

Ohnstad Twichell, P.C., is a full service law firm having a general and trial practice in North Dakota, Minnesota, and federal courts and offering services in the fields of probate, real estate, estate planning, corporate, labor/employment law, family law, elder law, municipal finance and bonding, taxation, personal injury, criminal, negligence, commercial, insurance defense, water rights, oil, gas and wind law, and automobile law.

## TILE DRAINAGE IN NORTH DAKOTA



**Sean M. Fredricks**  
*works in the West Fargo office and devotes his practice to water law.*

Many ag producers in the Red River Valley view tile drainage as North Dakota's oil boom. With high commodity prices in recent years, producers are anxious to maximize their production capacity, and tile drainage has emerged as a crucial tool. Farmers in Illinois and Iowa long ago recognized the value of tile drainage, and producers in the Upper Midwest are following suit. While soils obviously vary throughout the Midwest, producers region wide seem to agree tile drainage can transform an otherwise useless, swampy parcel into thriving, farmable acres.

Permitting regarding subsurface drainage varies from State to State almost as much as soil types. With that in mind, producers and landowners who are interested in installing tile drainage should be aware of relevant permitting requirements. Minnesota law differs from North Dakota law, and Minnesota landowners should approach their watershed management boards to inquire into permitting requirements; Minnesota permitting regarding tile varies from watershed to watershed. Conversely, North Dakota water resource districts have a more uniform permitting process as promulgated by the North Dakota legislature. This article will provide a brief synopsis of tile drainage permitting requirements in North Dakota.

I represent several individual water resource districts in the Red River Valley, as well as the Red River Joint Water Resource District

(a joint board comprised of 14 individual water resource districts up and down the Red River Valley in North Dakota). As you may or may not know, every county has at least one water resource district; Cass County has four individual water resource districts (the Southeast Cass, Maple River, Rush River, and North Cass Water Resource Districts) as well as the Cass County Joint Water Resource District. Before you install tile on your property, contact your water resource district to inquire into permitting requirements.

In 2011, the North Dakota legislature enacted new permitting requirements specific to tile drainage. Prior to the 2011 session, North Dakota's standard drainage permitting requirements applied to tile, but the 2011 legislation specifically addressed various issues unique to tile. I worked with several of the legislators who advocated new tile permitting standards, and those legislators sought to enact reasonable legislation that would ensure a landowner's ability to obtain tile permits within a reasonable time, with an eye toward protecting surrounding roads and downstream landowners. Since enactment of the 2011 legislation, water resource districts in the Red River Valley have approved literally hundreds of tile permits, so clearly the legislation served its purpose.

Under the 2011 legislation, the following permitting requirements apply to tile drainage installation:

1. Installation of a tile system that will cover 80 acres of land requires a tile drainage permit.
2. Landowners interested in installing 80 acres or more of tile must obtain a *continued on page 2*

## Table of Contents

Tile Drainage in North Dakota.....	1
Ohnstad Twichell Introduces Four New Associate Attorneys.....	3



*A legal newsletter from Ohnstad Twichell, P.C., with offices in West Fargo, Hillsboro, Casselton, and Page, North Dakota, and Barnesville, Minnesota.*

*Permitting  
requirements which  
apply to tile drainage  
installation*

tile drainage application from the water resource district where the land is located (e.g., land within the Maple River Water Resource District boundaries should obtain an application from the Maple River Water Resource District).

3. The water resource district will determine if the proposed application “is of statewide significance”; in other words, the water resource district will determine if the project would result in impacts in more than one water resource district; if so, the water resource district will forward to the State Engineer’s office for final approval.

4. If the permit does not include drainage “of statewide significance,” the water resource district must consider and approve or deny the permit. Recognize prior to the 2011 legislation, the North Dakota State Engineer’s office had to first consider all drainage permit applications, including tile applications; the State Engineer would consider and review the application, then forward to the water resource district for final determination. The 2011 legislation eliminated that step.

5. If the proposed project will discharge into a road ditch or will otherwise discharge onto downstream property owners, the applicant must provide a “Thirty-Day Notice” to downstream landowners to give them an opportunity to review the application and consider potential impacts to their property. The downstream landowners may submit comments to the water resource district in support of or in opposition to the proposed project. Many water resource districts will provide this Thirty-Day Notice for the applicant; inquire with your water resource district.

6. If the proposed project will discharge directly into an existing stream, natural watercourse, pond, legal drain, or other pre-existing body of water, no Thirty-Day Notice is required.

7. If the project will discharge into a road ditch or will otherwise discharge onto property of downstream landowners, the water resource district may require the applicant to obtain flowage easements up to a maximum of one mile downstream from the tile outlet, if the water resource district concludes the project would result in adverse impacts to property within one mile of the outlet.

8. If the project discharges directly into a legal drain or other pre-existing body of water or watercourse, the water resource district cannot require any flowage easements.

9. Water resource districts must approve all permits, with the exception of permits that are “of statewide significance” (applications that require approval by the State Engineer); if a project will flood or adversely affect property of downstream landowners, the water resource district has some discretion regarding approval or denial, and regarding flowage easement requirements.

10. Water resource districts may require an applicant to obtain permission from road authorities if tile projects include outlets or other usage of DOT, county, or township road ditches or right of way; similarly, water resource districts may attach other reasonable conditions to any permit.

The new process has certainly reduced the time involved in processing a tile permit application. You can further expedite the process by providing your water resource district with a deed or other evidence of your ownership of the property you intend to tile when you file your application; by providing some type of approval or consent provided by downstream landowners; by providing a copy of the tile plan prepared by your tile contractor; and by submitting your application well in advance of your proposed installation date. Recognize water resource districts support tile and process tile applications in a reasonable manner. Water managers seek to accommodate applicants who want to maximize their production capacity, while balancing protection of public infrastructure and downstream landowners, in an effort to process tile applications in a manner that is fair to all interested parties.

Most water managers in North Dakota are farmers or are otherwise engaged in agriculture in some fashion. Our water managers support tile and recognize the value tile can provide to an ag producer or to a landowner. Water resource districts will not unreasonably obstruct your efforts to tile your property. However, they simply ask that you follow the permitting requirements applicable to your project. The process is actually fairly easy, but if you neglect to obtain a permit for a tile project that exceeds 80 acres, the ramifications could be significant. Do not risk your project

or your investment; contact your local water resource district and follow the applicable permitting requirements.

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**OHNSTAD TWICHELL INTRODUCES  
FOUR NEW ASSOCIATE ATTORNEYS**



**Asa K. Burck**  
*joined the Ohnstad Twichell law firm in August 2012 as an associate attorney.*

He earned his undergraduate degree from North Dakota State University where he majored in political science with a minor in business administration. Asa received his law degree from the University of North Dakota School of Law where he graduated magna cum laude. While in law school, Asa was a member of the North Dakota Law Review and competed as a member of the school's trial team.

Asa practices in the Hillsboro office. He will maintain a general practice, but will focus on estate planning, probate and municipal law.

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**Andrew D. Cook**  
*joined Ohnstad Twichell in August 2012 as an associate attorney.*

He grew up in Fargo, North Dakota. Upon graduating from Shanley High School, he attended North Dakota State University, where he majored in business administration. In 2008, he received his law degree from the University of North Dakota School of Law.

Before joining Ohnstad Twichell, he served as a law clerk for Judge Rodney S. Webb at the District Court for the District of North Dakota. After completing his clerkship with Judge Webb, Drew served as a law clerk for Judge Kermit E. Bye at the Eighth Circuit Court of Appeals.

Drew practices in the West Fargo office, and

he is licensed to practice in both North Dakota and Minnesota. He will work in the litigation department.

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**Sarah M. Nyhus-Wear**  
*joined Ohnstad Twichell in August 2012 as an associate attorney.*

She graduated with honors from North Dakota State University with a Bachelor of Arts degree in political science in 2002. She attended the University of North Dakota School of Law and graduated with distinction in 2005.

In 2005 Sarah and her husband moved to Sioux Falls, South Dakota, where she worked as a Deputy State's Attorney until they moved back to North Dakota in the fall of 2011.

Sarah practices in the West Fargo office in the areas of water law and municipal law. She is licensed in North Dakota, Minnesota and South Dakota.

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**Lindsey J. Scheel**  
*joined Ohnstad Twichell in September 2012 as an associate attorney.*

A native of Fergus Falls, Minnesota, Lindsey graduated summa cum laude with a Bachelor of Arts from Northern State University, Aberdeen, South Dakota. In 2011, Lindsey graduated with distinction from the University of North Dakota School of Law. While in law school, Lindsey served as the Managing Editor of the *North Dakota Law Review*. Her case comment on oil and gas law was selected for publication.

Before joining Ohnstad Twichell, Lindsey clerked for Justice Carol Ronning Kapsner of the North Dakota Supreme Court. Lindsey practices in the West Fargo office and is licensed in North Dakota. She maintains a general practice but will concentrate in the areas of real estate, probate, estate planning, and corporate law.

*Introducing Ohnstad  
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IRON IN THE HARVEST HALL,  
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The information provided in this letter is of a general nature and should not be acted upon without prior discussion with your Ohnstad Twichell, P.C., attorney.

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