

TABLE OF CONTENTS

I. Statement of Issue1

II. Review of Facts and Geography2

III. General Reply5

A. Summary Judgment was Improper7

B. BRRWD’s Orders Are Improper As A Matter Of Law12

C. BRRWD’s Orders Are Unconstitutional16

IV. Miscellaneous Reply18

A. Despite Partial Completion, This Appeal Is Not Moot.....18

B. BRRWD Is Entitled To No Deference Or Discretion.....20

V. Conclusion and Precise Relief Sought.....25

Certificate of Compliance27

Party Substitution Affidavit of Lois Anna Minch.....28

Affidavit of Service by Mail.....29

TABLE OF AUTHORITIES

STATE CASES

Alton v. Wabedo Township,
524 N.W.2d 278 (Minn. App. 1994).....16, 17, 18, 25

Barfnecht v. Bd. of Hollywood Township,
232 N.W.2d 420 (Minn. 1975).....17

Burstyn v. Wilson,
343 U.S. 495, 532 (1952).....22

Matter of D.F.C. v. Minnesota Commissioner of Health,
693 N.W.2d 451 (Minn. App. 2005).....22

State v. Davidson,
481 N.W.2d 51, 56 (Minn. 1992).....22

State of Minnesota v. Reha,
483 N.W.2d 688, 691 (Minn. 1992).....22

STATE STATUTES

M.S.A. Chapter 103D13, 25

M.S.A. § 103D.30120

M.S.A. § 103D.31120

M.S.A. § 103D.31520, 25

M.S.A. § 103D.32120

M.S.A. § 103D.34120

M.S.A. § 103D.355, Subd. 1113

M.S.A. § 103D.53712, 13

M.S.A. § 103D.545 (3)25

M.S.A. Chapter 103E.....8, 13, 25

M.S.A. § 103E.07513, 14, 15

M.S.A. § 103E.202 et. seq.	2, 4
M.S.A. § 103E.305 et. seq.	2
M.S.A. § 103E.351	4
M.S.A. § 160.05.....	17
M.S.A. § 160.05 Subd. 1.....	17
M.S.A. § 164.35 Subd. 4.....	17

MISCELLANEOUS

M.S.A. Const. Art. 1 § 7	21, 25
M.S.A. Const. Art. 1 § 13	25
U.S. Constitution Amendment V	25

I. STATEMENT OF ISSUE

- I. Does a watershed district have the power to order a citizen to clean and widen a County road ditch in five (5) days at his expense and expected uncompensated loss of his adjacent farmland where the ditch was not established or constructed by the watershed district, the watershed district did not determine whether the citizen caused the alleged obstruction in the ditch, where there was no prior notice of hearing, no hearing, no findings, and where the order delegated authority to the county engineer to apply unwritten specifications to define exactly what would be required to perform the order?

II. REVIEW OF FACTS AND GEOGRAPHY

The map on page 30 of the Appendix of Appellant, App. p. 30 shows all necessary geographical and drainage features.

The section numbers on the North half of the map are in Kragnes Township, Clay County, Minnesota. The village of Kragnes is near the center of the map. The Buffalo River flows Northeasterly through Kragnes Township.

A. R. Minch (Minch) has an interest in the South Half of Section 28 and the North Half of Section 34.

The field dikes blocking the South to North drainage in Section 28 and now flooding Minch's and another's farmland are shown by the blue lines on the map. The aerial photographs illustrate the problem. App. pp. 63 and 64 (2004) and App. pp. 54, 55 and 56 (2005).

Putting aside the immediate problems in Section 28, Minch petitioned (M.S.A. § 103E.202 et. seq.) Buffalo-Red River Watershed District (BRRWD), as the only petitioner, to improve Ditch #51 which drains North from Kragnes into the Buffalo River.

BRRWD approved the improvement petition in 2003. Minch first wanted to address flooding problems for Kragnes.

BRRWD appointed viewers (M.S.A. § 103E.305 et. seq.) to access the benefits of the improvement petition. Based on existing drainage patterns, BRRWD's viewers assessed the landowners in Section 35 at a lesser rate than those in Section 34. Water from Kragnes, all of Section 34, and the East two-thirds of Section 28 can only drain into Ditch #51. Section 35 can either drain straight North one mile into the Buffalo River or into Kragnes and then North into the same river.

The map is out of date since Wayne Brendemuhl (Brendemuhl) has owned the land in the Northwest Quarter of Section 35, since January 21, 2002, and at all relevant times, has been a member of BRRWD's Advisory Committee. Brendemuhl's father, Warren, purchased the land on December 14, 1999.

Things went relatively smoothly for Minch with his improvement petition for Ditch #51, and most of the work was completed in 2004. The history of this is contained in Minch's affidavit. App. pp. 41 to 48.

Trouble came after BRRWD's Viewers assessed Brendemuhl's land in Section 35 for a reduced share of the cost of the Ditch #51 improvement. He complained, BRRWD confirmed it's viewers' report, and he appealed.

The appeal was improper and Minch had it dismissed. With the appeal BRRWD increased Minch's bond from \$20,000.00 to \$50,000.00, hoping it could dismiss the petition. App. p. 43.

BRRWD should have been thankful that Minch defended the appeal.

Brendemuhl lives along the Buffalo River in the Southeast Quarter of Section 22 behind 85% publicly financed ring dikes in the river floodway. He did not want water flowing from his farmland in Section 35 North into the river upstream from his farmstead. Better to run as much water as possible into Kragnes.

When Brendemuhl's father owned the Section 35 property, Brendemuhl's brother used a bobcat to dig out one of two long buried 18" culverts allowing water to flow from the Northwest corner of Section 35 onto the Northeast corner of Section 34 and into the county right-of-way ditch on the North side of Section 34. This was done without a

permit, clearly required by BRRWD's Rules¹. The culvert had been plugged for years before Minch purchased the land in Section 34 in 1977. App. pp. 59 and 60.

After Brendemuhl, BRRWD's Advisory Committee member, complained that his appeal had been dismissed and he was being assessed for drainage he thought he should have, BRRWD betrayed Minch coming to Brendemuhl's aid by ordering Minch to clean and widen the Section 34 county right-of-way ditch, rewarding the unpermitted dig out of the culvert by Brendemuhl's brother, and putting Brendemuhl back in the game after his improperly filed appeal had been dismissed. It did not matter that BRRWD's viewers' report was based on the existing drainage situation affecting Brendemuhl's land.

BRRWD could have simply removed Brendemuhl's land from the assessment area, M.S.A. § 103E.351 or Brendemuhl could have filed his own improvement petition concerning the county right-of-way ditch. M.S.A. § 103E.202 et. seq.

The Brendemuhl family also rents the farmland in the Northeast Quarter of Section 28, protected by the Section 28 field dikes, App. p. 43, something well known by BRRWD.

BRRWD's December 2004 orders, App. pp. 26 and 28, order Minch to clean and widen a county right-of-way ditch into his farmland, without compensation, with no notice or opportunity for hearing, to reward the unpermitted dig out of a culvert, to come to the aid of BRRWD's Advisory Committee member, all under the pretext that if the orders were not performed, BRRWD will ignore the horrible field dike flooding problems it has created for Minch in Section 28.

¹ See BRRWD rules Sec. 4 (B), Sec. 3 (H), Sec. 3 (G), Sec. 3 (M) and Sec. 5 (L) App. pp. 39 and 40.

The Section 34 county ditch is located on county right-of-way, and as the then county engineer told BRRWD and Brendemuhl, the county could not clean the ditch itself without taking at least 10 to 15 feet of Minch's farmland.

BRRWD was advised by its attorney that it could use an eminent domain proceeding. But better to simply order Minch to do the work, at his expense, and certain loss of his farmland, under its rules.

This was done to a man who played by the book. Minch prepared an improvement petition, posted bonds, attended meetings, and defended BRRWD's order approving the improvement petition. Minch dug out no long closed culverts without permits from BRRWD. He constructed no field dikes to flood the farmland of others. He has not plugged improperly opened culverts, nor leveled portions of improper field dikes flooding his land².

III. GENERAL REPLY

BRRWD criticizes Minch for being a man of principal. See pages 1, 6, 7 and 27 of its brief. (BRRWD Br.).

It refers to him as a purveyor of "wild conspiracy theories", a purveyor of "mere technical arguments", an unwilling and uncooperative individual, a "disagreeable landowner" and a man with mantras and red herrings. BRRWD Br. pp. 9, 24, 26, 27 and 29.

A copy of Minch's obituary is attached as Exhibit A.

² Field dikes such as those shown on the map, App. p. 30, and by the aerial photographs, App. pp. 63 and 64 (2004) and 54 to 56 (2005) are prohibited by BRRWD's rules. See Sec. 5 generally and especially Sec. 5 (C, D, and F) and Sec. 8 (A).

It is only a short step for BRRWD to misstate the record by stating that there was “testimony” given by Minch, BRRWD Br. pp. 8, 24 and 27, and that it gave proper notice and an opportunity for a hearing.

Minch was not even present at BRRWD’s October 25, 2004 meeting where it determined that the county no longer owned enough road right-of-way “to clean the ditch without infringing on Minch’s property”, App. p. 35, and decided to order a legal opinion, while its mind was already made up that it should be able “to enforce a simple ditch cleanout.” App. p. 35.

Minch appeared at the November 22, 2004 meeting, only to learn the results of the “Board’s consultation with their attorney”, and to endure the discussion about whether the county should purchase additional right-of-way through eminent domain, or simply order Minch to do the work at his expense. App. p. 36. One manager even wondered if BRRWD had ever done such a thing before. App. p. 36.

No one was sworn to testify, Minch had no opportunity to prepare testimony or bring witnesses or experts to the meeting. BRRWD acknowledges that due process requires “a reasonable time and opportunity to present testimony”. BRRWD Br. p. 24.

BRRWD refers to “*Hatfield v. McCoy* antics”, and Minch’s alleged descriptions of BRRWD “as a rouge local authority, stacked with political insiders furthering their own agendas.” BRRWD Br. pp 8 and 9. Minch can’t help that Brendemuhl, the prime mover at the October 25, 2004 hearing, App. p. 34, was also on BRRWD’s Advisory Committee, or that his brother had used a bobcat to dig out a long buried culvert without a permit to drain water into Kragnes, all combined with the fact that the Brendemuhl family farms the dry side of the field dikes in Section 28 held hostage by BRRWD’s

December 29, 2004 order. App. p. 28. Minch only points these things out. BRRWD provides its own colorful and accurate description of itself.

The “other drainage issues in and around Kragnes” BRRWD refused to discuss until Minch destroyed his farmland to comply with BRRWD’s order, App. p. 28, are shown by the aerial photographs of Section 28. App. pp. 54, 55, 56, 63 and 64. BRRWD issued, with no notice to Minch, the permit which initiated the field dikes. Although BRRWD now proclaims the dikes illegal, and has filed a criminal complaint, this comes too late for Minch. Brendemuhl enjoyed fine crops in 2005 in Section 35 without drainage through Section 34. App. pp. 52 and 57.

A. Summary Judgment Was Improper.

The district court improperly granted BRRWD’s Motion for Summary Judgment as a matter of law, after noting that the legal issue presented raises an “important issue of first impression”, App. p. 8, and that Minch raised “a genuine issue in an unsettled area of law”, App. p. 18.

BRRWD correctly states that this Court must view the evidence in the light most favorable to the factual findings and that summary judgment can only be granted if, viewing the evidence in the light most favorable to the nonmoving party, the moving party clearly sustains its burden proving there are no genuine issues of material fact. BRRWD Br. p. 10.

One factual issue the district court had to resolve, was exactly what BRRWD was ordering Minch to do. Instead the district court, after stepping outside its role as the initial appellate court, tried to limit what BRRWD’s orders. App. pp. 2 and 21.

Minch's declaratory judgment action was the only means of appeal, M.S.A. § 103D.537, and the only issue was whether BRRWD's orders were proper. Like any appellate court, Judge Vaa needed to provide a yes or no answer. Instead, he modified the orders. App. p. 21. He left the devil in the details up to the new county engineer. App. p. 2.

But even the follow up letter from the new county engineer did not provide the details. That letter, App. p. 29, provides no detail about total widths or side slopes, other than to note that road slopes "should remain unaltered". The devil in the details is that the former county engineer, John Cousins, knew that maintaining proper road slopes would require the destruction of 10 to 15 feet of Minch's farmland.

Judge Vaa knew that something was wrong with the orders. He set out, almost as an advocate for BRRWD³, to try to fix the orders, rather than determine whether there were factual issues or whether the orders were lawful. App. p. 21.

Judge Vaa knew that BRRWD had no authority to order Minch to do anything outside of the existing Section 34 ditch, and he cited a 1909 case. Resp. App. pp. 32 and 33.

But BRRWD had more in mind. Judge Vaa should have ruled the orders unconstitutional, rather than modifying the orders. This was outside his role as the appellate court.

BRRWD wanted Minch to clean a county right-of-way ditch at his expense, and widen it into his farmland so the orders were improper, as a matter of constitutional principal.

³ BRRWD's counsel made the boast about Judge Vaa in an e-mail message to the undersigned that "He [Judge Vaa] is on our side "

These are the factual issues that make summary judgment improper:

1. “The County no longer owns enough road r-o-w to clean the ditch without infringing on Minch’s property”. October 25, 2004 Meeting, App. p. 35;
2. “The County could purchase additional road right-of-way (r-o-w) from A. R. Minch through the possible use of imminent [SIC] domain so that the County could clean their ditch”. (Emphasis supplied). November 22, 2004 Meeting, App. p. 36;
3. “There is also a possibility that through adverse possession, the County may already have enough r-o-w to clean the ditch”. November 22, 2004 Meeting, App. p. 36;
4. “The second option would be for the BRRWD to issue an Order requesting that Minch clean his ditch by a specified date, citing the BRRWD Rules and Minnesota Drainage Law...”. November 22, 2004 Meeting, App. p. 36;
5. “Nelson [one of BRRWD’s Managers] questioned if there were precedents for this type of action, and if we could be accused of unfairly singling out a particular individual”. November 22, 2004 Meeting, App. p. 36;
6. “County State Aid Highway 5 only has 33 feet of right-of-way in Section 34, so only a portion of the ditch cleaning would be on County property”. February 8, 2005 letter from, Jack Cousins, to BRRWD’s entire board of managers. Resp. App p. 28;
7. “Either party has the authority to contact the Clay County Engineer forthwith regarding this Order, and request that the Engineer issue the

applicable county specifications for the cleaning of this ditch as soon as possible”. September 23, 2005 Order of Judge Vaa, App. p. 2; and

8. Some of Minch’s farmland would be used to work the ditch and “I knew they [the county] was short of right-of-way”. Deposition of BRRWD’s chairman, Roger Ellefson, of September 9, 2005.

Some of Mr. Ellefson’s deposition testimony was presented to Judge Vaa by a Supplemental Affidavit of Roger J. Minch in Opposition to Motions for Summary Judgment which is attached as Exhibit D.

The record is that there were no written County specifications on ditch cleanouts. Affidavit of BRRWD’s counsel, June 27, 2005, Resp. App. pp. 35 and 36. Counsel recited the need to obtain “a quick recitation of the County’s long-standing rule on specifications, which are unwritten”. (Emphasis supplied). Resp. App. p. 35.

BRRWD asserts that “...Minch knows that there are actually written specifications discovered after the summary judgment hearing in this matter, so his intent to mislead the Court by arguing about the lack of written specifications is troubling”. BRRWD Br. p. 30.

So the Court is as not mislead, consider the written specifications, attached as Exhibit B, and take judicial notice of the deposition of engineer Cousins. Exhibit C (without the attached transcript itself). This way, Minch will not suggest that BRRWD has intended to mislead this Court by arguing that Minch’s claim that BRRWD’s orders required him to widen the ditch into his farmland are mere mantras and red herrings. BRRWD Br. p. 29.

To avoid misleading the Court by sticking to the record before it, we know that there are unhelpful written specifications, Exhibit B, and we know that the county engineer specifically told BRRWD's office administrator that the county could not clean its own right-of-way ditch in Section 34 without taking at least 10 to 15 feet of Minch's farmland, without creating a dangerous ditch, Exhibit C. BRRWD knew this by the time it ordered its "legal opinion" at its October 25, 2004 meeting. App. p. 35. Put simply, although it knew of its power of eminent domain, App. p. 36, it simply ordered Minch to clean a county right-of-way ditch according to County specifications it knew would require Minch to lose at least 10 to 15 feet of his farmland along the ditch. This is most jarring given the Oaths of Office BRRWD's managers signed, App. p. 16.

Imagine how difficult it was for Minch. He knew that the orders were entered to aid Brendemuhl. He knew that Brendemuhl's brother used a backhoe to dig out a culvert without a permit to double drainage from Section 35 into the Section 34 ditch. He knew Brendemuhl was on BRRWD's Advisory Committee. He knew that the Brendemuhl family farms the dry side of the field dikes. He knew that BRRWD initially granted a permit to initiate the field dikes in Section 28, with no prior notice. He knew that BRRWD refused to address the field dikes. He knew that BRRWD's December 29, 2004 order meant, do whatever we want in Section 34, do it now, and don't waste any more of our time, or we will leave you with the horrible field dike problems we created for you in Section 28. BRRWD now takes the sanctimonious position that it needs to control drainage, asserting that no landowner can deprive another landowner of drainage, all the while it must stare, like this Court stares, at the aerial photographs showing crop losses and flooded land on Minch's property, App. pp. 54, 55, 56, 63 and 64 in 2004 and 2005.

So if BRRWD looks like a rouge local authority stacked with political insiders having their own agendas, so be it.

Judge Vaa tried ignore the factual issues by stepping outside his role as the initial appellate court, M.S.A. § 103D.537, and changing the orders without remand, App. pp. 2 and 21, thereby substituting his judgment for that of BRRWD, something he had already ruled a court should not do. Resp. App. pp. 19 and 20.

B. BRRWD's Orders Are Improper As A Matter Of Law.

BRRWD's orders are improper, as a matter of law, and that is how to address this appeal.

A watershed district does not have the power to order a citizen to do anything in the public domain with the certain uncompensated loss of farmland, even with notice and a hearing, particularly where the order is not specific, left to the discretion of another to implement, is not tested in court, where the work to be done is to be done somewhere other than in a "drainage system", and where the party subject to the order did not cause the alleged obstruction.

BRRWD even believes that its orders (unlike those of a court) do not need to be in writing. BRRWD Br. p. VI, p. 1 and the footnote on p. 2.

If a written order is required, the first written order is dated December 8, 2004, App. p. 26, which gave Minch, age 82 year, until December 13, 2004 to comply.

Section 9 of BRRWD's Rules, App. p. 40, suggests that the party subject to an order could ignore the order, depending on follow up criminal or civil proceedings, where the order could be tested in court. BRRWD does not claim the authority to issue writs to the county sheriff.

BRRWD's rules, App. p. 40, require a court action and an actual hearing or trial.

But Minch could not assume as much in light of M.S.A. § 103D.537, with its thirty day deadline to appeal an order made by a watershed district by a declaratory judgment action.

Thus, one subject to a watershed district's order is guaranteed no procedural safeguards, yet cannot wait for the matter to go to court, because if a court action occurred more than thirty days after the order were entered, the watershed district would argue that the order, no matter how infirm, had become final.

But managers must sign Oaths of Office, App. p. 16, and a watershed district, no matter what one calls it, must uphold constitutional principals.

Watershed districts must accord due process to those who come before it. Watershed districts have the power of eminent domain. M.S.A. § 103D.355, Subd. 11. But watershed districts do not have the power to simply order things done, whether that power is claimed under Minnesota Statutes Chapter 103D or 103E.

BRRWD's attitude is that since Minch happened to show up at one of its meetings, he was fair game for whatever BRRWD choose to do.

BRRWD claims that it is not bound by M.S.A. § 103E.075 because it has general powers under Minnesota Statutes Chapter 103D. It cites general provisions giving it control to alleviate soil erosion and siltation and to perform acts necessary and proper to carry out its express powers.

It is as if the Constitutions, applicable specific statutes, BRRWD's own rules and Oaths of Office disappear.

The only specific statutory authority given BRRWD to do anything with a ditch obstruction, even with notice and a hearing, is M.S.A. § 103.075, and then only if a “drainage system” is involved. BRRWD does not have inherent authority to ignore Constitutions, statutes, Oaths of Office, nor specific limitations in its own rules. BRRWD’s rules state:

It is the intention of the Managers that no person shall be deprived or divested of any previously established beneficial use or right, by any Rule of the District without due process of law, and that all Rules of the District shall be construed according to said intention.

¶6, §1, App. p. 39.

The previously established beneficial use or right of Minch is the right to his farmland, including the at least 10 to 15 feet of farmland BRRWD actually knew would be destroyed for the county to do the work BRRWD ordered Minch to do in the county right-of-way ditch according to its own specifications. See Exhibit C.

The transcripts of the hearings conducted on May 26, 2005, July 1, 2005 and September 19, 2005 are illuminating.

Judge Vaa was interested in customs and practices on ditch maintenance, and whether they differed if the ditch was on county right-of-way, township right-of-way, or just on private property. Tr. May 26, 2005, pp. 35 and 36.

He was concerned about whether there was a specific statute supporting BRRWD’s orders. He considered M.S.A. § 103E.075. Tr. May 26, 2005 p. 42 l. 8. He was concerned about whether there was a book or some type of document that the county engineer refers to concerning specifications for ditches. Tr. May 26, 2005 p. 43, ll. 6-8.

When it became apparent that BRRWD had not complied with M.S.A. § 103E.075, both BRRWD and the court changed their earlier positions that the ditch involved was a drainage system, so that the case could not go Minch's way because of BRRWD's failure to comply with that statute. Resp. App. p. 30 and App. p. 4.

The difference was discussed extensively at the July 1, 2005 hearing. Tr. July 1, 2005 pp. 9-12.

Judge Vaa was concerned why BRRWD had sent no notice of a hearing to Minch. Tr. July 1, 2005 p. 32.

By the time of the September 19, 2005 hearing, Judge Vaa asked about it and knew that whatever BRRWD's orders contemplated, they required work outside the county ditch in Minch's adjacent farmland. He was told that the cleanout contemplated simply removing sediment from an existing ditch. Tr. September 19, 2005 p. 10, ll. 5-9. Then, he was told that part of the ditch was on county right-of-way, and part was not. Tr. September 19, 2005 p. 10, ll. 22 and 23.

The Judge asked whether if all of the work could have been done on county right-of-way, Minch would have even gotten involved with the matter. Tr. September 19, 2005 p. 11, ll. 21-25. The Judge was told that if the cleanout had all been on county right-of-way, BRRWD could have cooperatively achieved the necessary result with the county highway department because the county supported the cleanout. Tr. September 19, 2005 p. 12, ll. 2-5.

We now know from the then county engineer that BRRWD and the county could not have cooperatively done the work without taking at least 10 to 15 feet of Minch's farmland. Exhibit C

C. BRRWD's Orders Are Unconstitutional.

This Court's case of *Alton v. Wabedo Township*, 524 N.W.2d 278 (Minn. App. 1994), is dispositive.

Here, according to the county engineer, the county right-of-way extends 33 feet North and South of the section line on the North side of Section 34. As BRRWD and Brendemuhl knew from visiting with the engineer, and as reported at BRRWD's October 25, 2004 meeting, "The County no longer owns enough road r-o-w to clean the ditch without infringing on Minch's property." App. p. 35. The county would need to use at least 10 to 15 feet of Minch's farmland to keep from making the road dangerous. Exhibit C paragraphs 19 to 25.

In *Alton*, supra, Wabedo Township wanted to clean brush and trees for eight feet back from the surface of a road adjacent to and on Alton's property. The township compiled a map describing a 66 foot wide right-of-way easement. Alton received actual notice from the township indicating its intention to record a 66 foot wide easement. Following a public hearing, the township adopted and recorded the map. Alton never received any compensation from the township and the township never maintained an eminent domain proceeding to acquire ownership of the road.

More than six years after the easement was recorded, the township accepted a quote for cleaning brush and trees for 8 feet beyond each side of the surface of the road. Alton received actual notice of a hearing where the public would be allowed to comment. At the meeting, the township decided to go forward with clearing the brush and trees. The township sent Alton a notice stating its intent and notifying him when the work would begin.

The day after the work begin, Alton appealed the township's determination and the district court issued a TRO. On cross motions for summary judgment, the district court issued an order granting Alton summary judgment and a permanent injunction preventing the township from clearing brush from his land. The district court declared former M.S.A. § 164.35, subd. 4 unconstitutional on its face because it allowed property to be taken without compensation in violation of the takings clause of the Minnesota Constitution.

After citing the due process clause of the United States Constitution and the takings clause of the Minnesota Constitution, this Court ruled that the basic requirements of due process are notice and an opportunity for hearing. Alton, supra. p. 281.

This Court cited Barfnecht v. Bd. of Hollywood Township, 232 N.W.2d 420 (Minn. 1975), which discussed the constitutionality of M.S.A. § 160.05, which allows a public highway to be established 33 feet on each side of a section line if used and kept in repair for at least six years.

In Barfnecht, the Minnesota Supreme Court held that if M.S.A. § 160.05, subd 1 were construed to extend a public dedication of a road by public use to a width greater than the actual public use, that would result in an unconstitutional taking of private property without due process.

The Supreme Court concluded that privately owned land cannot, merely by a statutory announcement, become a public road by adverse use beyond that portion used.

So just as Alton could not be deprived of 8 feet of trees and brush (which could grow back) along a public road through his property without compensation, Minch

cannot be permanently deprived of 10 to 15 feet of farmland almost a mile long along a county highway, without compensation.

BRRWD does not rely on a specific statute. It recorded nothing. It provided no public notice. It provided no public input. It provided no hearing. Instead it conspired with the county engineer and Brendemuhl to take Minch's farmland without compensation, after its own attorney advised it of the need for an eminent domain proceeding.

The holding of *Alton* is that even by statute, road widths and right-of-ways cannot be increased beyond the actual public use without causing an unconstitutional taking of a person's private property in violation of the takings clause, article I, section 13, of the Minnesota Constitution. *Alton*, supra, at page 282.

The Court ruled that townships could clear brush and trees along the road, but must use eminent domain, because this effectively provides private landowners with notice, due process of law, and the opportunity to secure just and fair compensation in return for property taken. The same should be true if a watershed district orders someone to widen a county right-of-way ditch into productive farmland resulting in the permanent loss of that farmland.

IV. MISCELLANEOUS REPLY

A. Despite Partial Completion, This Appeal Is Not Moot.

Minch thrice moved for a stay pending appeal in the district court. Resp. App. p. 16 and on reconsideration, Resp. App. p. 29.

After Judge Vaa entered the judgment granting BRRWD's Motion for Summary Judgment and assessing of costs, App. p. 38, BRRWD moved to have Minch found in

contempt for not complying with the specific requirements imposed by Judge Vaa after he stepped outside his role as an appellate judge and substituted his own judgment for BRRWD. App. pp. 2 and 21 and App. pp. 17 to 25.

BRRWD's Motion was entitled Motion to Compel, or to be Held in Contempt. Minch's responsive memorandum was called "Memorandum in Support of Motion for Stay Pending Appeal and to Fix Amount of Supercedeas Bond and in Opposition to the Defendant's Motion to Compel or to be Heard in Contempt". There Minch specifically asked the trial court to "stay its September 23, 2005 Order and Memorandum Pending Appeal without an additional bond."

Judge Vaa ignored the Motion for Stay in his December 1, 2003 Order and Memorandum, App. pp. 17 to 25. Instead he attempted to fix, rather than reverse or remand BRRWD's orders. App. p. 21.

BRRWD acted on the order by making a motion at its December 12, 2005 meeting to hire a contractor to do some of the work on December 13 and 14, 2005. Only the East 1,000 feet of the ditch was "cleaned". In the process, BRRWD piled all of the dirt on Minch's farmland, created yet another field dike on Minch's farmland, this time preventing drainage from approximately 30 to 40 acres of land in Section 34, which used to drain straight into the county right-of-way ditch. No doubt BRRWD plans to come back in the spring and work the rest of the ditch since the former county engineer supports BRRWD's actions "one hundred percent", Resp. App. p. 28, and made it clear to BRRWD at its October 25, 2004 meeting that "if the ditch along CSAH No. 5 is cleaned, it should be done for the entire mile."

BRRWD has not argued that this appeal has been mooted.

Judge Vaa made sure that nothing contained in his December 1, 2005 Order and Memorandum mooted an appeal of that good faith argument. As Judge Vaa noted:

This Order does not have any effect on Plaintiff's appeal, and does not render moot any pending legal issues. The siltation of Plaintiff's ditch is a recurrent maintenance issue that will continue to arise in the future. Therefore, the legal issue currently before the Court of Appeals will not be affected if the ditch is presently cleaned.

App. p. 25.

Judge Vaa ordered that "If Defendant receives a civil judgment for the reasonable costs of cleaning said ditch, said judgment may be vacated if Plaintiff's argument is successful on appeal." App. p. 19.

So the appeal is not moot because ultimate allocation of the costs, as well as the right of BRRWD to expand the improper ditch work next spring is still an issue.

B. BRRWD Is Entitled To No Deference Or Discretion.

The lesson is that every citizen has the capacity to conduct himself in a proper or improper manner depending on procedural safeguards to prevent abuse of discretion or power.

The issues before this Court arise because BRRWD's managers need no special knowledge, training, experience or qualifications. They do not face election. They do not face term limits. They are bound by no code of professional responsibility. They face no continuing education requirements. They adopt and then choose to enforce or ignore their own rules. They are bound by no rules of procedure or evidence. They are simply appointed by county commissioners⁴ and are paid \$75 per day when they work. They do not address constitutional rights or the law. BRRWD believes it has the

⁴ The only statutory requirements or limitations on a watershed district's managers we can find are found in M.S.A. §§ 103D.301, 103D.311, 103D.315, 103D.321 and 103D.341.

unrestrained power to order people to clean and widen county right-of-way ditches into adjacent farmland, with no notice or a hearing, due process of law or even any compensation for farmland they know will be destroyed in the process, because they were told so by the county engineer. BRRWD argues that its orders are not subject to effective review, and that it cannot be compelled to enforce its own rules nor be compelled to provide a remedy for those damaged by its failure to enforce its rules.

What BRRWD can do to Minch, it can do to anyone. Its office administrator boasts that that it has issued cleanout "requests" 30-40 times a year. Resp. App. p. 26.

No court could or would behave this way. Judges must be law trained, elected, subject to a continuing legal education requirement, a code of judicial conduct, an oath of office and rules of procedure and evidence promulgated by others. Even so orders of a court can only be made after proper commencement of an action, a proper hearing, with proper findings, and all subject to appeal.

There is no reason why this Court should allow BRRWD to do what a court could never do.

BRRWD needs detailed procedures to see that all citizens have their due process rights, rather than using secret proceedings to avoid the due process requirements of its own rules and the Constitutional protections against taking property without due process or for public use without fair compensation.

BRRWD needs to hold hearings and give notice. It needs to hear evidence and make findings just as a court would do. It needs to follow the law.

The Constitution of the State of Minnesota provides that individuals cannot be deprived of property rights without due process of law. Minn. Const. art.1, §7. The

fundamental essence of due process is that there be some type of notice and a hearing. Matter of D.F.C. v. Minnesota Commissioner of Health, 693 N.W.2d 451 (Minn. App. 2005).

The goal of the “due process” clause is to prevent the arbitrary and standardless enforcement of laws. State v. Davidson, 481 N.W.2d 51, 56 (Minn. 1992). The standard of what is permissible under rules should not depend on the “yea-or-nay-saying” by officials. Burstyn v. Wilson, 343 U.S. 495, 532 (1952), and the potential for arbitrary and discriminatory enforcement is a legitimate concern with respect to any law. State of Minnesota v. Reha, 483 N.W.2d 688, 691 (Minn. 1992).

The whole tone of BRRWD’s Brief is that it has some plan of its own to address drainage problems in the Kragnes area. It refers to a “plan”, “plans” and an “overall management plan” enough times that it might fool a court into believing that it actually has one. BRRWD Br. pp. 1, 3, 5, 9, 15 and 27. No such plan is in the record, no such plan exists, and none is contemplated.

BRRWD did order a study by a highly respected drainage expert, Robert Muscha dated January 9, 2002. App. pp. 49 and 50. The entire report was attached to Minch’s September 6, 2005 Affidavit and was part of the record. The number one recommendation was to construct a North/South flood control ditch one mile East of Kragnes to divert all water coming from the Southeast straight North into the Buffalo River. It is marked as “Houston Engineering Proposed Flood Control Project” on the map, App. p. 30. BRRWD did nothing to address this study.

BRRWD’s Brief stresses its effort to continue historic drainage patterns. BRRWD Br. pp. 6, 9 and 10. If it did so, it would recognize, as the Muscha study did,

that the historic drainage pattern East of Kragnes has been to intercept water coming from the East, directing it straight North into the Buffalo River as soon as possible. This accounts for Ditch 35 and the county road 95 road dike, both marked on the map provided Judge Vaa before the first hearing on May 26, 2005. App. p. 30. The flood control ditch would be a continuation of this same pattern.

BRRWD belittles Minch's ideas and plan, BRRWD Br. pp. 5 and 27, and "his own ideas about how water in the district should drain". BRRWD Br. p. 26.

This criticism was particularly cutting to Mr. Minch, while he was still alive, since he is the only one, in recent memory, to address any of the drainage problems for Kragnes.

Minch's plans and ideas for drainage in the Kragnes area started with improving Ditch #51 directly suited to first draining the village of Kragnes.

Minch's plan for Section 34 was exactly in keeping with the Muscha study. The number one recommendation of that study would prevent any water from flowing from Section 35 to Section 34.

Imagine how Minch felt when, in response to his improvement petition, Brendemuhl's brother used a bobcat to double drainage from Section 35 to Section 34 from one 18" culvert to two 18" culverts, and then finding himself subject to orders requiring him to clean and widen the county right of way ditch at his expense into 10 to 15 feet of his farmland, with no compensation, all to aid drainage for one digging out a culvert without a permit, to drain water through the flood control ditch recommended by Muscha to drain all water from Section 35 straight North, all while his Section 28 land stays flooded.

A watershed district may have some discretion if properly used. But here, BRRWD has no plan, no project, and no coordinated effort, other than to make the last years of Minch's life as miserable as possible.

The tone of BRRWD's Brief, and especially the Affidavit of its office administrator, Resp. App. pp. 25 to 28, is that it wishes to deal only with loyal subjects, who will not take up its time, question its actions, or make it abide by the Oaths of Office and the Constitutions its managers are sworn to uphold. It seems most concerned about the time it has had to spend to address drainage issues for Kragnes. Resp. App. p. 26 and BRRWD Br. pp. 7, 23, 25 and 28.

It cannot deal with citizens like Minch who know their rights. This emperor [BRRWD] has no clothes, head nor heart.

Good that BRRWD suddenly stresses continuing historic drainage patterns, BRRWD Br. pp. 6, 9 and 10 that individual landowners cannot affect the flow of surface water, and that it must order those who have obstructed a drainage system to remove the obstruction. BRRWD Br. p. 20.

BRRWD should have used those principals to address the horrible field dike flooding problems it created for Minch in Section 28. App. pp. 63 and 64.

BRRWD should have done its duty in Section 28, rather than dithering about avoiding a condemnation action in Section 34 to reward the brother of its Advisory Committee member who dug out a culvert to drain water into the Section 34 ditch, all in direct contravention of the only study BRRWD ever did to try to address drainage issues for Kragnes.

V. CONCLUSION AND PRECISE RELIEF SOUGHT

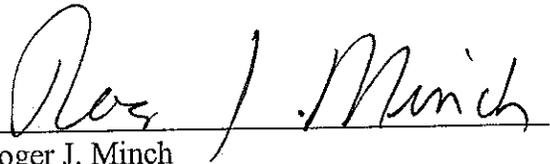
This Court should reverse the trial court's October 14, 2005 Judgment, App. p. 38, granting BRRWD's Motion for Summary Judgment and the costs award with a remand directing the trial court to determine that BRRWD's orders, App. pp. 26 and 28, were improperly entered, with no notice or hearing, in direct contravention of the U.S. Const. amendment V., Minn. Const. art. I § 13, Minn. Const. art. I § 7, M.S.A. Chapters 103D and 103E, the Oaths of Office of BRRWD's managers required by M.S.A. § 103D.315, BRRWD's own rules; and with instructions that the trial court vacate BRRWD's orders, App. pp. 26 and 28 as being void and of no effect from or after the dates they were entered, and award Minch attorneys' fees under M.S.A. § 103D.545 (3).

No remand is necessary for additional factual determinations. The uncontradicted testimony is that the orders required ditch work that would have widened the county right-of-way ditch into 10 to 15 feet of Minch's farmland. No additional findings will change this fact. BRRWD's chairman, Roger Ellefson admitted at his deposition with counsel present that at least some of Minch's farmland would be lost if its orders were performed and that the county right-of-way is not wide enough.

Bad things happen when good people do nothing. In Alton, supra, this Court correctly protected a landowner from the uncompensated loss of 8 feet of shrubs and trees along a woodland road. The court should do the same for someone ordered to permanently destroy a 10 to 15 foot strip of farmland nearly one mile long without compensation. Just as Rosa Parks could easily have taken a seat in the back of the bus, Minch could have easily destroyed his farmland at the uncompensated whim of BRRWD. It is Rosa Parks who has become the national hero. Minch's reward from BRRWD is

continued vilification, and his reward from the trial court is the characterization that his efforts only amount to leverage and a vehicle to address field dike flooding problems in Section 28, BRRWD Br. p. 32, something that BRRWD should have taken care of long ago, and for which it now acknowledges it is answerable for damages. BRRWD Br. p. 21.

Dated this 20th day of March 2006.



Roger J. Minch

SERKLAND LAW FIRM

10 Roberts Street

PO Box 6017

Fargo, North Dakota 58108-6017

Telephone No.: (701) 232-8957

Fax No.: (701) 237-4049

rminch@serklandlaw.com

MN License: 007360X

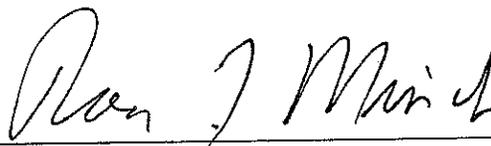
ND License: 03501

ATTORNEYS FOR APPELLANT

CERTIFICATE OF COMPLIANCE

The undersigned, as attorney for the Appellant in the above matter, and as the author of the above Brief, hereby, certifies, in compliance with Rule 132.01, Subd. 3 of the Minnesota Rules of Appellate Procedure, that the above Brief, excluding words in the table of contents, table of citations, any addendum containing statutes, rules, regulations, etc. and any appendix, signature block, Certificate of Service and this Certificate of Compliance, which was done in Microsoft Word, Windows 98, using a monospaced font of Times New Roman, totals 6,768 words.

Dated this 20th day of March 2006.



Roger J. Minch
SERKLAND LAW FIRM
10 Roberts Street
PO Box 6017
Fargo, North Dakota 58108-6017
Telephone No.: (701) 232-8957
Fax No.: (701) 237-4049
rminch@serklandlaw.com
MN License: 007360X
ND License: 03501
ATTORNEYS FOR APPELLANT

The appendix to this brief is not available for online viewing as specified in the *Minnesota Rules of Public Access to the Records of the Judicial Branch*, Rule 8, Subd. 2(e)(2) (with amendments effective July 1, 2007).