

MINUTES OF MEETING  
CASS COUNTY JOINT WATER RESOURCE DISTRICT  
CASS COUNTY HIGHWAY DEPARTMENT  
WEST FARGO, NORTH DAKOTA  
MARCH 9, 2017

The Cass County Joint Water Resource District met on March 9, 2017, at 8:00 a.m. at the Cass County Highway Department, West Fargo, North Dakota.

Present were Mark Brodshaug (by phone) and Dan Jacobson, Southeast Cass Water Resource District; Rodger Olson, Maple River Water Resource District; Ken Lougheed, North Cass Water Resource District; Jacob Gust, Rush River Water Resource District; Carol Harbeke Lewis, Secretary-Treasurer; Michelle Anderson, Administrative Assistant; Sean M. Fredricks, Chris McShane and Lukas Andrud, Attorneys for the Board; Lee Beauvais and Mike Opat, Engineers for the Board; Randy Richardson and John Albrecht, CH2M HILL Engineers, Inc.; Eric Dodds, Dean Vetter, Joe Herbst, Adam Marks and Paul Breen, Advanced Engineering and Environmental Services, Inc.; Brady Woodard, Moore Engineering, Inc.; Nathan Boerboom, City of Fargo Diversion Engineer-Metro Flood Diversion; David, Carolyn and Bradley Utke, Highland Township residents.

Chairman Brodshaug requested Manager Olson conduct the meeting.

**Minutes**

It was moved by Manager Gust, seconded by Manager Jacobson and unanimously carried to approve the minutes of February 23, 2017, meetings (two sets).

**Agenda**

It was moved by Manager Jacobson, seconded by Manager Lougheed and unanimously carried to approve the order of the agenda.

**Metro Flood Diversion Project – access update**

Joe Herbst and Chris McShane updated the Board on access issues. The land acquisition team has been working with property owners to obtain access on property for Phase II cultural resource surveys, biotic and geomorphic surveys. Access is still required for approximately 130 sites for the Corps of Engineers to conduct surveys prior to construction. Access for surveys and on property needed at the north end of the diversion channel will be discussed at the next meeting.

Discussion was held on the acquisition timeline, the statutory procedure required to obtain access, the timeline recently established by the Corps of Engineers for cultural mitigation, and delineating property acquisition for *Right of Entry* versus acquisition of property necessary for construction and building the Metro Flood Diversion.

## **Metro Flood Diversion Project – appraisal review/approval**

Jake Gust pointed out the Board will have to acquire property from his son, David Gust, to accommodate the project. Sean Fredricks indicated potential conflicts require a specific analysis under N.D. Cent. Code § 44-04-22. Section 44-04-22 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.

To justify an abstention regarding a matter before a governing entity, 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 a public official to refrain from participating. 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 some situations, however, when a conflict exists, abstention is proper.

The Section 44-04-22 test requires a multi-step analysis. First, a public official concerned about a conflict of interest should confer with the Board’s attorney to determine if a “direct and substantial personal or pecuniary interest” conflict exists under Section 44-04-22. If the public official’s review with the governing entity’s attorney is not dispositive, the remainder of the governing entity’s Board should vote to determine if a conflict exists by a majority vote. If the remaining members conclude a conflict does exist (or if the member and the Board’s attorney concludes a conflict exists), the remainder of the Board should next vote on whether or not the public official should “participate in or vote on that particular matter . . . .” In other words, even if a conflict does exist (even if the official does have a “direct and substantial personal or pecuniary interest” in the matter), if the governing entity concludes the public official should still participate despite the conflict, the official must participate.

In this situation, Mr. Fredricks indicated acquisition of property from Manager Gust’s son does not create a direct pecuniary interest for Manager Gust, but does create a direct and substantial personal interest, a conflict under Section 44-04-22. With that in mind, Mr. Fredricks advised the Board, in his opinion, a conflict existed and Manager Gust should not participate in the Board’s decisions regarding acquisition of property from David Gust. The next step was for the remainder of the Board to vote on whether or not Manager Gust should continue to participate in or vote regarding any of the Board’s decisions to acquire property from David Gust to accommodate the project.

The remainder of the Board voted unanimously to preclude Manager Gust from participating in or voting on any matters regarding right of way acquisition from David Gust.

It was moved by Chairman Brodshaug and seconded by Manager Jacobson to direct the land acquisition team to review and provide supplemental information for the Board on the appraisal for OIN 952 and to approve the appraised value as an initial offer to the following property owners regarding the Metro Flood Diversion Project:

- OIN 221, 222 and 223
- OIN 544
- OIN 571, 572, 573 and 574
- OIN 904
- OIN 1195 and 1196
- OIN 1197
- OIN 2362 and 9268
- OIN 2363
- OIN 9263
- OIN 1187
- OIN 1191 and 1193
- OIN 1199.

Upon roll call vote, the following Managers voted in favor: Brodshaug, Olson, Jacobson and Loughheed. Manager Gust abstained. Motion carried.

John Albrecht and Joe Herbst reviewed the appraisal process for acquisition of property for the Metro Flood Diversion Project. Mr. Herbst stated there are 8 appraisals left for Phase I property acquisition. Discussion was held on the valuation of buildings and structures, accepted industry appraisal practices, updating appraisals and conducting utility appraisals for the Oxbow-Hickson-Bakke Ring Levee Project.

Chris McShane updated the Board on appraisals and property acquisition for the diversion inlet structure. Brief discussion was held on the appraiser and property values.

#### **Metro Flood Diversion Project - relocation benefits**

It was moved by Manager Jacobson and seconded by Manager Gust to approve the Relocation Payments for OINs 9643, 9510 and 9504 as outlined in the letter dated March 6, 2017, regarding the Oxbow-Hickson-Bakke Ring Levee Project. Upon roll call vote, the motion carried unanimously.

Chris McShane updated the Board on the appeal of relocation assistance by the property owner for OIN 9505 regarding the Oxbow-Hickson-Bakke Ring Levee Project. The property owners are waiting for a response from their appeal to the Corps of Engineers. Brief discussion was held on the timeline to acquire the property.

#### **Metro Flood Diversion Project / Oxbow-Hickson-Bakke Ring Levee Project / In Town Levees Project – land acquisition**

Discussion was held on property acquisition, design, drainage, demolition, and the construction timeline for the Oxbow-Hickson-Bakke Ring Levee Project. A map and list of remaining property to acquire for the Oxbow-Hickson-Bakke Ring Levee Project will be reviewed at a future meeting.

Eric Dodds stated construction planning has begun for the realignment of Cass County Highways 16 and 17. A property acquisition timeline will be established by the land acquisition team and reviewed at the next meeting.

Mr. Dodds stated many property owners located in the staging area are interested in voluntary acquisition. Manager Olson recommended the City of Oxbow reserve lots for property owners in the staging area.

**Metro Flood Diversion Project / Oxbow-Hickson-Bakke Ring Levee Project – property management**

Paul Breen updated the Board on the Work Package 43E.2D contract for the residential demolition on Schnell Drive and Riverbend Road in the City of Oxbow. Consultants continue to work on the next demolition bid package.

**Metro Flood Diversion Project / Oxbow-Hickson-Bakke Ring Levee Project – project updates**

Eric Dodds stated the hearing for House Bill 1020, which includes funding for the Metro Flood Diversion Project and other local flood protection projects, is scheduled for March 16, 2017. Colonel Samuel L. Calkins, Diversion Authority members and consultants will testify in support of funding for the Metro Flood Diversion Project.

Mr. Dodds stated the Diversion Authority submitted draft correspondence and an outline to the Corps of Engineers clarifying the timeframe for acquisition of property necessary to complete cultural mitigation as well as biotic and geomorphic surveys. The land acquisition team has been working on a comprehensive list of property and structures impacted by the Metro Flood Diversion Project to determine cultural remediation. Mr. Dodds stated the *Mitigation Plan* was presented to the Land Management Committee on February 22, 2017, and will be presented at the next Diversion Authority Agricultural Policy Subcommittee.

Randy Richardson stated interviews continue with the four short-listed proposers regarding the Public-Private Partnership (P3) procurement process. Request for Proposals (RFP) will be published on March 10, 2017. Diversion Authority members will be in Washington D.C. to obtain support for the Metro Flood Diversion Project on March 20-22, 2017. A groundbreaking ceremony will be held by the Corps of Engineers at the diversion inlet structure south of Horace on April 17, 2017.

Brief discussion was held on the construction timeline for the diversion inlet structure, claims filed by the Richland-Wilkin Joint Powers Authority and Minnesota Department of Natural Resources, property negotiation and acquisition.

**Assessment District update**

Sean Fredricks and Eric Dodds updated the Board on the publishing requirements for the assessment list regarding FM Flood Risk Management District No. 1. Chairman Brodshaug requested Mr. Fredricks send the publishing requirements to the Board for review. Brief discussion was held on the financing plan for the Metro Flood Diversion Project.

### **Western Cass FIS**

Mike Opat stated Moore Engineering, Inc. continues to research and review the FEMA floodplain elevation modeling results for the City of Arthur, as well as north of the Sheyenne River, along the Red River in Noble and Wisner Townships.

### **Legislative update**

Sean Fredricks gave a summary of the drain improvement and reconstruction, assessment district and drain tile permitting bills affecting Water Resource Districts during the current North Dakota legislative session. Brief discussion was held on House Bill 1020.

### **Maple River Dam - signage**

David, Carolyn and Bradley Utke attended the meeting to respectfully request the Cass County Joint Water Resource District consider installing signs on Maple River Dam property, near their farmsteads to restrict access / hunting. The Utke's home sits at a lower elevation near the river and is difficult to see. The Utkes post "No Hunting" signs on their property, but hunting is allowed on adjacent Maple River Dam property. The Utkes stated it is a dangerous situation and they are very concerned. Maps were reviewed and discussion was held on the location and access to the Maple River Dam property, property boundaries, hunting, and signage.

The Board directed Moore Engineering, Inc. to look into permanent signage and to coordinate with the Water Resource District Attorney on the appropriate language to place on signs to restrict access by motorized vehicles and hunting with firearms on the Maple River Dam property in the SE 1/4 of Section 31 in Highland Township.

Brady Woodard and Dan Jacobson recently inspected the Maple River Dam. Brief discussion was held on maintenance and operation.

### **Maple River Dam – lease agreements**

Brady Woodard updated the Board on two *Lease Agreements* on Maple River Dam property. It was moved by Manager Gust and seconded by Manager Loughheed to approve and authorize Chairman Brodshaug to sign the *2017 Lease Agreements* with Dean Sprunk and Steven Fleischfresser. Upon roll call vote, the motion carried unanimously.

Manager Olson left the meeting at this time.

### **Bills**

It was moved by Manager Gust and seconded by Manager Loughheed to approve the payment of Checks #13186 through #13201 and the electronic funds transfers, as presented. Upon roll call vote, the following Managers voted in favor: Brodshaug, Jacobson, Loughheed and Gust. Manager Olson was absent. Motion passed.

**North Dakota Water Coalition meeting**

A North Dakota Water Coalition meeting will be held in Bismarck on March 15, 2017. Manager Gust will attend in place of Manager Jacobson.

**Lake Bertha Flood Control Project No. 75**

Mike Opat stated area landowners are completing wetland delineation reports to submit to the Natural Resources Conservation Service regarding Lake Bertha Flood Control Project No. 75.

**Adjournment**

There being no further business for the Board to consider, it was moved by Manager Gust, seconded by Manager Loughheed and unanimously carried to adjourn the meeting.

APPROVED:

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Mark Brodshaug  
Chairman

ATTEST:

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Carol Harbeke Lewis  
Secretary-Treasurer