MINUTES

North Dakota State Water Commission
Beulah, North Dakota

June 17 and 18, 1982

The North Dakota State Water Commission held a meeting at the Civic Center in Beulah, North Dakota, on June 17 and 18, 1982. Governor-Chairman, Allen I. Olson, called the meeting to order on June 17, 1982, at 10:00 a.m., Mountain Daylight Time, and requested Secretary, Vernon Fahy, to present the agenda.

MEMBERS PRESENT:
Allen I. Olson, Governor-Chairman
Alvin Kramer, Member from Minot
Florenz Bjornson, Member from West Fargo
Ray Hutton, Member from Oslo, Minnesota
Garvin Jacobson, Member from Alexander
Guy Larson, Member from Bismarck
Henry Schank, Member from Dickinson
Bernie Vculek, Member from Crete
Vernon Fahy, State Engineer and Secretary, North Dakota State Water Commission, Bismarck

MEMBER ABSENT:
Kent Jones, Commissioner, Department of Agriculture, Bismarck

OTHERS PRESENT:
State Water Commission Staff Members
Approximately 50 persons interested in agenda items

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

The proceedings of the meeting, except for the public hearings for Basin Electric Power Cooperative and The Nokota Company, were recorded to assist in compilation of the minutes.

BASIN ELECTRIC POWER COOPERATIVE APPLICATION FOR A WATER PERMIT (Water Permit No. 3370) - PUBLIC HEARING

A public hearing was held on the water permit application filed by Basin Electric Power Cooperative to appropriate 9,000.0 acre-feet of water from Lake Sakakawea for industrial purposes. The proceedings of the hearing were recorded by a Court Reporter.

It was moved by Commissioner Hutton, seconded by Commissioner Bjornson, and unanimously carried, that the hearing record remain open for 60 days after the date of hearing.

Thus, the record for the public hearing on the Basin Electric Power Cooperative water permit application will remain open until August 26, 1982.

CONSIDERATION OF MINUTES OF APRIL 6 AND 7, 1982 MEETING - APPROVED

The minutes of the April 6 and 7, 1982 meeting were approved by the following motion:

It was moved by Commissioner Bjornson, seconded by Commissioner Kramer, and unanimously carried, that the minutes of April 6 and 7, 1982, be approved as presented.

REGULATORY AUTHORITY - DRAINAGE (SWC Project No. 1053)

On December 28, 1978, Administrative Order No. 78-1 was issued by the State Engineer declaring all drainage in the Red River Watershed of areas comprising 80 acres or more to be of state-wide significance and mandated a public hearing.

Secretary Fahy stated that since the issuance of that Order, the water resource districts in the Red River Watershed and the Red River Joint Board have exhibited strong leadership in evaluating drainage applications and attempting to minimize adverse downstream impacts. They have also exhibited an awareness of the necessity to control drainage through a state-wide approach and an awareness of the importance of a cooperative and comprehensive approach to flood control.

Since the State Water Commission was involved when the Administrative Order was issued by the State Engineer, Secretary Fahy felt it important to brief the members on this matter. He said the purpose of the Order has been accomplished as it appears that the water resource districts in the Red River Watershed will continue to provide strong local leadership in drainage and flood control matters; therefore, the Order should be rescinded and the State Engineer's drainage regulations govern on a case-by-case analysis whether drainage applications in the Red River Watershed are of state-wide or interdistrict significance. The water resource districts are encouraged to continue the policy of holding public hearings on drainage applications that are not declared of state-wide or interdistrict significance. It remains important that the water resource districts continue to evaluate the downstream effects of drainage and that all drainage be analyzed from an entire watershed perspective rather than a specific project point of view.

It was the consensus of the Commission members that the State Engineer's action to rescind Administrative Order No. 78-1 be supported, and that six months following the rescission date, a report be made to the Commission relative to the affects of the rescission. Supporting information and the Administrative Order No. 82-1 rescinding Administrative Order No. 78-1 are hereby attached as APPENDIX "A".

Governor Olson and Commissioner Larson leave meeting; Commissioner Vculek assumes chair.

STATE ENGINEER AND STATE WATER COMMISSION COMMENTS RELATIVE TO WATER RESOURCES COUNCIL REPEAL OF PRINCIPLES & STANDARDS AND PROPOSED NEW PRINCIPLES & GUIDELINES (SWC Project No. 322)

Secretary Fahy stated that over the years the states have been governed in the development of federal projects by a very rigid document put out by the Water Resources Council known as Principles & Standards.

Under the new Administration, the title has been changed from Principles & Standards to Principles & Guidelines and an attempt is being made in a number of areas to repeal the Principles & Standards to provide more flexibility on how a project is considered. The states have been asked to comment on the Principles & Guidelines changes.

APPENDIX "B" reflects the State Engineer's official comments concerning the repeal of the Principles & Standards and the proposed new Principles & Guidelines which are intended to replace them.

The State Engineer's comments were read, and discussed, and it was the consensus of the Commission members to adopt these comments as the official position of the State Water Commission.

It was moved by Commissioner Jacobson, seconded by Commissioner Schank, and unanimously carried, that the State Water Commission adopt the official comments of the North Dakota State Engineer concerning the repeal of the Principles & Standards as the official position of the State Water Commission, and request the State Engineer to submit this position to the Water Resources Council.

NORTH DAKOTA STATE ENGINEER'S COMMENTS RELATIVE TO REVISION OF SECTION 404 OF THE CLEAN WATER ACT

Section 404 of the Clean Water Act authorizes the Secretary of Army, acting through the Chief of the U.S. Army Corps of Engineers, to issue permits for the discharge of dredged

or fill material into the waters of the United States, applying the guidelines developed by the Administrator of the Environmental Protection Agency in conjunction with the Secretary of Army.

Secretary Fahy indicated that under the new Administration, attempts are being made to revise Section 404, and he has been requested to comment on several areas of the proposed revisions. The State Engineer's comments relative to the Administrative Reforms to the Regulatory Program under Section 404 of the Clean Water Act have been submitted, and are attached hereto as APPENDIX "C". He noted that the area of revision most deserving of comment is clarification of the scope of the permit program, and stated "The Administration's position on jurisidictional scope of the program is most encouraging and we would hope that it will receive wide-based support. We suggest, however, that the only logical way to reduce conflicts, minimize impacts and recognize state concerns is to revise the legislation so that navigable waters are defined as navigable in fact as was the case prior to the federal litigation which produced the definition currently causing the majority of the problems associated with enforcement."

It was moved by Commissioner Kramer, seconded by Commissioner Schank, and unanimously carried, that the State Water Commission support the official comments of the State Engineer relative to the Administrative Reforms to the Regulatory Program under Section 404 of the Clean Water Act.

DISCUSSION OF AGENCY'S FINANCIAL STATEMENT

Matt Emerson, Assistant Secretary, presented and discussed with the Commission members the agency's financial statement.

It was moved by Commissioner Hutton, seconded by Commissioner Bjornson, and unanimously carried, that the financial statement be accepted as presented.

The meeting was recessed at 12:00 noon. The June 17 afternoon session was devoted to a very interesting tour of the Basin Electric and ANG facilities.

The meeting was reconvened at 9:00 a.m., Mountain Daylight Time, in the Civic Center at Beulah, North Dakota, on June 18, 1982.

THE NOKOTA COMPANY APPLICATION FOR A WATER PERMIT (SWC Water Permit No. 3508) - PUBLIC HEARING

A public hearing was held on the water permit application filed by The Nokota Company to appropriate 16,800.0 acre-feet of water from Lake Sakakawea for industrial purposes. The proceedings of the public hearing were recorded by a Court Reporter.

It was moved by Commissioner Hutton, seconded by Commissioner Bjornson, and unanimously carried, that the hearing record remain open for 60 days after the date of hearing.

Thus, the record for the public hearing on The Nokota Company water permit application will remain open until August 27, 1982.

STATUS REPORT ON RED RIVER DIKES LITIGATION (SWC Project No. 1638)

Michael Dwyer, Legal Counsel for the Water Commission, briefed the Commission members on the status of the Red River dike litigation. Mr. Dwyer noted that the action was filed against Minnesota landowners on June 4, 1982. He also stated that about a week prior to June 4, the State Engineer notified the North Dakota landowners, as required by the North Dakota Environmental Law Enforcement Act, that he intended to file a lawsuit against them to seek removal of their dikes. He noted there is a 30-day notice period before the lawsuits will actually be commenced.

UPDATE ON SOUTHWEST PIPELINE PROJECT (SWC Project No. 1736)

Mr. Bob Dorothy, Project Manager for the Southwest Pipeline Project, updated the Commission members on the progress of the study, noting that the soils reports and the environmental assessments have been completed by subcontractors. He said that the technical portion of the engineering studies, including the project design, design of the treatment plant, pipeline design, etc. are nearing completion. The engineering consultant is devoting most of his time to writing the draft report, which is to be completed by July 15, 1982.

Mr. Dorothy presented the following construction costs based on July, 1982 prices (does not include financing costs) for three plans based on three levels of water service: 1) Plan A - $134.4 million; 2) Plan B - $110.5 million; and 3) Plan C - $89.0 million.

The following estimated operation and maintenance costs for the project were given by Mr. Dorothy based on different water levels of service:

25% of ultimate use - $1.53 per thousand gallons
50% of ultimate use - $1.04 per thousand gallons
75% of ultimate use - $ .94 per thousand gallons
100% use - $ .86 per thousand gallons

Mr. Dorothy stated that the question of who should finance, construct, operate and maintain the pipeline project has been studied. There are four agencies which could be considered for these functions: 1) State Water Commission; 2) Industrial Commission; 3) a new water authority created for this project; and 4) water resource districts in the West River area. The Financial Consultant rated each of the four entities on 28 different points, and Mr. Dorothy indicated that the consultant's recommendation is that the State Water Commission is the most capable of performing these functions. Mr. Dorothy indicated that this matter will need to be considered by the Commission.

Mr. Dorothy stated that the draft report will be completed by July 15, 1982. He also stated that the Commission should make a decision on which entity they recommend to perform the functions of financing, constructing, operating and maintaining the pipeline.

Secretary Fahy stated that he is in favor of having a local unit of government operate the pipeline; however, he is of the opinion that the State Water Commission should make the recommendation after reviewing consultant recommendations and weighing the opinions of those who will ultimately benefit from the project.

Mr. Dwyer indicated that the Southwest Pipeline Advisory Committee, at their June 14, 1982 meeting, recommended that the State Water Commission be the entity responsible for these functions.

The proposed objectives for water service contracts which were distributed to the Commission members at their April meeting were reviewed by Mr. Dwyer. He indicated that the contract objectives attached as APPENDIX "D", contains several minor changes from the earlier draft. The Southwest Pipeline Advisory Committee adopted the proposed objectives at their June 14 meeting.

Commissioner Jacobson inquired about the status of the user's commitment. Mr. Dorothy responded that agreements of intent have been filed by approximately 30 cities whereby they have agreed to enter into a water purchase contract. He noted that the consultant and staff are now in the process of developing the water purchase contract, and hopefully, within the next couple of months negotiations on the contracts can begin with those cities who filed agreements of intent. Mr. Dorothy indicated the consultants and staff would like direction from the Commission members as to whether the water service contracts should be executed prior to the legislative session to assist in their decision-making process.

It was suggested by Mr. Dwyer, and it was the consensus of the Commission members, that the water service contracts be negotiated and executed prior to the 1983 session of the Legislature to assist in the decision-making process.

It was moved by Commissioner Jacobson,
seconded by Commissioner Kramer, and

unanimously carried, that water service contracts must be executed by potential water user entities prior to the 1983 Legislative Session to indicate local commitment for the project.

It was moved by Commissioner Schank, seconded by Commissioner Bjornson, and unanimously carried, that the proposed objectives for water service contracts be approved as presented.

Mr. Dwyer distributed, and discussed, the proposed principles for water service contracts for the project. He noted that the proposed principles, attached as APPENDIX "E", were adopted by the Southwest Pipeline Advisory Committee at their June 14 meeting. (This item was deferred at this time and discussion continued later on in the day.)

The Commission recessed at 12:00 noon; and reconvened at 1:00 p.m.

CONSIDERATION OF REQUEST FROM GRAND FORKS COUNTY FOR ENGLISH COULEE PROJECT (SWC Project No. 1351)

The following representatives from Grand Forks were introduced: H. H. Galloway, Attorney for the Grand Forks Water Resource District; Jay Fuiller, City Attorney for Grand Forks; Vincent Reed, Secretary-Treas. for Grand Forks Water Resource District; and Frank Orthmeyer, City Engineer for Grand Forks.

Mr. Orthmeyer presented the history of flooding along English Coulee in Grand Forks, explaining that approximately $5 million dollars in damages occurred during 1979. He further explained the potential solution to the problem, including an upstream dry dam and a two-phase diversion at the lower end of the coulee. All three of the components are considered to be part of the total project for flood protection. The north phase of the diversion is considered to be phase one and the south diversion phase two.

Mr. Fuiller explained the financial situation of the city, and its support for the project. He also explained the plan for special assessments for the city's share of the cost.

Mr. Galloway and Mr. Reed explained actions taken by the Grand Forks Water Resource Board to support the English Coulee Project. Both the city and the county have taken steps to acquire the land necessary for the project.

Secretary Fahy explained the understanding of the State Water Commission staff regarding cost sharing for this project. He stated that the $1 million dollars appropriation request had been based on traditional cost sharing guidelines with 40 percent of eligible construction costs granted toward the project.

Mr. Orthmeyer explained that the city would not be able to provide 60 percent of construction costs and road crossing costs at this time.

Discussion then centered on the possibility of considering the total three-phase project for cost sharing, and the possibility of the State Water Commission contributing the $1 million dollars at this time for construction of the entire project.

The State Engineer commented that although the expenditure of the entire $1 million dollars during the first of the three phases of the project rather than at a set percentage for each phase is somewhat unusual, the legislative action which established these funds as a separate line item within the Contract Fund appears to support the State Water Commission's action in approving the expenditure.

In essence, the Commission approved $1 million dollars as the state's share of the entire project even though the city has elected to utilize the state appropriation entirely during the first phase.

It was moved by Commissioner Hutton, seconded by Commissioner Larson, and unanimously carried, that the State Water Commission's share of the total three-phase English Coulee Project be expended at this time in order to accommodate the construction of the entire project.

RESOLUTION OF CONDOLENCE TO FAMILY OF TOM RONAN, GRAND FORKS COUNTY WATER RESOURCE BOARD (SWC Resolution No. 82-6-414)

It was moved by Commissioner Hutton, seconded by Commissioner Kramer, and unanimously carried, that the State Water Commission adopt Resolution No. 82-6-414, Resolution of Condolence to Family of Tom Ronan. See APPENDIX "F"

PRESENTATION BY CORPS OF ENGINEERS ON SHEYENNE RIVER FLOOD CONTROL PROJECT (SWC Project No. 1344)

Lt. Colonel John Atkinson, representing Colonel Rapp; Louis Kowalski; and William Spychalla from the St. Paul District Corps of Engineers were introduced.

Lt. Colonel Atkinson began their presentation by indicating their purpose of being in attendance is to answer any questions regarding the Sheyenne River Flood Control Project, and to request State Water Commission sponsorship in the overall project.

Mr. William Spychalla updated the Commission members on the project, summarized the nine points of the tentative selection plan, and discussed some of the public responses that were expressed at the public hearing on January 28, 1982 and also after the hearing. He also discussed costs of the project and cost sharing.

components that have been discussed, the following six have been recommended for implementation for the project. The other three are considered as elements of the plan but are not being recommended by the Corps for implementation at this time. The six components being recommmended for implementation are: 1) levees and a flood diversion channel at West Fargo/Riverside; 2) a flood diversion channel from Horace to West Fargo; 3) a five-foot raise of Baldhill Dam; 4) control of private levee construction; 5) control of drainage; and 6) floodplain regulation and zoning.

Mr. Spychalla stated that in the response that was shown at the public meeting, there was general support from the Citizens Committee representatives for the general plan. There was some concern expressed about the raise of Baldhill Dam, and from the citizens north of West Fargo on the effects of the diversion on that area and their concern that the type of alternative proposed for their area may not solve the flooding problems.

Since the public meeting, informational meetings have been held in the basin with the Southeast Cass Water Resource District, cities of West Fargo/Riverside, residents in the Cooperstown area, city officials of Valley City, the Lake Ashtabula Owners & Users Association and with residents north of the city of Fargo. These meetings were held to further explain in greater detail the components of the plan and how they would affect the area.

In the discussion of costs, Mr. Spychalla indicated the three components that the Corps would actually construct and put money into are: 1) estimated first costs to raise Baldhill Dam is approximately $32 million and the costs that would be allocated to flood control is estimated at about $16.8 million. The rest of the costs would be allocated to structural upgrading of the project; 2) levees and diversion channel at West Fargo/Riverside - total first costs are estimated at $17.2 million and is identified as all flood control; and 3) flood diversion channel from Horace to West Fargo is estimated at $.1 million and is identified as flood control.

In discussion of cost sharing, Mr. Spychalla indicated that the President of the United States and the Congress makes the final determination as to the federal and non-federal cost ratios. He did note that using the cost sharing policy that was established prior to the Carter Administration, the three components that the Corps will construct and contribute cost sharing would be $29.9 million federal and $12.2 million non-federal.

Mr. Spychalla discussed a number of local cooperation requirements that the State of North Dakota and the local interests must agree to prior to construction, attached hereto as APPENDIX "G". He then requested that the Water Commission consider providing the overall sponsorship of the project and consider an innovative method of financing the project. If

the State Water Commission becomes the overall sponsor, it would then contact the locals for subcommitments.

Secretary Fahy read a letter received from Mr. Daniel Twichell, attached hereto as APPENDIX "H", and also noted that his office has received numerous letters from concerned citizens regarding the proposed raise of Baldhill Dam.

Mr. Fred Sullivan, representing the Southeast Cass Water Resource District and representing the Fargo Area Floodplain Association, which was organized about three months ago, expressed concern that the tentative plan does not allow for any protection north of West Fargo.

It was moved by Commissioner Bjornson, seconded by Commissioner Hutton, and unanimously carried, that the State Water Commission enter into a Letter of Intent to work with local government entities to assure that non-federal responsibilities will be assumed for the Sheyenne River Flood Control Project. Among the responsibilities will be those related to cost sharing which have not as yet been formulated as regulated by the Federal Government.

CONTINUED DISCUSSION OF SOUTHWEST PIPELINE PROJECT (SWC Project No. 1736)

The discussion of the proposed principles for water service contracts for the project was continued. It was the consensus of the Commission members that item No. 7b. be amended to read as follows:

b. Determination of "ability to pay" will be based on a combination of comparable rates and median income throughout the service area.

It was moved by Commissioner Schank, seconded by Commissioner Jacobson, and unanimously carried, that the proposed principles for water service contracts be approved as amended.

Mr. Dwyer then reviewed the intended approach for legislation for the Southwest Pipeline Project. Mr. Dwyer indicated that proposed legislation will be contained in three separate bill drafts, noting that this method will be most understandable and will allow flexibility during the legislative decision-making process. Bill draft No. 1 will propose authorization of the Southwest Pipeline Project; Bill draft No. 2 will propose necessary appropriations and the financing plan for the Project, as well as clarification and guidelines for the Resources Trust Fund; and Bill draft No. 3 will propose necessary amendments to State Water Commission and other statutes.

SCHEDULING OF NEXT STATE WATER COMMISSION MEETING

At the invitation of Commissioner Vculek, it was the consensus of the Commission members that the next meeting of the Commission be held in Oakes on August 24 and 25, 1982.

STATEMENT BY LEMORE GREENSHIELDS, WEST RIVER JOINT BOARD MEMBER

Mr. Lemore Greenshields, representing the West River Joint Board, made the following statement:

"The West River Joint Board was formed in 1981. Because the Joint Board is so young, it has not yet had an opportunity to prioritize its water development recommendations. The Board will be meeting in Medora on June 21, 1982 to do this. Our first priority is the Southwest Pipeline Project. We will vigorously support the City of Dickinson, rural water co-ops, and other communities in the West River area to get this project approved. In addition, we hope to begin the process of development of other water projects in the West River area on a long-term basis. We hope to work with the State Water Commission and receive financial assistance from the Contract Fund for these efforts. Therefore, we are interested in submitting a request to the State Water Commission next week for our highest priority for funding. I have been designated on behalf of the West River Joint Board to ask you to consider this request even though we have not been able to submit a request by May 1 as requested by the State Engineer."

It was moved by Commissioner Kramer, seconded by Commissioner Bjornson, and unanimously carried, that the meeting adjourn at 5:05 p.m.

Allen I. Olson
Governor-Chairman

ATTEST:

Vernon Fahy
State Engineer and Secretary

NORTH DAKOTA STATE WATER COMMISSION

REGISTER

ATTENDANCE AT WATER COMM. HEARING

DATE 6-17-82 PLACE BEULAH

CIVIC CENTER PROJECT NO.

Your Name	Your Address	Who do you Represent? (Or Occupation)
Wm Curtiss	Bismarck	Basin Electric
DAVE BYRNES	BISMARCK	BASIN ELECTRIC
TED HEITMANN	BISMARCK	BASIN ELECTRIC
MARK FOSS	"	" "
W. W. Kroeber	"	M.D.U. Co.
Bernard Vaulk	Crete	SWC.
[illegible]	Glenburn N.D.	State Water Comm.
James Dilby	Beulah	Basin Electric
Irving Lieberman	Bismarck	KXMB-TV
David Viker	Bismarck	BEPC
JAMES GRANT	Bismarck	Basin Electric
JOHN ROGERS	Beulah	City of BEULAH
Tim Kjos	Beulah	Beulah Beacon
Tom Hanson	Minot	N.D. WATER USERS
Ken Zeigler	Bismarck	Basin Electric Coop

SWC Form No. 83

(500/6-77)

NORTH DAKOTA STATE WATER COMMISSION

REGISTER

ATTENDANCE AT _____

DATE _____ PLACE _____

_____ PROJECT NO. _____

Your Name	Your Address	Who do you Represent? (Or Occupation)
Rich Beierle	2203 Kennedy Ave - Bismarck	Basin Electric
Chuck Rupe	400 BROADWAY BISMARCK	N.G.P.C.
Fred Mislet	Hazen N.D.	BEPC.
L. W. Watkins	Hazen N.D	BEPC.
Lonnie Williamson	Stanton	NPS
Dennis Barnhardt	Bismarck	Basin Electric
Gilbert Key	Bismarck	U.S. Fish + Wildlife Serv.
D. Spry	"	SWC
A. H. Dellwo	Grand Forks	Att. Grand Forks County Reserve
Jay Fuller	Grand Forks	City Atty. - Grand Forks
Vincent F. Reed	G. Forks	Secty-Treas G.F. & W.R.D.
Frank Orthmeyer	G. Fork	City of Grand Fork
John [illegible]	1134 USPO ST. PAUL MN 55101	Corps of Engineers
Wilbur [illegible]	"	Corps of Engineers
Louis Kowalski	"	Corps of Engineers

Pop Gregory

SWC Form No. 83

(500/6-77)

APPENDIX "A"

North Dakota State Water Commission

MEMO TO: Vern Fahy, State Engineer
FROM: Joseph J. Cichy, Assistant Attorney General
RE: Regulatory Authority - Drainage
SWC Project File #1053
DATE: June 1, 1982

The legislature has enacted various laws to address emerging water related issues and problems and many times has vested the authority with either the State Water Commission or the State Engineer. In 1957 the Legislature adopted a statute requiring a permit from the State Water Commission before construction began on certain drains. At the same time the legislature was vesting regulatory authority for drainage with the State Water Commission it left the regulatory authority over water permits in the State Engineer's stable.

Beginning in 1977 the Legislature began a very clear pattern of vesting all regulatory authorities with the State Engineer when it placed the regulation of drainage under the State Engineer. In the following legislative sessions the regulation of dike and dam construction and floodplain management was placed under the State Engineer's authority. These amendments seem to clearly express the Legislature's intent that all regulatory authority pertaining to water resource management and control be vested with the State Engineer.

The State Engineer is not limited by the drainage regulations to any specific criteria in making a determination that drainage is of statewide or interdistrict significance. Therefore, your administrative order number 78-1, issued December 28, 1978, was completely within the parameters of the drainage regulations and a valid exercise of your regulatory authority. Conversely, an order rescinding administrative order 78-1 would just return the process of evaluating drainage applications with regard to a statewide or interdistrict significance determination to the criteria in the regulations concerning that issue. The order rescinding administrative order 78-1 does not alter the drainage regulations or adversely affect any prior policy of the State Water Commission or State Engineer. Subsequent to your rescission order, all drainage applications from the Red River watershed will be evaluated on a case by case basis to determine if they are of a statewide or interdistrict significance.

JJC:ps

Joseph J. Cichy
Assistant Attorney General

STATE OF NORTH DAKOTA

NORTH DAKOTA STATE WATER COMMISSION

NORTH DAKOTA STATE ENGINEER

In the Matter of Administrative Order of the State Engineer Rescinding the State Engineer's Order Declaring all Drainage Applications in the Red River Watershed Which Drain an Area of 80 acres or More to be of Statewide Significance	)	Administrative No. 82-1 ORDER OF STATE ENGINEER

I. Findings of Fact

1. On December 28, 1978, North Dakota State Engineer, Vernon Fahy, issued Administrative Order No. 78-1 declaring all drainage in the Red River Watershed of areas comprising eighty acres or more to be of statewide significance.

2. Since December 28, 1978, the water resource districts in the Red River watershed and the Red River Joint Board have exhibited strong leadership in evaluating drainage applications and attempting to minimize adverse downstream impacts.

3. Since December 28, 1978, the Water Resource Districts in the Red River watershed have exhibited an awareness of the necessity to control drainage through a watershed approach and an awareness of the importance of a cooperative and comprehensive approach to flood control.

II. Conclusion

1. The purpose of the State Engineer's Administrative Order No. 78-1 has been accomplished, as it appears that the Water Resource Districts in the Red River watershed will continue to provide strong local leadership in drainage and flood control matters.

2. The State Engineer can determine on a case by case analysis whether drainage applications for the Red River watershed are of statewide or interdistrict significance.

III. Order

The administrative order numbered 78-1, issued by the State Engineer on December 28, 1978, is hereby rescinded effective the date of this order. The State Engineer's drainage regulations again shall govern the procedures used by the State Engineer in determining whether drainage permits from the Red River watershed are of statewide or interdistrict significance. Additionally, the water resource districts are encouraged to continue the policy of holding public hearings on drainage applications that are not declared of statewide or interdistrict significance. It remains important that the water resource districts continue to evaluate the downstream effects of drainage and that all drainage be analyzed from an entire watershed perspective rather than a specific project point of view.

DATED this 22 day of June, 1982.

Vernon Fahy
VERNON FAHY
State Engineer

STATE OF NORTH DAKOTA)
) SS.
COUNTY OF BURLEIGH)

The foregoing instrument was acknowledged before me this 22 day of June, 1982, by Vernon Fahy, State Engineer.

Michael Dwyer
Notary Public

MICHAEL DWYER
NOTARY PUBLIC, BURLEIGH CO., ND
My COMMISSION EXPIRES AUG. 16, 1983

MICHAEL DWYER NOTARY PUBLIC STATE OF NORTH DAKOTA

APPENDIX "B"

NORTH DAKOTA
STATE WATER COMMISSION
900 east boulevard
701-224-2750
bismarck 58505
north dakota

May 5, 1982

Mr. Frank H. Thomas, Acting Director
Water Resources Council
2120 L Street N.W., Suite 800
Washington, D. C. 20037

Re: SWC Project No. 322

Dear Mr. Thomas:

Please consider this as the official comments of the State Engineer of North Dakota concerning the repeal of the Principles & Standards and the proposed new Principles & Guidelines which are intended to replace them.

This office enthusiastically approves the repeal of the Principles & Standards because of their bias against water development, particularly in the western states.

Although the new Principles & Guidelines offer some hope for improvement, this lies almost entirely in the implied discretionary authority given federal agency directors to make certain planning related alternative decisions and in the latitude allowed in the computation of agricultural benefits.

Unfortunately, the Principles & Guidelines retain most of the elements that have restricted western water development despite great efforts by state and local interests to develop projects to satisfy long-term needs.

The need to comply with the severely restrictive provisions of the Endangered Species Act, Fish & Wildlife Coordination Act, and the National Environmental Protection Act; the overall dominance of the need to prove National Economic Development benefits rather than developing the most cost effective solution to a problem; and, the reality that while most benefits are measurable, either quantitatively or qualitatively, only those which meet the NED criteria can be used in the computation of a cost-benefit ratio. These are some of the anti-development provisions that have been carried forward into the new Principles & Guidelines.

The concept of flexibility for state and local interests, which the present administration has fostered and which prompted the new Principles & Guidelines, is very much appreciated by those of us who view wise water development as essential to the nation's welfare; however, that concept cannot become a reality unless major legislative revisions are made.

Sincerely,

Vernon Fahy
State Engineer

VF:sl

cc: Carroll Hamon, Missouri Basin States Association
Gary Helgeson, ND Governor's Office

North Dakota State Water Commission

APPENDIX "C"

May 28, 1982

Mr. Christopher DeMuth, Executive Director
Vice President's Task Force on Regulatory Reform
Room 246
Old Executive Building
Washington, D. C. 20503

Dear Mr. DeMuth:

The following are the comments of the North Dakota State Engineer's office relative to the Administrative Reforms To The Regulatory Program Under Section 404 Of The Clean Water Act:

1. Reducing Uncertainty and Delay

A1. This section provides a definite improvement in procedures over that which now exist particularly if it results in a "vast majority" of the cases being handled by the District Engineer. This would undoubtedly require an increase in staffing of the Permit Section at the District Engineer level if schedules are to be met in a timely manner.

2. This will require rather definitive guidelines to be effective.

3. Limitations of reviews to cases involving insufficient coordination or development of new information is an improvement. The necessity for policy level review of issues of national importance within the authority of each of the involved agencies could be a problem area because of the wide divergence of views on what constitutes "national importance". This term has little significance to local officials who must solve problems of immediate concern to people in their area.

4. This is a very definite improvement, however, 120 working days is an extremely long time in areas in which construction periods are limited to the frost-free months.

5, 6 and 7. These provisions should help in speeding up the process.

B. Revision of Army regulations to reduce time elements should improve procedures substantially.

C. This is a most encouraging statement. We look forward to receiving a copy of the administrative procedures when they are available.

II. Giving States More Authority and Responsibility

The fact that no state has assumed jurisidiction for the enforcement of the Section 404 Program as it presently exists is indicative of the many problems it poses. It is interesting to note that state jurisdiction will be recognized in this new proposal provided that "issues of national importance" are not involved. Since the term can be construed to fit almost any situation, it may inhibit the transfer of authority to the states.

It is also interesting to note the lack of reference to funding a state-administered program.

III. Reducing Conflicting and Overlapping Policies

The intent of this section has great potential for improvement in the overall process.

IV. Expanding Use of General Permits

This is a concept that the states have been vigorously promoting since the passage of the enabling legislation. If it is implemented, it should solve many of the problems associated with the 404 process.

V. Clarifying the Scope of the Permit Program

This is the section most deserving of comment. The Administration's position on jurisdictional scope of the program is most encouraging and we would hope that it will receive wide-based support. We suggest, however, that the only logical way to reduce conflicts,

minimize impacts and recognize state concerns is to revise the legislation so that navigable waters are defined as navigable in fact as was the case prior to the federal litigation which produced the definition currently causing the majority of the problems associated with enforcement.

In general, the proposal appears to offer considerable improvement provided that the agencies involved have recognized the problems with the present procedures and are committed to work for improvement. The current definition of navigable waters is a major problem that will undoubtedly continue to impair cooperative efforts among the federal agencies and local entities of government.

We thank you for providing the opportunity for comment.

Sincerely,

Vern Fahy
State Engineer

VF:sl

PROPOSED OBJECTIVES FOR WATER SERVICE CONTRACTS

APPENDIX "D"

The following is a brief outline of the objectives that are proposed for water service contracts for the Southwest Pipeline Project.

1. Water Service Contracts will be required. All potential water users who wish to use water from the Southwest Pipeline Project will be required to execute a long-term water service contract, which will establish the terms and conditions for purchase and delivery of water. Potential water users include towns, rural water cooperatives, and other entities who may be interested in purchasing water from the project. These water service contracts will require that water users comply with the rules developed for the Southwest Pipeline Project by the operating entity.

2. Operation & Maintenance Costs. Water users shall be required to pay the entire actual operation and maintenance costs for the Southwest Pipeline Project. Water service contracts must bring in sufficient revenues, either through minimum payments or otherwise, to satisfy operation and maintenance costs. If not, it must be concluded that the Southwest Pipeline Project is not feasible and should not be pursued.

3. Minimum Payments. Water service contracts will require a minimum payment from each water user, regardless of whether or not project water is used. Minimum payments may vary with each community.

4. Water Rates. The cost of water will be determined as follows:

   a. The rate will be based on the water user's ability to pay. Ability to pay is the highest water rate that water users are able to pay, beyond which they could not afford to purchase water.

   b. Capital repayment of project costs by water users shall be maximized to the greatest extent possible within the water user's ability to pay.

5. Unallocated Capacity. It is anticipated that future growth in the southwest area will result in increased demand for water. Therefore, it will be recommended that the Southwest Pipeline Project be constructed with sufficient capacity to meet those needs. The state of North Dakota will retain total control over all water in the Southwest Pipeline Project which is not contracted for initially, and will enter into future contracts to sell such unallocated water at its discretion. Domestic and municipal water needs shall have the highest priority for unallocated water in the Southwest Pipeline Project.

6. Contract Principles. Contract principles to implement these objectives shall be as simple as possible.

PROPOSED PRINCIPLES FOR WATER SERVICE CONTRACTS
FOR THE SOUTHWEST PIPELINE PROJECT

APPENDIX "E"

The procedure that has been followed for the development of water service contracts for the Southwest Pipeline Project involves three steps:

1. First, development of basic contract objectives.

2. Second, development of contract principles which will implement the contract objectives. This includes the basic terms for water delivery to water users. For example, contract principles govern quantities of water to be purchased, manner of payment, method of delivery, etc.

3. Third, after contract principles have been developed, an actual water service contract can be drafted.

The following are proposed contract principles for consideration and review by the SWC.

1. All contracting entities agree to comply with the rules and regulations adopted for the Southwest Pipeline Project by the operating entity.

2. The water service contracts will be contingent on the following items:

   a. Legislative approval of the Southwest Pipeline Project in accordance with the recommendations of the State Water Commission and the terms of the water service contracts.
   b. Execution of a sufficient number of water service contracts to ensure that project users will be able to pay, at a minimum, the entire operation and maintenance costs for the Southwest Pipeline Project.

It must be understood, of course, that if the Southwest Pipeline Project is not approved by the Legislature, there will be no obligation by the State Water Commission to deliver water to contracting water user entities. On the other hand, it is also understood that if the Legislature authorizes a project other than the project recommended to the Legislature by the State Water Commission and on which the water service contracts are based, water service contracts will have to be renegotiated. Normally, water service contracts are not executed until after a project is authorized. However, in this case, it is agreed that water service contracts must be executed prior to the 1983 Legislative Session to assist in the legislative decision-making process. As a result, these contingencies must be understood.

3. The Southwest Pipeline Project will be constructed and operated as a bulk water supply system. Cities and rural water cooperatives will be required to provide the necessary water distribution systems to deliver water to their water customers or residents.

4. Term of Contract. The term of the water service contract will be 40 years. Provisions for renewal at rates and terms appropriate at that time will be included.

5. Measurement of Water. Water delivered to each entity will be measured at the delivery point. Metering equipment will be the responsibility of the SWC. A procedure will be provided for questioning the accuracy of the measurement of water.

6. Water will be treated.

7. Water rates: Capital Repayment.

   a. Capital Payments. Water users will be required to pay an amount per each 1000 gallons for capital repayment. The amount required for capital repayment will be based on ability to pay.

   b. Determination of "ability to pay" will be based on a combination of comparable rates and median income for ~~each water user entity~~ throughout the service area.

   c. Water rates for capital repayment shall fluctuate according to some type of rate adjustment factor. Even with a rate adjustment factor, the State Water Commission will have to be given certain authority over water rates.

   d. A credit on capital payments will be given for existing water supply facility debt service which is being paid by each water user entity. "Qualifying water supply facilities" will be determined by the State Water Commission, but will include such things as surface water reservoirs, wells, raw water pumps, water transmission pipelines from a water source to a distribution system, water treatment plants, and pipelines and controls necessary to connect the water user's distribution system to the Southwest Pipeline Project delivery point. Each user entity will be required to substantiate a credit request.

8. Water Rates: Operation, Maintenance & Replacement.

   a. Postage stamp rate will be used for the portion of water rates which will be for OM&R.

   b. OM&R charges will be established according to the following formula:

      (1) Estimate annual OM&R budget for upcoming year.
      (2) Project the total annual water sales for the upcoming year.
      (3) Divide the projected annual water use into the budgeted annual OM&R.

$$\frac{\text{Budgeted Annual OM\&R}}{\text{Estimated Total Annual Water Sales}} = \$/1000 \text{ gallons}$$

      This figure would then be multiplied times the water user entity's monthly water use, or minimum water purchase amount, whichever is greater, to compute the monthly billing for OM&R for each water user entity. Thus, the total formula is as follows:

Step 1: $\frac{\text{Budgeted Annual O\&M\&R}}{\text{Projected Annual Water Use}}$ = $/1000 gallons

Step 2: $/1000 gallons X Actual Town Water Sales = O&M&R Mo. Billing

At the end of each year, adjustments would have to be made to reflect the actual cost of the O&M&R for the same year. The adjustment formula would look like this, and would result in each water user receiving a credit or owing an additional amount:

Step 1: $\frac{\text{Actual Previous Year Total O\&M\&R}}{\text{Actual Previous Year Water Sales}}$ = Actual OMR Cost/1000 gallons

Step 2:
Actual OMR Cost/1000 gal. X Actual Town Water Sales = Actual O&M&R Cost/1000 gal

If the amount was more than the amount paid by the town under the forumula estimating O&M&R and water sales, the town would be required to pay the difference in the next year's billings. If the amount was less, the town would receive a credit.

An example of the O&M&R payments and formulas is as follows. The following assumptions are made for this example:

Assumptions: Total Estimated O&M&R for next yr. = $10,000
Estimated Total Water Use = 13,000,000 gallons
Actual Annual O&M&R = $9,000
Actual Total Water Use = 15,000,000 gallons
Actual Town Yearly Water Use = 6,000,000 gallons
Actual Town Monthly Water Use = 500,000 gallons

The monthly bill for an upcoming year would be computed as follows:

Step 1: $\frac{\text{\$10,000 (Estimated Annual O\&M\&R)}}{\text{13,000,000 gallons (Estimate Water Sales)}}$ = $.77/1000 gallons

Step 2: $.77 x 500 1000 gallon units (Actual Town Monthly Water Sales) = $339.74 (Monthly water bill)

Step 3: $\frac{\text{End of Year Adjustment}\ \text{\$9,000 (Actual O\&M\&R)}}{\text{15,000,000 gallons (Actual Water Sales)}}$ = $.60/1000 (Actual cost per 1000 gallons)

Step 4: $.60 X 6,000 (Actual town use) = $3600.00
$.77 X 6,000 (Actual town use) = $4076.88

Step 5: $3600 - $4076.88 = - 476.88
This is the amount of overpayment for which a credit is due. This credit could be taken care of the next year on a monthly basis or as a one time adjustment.

9. Water Rates: General

   a. Delinquent Payments. The State Water Commission may discontinue water service for delinquent payments, and a late charge will also be imposed on delinquent payments.
   b. Minimum Payments. Water service contracts will require a minimum payment from each water user, regardless of whether or not project water is used. Minimum payments will be determined by the cost per 1000 gallons for OM&R and capital repayment times the minimum amount of water to be purchased by each water user entity. The minimum amount of water that can be purchased will be determined by each water user through negotiation.
   c. Additional Water Purchase. If a water user entity uses more water than the minimum amount agreed to in the water service contract, it will pay for such water based on the rate established for capital repayment and through the adjustment of payment for OM&R.

10. The State Water Commission will not provide any warranty for a water user's fire fighting needs, nor will the Commission be responsible for each water user's distribution system. Failure to deliver due to temporary or partial breakdowns will not place any liability on the part of the State Water Commission.

11. Water user entities will not have any right to a greater flow rate than agreed to in the contract. The maximum flow rate is established by the minimum amount of water purchased. If a water user entity wishes to secure a right to a greater flow rate, it will be necessary to amend the water service contract to increase the minimum amount of water. Since one of the contract objectives is that domestic and municipal water needs shall have the highest priority, the State Water Commission will provide each water user entity with an opportunity to amend its water service contract and increase its minimum if the State Water Commission receives a request from a commercial water user for a significant portion of unallocated capacity.

12. A maximum flow rate will be established for each water user entity. This will be determined through a mathematical forumla which has a direct relationship to the minimum amount of water purchased along with the plan which is selected by the State Water Commission. While a water user entity does not have any contractual right to exceed the maximum flow rate, unless the contract is amended, it may be allowed to exceed the maximum flow rate during the early years of the project.

In conclusion, there may be additional provisions to be included in the water service contract, but the foregoing represents a summary of what we consider to be contract principles for water service contracts for the Southwest Pipeline Project.

APPENDIX "F"

RESOLUTION NO. 82-6-414

Resolution of Condolence
To Family Of Tom Ronan

WHEREAS, Tom Ronan served the people of Grand Forks County as a member and as Chairman of the Grand Forks County Water Resource District for many years; and

WHEREAS, Tom gave unstintingly of his time and talents to promote sound water management not only in his county but throughout the Red River Valley; and

WHEREAS, Tom always found time in his busy schedule to work in support of water resource programs on a state-wide basis; and

WHEREAS, Tom Ronan has recently left this world to join other worthy citizens who have preceded him to that Special Place reserved for those who have earned residence there.

NOW, THEREFORE, BE IT RESOLVED on this 18th day of June, 1982, at a meeting held in Beulah, North Dakota, that the members of the North Dakota State Water Commission; its Chairman, Governor Allen I. Olson; and its staff does hereby express condolence to the wife and family of Tom Ronan.

FOR THE NORTH DAKOTA STATE WATER COMMISSION:

Allen I. Olson
Governor-Chairman

SEAL

ATTEST:

Vernon Fahy
State Engineer and Secretary

APPENDIX "G"

(18 June 1982)

LOCAL COOPERATION REQUIREMENTS (SHEYENNE RIVER FLOOD CONTROL PROJECT)

For the proposed components to serve their intended purposes, local interests and the State of North Dakota must agree to certain conditions of local cooperation. Before construction, local interests and the State of North Dakota would have to furnish assurances satisfactory to the Secretary of the Army that they will:

*a. Contribute a share of the construction cost of the project which is determined to be satisfactory to the President and Congress. This contribution may be cash or in-kind contribution of land, easements, rights-of-way, relocation, or other real property interests necessary to and a part of the project.

b. Prescribe and enforce regulations to prevent obstructions or encroachments on channels, floodplain and floodway areas, and ponding areas that would reduce their flood-carrying capacity or hinder the operation and maintenance of the projects and/or compromise the level of protection provided by the projects.

c. Regulate levee construction along the Sheyenne River to ensure that construction of levees would not significantly affect flood levels and/or potentially increase flood damages either upstream or downstream to the full extent permitted by existing statutes, ordinances, regulations, and rules.

d. At least annually inform affected interests of the limitations of the protection afforded by the project.

e. Maintain and operate the flood diversion channel and levee portions of the project after completion in accordance with regulations prescribed by the Secretary of the Army.

f. Regulate drainage activities in the watershed to ensure that flood frequencies and discharges are not increased or that the effectiveness of the project is not adversely affected.

g. Publicize floodplain information in the areas concerned and provide this information to zoning and other regulatory agencies for their guidance and leadership in preventing unwise future development in the floodplain and in adopting such regulations as may be necessary to ensure compatibility between future development and protection levels provided by the project.

h. Hold and save the United States free from damages that may result from construction and maintenance of the project, not including damages which are caused by the fault or negligence of the United States or its contractors.

* Item a. is subject to change

APPENDIX "H"

LAW OFFICES

OHNSTAD, TWICHELL, BREITLING, ARNTSON & HAGEN

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OFFICE MANAGER
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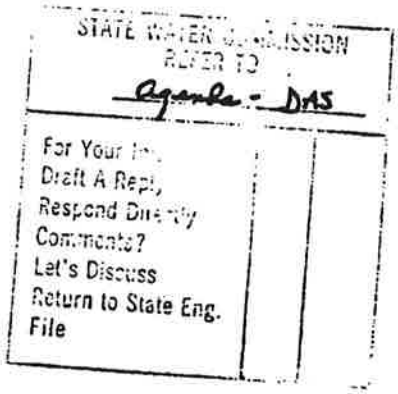
June 10, 1982



Vern Fahy
State Engineer
State Office Building
Bismarck, ND 58501

RE: Sheyenne River Flood Control

Dear Vern:

Please present our views to the State Water Commission at its meeting in Beulah on June 18, 1982.

The Southeast Cass Water Resource District has been working toward flood control on the lower Sheyenne River since 1961. Others in the area have been working toward the same goal since 1950. Although our district would be benefited to a greater degree by large upstream storage, it would appear that the only protection available is the presently recommended plan. We therefore support the study completion and look forward to cooperating with the State Water Commission and the Corps of Engineers in this study.

At this time, we feel the plan lacks efficient protection to the Harwood area and we urge that this be taken into consideration during the further planning period.

Because of the magnitude of the project and the many areas involved, we would urge the State Water Commission to be the local sponsor of this project.

I have also been in contact with the City of West Fargo and Mayor Clayton Lodoen and the City is in agreement with the position of the Water Resource District. Thank you.

Sincerely yours,

OHNSTAD, TWICHELL, BREITLING,
ARNTSON & HAGEN

Daniel R. Twichell

DRT:re