

## **LaMoure County Water Resource District Special Meeting Friday, November 13, 2020**

At approximately 9:00 a.m. Chairman Kerry Ketterling called the meeting to order with the following board members present: Jason Gross, Co-Secretary/Treasurer Jan Hamlin and Shanel Bohnenstingl. Board members attending via conference call were: Glenn Haugen, Bobby Frauenberg, and Water Resource District Attorney Kim Radermacher. Board member, Nathan Nitschke, was not present. Also attending via conference call were Rex Bierley, Calvin Bierley, Attorney Terry Effertz representing the Bierley brothers, and Attorney Kale Van Bruggen representing Scott Schrader, Levi Otis, Abraham Valenta, and Shane Kjellberg with K2S Engineering.

The meeting was called to order by Chairman Ketterling at approximately 9:00 a.m.

Terry Effertz, counsel for the Bierleys', summarized the issue for the water board. Ms. Effertz stated that Schrader's application for subsurface water management 2020-4 was initially approved at a meeting on July 31, 2020 without any notice to downstream landowners based on the belief that the project would drain into a natural watercourse. Through personal knowledge, the Bierleys' learned of the project and filed a complaint on September 26<sup>th</sup>, 2020. The water board re-opened the issue on October 8, 2020. Mr. Schrader agreed to send out the certified notice and give the 30-days in order to allow a technical evidence packet to be submitted. A notice was dated October 30, 2020 and sent certified on November 4 with the Bierleys' receiving it on November 7, 2020. When the issue was re-opened the Bierleys' did retain a hydrologist to start the study and they did subsequently start some conversations with Mr. Schrader's counsel about reciprocal access to land and a couple other minor matters. Ms. Effertz state that based on the dates that her clients have not had a full 30-day notice, claiming only 6-8 days to gather and submit their technical evidence. Although Ms. Effertz wasn't able to get a complete packet together due to the short turnaround after the notice was received, she was able to submit an initial packet with a cover letter, short summary, some photos and initial findings from Shane Kjellberg with K2S Engineering. This initial packet was sent to Schrader's counsel on the late evening of November 12, 2020. Ms. Effertz stated that the city thus far, has projected an increase to peak discharge by at least 35% to the area that is currently being farmed and is tillable and would affect the downstream landowners. There have been culverts recently installed in the last 10 days that have yet to be plotted and considered by the hydrologist, therefore the data analysis is not yet complete on the full study. In the interest of public safety and due diligence Ms. Effertz asked the board to allow time to finish the study and make sure both parties can come to an appropriate resolution.

At the October 8 meeting the waterboard decided that they would contact the state regarding the classification of the waterway. Ms. Effertz stated that although the Mr. Schrader submitted aerial maps showing the area in question wet as proof that area is a natural watercourse. However, K2S Engineering had taken pictures less than two weeks ago showing the area as tillable. There is some conflict on whether or not this is a wet area year-round. By allowing additional time to complete the study and submit the evidence the appropriate way for the

water board to go forward and decide whether or not the area in question is to be properly classified as a natural watercourse. Ms. Effertz stress the importance that the proper classification is applied because that's the only way to protect the property rights of the LaMoure county property owners.

Ms. Effertz stated that her clients, the Bierleys', are open to resolution with Mr. Schrader in private negotiations and are confident that they can come to a mutually beneficial conclusion on the matter without the board taking action on this application today. If given time to conclude the study, the Bierleys' could engage in a serious conversation immediately. Based on the fact that the notice was dated October 30, Ms. Effertz respectfully requests that the waterboard "table" the issue until at least November 30<sup>th</sup> which would allow for the 30 days to gather technical evidence and would also allow the hydrologist time to complete the study and engage in private conversation with Mr. Schrader.

Ms. Radermacher stated that the Bierleys' were aware that this situation was ongoing since September. The statute does not require 30 days to present technical evidence from the date of notice, its 30 days from the date the application was submitted. Therefore, the Bierleys' aren't necessarily entitled to 30 days to be able to gather the evidence. Ms. Radermacher is not suggesting the board precluded from considering it.

Mr. Clavin Bierley interjected stating that he never would have known about the project had it not been for his land renter that notified him. He stated the law requires that he be notified, but those letters were not sent out. He believes the argument that they knew would hinge upon having been notified which they were not.

Ms. Effertz stated that it is true that the Bierleys' had 30 days of personal knowledge and that it was a question whether Calvin Bierley is going to be included in the one mile downstream, which they are still waiting to see what determination was made regarding notification decal because it was going to change the scope of the study. Ms. Effertz also pointed out that there were other property owners that are impacted by the notice and that they haven't had 30 days.

Mr. Van Bruggen stated that the complaint against Mr. Schrader was a complaint claiming he didn't have a permit and that complaint was filed on September 6, 2020 which was 48 days ago. The meeting where the complaint was heard was October 8, 36 days ago. Mr. Van Bruggen pointed out that the Bierleys' have had more time than any other landowner in the state gets as part of the permitting procedure. The 30 days flew by without receiving anything until 10 o'clock last night. A letter was submitted that Ms. Effertz got on the day of the October 8 meeting explaining what Mr. Van Bruggen saw as potentially reasonable arguments about how the mile downstream is calculated. Mr. Van Bruggen stated what he believed to be the proper one-mile calculation which does not include Calvin Bierley. There are two potential landowners which are the Wieland and Schlenkers who potentially could have been sent notarized letters of approval. Mr. Van Bruggen sent copies of aerial photos that he believes speaks directly to what the Bierleys' keep alleging about the watercourse. It was stated that someone acting on behalf of the Bierleys' recently went out and burned cattails and did some digging in preparation for the photos provided by Ms. Effertz at 10 o'clock last night. Mr. Van Bruggen wanted the board to see multiple photos going back several years from a time span between June to October that show the site or that waterway is consistently wet. Addressing whether this is a natural watercourse; if it is then downstream notice is not required and if it's not then downstream notice is required. He stated the parties are past that, they have agreed to bring this in front of

the waterboard rather than in court so he believes that waiting for the state engineer's determination is not relevant. The photos submitted by Mr. Van Bruggen were not submitted to prove that it is a natural watercourse. Rather, addressing the culverts, Mr. Van Bruggen explained that from his understanding the township has done that and it's his understanding that is something that has been on that township's agenda for some time, before the Schraders began engaging with their contractor on this tiling plan. Those culverts were undersized between the Schrader property in the NE corner, section 18 and the Bierleys' property in the NW corner of section 17 there's an existing culvert that was left in place and a 36-inch culvert was added to it by the township. Then from the corner of that Bierley property to the north into the Valenta pasture there are three existing 24-inch culverts and a 36-inch culvert was added there. The land to the west start of the project will be with the new upgraded culverts as far as water ponding in the NW corner of section 17, the aerial photos shows that it is consistently wet there. Once water hits those culverts, the water will flow north into Mr. Abram Valenta's pasture.

Mr. Van Bruggen referred to the report submitted by Ms. Effertz, in regards to the increase peak discharges of 35% which was stated but later on in the report, the engineer states concern is actually that the peak discharge will be spread out over time. Pointing out how tile projects work, stated that those two positions are inconsistent, but it's the latter one that is true and that is why those aerial photos provided by Mr. Van Bruggen are relevant because when that peak discharge spread out over time, that's where the concern about the water and whether crops are affected, the photos show it's holding water. The parties do have several very viable opportunities to sort this out but between the time of the email last night and the 9 o'clock meeting today there wasn't time to have a discussion. Mr. Schrader has done what he needed to do and have already delayed their projects and do not want it to be delayed any further, and the Bierleys' have had 48 days to submit their evidence.

Both Mr. Van Bruggen and Ms. Effertz stated that their parties would be willing to begin discussions about possible resolutions early next week.

Shane Kjellberg with K2S Engineering stated that the report would be done middle to late next week.

Mr. Schrader wanted to work this out so they already agreed to suspend their permits so that the Bierleys' can have their 30 days to submit their technical evidence. There is also the additional cost each time there is a meeting they have to pay counsel to prepare for it, they are not able to lock in a price with the tiling contractor most likely the price for 2021 will go up. The Schraders are not in favor of "tabling" the issue because they want to get the project underway.

Ms. Effertz responded by again stating that the Bierleys' would appreciate a one-week extension so that the study can be finished and the data is reviewed.

Calvin Bierley reiterated that he only found out about Mr. Schrader's project through word of mouth. He did mention that Mr. Schrader did contact him several months before learning of the project to ask for his approval for which Mr. Bierley did not give but he did tell Mr. Schrader to begin the process for his drain project. Mr. Bierley stated that the process was not followed from the beginning.

Mr. Ketterling acknowledged that the process initially wasn't properly followed however when the application was re-opened then the whole process was essentially starting over which was 36 days ago so once being re-opened the process was indeed followed properly.

Mr. Rex Bierley asked Shane from K2S Engineering based on his preliminary findings the following two questions: 1.) Is the flow path consistently downhill or does the water have to flow from his slue uphill before it goes downhill? Are there areas where there'll be flooding before it flows together toward a creek. 2.) Is a natural waterway marked with blue or dashed blue lines on the map, if that is true does the alleged drain field go through our property constitute a natural watercourse?

Mr. Kjellberg with K2S Engineering responded stating that the area is consistently flat also that there are some areas that may drain in reverse. The culvert invert will not flow to the bottom of those culverts. In Mr. Valenta's pasture there is ground that is actually higher than the culverts so those culverts will remain inundated with water.

Will the water flow south as the slue fills? Mr. Kjellberg stated that yes water would flow south and connect to another wet land which would flood also. A culvert study was recommended for 86<sup>th</sup> Ave. There are (2) 36-inch culverts with (3) 24-inch culverts and then going downstream to 86<sup>th</sup> Ave where there are 2 smaller culverts which would have an adverse effect to those culverts.

Mr. Calvin Bierley stated that the discharge point occurs and enters into Rex Bierley's land. Not only does it flood that slue and Mr. Valenta's slue before it can move north; it backs up to the south on NW1/4 of section 17 almost all the way to Mr. Schrader's farmstead. The water would have to flood approximately a half mile of farmland before it starts to move through Mr. Valenta's pasture then to the remainder of section 8.

Mr. Kjellberg stated that there doesn't appear to be an actual channel.

The Bierleys' speculated how the drain may negatively affect farmland for surrounding landowners.

Ms. Effertz stated again that other landowners would be impacted by the drain and did not have meaningful notice, and for that she believes it is reasonable to ask for a one-week extension.

Mr. Rex Bierley stated that he doesn't want Mr. Schrader to have flooded land nor does he want other land owners to have adverse effect to other properties. His hopes are to avoid that and come to an agreement that is satisfactory to both parties. The Bierleys' are willing to discuss alternatives to trying to drain through apparent waterway that flows uphill before it flows downhill and has broad areas that are flat where there would be flooding. He stated he would like this to be delayed so that they can meet with Mr. Schrader and his attorney and work this out.

Mr. Van Bruggen stated that whatever decision the waterboard makes will not prevent the parties from sitting down and coming to an agreement. Mr. Schrader is interested in a decision being made so that things can move forward. The Bierleys' expressed concerns for Wieland and Schlinker properties, but they have both signed off on the permit application. He reiterated that one can see standing water in the growing season in the aerial pictures submitted which is where the water naturally flows.

More discussion on speculated adverse effects on the land and crops.

Ms. Radermacher stated that in seven days if this is to go to a full hearing because the two parties cannot reach a resolution, that the Bierleys' must have technical evidence showing that the drain project is going to unreasonably harm or flood their property; she recommends no more than a week from now, this needs to be done in a timely manner.

Mr. Van Bruggen stated that he would like the board to consider allowing Mr. Schrader and counsel 30 days to respond to any technical evidence submitted by the Bierleys'. Ms. Radermacher and Bierleys' agreed with this.

Based on the discussion, Mr. Gross made a motion to delay the matter until Tuesday, November 24<sup>th</sup>, seconded by Mr. Frauenberg. Motion carried.

In regard to the Bev Anderson complaint, Mr. Ketterling stated he drove out there and was able to see where a fence line was leveled, but the area is pretty flat and the area has dried up a lot since the complaint was made. Mr. Haugen made a motion to dismiss the complaint, seconded by Mr. Gross. Motion carried.

Meeting adjourned at approximately 10:12 a.m.

**Approved this 11th day of January, 2021**

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**Kerry Ketterling, Chairman**

**ATTEST:**

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**Shanel Bohnenstingl, Co-Secretary**