

MINUTES

North Dakota State Water Commission
Meeting Held In
State Highway Auditorium
Bismarck, North Dakota

September 14, 1978

The North Dakota State Water Commission held a meeting on September 14, 1978, in the State Highway Auditorium, Bismarck, North Dakota. Governor-Chairman, Arthur A. Link, called the meeting to order at 9:45 a.m., and requested Secretary Vernon Fahy to present the agenda.

MEMBERS PRESENT:

Arthur A. Link, Governor-Chairman
Richard Gallagher, Vice Chairman, Mandan
Gordon Gray, Member from Valley City
Alvin Kramer, Member from Minot
Arthur Lanz, Member from Devils Lake
Arlene Wilhelm, Member from Dickinson
Myron Just, Commissioner, Department of Agriculture, Bismarck
Vernon Fahy, State Engineer and Secretary, North Dakota
State Water Commission, Bismarck

OTHERS PRESENT:

State Water Commission Staff Members
Approximately 50 persons interested in various agenda items

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

Proceedings of the meeting were tape recorded to assist in compilation of the minutes.

CONSIDERATION OF MINUTES
OF AUGUST 23, 1978 MEETING -
APPROVED

Secretary Fahy reviewed the minutes of the August 23, 1978 meeting held in Bismarck, North Dakota. There was no discussion by the Commission members.

It was moved by Commissioner Gray, seconded by Commissioner Kramer, and carried, that the minutes of the August 23, 1978 meeting be approved as prepared and distributed.

CONTINUED DISCUSSION OF
WATER USE FEES
(SWC Project No. 1695)

Governor Link read a letter that he had received this date from William and Arlene Bernhardt, Taylor, ND, which is attached hereto as APPENDIX

"A", indicating that they are supporters of a water marketing fee and that they favor Alternative E.

Murray Sagsveen reviewed in detail and discussed draft No. 3 of Rules and Regulations of the North Dakota State Water Commission Proposed to be Adopted Pursuant to Title 61 of the North Dakota Century Code Governing Water Use Fees. This draft is attached hereto as APPENDIX "B".

The first paragraph on page 3 of the draft states: "The Commission realizes that the revenues received will accrue to the State Treasury. However, it is the intent of the Commission to request a biennial appropriation of all funds received under these regulations to fund the development of water distribution facilities for the long-term economic stability of North Dakota."

It was moved by Commissioner Gallagher and seconded by Commissioner Gray that the paragraph be rewritten to read as follows: "The Commission realizes that the revenues received will accrue to the State Treasury. However, it is the intent of the Commission to request a biennial appropriation of all funds received under these regulations to fund the development of any water resource activity authorized to the State Water Commission by State law for the long-term economic stability of North Dakota." All members voted aye; the motion unanimously carried.

Section 89-00-01-02. DEFINITIONS. 5. states: "Industrial use" means the use of 5,000 acre-feet or more of water annually for electrical generation or synthetic natural gas production and other uses incidental thereto including irrigation for reclamation for associated mining operations." The Commission members then entered into a lengthy discussion relative to a specific amount of acre-feet and also whether these rules and regulations at this time should apply only to industrial users or to all types of users.

Mr. Sagsveen explained that the 5,000 acre-feet figure used in the draft was only for illustrative purposes, but that up to 5,000 acre-feet would be exempt from charges if the section remained as written.

It was the general feeling of the Commission members that there should be a small exemption. However, it was

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noted that if charges begin with the first acre-foot of water, many small industries within municipalities would be included. Therefore, it was suggested that an exemption of 100 acre-feet would eliminate approximately 95 percent of the small industry zoned within a city.

It was suggested by Commissioner Wilhelm that the figure of 5,000 acre-feet be changed to 500 acre-feet. After further discussion -

It was moved by Commissioner Wilhelm that in Section 89-00-01-02, DEFINITIONS. 5, reference to a specific amount of acre-feet be deleted. Commissioner Lanz seconded the motion. That Section would then read as follows: "Industrial use" means the use of water annually for electrical generation or synthetic natural gas production and other uses incidental thereto including irrigation for reclamation for associated mining operations."

In discussion of the motion, it was the consensus of the other Commission members that a specific figure should be included, and the figure of 100 acre-feet was suggested. It was also discussed that only industrial uses be included at this time. Commissioner Wilhelm indicated that she was opposed to excluding irrigation.

A substitute motion was offered by Commissioner Kramer that Section 89-00-01-02 DEFINITIONS. 5. read as follows: "Industrial use" means the use of 100 acre-feet or more of water annually for all industrial purposes excluding irrigation." Commissioner Gallagher seconded the substitute motion. On the call of the question by the Chairman, Commissioners Gallagher, Kramer, Gray, Lanz and Just vote aye; Commissioner Wilhelm voted nay. The Chairman declared the substitute motion as passed.

Secretary Fahy made reference to paragraph 3 on page 2, and asked if it is still the Commission's intent that the paragraph remain as stated: "Water for industrial use, as defined herein, is considered available only from the main stem Missouri River (including Lake Sakakawea) due to the quantities of water involved."

After discussion, it was moved by Commissioner Gallagher and seconded by Commissioner Kramer that Section 89-00-01-01. INTENT. be supplemented to include all waters within the State. All members voted aye; the motion unanimously carried.

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It was suggested by Commissioner Kramer, and was the consensus of the other Commission members, that Conditional and Perfected Water Permits be defined under Section 89-00-01-02. DEFINITIONS.

The Commission then entered into a lengthy discussion relative to dollar amounts which to apply to conditional water permits and plants assigned a conditional water permit using a flow-through system.

Commissioner Just suggested that the waters reserved for non-consumptive use be charged in the same manner as the waters reserved on a conditional permit.

It was moved by Commissioner Wilhelm that the Water Commission adopt for hearing purposes the schedule for consumptive use of \$100 per acre-foot of water with a \$10 per acre-foot increment for each 1000 acre-feet; and that a fee of \$5.00 per acre-foot be assessed for flow-through plants. The motion was seconded by Commissioner Lanz.

In discussion of the motion, Commissioner Gray suggested the consideration of the following schedule: \$2.00 per acre-foot for reserved waters; 10 cents per acre-foot for flow-through waters; and \$100 per acre-foot for consumptive use on a graduated basis.

Commissioner Wilhelm then agreed to amend her motion to read \$2.00 per acre-foot to be assessed for flow-through plants instead of the \$5.00 per acre-foot, and Commissioner Lanz, who seconded the motion, likewise agreed to the amendment.

In further discussion of the motion, it was suggested that a rate schedule be adopted individually for each specific use; therefore, Commissioner Wilhelm withdrew the second portion of her motion which assessed a \$2.00 fee per acre-foot of water for flow-through plants.

Commissioner Wilhelm amended her motion to state that the Water Commission adopt for hearing purposes the schedule for consumptive use of \$100 per acre-foot with a \$10 per acre-foot increment for each 1000 acre-feet. Commissioner Lanz seconded the amended motion. All members voted aye; the motion unanimously carried.

It was moved by Commissioner Kramer and seconded by Commissioner Just that a \$2.00 fee per acre-foot of water be assessed for conditional water permits. All members voted aye; the motion unanimously carried.

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There were some reservations expressed by the Commission members relative to establishing a specific fee at this time for flow-through plants. It was suggested by Commissioner Gallagher that perhaps this fee could be established by assessing flow-through systems at a rate of approximately 50 percent of the per megawatt charge of systems other than flow-through. There was no final action adopted by the Commission members at this meeting regarding a specific fee for flow-through waters.

It was suggested by Murray Sagsveen that the Commission direct him to prepare draft No. 4 incorporating the suggestions and amendments adopted today and forward to Commission members for their review prior to the next meeting. It was the consensus of the Commission members that Mr. Sagsveen's suggestion be carried forth.

Mr. Ted Nace, representing the Dakota Resource Council, Dickinson, ND, distributed to the Commission members a statement relative to water use fees, which is attached hereto and labeled as APPENDIX "C".

CONTINUED DISCUSSION OF
RULES AND REGULATIONS
GOVERNING IRRIGATION
PURPOSES
(SWC Project No. 1400)

Murray Sagsveen indicated that since the last Commission meeting, a redraft of the Rules and Regulations Governing Irrigation Purposes has been forwarded to the Commission members for their final review. After the redraft had been mailed, it was discovered that the regulations would allow an application to be submitted for unlimited acreage, thereby frustrating the apparent intent of the Commission. It was suggested that the following sentence be included in Section 89-03-03-06, on page 3: "No single application may request water to irrigate more than 320 acres." Mr. Sagsveen indicated that if the Commission concurs with this amendment, the Rules and Regulations will then be formally delivered to the Attorney General for his review.

It was moved by Commissioner Just and seconded by Commissioner Lanz that Section 89-03-03-06. LIMITATIONS ON PENDING APPLICATIONS AND UNDEVELOPED PERMITS TO IRRIGATE, be amended to read as follows: "A person who has applications pending to irrigate more than 200 acres or who has both pending applications and undeveloped permits totalling more than 200 acres may not submit an application. No single application may request water to irrigate more than 320 acres." Following the inclusion of this amendment, the adopted Rules and Regulations shall be forwarded to the Attorney General for review. All members voted aye; the motion unanimously carried. (See APPENDIX "D")

The Commission recessed at 12:50 p.m., and the session was reconvened at 2:30 p.m.

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DISCUSSION CONCERNING
PROPOSED ADDITIONAL
CRITICAL HABITAT FOR
WHOOPIING CRANES IN
NORTH DAKOTA

whooping cranes, which are attached as APPENDIX "E".

Murray Sagsveen distributed copies of a news release from the Department of the Interior dated August 17, 1978, and an excerpt from the Federal Register also dated August 17, 1978, relative to additional critical habitat proposed for

Mr. Sagsveen noted that the proposed habitat includes Lake Audubon, Lake Sakakawea and the Oahe Reservoir. If the Secretary of the Interior designates critical habitat in a state then all other federal agencies are bound to recognize that and act accordingly.

Mr. Sagsveen indicated that he has initiated a Freedom of Information request from the Department of the Interior to obtain as much information as possible regarding the proposal before responding. He noted that the public has until October 16 in which to submit comments and the Governor has until November 15 to respond. (Note: Comment period for the public was subsequently changed to November 15.)

It was suggested that the Commission adopt a resolution expressing its support for continued existence of the Endangered Species Act, but that it reject the designation of critical habitat unless it is proven necessary.

It was moved by Commissioner Kramer and seconded by Commissioner Gray that the Legal Counsel for the State Water Commission be directed to prepare an appropriate resolution encompassing that the Water Commission supports the continued existence of the Endangered Species Act, but that it rejects the proposal because of the effects it may have on the State of North Dakota. All members voted aye; the motion unanimously carried.

PROGRESS REPORT ON
CHANNEL "A" PROJECT
(SWC Project No. 842)

the Channel "A" project sponsors can complete the project except for about 200 feet at the Dry Lake end. The plug will remain installed until legal problems are resolved.

Murray Sagsveen reported that the project sponsors of the Channel "A" project have met with the St. Paul District Engineer and have negotiated an agreement where

He noted that the Judge's decision has been appealed in the District of Columbia. If the appeal is won, the plug will be taken out. If the appeal is lost, the water management districts will apply for a permit, which permit may or may not be granted. In the next few months, it will be determined which option will be the most feasible.

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PROGRESS REPORT ON
RUSH LAKE CASE
(SWC Project No. 463)

Mike Dwyer reported that early this spring he had filed with the State District Court in Langdon the plaintiff's brief on the issues in the Rush Lake case.

He indicated that the Defendants were very tardy in submitting their briefs. Prior to making a decision, the Judge suffered a heart attack, therefore, no decision has been made to date on the case.

PROGRESS REPORT ON
RUSSELL DIVERSION CASE
(SWC Project No. 1685)

Mike Dwyer updated the Commission members on the Russell Diversion case. At a previous meeting of the Commission, he presented the background history of the

case. He reported that a Motion for DeFault had been filed asking the Judge to permanently close the drain. (Note: The Defendants have since filed their answer, thus a hearing will be held October 11, 1978, to determine if the illegal drainage should be closed.)

PROGRESS REPORT ON SOUTHWESTERN
NORTH DAKOTA WATER DELIVERY STUDY
(SWC Project No. 1674)

Dave Sprynczynatyk briefly reviewed discussion at the last Commission meeting at which an alternative had been selected for the delivery of water to the

southwestern portion of North Dakota. He indicated that he has since met with the consultants on the project and they are developing a more detailed evaluation of the costs, the benefits and the environmental effects, etc. of that alternative. This information will be presented to the Advisory Committee on September 28. At that meeting, the consultant will explain to the Advisory Committee the various alternatives for phased construction and delivery of water into that southwestern part of the State. The Advisory Committee, will at that meeting, make their final recommendation which will be a part of the final report.

Mr. Sprynczynatyk extended an invitation to the Commission members to attend the September 28 meeting to be held in Dickinson.

After discussion, it was suggested and it was the consensus of the Commission members, that the November meeting of the Commission be held in Dickinson, at which time the consultant be invited to discuss the project with the members.

DISCUSSION OF POLICY CONCERNING
FINANCIAL PARTICIPATION WITH
LOCAL UNITS OF GOVERNMENT

Secretary Fahy explained the criteria that is generally followed when considering cost participation with local units of government, noting that the major areas

for participation are ground-water studies, studies relating to municipal and rural water system supplies, recreation, flood control, drainage, and special studies.

After lengthy discussion, it was requested by Commissioner Wilhelm that the staff prepare a position paper of general criteria used by the State Water Commission for evaluation of cost participation

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for drainage projects. It was the consensus of the other Commission members that the staff proceed with the request.

**STATUTS OF CURRENT
INVESTIGATION OF
PROJECT FEASIBILITY**

A status of current investigation projects was distributed to the Commission members for their information. The memorandum listing these projects is attached as APPENDIX "F".

**CONSIDERATION OF WATER
PERMIT REQUESTS
(SWC Project No. 1400)**

Secretary Fahy presented APPENDIX "G" for the Commission's consideration, which represents water permit actions.

Secretary Fahy indicated that each application has been reviewed and appropriate conditions attached.

It was moved by Commissioner Kramer and seconded by Commissioner Wilhelm that the action of the State Engineer be confirmed. All members voted aye; the motion unanimously carried.

The following requests were approved:
No. 3116 - Apple Creek Country Club, Bismarck; No. 3117 - City of Rhame; No. 3110 - City of Golva; No. 2831 - Gary and Lavern Gutzmer, Mantador; No. 3010 - Mark D. Johnsrud, Watford City; and No. 2455 - Jim and Martin Schillo, Golva.

The following requests were deferred:
No. 3115 - Chad Wagner, Englevale; No. 3119 - Allen Hansen, Ludden; No. 3098 - Louis P. Kraft, St. Michael; No. 3114 - Maynard D. and/or Sandra R. Blohm, Beulah; No. 2949 - Irrigation Development Farm, Walhalla; and No. 2384 - Robert Dunnigan, Walhalla (this is a request for a change in point of diversion). (SEE APPENDIX "G")

**CONSIDERATION OF
FINANCIAL STATEMENT**

Secretary Fahy presented the financial statement for the Commission's consideration. He noted that the budget hearing had been held before the Department of Accounts and Purchases. He advised that the budget request was about 22 percent higher than the current budget when both federal and state fund totals are considered.

**STATUS REPORT CONCERNING
CASSIDY LAKE PROBLEM
(SWC Project No. 1321)**

Mike Dwyer distributed and discussed a memo which explained in detail the problems in the Cassidy Lake - Long Lake

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area of Bottineau County. This memo is attached as APPENDIX "H".

Governor Link indicated that he had received a petition from landowners in the area, stating that a water quality problem is occurring from a cattle feeding operation. If a water quality problem does exist, the matter will be handled by the State Health Department who has jurisdiction in this area.

CANADIAN SOURIS RIVER
BASIN STUDY REPORT
(SWC Project No. 984)

Secretary Fahy distributed brochures of the Canadian Souris River Basin Study Summary and Recommendations for the Commission's information. He noted that the 11-volume report had recently been received at his office.

STATUS REPORT ON
RED RIVER DIKING
PROBLEM
(SWC Project No. 1638)

Mike Dwyer reported that on August 30 a meeting was held in Grand Forks attended by the State Engineer, water management district board members in Red River Valley, and himself. At this meeting, the joint powers agreement was further discussed, and he indicated that most of the Boards supported the idea and indicated that they were in agreement that a joint board should be established.

After the August 30 meeting, Mr. Dwyer prepared the final draft of the agreement which contained the provisions and concepts that were discussed at the meeting. This draft has been forwarded to the boards this week for their consideration and approval.

CONSIDERATION OF REQUEST
FROM EMMONS COUNTY WATER
MANAGEMENT DISTRICT FOR
FINANCIAL ASSISTANCE
(SWC Project No. 1605)

Secretary Fahy presented a request from the Emmons County Water Management District requesting financial assistance for the State Line Water Co-Operative of Emmons County for the purpose of test drilling water to supply a rural water system in southern Emmons County.

He indicated that the testing program would cost approximately \$16,000. The Emmons County Water Management Board has agreed to provide 25 percent and the State Line Water Co-Operative 25 percent.

It was recommended by the State Engineer that the Commission participate in the amount of 50 percent of qualified items of the project.

It was moved by Commissioner Gray and seconded by Commissioner Wilhelm that the Commission participate in the test drilling project requested by the State Line Water Co-Operative of Emmons County in the amount

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of 50 percent of the qualified items, not to exceed \$3,500, subject to the availability of funds. All members voted aye; the motion unanimously carried.

REMARKS BY MR. JAMES
MARSDEN, NORTH DAKOTA
FARM BUREAU

Mr. James Marsden, North Dakota Farm
Bureau, Fargo, ND, presented the following
remarks:

"Governor Link and members of the Commission:

I have my watch out and will adhere for two minutes. First of all, I'd like to compliment you in your efforts in preserving our water resources. I've enjoyed sitting in on this session.

Our Farm Bureau members passed a resolution last year commending you for your role and I'd like to personally compliment Vern Fahy and his staff for the cooperation they have given me. I asked that the Secretary of the Natural Resources Committee of the Farm Bureau - I asked for one of the representatives of the State Water Commission to appear in Jamestown and he sent Dave Ripley. And, Dave did just an excellent job of helping our people better understand the problems and the procedures that are necessary to conduct themselves as far as our water is concerned.

I did learn that this study had been completed relating to the Souris River. Governor, as you recall, I appeared representing the Farm Bureau and our stand on this Souris River Project, along with the Farmers Union and the Stockmens Association, who were also concerned about this project. And, we mentioned at that time that our group had gone on record requesting that you and state agencies work with the Canadians. I'm somewhat disappointed that the Canadians haven't shown an interest in what we are doing down here and I think it should work both ways. And, I strongly urge that any communication with the Canadians - tell them that it goes both ways - if you want our cooperation, we expect yours. We feel that the Souris River, when you take a look at that map, you realize that a good part of it is in Canada as well as in this country. And, I think the project should be looked at as a whole. Thank you for this honor."

There being no further business to come
before the Commission at this time -

It was moved by Commissioner Gray, seconded
by Commissioner Kramer, and carried, that the
meeting adjourn at 4:50 p.m.

ATTEST:


Vernon Fahy, State Engineer and Secretary


Arthur A. Link, Governor-Chairman

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NORTH DAKOTA STATE WATER COMMISSION

REGISTER

ATTENDANCE AT State Water Comm. Meeting
 DATE Sept. 14, 1978 PLACE State Highway Blvd. Bismarck, N.D.

PROJECT NO. _____

Your Name	Your Address	Who do you Represent? (Or Occupation)
Pete Balka	Soil Cons. Service Box 1458 BIS.	Soil Cons. Service
Vern Kvernum	Box 1545 Williston N.D.	Williams Electric Cooperative, Inc
Olat Opedahl	R. Route 2 Tioga N. Dak.	Williams REC.
Jeanne A. Wagner	Route 2, Box 100 Richardton N.D.	INDEPENDENT REC USER.
Rose Sickler	Gladstone, N.D.	West Plains user
Arneval Ruge	Edgely N.D.	James Valley Elec Coop
G.D. Cuth	Mohor, N.D.	R.S.R. ELEC. COOP.
Richard Selinger	New England N.D.	Slope REC
Willis E. Johnson	New England N.D.	Slope REC
Gayne Kordak	Melina N.D.	ASR Elec. Coop.
Raymond Anderson	Swinner, N.D.	R.S.R. Elec. Coop
Francis Schuth	Havana N. Dak	R.S.R. Elec. Coop
Marian Lyle	Gladstone, N.D.	West Plains User
Richard Lyle	Gladstone N.D.	Dunn Co. F.V.
Art Sickler	Gladstone N. Dak	West Plains User

NORTH DAKOTA STATE WATER COMMISSION
REGISTER

ATTENDANCE AT _____

DATE _____ PLACE _____

PROJECT NO. _____

Your Name	Your Address	Who do you Represent? (Or Occupation)
Homer Engelhorn	Carrington	GTCD
Jim Petrite	Bismarck	USBR
Larry Richards	Dapa	Shy. Valley Elect. Coop
Allan Peterson	ANETA	Sheyenne Valley Elec. Coop.
Ernest Brothe	Finley	Sheyenne Valley Electric
Jim Letterling	Box 727 Mandan	NDAREC
Leslie G. Ulmer	Box 727, Mandan	NDAREC
Raymond Iverson	Laramie	MODA II Electric Coop
Henry Fallock	Bepton, ND	Minnesota Power
Kenneth S. Sig	Grand Forks, N. D.	Minnesota Power
Lloyd V. Hillier	Grand Forks, N. D.	Minnesota Power
Ted Nare	Box 507, Dickinson, ND	Delta Resource Council
Jim Eastgate	Bismarck	Beauregard Co. WMD
LAURENCE McMEATH	MINOT	NDWUA
Tom Fuglie	Bismarck	N.D. Dept. of Ag.

**NORTH DAKOTA STATE WATER COMMISSION
REGISTER**

ATTENDANCE AT _____

DATE _____ PLACE _____

PROJECT NO. _____

Your Name	Your Address	Who do you Represent? (Or Occupation)
Allen W. Johnson	Tolna N.D.	Sheyenne Valley Electric
Arthur Bettee	Farmford, N.D.	Sheyenne Valley Electric
Roy Rasmussen	McHenry, N.D.	Sheyenne Valley ELEC
Herb Simons	Mandan, ND	AMOCO Oil Co
Walter Kiest	Hoodrich ND	Capital Electric Bldg
Ingvald Eide	Arena, N.D.	Capital Electric Bldg
Lloyd Perkins	Merabey, N.D.	Capital Electric Bldg
O. J. Somers	Bismarck, N.D.	Capital Electric Corp
Glenda Lotow	P.O. Box 1073 Bismarck, N.D.	Natural Gas Pipeline Co.
CHUCK RUPE	BISMARCK	NGPL
Emil Wiege	DICKINSON	West Plains Elec. Cooperative
RAY JILEK	DICKINSON	" " "
Fred M. Ohmann	Taylor	" " "
Loew Stodig	Bismarck	United Power Association
Fletcher H. Poling	Bismarck	Basin Electric Power Co.

**NORTH DAKOTA STATE WATER COMMISSION
REGISTER**

ATTENDANCE AT _____

DATE _____ PLACE _____

PROJECT NO. _____

Your Name	Your Address	Who do you Represent? (Or Occupation)
<i>James H. Masden</i>	<i>P.O. Box 2064 Fargo</i>	<i>N.D. Farm Bureau</i>
<i>Bud Lanning</i>	<i>Box 1601 Bismarck</i>	<i>N. D. Assn. of SCD's</i>
<i>L. Kitter</i>	<i>BISMARCK</i>	<i>MINNOKOTA POWER CO. ST</i>

Taylor, N. D. 58656
13 Sept. 1978

State Water Commission
A. Z. Link, Chairman
State Capitol
Bismarck, N. D. 58501

APPENDIX "A"

Dear Mr. Chairman:

Please admit as testimony:
As supporters of a water
marketing fee, we favor Schedule
E of the Water Scheduling
Alternatives. We are REC
Consumers.

Thank you -

Sincerely yours -

Arlene Bernhardt
Mrs. Bernhardt

RULES AND REGULATIONS
OF THE NORTH DAKOTA STATE WATER COMMISSION

Proposed to be Adopted

Pursuant to Title 61 of the North Dakota Century Code

GOVERNING WATER USE FEES

GENERAL INFORMATION

Title 89: State Water Commission and State Engineer

Article 89-00: Water Use Fees

Action: Proposed Rules and Regulations. (First Draft dated 18 November 1975; Second Draft dated 17 December 1976; Third Draft dated 21 June 1978)

Summary: The State Water Commission and the State Engineer are considering regulations which would, if adopted, establish fees for certain large industrial uses of water.

Hearings: It is the policy of the State Water Commission to afford the public an opportunity to participate in the development of the proposed regulations. Accordingly, interested persons may submit written comments, suggestions, or objections regarding the proposed regulations to the State Water Commission. Public hearings will be held. Comments may be submitted to the State Engineer, State Water Commission, State Office Building, 900 East Boulevard, Bismarck, N.D. 58505.

Effective date of proposed regulations: The proposed regulations are still in the developmental state. Therefore, the State Water Commission has not yet determined whether the proposed regulations will be adopted or, if adopted, when they will be effective.

Supplemental information: The concepts contained in the proposed regulations have been provided by members of the State Water Commission. They do not constitute opinions or suggestions by the author. The proposed regulations have

been drafted by Assistant Attorney General Murray G. Sagsveen,
(701) 224-2750.

The \$2 and \$20 fee schedules utilized herein are only for the purpose of illustration; they do not represent final decision of the Commission and State Engineer.

Authority: These regulations are adopted pursuant to general regulation-making authority of the state water commission and the state engineer in North Dakota Century Code sections 61-02-11 and 61-03-13.

The authority for the state water commission and the state engineer to adopt regulations governing water use fees is contained in the following sections of the North Dakota Century Code:

61-02-01. WATER CONSERVATION, FLOOD CONTROL, AND ABATEMENT OF STREAM POLLUTION DECLARED A PUBLIC PURPOSE.--It is hereby declared that the general welfare and the protection of the lives, health, property, and the rights of all the people of this state require that the conservation and control of waters in this state, public or private, navigable or unnavigable, surface or subsurface, the control of floods, and the regulation and prevention of water pollution, involve and necessitate the exercise of the sovereign powers of this state and are affected with and concern a public purpose. It is declared further that any and all exercise of sovereign powers of this state in investigating, constructing, maintaining, regulating, supervising, and controlling any system of works involving such subject matter embraces and concerns a single object, and that the state water conservation commission in the exercise of its powers, and in the performance of all its official duties, shall be considered and construed to be performing a governmental function for the benefit, welfare,

and prosperity of all the people of this state.

* * *

61-02-14. POWERS AND DUTIES OF THE COMMISSION.--
The commission shall have full and complete power,
authority, and general jurisdiction:

1. To investigate, plan, regulate, undertake,
construct, establish, maintain, control,
operate, and supervise all works, dams, and
projects, public and private, which in its
judgment may be necessary or advisable.

* * *

- n. To provide water for the generation of
electric power and for mining and manufactur-
ing purposes;

* * *

2. To define, declare, and establish rules and
regulations:
 - a. For the sale of waters and water rights
to individuals, associations, corporations,
municipalities, and other political
subdivisions of the state, and for the
delivery of water to users;

* * *

5. To exercise all express and implied rights,
power and authority, that may be necessary,
and to do, perform, and carry out all of the
expressed purposes of this chapter and all of
the purposes reasonably implied incidentally
thereto or lawfully connected therewith;

* * *

61-02-29. COMMISSION TO HAVE FULL CONTROL OVER
UNAPPROPRIATED PUBLIC WATERS OF THE STATE.--The
commission shall have full control over all
unappropriated public waters of the state, whether
above or under the ground, to the extent necessary
to fulfill the purposes of this chapter.

61-04-06.2. TERMS OF PERMIT.--The state engineer....may
issue a permit subject to fees for water use,
terms, conditions, restrictions, limitations, and
termination dates he considers necessary to protect
the rights of others, and the public interest.

GENERAL PROVISIONS

89-00-01-01 INTENT

89-00-01-02 DEFINITIONS

89-00-01-01. INTENT. The intent of this chapter is to establish fees for the beneficial industrial use of water, and for the privilege of holding an option to place waters to beneficial use.

Further, these regulations establish a procedure for the State Engineer in the assessment of such fees.

Water for industrial use, as defined herein, is considered available only from the main stem Missouri River (including Lake Sakakawea) due to the quantities of water involved. The Missouri River, because of the construction and regulation pursuant to the 1944 Flood Control Act (ch. 665, 58 Stat. 887), is able to provide water even during years when its tributaries may be intermittent or dry.

The State consented to the construction of the Pick-Sloan Plan for the Missouri River since it promised a more stable supply of water for domestic, municipal, stock watering, irrigation and industrial uses -- all considered essential for the economic stability of North Dakota. Indeed, the Flood Control Act provides that:

The use for navigation, in connection with the operation and maintenance of such works herein authorized for construction, of waters arising in States lying wholly or partly west of the ninety-eighth meridian shall be only such use as does not conflict with any beneficial consumptive use, present or future, in States lying wholly or partly west of the ninety-eighth meridian, of such waters for domestic, municipal, stock water, irrigation, mining, or industrial purposes.

Economic stability continues to be a critical concern for the State Water Commission. The Commission has granted a number of water permits for energy conversion purposes. Such a use of water will stimulate concurrent uses of water for domestic, municipal, and other industrial uses in the region.

However, the Commission recognizes that energy conversion water uses may only be short-term, thereby leading to a boom and bust economy for the region. Anxious to prevent such economic instability, the Commission desires to realize revenue from the current energy conversion uses of water and apply the revenue to preparing for long-term domestic municipal, irrigation, industrial, and fish, wildlife and recreation beneficial uses of water in the region.

These regulations are adopted to accomplish that purpose.

The Commission realizes that the revenues received will accrue to the state treasury. However, it is the intent of the Commission to request a biennial appropriation of all funds received under these regulations to fund the development of water distribution facilities for the long term economic stability of North Dakota.

General Authority
NDCC 61-02-11
28-32-02

Law Implemented
61-02-01
61-02-14
61-02-29
61-04-06.2

89-00-01-02. DEFINITIONS. Unless the context otherwise requires, the following definitions apply to this article:

1. "Commission" means the state water commission (Governor, Commissioner of Agriculture, and five citizen members).
2. "State engineer" means the state engineer, appointed pursuant to North Dakota Century Code Section 61-03-01, who is also the chief engineer and secretary of the commission.
3. "Application" means an application for a conditional water permit.
4. "Applicant" means a person submitting an application for a conditional water permit.
5. "Industrial use" means the use of 5,000 acre-feet or more of water annually for electrical generation or synthetic natural gas production and other uses incidental thereto including irrigation for reclamation for associated mining operations.

General Authority
NDCC 61-02-11
28-32-02

Law Implemented
61-02-01
61-02-14
61-02-29
61-04-06.2

RATE AND ASSESSMENT

Section

- 89-00-02-01 Rate for Conditional Water Permit
- 89-00-02-02 Assessment and Payment on Conditional Water Permit
- 89-00-02-03 Rate for Perfected Water Right
- 89-00-02-04 Assessment and Payment on Perfected Water Right
- 89-00-02-05 Concerning Water Permit Interest for Delinquent Payments

89-00-02-01. RATE FOR CONDITIONAL WATER PERMIT. Upon the granting of a conditional water permit by the State Engineer, the holder of a conditional water permit for industrial use shall remit to the State of North Dakota an annual fee of \$2.00 per acre-foot for the quantity of water stated in the permit.

General Authority
NDCC 61-02-11
28-32-02

Law Implemented
NDCC 61-02-01
61-02-14
61-02-29
61-04-06.2

89-00-02-02. ASSESSMENT AND PAYMENT ON CONDITIONAL WATER RIGHT.

1. On or before January 15 of each year, the State Engineer shall forward to every holder of a conditional water permit for industrial use an assessment according to the following formula:

$$\$2/\text{acre-foot} \times \text{acre-feet authorized in conditional permit} \times \% \text{ of assessable year} = \$ \text{ fee}$$

2. Examples: [For each example assume the regulations became effective July 1, 1977]
 - a. Permittee secured a conditional water permit for 15,000 acre-feet on October 10, 1977.
$$\frac{\$2/\text{acre-foot} \times 15,000 \text{ acre-feet} \times 0.2246575}{365 \text{ days}} \text{ (82 days: Oct. 11 - Dec. 31)} = \$6,739.73.$$
 - b. Permittee secured a conditional water permit for 15,000 acre-feet in 1976. $\$2/\text{acre-foot} \times 15,000 \text{ acre-feet} \times 0.5041095$
$$\frac{\text{(184 days: July 2 - Dec. 31)}}{365 \text{ days}} = \$15,123.29.$$
 - c. Permittee secured a conditional water permit in 1977 for 15,000 acre-feet. The 1978 water use fee, to be assessed on or before January 15, 1979, would be \$30,000.
 - d. Applicant voluntarily forfeits conditional water permit for 15,000 acre-feet on February 15, 1979. $\$2/\text{acre-foot} \times 15,000 \text{ acre-feet} \times 0.1986301$ (January 1 - February 5 is 36 days) = \$2,958.90

3. The assessed permit holder shall remit the proper amount to the Treasurer of the State of North Dakota on or before March 15 of the year in which the assessment is forwarded by the State Engineer.

General Authority
 NDCC 61-02-11
 28-32-02

Law Implemented
 NDCC 61-02-01
 61-02-14
 61-02-29
 61-04-06.2

89-00-02-03. RATE FOR PERFECTED WATER RIGHT. Upon the application of water to a beneficial use, whether or not a perfected water permit has been granted, the holder of a water permit for industrial use shall remit to the State of North Dakota an annual fee of \$20 per acre-foot for the quantity of water actually put to consumptive beneficial use and \$.20 per acre-foot for the quantity of water actually used for flow through cooling or other similar nonconsumptive purposes.

General Authority
 NDCC 61-02-11
 28-32-02

Law Implemented
 NDCC 61-02-01
 61-02-14
 61-02-29
 61-04-06.2

89-00-02-04. ASSESSMENT AND PAYMENT ON PERFECTED WATER RIGHT.

1. On or before January 15 of each year, the State Engineer shall forward to every permittee utilizing water for industrial use an assessment according to the following formula:

\$.20 or \$20/acre-foot x acre-feet actually applied to beneficial use = \$ fee

2. The assessed permit holder shall remit the proper amount to the Treasurer of the State of North Dakota on or before March 15 of the year in which the assessment is forwarded by the State Engineer.

General Authority
 NDCC 61-02-11
 28-32-02

Law Implemented
 NDCC 61-02-01
 61-02-14
 61-02-29
 61-04-06.2

89-00-02-05. INTEREST FOR DELINQUENT PAYMENTS.

1. Industrial use permittees shall pay interest on

fees which become delinquent computed at the rate of 1 percent per month for the amount of the delinquent fees. A payment shall be considered delinquent if not paid on or before March 15. The interest shall accrue from March 16, and it shall include the date of payment.

2. If a delinquency should continue past May 1, the State Engineer may proceed to terminate an otherwise valid water permit pursuant to Section 61-04-23 through 61-04-25 and any contractual provisions accompanying a permit.

General Authority
NDCC 61-02-11
28-32-02

Law Implemented
NDCC 61-02-01
61-02-14
61-02-29
61-04-06.2

WATER MEASUREMENT

89-00-03-01

Metering Device Required

89-00-03-01. METERING DEVICE REQUIRED. Water use subject to fees herein shall be measured by a metering device satisfactory to the State Engineer. It shall be installed, operated, and maintained by permittee as required by the State Engineer at no expense to the State. It shall be accessible for inspection at all reasonable times by proper representatives of the State Engineer.

General Authority
NDCC 61-01-11
28-32-02

Law Implemented
NDCC 61-02-01
61-02-14
61-02-29
61-04-06.2

DAKOTA RESOURCE COUNCIL

P.O. BOX 254
DICKINSON, NORTH DAKOTA 58601
(701) 227-1851

September 14, 1978

Statement of Ted Nace, Dakota Resource Council Board of Directors to the North Dakota State Water Commission Regarding Water Use Fees

Governor Link, members of the North Dakota State Water Commission, thank you for this opportunity to comment regarding water use fees. I am offering the following comments on behalf of the Dakota Resource Council.

The Dakota Resource Council is an agriculturally-oriented citizens' organization concerned with the conflicts between agriculture and industry. DRC is incorporated with the state of North Dakota and has a membership of over 200 residents of this state.

DRC applauds the Commission for having the foresight to address this progressive idea of marketing fees in the framework of managing our valuable water resources. Our water, like our land, is a property for which specific dollar amounts are difficult to establish because of the great number of benefits which they provide for us which cannot be measured in dollars and cents.

There are, however, certain economic measures which can be used in order to determine part of the value of North Dakota's water supply, particularly that which is included in the Garrison and Oahe reservoirs.

In March of this year, the Department of Agricultural Economics at North Dakota State University published a report which quantifies some of the economic impacts which North Dakota has endured in order to provide a holding basin which sacrifices our food-producing land in order to serve others more than ourselves.

The report estimated that North Dakota suffers annual agricultural losses of \$93 million based on the estimated revenue foregone by

inundation of both dry and irrigated cropland and pasture.

Annual losses due to bank erosion were estimated at \$319,000. 2000 acres of bottomland have been eroded away by the river since closure of Garrison Dam, and the Corps of Engineers estimates that the loss of land due to further erosion amounts to about 75 acres per year. The study adds that "from the individual landowner's viewpoint, bank erosion is a real threat since he may suffer major losses of valuable bottomland which may have been developed for irrigation."

Roughly one-half of the land inundated by Garrison and Oahe was owned by the government or were Tribal lands. The other half, totalling about 250,000 acres, was privately owned. The loss of this land also caused the ten counties directly affected to lose part of their tax base, causing either a reduction in tax revenues or an increase on the tax rates on the remaining taxable property. The report indicates that McLean county lost 6.5% of their tax base. Mountrail county lost 4.8%, Mercer - 3.8%, Williams - 3.1%, McKenzie - 3.0%, Dunn - 0.6%, Emmons - 2.7%, Burleigh - 0.7%, Morton - 0.6%, and Sioux - 0.5%.

North Dakota suffers economic losses from the inundation of other resources as well. A total of over 100,000 acres of woodland was lost. The report estimates that about 20% of this would have been harvested. The loss of this resource, however, caused the loss to the owners of \$2.5 million in stumpage sales and a loss in the value of the lumber at a sawmill of \$15 million.

These economic estimates, though, cannot take into account the dollar value of the other 80,000 acres of woodland which could have served as shelterbelts, protection for cattle during harsh winter weather, or as habitat for a variety of wildlife.

An estimated 5,580 million tons of lignite were inundated by Garrison. In addition, there were 29 potential 80-acre petroleum locations

inundated which were not drilled. If all of these had proved productive, the report estimates they would have yielded 5 million barrels of oil. The possibility and extent of the development of either of these resources is not known, but whatever value they may have provided to North Dakota's economy is lost.

The sacrifice of over 500,000 acres of land has led to other losses which can't be quantified in terms of economics. North Dakotans also suffered tremendous social and cultural impacts to which dollar amounts do not apply.

North Dakota's compensation for these losses, by comparison, have been next to nothing.

Condemnation payments to landowners were minimal, and the report adds that "much of these proceeds were probably invested out of state."

Of all the power which Garrison Dam produces, one-half to two-thirds of this relatively inexpensive electrical power is exported to other states to help them subsidize their electrical bills.

The report also states that "flood control benefits of Garrison Dam are primarily realized by residents of downstream states."

The authors of the report close by expressing their view that North Dakota has "paid dearly for flood control, power, and water resource benefits that accrue to downstream states." They conclude that a "provincial" perspective should be considered "as policies regarding the allocation of impounded Missouri River waters are formulated. Specifically, the concept of compensation for economic losses imposed on a region or state should weigh heavily in the allocation of a resource such as water."

The Dakota Resource Council believes that it's time for North Dakotans to receive some form of compensation for the losses we have endured for the benefit of others. In that regard, DRC urges the

Commission adopt the strongest possible progressive water use fee schedule which will serve to promote conservation of this valuable resource and help to recover at least part of our losses.

It is our understanding that the strongest schedule which the Commission is reviewing at this time could provide revenues of up to \$37 million, providing compensation for only about a third of our economic losses sustained by the state each year. If, in the Commission's judgement, additional sources of revenue do not adequately provide North Dakota with economic compensation for our losses, DRC would support an even stronger proposal.

DRC realizes that a strong fee schedule will probably cause some increase to electricity rates in North Dakota. It is important to note, however, that this increase will be shared in the state by industrial users, and will provide revenue nine times over from users in other states who will be receiving 90% of the electricity produced by coal-fired plants in North Dakota in the next few years.

APPENDIX "D"

RULES AND REGULATIONS

OF THE NORTH DAKOTA STATE ENGINEER

GOVERNING APPLICATIONS FOR CONDITIONAL WATER PERMITS

FOR IRRIGATION PURPOSES

Section

- 89-03-03-01 INTENT
- 89-03-03-02 DEFINITIONS
- 89-03-03-03 REJECTION OF UNACCEPTABLE APPLICATIONS
- 89-03-03-04 LEGAL AGE
- 89-03-03-05 RESIDENCY
- 89-03-03-06 LIMITATIONS ON PENDING APPLICATIONS AND UNDEVELOPED PERMITS
- 89-03-03-07 APPLICATION PROCEDURE IF APPLICANT HAS PENDING APPLICATIONS OR HOLDS PERMITS TO IRRIGATE MORE THAN 200 ACRES OF IRRIGABLE LAND
- 89-03-03-08 SOIL AND WATER COMPATABILITY

89-03-03-01. INTENT. The limitations and procedural requirements for certain water permit applications for irrigation purposes contained in this chapter are designed:

1. To provide opportunity for a maximum number of farmers on the land.
2. To widely distribute the benefits which accrue from utilizing waters of the state.
3. To promote the family owned and operated farm.
4. To maximize the benefits of water resources which North Dakota law declares to be a public resource to the greatest number of irrigators.

a. SECTION 210, North Dakota Constitution: All flowing streams and natural water courses shall forever remain the property of the state for mining, irrigating and manufacturing purposes.

b. 61-01-01, North Dakota Century Code: WATERS OF THE STATE--PUBLIC WATERS.--All waters within the limits of the state from the following sources of water supply, namely:

1. Waters on the surface of the earth excluding diffused surface waters but including surface waters whether flowing in well defined channels or flowing through lakes, ponds, or marshes which constitute integral parts of a stream system, or waters in lakes; and
2. Waters under the surface of the earth whether such waters flow in defined subterranean channels or are diffused percolating underground waters; and
3. All residual waters resulting from beneficial use, and all waters artificially drained; and
4. All waters, excluding privately owned waters, in areas determined by the state engineer to be noncontributing drainage areas. A noncontributing drainage area is hereby defined to be any area which does not contribute natural flowing surface water to a natural stream or watercourse at an average frequency oftener than once in three years over the latest thirty year period; belong to the public and are subject to appropriation for beneficial use and the right to the use of these waters for such use, shall be acquired pursuant to the provisions of chapter 61-04.

c. In Baeth v. Hoisveen, the North Dakota Supreme Court observed:

....we do not approve the procedure followed by the State Water Commission in the instant case, which resulted in granting to one of two landowners, who owned adjacent land and who made application at approximately the same time for beneficial use of water, the use of so much water that the other was in effect denied use of any water. The failure on the part of the State Water Commission to determine the actual amount of water available before granting the first neighbor's application resulted in a very disproportionate granting of water rights. Such a procedure, if followed in the future, might well justify legislative action directed toward preventing the recurrence of such inequitable results.

Water resources and particularly underground sources are extremely difficult to quantify and appropriate fairly.

Therefore, it is the intent of these proposed rules and regulations to establish guidelines for distribution of water rights in an equitable manner during a rapidly escalating development stage.

It is the goal of the North Dakota State Water Commission, that as irrigation development progresses sufficiently and water resources become more clearly defined as to the geographical boundaries, the source, stability and quantity of irrigation water that local irrigation districts can be formed for the purposes of governing the use of this public resource.

General Authority
NDCC 28-32-02
61-03-13

Law Implemented
61-04-03

89-03-03-02. DEFINITIONS. Unless the context otherwise requires, the following definitions apply to this chapter:

1. "State engineer" means the state engineer, appointed pursuant to North Dakota Century Code Section 61-03-01, who is also the chief engineer and secretary of the commission.
2. "Application" means an application for a conditional water permit for irrigation purposes.
3. "Applicant" means a person submitting an application for a conditional water permit for irrigation purposes.

4. "Irrigable land" means the area to which acreage limitations are applicable and is the net acreage possessing irrigated crop production potential, after excluding areas that are occupied by and currently used for homesites, farmstead buildings, and corollary permanent structures such as feed lots, equipment storage yards, and similar facilities, together with dedicated roads open for general unrestricted use by the public. Areas used for field roads, farm ditches and drains, temporary equipment storage, and other uses dependent on operational requirements necessary to produce a specific crop, and subject to change at will, are included in the net irrigable acreage.

General Authority
NDCC 61-03-13
28-32-02

Law Implemented
61-04-03

89-03-03-03. REJECTION OF UNACCEPTABLE APPLICATIONS. The state engineer shall not accept an application unless the applicant meets the criteria contained in this chapter. Therefore, an application will not be assigned a priority date pursuant to North Dakota Century Code Section 61-04-04 unless it is filed in compliance with this chapter.

General Authority
NDCC 28-32-02
61-03-13

Law Implemented
NDCC 61-04-03

89-03-03-04. LEGAL AGE. An applicant must be eighteen years of age.

General Authority
NDCC 28-32-02
61-03-13

Law Implemented
NDCC 61-04-03

89-03-03-05. RESIDENCY. An applicant must be a resident owner. A resident owner is a landowner who has a principal place of residence within the State of North Dakota or within twenty-five miles of the state's boundaries.

General Authority
NDCC 28-32-02
61-03-13

Law Implemented
61-04-03

89-03-03-06. LIMITATIONS ON PENDING APPLICATIONS AND UNDEVELOPED PERMITS TO IRRIGATE. A person who has applications

pending to irrigate more than 200 acres or who has both pending applications and undeveloped permits totalling more than 200 acres may not submit an application. No single application may request water to irrigate more than 320 acres.

General Authority
NDCC 28-32-02
61-03-13

Law Implemented
NDCC 61-04-03

89-03-03-07. APPLICATION PROCEDURE IF APPLICANT HAS PENDING APPLICATIONS OR HOLDS PERMITS TO IRRIGATE MORE THAN 200 ACRES OF IRRIGABLE LAND. IF an applicant holds permits to irrigate more than two hundred acres of irrigable land or who has both pending applications and permits totalling more than 200 acres, the following procedure must be followed prior to submission of an application:

1. Applicant shall send a notice of intent to apply by certified mail to the following:
 - a. The city auditor of each city located within a one mile (1.6 kilometer) radius of the proposed water appropriation site and the land to be irrigated.
 - b. Each record title owner of real estate within a one mile (1.6 kilometer) radius of the proposed water appropriation site and the land to be irrigated (excluding all landowners within the geographical boundary of a city). Within fifteen days of mailing of notice to landowners, record title ownership shall be established through records in the appropriate register of deeds office, or abstract office. Record title owners of land under a contract for deed shall include both the grantor and grantee of the contract for deed.
2. Notice of intent to apply shall be printed, once a week for two consecutive weeks, in a newspaper of general circulation in the area of the proposed appropriation site. The applicant must pay costs of publication.
3. After the notice of intent to apply has been mailed to those required by this section, the applicant shall complete an affidavit of mailing which shall accompany the application when it is filed with the state engineer. The affidavit of publication must also accompany the affidavit of mailing.

4. The application may not be filed with the state engineer until ninety days after notices have been mailed and the second notice published as specified in paragraphs one and two (above), thereby affording others the opportunity to file an application within the ninety day period.
5. For purposes of clarification, illustrated examples involving the one mile (1.6 kilometer) radius from the location of the proposed water appropriation site are attached in "Appendix A" as the final page of Article 89-03.
6. The affidavit of mailing shall conform substantially to the following format (a form affidavit shall be supplied to applicant upon request):

I hereby certify that I have sent, by certified mail, a notice of intent to apply for a conditional water permit for irrigation purposes to:

- a. The city auditor of each city located within a radius of one mile from the location of the proposed appropriation site and land to be irrigated; and
- b. each record title owner of real estate within a radius of one mile from the location of the proposed water appropriation site and land to be irrigated (excluding all landowners within the geographical boundary of a city).

The record title owners were determined by an actual search of the records in the appropriate register of deeds office or abstract office within fifteen days of the mailing of the notice to landowners. A notice was sent to both the grantor and grantee of land under a contract for deed.

The following list contains the names and addresses of all landowners and cities notified:

NAME

ADDRESS

Signature of Applicant

Subscribed and sworn to before me this ____ day of _____, 19__.

Notary Public

(seal)

7. The notice of intent to apply for a conditional water permit for irrigation purposes shall conform substantially to the following format (a form notice shall be supplied to applicant by the state engineer upon request):

NOTICE OF INTENT TO APPLY FOR A CONDITIONAL
WATER PERMIT FOR IRRIGATION PURPOSES

TAKE NOTICE THAT _____ (name and address of applicant)
intends to apply to the state engineer for a
conditional water permit for irrigation purposes.
The application will request a permit to appropriate
water from _____ (specify "groundwater" or name of
stream)

The application will request a permit to appropriate
water from a point or point on the lands described
as follows: _____ (specify legal description) with
an average approximate rate of withdrawal at _____
(specify gallons per minute) during the operating
season for each year with an annual appropriation
of _____ acre-feet.

The application will be filed with the State
Engineer ninety days after all landowners or
cities within a one mile radius of the appropriation
site and land to be irrigated specified above have
been notified by certified mail and published
notice. During that period, you may (if authorized
by state law or regulations of the State Engineer)
file an application for a conditional water permit
thereby establishing an earlier priority day.

Upon the filing of the application, you will be
notified of the time and date for a hearing upon
the application.

(signature of applicant)

General Authority
NDCC 28-32-02
61-03-13

Law Implemented
NDCC 61-04-03

89-03-03-08. SOIL AND WATER CAPABILITY. All applications
shall contain a statement of soil and water compatibility
for the land to be irrigated from any governmentally employed
or licensed soil scientists.

General Authority
NDCC 28-32-02
61-03-13

Law Implemented
NDCC 61-04-03

DEPARTMENT of the INTERIOR**news release**

FISH AND WILDLIFE SERVICE

For Release August 17, 1978

Durham 202/343-5634

ADDITIONAL CRITICAL HABITAT PROPOSED FOR WHOOPING CRANES

Eight areas in five States have been proposed as critical habitat for the endangered whooping crane, Keith M. Schreiner, Associate Director of the Interior Department's U.S. Fish and Wildlife Service, announced today.

The proposal, published in the August 17, 1978, Federal Register, would list as critical habitat for the whooping crane areas in Kansas, Montana, Nebraska, North Dakota, and South Dakota. These areas are separate from and in addition to nine areas designated as critical habitat for the whooping crane in the May 15, 1978, Federal Register.

"Critical habitat" means, briefly, that the loss of the area so designated would appreciably decrease the likelihood of the survival and recovery of an endangered or threatened species. Under Section 7 of the Endangered Species Act, Federal agencies are prohibited from authorizing, funding, or carrying out actions that would adversely affect the critical habitat of a listed species. Critical habitat designations affect only the actions of Federal agencies and do not automatically close an area to most human uses.

All of the areas proposed here were selected because they provide secure nightly roosting sites and food during the spring and fall migrations of the Wood Buffalo-Aransas whooping crane flock. This flock, which numbered 70 in April 1978, migrates annually between September and early

December to its wintering grounds on or near Aransas National Wildlife Refuge, Texas. In April and May the flock returns along the same narrow route to its nesting grounds in Wood Buffalo National Park in Canada's Northwest Territories. Along the way the cranes need open, undisturbed expanses for nightly roosting sites and generally use sand and gravel bars or very shallow water in rivers and lakes. They also need areas that provide a variety of food, such as insects, crayfish, frogs, and other small animals as well as some aquatic vegetation and cereal crops.

Included in the critical habitat proposed here are areas in northwest North Dakota that are extremely important because they are among the last areas where the cranes will rest and feed before flying to their nesting grounds. From the North Dakota-Saskatchewan border area the cranes usually fly without stopping to Wood Buffalo National Park and begin to lay eggs almost as soon as they arrive. If the cranes were to be deprived of their feeding grounds in North Dakota and were to arrive at the park during one of the common spring snow storms, they might die of malnutrition or reabsorb their egg material for nourishment, thereby reducing the likelihood of reproductive success.

An unusual feature of this critical habitat proposal is that it includes two dams, Garrison Dam in North Dakota and Oahe Dam in South Dakota. Critical habitat designations usually do not apply to existing man-made structures because most of these are not necessary to the survival of the species. The Garrison and Oahe Dams, however, have created reservoirs that deposit sediment in certain areas, forming sand bars that the cranes use for roosting. If the critical habitat proposal for the dams becomes final, it will not change the traditional operation of the dams because it is the dams that have created favorable habitat for the whooping cranes.

Interested persons should send comments on these proposals to the Director (OES), U.S. Fish and Wildlife Service, Department of the Interior, Washington, D.C. 20240, by October 16, 1978.

x x x

Revised Federal Order

THURSDAY, AUGUST 17, 1978
PART II



**DEPARTMENT OF
THE INTERIOR**
Fish and Wildlife
Service



WHOOPING CRANES
Proposed Critical Habitat

PROPOSED RULES

[4310-55]

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

[50 CFR Part 17]

ENDANGERED AND THREATENED WILDLIFE
AND PLANTSProposed Critical Habitat for the Whooping
CraneAGENCY: Fish and Wildlife Service,
Interior.

ACTION: Proposed rule.

SUMMARY: The Service proposes eight additional areas as critical habitat in Kansas, Montana, Nebraska, North Dakota, and South Dakota for the endangered whooping crane (*Grus americana*) to those areas already determined to be critical habitat as published in the FEDERAL REGISTER of May 15, 1978 (43 FR 20938). If finalized, this rule would provide Federal protection of these areas under section 7 of the Endangered Species Act of 1973 and will further assure the conservation of the whooping crane.

DATES: Comments from the public must be received by October 16, 1978. Comments from the Governors of five States must be received by November 15, 1978.

FOR FURTHER INFORMATION
CONTACT:

Mr. Keith M. Schreiner, Associate Director—Federal Assistance, Fish and Wildlife Service, U.S. Department of the Interior, Washington, D.C. 20240, 202-343-4646.

SUPPLEMENTARY INFORMATION:

Background

In the FEDERAL REGISTER of May 15, 1978 (43 FR 20938-20942), the Service determined critical habitat in nine areas in six States for the whooping crane. The eight areas proposed in the present rule are separate and in addition to those nine areas already determined. The Service was petitioned on November 22, 1976, by the Sierra Club and the National Audubon Society to add six of these areas to those previously proposed in December 1976.

The service has thoroughly reviewed this petition, and a supplement dated September 29, 1977, and agrees that sufficient data was presented to warrant this proposed rulemaking. Additional data which covers the fall migration records of 1977 for the whooping crane as well as older confirmed migration records which have only recently come to the Service's attention are also included in the data base for this proposal.

Whooping cranes in the natural (Aransas—Wood Buffalo) flock numbered 70 individuals (10 subadults

from 1977 and 60 adult-plumaged birds from previous years) on April 1, 1978. This flock annually migrates from September to early December to the wintering grounds on or near Aransas National Wildlife Refuge, Tex. During April and May the flock migrates along the same narrow route toward the only nesting area left in the wild: Wood Buffalo National Park, Northwest Territories, Canada. The areas herein proposed are important as roosting and feeding area during this magnificent bird's migration.

CRITICAL HABITAT

Section 7 of the act, entitled "Inter-agency Cooperation," states:

The Secretary shall review other programs administered by him and utilize such programs in furtherance of the purposes of this act. All other Federal departments and agencies shall, in consultation with and with the assistance of the Secretary, utilize their authorities in furtherance of the purposes of this act by carrying out programs for the conservation of endangered species and threatened species listed pursuant to section 4 of this act and by taking such action necessary to insure that actions authorized, funded, or carried out by them do not jeopardize the continued existence of such endangered species and threatened species or result in the destruction or modification of habitat of such species which is determined by the Secretary, after consultation as appropriate with the affected States, to be critical.

A definition of the term "critical habitat" was published jointly by the Fish and Wildlife Service and the National Marine Fisheries Service in the FEDERAL REGISTER of January 4, 1978 (43 FR 870-876) to be codified in 50 CFR Part 402 and is reprinted below:

Critical habitat means any air, land, or water area (exclusive of those existing man-made structures or settlements which are not necessary to the survival and recovery of a listed species) and constituent elements thereof, the loss of which would appreciably decrease the likelihood of the survival and recovery of a listed species or a distinct segment of its population. The constituent elements of critical habitat include, but are not limited to: Physical structures and topography, biota, climate, human activity, and the quality and chemical content of land, water, and air. Critical habitat may represent any portion of the present habitat of a listed species and may include additional areas of reasonable population expansion.

As specified in these same regulations for interagency cooperation, the Director will consider the physiological, behavioral, ecological, and evolutionary requirements for survival and recovery of listed species in determining what areas or parts of habitat are critical. These requirements include, but are not limited to:

(1) Space for individual and population growth and for normal behavior;

(2) Food, water, air, light, minerals, or other nutritional or physiological requirements;

(3) Cover or shelter;

(4) Sites for breeding, reproduction, or rearing of offspring; and generally,

(5) Habitats that are protected from disturbances or are representative of the geographical distribution of listed species.

Of the five factors, three directly pertain to the eight areas in this proposal. The three factors are summarized below:

(1) All areas proposed in this rule would provide food, water, and other nutritional or physiological needs of the whooping crane during spring or fall migration. Insects, crayfish, frogs, small fish, and other small animals as well as some aquatic vegetation and some cereal crops in adjacent croplands appear to be major items taken during the migration period.

(2) Generally, whooping cranes (as do most other cranes in the world) require an open expanse for nightly roosting. This habit of using sand and gravel bars or very shallow water in rivers and lakes for nightly roosting appears to be one of the major factors in whooping crane habitat selection. Cranes observed during migration are most often found within short flight distances (frequently 15 miles or less) of wetlands that offer open sand or gravel bars for nightly roosting. Such roosting areas can be found when some of the large reservoirs in the area are at or below normal pool level and large bars of sediments are exposed, particularly at the mouths of major contributing streams and rivers.

(3) Whooping cranes do not readily tolerate disturbances to themselves or their habitat. A human on foot can quickly put a crane to flight at distances over one-quarter of a mile. Loss of large expanses of wetlands and shooting were the major factors in causing the massive declines of whooping cranes in the late 1800's. The one common feature uniting the vast majority of confirmed sightings of this crane in migration is their proximity to wetlands that provide undisturbed roosting sites.

EFFECTS OF THE RULEMAKING

The eight areas delineated in this proposal or in the May 15, 1978, determination (43 FR 20938-20942) do not include the entire habitat of the whooping crane, and modifications of the critical habitat designations may be proposed as a result of further studies. In accordance with section 7 of the act, all Federal departments and agencies would be required to insure that actions authorized, funded, or carried out by them would not result in the destruction or modification of the critical habitat of the en-

dangered whooping crane. Also, in accordance with section 7 of the act, Federal agencies would have to consult with the Secretary of the Interior with respect to any action which may affect any of these critical habitats, if finalized. Consultation pursuant to section 7 would be carried out using the procedures contained in the "interagency cooperation regulations" which were published in the FEDERAL REGISTER on January 4, 1978 (FR 870-876) and will be codified under 50 CFR part 402.

PUBLIC COMMENTS SOLICITED

The Director intends that the rules finally adopted will be as accurate and effective as possible in the conservation of the endangered whooping crane. Therefore, any comments or suggestions from the public, other concerned governmental agencies, the scientific community, industry, private interests, or any other interests, or any other interested party concerning any aspect of these proposed rules are hereby solicited. Comments particularly are sought concerning:

(1) The location of and the reasons why any habitat of this species should or should not be determined to be critical habitat as provided for by section 7 of the act;

(2) Additional information concerning the range, distribution, or habitat or food preferences of this species.

Pursuant to section 4(b) of the act, the Director will notify the Governors of Kansas, Montana, Nebraska, North Dakota, and South Dakota with respect to this proposal and request their comments and recommendations before making final determination.

Final promulgation of the regulations on the critical habitat will take into consideration the comments and any additional information received by the Director, and such communications may lead him to adopt final regulations that differ from this proposal.

A draft environmental impact assessment has been prepared in conjunction with this proposal. It is on file in the Service's Office of Endangered Species, 1812 K Street NW., Washington, D.C., and may be examined during regular business hours or obtained by mail (U.S. Fish and Wildlife Service—OES, Washington, D.C. 20240). A determination will be made at the time of final rulemaking as to whether this is a major Federal action which would significantly affect the quality of human environment within the meaning of section 102(2)(c) of the National Environmental Policy Act of 1969.

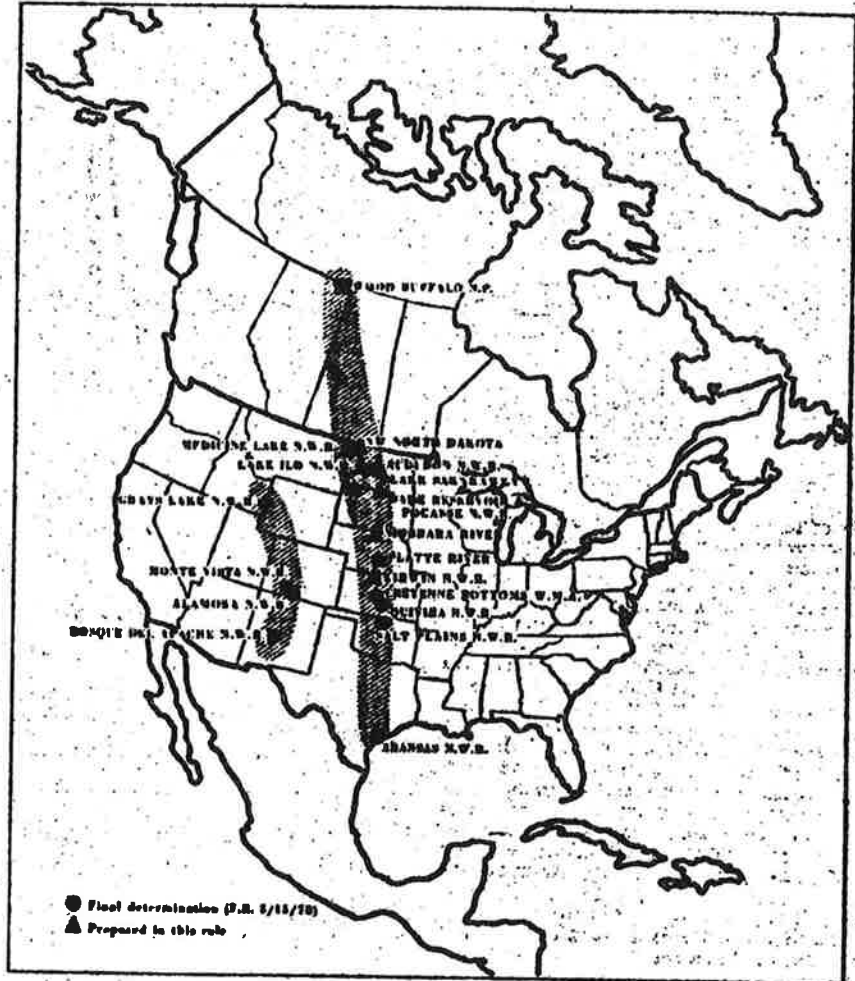
The primary author of this proposed rulemaking is Jay M. Sheppard, Office of Endangered Species, 202-343-7814.

REGULATIONS PROMULGATION

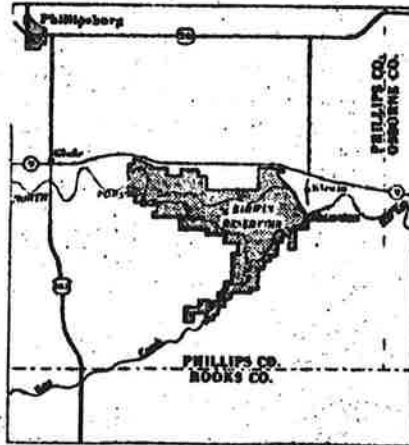
Accordingly, the Service proposes to amend § 17.95(b), part 17, subchapter B of chapter I, title 50 of the Code of Federal Regulations, by adding the below critical habitat of the whooping

crane to the critical habitat published on May 15, 1978 (43 FR 20938):

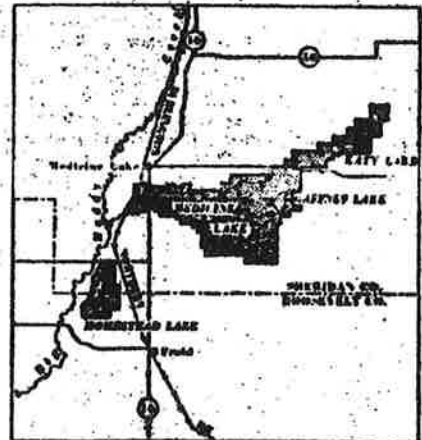
- (b) Birds
- WHOOPING CRANE
- (*Grus Americana*)



Kansas Phillips County. Kirwin National Wildlife Refuge.

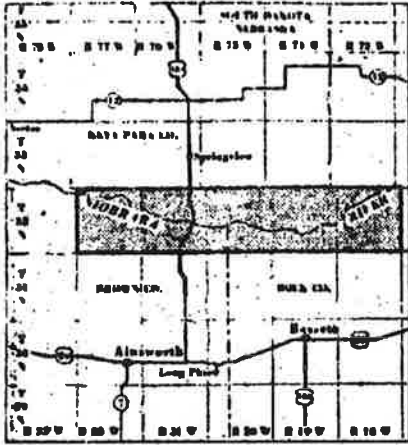


Montana Roosevelt and Sheridan Counties. Medicine Lake National Wildlife Refuge.



PROPOSED RULES

Nebraska, Brown, Keya Paha, and Rock Counties. T. 32 N., R. 18 W.; T. 32 N., R. 19 W.; T. 32 N., R. 20 W.; T. 32 N., R. 21 W.; and T. 32 N., R. 22 W.

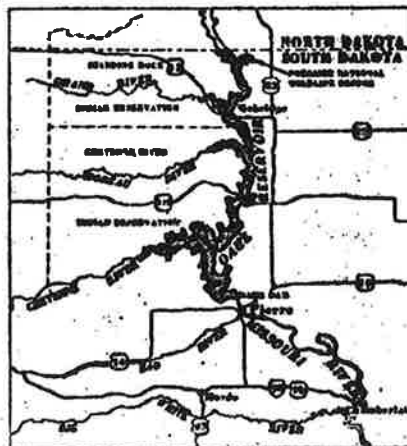
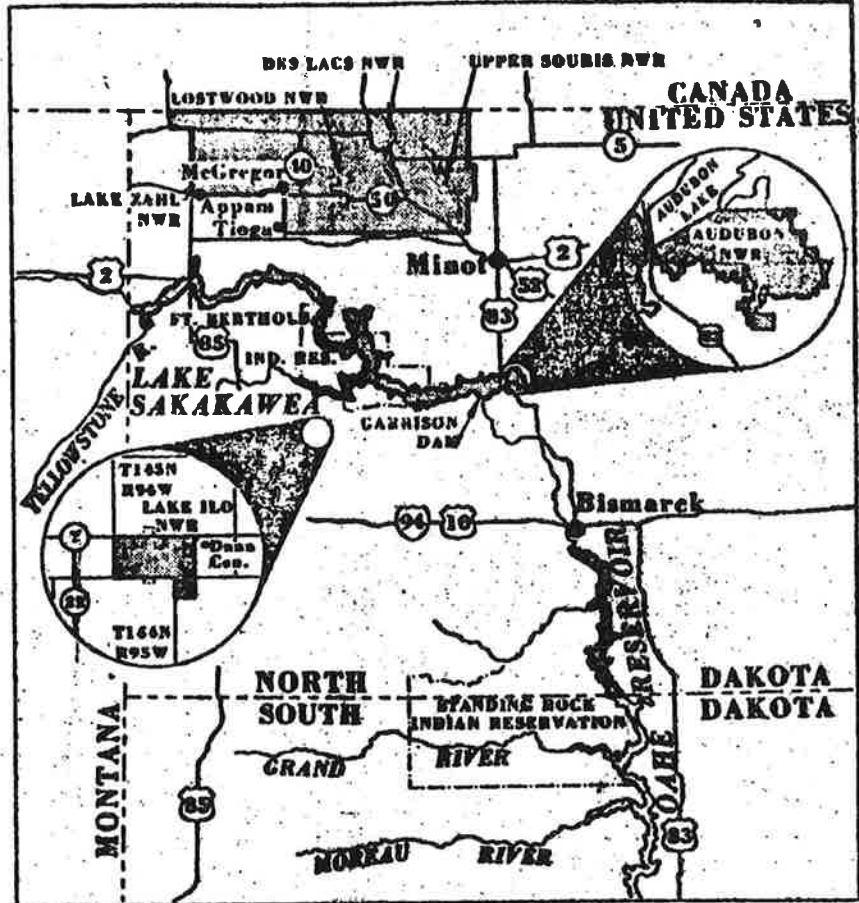


North Dakota. (1) Northwest North Dakota Zone. Burke, Divide, Mountrail, Renville, Ward, and Williams Counties. Starting on the international border at the northern terminus of U.S. 85 proceeding due east to the northeast corner of Renville County; thence southward along the Renville-Bottineau County line to the southwestern corner of Bottineau County; thence continued southward from the northeast corner of T. 158 N., R. 84 W. to the southeast corner of T. 157 N., R. 84 W.; thence westward along the 14th standard parallel to North Dakota Route 49 about 2 miles south of Toga; thence north along Route 40 to its intersection with North Dakota Route 50 about 2 miles south of McGregor; thence generally westward along Route 50 to its intersection with U.S. 85 near Appam; and thence generally northward along U.S. 85 to the starting point at the international border.

(2) Lake Sakakawea Zone. Dunn, McKendzie, McLean, Mountrail, Ward, and Williams Counties. All areas that would be inundated or surrounded by the maximum pool level of Lake Sakakawea by Garrison Dam, including all lands and waters of Audubon National Wildlife Refuge and Garrison Dam, a manmade structure.

(3) Lake Ro Zone. Dunn County. Secs. 27-34, T. 145 N., R. 94 W.; and sec. 8, T. 144 N., R. 94 W.

(4) Oahe Reservoir Zone. Burleigh, Emmons, Morton, and Sioux Counties. All areas in North Dakota that would be inundated or surrounded by the maximum pool level of Oahe Reservoir by Oahe Dam, South Dakota.



South Dakota. Campbell, Corson, Dewey, Haakon, Hughes, Potter, Stanley, Sully, Walworth, and Ziebach Counties. All areas in South Dakota that would be inundated or surrounded by the maximum pool level of Oahe Reservoir by Oahe Dam, including all adjacent lands and waters of Pecosse National Wildlife Refuge and Oahe Dam, a manmade structure.

NOTE.—The Service has determined that this document does not contain a major action requiring preparation of an economic impact statement under Executive Order 11949 and OMB Circular A-107.

Dated: July 17, 1978.

KURT M. SCHROEDER,
Acting Director,
Fish and Wildlife Service.

FWS Doc. 78-22787 Filed 8-18-78; 8:45 am.

NORTH DAKOTA STATE WATER COMMISSION

OFFICE MEMO

MEMO TO: Vern Fahy, State Engineer
David A. Sprynczynatyk, Director, Engineering Division
FROM: DuWayne A. Harthaller, Investigation Engineer
SUBJECT: Status of Current Investigation Projects.
SWC Project #1
DATE: August 24, 1978

The following is an updated list of on-going engineering investigations and a brief description of the status of each project.

Rocky Run Creek SWC #1633
Counties: Eddy, Foster & Wells
Date of Latest Agreement: October 1977
Deposit: \$500
Status: Engineering investigation has been completed. The three counties are in the process of forming a joint WMB. The counties are in favor of continuing with the project.

Goose River Snagging & Clearing SWC #1667
County: Traill
Date of Agreement: January 1977
Deposit: \$3,250
Status: Inventory and cost estimate has been completed. Agreement is being drafted for the construction phase.

Oak Creek Dam SWC #1324
County: Bottineau
Date of Agreement: October 1973
Deposit: \$1,000
Status: Various alternatives have been analyzed. All were determined to be not economically feasible. A response is being drafted to the Bottineau County WMB.

Baukol-Noonan Dam SWC #1696
County: Divide
Date of Agreement: July 1975
Deposit: \$1,500
Status: There are land acquisition problems with Baukol-Noonan. The Baukol-Noonan Board of Directors are to discuss the project at their August meeting and then inform the WMB of their decision. Baukol-Noonan wants to be able to mine the area at a later date.

Fremont Township Dam SWC #1539
County: Cavalier
Date of Agreement: August 1976
Deposit: \$1,500
Status: Preliminary engineering report has been completed. A meeting with the WMB is being planned for this fall.

East Branch Shell Creek SWC #1656
County: Mountrail
Date of Agreement: June 1976
Deposit: \$2,500
Status: Hydrölogy has not been completed. The limits of the project have to be defined. The investigation should be completed this year.

Steele County Drain #6 (Rygg Slough) SWC #1665
County: Steele
Date of Agreement: November 1976
Deposit: \$1,000
Status: Bid letting September 5, 1978.

Dead Coff Creek Dam SWC #1671
County: Ransom
Date of Agreement: April 1977
Deposit: \$3,000
Status: Additional subsurface investigation work will be done this fall. Some work has been completed on the preliminary design.

Nelson-Steele Drain #7A SWC #1622
Counties: Nelson & Steele
Date of Agreement: September 1977
Deposit: \$500
Status: The landowners are currently going through the voting process on establishing a legal drain. The preliminary design has been completed. A detailed alignment survey and a subsurface investigation will be made this fall if the drain is voted in.

Riverside Dam #1536
County: Grand Forks
Date of Agreement: September 1977
Deposit: \$1,500
Status: Design work has been completed. Construction has started. Some additional survey work will be done after the Coffey Dams are built.

Minto Dam SWC #448
County: Walsh
Date of Agreement: January 1978
Deposit: \$500
Status: The preliminary design of a new channel drain is in progress.

Mirror Lake SWC #448
County: Adams
Date of Agreement: February 1978
Deposit: \$1,500
Status: Site investigation work is in progress. Topographic survey has been completed. The sedimentation survey and the installation of observation wells will be done this fall.

Gastoyne Dam SWC #557

County: Bowman

Date of Agreement: June 1978

Deposit: \$500

Status: The hydrology has been started. The project consists of upgrading the embankment.

Sarnia Dam SWC #291

County: Nelson

Date of Agreement: June 1978

Deposit: \$500

Status: The preliminary design of the repairs is in progress.

Tongue River Snagging & Clearing SWC #1694

County: Pembina

Date of Agreement: July 1978

Deposit: \$250

Status: Inventory will be done following the completion of the work at Riverside Dam at Grand Forks.


Buffalo Lake SWC #565

County: Pierce

No Written Agreement

No Deposit

Status: Currently studying the possibility of raising the embankment.


DuWayne A. Marthaller
Investigations Engineer

DAM:dm

Dist.

VF

ME

DAS

DLA

DAM

* INDICATES P.N. JR
PERMIT STATUS

WATER PERMIT AGENDA FOR SEPTEMBER 14, 1978 MEETING

NO.	NAME AND ADDRESS	SOURCE	PURPOSE	AMOUNTS REQUESTED	COMMENTS & RECOMMENDATIONS
3115	Wagner, Chad - Englevale (Ransom County) Priority: 6-12-78 Hearing: 8-28-78	Ground Water * NO PRIOR PERMITS	Irrigation	480.0 acre-feet 320.0 acres	Defer action at this time pending lack of time to completely review application.
3116	Apple Creek Country Club - Bismarck (Burleigh County) Priority: 7- 6-78 Hearing: 8-28-78	Ground Water (Apple Creek Aquifer)	Municipal - (Rural Domestic)	175.0 acre-feet	100.0 acre-feet * #76A (Priority Date: 12-29-1910) Granted 25.0 acres for irrigation
3117	Rhame, City of - Rhame (Bowman County) Priority: 7- 6-78 Hearing: 9- 5-78	Ground Water (Fox Hills Aquifer)	Municipal	160.0 acre-feet	100.0 acre-feet * #1211P (Priority Date: 1-11-19) Granted 95.0 acre-feet
3119	Hansen, Allen - Ludden (Sargent County) Priority: 7-27-78 Hearing: 9- 5-78	Ground Water * #1931 (Priority Date: 5-8-73) Granted 152.0 acres #2057 (Priority Date: 1-17-74) Granted 160.0 acres #2184 (Priority Date: 11-4-74) Granted 135.0 acres #2248 (Priority Date: 11-4-74) Granted 135.0 acres #2428 (Priority Date: 1-21-76) Granted 135.0 acres #2436 (Priority Date: 4-15-76) Granted 135.0 acres	Irrigation	236.6 acre-feet 157.7 acres	Defer action at this time pending lack of time to completely review application.

NO.	NAME AND ADDRESS	SOURCE	PURPOSE	AMOUNTS REQUESTED	COMMENTS & RECOMMENDATIONS
3098	Kraft, Louis P. - St. Michael (Benson County) Priority: 5- 3-78 Hearing: 9- 5-78	Ground Water * NO PRIOR PERMITS	Irrigation	426.0 acre-feet 284.0 acres	Defer action at this time pending lack of time to completely review application.
3110	Golva, City of - Golva (Golden Valley Co.) Priority: 6-21-78 Hearing: 9- 5-78	Ground Water (Fox Hills Aquifer) * NO PRIOR PERMITS	Municipal	160.0 acre-feet	70.0 acre-feet
3114	Blohm, Maynard D. and/or Sandra R. - Beulah (Oliver County) Priority: 6-15-78 Hearing: 9- 5-78	Otter Creek, trib. to Knife River * NO PRIOR PERMITS	Irrigation- Waterspreading	52.4 acre-feet 52.4 acres	Defer action at this time pending lack of time to completely review application.
2949	Irrigation Development Farm - Walhalla (McHenry County) Priority: 7-19-78 Hearing: 9- 5-78	Ground Water * #2384 (Priority Date: 3-4-76)	Irrigation	320.0 acre-feet 160.0 acres	Defer action at this time pending lack of time to completely review application.

Granted 158.0 acres to
Robert Dunnigan

NO.	NAME AND ADDRESS	SOURCE	PURPOSE	AMOUNTS REQUESTED	COMMENTS & RECOMMENDATIONS
2384	Dunnigan, Robert - Walhalla (McHenry County) Priority: 3- 4-76 Hearing on Amendment: 9- 5-78	Ground Water * NO PRIOR PERMITS	Irrigation	This is a request for a change in point of diversion.	Defer action at this time pending lack of time to completely review request.
2831	Gutzmer, Gary and Lavern - Mantador (Richland County) Priority: 4-19-77 Hearing: 6-27-77 Deferred: 7- 8-77	Ground Water (Unnamed Aquifer) * NO PRIOR PERMITS	Irrigation	600.0 acre-feet 320.0 acres	Recommend for approval: 120.0 acre-feet 80.0 acres (The remainder of the request shall be held in abeyance.)
3010	Johnsrud, Mark D. - Watford City (McKenzie County) Priority: 12-13-77 Hearing: 2-27-78 Deferred: 3-16-78	Ground Water (Undifferentiated Aquifer) * NO PRIOR PERMITS	Irrigation	320.0 acre-feet 160.0 acres	275.0 acre-feet 150.0 acres
2455	Schillo, Jim and Martin - Golva (Golden Valley Co.) Priority: 9-14-76 Hearing: 10-11-76 Deferred: 12- 7-76	Unnamed Draw, trib. to Bullion Creek and Little Missouri River * NO PRIOR PERMITS	Irrigation	116.0 acre-feet 116.0 acres	80.0 acre-feet 116.0 acres

NORTH DAKOTA STATE WATER COMMISSION

OFFICE MEMO

MEMO TO: State Water Commission
FROM: Michael Dwyer, Assistant Attorney
SUBJECT: Cassidy-Long Lakes
DATE: September 12, 1978

This memo is to provide the State Water Commission members with recent and historical information regarding the controversy surrounding the Cassidy Lake - Long Lake area of Bottineau County. The present controversy concerns the quantity of water which flows from Cassidy Lake north into Long Lake. Long Lake landowners and cabin owners do not want Cassidy Lake waters flowing upon them, claiming that such waters raise the level of Long Lake, causing damage.

Cassidy Lake owners, on the other hand, feel that the level of Cassidy Lake is too high, to the point where they are unable to use their riparian lands. Thus, these landowners want a lower elevation established for Cassidy Lake.

In addition to local landowners, the State Game and Fish Department has expressed interest in establishing Cassidy Lake as a fishery, thus they are seeking to have the elevation of Cassidy Lake fixed at a higher level.

The elevation of Cassidy Lake when it was meandered by the government surveyors in the early 1900's was approximately 2180.0 msl. A township road which runs between Cassidy and Long Lakes, and which is the focus of the present controversy, includes a culvert which was established at 2181.5 msl. Thus, at the present time, water in Cassidy Lake must rise to 2181.5 msl before it will flow out of Cassidy Lake into Long Lake. ~~The attached map illustrates the geographic location of Cassidy~~

~~XXXXXXXXXXXX~~ After several meetings and a public hearing, it was determined that the elevation of Cassidy Lake would be permanently fixed at 2182.9 msl. This elevation was thought to be mutually acceptable to all interests. However, after an agreement to permanently establish the elevation of Cassidy Lake at 2182.9 msl was proposed, tensions surfaced which resulted in considerable dispute and controversy.

Who is right?

As you can see, except for the interests of the Game & Fish Department this is essentially a local dispute, to be resolved between the Long Lake and Cassidy Lake landowners with the aid of the Bottineau County Water Management District. To more fully understand the present controversy, a review of the historical background would be helpful.

Historical Background. At one time, at the request of the Game and Fish Department, a plan was developed which would drain Cassidy Lake to elevation 2169.5 msl for the purpose of restoring and rehabilitating Long Lake. In March of 1963, the Game and Fish Department formally requested the State Water Commission to conduct a preliminary survey of the Long Lake watershed to see what could be done to improve the recreation enhancement of Long Lake. The result of that survey was the following report:

Enhancement of Long Lake as a recreation area consists of raising and maintaining a water elevation best suited for fish propagation, cabin development and water recreation. Proposed plan to raise and maintain Long Lake consists of an open channel or burying a pipe with control between Long Lake and Cassidy Lake and a open channel between Cassidy Lake and Sultten Lake. This proposed works would raise Long Lake to elevation 2169.0. Elevation at time of survey was 2166.47. Plan would drain Sultten Lake and lower Cassidy Lake 10½ feet. It appears that an elevation of approximately 2169.5 would be desirable from this proposed plan. Additional drainage may be acquired from Hemming Lake with comparable little structure works. This additional water in storage could assure a more constant water elevation and possible higher water crest elevation if desired.

The physical aspects of accomplishing the desired improvements would include the construction of an open channel of approximately 16,000 cubic yards between Long and Cassidy Lake and a much smaller channel to drain Sultren into Cassidy Lake. Included with these works should be a low head control dam on the outlet of Long Lake. The present natural outlet is at an elevation of approximately 2168.5. Additional drainage into Long Lake can be accomplished by taking up to 10 feet from the upper layer of water by construction of an open channel and control works. Excavation on an open channel would consist of approximately 20,000 cubic yards.

Even before 1963, there were concerns about the amount of water in Long Lake. In 1955, the complaint was that someone had artificially drained Long Lake. A report by a State Water Commission staff engineer provided:

On June 23, and 24 I investigated Long Lake in Bottineau County, in response to a request from the State Game and Fish Department. A report had been forwarded to the Game and Fish Department from the District Game Warden, Mr. Decker, to the effect that some local ditching was taking place which constituted a threat to the status of the lake.

I found that there is now an open ditch between Long Lake and Halleck Lake. The ditch is approximately 100 feet wide and water stands three or four feet deep in the ditch. It was impossible to determine by inspection if this ditch was opened by artificial means or by action of runoff water. One nearby farmer stated that there is normally an opening between the two lakes.

For one reason or another, the proposal contained in the 1963 preliminary survey report was never followed through. The records indicate a letter from the State Water Commission to the Game and Fish Department which requested the following:

The Commission is reviewing all projects in an effort to bring all projects up to a current status. Our records indicate that the last correspondence on this project took place last winter when a meeting was requested to review the preliminary plans and cost estimate. Somehow this meeting was not held.

Please advise us if your department is still interested in this project so that we can plan our work for the coming field season. We will be happy to meet with personnel from your department at your convenience so that the final status of this project can be determined. I would suggest a meeting in the near future on this matter.

Apparently, after receiving no answer to this request, the proposed project to enhance recreation of Long Lake was shelved. Also, it appears that there were no further discussion of problems regarding Long and Cassidy Lakes until 1976.

During the fall of 1976, the Homen Township Board of Supervisors began to install a culvert in the road which runs between Cassidy and Long Lakes. At that time no culvert existed, and the road served as an impoundment and held excess waters in Cassidy Lake. However, after much local consternation over the proposal to install a culvert in the township road, a meeting was held on December 6, 1976, between all interested parties. A report from Stephen Hoetzer provided:

Rich Voss and I met with representatives of the WMB, County Commission, Township Board and local landowners on the site to discuss the drainage of Cassidy Lake into Long Lake. It was agreed that no construction would be done this winter. Next spring culverts will be installed at the natural outlet elevation but not below elevation 2180 msl (meandered elevation). I stated that if possible we would have our survey crew set the 2180 elevation. I would also like to get some additional survey information to determine the natural outlet. It should take approximately one day survey time if there is a bench mark within a reasonable distance.

From our inspection it appears that the roadway is holding back 14 to 18 inches. This is based on the fact that many large trees were under water this spring and some traces of the old outlet are much lower than the road grade. One of the Township Board members states that at one time there was an old wooden culvert under this road.

The following spring, in 1977, a letter was sent to the Chairman of the Bottineau County Water Management District which stated:

We have completed our survey work of the area between Cassidy Lake and Long Lake, as per our agreement last fall. The water surface elevation of Cassidy Lake is 2182.78 and the water surface elevation of Long Lake is 2167.5 as of April 26, 1977.

As I explained last fall, our estimated meandered elevation of Cassidy Lake is 2180 msl. However, our recent survey information shows that the natural outlet to Cassidy Lake would appear to be at

elevation 2181 msl. Based on this information, we would recommend that the culvert be placed in the roadway between Long Lake and Cassidy Lake at elevation 2181.0. This would allow Cassidy Lake to be lowered by 1.78 feet.

I am sending a copy of this letter to the North Dakota Game and Fish Department and asking for their comments. I would like your Board to contact the landowners and cabin owners around Cassidy and Long Lakes to see if they have any comments to make on the proposed installation of the culverts at elevation 2181. This could be done at a local public meeting. If the State Engineer has no adverse reactions to this elevation by June 17, he will authorize the Board to install the culvert at elevation 2181.

The response from the Bottineau County Water Management District stated:

Reference is made to your letter of May 6, 1977 wherein you discuss the Cassidy-Long Lake culvert at a proposed level of 2181 msl.

Our board authorized the Homen Township Board to install the culvert in question provided they did not receive too much adverse criticism at a meeting with affected landowners. This action was taken by our board on June 24, 1977.

We are advised the township held such a meeting and did not receive any appreciable criticism and did install the culvert in question.

At our Board meeting of November 14, 1977, Mr. Paul Kretschmar reported that he inspected the culvert installation at Cassidy-Long Lake and further reported that the culvert was placed at a level approximately 3 inches above that recommended by the State Water Commission. Accordingly our board approved the installation subject to the approval of Water Commission engineer Hoetzer during an inspection and meeting trip to Bottineau on November 17, 1977.

Subsequent to the installation of the culvert by the township board, the State Water Commission received several telephone calls and letters from local citizens in the area expressing concerns about the culvert which had been installed and the elevation at which it had been installed. As a result, a public hearing was proposed to provide all interested citizens and organizations an opportunity to express those

concerns with hopes that a long-term solution to the Long Lake - Cassidy Lake controversy might be reached which would be acceptable to upstream and downstream landowners.

A news release to give notice of the public hearing was sent to the Pierce County Tribune, Turtle Mountain Star, the Westhope Standard, the Bottineau Courant, the Associated Press News Service, and the Minot Daily News. Several meetings were held after the public hearing and it was finally agreed that the elevation of the culvert would be raised to 2182.9 by placing a weir in the bottom of the culvert. An agreement was proposed to implement this decision, which brings us to the present controversy.

Since the dispute over the elevation is essentially a local concern, and has little to do with preserving or rehabilitating either Long or Cassidy Lakes, the Bottineau County Water Management District was informed that it would be their responsibility to determine the permanent fixed elevation of Cassidy Lake. After holding another public hearing, they will be making a final determination which will be the permanent elevation. As of this date, we have not received word from the Bottineau County Water Management District.


Michael Dwyer
Assistant Attorney

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