

MINUTES**North Dakota State Water Commission
Bismarck, North Dakota****May 26, 1992**

The North Dakota State Water Commission held a meeting in Lecture Rooms A and B in the North Dakota Heritage Center, Bismarck, North Dakota, on May 26, 1992. Chairman, Lieutenant Governor, Lloyd Omdahl, called the meeting to order at 1:30 PM, and requested State Engineer and Chief Engineer-Secretary, David Sprynczynatyk, to call the roll. The Chairman declared a quorum was present.

MEMBERS PRESENT:

Lieutenant Governor Lloyd Omdahl, Chairman
 Sarah Vogel, Commissioner, Department of Agriculture, Bismarck
 Joyce Byerly, Member from Watford City
 Marjorie Farstveet, Member from Beach
 Jacob Gust, Member from Fargo
 Lorry Kramer, Member from Minot
 Norman Rudel, Member from Fessenden
 Jerome Spaeth, Member from Fargo
 David Sprynczynatyk, State Engineer and Chief Engineer-Secretary, North Dakota State Water Commission, Bismarck

MEMBER ABSENT:

Daniel Narlock, Member from Grand Forks

OTHERS PRESENT:

State Water Commission Staff Members
 Approximately 30 people in attendance interested in agenda items

The attendance register is on file in the State Water Commission offices (filed with official copy of minutes).

The meeting was recorded to assist in compilation of the minutes.

APPROVAL OF AGENDA

There being no additional items for the agenda, the Chairman declared the agenda approved and requested Secretary Sprynczynatyk to present the agenda.

**CONSIDERATION OF MINUTES
OF APRIL 2, 1992 MEETING -
APPROVED**

The minutes of the April 2, 1992 meeting were approved by the following motion:

It was moved by Commissioner Rudel, seconded by Commissioner Farstveet, and unanimously carried, that the minutes of the April 2, 1992 meeting be approved as circulated.

**CONSIDERATION OF MINUTES
OF APRIL 7, 1992 TELEPHONE
CONFERENCE CALL MEETING -
APPROVED**

The minutes of the April 7, 1992 telephone conference call meeting were approved by the following motion:

It was moved by Commissioner Rudel, seconded by Commissioner Farstveet, and unanimously carried, that the minutes of the April 7, 1992 telephone conference call meeting be approved as circulated.

**CONSIDERATION OF MINUTES
OF MAY 12, 1992 TELEPHONE
CONFERENCE CALL MEETING -
APPROVED**

The minutes of the May 12, 1992 telephone conference call meeting were approved by the following motion:

It was moved by Commissioner Rudel, seconded by Commissioner Farstveet, and unanimously carried, that the minutes of the May 12, 1992 telephone conference call meeting be approved as circulated.

AGENCY FINANCIAL STATEMENT

Secretary Sprynczynatyk presented and discussed the Program Budget Expenditures, dated May 15, 1992, reflecting 42 percent of the current biennium. The Contract Fund expenditures for the 1991-1993 biennium were reviewed and discussed.

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**SOUTHWEST PIPELINE PROJECT -
PROJECT UPDATE AND
CONTRACT STATUS
(SWC Project No. 1736)**

At the May 12, 1992 meeting, the Commission approved the award of Contracts 2-3E and 2-3F for the main transmission pipeline to Larry's, Inc., Gillette, Wyoming; and Contract 3-1B for the second tank at the Zap Reservoir to Advance Tank and Construction Co., Wellington, Colorado, contingent upon approval by the Bureau of Reclamation. Tim Fay, Manager of the Southwest Pipeline Project, reported the Bureau of Reclamation has approved the award of the Southwest Pipeline Project Contracts 2-3E, 2-3F and 3-1B.

On June 9, 1992, bids will be opened for Southwest Pipeline Project Contract 2-7A for a segment of the main transmission line from the west side of Dickinson to Davis Butte. Mr. Fay indicated this segment of the pipeline involves approximately seven miles.

Mr. Fay reported on the Southwest Water Authority's water sign-up campaign. The campaign has been completed with 2,130 members.

Rural water delivery within the Southwest Water Authority area is being reviewed for feasibility by Bartlett and West/Boyle Engineering. Mr. Fay said some areas may need further sign-up effort to be feasible and some areas may be clearly infeasible.

Secretary Sprynczynatyk briefed the Commission members on a letter received from the Mercer County Water Resource Board expressing an interest and need for rural water development in that area. Results from the water sign-up campaign indicated 319 people are interested in purchasing water from the project.

**SOUTHWEST PIPELINE PROJECT -
REQUEST FOR ATTORNEY GENERAL'S
OPINION FOR LEGISLATION
CLARIFICATION AND DETERMINATION
OF VALIDITY OF SWPP WATER
SERVICE CONTRACTS
(SWC Project No. 1736)**

At the April 2, 1992 meeting, the Commission members were informed that the Assistant Attorney General assigned to the Southwest Pipeline Project reviewed the North Dakota Century Code pertaining to water service contracts and the purchase of water. Because of conflicting legislation on the issues, the State Engineer was directed to request an Attorney General's opinion for legislation clarification and to determine if the Southwest Pipeline Project contracts the Commission has with the entities are valid.

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Secretary Sprynczynatyk indicated an Attorney General's opinion has been requested, but to date a formal response has not been received.

Tim Fay reported on a public meeting held in Bowman on May 18, 1992 to provide information prior to the June 8, 1992 election when the City of Bowman's water service contract will be put to a city-wide vote.

**SOUTHWEST PIPELINE PROJECT -
PILOT PROGRAM WITH SOIL
CONSERVATION SERVICE TO
CONSTRUCT LIVESTOCK WATERING
SYSTEMS WITHIN PROJECT AREA
(SWC Project No. 1736)**

Tim Fay said the area between Dickinson and Richardton and extending north to the Knife River is under review by the Soil Conservation Service for development as a pilot rural water project under their P.L.

566 authority. Inter-disciplinary teams from the Soil Conservation Service are currently conducting resource inventory of the area. Later this summer an inter-agency team will examine the proposed project and this fall the project will move into the public information phase.

**SOUTHWEST PIPELINE PROJECT -
APPROVAL FOR STATE WATER
COMMISSION TO PROVIDE
ENGINEERING SERVICES FOR
DEVELOPMENT OF RURAL
WATER SYSTEMS
(SWC Project No. 1736)**

In order to maintain progress in rural development and input and coordination with the Soil Conservation Service effort, Tim Fay said it is essential that the engineering design activities keep pace. In order to do so, Mr. Fay said the

Commission will need to make policy decisions as a result of integration and clarify the roles of the different parties involved in the integration effort.

The issue of whether the State Water Commission versus the Southwest Water Authority retaining the engineer for development of the rural water system was discussed. This would include the continued planning, design and construction engineering functions. Before integration, Mr. Fay said each of the rural water cooperatives, which are being dissolved, would have retained an engineering firm for these functions.

Mr. Fay indicated that previous action of the Commission on July 7, 1989 and July 5, 1990 appear to recognize the Southwest Water Authority as having the role of administering the sale of water and the operation of the system, with the State Water Commission acting as the development entity.

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Mr. Fay said this past direction leads to the conclusion that under integration the State Water Commission should retain the engineering firm for development of the rural water systems.

Alfred Underdahl, Chairman of the Southwest Water Authority, presented a memorandum to the Commission members stating the Authority's position concerning engineering services. The memorandum is attached hereto as APPENDIX "A" and, in part, states:

"Our position is that we believe it is essential that the entire integrated Southwest Pipeline Project be under the contract and supervision of a single engineer. While we hope there are opportunities for the previous engineers of the rural water systems to receive subcontract work, we do not feel it is appropriate to designate geographic areas or specific areas of engineering services for sub-contract work. We believe any sub-contract work must be provided through and at the discretion of the engineer responsible for the project."

Secretary Sprynczynatyk indicated Kris Moelter, Assistant Attorney General, has reviewed the authorizing legislation for the project, including integration, and the legislation creating the Southwest Water Authority. Ms. Moelter advised that the Southwest Water Authority does not have the authority to act as a developmental entity.

Based on previous actions of the State Water Commission and the position of the Southwest Water Authority, it was the recommendation of the State Engineer that the State Water Commission provide engineering services for development of rural water systems for the Southwest Pipeline Project.

It was moved by Commissioner Byerly and seconded by Commissioner Gust that the State Water Commission continue with the development of the Southwest Pipeline Project to include the engineering services for development of the rural water systems for the project.

Commissioners Byerly, Farstveet, Gust, Kramer, Rudel, Spaeth, Vogel, and Chairman Omdahl voted aye. There were no nay votes. The Chairman declared the motion unanimously carried.

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**SOUTHWEST PIPELINE PROJECT -
CONSIDERATION AND APPROVAL
FOR SWC TO BEGIN SELECTION
PROCESS FOR ENGINEER FOR RURAL
WATER DISTRIBUTION SYSTEM
(SWC Project No. 1736)**

Secretary Sprynczynatyk presented and discussed options for the Commission's consideration relative to the procedure for selecting an engineering firm for the rural water distribution system. The two

options discussed were:

- 1) Bartlett and West/Boyle Engineering Corp. can proceed directly under the terms of the current agreement. The agreement with the Joint Venture authorizes them to perform these services for "the project". The legislation authorizing integration expands "the project" to include rural water systems, and this work would be authorized under the existing agreement. If this were done, the Joint Venture would be at its discretion regarding subcontracting of services to other firms.
- 2) Name a selection committee and select a firm or firms according to the laws governing procurement of professional services. Any qualified engineering firm would be eligible for consideration in the selection process.

Kris Moelter, Assistant Attorney General, indicated there appear to be ambiguities within the law on what can be done. State law may require another selection process for professional services because of the change in scope of the project. This may be contradictory to the law allowing integration from just a water transmission project to a water transmission and distribution project to achieve cost savings. Ms. Moelter advised the Commission that because of the law addressing the selection of professional services, the State Water Commission should initiate the selection process for an engineer for the development of the rural water distribution system.

Secretary Sprynczynatyk indicated the selection process will take time and will require considerable work on the part of the selection committee. He reviewed a tentative schedule and assured the Commission that the selection process can be completed without seriously impacting the rural water development schedule.

It was the recommendation of the State Engineer that because of the law addressing the selection of professional services, the State Water Commission immediately initiate the selection process for an engineer for the rural water distribution system.

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It was moved by Commissioner Byerly and seconded by Commissioner Gust that the State Water Commission direct the State Engineer to name a Southwest Pipeline Project Rural Water Engineer Selection Committee and that the Committee immediately initiate the selection process to hire an engineer to develop the rural water distribution system for the Southwest Pipeline Project.

Commissioners Byerly, Farstveet, Gust, Kramer, Rudel, Spaeth, Vogel, and Chairman Omdahl voted aye. There were no nay votes. The Chairman declared the motion unanimously carried.

On May 26, 1992, the State Engineer named the following to the Southwest Pipeline Project Rural Water Engineer Selection Committee: Commissioners Gust and Farstveet, representing the State Water Commission; Loren Myran and Willie Mastel, representing the Southwest Water Authority; and Tim Fay, representing the State Engineer. Tim Fay was appointed as Chairman and Secretary of the Committee.

**NORTH DAKOTA WATER USERS
ASSOCIATION INITIATED TAX
MEASURE UPDATE
(SWC Project No. 1852)**

Michael Dwyer, Executive Vice President of the North Dakota Water Users Association, provided the Commission members with an update on the initiated measure for a 1/2 cent sales tax for water development.

At the February 4, 1992 meeting the Commission authorized the expenditure of funds to publish a water tabloid summary of the Governor's Water Strategy Task Force Final Report for public distribution. Mr. Dwyer indicated the water tabloids have been printed and will be inserted in the newspapers throughout the state.

Arrangements have been made with the University of North Dakota to conduct a survey poll on June 3, 1992 on the proposed initiated measure.

The North Dakota Water Users Association will complete the petition drive. A meeting has been scheduled for July 7, 1992 at which time the decision will be made to determine if the petitions will be filed to place the initiated measure on the November general election ballot. (For several reasons, the July 7th meeting has been moved up to June 23rd).

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**GARRISON DIVERSION PROJECT -
PROJECT UPDATE; AND SWC APPROVAL
OF PROPOSED LEGISLATIVE
AMENDMENTS TO REFORMULATION
ACT OF 1986
(SWC Project No. 237)**

Secretary Sprynczynatyk discussed draft proposed amendments and legislation to the Garrison Diversion Unit Reformulation Act of 1986. The proposed amendments address the following and are attached hereto as APPENDIX "B":

- 1) Mid Dakota Dam and Sheyenne Lake
- 2) Stabilization of Devils Lake
- 3) Abandoned or oversized features
- 4) Indian irrigation facilities
- 5) Sheyenne River treatment facilities
- 6) Adjustment to the authorization of appropriations
- 7) Wildlife enhancement
- 8) Irrigation facilities
- 9) Operation, maintenance and replacement of existing facilities

Secretary Sprynczynatyk indicated the proposed legislation has been distributed in Washington, DC. He will accompany Governor Sinner and others to Washington on June 19, 1992 to meet with representatives of Congressman Miller and environmental organizations to discuss and consider the bill for introduction in Congress.

It was the recommendation of the State Engineer that the State Water Commission consider support of the proposed legislation and amendments to the Garrison Diversion Unit Reformulation Act of 1986.

It was moved by Commissioner Rudel and seconded by Commissioner Byerly that the State Water Commission support the proposed amendments and legislation to the Garrison Diversion Unit Reformulation Act of 1986.

In discussion of the motion, Commissioner Vogel expressed concern that the proposed amendments state: "It may be necessary to postpone irrigation development as a trade-off for the Mid Dakota authorization. An eight-year postponement, unless the Secretary determines that earlier development is in the national interest, would be realistic. ..." Commissioner Vogel also voiced her concerns regarding sources of revenue for funding the proposed amendments.

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Commissioner Spaeth indicated it should be clearly understood that the State Water Commission still supports the Mid Dakota/Sheyenne Lake as the preferred alternative.

Commissioners Byerly, Farstveet, Gust Kramer, Rudel, Spaeth, and Chairman Omdahl voted aye. Commissioner Vogel voted nay. Recorded vote was 7 ayes; 1 nay. The Chairman declared the motion carried.

At the April 2, 1992 meeting, the Commission members were advised that the Garrison Funding Advisory Committee agreed at its March 13, 1992 meeting to request an increase in the Fiscal Year 1993 funding level to \$39 million. This increased funding level from \$30 million to \$39 million was to address the municipal, rural and industrial water supply needs of the Indians. Secretary Sprynczynatyk said final approval of the federal Fiscal Year 1993 funds should be known by July, 1992.

**GARRISON DIVERSION PROJECT -
MR&I WATER SUPPLY PROGRAM UPDATE
(SWC Project No. 237)**

Jeffrey Mattern, MR&I Water Supply Program Coordinator, provided the following status report of projects approved for funding in 1992:

The Agassiz Rural Water project will be completed after the fall harvest when the final three miles of pipeline are installed.

The City of Grandin is using their new pipeline. The project will be complete after final grading and seeding is done.

The City of Kindred has accepted bids and is in the process of awarding the contract.

Missouri West has signed a bulk water service contract with the City of Mandan. The engineer is proceeding with design. Construction on Phase I is planned to begin this fall.

North Valley has two miles of pipeline to install to complete the connection to the City of Cavalier. The reservoir for serving Cavalier needs to be completed.

Ramsey County Rural Water has accepted bids and is in the process of awarding contracts. Construction is

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scheduled for completion on November 1, 1992. The North Dakota Parks and Tourism has requested funding for the Graham's Island State Park Water Supply system. The park would receive bulk water service from Ramsey County Rural Water.

The City of Stanley is proceeding on their water supply project with construction to begin this fall.

Tri-County Rural Water is preparing to advertise for bids in May with the project to be completed by October, 1992.

**GARRISON DIVERSION PROJECT -
CONSIDERATION AND APPROVAL
FOR MR&I FEDERAL GRANT
FUNDING FOR GRAHAM'S ISLAND
STATE PARK IN RAMSEY COUNTY
(SWC Project No. 237-5)**

A request from the North Dakota Parks and Tourism was presented for the Commission's consideration for MR&I grant funding for the Graham's Island State Park Water distribution project.

The park would receive bulk water service from Ramsey County Rural Water. The project will provide water distribution service for the park. The estimated construction cost of the project is \$113,000. The project would be part of the Ramsey Rural Water project now underway.

Jeffrey Mattern explained that the Garrison Diversion Conservancy District will be the funding sponsor for the Graham's Island project because it is developing the state park. For this reason, the District has requested funding for the project based on a 75/25 percent split between the MR&I grant program and the Garrison Diversion Conservancy District. Mr. Mattern said this would be the same funding approach being used on the Southwest Pipeline Project. The Graham's Island project is part of the overall master plan of providing to park users a water supply of sufficient quantity and good quality. Water is presently being hauled into the park to meet this demand. Graham's Island Water Supply project is scheduled to be completed by late fall. The Garrison Diversion Conservancy District Recreation Committee approved funding for the project at its February 4, 1992 meeting.

It was the recommendation of the State Engineer that the State Water Commission approve funding for the Graham's Island State Water distribution system in the form of a 75 percent federal MR&I grant, not to exceed \$84,750. These funds would come from within the \$3.9 million previously approved for the Ramsey County Rural Water project. Secretary Sprynczynatyk said this recommendation is contingent upon the availability of funds and that all MR&I program requirements are met.

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The Garrison Diversion Conservancy District will consider this request at its June 5, 1992 meeting.

It was moved by Commissioner Rudel and seconded by Commissioner Vogel that the State Water Commission approve funding for the Graham's Island State Water distribution system in the form of a 75 percent federal MR&I grant, not to exceed \$84,750. These funds shall come from within the \$3.9 million previously approved for the Ramsey County Rural Water project. This motion shall be contingent upon the availability of funds and that all MR&I program requirements are met.

Commissioners Byerly, Farstveet, Gust, Kramer, Rudel, Spaeth, Vogel, and Chairman Omdahl voted aye. There were no nay votes. The Chairman declared the motion unanimously carried.

**GARRISON DIVERSION PROJECT -
CONSIDERATION AND APPROVAL
OF REQUEST FOR MR&I FEDERAL
GRANT FUNDING FOR GARRISON
RURAL WATER PROJECT
FEASIBILITY STUDY
(SWC Project No. 237-3)**

A request from the Garrison Rural Water Association was presented for the Commission's consideration for MR&I funding for a water supply feasibility study. Plans are to develop a new rural water system around the City of Garrison. The

water will be used for domestic, agriculture, and livestock purposes. Water is currently supplied from groundwater wells that have high levels of total dissolved solids, chlorides, sodium, sulfates and considered hard (up to 1,000 mg/l). Some users have also noticed they have a limited quantity of water. The service boundaries are from one mile north of the City of Garrison south to Lake Sakakawea and from four miles west of the City of Garrison to six miles east of US Highway 83. The estimated cost of the project is \$1,500,000.

Jeffrey Mattern indicated that to date the Association has signed 172 users from platted subdivisions, rural residents and Fort Stevenson State Park. This total includes permanent and seasonal residents. Over 66 percent of the potential rural users and 50 percent of potential subdivision users have signed up. Other potential users are the Custer Coal Mine Interpretive Center and Centennial County Park. The final sign-up is expected to reach 200 users.

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Mr. Mattern said the estimated user cost is \$35 to \$40 per month. The Association estimates water usage of 4,000 gal/user/month. Fort Stevenson State Park will require one million gallons per year and a flow of 25 gallons per minute.

The Association will purchase bulk water service from the City of Garrison. The city recently completed a new intake in 1991 and will finish their water treatment plant in 1992. Mr. Mattern stated the Garrison Rural Water project's priority score of 52 points will place the project near the top of the ranked projects. The estimated feasibility study cost is \$15,000, with 25 percent being \$3,750.

It was the recommendation of the State Engineer that the State Water Commission approve funding for the Garrison Rural Water feasibility study in the form of a federal MR&I grant of 25 percent, not to exceed \$3,750, contingent upon the availability of funds and that all MR&I requirements are met.

It was moved by Commissioner Spaeth and seconded by Commissioner Vogel that the State Water Commission approve funding for the Garrison Rural Water feasibility study in the form of a federal MR&I grant of 25 percent, not to exceed \$3,750. This motion is contingent upon the availability of funds and that all MR&I requirements are met.

Commissioners Byerly, Farstveet, Gust, Kramer, Rudel, Spaeth, Vogel, and Chairman Omdahl voted aye. There were no nay votes. The Chairman declared the motion unanimously carried.

**CONSIDERATION OF REQUEST
FROM CASS COUNTY JOINT
WATER RESOURCE DISTRICT
FOR COST SHARING FROM THE
CONTRACT FUND FOR THE MAPLE
RIVER DAM PRELIMINARY
ENGINEERING REPORT (COMPONENT
OF THE SHEYENNE RIVER FLOOD
CONTROL PROJECT)
(SWC Project No. 1344)**

Project, which also includes the Sheyenne River diversions that

The Commission considered a request from the Cass County Joint Water Resource District to appropriate funds for the Maple River Dam project. The Commission has earmarked funds from the Contract Fund in the amount of \$500,000 for this project. The Maple River Dam project is a component of the Sheyenne River Flood Control

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are being completed by the Corps of Engineers and a possible future raise of Baldhill Dam. The Maple River Dam component does not involve federal funding.

Dale Frink, State Water Commission Water Development Division Director, indicated the Corps of Engineers completed an economic analysis of the Maple River Dam component and determined a benefit cost ratio of 0.2. The local sponsors disagree with the Corps' analysis and are moving ahead with their own preliminary engineering report, which includes a downstream benefit analysis and an environmental assessment. They are also proceeding with the geotechnical analysis of the dam site, a cultural resource analysis and some design. The estimated cost of the preliminary engineering report is \$600,000.

Due to the unfavorable cost benefit analysis by the Corps of Engineers and a lack of another report to dispute the analysis, it was the recommendation of the State Engineer that the State Water Commission not approve funding for design and construction until the preliminary engineering report has been completed. The remaining portion of the \$500,000 should remain allocated to the project until the Commission reviews the preliminary engineering report.

It was the recommendation of the State Engineer that the State Water Commission grant 50 percent of \$600,000 for eligible items from the Contract Fund, not to exceed \$300,000, for the Maple River Dam project preliminary engineering study. Approval is contingent upon the availability of funds. The preliminary engineering study is to include an evaluation of the project's overall feasibility. Specific items to be included in the study are the flow reduction impacts on historic flood events, development of a detailed benefit cost ratio, evaluation of environmental impacts, and results of the geotechnical analysis and cultural resource inventory. The study is also to include a discussion concerning land acquisition, permit requirements, a detailed cost estimate, and any other items determined appropriate by the local sponsor.

Jeff Volk, Moore Engineering, provided the Commission members with a summary of the work items involved in the preliminary engineering study. He discussed the benefit cost ratio of 0.2 for the project as determined by the Corps of Engineers. Mr. Volk said the local sponsors disagreed with the Corps' benefit cost ratio analysis and are, therefore, moving ahead with their own preliminary engineering study, which includes a downstream benefit analysis and an environmental assessment. The study is anticipated to be completed this summer.

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Commissioner Gust provided background information on the Sheyenne River Flood Control project, consisting of three phases: the West Fargo diversion, the Horace to West Fargo diversion, and the Maple River Dam. He discussed the benefit cost ratio for each specific phase of the project, but he said the overall benefit cost ratio for the entire project is very positive. When funding for the Maple River Dam component is considered, which has a lower benefit cost ratio, Commissioner Gust said it is important that the historical context of the Sheyenne River Flood Control Project be considered.

It was moved by Commissioner Spaeth and seconded by Commissioner Gust that the State Water Commission grant 50 percent of \$600,000 for eligible items from the Contract Fund, not to exceed \$300,000, for the preliminary engineering and design, geotechnical analysis, cultural resource studies, and associated contingency costs for the Maple River Dam component of the Sheyenne River Flood Control project. This motion is contingent upon the availability of funds.

The preliminary engineering study shall include an evaluation of the project's overall feasibility. Specific items shall include flow reduction impacts on historic flood events, development of a detailed benefit cost ratio, evaluation of environmental impacts, and results of the geotechnical analysis and cultural resource inventory. The study shall include a discussion concerning land acquisition, permit requirements, a detailed cost estimate, and any other items determined appropriate by the local sponsor.

Commissioners Byerly, Farstveet, Gust, Kramer, Rudel, Spaeth, Vogel, and Chairman Omdahl voted aye. There were no nay votes. The Chairman declared the motion unanimously carried.

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**BALDHILL DAM -
CONSIDERATION AND
APPROVAL OF MOTION OF
SUPPORT FOR CORPS OF
ENGINEERS TO PROCEED
WITH RIGHT-OF-WAY STUDY
RELATED TO PROPOSED RAISE
OF FLOOD CONTROL POOL
(SWC Project No. 300)**

federally-owned property at Baldhill Dam/Lake Ashtabula. The Corps has indicated that the funds which are available for these studies for this fiscal year and next fiscal year are not sufficient to complete the evaluation. If the necessary right-of-way studies are to be accomplished, the Corps has indicated they will have to be done with Fiscal Year 1994 funds which will have to be requested and supported.

Mr. Frink indicated the Corps of Engineers has requested a letter of non-federal support to assure continuation of this unit of the Sheyenne River Flood Control project. Mr. Frink said the Corps' request does not include funding at this time, but the Commission may wish to consider support to proceed with the right-of-way evaluation study for Baldhill Dam.

It was the recommendation of the State Engineer that the State Water Commission support the Corps of Engineers request to proceed with the right-of-way evaluation study for Baldhill Dam.

Robert Brodshaug, Southeast Cass Water Resource District, addressed the Commission members and encouraged the Commission to support the five-foot raise proposal for Baldhill Dam.

It was moved by Commissioner Spaeth and seconded by Commissioner Gust that the State Water Commission provide the Corps of Engineers with a letter of support for the right-of-way evaluation study for Baldhill Dam.

Commissioners Byerly, Farstveet, Gust, Kramer, Rudel, Spaeth, Vogel, and Chairman Omdahl voted aye. There were no nay votes. The Chairman declared the motion unanimously carried.

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**CONSIDERATION AND APPROVAL OF
REQUEST FROM WALSH COUNTY
WATER RESOURCE DISTRICT FOR
COST SHARING FROM CONTRACT
FUND FOR PARK RIVER SNAGGING
AND CLEARING, PHASE II
(SWC Project No. 662)**

of removing dead trees, stumps, snags and standing trees in danger of falling into the channel along approximately three miles of the river. The Commission previously approved Phase I of the project for snagging and clearing approximately 41 river miles of the Park River and its tributaries in Walsh County. The board intends to use Walsh County Highway Department crews to do the work this summer.

A request from the Walsh County Water Resource District was presented for the Commission's consideration to cost share in Phase II of snagging and clearing the Park River on the north branch of the river upstream of Grafton. The project consists

James Lennington, State Water Commission Water Development Division, presented the project request. The cost estimate for Phase II is \$18,500. All of these costs are eligible for 25 percent cost sharing, which would amount to \$4,625 from the Contract Fund. The cost estimate does not include engineering costs, which are to be completely borne by the county.

It was the recommendation of the State Engineer that the State Water Commission grant 25 percent of the eligible costs, not to exceed \$4,625 from the Contract Fund, for Phase II of the Park River snagging and clearing project, contingent upon the availability of funds.

It was moved by Commissioner Vogel and seconded by Commissioner Byerly that the State Water Commission approve 25 percent of the eligible costs, not to exceed \$4,625 from the Contract Fund, for Phase II of the Park River snagging and clearing project.

Commissioners Byerly, Farstveet, Gust, Kramer, Rudel, Spaeth, Vogel, and Chairman Omdahl voted aye. There were no nay votes. The Chairman declared the motion unanimously carried.

**STATE WATER MANAGEMENT
PLAN UPDATE
(SWC Project No. 322)**

process of developing solutions and alternatives to address the

Linda Weispfenning, State Water Commission Planning and Education Division, reported that the staff has completed the

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problems and opportunities identified by the eight Citizens Advisory Boards. Ms. Weispfenning said the response and participation in this planning process was beyond expectation and, therefore, the staff had to devote considerable more time than was planned to developing background information for all of the projects submitted for consideration.

The fourth round of meetings of the Citizens Advisory Boards is scheduled for May 26 through June 3, 1992. Information was distributed to the Commission members regarding the meeting notices and an example of the potential water resource management projects and programs that have been identified for the Sakakawea region. Ms. Weispfenning discussed the work plan for the fourth round of meetings, with the primary purpose to prioritize the projects and programs into time frames and to determine when the projects should be implemented. This information will be used to prepare the early action portion of the State Water Management Plan that will be used in developing the State Water Commission budget for the 1993-1995 biennium.

Following the fourth round of meetings, the information will be compiled and a draft report will be developed for review by the Citizens Advisory Boards, the Steering Committee, the Technical Review Committee and those agencies that have been involved in the planning process.

Ms. Weispfenning commented that the final State Water Management Plan will be a very useful document to the State Water Commission in providing an overall view of what needs to be done to improve North Dakota's use of its' water and promote economic development, and it will also be of assistance to the Commission and the local governments in planning their future budgets.

**NA CHIIN HUUN -
DAKOTA PROJECT UPDATE
(SWC Project No. 237-4)**

Affiliated Tribes concerning the location of the intake, the Indian water right, and control of the facility.

Secretary Sprynczynatyk stated negotiations relating to the Na chiin Huun - Dakota Project are continuing with the Three

On May 8, 1992, a letter was sent to Wilbur Wilkenson, Chairman of the Three Affiliated Tribes, from Governor Sinner stating, in part:

"Due to the increasing demands I am seeing for resolving water supply needs across the state, I believe it is extremely important that a decision be made soon on how to move forward with a water supply system for northwest North Dakota. I also believe the Three Affiliated

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Tribes has a critical role in determining how the system will be developed. Because of this role, I would appreciate knowing the current position of the Three Affiliated Tribes Business Council concerning the Na chiin Huun - Dakota Project and the legislation which was introduced by Senator Conrad. Since Congress will be adjourning early this year, it will be necessary to act soon. Thus, if the Council can tell us its position on the project by the first of June, we will be able to decide how to proceed."

**DEVILS LAKE MANAGEMENT
PROJECT UPDATE
(SWC Project No. 1712)**

Secretary Sprynczynatyk briefed the Commission members on a recent meeting held with Nancy Dorn, Assistant Secretary of the Army Civil Works, and Governor Sinner in Washington, DC to discuss the stabilization of Devils Lake and the Corps of Engineers proceeding with the feasibility study for the project.

Secretary Sprynczynatyk indicated that a meeting and tour of the Devils Lake Basin has been scheduled for June 8 and 9, 1992 by the Corps of Engineers to discuss their draft reconnaissance report.

Robert Garske, Chairman of the Ramsey County Water Resource Board, provided the Commission members with a status report on the Channel "A" project and information relative to the Devils Lake Basin.

**MISSOURI RIVER UPDATE
(SWC Project No. 1392)**

Julie Krenz, Assistant Attorney General, briefed the Commission members on a settlement conference meeting held recently in Billings, MT relative to the Missouri River lawsuit. Ms. Krenz said it was a positive meeting of the attorneys from the upstream states and the attorney for the federal government. The judge has scheduled a telephone conference call of the settlement conference group for June 3, 1992 and has ordered a temporary stay for filings of documents, amicus briefs and responses to the defendant's motion for a summary judgement until after the June 3 conference call.

**STATE WATER COMMISSION AND
ATMOSPHERIC RESOURCE BOARD**

On December 19, 1991, Governor Sinner wrote the State Water Commission asking it to "..... have the State Engineer meet with the Director of the Atmospheric Resource Board to review what has been done so far, and, that he recommend further changes, if appropriate, to enhance operations." Secretary Sprynczynatyk said this request was based

May 26, 1992

upon the facts that, by law since 1983, the Atmospheric Resource Board has been a division of the Commission; since February 1991, the two agencies have been co-located; and since July 1991, the budget of the Board has been part of the Commission's budget. On December 19, 1991, the Board agreed to appoint a subcommittee to meet with the State Engineer to develop a workable policy from an administrative standpoint to enhance the operations of the Commission and the Board. On December 20, 1991, the Commission supported the request of Governor Sinner.

The Atmospheric Resource Board appointed a subcommittee at its December 19, 1991 meeting to meet with the State Engineer to develop a workable policy from an administrative standpoint to enhance the operations of the State Water Commission and the Atmospheric Resource Board. On January 24, 1992, the Atmospheric Resource Board considered and adopted the policy statement of the subcommittee.

Secretary Sprynczynatyk stated he has met with the Director of the Atmospheric Resource Board to explore areas where administrative staff functions might be improved. The administrative operations of the Board and the Commission have been reviewed and although the missions of the Board and the Commission are somewhat different, the administrative functions are quite similar, with the main difference being the size of the budgets of the Board and Commission and the number of employees for each. Secretary Sprynczynatyk said since the Board and the Commission have operated as two separate agencies satisfying the fiscal and personnel policies of the office of Management and Budget, administrative operations is an area of similar activities and the easiest area to further combine operations for efficiency.

Secretary Sprynczynatyk reviewed the duties and responsibilities of the Business Manager for the Board and the Accountant/Budget Specialist for the Commission.

It was the recommendation of the State Engineer that the Business Manager for the Board be assigned responsibilities for personnel activities, including personnel files, American Disabilities Act, Veterans Preference, personnel policies and agency financial statements; and the Accountant/Budget Specialist for the Commission be assigned the responsibilities for payroll, vouchers, fixed assets and accounts receivable for both the Board and the Commission. Both employees will continue to do the other things they now do for the Board and the Commission. He said implementing these recommendations immediately will eliminate the situation of parallel activities and will allow both employees to better address their other responsibilities.

May 26, 1992

Secretary Sprynczynatyk stated these recommendations will be presented to the Atmospheric Resource Board for its consideration.

It was moved by Commissioner Vogel and seconded by Commissioner Rudel that the State Water Commission approve the recommendations of the State Engineer to enhance the operations of the State Water Commission and the Atmospheric Resource Board.

Commissioners Byerly, Farstveet, Gust, Kramer, Rudel, Spaeth, Vogel, and Chairman Omdahl voted aye. There were no nay votes. The Chairman declared the motion unanimously carried.

DROUGHT DISASTER LIVESTOCK WATER ASSISTANCE PROGRAM UPDATE (SWC Project No. 1851)

On May 14, 1992, the Drought Review Committee, consisting of Commissioners Vogel, Gust and Rudel, held a conference call to discuss the "Drought Disaster Livestock Water Project Assistance Program" report, dated May, 1992.

Cary Backstrand, State Water Commission Development Division, provided the Commission members with a summary of report. The report is attached hereto as APPENDIX "C".

Commissioner Vogel reported on the Drought Task Force meeting held May 26, 1992. The members of the Task Force were in consensus that although the drought situation has improved in the state, stockwater conditions remain a major concern. The task force members indicated the Drought Disaster Livestock Water Assistance Program was a very worthwhile program and efforts should be pursued for continuation of the program.

It was the consensus of the Commission members that the State Engineer and staff investigate funding sources that may be available to continue the program and that a report be provided to the Commission.

NEXT MEETING OF STATE WATER COMMISSION

Secretary Sprynczynatyk announced that tentative arrangements are being made for the next meeting of the State Water Commission to be held on July 1, 1992

May 26, 1992

in Garrison. A joint meeting of the State Water Commission and the Garrison Diversion Conservancy District is tentatively scheduled for July 2, 1992. (Because of insufficient motel accommodations in Garrison for both entities, the meeting has been moved to Bismarck on the same dates.)

**UNITED STATES V. SARGENT
COUNTY WATER RESOURCE
DISTRICT, ET AL LAWSUIT
(SWC Project No. 1222)**

On April 6, 1992, the Federal District Court in Fargo issued a memorandum and order regarding a motion made by the United States for summary judgment, a

motion made by Sargent County Water Resource District to dismiss, and a motion made by Moore Engineering for summary judgment in United States v. Sargent County Water Resource District, et al. The State of North Dakota joined the county and Moore Engineering in their motions to dismiss and for summary judgment respectively. Julie Krenz, Assistant Attorney General, stated that the state is a defendant in this lawsuit only because it may be liable under the Clean Water Act for a judgment entered against the county if the county is unable to pay.

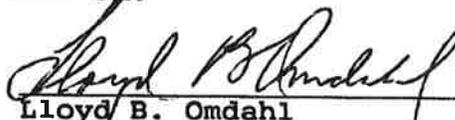
Ms. Krenz explained that in this case, the United States sued Sargent County claiming that Sargent County did not obtain the required permit from the Corps of Engineers before conducting work on a drain. The drain bisects three sloughs. Moore Engineering was joined in the lawsuit because it was hired to do engineering work for the project.

Ms. Krenz summarized the judge's decision. The summary is provided in APPENDIX "D" attached hereto. A pretrial conference was held on May 8, 1992 in Fargo. At that conference, Sargent County asked the court to reconsider the portion of its decision which held that isolated wetlands were subject to Clean Water Act jurisdiction. Sargent County asked for the reconsideration in light of a 7th Circuit decision decided April 20, 1992 which held the opposite of the federal district court in Fargo i.e. that the Clean Water Act's jurisdiction does not extend to isolated wetlands. Ms. Krenz said if the court accepts the position of the 7th Circuit, the court could grant Sargent County's motion to dismiss.

The court agreed to reconsider its decision when the 7th Circuit decision is final. The court said if it reconsiders its position on isolated wetlands, it would also reconsider its position on adjacent wetlands. The United States has until June 4, 1992 to decide whether it will appeal the 7th Circuit decision to the United States Supreme Court, request a rehearing at the 7th Circuit, or not pursue the case further.

May 26, 1992

There being no further business to come before the State Water Commission, it was moved by Commissioner Vogel, seconded by Commissioner Byerly, and unanimously carried, that the State Water Commission meeting adjourn at 4:30 PM.



Lloyd B. Omdahl
Lieutenant Governor-Chairman

SEAL



David A. Srynczypatyk
State Engineer and
Chief Engineer-Secretary

May 26, 1992

NORTH DAKOTA STATE WATER COMMISSION

REGISTER

ATTENDANCE AT State Water Commission Meeting

DATE May 26, 1992 PLACE Bismarck, ND

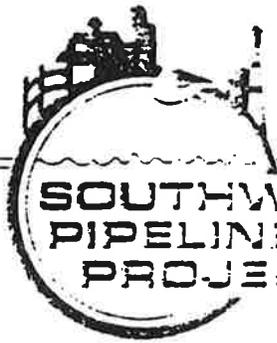
PROJECT NO. _____

Your Name	Your Address	Who do you Represent? (Or Occupation)
Tim Fay	Bismarck	SWC staff
Jeffrey Mattern	Bismarck	SWC
Hank Thompson	Fargo	Hankston Eng.
Krislyn Thompson	Bismarck	SWC
Linda Weisfening	Bismarck	SWC
- Bob Gaska	Devil Lake	BCRW
John Olson	Devils Lake	Midwest Engineering
Willie Mastel	Dickinson	SWW Authority
Gene Krenz	Bismarck	SWC staff
Gene A Davini	Heltinger	Southeast Water Authority
Myrtle Hayden	Adams County	South West Water Authority
Walter E. Sailer	Meeker	South Water Authority
Ken Thompson	Dickinson	Southeast water Authority
Lora Myers	Taylor	SWA
Mark A. Hoffmann	Grand Forks.	KDM, GARRISON RWTR.,

NORTH DAKOTA STATE WATER COMMISSION
REGISTER

ATTENDANCE AT _____
DATE _____ PLACE _____
PROJECT NO. _____

Your Name	Your Address	Who do you Represent? (Or Occupation)
LEE RAGAN	BISMARCK	U. S. FISH & WILDLIFE SERVICE
DAVE KOLAND	RT 1, Box 34c Bismarck	ND Rural Water Systems Assoc
RONALD FRENCH	DEVILS LAKE, ND	MIDWEST ENGINEERING INC
DENNIS MARKUSEN	COURTHOUSE GRAFTON, ND	WALSH Co. WATER RESOURCE DIST.
Cary Backstrand	Bismarck	State Engr. / SWC
Charles Cawell	"	Atty. General
Robert L. Benschang	West Fargo	Cross Co. Water Power
Joseph Harbeck	Page	Maple R W R B
William Sierz	Casselton ND	Push R W R B
Jeffrey Volk	West Fargo	Cross Co. STWARD / Muncie Engr Inc
Mike Gump	Bismarck	ND Water Users
ROBERT DIPPOLD	GARRISON	GARRISON RURAL WTR ASSN.
Linn Matt	Bismarck	Atty. Gen.
Julie Krenz	"	"
Bruce F McCollom	"	BW / BEC



Southwest Water Authority

Southwest Pipeline Project Bldg.
 West Municipal Park
 405 Central Street West
 Winston, SD 58081
 701 225-2111

Capital Projects
 150 North 12th Street
 57100, Box 2700
 Dickinson, SD 58501
 701 221-2677

MEMO: May 26, 1992

TO: State Water Commission

FROM: Southwest Water Authority

RE: Engineering Services for Southwest Pipeline Project

The Southwest Water Authority position concerning engineering services for the Southwest Pipeline Project was established by the Board of Directors on January 10, 1992. This position is explained in a May 15, 1992 letter to the State Engineer. A portion of that letter provides:

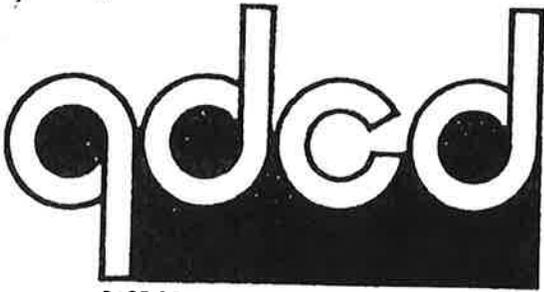
Our position is that we believe it is essential that the entire integrated Southwest Pipeline Project be under the contract and supervision of a single engineer. While we hope there are opportunities for the previous engineers of the rural water systems to receive sub-contract work, we do not feel it is appropriate to designate geographic areas or specific areas of engineering services for sub-contract work. We believe any sub-contract work must be provided through and at the discretion of the engineer responsible for the project.

For a number of reasons, including liability, communication, efficiency, coordination, and other advantages, we believe one engineer must be responsible for the entire project.

Concerning a selection process, we have the following concerns:

1. **Delay.** We have undertaken and are continuing with a vigorous rural water sign-up campaign which so far has over 2,000 sign-up. We feel it is essential that some water be delivered to areas outside the city of Dickinson in 1992.
2. **Existing Services.** It is difficult for us to imagine that anyone other than Bartlett and West/Boyle would be selected to provide engineering services for the rural phases of the project, since the project is integrated as one project. Because we feel it is necessary that a single engineer be responsible for engineering services for the entire project, the selection of a different engineering firm for a portion of the project would create the very problems we are seeking to avoid.

In conclusion, it is our preference that Bartlett and West/Boyle be authorized to provide engineering services for the entire Southwest Pipeline Project without going through a selection process. However, if a selection process is deemed necessary, we urge absolute haste in expediency, so that our objective of water delivery to at least one area outside the city of Dickinson in 1992 can be achieved. If a selection process is pursued, we strongly recommend that the Roshau Subdivision outside the city of Dickinson be excluded from any selection process, and we further recommend that the State Water Commission authorize Bartlett and West/Boyle to proceed with the engineering design and construction of this segment of the Southwest Pipeline Project (Roshau Subdivision) in 1992. Thank you very much for considering our comments.



GARRISON DIVERSION CONSERVANCY DISTRICT
P.O. BOX 140
CARRINGTON, NORTH DAKOTA 58421 701-652-3194

MEMORANDUM

Subject: Proposed Amendments to the Garrison Diversion Unit Reformulation Act of 1986
Date: May 4, 1992

1. **Mid-Dakota Dam and Sheyenne Lake.** Legislation should direct the Secretary of the Interior to complete the principal supply works by completing a connection between the McClusky Canal and the New Rockford Canal. The legislation should provide the following procedure:

- a. Deauthorize Lonetree Dam.
- b. Require the Secretary of the Interior, after necessary studies and consultations with Canada, to choose either the Sykeston Canal or Mid-Dakota Dam and Sheyenne Lake, then submit a report about the selection to the Congress within 18 months after the passage of the act. The Secretary must consider the recommendations of the State of North Dakota and the position of the Government of Canada when making this determination, and the report must state the opinions of the Secretary of State and the Secretary of the Interior (after consultations with EPA) that the selected feature will comply with the Boundary Waters Treaty of 1909.
- c. The State of North Dakota should provide 40% (up to \$12,000,000) of the remaining construction costs of the feature. Because of current federal fiscal constraints, the Congress may not be receptive to any legislation which does not include a cost-sharing provision.
- d. The Secretary should be authorized to enter an agreement with the State for the construction of the selected feature and the James River Feeder Canal if the report is not disapproved by the Congress.
- e. The Congress will probably require that the Secretary amend the master contract prior to the construction of the features.

OFFICERS AND DIRECTORS

Charles A. Richter, Chm., New Rockford
Norman D. Haak, 1st V. Chm., Oakes
Robert Strand, 2nd V. Chm., Portland
C. Emerson Murry, Manager, Carrington

Lester M. Anderson, Maxbass
Rick Anderson, Coleharbor

William P. Bosse, Cogswell
Paul Christianson, Glenburn
Lester R. DeKrey, Valley City
Russell L. Dushinske, Devils Lake
J.C. Eaton, Jr., Minot
Argil R. Froemke, Lisbon
Richard Fugleberg, Portland

H.A. Hendrickson, Fargo
David B. Johnson, Minnewaukan
LeRoy Johnson, Rugby
Roger L. Johnson, Toga
Selmer N. Jordheim, Fargo
Kenneth Leininger, Bismarck
Milton Lochow, Courtenay

Bill Long, Upham
Steve Metzger, Carrington
Frank B. Orthmeyer, Grand Forks
Tilmer J. Reiswig, McClusky
Jerrold L. Roble, Harvey
Thomas C. Shockman, LaMoure
Connie Sprynczynatyk, Bismarck

Representative George Miller contemplated this type of legislation in a February 6, 1986, letter to GDCD Chairman Russ Dushinske. The letter stated (at p. 2):

I fully understand the economic and engineering questions you and others on the Board have regarding Sykeston. If the project is reauthorized and studies later show that Sykeston should not be built, there is nothing in the bill to prevent Congressional reconsideration of an alternative to Sykeston at that time.

Mid-Dakota Dam has also been the subject of consultations with Canada. The joint press line from the December 13, 1990, consultations states, in part:

The primary issue considered by the Consultative Group was the connection between the McClusky Canal and the New Rockford Canal. The Joint Technical Committee evaluated ten options and concluded that three options "are potentially acceptable from the standpoint of risk to Canadian waters." The three options are (a) the Sykeston Canal, if entirely constructed within the Missouri Basin without the Lincoln Valley irrigation area, (b) the "southern alignment" of the Sykeston Canal, if the eastern reach is relocated and the Lincoln Valley irrigation area is not developed, and (c) the Mid Dakota Reservoir, which has been proposed by the State of North Dakota, if the outlet is relocated and an acceptable fisheries and recreation management plan is developed for the reservoir.

The bill should also clarify two other issues related to the former Lonetree Reservoir site. The Secretary of the Interior should terminate the refuge status of the Sheyenne Lake National Wildlife Refuge within one year of the estimated date of completion of the Mid-Dakota Dam with Johnson Lake designated as a replacement refuge. Also, The Secretary should reimburse the North Dakota Game and Fish Department for all costs, including payments in lieu of taxes, related to the management of former Lonetree Reservoir lands which are not needed for Sheyenne Lake (Mid-Dakota Reservoir).

2. Stabilization of Devils Lake. Legislation should authorize facilities to stabilize the level of the Devils Lake chain of lakes (the facilities would deliver treated project water to, and provide for an outlet from, the chain of lakes). The legislation should provide the following procedure:

- a. The Secretary should cooperate with the Corps to complete the pending feasibility study, and the Corps

should provide the report and supporting data, without recommendation, to the Secretary.

- b. The State should pay 25% of the actual construction costs and annual OM&R. The Congress will certainly require cost-sharing for this feature, but 75% of the costs should be allocated to Indian economic development, fish and wildlife habitat, and compliance with the Boundary Waters Treaty of 1909.
- c. The Secretary of the Interior, after suitable review and consultations with Canada, should select a plan for the stabilization of Devils Lake and submit the report to the Congress by December 31, 1994. The Secretary must consider the recommendations of the State of North Dakota and the position of the Government of Canada when making this determination, and the report must state the opinions of the Secretary of State and the Secretary of the Interior that the feature will comply with the Boundary Waters Treaty of 1909.
- d. The Secretary should be authorized to enter an agreement with the State for the construction of the selected lake stabilization features if the report is not disapproved by the Congress.

3. Abandoned or oversized features. Section 1(g) of the 1986 Act states:

Where features constructed by the Secretary are no longer used to full capacity pursuant to the recommendations of the Garrison Diversion Unit Commission Final Report, that portion of the Secretary's investment attributable to the construction of such unused capacity shall be nonreimbursable.

However, the Inspector General for the Interior Department issued a report which effectively nullifies this subsection. Therefore, new language should be added to clarify that the State of North Dakota would not be obligated to reimburse the United States for oversized or abandoned project features.

4. Indian Irrigation facilities. The legislation should give additional flexibility in the location of suitable irrigation lands for the Three Affiliated Tribes and the Standing Rock Sioux Tribe.

5. Sheyenne River Treatment facility. The legislation should establish a schedule for the Secretary of the Interior, after consultations with Canada, to complete the Sheyenne River Treatment facility. The legislation should state the following procedure:

- a. Submit a report concerning the appropriate plan within eighteen months after the date of the act. The Secretary must consider the recommendations of the State of North Dakota and the position of the Government of Canada when making this determination, and the report must state the opinions of the Secretary of State and the Secretary of the Interior that the feature will comply with the Boundary Waters Treaty of 1909.
- b. The legislation should authorize the Secretary, if the report is not disapproved by the Congress, to enter an agreement with the State for the construction of the facility and to advance the necessary construction funds to the State.

6. **Adjustment to the authorization of appropriations.** The legislation should index the authorization for the Indian MR&I authorization. In addition, the legislation should permit a transfer of authorization to recreation and irrigation service facilities if the Sheyenne River Treatment facility is constructed for less than the authorized amount. No increase in total authorization is requested.

7. **Wildlife enhancement.** The 1965 law required nonfederal interests (i.e., the GDCD) to pay 50% of capital costs and 100% of OM&R costs related to wildlife enhancement. However, the 1986 Act dramatically increased the mitigation requirements, dedicated the Taayer Reservoir site for wildlife enhancement, and also set aside the Lonetree Reservoir site for wildlife habitat. It was contemplated that these costs would be a federal responsibility. This amendment should clarify that the state is not to be assessed the capital costs for these and future wildlife enhancement projects.

8. **Irrigation facilities.** It may be necessary to postpone irrigation development as a tradeoff for the Mid-Dakota authorization. An eight year postponement, unless the Secretary determines that earlier development is in the national interest, would be realistic. However, the postponement would not delay the Oakes Test Area and the Turtle Lake Equal Emphasis Wetland, Irrigation, and Wildlife Demonstration Area.

9. **Operation, maintenance, and replacement of existing facilities.** The legislation should direct the Secretary to enter into an agreement with the State to repair or replace, at federal expense, inoperative existing facilities (e.g., the McClusky Canal).


C. Emerson Murry
Manager

May, 1992

**NORTH DAKOTA STATE WATER COMMISSION
DROUGHT DISASTER LIVESTOCK WATER PROJECT
ASSISTANCE PROGRAM**

On April 24, 1990, Governor George Sinner declared a drought disaster for the State of North Dakota in Executive Order 1990-4. This declaration was based on reports received by the Governor's office. Shortages in forage and water for livestock, crop failures, water problems, rural fire dangers, and adverse economic effects on the state's agribusiness constituted a significant threat to the state's economy.

Based on information developed by the Agriculture Task Force of the North Dakota Drought Mitigation Organization chaired by Sarah Vogel, the Department of Agriculture drafted legislation to provide cost-sharing in developing new water sources to replace those lost due to drought related reasons. The legislation was sponsored by Senator Dean Meyers and Representative Ron Nichols and passed by the North Dakota Fifty-Second Legislative Assembly. This bill provided for a livestock water assistance program to be administered by the State Water Commission. The program, called the Drought Disaster Livestock Water Assistance Program, provides cost-sharing for the development of drought resistant water supplies for livestock producers affected by the drought. The bill also directed the State Water Commission to establish an advisory committee to determine criteria for eligibility, covered expenses, and to develop rules for administering the program. Unfortunately, Senate Bill 2359 did not provide an appropriation for the livestock

water program but did in effect, encourage the State Water Commission to find funds for the program. The State Water Commission subsequently allocated \$250,000 from the Resources Trust Fund for the program.

The advisory committee consisted of: Joyce Byerly, ND State Water Commission Member, Watford City, ND; Milton Lindvig, ND State Water Commission Staff, Bismarck, ND; Jim Moench, ND Farmers Union, Jamestown, ND; Wade Moser, ND Stockman's Association, Bismarck, ND; Ilef Olerud, North Dakota Grazing Association, McLeod, ND; Gary Puppe, ND Association of Soil Conservation Districts, Bismarck, ND; Sarah Reinhiller, ND Department of Agriculture, Bismarck, ND; and Dave Rustebakke, ND Farm Bureau, Bismarck, ND. Members of the advisory committee also advertised the existence of the program in their respective association and agency publications. Included with this report are excerpts from some of these publications with descriptions of the Drought Disaster program.

In establishing the rules for administering the program, the advisory committee reviewed the rules used by South Dakota in their Drought Disaster Livestock Water Assistance Program. South Dakota's rules provided the basis for the North Dakota program. The South Dakota program was active in 1988-1990 and was administered by staff of the South Dakota Department of Water and Natural Resources. Under the South Dakota program livestock producers were able to obtain 50 percent cost-sharing up to \$3,500 with most costs of the project eligible for cost-share.

The rules established for the North Dakota program stipulated that the producer had to be denied assistance by the Federal Agricultural Stabilization and Conservation Service (ASCS) and defined eligible costs. Non-eligible costs included those for removable items such as pumps, stock tanks, and electrical equipment as well as easements and hookup fees. The program went into effect on July 1, 1991, and applications began arriving almost immediately.

The advisory committee developed interim rules which were followed from the program's commencement until the final rules were approved by the State Water Commission. The interim rules were modified after hearings were held and concerns were raised that some producers did not know of the program's existence until after they had developed a water supply. The modified interim rules allowed any project started or completed after July 1, 1991 and before January 1, 1992 to be eligible for cost-sharing as long as other criteria were met. These interim rules were approved by the State Water Commission and became the rules of the Drought Disaster Program on August 22, 1991.

During the course of the program, some problems surfaced. The State Water Commission received several complaints about the prior approval requirement after January 1, 1992. In some cases, a well driller informed the farmer about the program while drilling was underway. Also, there was a rumor of double billing occurring.

This is where a contractor sends the participant two bills, one to be paid to the contractor and a second one to be submitted to the State Water Commission for cost-sharing. State Water Commission legal council recommended development of an affidavit of actual expenses to be signed by the applicant to stop such activity. Blank affidavits were then included with project approval letters.

All available funds of the Drought Disaster program have been allocated as of March 18, 1992. Twelve applications have arrived since that date and the applicants were sent a letter informing them that all funds have been allocated. These applications have been placed on hold in the event additional funds become available.

To date, there have also been 16 additional inquiries into the program since funds were completely allocated; the inquirers' names, addresses, and phone numbers were placed on a waiting list by date of contact.

Time spent by the State Water Commission Staff to develop and implement the Drought Disaster program was paid out of the State Water Commission operating expenses with the entire \$250,000 from the Resources Trust Fund used for participant compensation. As a result, the total cost of the program so far, is \$273,225.

<u>Name</u>	<u>Title</u>	<u>Hours</u>	<u>Cost</u>
Cary Backstrand,	Chief Regulatory Section	70	\$ 1,890
Dwight Comfort,	Program Administrator	968	15,125
Raymond Olinger,	Reg. Section Technician	160	1,860
Linda Weispfenning,	Env. Sci., Planning Sect.	<u>240</u>	<u>4,350</u>
	Total	1,438	\$23,225

As of May 4, 1992, there were 141 applications approved by the State Engineer. A total of 176 applications were reviewed, this includes the 12 applications we have on hold but not the 16 inquiries on the waiting list. A state status map with the projects in each county is attached to this report. The following list of projects were approved for funding:

Wells on Farmstead	36
with Pipelines	17
Wells in Pasture	23
with Pipelines	21
Pipelines	12
Rural Water System	3
Wells and Dugouts	3
Dugouts	22
Spring Developments	<u>4</u>
	141

The following list of projects were not funded:

Projects Withdrawn	15
Projects Denied	8
Applications on Hold	
(due to Lack of Funds)	<u>12</u>
	35

One reason there are so many farmstead projects is that the ASCS program denies projects located within 1/4-mile of a farmstead. The ASCS program does not allow farmstead wells because the major purpose of their program is to promote improved range (pasture) management practices.

The State Water Commission program filled a gap by providing

farmstead water for many livestock producers. However, the farmstead well also provides water to the house and for other purposes, and, therefore, is only partially used for livestock watering. Our records show that 66 projects also served households as well as livestock. Since the program intent was to provide water for livestock, it may have been advisable to only allow a percentage of the total cost of farmstead wells or pasture wells with pipelines to farmsteads, to be eligible for cost-share.

The State Engineer has directed that 20 percent of the completed projects be inspected. So far, 10 projects have been inspected with more projects scheduled for inspection. All 10 inspected projects were functioning as expected. The State Water Commission staff have learned that in one other case, a well was not developed after assistance for drilling and casing costs was received. This situation is being investigated since the purpose of the program is to provide emergency drought relief.



Nicholas J. Spaeth
ATTORNEY GENERAL

ATTORNEY GENERAL

STATE OF NORTH DAKOTA
600 East Boulevard
State Capitol
Bismarck, North Dakota 58505-0040

701-224-2210
FAX 701-224-2226



MEMORANDUM

STATE WATER COMMISSION REFER TO	
For Your Inf. Draft A Reply Respond Directly Comments? Let's Discuss Return to State Eng. File	

Capitol Tower Offices
Consumer Fraud
and Antitrust Section
701-224-3404
800-472-2600
Toll Free in North Dakota

Gaming Section
701-224-4848

Licensing Section
701-224-4848

Racing Commission
701-224-4290

Capitol Complex Offices
State Office Building
900 East Boulevard
Bismarck, ND 58505-0040
FAX 701-224-4300

Civil Litigation
701-224-3640

Natural Resources
701-224-3640

Bureau of Criminal
Investigation
P.O. Box 1054
Bismarck, ND 58502-1054
701-221-6180
800-472-3185
Toll Free in North Dakota
FAX 701-221-6158

Fire Marshal
1835 Bismarck Expressway
Bismarck, ND 58504
701-221-6390
FAX 701-221-6363

TO: David A. Sprynczynatyk
State Engineer

FROM: Julie A. Krenz *JK*
Assistant Attorney General

RE: April 6, 1992 Order in U.S. v. Sargent County
Water Resource District

DATE: May 20, 1992

On April 6, 1992, the Federal District Court in Fargo issued a memorandum and order regarding a motion made by the United States for summary judgment, a motion made by Sargent County Water Resource District to dismiss, and a motion made by Moore Engineering for summary judgment in United States v. Sargent County Water Resource District, et al. The state of North Dakota joined the county and Moore Engineering in their motions to dismiss and for summary judgment respectively. The state is a defendant in this lawsuit only because it may be liable under the Clean Water Act for a judgment entered against the county if the county is unable to pay.

In this case, the United States sued Sargent County claiming that Sargent County did not obtain the required permit from the Corps of Engineers before conducting work on a drain. The drain bisects three sloughs. Moore Engineering was joined in the lawsuit because it was hired to do engineering work for the project.

In order for the government to have jurisdiction over these sloughs, it must show that the county discharged a pollutant into waters of the United States by sidestepping excavated material into these sloughs. The United States claimed that it had jurisdiction under the Clean Water Act over the sloughs under both an adjacent wetlands theory and an isolated wetlands theory.

Adjacent wetlands are wetlands separated from other waters of the United States by man-made dikes or barriers, natural river berms, beach dunes, or the like or are wetlands bordering, contiguous, or neighboring

waters of the United States. The court held that the sloughs were not adjacent wetlands.

The court did find, however, that the government had jurisdiction under the isolated wetlands theory. The rules adopted to implement the Clean Water Act provide that waters of the United States include isolated waters such as sloughs "the use, degradation or destruction of which could affect interstate or foreign commerce." The court stated that these three sloughs provide habitat to migratory birds and that the sloughs could be used by interstate travelers for recreational purposes.

Under the Clean Water Act, even if the government has jurisdiction over wetlands, a permit is not required if the discharge of dredged or fill material is for the purpose of maintaining a drainage ditch. The issue in this case is whether the counties work on the drain constituted maintenance or whether it was new work requiring a permit. Maintenance requires that the original depth and bottom of the drain remain the same. The court said whether the original condition of the drain was maintained by the county, remains a genuine issue of material fact. The court defined original as the depth and width of the drain as it was originally constructed plus any improvements made to any segments of the ditch prior to the Clean Water Act's jurisdiction over wetlands in 1975. This is important because there appears to have been work done on the drain between the time the original drain was completed and prior to the work at issue in the 1980s. Any deepening or widening of the drain prior to 1975 would be the standard that the court would allow as not requiring a permit and as being maintenance.

Under the Clean Water Act, even if a county satisfies the maintenance exemption, the activity can be recaptured and a permit required if the discharge of dredged or fill material into the sloughs subjects an area to a use to which it was not previously subject. Any discharge of dredged or fill material into navigable waters incidental to any activity having as its purpose bringing an area of the navigable waters into a use to which it was not previously subject is required to have a permit. The court did not make a final ruling on what "purpose" means as used in this statute. The United States argued that it is the effect of the county's activity rather than its purpose that should be the focus of the court's inquiry. The county argued that its purpose was to maintain the drain and that the purpose of the activity and not its effect is the key.

The federal rules of procedure allow a party to move for summary judgment when the party believes there is no

genuine issue of material fact and that that party is entitled to prevail as a matter of law. A motion to dismiss attacks the action on the basis of insufficiency of the pleading, of process, venue, etc. The motion to dismiss by the county in this case was made on the basis that the case should be dismissed because the government did not have jurisdiction over these wetlands.

The court found that Moore Engineering did not exercise sufficient responsibility for or control over the work to be liable and granted Moore's and the state's motion for summary judgment on liability. The court did not grant the federal government's motion for summary judgment because it found there were genuine issues of material fact with regard to whether or not the county only maintained the drain or whether the changes in the sloughs were caused by something other than the county's action such as the drought. The court did not grant Sargent County's and the state's motion to dismiss because it found the federal government had jurisdiction over the wetlands pursuant to the isolated wetlands provisions of the Clean Water Act.

A pretrial conference was held Friday, May 8, 1992 in Fargo. At that conference, Sargent County asked the court to reconsider the portion of its decision which held that isolated wetlands were subject to Clean Water Act jurisdiction. Sargent County asked for the reconsideration in light of a 7th Circuit decision decided April 20, 1992 which held the opposite of the court i.e. that the Clean Water Act's jurisdiction does not extend to isolated wetlands. If the court accepts the position of the 7th Circuit, the court could grant Sargent County's motion to dismiss.

The court agreed to reconsider its decision when the 7th Circuit decision is final. The court said if it reconsiders its position on isolated wetlands, it would also reconsider its position on adjacent wetlands. The United States has until June 4, 1992 to decide whether it will appeal the 7th Circuit decision to the United States Supreme Court, request a rehearing at the 7th Circuit, or not pursue the case further. We should know soon after June 4th whether the court is going to reconsider its April 6, 1992 decision. If the court does not reconsider its opinion or if it does reconsider its opinion and still finds that the wetlands involved are subject to Clean Water Act jurisdiction, the trial will probably be set for next fall.

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