Mother's Trust's property in the S1/2SW1/4 Section 11 and his Mother's property in the N1/2SW1/4 Section 11. All of those parcels are immediately downstream of the Drain #66A outlet, and could be impacted by improvements to Drain #66A.

On July 14, 2020, the Board conducted conflict analysis related to Drain #66A and property Chr. Friskop leases from the Donovan Folden Family Limited Partnership in the NE1/4 Section 34, Mooreton Township, in the context of a culvert improvement project the Board is pursuing in Sections 15, 27, and 34 (RCWRD #20-014). However, these are different properties that could be impacted by a separate Drain #66A project and the Board must conduct additional analysis specific to these parcels.

Sean Fredricks, the Board's attorney, previously explained the conflict analysis the Board should conduct regarding these types of potential conflict situations. 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 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. 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 other words, just the possibility that Chr. Friskop has an interest in Drain #66A does not automatically afford Chr. Friskop the ability to abstain from any votes on the matter; rather, the Board must first conduct the requisite conflict analysis.

The Section 44-04-22 test requires a multi-step analysis. With regard to Chr. Friskop's potential conflict, the question is whether or not potential impacts of any project to the property he owns and the property he farms, and the potential impacts to those parcels as a result of any Drain #66A improvements, create a conflict. Under Section 44-04-22, the question is if the situation creates a "direct and substantial personal ... interest" conflict under Section 44-04-22. Mr. Fredricks previously indicated that the North Dakota Supreme Court has held that a Manager's ownership or interest in real property within a drain assessment district qualifies as a technical conflict since the interest creates a "direct and substantial personal ... interest" regarding the property and the assessment district. In this case, the conflict is even more pronounced since Chr. Friskop's property, and his Mother's property that he farms, are immediately downstream of the Drain #66A outlet and could be impacted by a project. However, the existence of a technical conflict does not conclude the conflict analysis. The Board must next decide if the conflict should preclude Chr. Friskop's participation in discussion of the proposed project, or participation in any votes regarding a project.

The Board agreed the potential impacts to Chr. Friskop's property, and his Mother's property Chr. Friskop farms, create a clear "direct and substantial personal ... interest" in the matter, and that his conflict should preclude him from voting regarding a proposed project. However, the Board also agreed Chr. Friskop understands that area better than any of the other Board Members and that he should still be allowed to participate in discussions regarding a project, just to provide context in light of his personal knowledge of the area. Mgr. Burvee moved to declare that Chr. Friskop has a conflict in the matter under Section 44-04-22 and to preclude Chr. Friskop from voting on matters related to Drain #66A. Mgr. Fahsholz seconded the motion. On roll call vote, Managers Burvee, Haugen, Moffet, and Fahsholz voted in favor of the motion. Chr. Friskop abstained. The motion passed unanimously.

With the conflict issues concluded, the Board proceeded with discussion regarding issues with Drain #66A and the watershed.

Board Members contact from landowners was due to the recent 4+ inches of rainfall near Great Bend. It was noted that the problems are not new, but the recent heavy rainfall and loss of crops prompted landowners to contact some Board Members.

There are concerns that Proj #66A does not handle the excessive rainfall events as efficiently as desired. Gene and Cari Wefel, who were in attendance at the meeting, voiced numerous concerns regarding how the Interstate 29 ditch is functioning, how it is not moving water as proposed during construction of the road, and how it changed the flow of water when it was built. Secretary-Treasurer Zentgraf reported that she had a conversation with Mike Bassingthwaite, of Interstate Engineering, prior to the meeting, to collect information about the drain, as he is very familiar with the drain and the surrounding area. Mr. Bassingthwaite indicated the drain only has approximately 1 foot of drop per mile and was designed for approximately 1/2 inch of runoff per day. The drain is very flat and

the water flows slowly. Considerable discussion was held relative to the problems both on and off of the drain.

Discussion was tabled at this point due to a scheduled video conference meeting with Mr. Fredricks.

### **Proj #1 Reconstruction**

A video conference meeting was held with Mr. Fredricks at this time. The subject of discussion was options for how the Board can move forward with a reconstruction of Proj #1 in Sections 28 and 29, Abercrombie East Township. Various options for reconstruction were discussed with Mr. Fredricks, as well as possible abandonment of the drain due to financial constraints. Financial constraints are the result of a small assessment district which causes an inability to raise adequate maintenance money to pay for reconstruction, compounded by a high probability that North Dakota State Water Commission cost-share assistance will not be available in the foreseeable future (due to the reduction in sales tax and oil revenue caused by the on-going coronavirus pandemic).

It was difficult to find an option which will financially allow the District to complete reconstruction even with Kelly Miller's possible financial contribution to the project. The Managers will meet with Mr. Miller in the coming weeks for the purpose of making a final decision about the proposed reconstruction project. (RCWRD #17-017)

### **Proj #66A- Continued**

The Managers resumed discussion of the problems associated with Drain #66A and the watershed. Consensus of Mgrs. Burvee, Moffet, Fahsholz, and Haugen was for the Board to meet with Mr. Bassingthwaite to discuss a study of the drain and watershed for the purpose of identifying potential solutions on and off the drain. It was felt that once potential solutions are identified, a meeting should be held with the landowners in the assessment district to present the findings and gather their input.

Consensus of Mgrs. Haugen, Fahsholz, Moffet, and Burvee, was to move forward with the culvert replacement project approved under RCWRD Application #20-014 on July 14, 2020 and not to hold that project up due to the issues brought before the Board at this time.

Mr. and Mrs. Wefel left the meeting.

### **Proj #4 Reconstruction**

Manager Haugen introduced the following RESOLUTION and moved its adoption:

#### **RESOLUTION AUTHORIZING RECONSTRUCTION OF RICHLAND COUNTY DRAIN NO. 4**

WHEREAS, the Richland County Water Resource District (the "District") is a North Dakota water resource district and political subdivision under N.D. Cent. Code Chapter 61-16.1.

WHEREAS, the District previously conducted proceedings in accordance with North Dakota law to create, establish, construct, own, operate, manage, and maintain a legal assessment drain in certain portions of Abercrombie West Township, Richland County, North Dakota, known as Richland County Drain # 4 ("Drain 4").

WHEREAS, the District owns and operates portions of Drain 4 along and across Richland County Road No. 8 ("Highway 8"), a highway owned and operated by the Richland County Highway Department (the "County").

WHEREAS, in 2008 and 2009, the County reconstructed portions of Highway 8 and, as a component of the County's Highway 8 reconstruction project, the County relocated and reconstructed a portion of Drain 4.

WHEREAS, the District must acquire the requisite right of way to accommodate those portions of Drain 4 relocated and reconstructed by the County, and must obtain regulatory authority from the North Dakota State Engineer's Office ("OSE"), after the fact.

WHEREAS, the Drain 4 relocation and reconstruction project previously constructed by the County included the relocation and reconstruction of the Drain 4 channel depicted in the drawing attached as **Exhibit A** in portions of Sections 25, 26, and 35 of Abercrombie West Township (the "Project"); the District will acquire the right of way necessary to accommodate the Project, including permission from the County to own, operate, improve, reconstruct, repair, and maintain Drain 4 within the County's Highway 8 right of way; and the District will acquire a surface drainage permit from OSE regarding the relocated and reconstructed Drain 4.

WHEREAS, the relocation and reconstruction of portions of Drain 4 does not in any way inhibit, impede, or limit the benefits of Drain 4 to the properties within the Drain 4 assessment district.

WHEREAS, additional assessments were not necessary to construct or fund the Project, and will not be necessary to finance or fund right of way acquisition and regulatory approvals necessary to accommodate the Project; rather, in accordance with North Dakota law, the District will utilize funds generated via annual maintenance levies of the Drain 4 assessment district to finance and fund the right of way acquisition and regulatory approvals necessary to accommodate the Project.

NOW THEREFORE, BE IT RESOLVED that the District finds, determines, and declares the necessity to acquire right of way as necessary to accommodate the Project; to acquire the regulatory approvals from applicable government agencies; and to ultimately operate, manage, and maintain Drain 4.

BE IT FURTHER RESOLVED that the District finds, determines, and declares the Project has not and will not adversely impact any of the properties within the Drain 4 assessment district; rather, the Project has benefitted the properties and property owners within the Drain 4 assessment district.

BE IT FURTHER RESOLVED that the District designates and authorizes Interstate Engineering, Inc., and Ohnstad Twichell, P.C., respectively, to perform the following tasks on behalf of the District regarding the Project:

- a) identify the permanent right of way the District must acquire to accommodate the Project;
- b) apply for and secure all necessary permits and approvals from all applicable federal and state entities, including OSE;
- c) negotiate with landowners and otherwise administer right of way acquisition;
- d) acquire the requisite permanent right of way to accommodate the Project, in the District's name, including right of way or other satisfactory consent from the County; and
- e) otherwise perform all other tasks necessary to properly operate, manage, own, and maintain Drain 4, including those portions previously relocated and reconstructed by the County.

BE IT FURTHER RESOLVED that the District will utilize Drain 4 maintenance funds to fund the right of way and regulatory activities necessary to accommodate the Project.

BE IT FURTHER RESOLVED that the Project did not constitute construction of a "lateral drain" under North Dakota law, and construction of the Project did not require an excess levy vote, an additional assessment district vote, or any other additional legal proceedings under North Dakota law.

APPROVED:

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Gary Friskop, Chairman

ATTEST:

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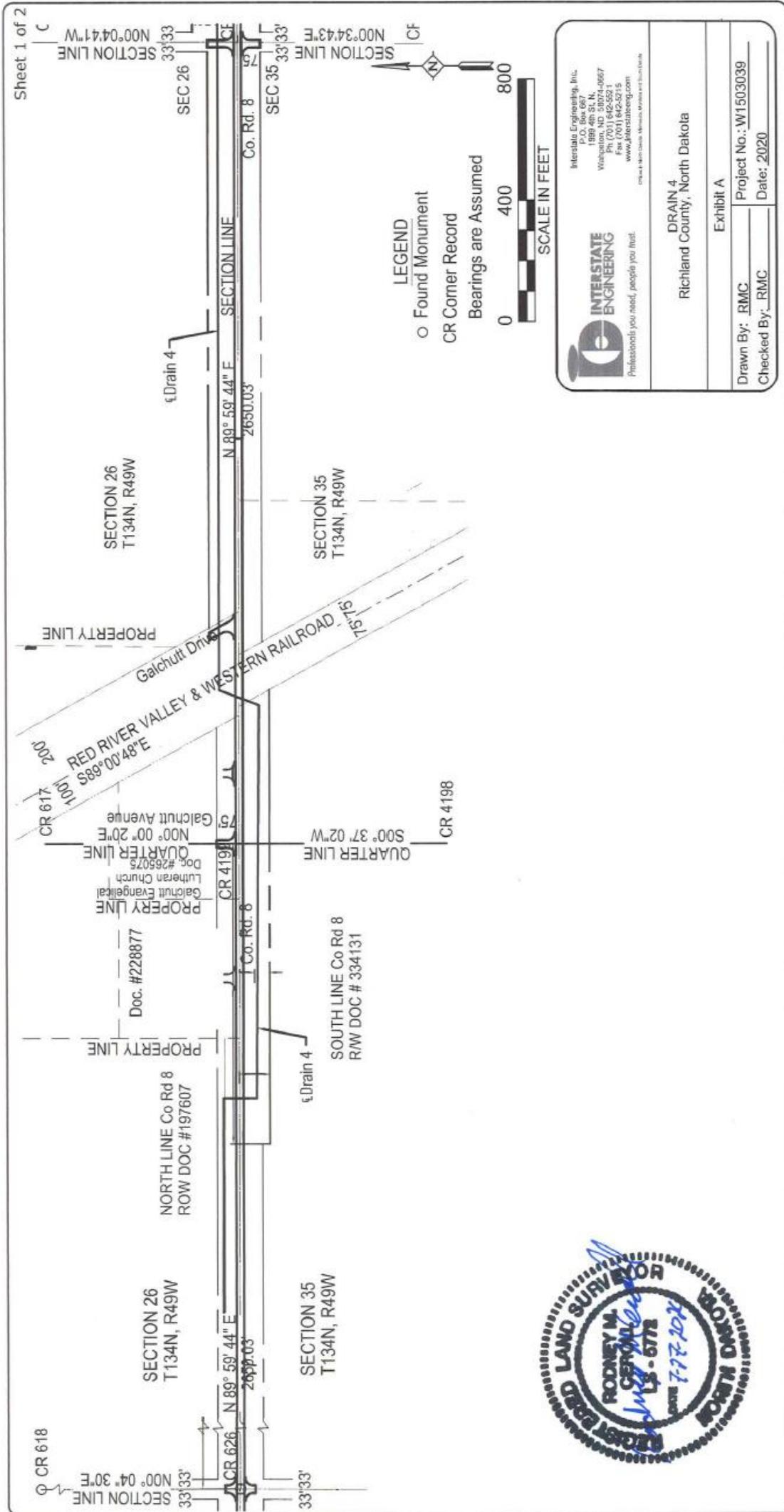
Monica Zentgraf  
Secretary-Treasurer

Date Approved: July 28, 2020

The motion for the adoption of the foregoing RESOLUTION was duly seconded by Manager Fahsholz. On roll call vote the following Managers voted aye: Burvee, Moffet, Fahsholz, Haugen, and Friskop. The motion carried unanimously, and the RESOLUTION was duly adopted. (RCWRD #20-001)

# EXHIBIT A

## Depiction of the Project



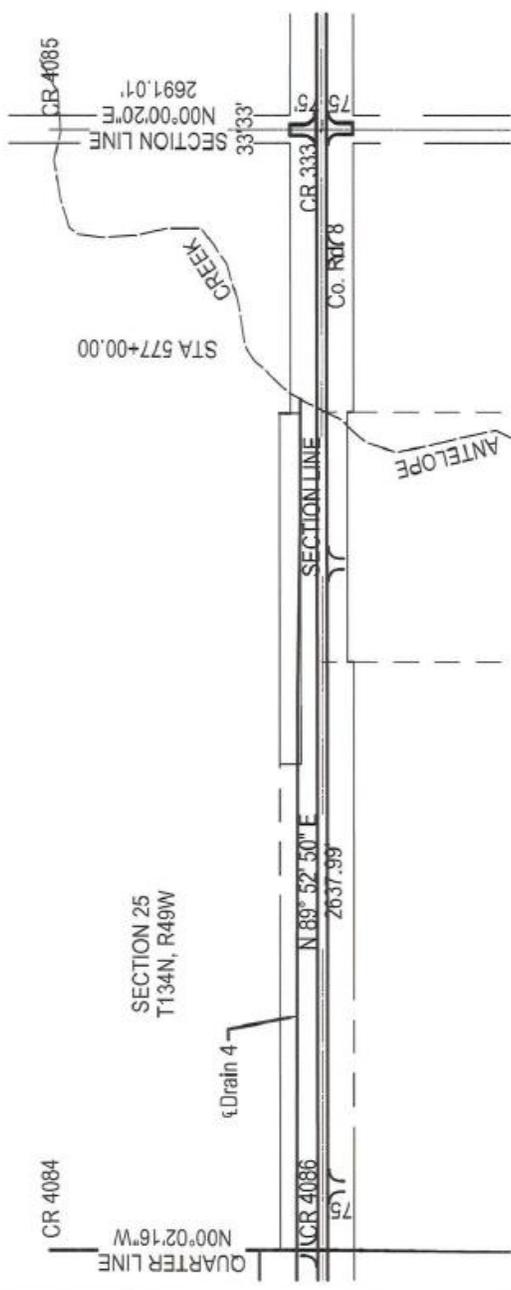
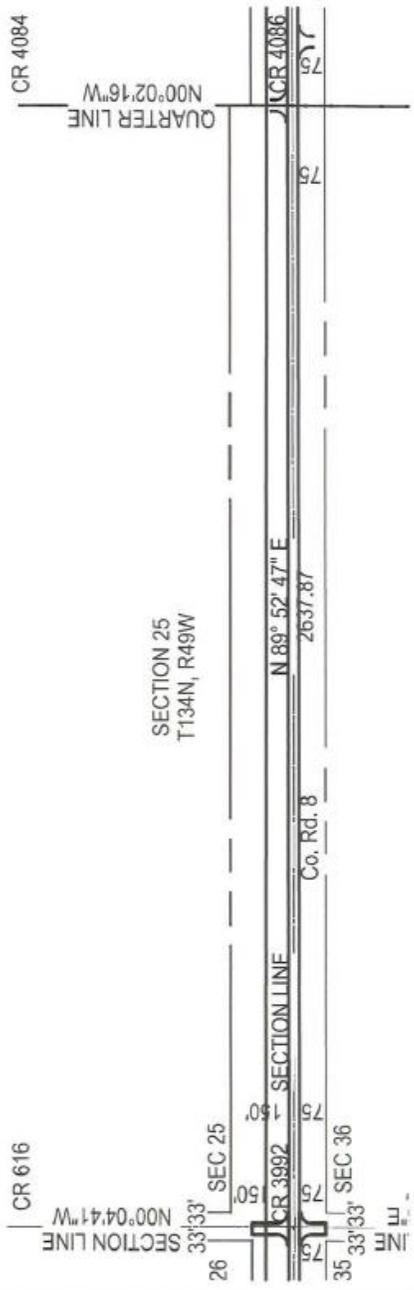
Sheet 1 of 2

**LEGEND**  
 ○ Found Monument  
 ○ CR Corner Record  
 Bearings are Assumed



<p><b>INTERSTATE ENGINEERING</b>          Professionals you need, people you trust.</p>	<p>Interstate Engineering, Inc.          P.O. Box 667          1989 W. Hwy. 10          Westport, ND 58074-0667          Ph: (701) 642-5921          Fax: (701) 642-5215          www.interstateeng.com</p>
	<p>DRAIN 4          Richland County, North Dakota</p>
<p>Exhibit A</p>	
<p>Drawn By: RMC</p>	<p>Project No.: W1503039</p>
<p>Checked By: RMC</p>	<p>Date: 2020</p>





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www.interstateeng.com

CR 4084, CR 4085, CR 333, CR 4086, CR 616, CR 3992, CR 4086

DIRAIN 4  
Richland County, North Dakota

Exhibit A

Drawn By: RMC  
Checked By: RMC

Project No.: W1503039  
Date: 2020

Mgr. Burvee left the meeting.

### **Antelope Township Complaint- NW1/4 Section 4, Antelope Township**

The Board next discussed the COMPLAINT FOR WATER-RELATED ISSUES (#20-033) filed by Antelope Township against MDB Holdings, LLLP/Mark Boyer. Before proceeding with any further discussion of the Complaint, the Board discussed Mgr. Haugen's potential conflict in the matter. Mgr. Haugen noted his niece is married to Brian Boyer, Mark Boyer's son. Further, Mgr. Haugen's grandson works for the Boyer family. Sean Fredricks, the Board's attorney, previously explained the conflict analysis the Board should conduct regarding these types of potential conflict situations.

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 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. 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 other words, just the possibility that a Manager has some type of interest in a matter does not automatically afford that Manager the ability to abstain from any votes on the matter; rather, the Board must first conduct the requisite conflict analysis.

The Section 44-04-22 test requires a multi-step analysis. With regard to Mgr. Haugen's potential conflict, the question is whether or not his family's relationship creates a conflict. Under Section 44-04-22, the question is if the situation creates a "direct and substantial personal ... interest" conflict under Section 44-04-22. Mgr. Haugen's relationships with the Boyers, via his niece and his grandson, certainly create a personal interest in the matter and seem to rise to the level of a technical conflict under Section 44-04-22. However, the existence of a technical conflict does not conclude the conflict analysis. The Board must next decide if the conflict should preclude Mgr. Haugen's participation in the matter.

Mgr. Haugen's family will be directly impacted by the outcome of the Board's consideration and actions regarding this Complaint. With that in mind, a motion was made by Mgr. Fahsholz to declare that Mgr. Haugen has a "direct and substantial personal ... interest" in this complaint; that Mgr. Haugen has a conflict in the matter under Section 44-04-22; and to preclude Mgr. Haugen from participating in discussions regarding, or participating in any votes regarding, the Complaint. Mgr. Moffet seconded the motion. Upon roll call vote, Mgrs. Moffet, Fahsholz, and Friskop voted in favor of the motion. Mgr. Burvee was absent and not voting and Mgr. Haugen abstained. The motion carried.

With the conflict issue concluded, the Board proceeded with discussion regarding the Complaint and possible options for handling the matter with Mr. Boyer. Consensus of the Board was to schedule a meeting with Mr. Boyer to discuss the options available to resolve the complaint. (Antelope Township #20-033)

### **Video Conference Equipment**

Mr. Johnson estimated the cost for webcams needed for the Board to hold meetings via video conferencing to be in the area of \$100 to \$120 per webcam. The matter was tabled pending a meeting of the full Board.

**Applications**

Appl #20-036, Steve Haverland: SE1/4 Section 29, Colfax West Township The RCWRB acknowledged the application for drain tile was filed for notification purposes only. No State Subsurface Permit is required and no action is required by the RCWRB as the project involves less than 80 acres. Mr. Johnson reported that he spoke with Mr. Haverland to see if he would be willing to keep the drain tile lines 30 feet to 50 feet off the top of the backslope of Proj #72 to account for future work on the drain. Mr. Haverland was very willing to accommodate the request.

**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