

BUFFALO-RED RIVER WATERSHED DISTRICT

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PROJECT NO. 77, CLAY COUNTY DITCH NO. 51-LATERAL 3 MINUTES FOR PRELIMINARY HEARING January 5, 2015

Pursuant to Minnesota Statutes Annotated (M.S.A.) 103E.261, and other applicable statutes, the Board of Managers, Buffalo-Red River Watershed District (BRRWD), held the Preliminary Hearing for the development of Lateral No. 3 to Clay County Ditch (C.D.) No. 51 on Monday, January 5, 2015, at 7:00 PM in the Moorhead City Hall Council Chambers. BRRWD Managers present were: Peter V. Fjestad, Catherine L. Affield, Breanna L. Kobiela, Mark T. Anderson, John E. Hanson, and Gerald L. Van Amburg. Other attending included: Bruce E. Albright and Erik S. Jones, Houston Engineering, Inc. (HEI); Tami L. Norgard, Attorney, Vogel Law Firm; Paul Kegel, Valley R/C Flyers; Zenas Baer, Attorney for Robert Norby; Roger Minch, Attorney, and representing the petitioners; Wayne Brendemuhl, Warren Brendemuhl, Duane Brendemuhl, Curt Brendemuhl, Trevor Sorby, Gary Grugel and Harlan Sauter.

BRRWD Chairman Gerald L. Van Amburg called the hearing to order at 7:00 PM. After introductions, he turned the hearing over to Bruce E. Albright, Administrator, BRRWD, for a project overview. Albright began by stating that the Watershed Board is here in accordance with Minnesota Drainage Law to hold a preliminary hearing regarding a drainage petition we received in August 2014 for a new lateral to Clay C.D. No. 51. Drainage law states that once a petition and bond are filed, we then ask for our attorney's review of both documents. Tami L. Norgard, Vogel Law Firm, did that review and provided an email stating she found the petition to be adequate. She did question the bond, because she hadn't seen it. It was verified that there was a \$10,000 bond (cash) filed with the initial petition. Once that determination was made, the next step was to appoint an engineer to complete the preliminary survey report (M.S.A. 103E.245). Erik S. Jones, HEI, was assigned that task. His report in that regard is on our website (www.brrwd.org), dated 11/12/14 and is titled Establishment of Clay C.D. No. 51-Lateral 3, Project No. 77. Those who have asked for a copy were sent one. Once his report was filed, he then by law has to file that with a couple of agencies for their advisory comments. We did not receive any comments from the Minnesota Department of Natural Resources (DNR). The Minnesota Board of Soil and Water Resources (BWSR) did comment, and their report is on file. They had 30 days to file their advisory comments regarding the preliminary report. The Statute then says the Board needs to hold a Preliminary Hearing, which is the purpose of tonight's hearing. According to Statute, at tonight's hearing, the engineer shall attend and provide the necessary information from his preliminary report. The petitioners and all other interested parties may appear and be heard. Notice of tonight's preliminary hearing was mailed to everyone who is currently a benefitted landowner on the existing Clay C.D. No. 51 system.

Albright explained that one of the first things that would be examined tonight at the hearing was audience questions about the petition and whether or not it meets the legal requirements. The Board would take testimony on that. Jones will present his preliminary report. As indicated, the hearing would be opened to any and all interested parties for their comments. Following tonight's proceeding, the Watershed Board will be charged in accordance with Minnesota Drainage Law, M.S.A. 103E.261, to basically do one of two things: Subd. 4 says that they shall dismiss the

proceedings if they determine that the proposed project is not feasible, the adverse environment impacts are greater than the public's benefits, the proposed drainage project is not of public benefit or utility, or if the outlet is not adequate. If they find any one of those four things, they could make an order dismissing this proceeding. If those conditions do not exist, then the next step would be to create the findings and order (Subd. 5) to continue the project development. Those findings and order would indicate that the proposed drainage project outlined in the petition and recommended by the engineer is feasible, that there's a necessity for the project, that the project will be of public benefit and promote the public health, and the outlet is adequate. Dismissed means it's done. If we continue on with it, the next step would be that the BRRWD would authorize the engineer to do the detailed survey report, (M.S.A. 103E.285), which would provide more information than the preliminary report Jones will present this evening and could incorporate any changes or modifications that the petitioners agree upon at tonight's hearing. Then, we would get into the assessment of benefits and damages. Once Jones files his detailed report, three Viewers (as they are called in Minnesota Drainage Law) would be appointed (M.S.A. 103E.305). The statutory requirement would be that they cannot have an interest in the project. They would complete their viewing and determine the project benefits and damages. After that report is filed with the Board, the final hearing would be held (M.S.A. 103E.325). Albright observed that some of the people at tonight's hearing were probably at the 2012 preliminary hearing for the initial project (Project No. 74). That project also went through the preliminary hearing. An order was made to continue its development. That order was contested in court and that issue was eventually resolved. The detailed survey report did get done. The Viewers were appointed. The petitioner in accordance with Drainage Law decided to dismiss that petition, which he has the right to in accordance with Statute (M.S.A. 103E.231). So that petition was dismissed on August 25, 2014, and on August 26, 2014, Minch filed a new petition to start the proceeding over, with some slight modifications.

Albright passed around a sign-up sheet to record attendance at tonight's hearing, and asked attendees to legibly write their name on the tablet so we have a record of who was here. He explained that we were recording tonight's proceedings so that office staff can prepare minutes of the proceedings for the file. For the Board's benefit, Albright asked that the landowners state their name for the record, when asking questions or providing comments.

Chair Van Amburg asked if there were any questions about this proceeding. No questions were noted.

Erik S. Jones, HEI, presented the engineer's report. Using an overhead projector, he began by describing the area in question. The petitioned project starts in Section 33, Kragnes Township. It would run straight north through Section 28 to County Road (C.R.) No. 99. Then it would go along the railroad tracks, through an existing trestle bridge, and then back south to an existing culvert that goes under Trunk Highway (T.H.) No. 75 on the north side of C.R. No. 99. Then it would go east over to C.D. No. 51, which runs north-south along the east line of Section 21, Kragnes Township. The dashed line on the map has been delineated as a drainage area for the proposed Lateral No. 3 to Clay C.D. No. 51. It's about 0.9 of a square mile or 560 acres. It would include land in Section 33, east of where there is a ridge. The land to the east of the ridge in Section 28 would also drain to the proposed lateral and eventually to C.D. No. 51, draining easterly along 110th AVE N.

The next two sheets were the plan and profile drawings. They show a bird's eye view of the project. The squares on the bottom show the profile of the channel, so basically it shows the elevation along the proposed ditch system. Jones began his review at the upstream end of the proposed ditch and worked his way downstream. The first location is at 100th AVE N, or the north

line of Section 33. Right now, there is no pipe through the road. The plan proposes that a 24 inch diameter corrugated metal pipe (CMP) be inserted in that location to drain the low area to the south of the road. Going north, the proposed ditch grade line from there is at a 0.1% slope. The proposed ditch has a 6 foot bottom width with 4:1 side slopes. Through Section 28, the proposed ditch varies in depth from 1.5 to 3 feet. Each one of the dots on the profile view is 0.5 feet. At the north end of Section 28, the engineer is proposing a 57 inch wide by 38 inch high corrugated metal arch pipe (CMP-A). That culvert would be set down lower (about one foot) than what the existing pipes currently are through C.R. No. 99. Once we go through C.R. No. 99, the water would go east along the north side of the road and then north along the west side of the railroad tracks through the existing trestle in the railroad tracks and then back southeast to the existing 60 inch diameter centerline pipe through T.H. No. 75. The ditch then would continue east along the north side of the road. The north side of the road has an existing ditch, and the project would be to do a ditch clean out so only the very bottom of the ditch would be excavated. Generally, the cuts in this area are less than one foot through most of that stretch. The last structure on the proposed lateral is a 60 inch diameter cmp. That pipe needs to be set down a little lower to get in on the proposed grade line. The lateral would match in at the bottom of the existing C.D. system at that location. For reference, the two pipes going north on C.D. No. 51 are both 66 inch arch equivalents, or 73 inches wide by 55 inches tall. The CMP-As would have a combined 46 square feet (sq. ft.) of waterway opening. The 60 inch diameter CMP at the outlet of the proposed lateral would have a waterway opening of 19.64 sq. ft. Further upstream on C.D. No. 51, there is a single line of 60 inch diameter CMP before the outlet of the proposed lateral. State law requires that we install buffers along new county ditch systems. A legal drain has to have a one rod or 16.5 foot wide buffer strip on it. Right-of-way (R/W) along the ditch varies, anywhere from 76 feet wide through Section 28. Along the north side of C.R. No. 99, we have 33 feet of existing road R/W, plus we need an additional 34 feet, so we are at 76 feet there as well. In total, the proposed lateral has 1.7 acres of R/W along C.R. No. 99, needing an additional 11.4 acres of permanent R/W (ditches/buffers) and 14.7 acres of temporary R/W that will be used for ditch construction.

Manager Anderson asked if the existing Clay C.D. No. 51 system has the required one rod buffers. Albright answered that no, not on the entire ditch. A part of the main ditch in Section 28 was improved in Section 28 a number of years ago, so that segment does not have a grassed buffer.

Jones continued by giving the cost estimate (Exhibit C). Excavation would be about 8,000 yards of excavation at \$4.00/yard or \$32,000.00. There is 12,300 yards of stripping at \$24,600.00. A lot of stripping is necessary because the proposed ditch is so shallow. The project needs 40 cubic yards (c.y.) of rip rap at \$90.00/yard, for \$3,600.00. The proposed 57" x 38" of CMP-A on the north end of Section 28 is estimated to cost \$110.00/foot, or \$6,600.00. The 50 feet of 24 inch diameter culvert through 100th AVE N is estimated to cost \$50.00/foot, or \$2,500.00. To salvage and relay the 60 inch diameter CMP at the outlet of the proposed lateral is estimated to cost \$70.00/foot, or \$3,360.00. Seeding and mulching of ten acres of permanent R/W was estimated at \$1,000.00/acre, or \$10,000.00. Twenty feet of erosion control bio roll is estimated at \$5.00/foot, or \$100.00. For construction, the total is at \$82,760.00. A 10% contingency, or \$8,276, is used to cover anything that might come up during project construction. Legal and administrative costs are estimated at \$3,000.00. The 11.4 acres of permanent R/W was estimated at \$5,000.00/acre, or \$39,900.00. The 14.7 acres of temporary R/W was estimated at \$250.00/acre, or \$3,675.00. The total project cost estimate is \$157,611.00.

Albright noted that Jones set the values shown on his preliminary cost estimate for R/W. Those amounts actually get set by the Viewers (damages) should this project get to that stage.

Duane Brendemuhl asked how wide the ditch would be through Section 28 once you add the buffer strips. Jones answered 76 feet. The ditch itself is about 40 feet wide. Again, it has a 6-foot wide bottom width and 4-to-1 slide slopes. Jones went on to explain that the ditch is designed to handle a two-year flood event. It's not a big channel. It would have the capacity to carry a little over 0.5 inch of runoff per day. The five-year storm event is a little over three inches. Duane Brendemuhl then asked what Jones planned for access to the ditch/berms from the field to adjoining fields. Jones stated that he would have to take a look to determine if a ditch crossing is needed in this area.

Wayne Brendemuhl asked what size outlet is currently on the proposed lateral, and Jones replied that it was a 60 inch diameter pipe. So they both confirmed that the size of the pipe was not changing, it is just being lowered. Jones added that there is almost no grade on the north end of Section 28, so the pipe would be dropping less than one foot at that location to increase the proposed lateral grade. Jones added that we may have to extend the culvert a little if it is used as a field access. Wayne Brendemuhl asked if there was a berm on each side of the ditch. Jones confirmed that there would be a berm because the proposed lateral is not very deep. There will not be a lot of material coming out of the excavation, which needs to be leveled/wasted into the berm areas. Brendemuhl suggested that they spread out the spoil. Jones replied that he did not want to move it too far, because the proposed ditch is pretty shallow, and will not have that much dirt to waste.

Chair Van Amburg asked if there were any other questions.

Duane Brendemuhl inquired as to how the proposed benefit areas will be determined. Jones stated that all he did for the drainage area was to look at the LiDAR that was created by the International Water Institute (IWI). Basically it is an aerial survey where they shoot laser beams at the ground; it has plus or minus six inch accuracy. Typically, out in an open area such as a field, it has about two inch accuracy. Jones used that information to delineate the project's watershed. However, the Viewers will ultimately determine who they feel benefits from the project.

Gary Grugel asked if the ditch was going to run right through the Norby dike. Jones answered yes, it will go through that dike near the east-west quarter line and on the north end of Section 28.

Zenas Baer stated that he had some questions and a statement that he would like to make. Chair Van Amburg stated that he should ask his questions at this time. Baer began by stating that there was no discussion in Jones' preliminary report as to the existing conditions, that is, the culverts that are currently providing an outlet for the water that flowed off of Minch's property in the S1/2 of Section 28. He asked why Jones did not consider the existing conditions and why he did not analyze for the Board what the existing culvert structures looked like and what the grade would be to those culverts. Jones said that he had not intentionally left that information out of his report. Baer replied by questioning if Jones thought the Board should know what the culvert structures are like that currently provides drainage for the Minch property before they are asked to approve a \$150,000 project that may provide less drainage than what is existing there, if the existing system was only cleaned. Jones replied by detailing the existing drainage. He stated that there is currently a dike that sits on the east-west quarter line in Section 28. The ditch ties into the railroad embankment. The drainage from the S1/2 of Section 28 comes up to that dike and then goes east and then to the north. It flows through two 30 inch diameter culverts through the railroad embankment and then between T.H. No. 75 and the railroad tracks, north up to C.R. No. 99. There's a 36 inch diameter culvert through C.R. No. 99, and from that point, the water would follow

the same route as the proposed lateral. Baer asked Jones what the existing ditches grades were. Jones replied that this segment has about a 0.05% grade. From the 36 inch diameter culvert in C.R. No. 99 back to the two 30 inch diameter culverts going through the railroad grade, there was about a 0.05% grade. That's what shows up on the Minnesota Department of Transportation (MNDOT) plans. Baer asked if that was the grade prior to the 1950 T.H. No. 75 reconstruction. Jones stated that he didn't know if it was the 1950 grade, but it is what shows up on the MNDOT plans for the reconstruction. T.H. No. 75 used to run on the other side of the railroad tracks in this area. The drainage that you can get going this way (between T.H. No. 75 and the railroad grade) isn't as good as what the proposed lateral could provide. Jones reiterated that he has done the existing condition analysis. Baer asked if he shared his findings with the Board. He asked if Jones allowed the Board to see that analysis. Jones stated that he has spoken about it with the Board at different times over the last few years. Van Amburg added that the Board is pretty familiar with this whole area. Baer added that the Board has a lot of new members and he would doubt that they are all familiar with the existing drainage patterns.

Manager Fjestad asked when the dike was constructed by Norby and why. Baer answered that the dike was installed in the 1950's by Robert Norby's father and the previous property owner of the Minch property, a Mr. Fosse. They did that as a private drainage control project to allow the S1/2 of Section 28 to drain over to the highway ditch and then north. According to all of the past testimony, it worked fine up until about the year 2000 or 2001, and then it came into disrepair and Minch has failed to properly maintain it.

Jones added that currently, there is a 30 inch diameter culvert on the north end of Norby's dike with a slide gate on it. A Board Member asked if that culvert basically drains what's inside the dike. Jones replied yes. Baer added that the gate is for backup control from Clay C.D. No. 51, to prevent flooding of Norby's property. Brendemuhl added that Clay C.D. No. 51 does back up to that point. When Clay C.D. No. 51 is full, it'll flow backwards into Section 28, until it drops, then it'll drain out. Jones added that there is basically very little elevation difference between the north end of Section 28 and the bottom of Clay C.D. No. 51. Baer replied that according to Jones' drawings, it is at least one foot. Jones agreed, from the proposed alignment. Baer asked Van Amburg and Jones if the reason that the report did not include repair of the current drainage as a solution for solving the area drainage problems, was because of the agreement that the Board reached with Mr. Minch in the federal lawsuit that said he has complete control over what project is considered by the Board. Van Amburg stated that he would refute that characterization, and didn't think that was the case.

Baer then asked whether or not Jones took orders from Minch on what to consider and what not to consider in describing the available drainage from that property and for the alternatives. Jones stated that no, he didn't intentionally omit the existing drainage patterns.

Albright stated that the Statute 103E.245 gives us some guidance in this regard. Subd. 2 talks about the limitations of the preliminary survey conducted by the engineer. It states the engineer shall restrict the preliminary survey to the drainage area described in the petition. It is not the engineer's job to say "I'm going to look at options B, C, D, or E". He is looking at the petition in accordance with the Statute. In this particular case, the petitioner, Roger Minch, asked for a project to construct a lateral beginning and ending at a certain points. The survey report is limited to what is described in the petition.

Baer felt that Jones' report makes a mockery out of the language of the Statute that says you have to determine its necessity and its feasibility. If there's a perfectly good drainage system in place that

only needs a cleanout, it isn't necessary to build this \$150,000 project. Baer disagreed with Albright's interpretation of the Statute. Baer felt the very fact of this petition being filed was because of a settlement of a federal lawsuit. The lawsuit states that this proposed project is a stipulation for entry of stay of the proceedings in federal district court, which is court file number 11-CB-03. The terms say: The parties to the lawsuit are the Minch Family Limited Liability Partnership v. BRRWD, plus all of the individual Managers, or five of the individual members, which now have subsequently been dismissed. The stipulation says that either party may notify the court and request a formal dismissal with prejudice upon completion of all of the following: 1) Upon BRRWD's final order pursuant to Minnesota Statutes 10E.341 granting the petition in the form proposed by the plaintiff or amended with plaintiff's consent, alone or jointly. 2) Upon the expiration of the time for any person to appeal from the proceedings. 3) Upon the final dismissal of any and all appeals relating to the establishment of the project, condemnation matters, benefit assessments, or any other project-related litigation. 4) Upon BRRWD sending a letter to plaintiff notifying him that the project approval is final, and that BRRWD is committed to the project being built as approved. Baer clarified that when he said that he thinks this is being driven by a settlement in a federal lawsuit, it is precisely the condition upon which the lawsuit will be dismissed is only after BRRWD grants Mr. Minch, the petitioning party, the relief he is seeking. And that relief is to put this big \$150,000 drain through Norby's modest-sized field, with little drainage, as it insists, even by the engineer's admission, when there is in existence drain pipe that has served that same property properly for drainage since the 1950s.

Norgard stated that Baer probably accurately read some of the language of the lawsuit, but he left out a few very important terms. First of all, there has been no settlement of the current federal lawsuit. The Minch family brought a federal lawsuit, which was dismissed. They brought another federal lawsuit, and we filed a motion to dismiss saying that it had already been tried and answered. We've been through various state and federal courts for these same things, so we moved to dismiss. During the mediation that followed, the Minch family and their attorney suggested that we stay this federal case, to allow Minch time to bring forth a petition. The Board stated that Minch could bring a petition forward, with or without the lawsuit. Norgard emphasized that the agreement was to stay the federal lawsuit, not settle it. There's no settlement, it's still pending. The Board said that Minch was welcome to bring a petition forward, and the Board would consider it just like they would consider any other petition. So, there's no agreement that the Board has to approve this project. Norgard clarified her statement by reiterating that the Board has only agreed to consider the project, just like any other project.

Norgard also mentioned that Jones has done the survey work to examine what would happen if Minch cleaned the existing ditch. It was determined that the ditch could be cleaned out to some extent, but that it would not provide the same level of relief as the proposed lateral project, so there would still be water on Minch's Section 28 property. Norgard said she just wanted to make it clear for the record that the existing drainage has been looked at previously.

Duane Brendemuhl asked Jones what condition the existing ditch is in. He then added that he thought the ditch was in disrepair, and there isn't much of a ditch there. Gary Grugel asked how long it was going to be before they abandon the railroad tracks. He wanted to know if anyone has checked into that.

Jones answered that he has inquired about the status of the railroad tracks with the Burlington Northern Santa Fe (BSNF) railway, and they haven't set a timeline to abandon it. As a matter of fact, in 2014, they put in a new culvert further north on Clay C.D. No. 28. Grugel responded that he

thought it was around 130th AVE. Jones stated that BNSF lowered and installed a new pipe underneath the railroad tracks there late last fall.

Manager Anderson asked if the existing ditch was in the railroad R/W. Jones said that the ditch runs right next to the tracks, on the west side. He suspected that it would be in the railroad R/W, which is 75 feet in this area. Jones added that last time we had a preliminary hearing, one of the comments we received from MNDOT was that they were opposed to having a ditch in the highway R/W.

Zenas Baer announced that he was there to represent Bob Norby, who was unable to be present this evening. Baer had five copies of materials to leave with the Board. He stated that Norby opposes this project for various reasons which are articulated in their filings, but first and foremost is the issue of the existing conditions. He believes that the engineering report conducted by HEI does not include an accurate description of the existing conditions, and he believes that it should. Baer had an extended testimony which included findings from a Moore Engineering study, which detailed the drainage for Section 28. This study is included in the material that he handed out. He does not believe the Board should make a decision on the matter without having a detailed summary of the existing conditions. He also believes that this project has no public benefit. Baer referred to the landowner to the south of the project, Mr. Sauter, and asked him if he signed the petition. Sauter stated no, and that he didn't intend to because the last time he signed a petition with Minch's father, A.R. Minch, it turned out to be a disaster for him, so he's not going to sign anything now. Baer concluded by stating that he would like the Board to reject the petition, finding that it is not necessary, feasible, or practical.

Chair Van Amburg thanked Baer for his comments. He added that this Board has never rubber stamped anything, to his knowledge. They ask a lot of questions and look at things very closely before any decisions are made. That will be the case in this matter as well. Albright may have helped with the wording on the petition, but that's not unusual. The Board will take Baer's comments under consideration and look at the material that he has given us.

Norgard noted that one of Baer's main concerns was that there was no survey of existing conditions. She asked if it would address his concern if HEI's past survey was added to the record, after tonight's hearing. Baer said that he has not seen the survey and if it was added after the fact, he would not have an opportunity to address the Board regarding those findings.

Duane Brendemuhl stated that he is a neighbor and friend of Robert Norby. He farms this piece of property in Section 28 along with his brother. He felt that the project was too expensive and that the neighboring landowners would have to pay over 60 percent of the cost of the project. He suggested another way to solve the conflict. He said that Norby proposed the idea to trade his property in the NE corner of Section 28, west of the BNSF tracks and T.H. No. 75, which is where this ditch would be located, for the same number of tillable acres on Minch's property in the S1/2 of Section 28. Stipulations would be that the property traded would be on a contiguous piece with the west and east borders to be straight north-south lines and that the property must not be landlocked. He also added that if anyone wants to view the area, he'd personally take them there and show them.

Van Amburg stated that this is an interesting concept, but it is not anything the Board can act on. He then asked if there were any more questions or comments.

Minch stated that he wanted to make a statement, as soon as everyone else was done. He handed out booklets to each of the Managers. He then gave extended testimony explaining that he believes he is following the rules and doing the proper thing by submitting a petition. He had several examples of Mr. Norby not following the rules and bullying him and others. He believes the Board should draw their decision from the engineers report. He believes this project will not only benefit himself, but Norby and neighboring landowners.

Van Amburg thanked both parties for their comments and asked if anyone else had questions. He noted that the Board will need to discuss the testimony and act on the petition at an upcoming meeting.

Albright stated that we've heard a lot of information tonight from both sides. He urged the Board members to take the handout materials home and review them. He reminded them that they can dismiss the petition according to the four statutory requirements previously listed, or they can make a findings and order which will continue the project development process, including a final engineer's report, a determination of benefits by the Viewers to decide whether or not the project benefits exceed the proposed project costs, and a final hearing. He explained that the Board's decision to dismiss or go forward with project development, as Minch indicated, is not appealable. It is a Board action to decide to go ahead with the proposed project development process or dismiss it. If the petition process moves forward to a final hearing, the Board action on the fate of this project following that hearing is subject to appeal by anyone who is dissatisfied with the BRRWD's decision.

Baer added that he did not bring enough handouts for everyone. He will deliver extra copies of the materials to the office for distribution at the upcoming 01/12/15 BRRWD meeting.

Chair Van Amburg adjourned the hearing at 9:47 PM.

Respectfully submitted,

Bruce E. Albright, Office Administrator