

A05-2339

STATE OF MINNESOTA  
COURT OF APPEALS

A. R. Minch,	)	
	)	<b>Dist. Ct. File Nos.: C9-05-48</b>
Plaintiff/Appellant,	)	<b>C0-05-49</b>
	)	
vs.	)	
	)	
Buffalo-Red River	)	
Watershed District,	)	<b>Date of Decisions: September 23, 2005 &amp;</b>
	)	<b>October 14, 2005</b>
Defendant/Appellee.	)	
	)	

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**BRIEF OF APPELLANT**


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## 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 and the watershed district did not determine whether the citizen caused the alleged destruction in the ditch and 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?

In its September 23, 2005 Order and Memorandum the trial court determined that the Appellant (“Minch”) raised “an important issue of first impression” and that “Although Chapter 103D does not specifically state that a watershed district has the authority to order Plaintiff to clean out his ditch, such authority is assumed under the provisions of that Chapter”. (App. p.8).

Realizing that the Order was not specific and capable of performance on its face, the trial court also determined in its September 23, 2005 Order and Memorandum that the ditch “shall be cleaned according to specifications issued by the Clay County Engineer”. (App. p. 2). The trial court ordered that “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”. (App. p. 2). The trial court further ruled that “If the Clay County Engineer mails the specifications to the Plaintiff on or before October 15, 2005, Plaintiff shall complete the clean out of said ditch within thirty (30) days...”. (App. p.2)

Thus, the Court delegated its authority to the Clay County Engineer to issue the cleaning specifications, and invited the parties to have ex parte contact with the Engineer. The record does not contain written County specifications concerning ditch cleaning, standard widths, back slopes, side slopes, grades, or anything else.

Minch made a Motion for Stay Pending Appeal which resulted in the trial court’s December 1, 2005 Order and Memorandum (App. p. 17), which, although did not grant a stay, does conclude that Minch has raised a “good-faith argument regarding an unsettled area of the law” and that “this argument raises a genuine issue in an unsettled area of the law”. (App. pp. 20 & 18 respectively).

The most important statutory and constitutional provisions are M.S.A. §103E 075, a copy of which is attached to this Brief, which only gives a watershed district limited and specific powers, after notice and a hearing, to order persons responsible for an obstruction to remove it within a reasonable time from a “drainage system”, which is defined as a system of ditch established and constructed by a drainage authority. See M.S.A. §103E.005 Subd. 12, a copy of which is also attached to this Brief. In addition, managers of a watershed district must sign the Oath of Office defined in Minnesota Constitution article V, section 6. M.S.A. §103D.315. The actual oath of the Chairman of Buffalo-Red River Watershed District (“BRRWD”), is in the Appendix. (App. p.16)

The M.S.A.Const.Art.1 §7 and the U.S.Constitution, Amendment V both protect due process rights and prohibit a governmental body from taking private property without just compensation.

## **II. STATEMENT OF THE CASE**

### **A. Nature of the Case**

Minch sought Court review of the orders of BRRWD dated December 8, 2004 and December 29, 2004 (App. pp. 26 & 28) directing him to clean a County road ditch according to unspecified “County’s specifications” where Minch was given no prior notice, no hearing was conducted and no findings were made. The first order mailed December 8, 2004 gave Minch just five (5) days to do the work by December 13, 2004. Although the trial court ruled that Minch has raised a good faith argument and raised a genuine issue in an area of unsettled law, the trial court upheld BRRWD’s power to issue the orders, and become involved to the point of almost being an advocate for BRRWD, by using the September 23, 2005 order to address the vague nature of BRRWD’s orders.

See the trial court's September 23, 2005 Order and Memorandum (App. p. 2), which directed involvement of another state official to fill in the gaps for BRRWD and the trial court. Taking the bait, BRRWD engaged in ex parte contact with the new County Engineer, and induced him to send a letter to Minch dated October 11, 2005 (App. p. 29).

Minch contends that BRRWD and its Managers have acted contrary to BRRWD's own Rules, a specific state statute (M.S.A. § 103E.075), a copy of which is attached to this Brief, and the Oaths of Office required of each of BRRWD's Managers (App. p. 16); and therefore, Minch had been deprived of his due process rights assured by BRRWD's own Rules, a specific state statute and the Minnesota and Federal Constitutions. Minch was given no prior notice and opportunity for hearing before BRRWD's orders were made, no hearing occurred, BRRWD does not contend Minch caused any ditch destruction, BRRWD has not attempted to condemn or compensate Minch for the expected loss of his farmland, and Minch has been required to comply with orders that are void for vagueness, and can only be enforced through an improper delegation of authority by the trial court to a County Engineer after ex parte contact by BRRWD. The trial court is the District Court for Clay County, Minnesota, and the Trial Judge is the Honorable Galen J. Vaa.

### **III. STATEMENT OF FACTS**

During the 1970's Minch purchased farmland around the village of Kragnes ("Kragnes") in Clay County, Minnesota a few miles Northeast of the City of Moorhead. The Appendix contains a map showing Minch's land in Sections 28 and 34 near Kragnes. This is the same map provided the trial court in chambers right before the May 26, 2005 hearing. (App. p. 30).

About five years ago Minch discovered substantial field dike flooding problems damaging his land Northwest of Kragnes in Section 28, and promptly reported that to BRRWD. The Appendix contains three aerial photographs showing the field dike flooding as it existed in 2004. (App. pp. 31, 32 & 33) The flooding was just as bad in 2005, and again resulted in substantial crop losses. BRRWD took no action. Rather than forcing a solution to that immediate problem, Minch petitioned BRRWD to improve drainage North from Kragnes. He wanted to initiate a comprehensive solution, not just for himself, but for the whole area. As a result of his Improvement Petition, BRRWD installed two concrete box culverts on the North edge of Kragnes in the ditch leading North from Kragnes (Ditch #51) to replace the prior steel culverts, which had been set about 1.4 feet higher than the new box culverts.

Along the way, BRRWD entered an order approving the Improvement Petition, and confirming its Viewers' Report assessing benefits and damages of the Improvement. Arguably the Improvement could improve drainage for Minch's farmland East of Kragnes in the North Half (N ½) of Section 34.

Trouble began when persons owning farmland about one mile East of Kragnes in Section 35 appealed from BRRWD's order confirming its own Viewers' Report. Minch made a motion to the district court and the appeals were dismissed, and so the Improvement was completed.

Some of those filing the appeal had dug out a culvert draining their land approximately one mile East of Kragnes in Section 35 into and down a County road ditch to the West running along the North side of Minch's land in Section 34 just East of Kragnes, and into Ditch #51.

Apparently it never set well with BRRWD that the appeals of BRRWD's own order were dismissed. In any event, after the appeals were dismissed, the Improvement was substantially completed during the Fall of 2004.

At its regularly scheduled October 25, 2004, meeting, not attended by Minch, some of the landowners approximately one mile East of Kragnes whose appeals had been dismissed, complained to BRRWD that they were not getting the drainage they had hoped, and needed relief because their appeals had been dismissed. One complained that his assessment had been \$667.00. Partial highlighted minutes of this meeting are contained in the Appendix. (App. p. 34). Remember that it was BRRWD itself through its own appointed Viewers who had fixed the \$667.00 assessment.

BRRWD's Viewers had made the assessments based on existing drainage and culvert conditions.

As a result, at the October 25, 2004, meeting BRRWD moved to seek a "legal opinion regarding this drainage issue". (App. p. 35). The drainage issue was how, with dismissal of the appeals, the landowners approximately one mile East of Kragnes, who had already dug out a culvert without a permit to run water into Kragnes, could obtain better drainage down a country road ditch along Minch's land just East of Kragnes along the North side of Section 34.

Minch did attend BRRWD's November 8, 2004, meeting, but there was no mention made at that meeting of the pending legal opinion.

Minch had made a practice of attending as many of BRRWD's meetings as possible, despite his age, 84 on January 29, 2006, to make sure that his Improvement

Petition was completed and that Kragnes, as well as his adjacent farmland, obtained improved drainage.

Minch attended the November 22, 2004, meeting of BRRWD as a matter of habit. He was given no prior notice of any particular agenda item to be presented at that meeting. Partial highlighted minutes of this meeting too are contained in the Appendix. (App. p. 36).

At the November 22, 2004, meeting, BRRWD reported the results of its “legal opinion”. The problem noted at the October 25, 2004 meeting (App. p. 35) was that the County road had widened to the point that the County no longer had enough road right-of-way to clean its own ditch without “infringing on Minch’s property”. (Emphasis added). The legal opinion discussed at the November 22, 2004 meeting concluded that BRRWD could commence an eminent domain proceeding to obtain the land it needed, or might assert some type of adverse possession claim. The opinion also advised BRRWD that another alternative would be to simply order Minch to clean the ditch under its Rules. (App. p. 36).

With very little discussion, this is exactly what BRRWD decided to do at its November 22, 2004, meeting. One of the Managers was concerned that this unprecedented action would look like Minch was being unfairly singled out. (App. p. 36).

Again, there was no notice of a hearing. No hearing occurred on November 22, 2005. No testimony was taken. BRRWD made no effort to determine why the County right-of-way ditch was allegedly obstructed. (App. pp. 44 & 45) Minch contended in the record before the trail court that the obstruction was caused by the unpermitted

cleanout of one of two long plugged 18” culverts at the Northeast corner of Section 34 at the higher end of the County road ditch in question. No one has ever contended that Minch deliberately created any obstructions in the County ditch.

Naturally, Minch was dumbfounded by the surprise order at the November 22, 2004, meeting.

On December 8, 2004, (App. p. 26) BRRWD issued its first order (App. p. 26) giving Minch just five (5) days until December 13, 2004 to do the work.

Minch at the time was 82 years old and as BRRWD knew, owned no farm equipment.

The December 8, 2004, order requires Mr. Minch to “clean the entire ditch to the County’s specifications”. The record is clear that there are no written “County’s specifications”. (App. p. 26).

Next came BRRWD’s December 29, 2004 order (App. p. 28) extending Minch’s time to do the work until June 1, 2005, but indicating that until the work was done, BRRWD “is not going to discuss any other drainage issues in and around Kragnes until this issue is resolved”. (App. p. 26).

This is an unmistakable and deliberate reference to the very substantial field dike flooding problems Minch is facing on his other land Northwest of Kragnes in Section 28 caused by field dikes and other obstructions originally permitted by BRRWD, and later proclaimed by BRRWD to be “illegal”. Apparently BRRWD does not want to address the field dike issues.

It is worth noting that one of the persons who unsuccessfully appealed BRRWD’s order approving the Improvement Petition for Ditch #51 and confirming its Viewers’

Report and who complained about the \$667.00 assessment has been sitting on BRRWD's Advisory Committee since at least 2004. His brother used a Bobcat to dig out the long closed culvert to drain water into Kragnes down the County road ditch on the North edge of Section 34 which is the subject of BRRWD's December 8, 2004 and December 29, 2004 orders. The persons farming the dry side of the field dikes Northwest of Kragnes in the Northeast Quarter (NE ¼) of Section 28 are from the same family as BRRWD's Advisory Committee member and the individual who used the Bobcat to dig out the culvert.

Minch always believed that BRRWD did not have the power to issue the December 8, 2004 and December 29, 2004 orders, because there was no notice or a hearing, the orders were unreasonable, void for vagueness, improperly delegated authority and were issued to avoid a condemnation action and resulting required payment; but could not take the chance that if he did not seek review of the orders, they would become final and nonappealable, whether they were properly entered or not.

Thus, Minch sought review of the orders by commencing a Declaratory Judgment Action. The proper means of review would have been by appeal if the cleanout order related to a project. If not, the Declaratory Judgment Action was the proper route. After BRRWD admitted that the cleanout of the ditch addressed in its orders was not part of the Ditch #51 Improvement Petition, Minch and BRRWD agreed to dismiss the Appeal Action, but continue the Declaratory Judgment Action.

The trial court's September 23, 2005 Order and Memorandum dismissed the Appeal Action, C0-05-49, by agreement of the parties, but granted BRRWD's Motion for Summary Judgment in the Declaratory Judgment Action, C9-05-48. The October 14,

2005 Judgment dismissing the Declaratory Judgment Action, including the Cost Judgment (App. p. 38), is what is on appeal here.

Along the way, in the Declaratory Judgment Action, Minch served a Motion for Stay Pending Appeal, a Memorandum, detailed Affidavits and a proposed Order. The hearing occurred on May 26, 2005 and on June 6, 2005, the trial court denied the Motion for Stay Pending Appeal.

Minch filed a Motion for Reconsideration of that Order, and on June 29, 2005 the trial court granted Minch's request for a hearing on the Motion for Reconsideration. Along the way, the parties had agreed to consolidate the Appeal Action and the Declaratory Judgment Action.

The hearing on Minch's Motion for Reconsideration occurred on July 1, 2005 and on July 13, 2005 the trial court issued its Order and Memorandum affirming its June 6, 2005 Order denying Minch's Motion for Stay Pending Appeal.

BRRWD filed Motions for Summary Judgment in both the Appeal Action and the Declaratory Judgment Action. The hearings occurred on September 19, 2005 and the result is the trial court's September 23, 2005 Order and Memorandum (App. p. 1) and the October 14, 2005 Judgment (App. p. 38) appealed here. Complete transcripts of all three hearings, May 26, 2005, July 1, 2005 and September 19, 2005 have been ordered and are filed.

As a result of the September 23, 2005 Order and Memorandum (App. p. 1), BRRWD contacted the new Clay County Engineer on an ex parte basis and procured the October 11, 2005 letter (App. p. 29). This letter provided no more detail about exactly what needed to be done than BRRWD's orders themselves.

Minch served his Notice of Appeal on November 22, 2005. Meanwhile, BRRWD made a motion to compel Minch to comply with the orders and to have Minch found in contempt, while Minch filed a Motion for Stay Pending Appeal and to Fix the Amount of the Supersedeas Bond. The result is Judge Vaa's December 1, 2005 Order and Memorandum (App. p. 17).

Although the trial court did not find Minch in contempt, nor compel him to do anything, it did allow BRRWD to perform very specific and limited work in the County road ditch, if it could do so before the end of 2005. The December 1, 2005 Order and Memorandum (App. p. 17), in addition to again noting that Minch "raises a good-faith argument" and "a genuine issue in an unsettled area of law" (App. p. 18) puts specific limitations on BRRWD if it chose to do work itself. The Judge specifically ruled that any "clean-out operation is limited to the existing ditch" and that "Said clean-out operation may not be performed so as to interrupt Plaintiff's ability to farm his land in the Spring, Summer or Fall of 2006". The Order prohibits the ditch from being laterally enlarged or deepened. (App. p. 21). The Order indicates that Minch would have the right to object to the costs. Minch has done so, and the hearing on the objection occurred on January 30, 2006. The matter is under advisement by Judge Vaa.

Judge Vaa explains in his December 1, 2005 Order and Memorandum that his December 1, 2005 Order and Memorandum would not have any effect on Minch's appeal and would not render moot any pending legal issues. (App. p. 25).

In addition, the December 1, 2005 Order and Memorandum indicates that if the work is done by BRRWD, the appeal will not be moot because "siltation of Plaintiff's ditch is a recurring issue". (App. p. 25). Also, the Order rules that if BRRWD recovers a

civil judgment against Minch for the cost of cleaning the ditch, “Said judgment may be vacated if Plaintiff’s argument is successful on appeal”. (App p. 19).

Thus, what this all boils down to is whether BRRWD had the authority to issue its December 8, 2004 and December 29, 2004 orders (App. pp. 26 & 28) in the first place.

#### **IV. LAW AND ARGUMENT**

##### **A. Standard Of Review**

The trial court granted BRRWD’s Summary Judgment Motion in the Declaratory Judgment Action. Whether the Summary Judgment was proper depends on whether there were genuine issues of material facts. If so, Summary Judgment was not proper.

The trial court’s Conclusions of Law about the legal authority of BRRWD are fully reviewable on appeal, and Minch needs show no clearly erroneous factual determination nor abuse of discretion.

##### **B. A Watershed District Is A Creature Of Statute And Therefore Must Exist And Operate Within The Powers Specifically Given To It By Its Creator, The Legislator.**

One supplying a “legal opinion” to a watershed district concerning an alleged obstruction in a ditch, could hardly miss noticing M.S.A. § 103E.075 entitled “Obstruction of Drainage System”. This title of this statute appears in the index summary to M.S.A. Chapter 103E. A copy of the statute is attached to this Brief.

One would immediately notice that for a watershed district to use the power granted by that statute, it must determine that a “drainage system” has been obstructed. It would then need to notify the person responsible for the obstruction as soon as possible, serve a certified mail notice at least ten (10) days before a hearing, and then actually conduct a hearing. At the hearing, all interested parties would have to be heard and only

then if the board determined that a “drainage system” had been obstructed by someone, could the watershed district order the responsible party to remove the obstruction within a reasonable time set in the order. M.S.A. § 103E.075.

M.S.A. § 103E.005 Subd. 12 (copy attached) defines a drainage system to mean a ditch “established and constructed by a drainage authority”. Thus, if a watershed district has invested itself to the point of establishing and constructing a ditch, then it is given the limited powers specified by M.S.A. § 103E.075. It is not surprising that a watershed district might be given carefully circumscribed powers to order responsible parties to remove obstructions, after proper notice, a hearing and findings are made, where a watershed district has invested itself in a ditch system.

But the ditch subject to BRRWD’s orders (App. pp. 26 & 28) do not relate to a “drainage system”. They relate to a County right-of-way road ditch, never constructed or established by BRRWD. As the County itself determined, even its own right-of-way was not sufficient to allow the work BRRWD hoped to force Minch to perform, all in an effort to avoid a condemnation action.

Even if the ditch in question were a “drainage system” BRRWD would not have complied with M.S.A. § 103E.075. It notified no one. It sent no certified mail notice of a hearing. It conducted no hearing. It took no testimony. It made no findings. It made no determination of who the responsible person was. In fact, it never even tried to find out, and, in fact, has never accused Minch of doing anything to actively cause the obstruction.

M.S.A. § 103E.075 requires that even if all specific due process procedural safeguards are met, the order directed to the responsible party to remove the obstruction must set a “reasonable time”. M.S.A. § 103E.075 Subd. 3 BRRWD’s December 8,

2004 order (App. p. 26) even if mailed on that day gave Minch only until five (5) days later, or December 13, 2004 to perform the order. No one would contend that this is a “reasonable time” for an 82-year old man to round up ditching equipment, or hire someone to do ditching work after freeze up.

The specific controls the general. If a statute specifically addresses a particular problem, that statute should be deemed conclusive and the total authority on the point.

Initially BRRWD and the trial court concluded that the ditch in question was a “drainage system”. They both later changed their mind when it became apparent that BRRWD had not complied with M.S.A. § 103E.075. The better approach then was to simply conclude that since no “drainage system” was involved, BRRWD had some type of unwritten “inherent authority” to do whatever it wanted to do, without regard for the specific and detailed procedural safeguards and other safeguards of M.S.A. § 103E.075.

This strange outcome means that where the Legislature specifically gave watershed districts specific, but very limited, powers to deal with obstructed ditches established and created by a watershed district, where a watershed district did not invest itself to the extent of establishing and constructing a ditch, its power would be inherent, unlimited and unrestrained, subject to no procedural safeguards.

We submit that if a “drainage system” is involved, then a watershed district must comply with M.S.A. § 103E.075. If no “drainage system” is involved, as here where there is merely a County right-of-way ditch, then BRRWD has no authority to issue its own orders based on its own interpretation of its own Rules, without Court involvement. One would think that BRRWD’s counsel would have at least advised it that if it wanted to enter an order concerning a County right-of-way ditch, it should at least comply with

the requirements it would have had to follow to address an obstruction in a ditch established and constructed by it.

Clearly BRRWD wants no one to question its authority. The trial court simply did not want to get involved with what it viewed as contentious and complicated drainage issues, and wants to assume that BRRWD knows better about drainage matters and needs to have ultimate discretion. But constitutional rights, Oaths of Office, and following the law are not discretionary or advisory things. BRRWD and the trial court act as if without this unfettered discretion, the world might come to an end. But recall that almost all of Minnesota history and farming practices developed without watershed districts at all. BRRWD can only date its authority from July 1, 1979.

**C. BRRWD Cannot Enforce A Clean Out Of A County Right-Of-Way Ditch Without Obtaining A Court Order**

Although not important here, if anyone were concerned that BRRWD needed to have willy-nilly authority to enforce rules promulgated by it according to its own present interpretation of its Rules or notions of due process, it only needs to go to Court, just like any other citizen wanting to exercise executive power or obtain other relief. See M.S.A. § 103D.545 Subd. 2 and Section 9 of BRRWD own Rules (App. p. 40).

**D. BRRWD Cannot Use An Improperly Made Order As A Substitute For A Condemnation Action**

BRRWD's problem was that it could not induce Clay County to clean its own right-of-way ditch to meet the demands of Wayne Brendemuhl, BRRWD's Advisory Committee member, who had appealed from BRRWD's own Viewers' Report establishing Mr. Brendemuhl's assessment for Section 35, and whose brother had dug out a long plugged culvert without a permit to run as much water down the County right-of-

way ditch on the North side of Section 34 into Kragnes, and then down Ditch #51, the subject of Minch's Improvement Petition, designed to aid Kragnes, which had and still has no other drainage alternatives. The County Engineer had clearly and unequivocally informed BRRWD that the County could not do the work without "infringing on Minch's property" because "the County no longer owns enough road r-o-w to clean the ditch ...". See the minutes of the October 25, 2005 meeting (App. p. 35).

The next best thing for BRRWD was to order a "legal opinion regarding this drainage issue" as a result of a meeting Minch did not attend. (App. p. 35).

The next best thing after that, to avoid the time and expense of an eminent domain proceeding, was simply to order Minch to do the work at his own expense, and if there wasn't room enough in the County right-of-way to do so, then tough, he could just sacrifice his own farmland. See the minutes of the November 22, 2004 meeting (App. p.36). Even one of the Mangers thought that might be going to far and questioned whether there was any precedent for this type of action and was afraid that BRRWD could be accused of unfairly singling out a particular individual, (App. p. 36) in this case an 82-year old man who had owned land in the Kragnes area since the 1970's, and who had played by the rules and prepared an Improvement Petition for Ditch #51, which resulted in the costs being spread by those benefited.

One would have thought that BRRWD would have considered that same option for Mr. Brendemuhl, or simply held a hearing and removed Mr. Brendemuhl's land from the Ditch #51 assessment. M.S.A. § 103E.351.

The saddest part of this, other than the obvious local insider activities, is the fact that Watershed District Managers need only live in the same County where the County

Commissioner appointing them to the Watershed District lives, and they must sign an Oath of Office. M.S.A. §§ 103D.311 and 103D.315. In this particular case, the Oaths of Office signed by the Managers states that they “will support the Constitution of the United States and of this State and will discharge faithfully the duties of his office as Manager of the Buffalo-Red River Watershed District to the best of his judgment and ability”. (App. p. 16). BRRWD’s own Rules themselves require BRRWD to operate with due process of law. See ¶6 of Section 1 of the Rules (App. p. 39). The Oath of BRRWD’s Chairman is contained in the Appendix. (App. p.16).

Other than this, there are simply no procedural safeguards. Managers are not required to have any particular knowledge, training or experience. They are not required to have a license. They are subject to no rules of professional responsibility or conflicts of interest. They get to promulgate their own Rules and then enforce their own Rules. There are no term limits. They do not face election. BRRWD’s Rules contain no procedural rules or other safeguards that even courts must be bound by.

Perhaps because of this, BRRWD feels that it is in some special position to take private property without compensation, in this case a mile long strip of Minch’s farmland it knew and Clay County knew would need to be consumed in order for even the County to do the work BRRWD wanted to be done in the County right-of-way road ditch.

All of this violates BRRWD’s own due process Rules, the Oaths of Office of each of its Managers, and the Federal and State Constitutional provisions requiring governmental bodies to accord due process rights to the citizens coming before it M.S.A.Const.Art.1 § 7 and U.S. Constitution, Amendment V. These Constitutional

safeguards include the right to notice and an opportunity for hearing and the right to just compensation for private property taken for a public use.

**E. BRRWD's Orders Are Void For Vagueness**

One of the other major problems with BRRWD's Orders is that they are indefinite and vague. The December 29, 2004, Order (App. p. 28) requires the ditch to be cleaned "to the County's specifications along your property in Section 34, Kragnes Township". These specifications were not supplied with the Order, and thus the Order is impossibly vague. See the Affidavit of A. R. Minch concerning Response to Motion to [SIC] Stay Pending Appeal dated May 25, 2005, without the attached Exhibit (App. p. 41). There he says he has no idea what the County's specifications are or mean. (App. p. 45).

The United States Supreme Court has indicated that every order granting an injunction or a restraining order must, in addition to setting forth the reasons, be specific in terms, and describe in reasonable detail, and not by reference to another document, the act or acts sought to be restrained. *International Longshoreman's Assn., Local 1291 v. Philadelphia Marine Trade Assn.*, 88 S. Ct. 201 (1967). A court must provide the accused party with a clear definition of the acts to be performed before a party can be held in contempt. *Afremov v. Amplatz*, 205 W.L. 89475 (Minn. App. 2005) and *Hopp v. Hopp*, 156 N.W.2d 212 (Minn. 1968).

So, specifically, the problem with BRRWD's orders is that they both require Minch to do work according to the "County's specifications", which were not explained in the orders, attached to the orders, and which in fact, even to this day, no one can locate in written form.

The trial court's answer to this problem was to simply order that BRRWD could contact the new County Engineer on an ex parte basis so he could issue the specifications, and then Minch would have thirty (30) days to comply with whatever they turned out to be. In other words, the trial court ruled that BRRWD can contact the new Clay County Engineer, ex parte, and then Minch will have thirty (30) days to do whatever the Engineer decides needs to be done.

Not only is all of this void for vagueness, but it is an improper deligation of judicial authority to another state official, the Clay County Engineer.

**F. BRRWD Has Violated Minch's Due Process Rights And Lacks Procedural Due Process Safeguards Required By Its Own Rules**

Whatever authority BRRWD has, must be exercised properly, the same as with any governmental unit or Court. No one questions the authority of a court to issue orders. But even a court must do so on notice and hearing and in strict conformity with rules of procedure and evidence, promulgated by others, evenly applied. The same is required of the BRRWD.

BRRWD is bound by the rights accorded citizens by the United States Constitution, the Constitution of the State of Minnesota, what it has undertaken to do because of its own rules, and the case law.

But even if no constitution nor any court required it to do so, BRRWD has drafted its own Rules and has stated in those Rules that "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". (App. p. 39).

Due process is required of governmental agencies and BRRWD, whether their own Rules require it or not.

The due process clause requires that action by a state through any of its agencies must be consistent with fundamental principles of liberty and justice, Buchalter v. New York, 319 U.S. 427 (1943).” (Emphasis added); Anderson v. Lappegaard, 224 N.W.2d 504, 507-08 (Minn. 1974).

The authority to create watershed districts is derived from the Minnesota Watershed Act, which is a legislative grant of power. In 1955, the Minnesota Watershed Act was enacted to permit the development of an integrated program for the use of water. “The legislature broadly declared the purpose of the act to be ‘the protection of the public health and welfare and the provident use of the natural resources’ of the state. M.S.A. § 112.34, Subd. 1”. Adelman v. Onischuk, 135 N.W.2d 670, 673 (Minn. 1965). “[T]he act provides for the establishment of multiple-purpose watershed districts in order to develop and manage uniform and integrated programs of water use in separate areas.” Id. “[T]he Watershed Act meets the requirements of due process since it affords a right of review and requires notice to all landowners affected by an improvement project.” Id. at 681. Thus, watershed districts are properly categorized as administrative agencies. “Watershed districts more nearly resemble administrative agencies in that the districts govern a single topic: water.” In re 1994 and 1995 Shoreline Improvement Contactor Licenses of Landview Landscaping, Inc., 546 N.W.2d 747, 750 (Minn. App 1996) See also Adelman at 681. As such, watershed districts are required to afford parties with the same due process rights and procedures that the constitutions of the State of Minnesota and of the United States would provide. “The Due Process Clauses of both the

Minnesota and the United States Constitutions provide that the government cannot deprive a person of “life, liberty, or property without due process of law.” U.S. Const. Amends V, XIV; Minn. Const. Art. 1 §7.” Boutin v. LaFleur, 591 N.W.2d 711, 716 (Minn. 1999). Both clauses prohibit “certain arbitrary, wrongful government actions, regardless of the fairness of the procedures used to implement them.” Id. (quoting Zinerman v. Burch, 494 U.S. 113, 125 (1990) See also Sartori v. Harnischfeger Corp., 432 N.W.2d 448, 453 (Minn. 1998) (stating that **“the due process protection provided under the Minnesota Constitution is identical to the due process guaranteed under the Constitution of the United States.”**) (Emphasis added). “Procedural due process is guaranteed by the state and federal constitutions. When a protected interest is subject to government action, the administrative agency must provide reasonable notice and an opportunity to be heard.” In the Matter of the Real Estate Salesperson’s License of Hendrie Cutler Grant and the Mortgage Originator License of Cutler Mortgage Company, 2005 WL 406260, \*2 (Minn. App. 2005) See also Programmed Land, Inc., v. O’Conner, 633 N.W.2d 517, 528 (Minn. 2001). **“Minnesota law establishes that agency hearings do not provide a full and fair opportunity to be heard unless elaborate procedural due-process safeguards are built into the proceedings.”** Heine v. Simon, 674 N.W.2d 411, 422 (Minn. App. 2004) (Emphasis added).

The protected interest of Minch at stake is the continued use and enjoyment of an almost 1-mile long strip of farmland at least 10 to 15 feet wide that Clay County itself would have needed to use to do work in its own ditch and which BRRWD simply ordered Minch to consume as a result of its clean out orders (App. pp. 26-28) because those

orders required the work to be done according to the same County's specifications of the County that couldn't do the work itself within its own right-of-way.

We submit that any decision of BRRWD done in violation of its own Rules without according Minch proper due process should be accorded no deference whatever and no enforcement by any Court.

It may be true that BRRWD is accorded some discretion concerning orders it makes after notice and a hearing and according the affected party due process, (as required by its own rules) but where there has been no due process, no deference should be allowed.

As noted above, Minnesota law establishes that agency hearings do not provide full and fair opportunity to be heard unless "elaborate procedural due-process safeguards are built into the proceedings". *Heine v. Simon*, 674 N.W.2d 411, 422 (Minn. App. 2004).

Here BRRWD's Rules consisting of two pages and nine sections, (App. pp. 39 & 40) although they mention the words "due process of law" do nothing to explain how that will actually be assured.

For a court to obtain jurisdiction over a party, there must be service of a pleading. Then, there must be an opportunity to be heard and an actual hearing where real evidence can be presented, witnesses can be cross examined, and there must be findings of fact, conclusions of law and an order for judgment.

At least as much is required of a watershed district, comprised of untrained, unlicensed managers simply appointed by County Commissioners with no term limits or an election.

Here, BRRWD's Rules do not even touch on the mechanics of procedural or substantive due process. BRRWD simply takes the position that since it is a watershed district, it can issue orders under any circumstances, and expect them and its unfettered discretion to go unchallenged at every level.

**G. There Was No Reason Or Justification For BRRWD's Orders**

The Affidavit of A. R. Minch in Opposition to Motions for Summary Judgment sworn to on September 6, 2005 was also made part of the record. A copy of it (without the Muscha Study, but with the aerial photographs (Exhibits A through D) is contained in the Appendix). (App. p. 49).

That Affidavit and the aerial photographs shows that Wayne Brendemuhl found sufficient alternative drainage for ditching work he did himself during the fall of 2004 leading North along the West side of Section 26 and away from the County right-of-way ditch in question. The results during 2005 were beautiful crops for all his land said to need drainage into the County ditch in question, but continued substantial field dike flooding crop losses for Minch Northwest of Kragnes in Section 28.

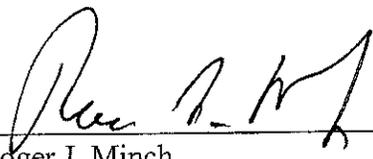
So through its orders, BRRWD found a way to satisfy its Advisory Committee member, Wayne Brendemuhl, and found a convenient excuse to avoid dealing with the horrible field dike flooding problems for Minch in Section 28 it initiated by an after the fact permit given to the dike builder in 1979.

This is the significance of the reference that "the Board is not going to discuss any other drainage issues in and around Kragnes until this issue is resolved". (App. p. 28). See also the Affidavit of A. R. Minch dated January 31, 2005, for more about his storied background and the horrible Section 28 field dike flooding problem (App. p. 58).

## V. CONCLUSION

**FOR ALL OF THESE REASONS**, Minch respectfully requests that this Court determine that BRRWD's orders dated December 8, 2004 and December 29, 2004 are void and therefore Minch respectfully requests that the Court remand the matter back to the District Court with instructions that it vacate its October 14, 2005 Judgment and direct it to enter Summary Judgment in favor of Minch and against BRRWD determining that BRRWD's orders are void and of no effect. Although Minch filed no cross-motion for summary judgment below, the court had authority to grant summary judgment in Minch's favor. *Leidall v. Grinnell Mut. Reinsurance Co.*, 374 N.W.2d 532 (Minn. App 1985) and the court was given this authority at the September 19, 2005 arguments. Tr September 19, 2005 hearing, p. 3. The order for remand should take the suggestion of the trial court and specifically order that BRRWD shall pay all costs and expenses it incurred to do work in the ditch during December of 2004. This is in keeping with the trial court's December 1, 2005 Order and Memorandum, especially ¶11 on page 3 (App. p. 19).

Dated this 31<sup>st</sup> day of January 2006.

  
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**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 6,729 words.

Dated this 31<sup>st</sup> day of January 2006.



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### **103E.075. Obstruction of drainage system**

**Subdivision 1. Notification to responsible party.** If the board determines that a drainage system has been obstructed, including by the installation of bridges or culverts of insufficient hydraulic capacity, the board shall notify the person or public authority responsible for the obstruction as soon as possible and direct the responsible party to remove the obstruction or show the board why the obstruction should not be removed. The board must set a time and location in the notice for the responsible person to appear before the board.

**Subd. 2. Obstruction on private property.** If the obstruction is on private property, the owner is responsible for the obstruction unless the owner proves otherwise. The owner must be notified by certified mail at least ten days before the hearing.

**Subd. 3. Obstruction hearing.** The board shall hear all interested parties and if the board determines that the drainage system has been obstructed by a person or public authority, the board shall order the obstruction removed by the responsible party within a reasonable time set in the order. If the obstruction is not removed by the prescribed time, the board shall have the obstruction removed and the auditor shall make a statement of the removal cost. The statement must be filed in the county recorder's office as a lien on the property where the obstruction is located or against the responsible party. The lien must be enforced and collected as liens for drainage repairs under this chapter, except that a lien may not be filed against private property if the board determines that the owner of the property is not responsible for the obstruction. The lien may be enforced against the responsible party by civil action.

Laws 1990, c. 391, art. 5, § 16.

## GENERAL PROVISIONS

## Library References

Drains ⇨7  
WESTLAW Topic No. 137.  
C.J.S. Drains § 2.

**103E.005. Definitions**

**Subdivision 1. Applicability.** The definitions in this section apply to this chapter.

**Subd. 2. Affected.** "Affected" means benefited or damaged by a drainage system or project.

**Subd. 3. Auditor.** "Auditor" means the auditor of the county where the petition for a drainage project was properly filed.

**Subd. 4. Board.** "Board" means the board of commissioners of the county where the drainage system or project is located.

**Subd. 5. Commissioner.** "Commissioner" means the commissioner of natural resources.

**Subd. 6. Director.** "Director" means the director of the division of waters in the department of natural resources.

**Subd. 7. Dismissal of proceedings.** "Dismissal of proceedings" means that the petition and proceedings related to the petition are dismissed.

**Subd. 8. Ditch.** "Ditch" means an open channel to conduct the flow of water.

**Subd. 9. Drainage authority.** "Drainage authority" means the board or joint county drainage authority having jurisdiction over a drainage system or project.

**Subd. 10. Drainage lien.** "Drainage lien" means a lien recorded on property for the costs of drainage proceedings and construction and interest on the lien, as provided under this chapter.

**Subd. 11. Drainage project.** "Drainage project" means a new drainage system, an improvement of a drainage system, an improvement of an outlet, or a lateral.

**Subd. 12. Drainage system.** "Drainage system" means a system of ditch or tile, or both, to drain property, including laterals, improvements, and improvements of outlets, established and constructed by a drainage authority. "Drainage system" includes the improvement of a natural waterway used in the construction of a drainage system and any part of a flood control plan proposed by the United States or its agencies in the drainage system.

**Subd. 13. Engineer.** "Engineer" means the engineer for a drainage project appointed by the drainage authority under section 103E.241, subdivision 1.

**Subd. 14. Established.** "Established" means the drainage authority has made the order to construct the drainage project.