

MINUTES

North Dakota State Water Commission Audio Conference Call Meeting Bismarck, North Dakota

November 17, 2004

The North Dakota State Water Commission held an audio conference call meeting in the Governor's conference room, Bismarck, North Dakota, on November 17, 2004. Lt. Governor-Chairman, Jack Dalrymple, called the meeting to order at 10:15 AM, and requested State Engineer, and Chief Engineer-Secretary, Dale L. Frink, to call the roll. Lt. Governor Dalrymple announced a quorum was present.

STATE WATER COMMISSION MEMBERS PRESENT:

Lt. Governor Jack Dalrymple, Chairman
Jeff Olson, representing Roger Johnson, Commissioner,
North Dakota Department of Agriculture, Bismarck
Charles Halcrow, Member from Drayton
Larry Hanson, Member from Williston
Elmer Hillesland, Member from Grand Forks
Curtis Hofstad, Member from Starkweather
Harley Swenson, Member from Bismarck
Robert Thompson, Member from Page
Dale L. Frink, State Engineer, and Chief Engineer-Secretary,
North Dakota State Water Commission, Bismarck

STATE WATER COMMISSION MEMBER ABSENT:

Jack Olin, Member from Dickinson

OTHERS PRESENT:

State Water Commission Staff
Julie Krenz, Assistant Attorney General, Bismarck
Matthew Sagsveen, Assistant Attorney General, Bismarck
Dale Wetzel, Associated Press, Bismarck
Joseph Smith, Standing Rock Sioux Tribe, Water Resources, Fort Yates
Archie D. Fool Bear, Standing Rock Sioux Tribe, Water Resources, Fort Yates
Eric Antoine, Standing Rock Sioux Tribe, Legal Department, Fort Yates
Gene R. Laducer, Turtle Mountain Band of Chippewa, Belcourt
Thomas Davis, Turtle Mountain Band of Chippewa, Water Resources, Belcourt

The attendance register is on file with the official minutes.

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

CONSIDERATION OF AGENDA

announced the agenda approved as presented.

There being no additional items for the agenda, Lt. Governor Dalrymple an-

**CONSIDERATION OF FINAL DRAFT
MINUTES OF AUGUST 16, 2004
STATE WATER COMMISSION
MEETING - APPROVED**

The final draft minutes of the August 16, 2004 State Water Commission meeting were approved by the following motion:

It was moved by Commissioner Swenson, seconded by Jeff Olson representing Commissioner Johnson, and unanimously carried, that the final draft minutes of the August 16, 2004 State Water Commission meeting be approved as prepared.

**APPROVAL OF AWARD OF CONTRACTS
FOR STATE WATER COMMISSION
MAINTENANCE BUILDING
(SWC File SHOP)**

Avenue and to use the proceeds to build a new maintenance building. The authorization directed that the cost of the land and construction of the building shall not exceed \$977,100.

In accordance with the State Water Commission budget for the 2003-2005 biennium, House Bill 1023 authorized the Commission to sell its property at the corner of 26th Street and Broadway

The State of North Dakota deeded approximately 4.3 acres north of the North Dakota Penitentiary and east of the North Dakota Department of Health and Consolidated Laboratories in southeast Bismarck to the State Water Commission for the purpose of constructing a new maintenance building. In March, 2004, the Commission entered into a contract with the architectural firm of AWBW, Bismarck, to develop plans and specifications for a new building.

The North Dakota Game and Fish Department is constructing a maintenance facility on land immediately to the east of the Commission's property. The state is currently constructing a new mortuary on the Health Department's property. On June 28, 2004, the State Water Commission approved an expenditure of \$100,000 to cost share in the development of the site and utilities with these agencies.

On June 6, 2004, the bids were opened for developing the utilities at the new location, and on June 23, 2004, bids were opened for the construction of a new maintenance building. The apparent low general, mechanical and electrical construction bids, the alternate features required for a functional maintenance building, and the State Water Commission's cost share for development of the site and utilities exceeded the funding limit of \$977,100 authorized by the Legislature under House Bill 1023.

The new State Water Commission maintenance building was rebid, with the bids being opened on October 28, 2004. The project was bid for general construction, combined mechanical construction, and electrical construction, with several alternates.

There were five bids received from the following for the general construction: Associated Builders, Capital City Construction, Dakota West Contracting, Northwest Contracting, and Professional Contractors, Inc., all located in Bismarck, ND. Based on the bids received, the apparent low bidder for the general construction contract was Professional Contractors, Inc., Bismarck, ND, with a base bid of \$433,300, and a base bid with alternates of \$542,300.

There were four bids received from the following for the combined mechanical construction: Advanced Mechanical, Central Mechanical, Cofell's Plumbing and Heating, and Northern Plains Heating and Air, all located in Bismarck, ND. Based on the bids received, the apparent low bidder for the combined mechanical construction was Advanced Mechanical, Bismarck, ND, with a base bid of \$137,715, and a base bid with alternates of \$158,350.

There were three bids received from the following for the electrical construction: Don's Electric, Electric Systems, and RK Electric, all located in Bismarck, ND. Based on the bids received, the apparent low bidder for the electrical construction was Electric Systems, Bismarck, ND, with a base bid of \$78,920, and a base bid with alternates of \$90,303.

Secretary Frink explained that the general construction contract includes a metal shelving alternate in the amount of \$38,400. This is the largest cost item which can be added in at a later date, therefore, it was recommended that the metal shelving alternate not be included at this time. Secretary Frink said the expenditures to date (\$153,141) for architect and engineer fees, utilities, site preparation, advertising costs and printing; the additional estimated costs (\$33,959) for paving, architect, and miscellaneous items; and the apparent low base bids with alternates (\$752,553) are within the authorization of House Bill 1023 for construction of a new maintenance building.

It was the recommendation of the State Engineer that the State Water Commission approve the expenditure of \$977,100, authorized in 2003 House Bill 1023, for the construction of a new State Water Commission maintenance building. It was also the recommendation of the State Engineer that the State Water Commission approve the award of the following contracts: general construction contract, in the amount of \$503,900 (excludes \$38,400 for metal shelving alternate), to Professional Contractors, Inc, Bismarck, ND; combined mechanical construction contract, in the amount of \$158,350, to Advanced Mechanical, Bismarck, ND; and electrical construction contract, in the amount of \$90,303, to Electric Systems, Bismarck, ND. The award of the contracts and notices to proceed are dependent on the completion of the contract documents, and concurrence from legal counsel.

It was moved by Commissioner Swenson and seconded by Commissioner Thompson that the State Water Commission approve the expenditure of \$977,100, authorized in 2003 House Bill 1023, for the construction of a new State Water Commission maintenance building; and, that the State Water Commission approve the award of the following contracts: general construction contract, in the amount of \$503,900 (excludes \$38,400 for metal shelving alternate), to Professional Contractors, Inc, Bismarck, ND; combined mechanical construction contract, in the amount of \$158,350, to Advanced Mechanical, Bismarck, ND; and electrical construction contract, in the amount of \$90,303, to Electric Systems, Bismarck, ND, for a total of \$752,553. The remaining amount (\$224,547) includes costs for architect fees, road and site improvements, and change orders. This motion is contingent upon the availability of funds.

Commissioners Halcrow, Hanson, Hillesland, Hofstad, Jeff Olson representing Commissioner Johnson, Swenson, Thompson, and Lt. Governor Dalrymple voted aye. There were no nay votes. Lt. Governor Dalrymple announced the motion unanimously carried.

2005 LEGISLATION

Secretary Frink provided the following summary of proposed legislation being discussed at the staff level for consideration to the 2005 legislative session, which are under the authority of the State Engineer and the State Water Commission. The proposed legislation is contingent upon approval of legal counsel and the Governor. The proposed bill drafts are attached to these minutes as **APPENDIX "A"**.

Under the authority of the State Engineer:

- ∞ **Amendment of North Dakota Century Code § 61-36-01 relating to membership of the Devils Lake outlet management advisory committee.**
Attachment 1

The amendment to North Dakota Century Code § 61-36-01 adds a Sheyenne River Joint Water Resource Board representative to the Devils Lake Outlet Management Advisory Committee.

It was the recommendation of the State Engineer that the State Water Commission support the proposed bill draft related to the membership of the Devils Lake Outlet Management Advisory Committee.

It was moved by Commissioner Hillesland and seconded by Commissioner Thompson that the State Water Commission support the proposed bill draft related to the membership of the Devils Lake Outlet Management Advisory Committee.

Commissioners Halcrow, Hanson, Hillesland, Hofstad, Jeff Olson representing Commissioner Johnson, Swenson, Thompson, and Lt. Governor Dalrymple voted aye. There were no nay votes. Lt. Governor Dalrymple announced the motion unanimously carried.

- ∞ **A Bill for an Act to create and enact five new sections to chapter 61-03 of the North Dakota Century Code, authorizing the state engineer to negotiate reserved water rights of the United States and federally recognized Indian tribes.** Attachment 2

Current state law does not contain a procedure allowing the state to negotiate with Tribes or the federal government to quantify reserved water rights. Reserved water rights are water rights that have been impliedly reserved to the Tribes or the federal government in amounts sufficient to fulfill the purposes of the reservations. These rights are based on federal law. They differ from state-based prior appropriation rights because their priority is the reservation's creation date and they are not subject to forfeiture or abandonment for nonuse.

This bill authorizes the State Engineer to enter into negotiations with each Indian tribe, or the federal government, to quantify the reserved water rights of that Tribe's, or the federal government, respective reservation.

The Turtle Mountain Band of Chippewa recently passed a resolution requesting to begin the negotiation process to quantify its rights. It is not known whether other tribes will want to quantify their reserved water rights in the future but, if they do, this bill will establish a procedure by which the quantification can take place.

Thomas Davis, water resource manager, Turtle Mountain Band of Chippewa, Belcourt, ND, appeared before the State Water Commission to support proposed legislation authorizing the State Engineer to negotiate Indian tribal water rights within the state. He explained that Montana's Indian tribes, state government and other interests have an arrangement for negotiating water rights, and expressed the importance that North Dakota should have a similar arrangement. The Turtle Mountain reservation, which has an increasing population, appropriates water from a relatively small aquifer. Mr. Davis explained this is a serious concern and alluded to possible over-appropriation of the aquifer before the rights can be quantified as a tribe. On behalf of the Turtle Mountain Band of Chippewa, Mr. Davis said the tribal council has agreed to a working relationship with the state in this process to develop an arrangement that is going to be neighborly.

Archie Fool Bear, representing the Standing Rock Nation, Fort Yates, ND, appeared before the State Water Commission to express the tribal council's interest and continued review of the proposed legislation.

It was the recommendation of the State Engineer that the State Water Commission support the concept of the proposed legislation related to authorizing the State Engineer to negotiate reserved water rights. The proposed bill draft has been forwarded to the Bureau of Indian Affairs for comment.

It was moved by Commissioner Swenson and seconded by Jeff Olson representing Commissioner Johnson that the State Water Commission support the concept of proposed legislation related to authorizing the State Engineer to negotiate reserved water rights.

Commissioners Halcrow, Hanson, Hillesland, Hofstad, Jeff Olson representing Commissioner Johnson, Swenson, Thompson, and Lt. Governor Dalrymple voted aye. There were no nay votes. Lt. Governor Dalrymple announced the motion unanimously carried.

Under the authority of the State Water Commission:

- ∞ **A Bill for an Act to amend and reenact section 11 of chapter 535 of the 1999 Session Laws as amended by section 1 of chapter 559 of the 2001 Session Laws as amended by section 1 of chapter 549 of the 2003 Session Laws, relating to the issuance of bonds for construction of an outlet from Devils Lake; to amend and reenact sections 61-02.1-01 and 61-02.1-02.1 of the North Dakota Century Code, relating to the water commission's authority to issue bonds for projects; to repeal section 61-02.1-02 of the North Dakota Century Code, relating to bond issuance amount limits; and to declare an emergency.** Attachment 3

The State Water Commission has authority to issue bonds under North Dakota Century Code chapter 61-02.1, which was created by 1999 Senate Bill 2188 and 1999 House Bill 1495, for water management and development. To assist in financing the costs of the statewide water development program during the 2003-2005 biennium, it will be necessary to exercise the Commission's bonding authority.

When soliciting proposals for investment banking services for the agency's bond issue, it became apparent that it would be advantageous for the agency to identify sources of repayment in addition to the Water Development Trust Fund. Bonds issued using only the tobacco proceeds for repayment have become increasingly difficult to sell, and command substantially higher interest rates. Replicating the following sources of repayment identified in the agency's 2000 Series Statewide Water Development bonds would make the bonds more marketable: Water Development Trust Fund, Resources Trust Fund, other revenues appropriated to the State Water Commission, and an amount necessary to make one biennium's payments from proceeds of the Bank of North Dakota.

In addition, it is proposed to eliminate project-specific sections of the law in favor of authorizing bonding for projects identified in the Statewide Water Development Plan.

The bill draft proposes a provision for declaring an emergency measure, which would allow the State Water Commission to issue bonds late in the 2003-2005 biennium.

Secretary Frink explained the proposed legislation that would clarify how the bonds would be secured. The change is being offered at the suggestion of attorneys who have reviewed the bond offering. He said the bond proceeds would help finance a number of initiatives including flood control projects at Grand Forks and Wahpeton, repairs to Mount Carmel Dam in Cavalier county, and the Devils Lake outlet to the Sheyenne River. A portion of the \$60 million has been expended using Bank of North Dakota loans, which will be repaid once the bonds are sold.

Commissioner Swenson questioned whether the proposed legislation would conflict with the constitutional limits on the North Dakota government debt. He also expressed concerns relative to the possibility of legal challenges and the effects prevailing challenges could have on the state and the agency.

Lt. Governor Dalrymple responded that the bond buyers will rely on the state's implicit guarantee that the debt will be financially satisfied. He explained that for the State of North Dakota to default on any kind of a bond issue of this type is not an option. These types of bonds would have to be honored or the entire credit worthiness of the state would be in jeopardy.

It was the recommendation of the State Engineer that the State Water Commission support the proposed bill draft related to the Commission's bonding authority.

It was moved by Jeff Olson representing Commissioner Johnson and seconded by Commissioner Swenson that the State Water Commission support the proposed bill draft related to the State Water Commission's bonding authority.

Commissioners Halcrow, Hanson, Hillesland, Hofstad, Jeff Olson representing Commissioner Johnson, Swenson, Thompson, and Lt. Governor Dalrymple voted aye. There were no nay votes. Lt. Governor Dalrymple announced the motion unanimously carried.

∞ **A Bill for an Act to amend and reenact section 23-33-08 of the North Dakota Century Code, relating to access for ground water monitoring.** Attachment 4

The State Health Department has requested support for its bill related to ground water monitoring. North Dakota Century Code § 23-33-08 provides that the names and addresses of landowners who participate in a ground water monitoring program may not be linked in any public disclosure to the findings of the monitoring program.

A North Dakota Attorney General's opinion determined that publication of monitoring locations and results constitute linking the names and addresses of the landowners because this information is available in a county ownership atlas.

The ruling severely limits ongoing and future studies of areas such as the Karlsruhe aquifer that shows increased nitrate levels possibly from irrigation development. All monitoring is tied to a location and most studies include interim and final reports.

The proposed legislation allows the publication of data, location, and results provided the document does not include the names and addresses of the landowners.

Although the State Health Department requested the State Water Commission to co-sponsor the bill, it was the State Engineer's recommendation that the Commission support the proposed bill draft. The State Water Commission concurred with the State Engineer's recommendation.

***NEXT STATE WATER
COMMISSION MEETING***

Hotel, Bismarck, ND, convening at 9:00 AM.

The next meeting of the State Water Commission is scheduled for December 10, 2004 at the Best Western Ramkota

There being no further business to come before the State Water Commission, Lt. Governor Dalrymple adjourned the audio conference call meeting at 11:40 AM.

John Hoeven, Governor
Chairman, State Water Commission

SEAL

Dale L. Frink
North Dakota State Engineer, and
Chief Engineer-Secretary to the
State Water Commission

