

RICHLAND COUNTY WATER RESOURCE DISTRICT  
Richland County Courthouse, Wahpeton, ND  
September 22, 2020

The Richland County Water Resource Board ("RCWRB") met September 22, 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, and Secretary-Treasurer Monica Zentgraf.

THOSE ABSENT: None

### **Approval of Agenda**

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

### **Minutes**

The September 15, 2020 minutes were presented. A motion was made by Mgr. Fahsholz, seconded by Mgr. Haugen, and unanimously carried to approve the September 15, 2020 minutes as presented.

### **Financial Matters**

●Vouchers- Vouchers for the month of September 2020 were presented for the Board's review and approval. A motion was made by Mgr. Burvee and seconded by Mgr. Fahsholz to approve Vouchers #18441 through #18462 and the electronic funds transfers for the IRS and Job Service payments. Upon roll call vote, the motion carried unanimously.

### **Mail**

1) None

### **Applications**

#### **Application to Install a Subsurface Water Management System No. 20-044 for Cynthia Schreiber-Beck and Northwest Land Limited Partnership in the W1/2 Section 20 and SE1/4 Section 20, Center East Township**

The District reviewed *Application to Install a Subsurface Water Management System No. 20-044*, dated August 11, 2020, and filed August 20, 2020, for Cynthia Schreiber-Beck and Northwest Land Limited Partnership. Under the application, Applicants seek to install a 351-acre drain tile system in the W1/2 Section 20 and the SE1/4 Section 20 in Center East Township, Richland County, North Dakota. The project will include a single pump outlet located in the NWCR SW1/4 Section 20; the outlet will discharge into abandoned railroad property on the west boundary of the SW1/4, and on the east side of State Highway 127; the discharge will flow into Highway 127 right of way, then will flow south in the Highway 127 ditch, to the SWCR SW1/4 Section 20; the discharge will then flow west, under Highway 127, in the north road ditch along 82nd Street Southeast, along the south boundary of the SE1/4 Section 19, and the SE1/4 SW1/4 Section 19, until ultimately discharging into a natural watercourse.

The Board previously provided THIRTY-DAY NOTICES to landowners within one mile of the project outlet, including owners in Section 19 and the North Dakota Department of Transportation ("NDDOT"), as required under N.D. Cent. Code § 61-32-03.1; in addition, the Board provided THIRTY-DAY NOTICES to Southeast Water Users and Center Township. None of the downstream landowners submitted any "technical evidence" to object to the project; with that in mind, the Board cannot require Applicants to obtain consent from any downstream landowners as a condition to the permit. However, NDDOT will require Applicants to obtain a "Request for Drainage on Highway Right of

Way” under NDDOT’s authorities, regarding the discharge into Highway 127 right of way.

Southeast Water Users District has a blanket easement in the N1/2 Section 20; Applicants entered into a letter agreement with Southeast Water Users in which Applicants agreed not to install any tile lines within 20 feet of Southeast Water Users’ water line.

According to records supplied by Applicants, Applicants Cynthia Schreiber-Beck and Northwest Land Limited Partnership own the 351 acres in the W1/2 and SE1/4 Section 20 where Applicants intend to install tile. More specifically, Cynthia Schreiber-Beck owns 111.93 acres in the NW1/4 Section 20, and 114.28 acres in the SW1/4 Section 20. Northwest Land Limited Partnership owns 32.68 acres in the N1/2N1/2NW1/4 Section 20; 25.57 acres in the S1/2S1/2SW1/4 Section 20; 65.84 acres in the SE1/4 Section 20; and Prairie View Acres Lot 1, Block 1, in the SWCR SW1/4 Section 20. With regard to downstream properties, Philip and Candyce Glander own the S1/2S1/2SE1/4 Section 19; Ryan Kiefer, Jason Kiefer, and Stephanie Tupper own a 3.64-acre tract in the SECR SW1/4 Section 19, subject to a life estate in Nancy Kiefer. Robin Finke and Mandy Finke own the parcel in the SECR SW1/4 Section 19. NDDOT owns its Highway 127 right of way.

Mgr. Haugen moved, and Mgr. Fahsholz seconded the motion, to approve *Application to Install a Subsurface Water Management System No. 20-044*, dated August 11, 2020, and filed August 20, 2020, for Cynthia Schreiber-Beck and Northwest Land Limited Partnership, regarding a proposed tile system in the W1/2 Section 20 and the SE1/4 Section 20, Center East Township, and to authorize the Secretary-Treasurer to sign SUBSURFACE WATER MANAGEMENT PERMIT NO. 20-044, subject to the following conditions:

- 1) that Applicants notify the Richland County Water Resource District in advance of any proposed alterations to outlet locations, or addition of any outlets;
- 2) that Applicants will not install Applicants’ tile system within 20 feet, on either side, of Southeast Water Users District’s rural water line on the N1/2 Section 20; and
- 3) that Applicants must turn off any pump outlets and otherwise close all outlets during “critical flood periods,” as determined by the Richland County Water Resource District.

Upon roll call vote, Mgrs. Burvee, Fahsholz, Moffet, and Haugen voted in favor of the motion. Mgr. Friskop voted against the motion; the motion carried.

Under Section 61-32-03.1, the Board cannot attach any additional conditions to Applicants’ permit. However, for Applicants’ protection, and to ensure protection of Applicants’ tile system, the Board will recommend that Applicants comply with the following:

- 1) that Applicants notify the Richland County Water Resource District in advance of any proposed improvements to the tile system, or any proposed increase in the capacity or drainage area of the tile system and, if necessary, submitting an additional permit application;
- 2) that Applicants obtain permission from the NDDOT to discharge into, or otherwise utilize, any of NDDOT’s highway right of way;
- 3) that Applicants obtain permission from Center Township to discharge into, or otherwise utilize, any of its road right of way; and

4) that Applicants obtain all other necessary and requisite licenses, permits, registrations, and/or approvals from all applicable federal, state, county, and municipal governments, and any other applicable governmental entities.

### **Technician's Report**

- Mr. Johnson reviewed Loff Farms Appl #19-056, for the SW1/4 Section 18, Abercrombie West Township, with the Board before reporting on the work in Drain #72 recently undertaken by Dallas Loff.

Before the Board proceeded with any substantive discussion regarding Mr. Loff's work, Mgr. Fahsholz indicated he may have a conflict in light of his ownership of property within the Drain #72 assessment district. More specifically, Mgr. Fahsholz owns the SW1/4 Section 32, Colfax West. The Board's attorney, Sean Fredricks, previously indicated the Board is required by law to conduct a conflict analysis in these 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. Fahsholz's potential conflict, the question is whether or not the property he owns in the Drain #72 district 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. Any work required under this application will not impact directly on Mgr. Fahsholz's property. However, Mr. Fredricks previously indicated 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.

However, the existence of a technical conflict does not conclude the conflict analysis. The Board must next decide if the conflict should preclude Mgr. Fahsholz's participation in this matter or any votes regarding the application.

In this situation, additional work which may be needed will not result in new assessments to Mgr. Fahsholz's property; if the Board funds any of this work the Board would fund the work with the Drain #72 maintenance district, and the maintenance levy for Drain #72 will not vary depending upon this work. Further, Mgr. Fahsholz has more personal knowledge of the area, more

familiarity with the issues with Drain #72, and an understanding of the benefits the work may provide to the various properties in the Drain #72 assessment district. In light of Mgr. Fahsholz's knowledge of the watershed, Mgr. Burvee moved to declare that Mgr. Fahsholz does have a conflict in the matter under Section 44-04-22, but to require Mgr. Fahsholz to participate in discussions regarding this application, and to vote on the application. Mgr. Moffet seconded the motion. Upon roll call vote, the following Managers voted in favor of the motion: Burvee, Moffet, Haugen, and Friskop. Mgr. Fahsholz abstained from voting. The motion passed.

With the conflict issues concluded, the Board proceeded with discussion regarding the application.

Mr. Johnson reported that as part of Mr. Loff's application, he requested an inlet culvert be installed into Drain #72 in the SW1/4 Section 18, Abercrombie West Township. The Board previously approved the inlet culvert and assigned the work to JBX contingent upon Mr. Loff completing his private work first, which included excavation work in the township road ditch, raising the township road culvert, and installing a berm. Mr. Johnson recently noticed all of the work had been done including installation of the inlet culvert. Mr. Johnson contacted Mr. Loff about the culvert; Mr. Loff acknowledged that he purchased the culvert and hired Kummer Construction to install it. Mr. Loff did not contact the District for permission to purchase the culvert or hire Kummer Construction to install it. Mr. Johnson further reported the culvert was not installed per the District's standards, specifically installation of fabric, riprap, and a marker post at the outlet end of the pipe.

Considerable discussion followed regarding the need for fabric, riprap, and a marker post, whether to contact Mr. Loff about the situation via letter or telephone, who should install the fabric, riprap, and marker post, and financial responsibility for these remaining items. The Managers also voiced their dissatisfaction with Mr. Loff proceeding with the culvert installation without the District's approval. Consensus of the Managers was to contact Mr. Loff via telephone and require him to complete the additional work at his expense. Mr. Loff was placed on speaker phone, informed accordingly, directed to complete the additional work this fall, and to contact Mr. Johnson to oversee the work. Mr. Loff was also informed that he is "not to do this again". Mr. Loff agreed to complete the additional work as directed and apologized for his oversight of not contacting the District.

- Comstock Construction- Ms. Zentgraf and Mr. Johnson provided an update on the status of Comstock Construction's projects. Ms. Zentgraf reported that she contacted Matt Dockter yesterday for a timeline for completing projects. Mr. Dockter indicated he would talk to their concrete staff about completing repairs on Proj #10 next week and get back to her yesterday; she did not hear back from him.

Mr. Johnson reported the culvert through the Pausch driveway needs to be done as this was a project from 2019 and Mr. Pausch has had to add gravel several times. The Managers directed Ms. Zentgraf to contact Mr. Dockter once more about a timeline for the projects and to advise him that if the projects are not done within the next two weeks the Managers would reassign the work to another contractor and remove Comstock Construction from their approved contractor list.

- Proj #4(33)  
Site #484: SWCR NW1/4 Section 13, Ibsen Township- 28 inch x 44 foot cmp rusted out.

A motion was made by Mgr. Fahsholz and seconded by Mgr. Moffet authorizing Interstate Engineering to prepare a hydraulic report for Site #484. Upon roll call vote, the motion carried unanimously. (RCWRD #20-023)

●Proj #19- The Board further considered Stuart Gunness' request to have Proj #19 cleaned, as this application was deferred at the September 15, 2020 board meeting. The Managers considered hiring Kummer Construction for this cleanout. Mr. Kummer has not had any contact with the District since 2013. Board consensus was for Mr. Johnson to contact Mike Kummer to gauge his interest in working for the District. If interested, Mr. Kummer will need to submit his contractor's license, certificate of insurance, and W-9 to the District before any work will be assigned. No action was taken pending contact with Mr. Kummer. (Gunness #20-052)

●Proj #95- The Board next discussed an application for the Drain #95 assessment district. Under Application #20-054, Andrew Braaten and Craig David requested the District clean Proj #95 in the N1/2 Section 26, Homestead Township.

Before the Board proceeded with any substantive discussion regarding this application, Mgr. Fahsholz indicated he may have a conflict in light of land he farms within the Drain #95 assessment district. More specifically, Mgr. Fahsholz farms the NW1/4 Section 35, Antelope Township.

Mgr. Moffet indicated he may have a conflict in light of property he owns and his family owns or farms within the Drain #95 assessment district in Sections 20, 29, 32, and 33, all in Antelope Township.

The Board's attorney, Sean Fredricks, previously indicated the Board is required by law to conduct a conflict analysis in these 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. Fahsholz's potential conflict, the question is whether or not the property he farms in the Drain #95 district creates a conflict and with regard to Mgr. Moffet's potential conflict, the question is whether or not the property he owns and his family owns and farms in the Drain #95 district 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. The cleanout will not have any impact directly on property Mgr. Fahsholz farms, or

on property Mgr. Moffet owns, or on property the Moffet family owns or farms. However, Mr. Fredricks previously indicated 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.

However, the existence of a technical conflict does not conclude the conflict analysis. The Board must next decide if the conflict should preclude Mgr. Fahsholz and Mgr. Moffet from participating in this matter or votes regarding this application.

The cleanout will not result in new assessments to property Mgr. Fahsholz farms, or property Mgr. Moffet owns, or property the Moffet family owns or farms; the Board would fund the cleanout with the Drain #95 maintenance district, and the maintenance levy for Drain #95 will not vary depending upon this project. Further, Mgr. Fahsholz and Mgr. Moffet have more personal knowledge of the area, more familiarity with the issues with Drain #95, and an understanding of the benefits the cleanout may provide to the various properties in the Drain #95 assessment district. In light of Mgr. Fahsholz's knowledge and Mgr. Moffet's knowledge of the watershed, Mgr. Burvee moved to declare that Mgr. Fahsholz and Mgr. Moffet do have a conflict in the matter under Section 44-04-22, but to require Mgr. Fahsholz and Mgr. Moffet to participate in discussions regarding this application, and to vote on the application. Mgr. Haugen seconded the motion. Upon roll call vote, the following Managers voted in favor of the motion: Burvee, Haugen, and Friskop. Managers Fahsholz and Moffet abstained from voting. The motion passed.

With the conflict issues concluded, the Board proceeded with discussion regarding the application.

Mr. Johnson explained the request for cleaning is in Proj #95 located along the north side and east side of Section 26, Homestead Township. Mr. Johnson recommended an engineer set stakes in the NECR NE1/4, as there are no culvert elevations to reference in that location.

A motion was made by Mgr. Fahsholz and seconded by Mgr. Haugen to assign the cleanout to JBX; Interstate Engineering to provide the necessary staking. Upon roll call vote, the motion carried unanimously.

### **Snagging and Clearing**

Discussion was held about snagging and clearing projects on the Wild Rice and Sheyenne rivers for this fall and/or winter. Board consensus was for the Office to contact American Enterprises to solicit bids for both rivers.

### **Adjournment**

There being no further business to come before the Board, Chr. Friskop adjourned the meeting at 10:30 AM.

Respectfully submitted,

*Monica Zentgraf*  
Monica Zentgraf  
Secretary

*Gary Friskop*  
Gary Friskop  
Chairman of the Board