

RICHLAND COUNTY WATER RESOURCE DISTRICT
Richland County Courthouse, Wahpeton, ND
November 29, 2022, Special Meeting

The Richland County Water Resource District ("RCWRD") met November 29, 2022, at 10:00 A.M. at the Richland County Courthouse.

THOSE PRESENT: Managers Arv Burvee, Gary Friskop, Clint Arndt, Tom Kubela, Don Moffet, Engineering Technician Justin Johnson, Secretary-Treasurer Tiffany Bladow.

THOSE ABSENT:

Approval of Agenda

A motion was made by Mgr. Moffet and seconded by Mgr. Arndt and unanimously carried to approve the agenda as presented.

Minutes

The November 15, 2022, minutes were presented. A motion was made by Mgr. Arndt and seconded by Mgr. Kubela to approve the November 15, 2022; minutes as presented. Upon roll call vote, the motion carried unanimously.

Drain #58

Justin Johnson was informed by Mgr. Kubela that someone was taking dirt from Drain #58 spoil bank. After going out to assess the situation and measuring out our 66 feet of Right of Way, Matt Miranowski was told he was not able to load any more trucks with the dirt. Arv Burvee did call Miranowski and told him he did need to stop right away as he did not have permission to take the dirt from RCWRD right of way. The board decided to send a letter to Matt Miranowski letting him know that he will need to haul back in some loads of dirt and get the spoil bank put back to its previous conditions.

Sean Fredricks Ohnstad Twichell, PC joined the meeting via Zoom.
Mike Opat Houston Engineering joined the meeting via Zoom.
Rick Bladow joined the meeting.

COMPLAINT FOR WATER-RELATED ISSUES filed by Tom Brosowske against Russell Mauch - Unauthorized Dam, Dike, or Other Device and Obstruction to a Drain/Watercourse

The Board next considered Tom Brosowske's COMPLAINT FOR WATER-RELATED ISSUES, dated August 22, 2022, filed against Russell Mauch. In the Complaint, Mr. Brosowske alleges Mr. Mauch installed a dam "across a natural drain" in the Northwest Quarter of Section 17 of Danton Township. The documentation submitted by Mr. Brosowske confirms the subject of the Complaint is a crossing or embankment installed by Mr. Mauch in the Southeast Quarter of the Northwest Quarter of Section 17 of Danton Township, an area that has been the source of contention between the parties for several years. The Board's attorney, Sean Fredricks, conducted a deed search and confirmed RCM Family LLLP, a North Dakota limited liability limited partnership owned by the Mauch family, owns that portion of the Northwest Quarter of Section 17 lying south and west of railroad right of way, including the area at issue in this Complaint in the Southeast Quarter of the Northwest Quarter of Section 17. The Complaint alleges the structure acts as an unpermitted "dam, dike, or other device," in violation of N.D. Cent Code §§ 61-16.1-38 and 61-16.1-53. In addition, following his submission of the Complaint, Mr. Brosowske indicated he wished to amend the Complaint to include the allegation that the same structure acts as an obstruction to a drain or natural watercourse in violation of N.D. Cent Code § 61-16.1-51.

The Board previously met with the parties in an effort to reach a mutually acceptable resolution to this matter, but the parties could not come to an agreement. With that in mind, the Board directed Houston Engineering to investigate the matter. Mr. Mike Opat

submitted a written report for the Board's consideration, dated November 22, 2022; Mr. Opat's report describes his investigation and his findings.

Mr. Opat consulted with Mr. Fredricks regarding the statutory elements regarding obstruction and dam complaints under Sections 61-16.1-51 and 61-16.1-53, respectively. Mr. Opat's report contained an outline of the Board's previous consideration of Mr. Mauch's proposals regarding this particular area back in 1989. However, as noted by Mr. Opat, the focus of this Complaint is the crossing or embankment constructed by Mr. Mauch in 2022. Mr. Opat further noted there is no record of any drainage or construction permits on file with the North Dakota Department of Water Resources for Mr. Mauch regarding the Northwest Quarter of Section 17 in Danton Township.

With those underlying facts in mind, the Board considered the dam/dike and obstruction allegations in Mr. Brosowski's Complaint.

As a preliminary matter, the nature of the water feature at issue in this Complaint is significant for purposes of the obstruction allegations under Section 61-16.1-51, but also generally in terms of considering the dam/dike elements. N.D. Cent. Code § 61-01-06 provides the following definition of a "watercourse":

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....

In this case, Houston utilized historic aerial photography, USGS topographic maps, LiDAR data, Google Earth, and the International Water Institute's online portal to evaluate this water feature. In addition, Houston collected topographic survey data on October 28 and November 15 and reviewed their cross sections in conjunction with USGS StreamStats. Finally, Mr. Opat conducted a site inspection. Ultimately, Mr. Opat's report includes Houston's conclusion that this particular water feature does, in fact, qualify as a "watercourse" under Section 61-01-06.

Next, with regard to the dam/dike complaint portion of the Complaint, Sections 61-16.1-38 and 61-16.1-53 control, along with the applicable Administrative Code provisions. Section 89-08-01-01(3) of the North Dakota Administrative Code, provides the following definition of a "dam":

"Dam" means any barrier, including any appurtenant works, constructed across a watercourse or an area that drains naturally to impound or attenuate the flow of water. All structures necessary to impound a single body of water are considered a single dam.

Mr. Opat concluded Mr. Mauch had, in fact, constructed an earthen embankment across the watercourse in the Northwest Quarter of Section 14. With that in mind, Mr. Opat's report indicates this structure across the natural watercourse qualifies as a "dam."

Because this crossing or embankment is a "dam," the Board must then make a hazard determination, under N.D. Admin Code § 89-08-02-01, to determine if the dam required a permit. Under Section 61-16.1-38, "medium-hazard" and "high-hazard" dams require permits if they "are capable of retaining, obstructing, or diverting more" than 25 acre-feet of water, whereas "low-hazard" dams require permits if they meet the 50 acre-foot threshold. Section 89-08-02-01 provides the applicable definitions regarding hazard determinations:

9. "High-hazard dam" means a dam located upstream of developed or urban areas where failure may cause serious damage to homes, industrial and commercial buildings, and major public utilities. There is potential for the loss of more than a few lives if the dam fails.

12. "Low-hazard dam" means a dam located in a rural or agricultural area

where there is little possibility of future development. Failure of low-hazard dams may result in damage to agricultural land, township and county roads, and farm buildings other than residences. No loss of life is expected if the dam fails.

13. "Medium-hazard dam" means a dam located in a predominately rural or agricultural area where failure may damage isolated homes, main highways, or railroads, or cause interruption of minor public utilities. There is potential for the loss of a few lives if the dam fails.

This structure is in a rural, agricultural area, with little possibility of future development in the vicinity, and Mr. Opat concluded the embankment qualifies as a "low-hazard dam." As a low-hazard dam, the permitting standard for this particular structure under Section 61-16.1-38 is whether or not the dam is "capable of retaining, obstructing, or diverting more than 50 acre-feet" of water. While Mr. Mauch may have installed this embankment as a crossing, private roadways are not exempt from dam permitting requirements under Section 61-16.1-38.

Mr. Opat's report next analyzed the retention capacity of this dam. Under Section 89-08-02-01 of the Administrative Code, "the impounding capacity of a dam is calculated based upon the elevation at the top of dam." Houston utilized LiDAR data to evaluate the elevation, but also conducted an on-site survey of the embankment on Mr. Mauch's property. Mr. Opat's report indicated the top of dam elevation was 1043.6; the surface area at that elevation is 14.2 acres; and, ultimately, the dam's retention capacity is approximately 12 acre-feet, well below the 50 acre-feet permitting threshold for this low-hazard dam. With that in mind, this embankment did not require a permit under Section 61-16.1-38, and the Board has no choice but to dismiss the portion of the Complaint regarding the dam.

Manager Arndt moved to dismiss that portion of Mr. Brosowske's COMPLAINT FOR WATER-RELATED ISSUES regarding allegations of an illegal dam under Sections 61-16.1-38 and 61-16.1-53, due to lack of jurisdiction. Manager Moffet seconded the motion. Upon roll call vote, the motion carried unanimously.

Next, the Board considered Mr. Brosowske's allegations that this embankment acts as an obstruction, in violation of Section 61-16.1-51. Under Section 61-16.1-51, the Board must determine if "an obstruction to a drain has been caused by [Mr. Mauch's] negligent act or omission...." Section 61-16.1-51 further provides:

For the purposes of this section, "an obstruction to a drain" means a barrier to a watercourse, as defined by section 61-01-06, or an artificial drain, including if the watercourse or drain is located within a road ditch, which materially affects the free flow of waters in the watercourse or drain.

As noted previously, Houston concluded the water feature at issue is, in fact, a "watercourse" under Section 61-01-06. Therefore, the remaining consideration for the Board is whether or not Mr. Mauch's embankment acts as a "barrier . . . which materially affects the free flow of waters" in this watercourse.

Mr. Opat's report noted Mr. Mauch's embankment does not include a pipe; therefore, Mr. Opat concluded analyzing the rock overflow section would be necessary to determine when water begins to overflow that portion of the dam. In the absence of historic channel bottom information or elevations, Houston utilized the results of their survey of the dam and the upstream and downstream streambed elevations. Houston concluded the controlling elevation on the upstream side is 1039.7, and the controlling elevation on the downstream side is 1039.4, with a controlling overflow elevation of 1041.1, or 1.4 feet above the streambed. In Mr. Opat's opinion, that qualifies as an obstruction to the watercourse.

Mr. Opat noted that, although the North Dakota Stream Crossing Standards do not apply to private roads or private crossings, the Department of Water Resources recommends usage of the Stream Crossing Standards as guidance in terms of determining if a structure “materially affects the free flow of water.” The Stream Crossing Standards, contained in Chapter 89-14-01 of the North Dakota Administrative Code, indicate that a crossing that produces a water surface elevation upstream that does not exceed the allowable headwater is adequate. In the context of an obstruction analysis, if a structure’s conveyance is not adequate, the structure likely “materially affects the free flow of waters” in the watercourse.

In this case, Mr. Mauch’s dam does not include a pipe, and Section 89-14-01-03 notes that if a crossing includes an overflow section, the overflow section and the pipe “must pass the appropriate design event within the headwater limitations” to meet the Stream Crossing Standards. DWR staff indicated to Houston that a crossing without a pipe would not comply with the Stream Crossing Standards even if the crossing included an overflow section. With all of that in mind, Mr. Opat concluded Mr. Mauch’s dam does, in fact, act as an obstruction to the watercourse in the Northwest Quarter of Section 17 in Danton Township.

The Board concurred with Mr. Opat’s findings. Mr. Mauch intentionally installed or constructed a crossing or embankment through a natural watercourse in the Northwest Quarter of Section 17. That structure is an obstruction to a natural watercourse that “materially affects the free flow of waters.” In light of the fact that the dam acts as an “obstruction” under Section 61-16.1-51, the Board has no choice but to order removal of the structure.

Mr. Mauch and Mr. Brosowske may come to an agreement regarding installation of culverts to mitigate impacts to Mr. Brosowske’s property. With that in mind, Manager Arndt proposed the possibility of ordering removal of the rock portion of the embankment by January 1 but affording the parties an additional 60 days to arrive at a mutually acceptable plan regarding culvert installation, with the idea that if the parties do not come to an agreement, Mr. Mauch would have to remove the remainder of the obstruction by March 1. The Board agreed that approach would be appropriate and fair.

Manager Arndt moved, and Manager Kubela seconded the motion, to order Mr. Mauch to remove the rock portion of the obstruction installed in the Northwest Quarter of Section 17 of Danton Township, Richland County, North Dakota, by 5:00 p.m. on January 1, 2023, and the remainder by 5:00 p.m. on March 1, 2023. Upon roll call vote, the motion carried unanimously. If the parties come to an agreement regarding culvert installation before March 1, they will notify the Board and the Board can then take additional action regarding the March 1 deadline, if appropriate.

Rick Bladow, Sean Fredricks and Mike Opat left the meeting.

Gabe Bladow with Houston Engineering, Tim Woodbury, Todd Woodbury, Kevin Hegseth, Paul Langseth, and Mike Langseth joined the meeting.

Dr. #14 Reconstruction

Gabe Bladow went over 4 different improvement options for Drain #14. Each option went into detail of the improvements including the approximate length of drain that would be reconstructed and the approximate cost of each option.

A conversation was held between all the attendants of the meeting it was decided to have the landowners that attended the meeting to review the information Houston Engineering provided and talk with the other people that could not attend the meeting. The Board asked them to contact the office with their opinions before another meeting is scheduled.

Technician’s Report

Adjournment

There being no further business to come before the Board, Chr. Burvee adjourned the meeting at 12:10 P.M.

Respectfully submitted,

Tiffany Bladow
Tiffany Bladow
Secretary/Treasurer

Arv Burvee
Arv Burvee
Chairman of the Board