

The Drain #11 history to today's discussion regards the PROCCESS used and not the PUBLIC NEED.

Sargent County Drain #11 was first conceived in 1916 by a small landowner group petitioning a three - member County Commission appointed (unelected) Drain Board. Newspaper accounts followed the progression to the Drain's installation in 1918 where articles record already that adjoining Ransom County was not going to participate. By July 2, 1918 the Board approved building this Drain (no landowner vote was required or done) a \$127,019.17 (in 2021 dollars = \$2,191,071) project of 45 miles of ditching with bridges. The 1918 assessment was share by a narrow corridor landowner surrounding the ditch (2 miles), but also by railroads (10.21%), townships for their roads (25.90%) and even a small village (now gone).

In 1983, it seems that all Drain #11 maintenance was finance through Water Board's general funds provided by county-wide mill levies from 1918 to 1983. The Board then performed its first re-assessment since 1918. This official re-assessment was to update who benefits from the Drain's presence which then bulged the parcels of land assessed from that narrow corridor to its farthest watershed's reach (greater than 6 miles), but only with the confines of Sargent County which again leaves over 30% of watershed participation in adjacent Ransom County. At least twice after 1983, the Water Board held publicly advertised landowner meetings explaining a very similar improvement project envisioned today. But each time the landowners and Board rejected that sizeable improvement project. In the years after 1983 to 2014, the Board "modified" the assessment district by subtracting and adding properties (including the city of Cogswell) all without following an official re-assessment process. In other words, the property list of 1983 totaled to 100% was modified by the Boards to something not equaling 100% anymore.

The Board continued to hear concerns from a few landowners (< 10) that encouraged improvement should be considered. The Board proceeded to partner with State Water Commission to have an elaborate study (> \$200,000) prepared to consider possible improvements.

The Study, dated 4/5/2016, presented opportunities to design a new corridor (more than twice the existing) increasing culvert and channel capacities 60-70%. The design conceived (when all 45 miles re-constructed) could reduce flood breakouts 20-28 days from current 10-year rainfall event (just less than a 3" rain over 24 hr period), but only when the Study's required retention sites are all functional. Only then the 25% discharge increase in downstream impact forecast is reached as it enters the headwaters of the Wild Rice River. Notably, the current discharge of Drain #11 when operating full already floods the Wild Rice River at its outlet. But the hydrology Study indicates a projected flood with 100% completed improvement project increases the flood level by a couple inches. This leaves to layman's imagination that 25% increase in discharge is spread over vast number of new acres beyond Drain #11 outlet and outside its assessment area.

The Board received this Study and asked their engineer (same one who prepared Study) at next regular April 2016:

"... to develop an Engineer's Report for a project that would fit within a 5-6-year maintenance bond, prepare a cost share request and drain application to the State Engineer..."

By June 2016 the Board minutes reflect:

"... Chris Gross presented to the board an Engineer's Opinion of Probable Cost for Drain No. 11 channel improvements The cost was \$3,900,000.00. The breakdown of possible cost share participation included: \$1,417,967 from NDSWC; \$200,547 from county road department for crossings and \$2,281,486 from local maintenance fund. Further discussion followed on conducting a public meeting to inform the landowners of this project once it is determined if cost share will be provided."

This conceived project only improves about 25% of the 45-mile Drain #11.

At that time (March 2016), the Drain #11 assessment district was providing \$283,004 annually at maximum \$4.00/ac. levy and Engineer noted \$238,094 available in Drain #11's maintenance fund. The data in June, if SWC provides their funds and county theirs, it should have tripped the lever mandating a landowner vote as would be required by law NDCC §61-21-46 (2):

"If the cost of, or obligation for, the cleaning and repair of any drain exceeds the total amount that can be levied by the board in any six-year period, the board shall obtain an affirmative vote of the majority of the landowners as determined by section 61-21-16 before obligating the district for the costs."

The annual levy $\$283,004 \times 6 = \$1,698,024$ vs. Engineer's estimate \$2,281,486 needed from local maintenance fund would appear as a shortage. In June minutes, a landowner reading them would have assumed a public meeting would began the required state statute would be complied to. The shortfall ($2,281,486 - 1,698,024$) of \$583,462 would seem to demand it.

On October 12, 2016 the SWC approved Drain #11 application as a rural flood control project not to exceed \$1,417,967. Just days later the Sargent County Water Board agenda prepared has no indication on its agenda of pending motion regarding Drain #11 for its next board meeting scheduled October 20, 2016. That next meeting the Board proceeded:

" RESOLUTION and moved its adoption: SARGENT COUNTY WATER RESOURCE DISTRICT RESOLUTION OF NECESSITY REGARDING DRAIN 11 IMPROVEMENT PROJECT NO. 2016-01 WHEREAS, the Sargent County Water Resource District (the "District") is a North Dakota water resource district and political subdivision under N.D. Cent. Code Chapter 61-16.1. ...

BE IT FURTHER RESOLVED that the Drain 11 Project will not constitute construction of a "lateral drain" under North Dakota law, and construction of the Drain 11 Project does not require an excess levy vote, an additional assessment district vote, or any other additional legal proceedings under North Dakota law....

BE IT FURTHER RESOLVED that, from the date of this RESOLUTION, the District will manage, own, operate, and maintain Drain 11, including the Drain 11 Project, as a "project" under Chapter 61-16.1 of the North Dakota Century Code."

One should note here the RESOLUTION attempts to move Drain #11 from §61-21 to §61-16.1 which violates both the 1984 ND AG Opinion 84-22 and recent 2020-L-4.

Twenty-seven days later, the Board, provided by postcard invite only to construction corridor landowners, held a gathering. At this gathering, it was learned that the Board's improvement plan was not contingent on landowners ratifying by a vote themselves. The regular monthly board meeting the next morning confirmed.

That November 17, 2016 Water Board meeting includes:

"Landowners present at the meeting stated their concerns about the cost of the project, project benefits, Ransom County water, and whether the landowners are in favor of the project. A request was made to conduct a vote of the assessment district members, but the board explained the vote process would take five months and is very costly to conduct. More importantly, under North Dakota law, a vote of the assessment district is not required as long as the project will not exceed the maximum maintenance levy the Board may assess per acre against the properties within the Drain 11 assessment district in any six-year period. In other words, a vote of the assessment district is only required if the cost will exceed the maximum \$4 per acre annual maintenance levy levied over a six-year period....

Sean (the board attorney) noted nobody timely appealed the Board's RESOLUTION OF NECESSITY to proceed. Chris (the board engineer) pointed out that if the Board did not proceed with this project, cost-share funding that is currently available may not be available in the future."

Landowners attending that meeting were stunned that a substantial project could be pursued by an unelected (and two members having conflict of interest) Board and could proceed without landowner participation. Also, landowners did not realize a law to appeal was still available for 48 hours to file with District Court although the Board attorney announced the period had already passed.

In the Christmas holiday week of December 2016, a group of over thirty landowners assembled to consider their fate consulting a law firm. That group proceeded to file in District Court to allege the Water Board did not comply with the mandatory landowner vote triggered by a project exceeding 6-year maximum levy.

The District Court begin its hearings in January 2018 but was stalled to consider the Water Board's motion to dismiss the case providing the landowners failed to appeal within 30 days of the motion passed October 20, 2016. District Court Judge ruled on April 2, 2018 granting them that relief. But included in that ruling, he explained:

"¶ 6. The Sargent County Water Board cloaks itself in its minimal compliance with statutory requirements by taking the action it did at a regularly noticed meeting and that if the plaintiffs were more diligent, they would have attended the meeting to 'protect their interests' or made open records requests to obtain the minutes after the meeting. (It is unknown as to when the minutes were actually prepared and available). Although plaintiffs had no reason to suspect that 'their interests' were going to be or were affected by the Sargent County Water Board at the October 20, 2016 meeting because the agenda item they were interested in was not on the agenda. The Sargent County Water Board would have the plaintiffs be more prophylactic and attend every meeting of the county commission, school board, park board, water board, public health district, airport board, township board, city commission, legislature, Garrison Diversion Conservation District, and any other body with regulatory or taxing authority over them in order

to 'protect their interests.' In the unfortunate event the plaintiffs have to work, attend family or other less important matter than attending meetings of governing bodies to 'protect their interests.' They had better obtain and review the minutes of each of these meetings post haste in order to protect themselves from adverse government action. The position and the actions of the Sargent County Water Board in approving Drain #11 maintenance project subvert the intent of the sunshine laws, morally deficient, and do anything but instill faith and confidence in local government.

¶ 8. However, if the court grants Sargent County Water Board's motion to dismiss, it would be the water board who will ultimately be rewarded from its gamesmanship in how it proceeded with the Drain 11 project."

The group of landowners appealed this District Court's dismissal to the ND Supreme Court which ruled February 26, 2019. That decision included:

"¶ 17. Section 61-16.1-54, N.D.C.C., provides a right to appeal a decision of a water resource district, and the appeal is governed by N.D.C.C. § 28-34-01. Under N.D.C.C. § 28-34-01(1), a 'notice of appeal must be filed . . . within thirty days after the decision of the local governing body.' 'he 30-day time limit for appealing a local governing body decision under N.D.C.C. § 28-34-01 is not a statute of limitation; rather, it is a statute conferring appellate subject-matter jurisdiction upon a reviewing court.'

¶ 18. The legislature may want to consider extending the time for appeal or consider triggering the time for appeal from a decision by a local governing body from service of the notice of the decision on the affected party or from publication of the decision.

¶ 19. We again recognize the abbreviated time frame for an appeal that is imposed by the plain language of N.D.C.C. §§ 61-16.1-54 and 28-34-01; however, nothing in N.D.C.C. § 61-16.1-45 required the District to notify the Landowners of its decision to finance the Drain 11 project through the maintenance levy. Regardless of whether or not any notice was given, N.D.C.C. §§ 61-16.1-54 and 28-34-01 require an appeal to be taken within thirty days of a water resource district's decision. Because the Landowners failed to appeal the District's resolution of necessity within thirty days, the district court did not err in dismissing the Landowners' complaint."

This disappointed the landowners trying to find justice and we have been directed to the Legislature to amend current law to provide a slightly larger window to appeal, like our circumstance, to future situations. Even last month with only hours of an SWC informal meeting, over 25 landowners participated showing concern regarding the Drain #11 project. The 30-year history of levies from 1983 to 2013 total \$23.75 (ave/yr= \$0.79 /ac) and swelled to \$27.00 since for 8 years (ave/yr= \$3.37/ac). Records indicate most, if not all, culverts in the improvement zone are less than 20 years old.

As our event provides an example how over 150 possible affected landowners (+/- 1,067 parcels as of 8/16/96) (without City of Cogswell billed for 240 ac x 6 x \$4.00/ac)) would be subject to an unelected and partially conflict of interest water board to substantial levies, it would seem an additional 30 days might be in reasonable amendment.