

BUFFALO-RED RIVER WATERSHED DISTRICT

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MINUTES FOR MANAGERS' MEETING

June 24, 2019

The Board of Managers, Buffalo-Red River Watershed District (BRRWD), held a regular meeting on Monday, June 24, 2019, at 7:00 PM in the Barnesville office. BRRWD Managers present were Jay A. Leitch, Mark T. Anderson, John E. Hanson, Catherine L. Affield, Peter V. Fjestad, Troy E. Larson, and Gerald L. Van Amburg. BRRWD staff attending included: Bruce E. Albright, Administrator, Kathleen K. Fenger, Assistant Administrator, and Erik S. Jones, Engineer, Houston Engineering, Inc. (HEI); Lyle Hovland, Wilkin County Commissioner/Richland Wilkin Joint Powers Authority (JPA); Kevin Campbell and Grant Weyland, Clay County Commissioners/Fargo-Moorhead Diversion Authority (FM DA); Jim Haney and Frank Gross, Clay County Commissioners; Mary Scherling, Cass County Commissioner/FM DA; Don Nelson and Matt Ness, Directors, MNDAK Upstream Coalition; Robert Zimmerman, Engineer, City of Moorhead; Gregg Thielman, Engineer, Houston-Moore Group, LLC (HMG); Eric Dodds, Engineer, Advanced Engineer and Environmental Services (AE2S); and others: Jay Nord, Curt Bjertness, Stephen Larson, Barry Amundson, Joshua Erickson, Jan Ness, Larry Ness, Judy Ness, Morgan Nelson, Michael Nelson, Micki Spanier, Jeremy Spanier, Hugh Trowbridge, Gary Nelson, John Ready, Stephanie Miranowski, Martin Nicholson, Duane Nelson, Bradley Nelson, Don Cossette, Jim Thoreson, Kevin Askegaard, and Chuck Anderson.

BRRWD President Leitch called the meeting to order at 7:00 PM and announced that the proceedings were being video recorded to aid in the preparation of the minutes.

Agenda. President Leitch asked for comments or additions to the meeting agenda. There being none, the agenda was adopted.

Secretary's Report. The Board reviewed draft minutes for the 6/10/19 Board meeting. **Motion** by Manager Affield to approve the minutes. **Seconded** by Manager Fjestad. **Approved.**

Treasurer's Report. The Board reviewed the BRRWD's financial status. Cash on hand is \$2,418,919.00. Total income since the 6/10/19 meeting was \$110,943.34, including \$4,185.00 from Audubon Township for 50% of the cost of culvert replacements on Project No. 23, Becker County Ditch (C.D.) No. 15 and \$106,758.34 from Becker County for current 2019 property/ditch tax proceeds. Harold Rotunda will be presenting the 2018 audit at 9:00 PM.

Citizens to Be Heard.

Marcus Larson, Hickson, ND; Don Nelson, MNDAK Upstream Coalition; Jay Nord, landowner; and Duane Nelson, Wolverton City Council, provided comments on the negative Minnesota impacts of the FM Diversion project, benefit cost ratio issues, impacts from the dam structures, the long-term consequences to future BRRWD Rules/permitting enforcement, the BRRWD's draft permit conditions, and various other concerns about the proposed project already documented in previous meeting minutes.

Other Business brought before the Board included:

Permit No. 19-003, FM DA Diversion. Bruce E. Albright, BRRWD Administrator, provided a brief history of the Diversion permit application process. According to Rule 15.99, the Board has 60 days to make a decision on permit applications. The DA gave the Board an extension until 6/28/19 (Friday) to continue their

review, but the Board agreed to make a decision at tonight's meeting. The Board wanted to take some time prior to the vote to discuss the process with BRRWD Attorney Brent Edison. **Motion** by Fjestad for the Board to go into Executive Session to discuss Permit No. 19-003 with our legal counsel. **Seconded** by Manager Van Amburg. **Approved.** The Board recessed the meeting at 7:20 PM and reconvened at 7:40 PM.

Van Amburg **moved** to approve Permit No. 19-003, subject to the proposed conditions, **seconded** by Leitch. Van Amburg encouraged the Board to discuss the proposed draft permit conditions. He felt that with the addition of the permit conditions, the Board has gone as far as we can within the constraints of our Rules to address landowner concerns.

Using the overhead monitors, the permit conditions were displayed, and the group reviewed and discussed each item. The Board approved an amendment to Condition No. 1, and the audience had questions regarding Condition No. 3:

Condition No. 1, Additional Flood Mitigation.

- **Motion** by Van Amburg to add an amendment to Condition No. 1 to include language that the beneficiary of the project would pay for the Operation and Maintenance (O&M) of the flood protection for the Cities of Comstock and Wolverton with the BRRWD technical assistance discussed in the condition. **Seconded** by Fjestad. **Approved.** Manager Anderson abstained on advice from the BRRWD's legal counsel regarding a potential conflict of interest.

Condition No. 3, Property Rights.

- The group reviewed a drawing showing where the operating pool will impact communities/property on the Minnesota side of the Red River, the extent of the Red River flooding during various highwater events, and the pool elevation at the dam, projected upstream to the south. The 100-year event pool would reach just north of Kent and the Probable Maximum Flood (PMF) would be at Kent. Leitch explained that the DA has agreed that property south of the Clay County line would not be demolished, and the DA will work with the Minnesota Department of Natural Resources (DNR) and the landowners to floodproof their property. Leitch noted that this agreement was the greatest concession that the BRRWD got from the DA after six months of negotiations.
- Jeremy Spanier asked if his property would be in the mandatory buyout area with these new concessions. Albright explained that in the document, *Mitigation Flexibility for Structures Upstream of Southern Embankment*, dated June 10, 2019, the mitigation process/landowner options are explained, based on proximity to the Operating Pool and Maximum (PMF) Pool elevations. With floodproofing, Spanier could stay on his farmstead. Spanier pointed out that he doesn't want a ringdike, and without the Diversion project, his property doesn't need a ringdike because his property doesn't flood.
- In response to questions about flooding land that previously never flooded, Leitch explained that the BRRWD's Rules allow projects that affect adjacent land if the permittee provides adequate mitigation, which includes buyouts, damage payments, floodproofing, etc., including a provision for the use of eminent domain to acquire properties.

Leitch asked if any of the Managers had questions or changes to the draft Conditions. Albright commented that the Managers have spent considerable time and effort on the Rules document, and Eric Dodds, AE2S, presented the Mitigation Flexibility document at the 6/10/19 Board meeting.

Anderson asked what the consequences would be if the DA doesn't adhere to the conditions placed on their permit. Leitch explained that if the conditions are not met, there is no permit.

Manager Affield read a statement into the record. She stated that the BRRWD has taken great measures to let our process work according to our Rules. We have reviewed the permit, contested the DNR permit to gather more information, and participated in meetings with the DNR, Army Corps of Engineers (COE), and the DA to work through the process. How this project has been developed is not how we do business in the Watershed. We line things up in proper order before the project is started. We start with a project plan, which is a working document that changes as needed. It's not the best practice to get stuck if something doesn't make sense. We work with our landowners, line up permits and funding before the project is started. She also looked to the future to consider how the Watershed's decisions and actions to the Diversion project and permit might look to those who have the advantage of 20/20 hindsight in the future. She hoped that following our Rules and working through the contest and permit/conditions process would be viewed as the right thing to do. She also wondered how the future will view the exorbitant amount of money spent on a project that may or may not be used except for once in 100 years. How will developing in a floodplain for economic reasons be viewed in the future. Will the members of the Diversion Authority look like visionaries or will those in the future say, "What were you thinking?" How will the taxpayers view this project when they are on the hook for paying for it on both sides of the river. The needed funding has not been appropriated for this project yet, and there has been a lot of money spent. We know that flood protection is needed for Fargo, as well as several other communities in the Red River Valley, along with the individual who will be put in harm's way with the Diversion project, or who already experience flooding. All the work that has been done in Moorhead and Fargo is a great common sense start, so now is a Diversion project with a huge price tag really needed, or the more common sense approach. Looking way into the future, is limiting the ability to grow for the future of Fargo by putting in a dam make the most sense, or should the plan be to let the water run where it has historically and manage it accordingly and simply develop on higher ground.

Leitch noted that the Board is not against flood protection for Fargo or Moorhead. He thought the current opposition is to Plan B, not flood protection. The DNR found that the benefit cost ratio (BCR) for the project was 0.5. According to his economic expertise, he thought it could even be less than that. However, he acknowledged that according to our Rules, we can't tell others how to spend their money. Leitch pointed out that federal funding for the project is not yet appropriated from Congress. The DA only has a commitment from the COE to ask Congress and the Office of Management and Budget (OMB) for funding. He also noted that instead of coming to the BRRWD to address project concerns, Clay County landowners should take up their issues with their County Commissioners, two of which are members of the DA. Leitch referenced the public comments the BRRWD has received for the past several months are nearly 5 to 1 against approving the Diversion permit. He explained that the Board must base their decision on the Rules, not on whether we support the project. Leitch added that based on the results of the permitting process, he is inclined to support permit approval.

Fjestad thought if the DNR and BRRWD conditions (64 total) are met, we can't expect much more from the permitting process. He observed that a former BRRWD Chairman (Roger Ellefson) questioned the wisdom of living downstream of a high hazard dam, which is how the Diversion dam is classified. He added that it has been reported that the COE has had 25 out of 26 dam projects fail in Nebraska, and he was also concerned that the project financing has not been secured. Leitch observed that while he agreed that Fjestad's concerns were valid, they were not within the scope of the BRRWD Rules.

Manager Larson commented that people may think he's against flood protection for Fargo because he lives in Wilkin County, but he was actively involved with the Fargo flood fights for every major flood since 1989. However, this permit requires that he make his own decision for the good of the citizens within the BRRWD.

Anderson agreed with Larson. He added that the BRRWD Attorney has advised him that he can't vote because of an appearance of a conflict of interest.

Van Amburg explained that the Board is aware of the landowners' concerns, but we are limited by the permit Rules. He acknowledged this permit review process was "painful" and that there are differing opinions about

what a flood control project for Fargo should look like. Leitch noted that the BRRWD has worked with the DNR and DA to relieve as much "pain" as possible for the affected landowners within the purview of our Rules.

Leitch called for a roll call vote on Van Amburg's motion to approve Permit No. 19-003, subject to the amended Conditions. The motion **failed** with Managers Hanson, Leitch, and Van Amburg voting in favor, Managers Affield, Fjestad, and Larson voting against, and Manager Anderson abstaining. The vote was tied. Albright noted that the DA has the right to resubmit a new permit application at any time.

The Board then took up the issue of the DNR permit contested case. Albright explained that the 60-day permit rule doesn't apply to the contested case, so the Managers are not under any pressure to make a decision regarding this issue tonight. If they were interested in taking action to withdraw from the contested case, a motion to withdraw would be needed. **Motion** by Van Amburg for the BRRWD to withdraw from the contested case proceeding. **Seconded** by Leitch.

Attorney Edison gave details regarding the contested case, involving three entities: the Cities of Comstock and Wolverton and the BRRWD. A pre-hearing conferenced is scheduled for July 2, 2019, before an Administrative Law Judge, who will address scheduling and the hearing process. Discussions with the DNR and the DA have resolved most of the BRRWD concerns. Eventually, there will be a hearing where the Administrative Law Judge will review evidence to make a recommended decision and proposed Order, which will go to the Commissioner of the DNR to decide to accept or not accept. The DNR will compile the record that will be the base of what can be reviewed by the Administrative Law Judge. The BRRWD and Cities will be able to supplement the record with exhibits, testimony, and witnesses. There will be a discovery period to pursue written question/depositions, etc. The Judge will look at the contested case within the context of two specific issues: 1.) Whether the proposed activity for which the DNR permit is requested (Plan B project construction) affects the municipalities of Comstock and Wolverton, and therefore, if the Cities have standing to challenge the permit issuance. 2.) Whether the permit applicant has proven that the proposed project is reasonable, practicable, and will adequately protect public safety and promote the public welfare. Attorney Edison explained that the Board will have to provide direction for their legal counsel on the objectives of the contest and the cost.

Van Amburg pointed out that this question is different from the previous permit application vote. The Board has met with the DNR regarding their Diversion permit approval and conditions several times, and he felt we got answers to our initial questions. Van Amburg said that the Board has to have good reasons to continue with the contest and to consider that the proceeding will cost the taxpayers a lot of money. He thought moving forward with the case wasn't prudent. Affield said that continuing with the contest was the best way to work through the entire process. Fjestad didn't think that the DNR has answered all of the questions regarding their permit approval process. He thought the BRRWD had to represent the interests of the Minnesota landowners affected by the Diversion project. Leitch was in favor of the motion because even though we didn't get all the answers from the DNR that we wanted, it appears that we've gotten as much as we can hope to get.

Leitch called for a roll call vote on Van Amburg's motion to withdraw from the DNR contested case. The motion **failed** with Manager Van Amburg voting in favor, Managers Larson, Fjestad, Affield, and Hanson voting against, and Manager Anderson abstaining. Attorney Edison will begin the preparation for the contested case. He will appear before the Judge on 7/2/19 on behalf of the BRRWD.

Leitch called for a five minute recess while the audience cleared the room at 7:42 PM. At 7:49 PM, the meeting reconvened.

At the end of the meeting, Attorney Edison advised the Board to consider a formal motion to deny Permit No. 19-003 for the record to avoid the argument that the failed tie vote to approve the permit did not constitute

a formal denial. He was concerned it could be argued the Board didn't actually act on the permit application by the 6/28/19 permit review deadline, according to the 60-day Rule. He thought it could be argued the lack of a formal denial could be used as a claim that the permit was actually approved by default, which could also strip the permit of the BRRWD's proposed permit conditions. After discussion, the Board agreed to affirm their earlier action to deny the Diversion permit application. **Motion** by Fjestad to deny Permit No. 19-003. **Seconded** by Hanson. Leitch called for a roll call vote. The motion **was approved** with Managers Hanson, Larson, Affield, and Fjestad voting in favor, Managers Leitch and Van Amburg voting against, and Manager Anderson abstaining. Albright noted that the DA can appeal this decision in accordance with Minnesota Watershed Law, or they could resubmit the application for reconsideration.

Permit No. 19-062, Superior Sales & Service LLC. Applicant proposes to install a new culvert on Lot 7 in the Gloryland Subdivision in Section 11, Hawley Township, Clay County. Jones conducted a field review last week. The adjacent culverts are all 18" dia., and he recommended that the new culvert match the existing structures. Jones found no problems with the proposal and recommended permit approval.

Permit No. 19-063, Wilkin County Highway Department. Applicant proposes to replace an existing reinforced concrete box culvert (RBC) in County Road (C.R.) No. 19 in the NW¼, Section 2, Foxhome Township, extended by a 42" x 58" corrugated metal arch pipe (CMP-A) extension with a 36" x 58.5" reinforced concrete arch pipe (RCP-A), according to Jones' recommendation. Jones recommended permit approval.

Permit No. 19-064, Frank Boone. Applicant filed an after-the-fact permit application for installing an 8' wide x 6' high bridge crossing over a tributary to Whisky Creek last year in the NW¼, Section 36, Barnesville Township, Clay County, on an existing minimum maintenance field road to access his newly constructed farm shop off 180th ST S. Boone also cleaned the waterway channel for a short distance, up and downstream of the bridge. He would like to install some small rocks inside the bridge and on the outlet and inlet ends to address possible erosion. Clay County Planning and Zoning reported the project to the BRRWD. Jones and Albright both recommended permit approval.

Permit No. 19-065, Audubon Township. Applicant proposes to remove a plugged culvert in 200th ST in the SE¼SE¼, Section 8, and install a new 12" dia. culvert in the south ditch through 190th AVE, and then clean the east ditch along 190th AVE to contain flows, eventually outletting to a natural waterway. Fjestad questioned installing a 12" dia. sized pipe, pointing out that the current pipe was already plugged. Albright recommended permit approval with a 15" dia. pipe.

Motion by Anderson to approve Permit Nos. 19-062 through 19-065, subject to the referenced disclaimers and conditions. **Seconded** by Fjestad. **Approved.**

2018 Audit. Harold J. Rotunda, CPA, presented the draft 2018 audit. He noted that he had a few formatting edits to complete before it is ready for Board approval, and Albright hasn't had a chance to review the final document. He discussed the BRRWD's management of our project assessment practices, project administration fees, and the M.S.A. 103D.905, Subd. 3, taxing authority. Rotunda pointed out that the staff's detailed accounting practices make it possible to show the public where their money is spent and helps the Board make financial decisions. Albright suggested that the Board review the draft audit so they can take action to approve it at our 7/8/19 meeting. **Motion** by Fjestad to postpone action on the Audit until the next meeting. **Seconded** by Anderson. **Action Postponed.**

Project No. 23, Becker C.D. No. 15-Branch 7 Repairs. Jones is working on finalizing his recommendations for a 220th ST structure replacement in Audubon Township and plans to have it ready for Board consideration at the 7/8/19 meeting. He noted that given the road profile allowing only 6' between the pipe inverts and the top of the road, two smaller structures should be considered. Hanson noted that several years ago, Becker County replaced some bridge culverts with concrete box culverts in Hamden Township in cooperation with

a state/county/local cost share program. He thought it might be useful to find out if there's a program like that still available.

Project No. 30, Clay/Wilkin Judicial Ditch (J.D.) No. 1-Branch 2. Jones explained that Branch 2 is a one-mile stretch of ditch through Section 12, Wolverton Township, outletting to J.D. No. 1. According to his report, last fall, there were discussions about a culvert that had been deliberately plugged between Sections 12 and 13, causing standing water in the south ditch of 120th ST, but has now been opened. A survey investigation and a field review were conducted, showing that Branch 2 should be repaired back to the historic 10' bottom gradeline and up to 12 side inlets could be installed through Section 12. The ditch centerline and the toe of the sideslopes have about 1' or more of sediment, which could be used to cover the proposed side inlets and build up the ditch berm. The estimated repair cost is \$25,000-\$30,000. Jones suggested that potentially 75% of the costs could be paid from the Clean Water Fund (CWF) grant funding for the Wolverton Creek project, since the side inlets would be an eligible project feature. Albright suggested that the survey could be forwarded to the adjacent landowners and the Wilkin County Highway Department to see if there was interest to improve area drainage. The Board agreed to postpone action on the proposed repair until we receive feedback from the affected parties.

Project No. 27, Clay C.D. No. 55. Jones reported that a survey of all the low spots along C.D. No. 55 has been completed. It appears that there will be enough spoil from the ditch cleanout to make the berm elevation more uniform along the ditch, especially near the farmsteads. Jones will bring final repair recommendations for the Board's review at the 7/8/19 meeting.

Wilkin-Otter Tail J.D. No. 2. The pre-construction meeting for the J.D. No. 2 repair was held on 6/17/19 with States Borders Construction, Inc. Jones presented contract documents for the Board's signature. He also submitted Change Order No.1 in response to the discovery of an existing tile outlet pipe, which increased the excavation quantities to shift the gradeline of the ditch north to allow the pipe to drain. Total pipe quantities and riprap quantities were reduced, creating an overall net increase of \$2,992.25 to the contract. **Motion** by Fjestad to authorize Leitch and Hanson to sign the J.D. No. 2 construction contract with States Borders Construction, Inc. **Seconded** by Anderson. **Approved.** **Motion** by Fjestad to approve Change Order No. 1, as discussed. **Seconded** by Larson. **Approved.**

Project No. 79, Wolverton Creek Restoration. Albright reported that John Voz, Reinvest In Minnesota (RIM) Easement and Working Lands Specialist, Minnesota Board of Water and Soil Resources (BWSR), is interested in moving forward with the RIM easement application for the Blilie buyout property. **Motion** by Fjestad to proceed with the RIM application for the former Blilie property. **Seconded** by Affield. **Approved.**

Stony Creek Restoration. The Preliminary Resolution hearing is scheduled for tomorrow night (6/25/19) at 7:00 PM in the BRRWD office. Newspaper notices have been sent for publication and a meeting notice was mailed to the affected landowners.

BRRWD Rules Update. The public hearing is scheduled for Tuesday, July 2, 2019, at 7:00 PM in Barnesville with final Rules adoption to take place at the 7/8/19 Board meeting.

MAWD Summer Tour. The Minnesota Association of Watershed Districts (MAWD) is hosting their Summer Tour this year in Moorhead at the Courtyard by Marriott on June 26-28, starting on Wednesday night (6/26/19) at 6:00 PM with a Social and Dinner at the Hjemkomst Center in Moorhead.

The following bills were presented for approval:

Accounts Payable	Description	Account	Amount
Buffalo River Excavating, LLC	Repairs/Beaver Control	Varies	\$ 3,980.50
Chris Hoppe Lawn Care	Fertilizer Application	Admin.	\$ 190.00

DelMar Nord	Easement Option Payment	Pj. 79, Wolverton Crk	\$ 4,254.25
Fergus Falls Newspapers, Inc.	Rules Hearing Notice (2)	Admin.	\$ 241.28
Forum Comm. Co.	#CL01757013, Rules Hearing Notice	Admin.	\$ 29.58
Forum Comm. Co.	#CL01757136, Prelim Hearing Notice	Stony Creek	\$ 52.20
Forum Comm. Co.	#C-04005197, Rules Hearing Notice	Admin.	\$ 163.00
HCI Commercial Landscape	#19048, Buffer Strip Seeding	Varies	\$ 18,002.00
Joel Carlson	July Lobbyist Billing	Admin.	\$ 850.00
Leland & Carol Larson	Easement Option Payment	Pj. 79, Wolverton Crk	\$ 1,253.50
Liberty Business Systems	#379286, Overage 3/27/19-6/26/19	Admin.	\$ 228.11
Moorhead Public Service	05/02/19-06/07/19 Service (4)	Pj. 49, Oakport	\$ 333.55
ND Water Education Foundation	2019 Summer Water Tour-Leitch	Admin.	\$ 20.00
New Century Press	Preliminary Resolution Hearing (2)	Stony Creek	\$ 108.00
New Century Press	Rules Hearing Notice (2)	Admin.	\$ 67.50
Northern States Excavating	2019 Flood Repairs	Varies	\$ 7,060.00
RMB Environmental Labs.	#445970, WQ Analysis	MSA 103D.905, Sub.3	\$ 184.00
RMB Environmental Labs.	\$446245, WQ Analysis	MSA 103D.905, Sub.3	\$ 473.00
RMB Environmental Labs.	#447077, WQ Analysis	MSA 103D.905, Sub.3	\$ 522.00
RMB Environmental Labs.	#446545, WQ Analysis	MSA 103D.905, Sub.3	\$ 632.00
RMB Environmental Labs.	#449426, WQ Analysis	MSA 103D.905, Sub.3	\$ 411.00
Robert Klein ETAL	Easement Option Payment	Pj. 79, Wolverton Crk	\$ 3,655.75
Roger Lundberg	Beaver Control Billing	Varies	\$ 903.77
Vogel Law Firm	#236824, May billing	Admin.	\$ 1,886.50
Vogel Law Firm	#236825, May billing	COE	\$ 5,451.94
Wahpeton Daily News	#173266, Rules Hearing Notice	Admin.	\$ 80.64
Wahpeton Daily News	#173263, Prelim Resolution Hearing	Stony Creek	\$ 131.04
			\$ 51,165.11

Motion by Anderson to approve payment of the bills. **Seconded** by Hanson. **Approved.**

Next Meeting Agenda. Leitch asked if anyone had an item they would like added to the next meeting agenda. Van Amburg suggested that the Board needed to discuss the issues the Board wishes to be included in the contested case. They agreed to hold a special meeting on Friday, June 28, 2019, at the Vogel Law office in Fargo at 1:00 PM to consult with Attorney Edison.

Next Meeting. The next regular BRRWD meeting will be held on Monday, July 8, 2019, at 7:00 PM in our Barnesville office.

Adjournment. President Leitch adjourned the meeting at 9:36 PM.

Respectfully submitted,

John E. Hanson, Secretary