

1999 SENATE NATURAL RESOURCES

SB 2107

1999 SENATE STANDING COMMITTEE MINUTES

BILL/RESOLUTION NO. SB2107

Senate Natural Resources Committee

Conference Committee

Hearing Date January 8, 1999 (hearing reopened January 15, 1999)

Tape Number	Side A	Side B	Meter #
1	x		2500-6235
1		x	0-190
1	x		5546 to end
1		x	0-590
Committee Clerk Signature <i>Sylvia A. Hagen</i>			

Minutes:

SENATOR TRAYNOR opened the hearing on SB 2107: A BILL FOR AN ACT TO CREATE AND ENACT A NEW SECTION TO CHAPTER 61-04 OF THE NORTH DAKOTA CENTURY CODE, RELATING TO WATER PERMIT APPLICATIONS; AND TO AMEND AND REENACT SUBSECTION 4 of section 61-04-05 AND SECTION 61-04-06 OF THE NORTH DAKOTA CENTURY CODE, RELATING TO WATER PERMIT APPLICATIONS. DAVID A. SPRYNCZYNATYK, State Engineer and Secretary to the State Water Commission testified in support of SB2107. The bill was introduced at the request of the State Engineer.

(See attached testimony)

SENATOR CHRISTMANN asked how complicated is the hearing process when no one appears, and are individuals reluctant to request hearings?

DAVID A. SPRYNCZYNATYK, replied that once the notice of hearing is made, the hydrologist or resource engineer is stationed in the hearing room during scheduled time. Individuals may file written comments rather than attend a hearing, and if they do this, they will receive a recommended decision from the state engineer. If they are not satisfied with the decision, they may request a hearing to be held in the State Engineer's office..

SENATOR REDLIN asked if all aspects of the hearing would be aired at that time.

DAVID A. SPRYNCZYNATYK replied the legal notice and written notice to interested parties would contain the same information, plus it would include a deadline date to provide written comments.

SENATOR REDLIN asked if the state engineer is prepared and would have the information regarding the history of a project at the hearing.

DAVID A. SPRYNCZYNATYK stated the state engineer explains what is being proposed and prior to the hearing, an analysis has been made to determine compliance with existing law. Only what is available in the application is discussed at the time of the hearing. Under current law, if the state engineer does know the history from past experience, it will be explained. A hearing is an opportunity for someone to offer more information to the state engineer and to incorporate that into the analysis. The analysis is done subsequent to the hearing, and if an appeal of the decision is made, it is reviewed by the state engineer, and determined if those considerations should be incorporated into the initial analysis to determine if a second hearing should be held.

SENATOR REDLIN asked if the state engineer defends its decision on the basis of fact.

DAVID A. SPRYNCZYNATYK, yes. A thorough and detailed review of what is proposed

of the requirements in the law is documented in a memo with the recommended decision. A sample copy of a memo and legal notice can be provided to you.

SENATOR REDLIN asked for the sample copies.

SENATOR TRAYNOR asked what if the comments indicate this is a matter that should be heard and no one has asked for a hearing?

DAVID A. SPRYNCZYNATYK stated notice would be provided to the newspaper and interested parties, and if there was any interest, the people would have to respond saying they are interested and concerned about the application. If the people receive the written decision and feel they missed something and not everything was addressed, they could ask for a hearing to provide the state engineer with that information.

SENATOR TRAYNOR asked if this deprives the state engineer the discretionary right to hold the hearing when there is no written request by anyone.

DAVID A. SPRYNCZYNATYK stated there wouldn't be anything that would prohibit us from holding a hearing, but if no one has expressed any concern, it is doubtful we would hold a hearing.

SENATOR HEITKAMP asked if you received enough comments and felt there should be a hearing on it, could you still hold a hearing?

DAVID A. SPRYNCZYNATYK replied, yes.

SENATOR TRAYNOR stated that the bill contains a sentence that states that if a request for hearing is not made, the state engineer shall consider the additional comments if any are submitted, and issue a final decision. Does that prevent you from having a hearing, because it says you shall make a final decision.

DAVID A. SPRYNCZYNATYK replied that how a decision is arrived at should be up to the state engineer.

LOREN DEWITZ a landowner in Kidder County stated that a hydrologist better answers the questions and didn't feel that the hearing process would answer the water questions and does not feel that the state engineer not holding a hearing would be a drawback.

SENATOR TRAYNOR asked David A. Sprynczynatyk if the bill passes, what will this do to a slam-dunk case where there is no response, appearance, and the application is served without any question about it. How does that expedite your process in a time frame?

DAVID A. SPRYNCZYNATYK stated they would do the same process as they do today.

SENATOR TRAYNOR stated since there will be additional information that Senator Redlin requested, the meeting will be held open for that purpose and discussed at a later date.

SENATOR TRAYNOR reopened the hearing on SB 2107 on January 15, 1999. A memorandum was provided by David A. Sprynczynatyk, state engineer.

Senator Heitkamp moved for a DO PASS. Senator Fischer seconded the motion. Voice vote, all in favor.

Senator Fischer moved for DO PASS AS AMENDED. Senator Heitkamp seconded the motion.

ROLL CALLS - 5 AYES, 1 NAYES, 0 ABSENT

FLOOR ASSIGNMENT: SENATOR HEITKAMP

Date 1-15-99
Roll call vote # 1

Please type or use
black pen to complete

1999 SENATE STANDING COMMITTEE ROLL CALL VOTES
BILL/RESOLUTION NO. SB2107

Senate Natural Resources Committee
Subcommittee on _____ (Identify or
Conference Committee _____ (check where
(appropriate

Legislative Council Amendment Number _____

Action Taken Or pass Voice Vote
Motion Made By Heitkamp Seconded By Fischer

Senators	Yes	No	Senators	Yes	No
SENATOR TRAYNOR, CHR	✓				
SENATOR FISCHER, VCHR	✓				
SENATOR CHRISTMANN	✓				
SENATOR FREBORG	✓				
SENATOR HEITKAMP	✓				
SENATOR REDLIN	✓				

Total 6 0
(Yes) (No)

Absent 0

Floor Assignment _____

If the vote is on an amendment, briefly indicate intent:

DO NOT USE HIGHLIGHTER ON ANY FORMS

Date 1-15-99
Roll call vote # 2

Please type or use
black pen to complete

1999 SENATE STANDING COMMITTEE ROLL CALL VOTES
BILL/RESOLUTION NO. SB 2107

Senate Natural Resources Committee
Subcommittee on _____ (Identify or
Conference Committee _____ (check where
(appropriate

Legislative Council Amendment Number SB 2107

Action Taken Do pass as amended

Motion Made By Fischer Seconded By Heitkamp

Senators	Yes	No	Senators	Yes	No
SENATOR TRAYNOR, CHR	<input checked="" type="checkbox"/>	<input type="checkbox"/>	_____	<input type="checkbox"/>	<input type="checkbox"/>
SENATOR FISCHER, VCHR	<input checked="" type="checkbox"/>	<input type="checkbox"/>	_____	<input type="checkbox"/>	<input type="checkbox"/>
SENATOR CHRISTMANN	<input type="checkbox"/>	<input checked="" type="checkbox"/>	_____	<input type="checkbox"/>	<input type="checkbox"/>
SENATOR FREBORG	<input checked="" type="checkbox"/>	<input type="checkbox"/>	_____	<input type="checkbox"/>	<input type="checkbox"/>
SENATOR HEITKAMP	<input checked="" type="checkbox"/>	<input type="checkbox"/>	_____	<input type="checkbox"/>	<input type="checkbox"/>
SENATOR REDLIN	<input checked="" type="checkbox"/>	<input type="checkbox"/>	_____	<input type="checkbox"/>	<input type="checkbox"/>
_____	<input type="checkbox"/>	<input type="checkbox"/>	_____	<input type="checkbox"/>	<input type="checkbox"/>
_____	<input type="checkbox"/>	<input type="checkbox"/>	_____	<input type="checkbox"/>	<input type="checkbox"/>
_____	<input type="checkbox"/>	<input type="checkbox"/>	_____	<input type="checkbox"/>	<input type="checkbox"/>
_____	<input type="checkbox"/>	<input type="checkbox"/>	_____	<input type="checkbox"/>	<input type="checkbox"/>

Total 5 1
(Yes) (No)

Absent 0

Floor Assignment Heitkamp

If the vote is on an amendment, briefly indicate intent:

DO NOT USE HIGHLIGHTER ON ANY FORMS

REPORT OF STANDING COMMITTEE (410)
January 18, 1999 9:42 a.m.

Module No: SR-10-0763
Carrier: Heitkamp
Insert LC: 98173.0101 Title: .0200

REPORT OF STANDING COMMITTEE

SB 2107: Natural Resources Committee (Sen. Traynor, Chairman) recommends **AMENDMENTS AS FOLLOWS** and when so amended, recommends **DO PASS** (5 YEAS, 1 NAY, 0 ABSENT AND NOT VOTING). SB 2107 was placed on the Sixth order on the calendar.

Page 2, line 15, after the second underscored comma insert "or if the state engineer determines a hearing is necessary to obtain additional information to evaluate the application or to receive public input,"

Renumber accordingly

1999 HOUSE NATURAL RESOURCES

SB 2107

1999 HOUSE STANDING COMMITTEE MINUTES

BILL/RESOLUTION NO. 2107

House Natural Resources Committee

Conference Committee

Hearing Date 2/25/99

Tape Number	Side A	Side B	Meter #
2	x		5.5-41.6
3/4/99 2	x		23.0-30.0
Committee Clerk Signature <i>Robin L. Small</i>			

Minutes: The committee hearing was called to order Rep. Grosz.

DAVID A. SPRYNCZYNATYK, STATE ENGINEER, introduces the bill to the committee.

SEE HANDOUTS. DAVID urges the committee for a do pass motion on the bill.

REP. DEKREY asks about the hearings being moved out of Bismarck. If one requests a hearing, can it be held where they want it to. DAVID replies yes, that section of the law is not being changed at all. DEKREY asks about irrigation permits, and it taking to long to get approved.

Will this actually free up some of your people in the office? DAVID replies that yes it will.

REP. GROSZ comments about the people that did the investigating, and they weren't the judges in the end. This bothers him, he knows that its a little less efficient.

REP. SOLBERG asks if every incident has a hearing no matter what. DAVID replies yes.

DAVID then goes on to explain to the committee about hearings and applications.

REP. NELSON asks about the new language in the due process area, if there is an objection concerning the water permit, but they don't ask for a hearing, the general public has a lack of understanding of every step that needs to be taken in the process of complying with the requests for hearings. What would be their recourse? Do they still have adequate time for a hearing?

DAVID replies yes.

REP. SANDVIG asks about appropriation and its definition. DAVID replies that it means acres or feet of water. SANDVIG asks about letting people know of the hearing procedure. DAVID replies that a notice will be in the county newspaper and a letter has to be sent to all of the landowners within a one mile radius. A statement would be added to say that you have until a certain date to provide comments, and after that to request a hearing, if this went into law.

REP. GROSZ asks about the written comments and how they would be taken care of. DAVID replies that they would address every comment in the investigation and they would continue to do so.

REP. NOTTESTAD asks about environmental groups. DAVID replies that they accept comments from anyone.

REP. GROSZ comments about taking out 28-32, it gives him a little bit of heart burn. He was happy to see that the hearing officer had an open mind. Would it create a lot of heart burn with you if we take that part out, and left it. Talking about a fair hearing. DAVID replies that he is not sure how they will conduct business in the future. They would have to devise some way of having two people involved. GROSZ comments that justice isn't always cheap. He is reluctant to exempt one person out.

MIKE DWYER, ND WATER ASSOC., speaks in support of this bill. DWYER talks to the committee about irrigation in the state. He urges the committee for a do pass.

There were no questions for DWYER.

The hearing was then closed.

On March 4, 1999, the committee took action on this bill. REP. GROSZ introduced amendments for it. Discussion of the amendments. REP. PORTER made a motion to accept the amendments, seconded by REP. MARTINSON. A roll call vote was taken with 8 YES, 6 NO, 1 ABSENT. Motion carries. REP. DEKREY moves for a DO PASS AS AMENDED, seconded by REP. HENEGAR. The roll call vote was taken with 15 YES, 0 NO, 0 ABSENT. The motion carries. The CARRIER of the bill on the floor is REP. CLARK.

3.4.99

Date: ~~2003~~ 3.4.99

Roll Call Vote #: 1

1999 HOUSE STANDING COMMITTEE ROLL CALL VOTES
BILL/RESOLUTION NO.

House House Natural Resources Committee

Subcommittee on _____

or

Conference Committee

Legislative Council Amendment Number _____

Action Taken 2107 move the amendment

Motion Made By Porter Seconded By Martinson

Representatives	Yes	No	Representatives	Yes	No
Chairman Mick Grosz	✓				
Vice-Chairman Dale Henegar	✓				
Representative David Drovdal	✓				
Representative Pat Galvin	✓				
Representative Duane DeKrey		✓			
Rep. Darrell D. Nottestad		✓			
Representative Jon O. Nelson	✓				
Representative Byron Clark	✓				
Representative Todd Porter	✓				
Representative Jon Martinson	✓				
Reperesentative Lyle Hanson		✓			
Representative Scot Kelsh					
Representative Deb Lundgren		✓			
Representative Sally M. Sandvig		✓			
Representative Dorvan Solberg		✓			

Total (Yes) 8 No 6

Absent 1

Floor Assignment _____

If the vote is on an amendment, briefly indicate intent:

Date: 3.4.99
Roll Call Vote #: 2

1999 HOUSE STANDING COMMITTEE ROLL CALL VOTES
BILL/RESOLUTION NO.

House House Natural Resources Committee

Subcommittee on _____
or
 Conference Committee

Legislative Council Amendment Number _____

Action Taken 2/07 Do Pass as Amended

Motion Made By DeKrey Seconded By Henegar

Representatives	Yes	No	Representatives	Yes	No
Chairman Mick Grosz	✓				
Vice-Chairman Dale Henegar	✓				
Representative David Drovdal	✓				
Representative Pat Galvin	✓				
Representative Duane DeKrey	✓				
Rep. Darrell D. Nottestad	✓				
Representative Jon O. Nelson	✓				
Representative Byron Clark	✓				
Representative Todd Porter	✓				
Representative Jon Martinson	✓				
Reperesentative Lyle Hanson	✓				
Representative Scot Kelsh	✓				
Representative Deb Lundgren	✓				
Representative Sally M. Sandvig	✓				
Representative Dorvan Solberg	✓				

Total (Yes) 15 No 0

Absent _____

Floor Assignment Clark

If the vote is on an amendment, briefly indicate intent:

REPORT OF STANDING COMMITTEE (410)
March 5, 1999 12:07 p.m.

Module No: HR-40-4118
Carrier: Clark
Insert LC: 98173.0201 Title: .0300

REPORT OF STANDING COMMITTEE

SB 2107, as engrossed: Natural Resources Committee (Rep. Grosz, Chairman)
recommends **AMENDMENTS AS FOLLOWS** and when so amended, recommends
DO PASS (15 YEAS, 0 NAYS, 0 ABSENT AND NOT VOTING). Engrossed SB 2107
was placed on the Sixth order on the calendar.

Page 3, remove lines 15 and 16

Page 3, line 17, remove "accorded due process."

Renumber accordingly

1999 SENATE NATURAL RESOURCES

SB 2107

CONFERENCE COMMITTEE

1999 SENATE STANDING COMMITTEE MINUTES

BILL/RESOLUTION NO. SB2107

Senate Natural Resources Committee

Conference Committee

Hearing Date March 18, 1999

Tape Number	Side A	Side B	Meter #
1	x		0-3180
03/23/99 1	x		0-140
Committee Clerk Signature <i>Lyla A. Ziegenfuss</i>			

Minutes:

CONFERENCE COMMITTEE

SENATOR TRAYNOR opened the conference on SB2107 with all appointees present.

REP. GROSZ explained the amendments and stated lines 13, 14 and part of line 15 on page 3 and the reason for that was the person who runs the hearing cannot be the one that did the investigation. This would exempt the water commission in these cases from doing that.

SENATOR FISCHER stated administrative hearings office shouldn't be necessary. Water boards investigate public hearings and if it goes beyond that, then we would use another mechanism if a complaintant would go beyond that point.

REP. GROSZ stated that his interpretation of the bill is there necessarily wouldn't be a hearing unless one of the parties would request a hearing. A hearing would be called if they disagreed with the finding of the report. If they ask for a hearing, and the same person they disagreed with

showed up as the hearing officer that is going to give the recommendation to the commissioner, they wouldn't have a lot of confidence in the system. The only step beyond this is going to court and the reason for the administrative hearing officer is so that there is a step between that isn't too costly for the average citizen.

SENATOR TRAYNOR stated he asked the state engineer to give comments about how this would operate, assuming if the amendments are adopted by the Senate. (See attached letter from David A. Sprynczynatyk, State Engineer) Also, Allen C. Hoberg, Office of Administrative Hearings was contacted regarding hourly charges from his office who charge the agencies for the work that they do. (See attached letter from Allen C. Hoberg)

REP. GROSZ asked if this bill does not pass, could the State Water Commission legally go back to closing its own hearings, or should they have gone through the Administrative Hearings office all along.

ATTORNEY, STATE ENGINEER OFFICE replied there are court cases where if they appeal they can be assessed attorneys fees. If this doesn't pass as introduced, the agencies would want to separate the functions of investigation and decision making. They can do that by either separating it within the agency or by using the office of Administrative Hearing.

SENATOR TRAYNOR replied because it is passed by the Senate, it is waived as far as the agency that can conduct its own investigation and make their own rule.

REP. GROSZ stated Subsection 1 of section 28-32-12.2 relates to the investigative officer not being able to do the hearing.

DAVID A. SPRYNCZYNATYK stated there is a different step available that when after the initial process is completed and a decision is made, even after the first hearing, if a hearing is

requested, a party can ask for a rehearing and ask for a second hearing at the agency level before they go to court. In the past, we have not followed the Administrative Agency Practices Act to the tee, but we have not had a problem with it. Since this has been brought to the Legislature's attention, we may be subjecting ourselves to severe criticism if we didn't go back and begin to follow the Administrative Agency Practices Act, which will mean significant additional cost.

When these permit applications come in and if you follow that act to the tee, you would have one person do the preliminary review and investigation. A second person has to do the final review and recommendation. From the agency's standpoint, we do not have the resources internal to do that. If the bill fails, we will have to go back and re-evaluate how we handle these permits and will have to follow the APA. This will make the process legally more efficient.

SENATOR HEITKAMP asked wouldn't we rather have the decision being made on whether a permit goes forward or not, being made by the people from the Water Commission where the knowledge of the subject is.

SENATOR TRAYNOR asked would it satisfy your concerns of due process if at the application for rehearing, then the office of Administrative Hearings became involved.

REP. GROSZ replied I thought there was just one hearing.

DAVID A. SPRYNCZYNATYK replied section 28-32-12.2 states language regarding opportunities for rehearing.

SENATOR TRAYNOR stated in a petition for rehearing, you are still in the administrative phase so you are not in court, and then you bring in the independent hearing officer.

SENATOR FISCHER stated the intent of the bill is to eliminate a hearing where no one showed up. Rather than schedule a hearing with a notice, they are just getting rid of that hearing. The

hearing is still there, it just isn't automatically held. If no one protests, then there is no hearing. If someone protests, there is an in-house hearing and the hydrologist testifies to either the aye or nay of allowing the permit.

REP. GROSZ replied Section 28-32-12.2 says it cannot be the same person who does the investigation that runs the hearing. The person who runs the hearing gives the recommendation to the State Water Commissioner.

SENATOR TRAYNOR asked Rep. Grosz to contact him after talking with Legislative Council and the conference committee will meet at a later date to act on SB2017.

CONFERENCE COMMITTEE DISCUSSION AND ACTION: March 23, 1999, Tape 1,

Side A, Meter# 0-140: Senator Traynor opened the conference committee with all appointees present. The amendments were agreed upon and REP. GROSZ moved for the House to Recede from the House amendments, seconded by SENATOR HEITKAMP. Roll call vote indicated 6 YEAS, 0 NAYS, 0 Absent and not voting to adopt the amendments. SENATOR TRAYNOR volunteered to carry the bill.

REPORT OF CONFERENCE COMMITTEE
(ACCEDE/RECEDE) - 420

07398

(Bill Number) SB 2107 (, as (re)engrossed):

Your Conference Committee

For the Senate:

Sen. Traynor [Signature]
 Sen. Fischer [Signature]
 Sen. Heitkamp [Signature]

For the House:

Rep. Grosz [Signature]
 Rep. Clark [Signature]
 Rep. Solberg [Signature]

recommends that the (SENATE/HOUSE) (ACCEDE to) (RECEDE from)
723/724 725/726 S724/H726 S723/H725
the (Senate/House) amendments on (S/J/NJ) page(s) 741 - _____

and place _____ on the Seventh order.
727

, adopt (further) amendments as follows, and place
SB 2107 on the Seventh order:

having been unable to agree, recommends that the committee be discharged
and a new committee be appointed. 690/515

((Re)Engrossed) _____ was placed on the Seventh order of business on the
calendar.

DATE: 03/23/99

CARRIER: Sen. Traynor

LC NO. _____ of amendment

LC NO. _____ of engrossment

Emergency clause added or deleted _____

Statement of purpose of amendment _____

(1) LC (2) LC (3) DESK (4) COMM.

REPORT OF CONFERENCE COMMITTEE

SB 2107, as engrossed: Your conference committee (Sens. Traynor, Fischer, Heitkamp and Reps. Grosz, Clark, Solberg) recommends that the **HOUSE RECEDE** from the House amendments on SJ page 741, adopt amendments as follows, and place SB 2107 on the Seventh order:

That the House recede from its amendments as printed on page 671 of the Senate Journal and page 741 of the House Journal and that Engrossed Senate Bill No. 2107 be amended as follows:

Page 3, line 15, after "proceedings" insert "unless a request for a hearing is made."

Page 3, remove line 16

Page 3, line 17, remove "accorded due process."

Renumber accordingly

Engrossed SB 2107 was placed on the Seventh order of business on the calendar.

1999 TESTIMONY
SB 2107

TESTIMONY ON SENATE BILL 2107

Natural Resources Committee

**David A. Sprynczynatyk, State Engineer
and Secretary to the State Water Commission**

January 8, 1999

Mr. Chairman and Members of the Committee, my name is David Sprynczynatyk. I am the North Dakota State Engineer and Secretary to the State Water Commission and appear today in support of Senate Bill 2107.

This bill makes two changes to the procedures for obtaining water permits. The first change relates to when the State Engineer must hold hearings on water permit applications. It will eliminate the need to hold hearings on applications where no one has objections or concerns about the proposed appropriation. Under current law, whenever a water permit is required to appropriate water, the State Engineer must hold a hearing on the proposed appropriation. Any person present at the hearing can testify with regard to the proposed appropriation. In addition, any person may file written comments with the State Engineer for the State Engineer's consideration.

In the vast majority of cases no one appears at the hearings and in many cases no written comments on the proposed appropriations are filed with the State Engineer. For example, from January through August 1998, the State Engineer conducted 64 hearings on water permit applications. At approximately one-third of the hearings (20) no one appeared at the hearing and no written comments were filed. At 38 of the hearings written comments only were filed with the State Engineer, generally prior to the date of the hearing. At only six of the hearings did people appear to testify.

Senate Bill 2107 requires the State Engineer to hold hearings only when a request to do so is made. Notice of the proposed appropriation would continue to be given in the same manner as required by law. Under current law, notice is given to all record title owners and all persons holding water permits located within one mile of the proposed point of diversion, and to all municipal or public use water facilities located in the county where the proposed water appropriation site is located. The notice is also published in the official county paper. The notice contains facts related to the proposed appropriation such as the place of appropriation, amount of water, and the use. This bill changes the content of the notice by requiring the notice to also state the date written comments regarding the proposed appropriation must be filed with the State Engineer.

Once comments are received, the State Engineer would conduct the evaluation required by N.D.C.C. § 61-04-06. Pursuant to that section, a permit may only be issued if the State Engineer finds that the rights of prior appropriators will not be unduly affected, the proposed means of diversion or

construction are adequate, the proposed use of water is beneficial, and the proposed appropriation is in the public interest.

During the evaluation, the State Engineer would consider all comments filed. Knowing what the concerns may be regarding a proposed appropriation will assist the State Engineer in determining whether the criteria in N.D.C.C. § 61-04-06 will be met. Once the evaluation is complete, the State Engineer will issue a recommended decision.

Anyone who filed written comments will receive a copy of the State Engineer's recommended decision on the application and the basis for the recommendation. Within 30 days of receiving the recommended decision, the applicant and any person who filed written comments can file additional written comments with the State Engineer or request a hearing on the application or both. If no request for a hearing is made, the State Engineer will consider the additional comments, if any are filed, and issue a final decision. If a request for a hearing is made, the State Engineer will designate a time and place for the hearing and notify the applicant and any person who filed written comments of the date and time of the hearing. The State Engineer will consider the testimony and any other information presented at the hearing and issue a final decision on the application.

This change will also allow the State Engineer to more efficiently comply with the Administrative Agencies Practices Act. Currently, the State Engineer's office receives written comments up through the date of the hearing and oral and written testimony at the hearing. The State Engineer considers the comments and, if necessary, conducts an analysis of the issues raised. This often requires the State Engineer to conduct further investigations or utilize other relevant information and evidence. Under N.D.C.C. § 28-32-07, an administrative agency can use other evidence and information or conduct further investigations provided a copy of any of the information used is provided to all parties to the proceeding and all parties are given the opportunity for another hearing. Current procedures can result in the State Engineer holding two hearings.

With the proposed change, all comments, concerns, and objections should be filed in writing with the State Engineer's office by the date specified in the notice. The State Engineer's office would be able to address the concerns in the initial evaluation of the application. This will allow the concerns of all parties to be addressed in one hearing and meet the requirements of N.D.C.C. § 28-32-07. Attached is a table that lists the steps in the water permit application process.

The second change proposed in Senate Bill 2107 relates to the evaluation of water permit applications. The State Engineer's office has 11 hydrologists and water resource engineers who are assigned responsibility for several water sources within geographical areas of the state. The hydrologist or water resource engineer becomes knowledgeable about the hydrologic and geologic characteristics of that geographic area and is responsible for evaluating water permit applications in the geographic area of expertise. When an application is received, the hydrologist or water resource engineer conducts an independent evaluation of the application based on the criteria set out in N.D.C.C. § 61-04-06, as

described earlier, and makes a recommended decision to the State Engineer on the proposed application.

The North Dakota Administrative Agencies Practices Act, N.D.C.C. § 28-32-12.2(1), appears to prohibit the hydrologist or water resource engineer who evaluates the application from making a recommended decision on the application to the State Engineer. The change proposed in this bill would allow the hydrologist or water resource engineer to conduct the evaluation of an application and make the recommendation on it to the State Engineer. This will allow the State Engineer's office to continue to efficiently utilize staff resources and prevent the duplication of efforts that would be required if one project manager conducted the evaluation and another project manager was required to conduct another analysis and make the recommended decision.

Both the State Engineer and the State Water Commission support Senate Bill 2107 and request your favorable consideration of the bill.

Thank you.

CURRENT PROCEDURE

Application

Notice by certified mail

Advertisement of application and notice of hearing

Hold hearing

Analysis of application and decision

..... If hearing record held open, provide copy of analysis and decision to all parties giving 30 days to request data, request an additional hearing, or provide additional comments

Hold additional hearing if requested

Consider additional comments and make a final decision

..... If hearing record not held open, issue the final decision

PROPOSED PROCEDURE

Application

Notice by certified mail

Advertisement of application and notice to provide written comments by a specified date

Receive written comments, prepare analysis and recommended decision

Copy of analysis and recommended decision to parties providing comments and advise additional comments can be provided or a hearing requested

If hearing requested, notify all parties and hold hearing

Consider information presented at hearing, issue decision

If no hearing requested, prepare final decision



Office of the State Engineer

MEMORANDUM

TO: Senate Committee on Natural Resources
FROM: David A. Sprynczynatyk, State Engineer
SUBJECT: Information in support of SB 2107
DATE: January 15, 1999

In response to the request for additional information regarding the water permit application process, the following is a summary of the interest and concerns presented at all hearings held in 1998 for water permit applications.

Number of hearings	126
Number of hearings with letters from landowners	26
Number of hearings with letters from state and federal agencies	62
Total number of hearings at which letters were submitted	77
Number of hearings at which people appeared to give verbal testimony	15
Number of hearings with no letters or verbal testimony	44

The state and federal agencies include the U.S. Fish and Wildlife Service, State Department of Health, State Land Department, and State Game and Fish Department. Attached is a list of the hearings with the parties to each hearing.

Also attached is a copy of the legal notice for a permit application as required by current law. I have also made a mock up of showing how that notice might change if SB 2107 becomes law.

For your information I have provided a copy of two decision memos for two water permit applications, one contested and one uncontested, to show the record of analysis for each. Copies of memos like these would go to each party of record for further comment or a hearing could be requested and held before a final decision. Currently, when an application is contested and a request is made to leave the hearing record open, the opportunity is provided to parties of record to request another hearing or to provide additional comments. This is done in an effort to comply with N.D.C.C. Chapter 28-32, the Administrative Agency Practices Act. SB 2107 will eliminate the potential need for a second hearing because all concerns regarding the proposed appropriation will be known before the recommended decision is prepared, and a subsequent hearing will focus on the manner in which those concerns are addressed, which will comply with N.D.C.C. 28-32.

To address a concern expressed by Senator Traynor regarding the ability of the State Engineer to call a hearing, the following amendment is offered.

On page 2, line 15, after the second comma, insert "or if the state engineer determines a hearing is necessary to obtain additional information to evaluate the application or to receive public input,"

Then the entire sentence would read:

"If a request for a hearing is made, or if the state engineer determines a hearing is necessary to obtain additional information to evaluate the application or to receive public input, the state engineer shall designate a time and place for the hearing and serve a copy of the notice of hearing upon the applicant and any other person who filed written comments."

Permit #	Pri. date	Applicant	letters received	appeared at hearing
4944	4/1/98	Heuchert/Vititson amend 4944		
5138	7/7/98	Ty Dewitz (amend #5138)		LO
5171	1/27/98	Pembina Co. WRD		LO-1
5172	10/13/97	Leroy Wieland	FW	LO-3
5173	10/17/97	Victor Wolf		City-4
5174	10/20/97	Mark Krebsbach	FW	FW
5175	10/21/97	Richard & Arlene Dragseth		
5176	10/27/97	Armond Barbot	LO-3	
5177	10/31/97	Milton Dobbert		
5178	10/31/97	Edward Martin		
5179	11/3/97	All Seasons Water Users		LO-4
5180	11/3/97	John Stewart		
5181	8/18/97	Eidmann Farm & Ranch		
5182	11/12/97	Terrence Nygaard	LO-2	Water Res. Board
5183	11/13/97	Jay Sandstrom		
5186	7/30/97	Michael Tweed		
5187	11/21/97	Leo Hafner	LO - City	
5188	11/24/97	Ransom-Sargent Water Users	US Bureau	FW-US Forest Ser.
5189	11/26/97	Rodney Rudolph		
5190	11/25/97	Rodney Fuglestad		
5191	12/2/97	US Fish & Wildlife Service	County	
5192	12/5/97	Charles Wallace		
5193	12/5/97	Charles Wallace		
5194	12/12/97	Donald Streifel		
5195	12/22/97	Lee Tjelde		
5196	12/31/97	Walter Streifel	City	
5197	10/24/97	Mike & Eleanore Wolbaum	FW	
5198	10/29/97	Wayne & Marvin Bodvig		
5199	11/12/97	Sarah Bowerman	HD	
5200	12/5/97	Ernie Streifel	HD-FW-Cty-2-LO-3	
5201	12/23/97	Wayne Bodvig		
5202	3/27/98	Berco Resources		
5203	8/11/97	David Hartsoch		
5205	12/26/97	Hawktree Inc.	HD - LO-2	
5206	12/26/97	Hawktree Inc.	HD - LO-1	
5207	1/8/98	Thomas Hansen	HD	
5208	1/9/98	Gerald Berger		
5209	1/9/98	Jeff Berger		
5210	1/9/98	Michael Sitzmann		
5211	1/27/98	Loren Dvirnak		
5213	5/4/98	Westport Oil amend app 5213	FW	
5214	1/16/98	Frank Kraft		
5215	1/26/98	Orrin Nelson	HD	
5216	2/9/98	Walsh Co. WRD	HD	
5217	2/13/98	Kenneth A. Krueger	HD	
5218	2/20/98	Floyd & Mary Anderson	HD	
5219	2/23/98	Samedan Oil Corp	FW	

Permit #	Pri. date	Applicant	letters received	appeared at hearing
5220	2/23/98	James Pojorlie	HD - LO-4	LO-4
5221	2/23/98	James Pojorlie	HD - LO-4	LO-4
5222	2/25/98	Central Plains Water Dist.	LO	
5223	3/4/98	Delores Hegge	HD	
5224	3/4/98	Wayne Jensen	HD - CITY	
5225	3/12/98	USFWS - (Des Lac River)		
5226	3/27/98	Kevin Pleines	HD	
5229	3/2/98	US Fish & Wildlife Service		
5230	3/9/98	Duncan Oil		
5231	3/9/98	Glen Solberg	HD	
5232	3/18/98	Robert Weisgarber	HD - LO	
5234	3/19/98	Mary Schmidt	HD	
5235	3/20/98	David & Bridget Kjorstad	HD	
5236	3/23/98	Darrell Mangel	HD - LO	
5237	3/25/98	Collins & Ware, Inc. # 1		
5238	3/25/98	Collins & Ware, Inc. # 2		
5239	3/30/98	Terry Smith	HD	
5241	3/27/98	Helen Sveen		
5242	1/28/98	Joseph & Betty Wettstein	HD - LO	
5243	2/6/98	Breker Farms	HD	
5244	4/19/98	Lakeview Golf Course	FW - HD	
5245	3/10/98	Steve Melin	HD	
5246	3/28/98	USFWS-(Philbrick Cr.)		
5247	3/26/98	Bjorn Bjornstad	LO	LO
5248	4/14/98	USFWS - (Goodrich Sec. 14)	LO	
5249	4/14/98	USFWS - (Goodrich Sec. 23)	LO	
5250	5/4/98	City of Fargo		
5251	5/4/98	James & Colleen Langerud	NDGF - CITY	
5252	5/4/98	USFWS (Weckerly WPA)	LO	
5253	3/19/98	Monty Carvell		
5255	10/6/98	Richard Nelson	HD	
5256	4/20/98	USFWS - (Billings Lk. North)	LO	
5258	5/13/98	Bis Parks & Rec.	HD	
5259	5/26/98	Dakota Prairie Beef		
5260	5/26/98	Turtle Mt. Chippewa	FW - LO-7	LO-4
5261	6/3/98	Berco Resources, Inc.		
5262	6/4/98	Coteau Properties Co.	LO	LO
5263	10/29/98	Myron Carlson	HD - LO	
5264	4/20/98	USFWS - (Billings Lk center)	LO	
5265	7/30/98	Glen Ullin Park District	NDGF	
5266	5/19/98	Pius Black	HD - FW	
5267	7/1/98	Arthur Schmidt		
5269	8/4/98	Wayde Atkinson		
5270	8/4/98	US Fish & Wildlife - Cannonball		
5271	8/6/98	Ardean Skogen	HD - LO	LO
5272	8/10/98	USFW Cedar Creek - (NE 34)		
5273	8/10/98	USFW Cedar Creek - (SE 34)		
5275	7/28/98	Vernon Klose	HD - LO	

Permit #	Pri. date	Applicant	letters received	appeared at hearing
5276	8/24/98	Wayne & Rita Oakland	LO	
5277	8/18/98	Ron Undlin	FW - LO	
5278	8/24/98	US Fish & Wildlife Service		LO-3
5279	8/24/98	US Fish & Wildlife Service		
5280	9/10/98	Robert Barton	HD-FW-NDGF L.Dept	
5282	12/5/97	Marlow Flanders	HD	
5283	1/29/98	James Bodvig	HD	
5284	2/6/98	William Jebb	HD	
5285	2/17/98	Jon Dobbert	HD- FW - L.Dept	
5286	2/19/98	Richard DeWitz	HD	
5287	1/20/98	Myron Strom	HD - L.Dept	
5288	2/26/98	Don Morlock	HD	
5289	3/12/98	Curtis Hanson	HD - L.Dept	
5290	9/22/98	Irene Metzen	HD	
5292	3/19/98	Raymond Guthmiller	HD	
5293	3/23/98	Bill, Jeff and Kent Van Ray	HD - FW - L.Dept	
5294	5/19/98	Kevin Pleines		
5295	6/4/98	Richard Neustal	HD	
5296	1/18/98	Anne Ongstad	HD - FW	
5297	1/18/98	Anne Ongstad	HD - FW - L DEPT	
5298	1/18/98	Ward Whitmann	HD - FW - L DEPT	
5299	9/15/98	John Rogstad		
5300	7/16/98	Van Amundson	HD - L. Dept.	
5302	6/23/98	H.W. White	HD - FW - L.Dept	
5304	6/25/98	Larry Koester	HD	
5305	6/30/98	Jack Streyle	HD - LO	
5306	7/2/98	Charles, Jean & Thomas Bon	HD - FW	
5307	7/6/98	Clyde Trautmann	HD - FW	
5310	10/6/98	Duncan Oil		
5311	10/6/98	Duncan Oil		
5316	11/5/98	Helen Sveen	HD	
Total permit applications =126				
HD= Health Dept./ FW= Fish & Wildlife Service				
LO= Land owner/NDGF=ND Game & Fish				
L.Dept = ND State Land Department				

NOTICE OF HEARING

ON PETITION FOR APPROPRIATION OF WATER
FROM GROUND-WATER SOURCES

TAKE NOTICE that Greg A. Marquardt, Pettibone, North Dakota, has made application to the State Engineer of North Dakota for a permit to divert and appropriate water from ground-water sources.

The petition prays for a permit to appropriate water from ground-water sources utilizing point(s) of diversion located in the NE1/4 and SE1/4 of Section 8; and in the SW1/4 of Section 9; all in Township 142 North, Range 70 West, at a pumping rate of 1200 gallons per minute during the operating season, for each year said permit may remain in force, with an annual appropriation of 200.0 acre-feet of water, for the purpose of irrigating 128.0 acres located in the SW1/4 of Section 9, Township 142 North, Range 70 West, in Kidder County, North Dakota, and as shown on the map accompanying the application.

TAKE NOTICE further that the State Engineer will consider said application in the State Office Building second floor conference room, 900 East Boulevard, Bismarck, North Dakota, on the 20th day of October, 1997, at the hour of 1:00 o'clock PM on that date, at which time and date all persons interested may present their views in person or in writing.

If auxiliary aids or services such as readers, signers, or Braille material are required, please contact the North Dakota State Water Commission, 900 East Boulevard, Bismarck, North Dakota 58505; or call (701) 328-2754 at least seven (7) working days prior to the hearing. TDD telephone number is (701) 328-2750.

Dated at Bismarck, North Dakota, on September 15, 1997.

/S/ David A. Sprynczynatyk
State Engineer
900 East Boulevard
Bismarck, ND 58505

NOTICE OF HEARING MAILED TO THE
KIDDER COUNTY WRD BOARD MEMBERS,
G&F, F&WS, AND NRCS ON SEPTEMBER 15, 1997

TO BE PUBLISHED IN THE STEELE OZONE PRESS,
STEELE, ND, ON SEPTEMBER 23 AND 30, 1997

NOTICE OF HEARING

ON PETITION FOR APPROPRIATION OF WATER
FROM GROUND-WATER SOURCES

TAKE NOTICE that John Doe, Anywhere, North Dakota, has made application to the State Engineer of North Dakota for a permit to divert and appropriate water from ground-water sources.

The petition prays for a permit to appropriate water from ground-water sources utilizing point(s) of diversion located in the NE1/4 and SE1/4 of Section 8; and in the SW1/4 of Section 9; all in Township 142 North, Range 70 West, at a pumping rate of 1200 gallons per minute during the operating season, for each year said permit may remain in force, with an annual appropriation of 200.0 acre-feet of water, for the purpose of irrigating 128.0 acres located in the SW1/4 of Section 9, Township 142 North, Range 70 West, in Kidder County, North Dakota, and as shown on the map accompanying the application.

TAKE NOTICE further that the State Engineer will accept written comments from all persons having an interest in the application until 5:00 p.m. Central Standard Time, March 31, 1999. The comments must be submitted to the Office of the State Engineer, 900 East Boulevard Avenue Dept. 770, Bismarck, North Dakota 58505-0850. The comments will be considered in preparing a recommended decision on the application, which will be provided to all persons submitting comments for their consideration, at which time they may provide additional comments, request a formal hearing, or both.

Dated at Bismarck, North Dakota, on March 1, 1999.

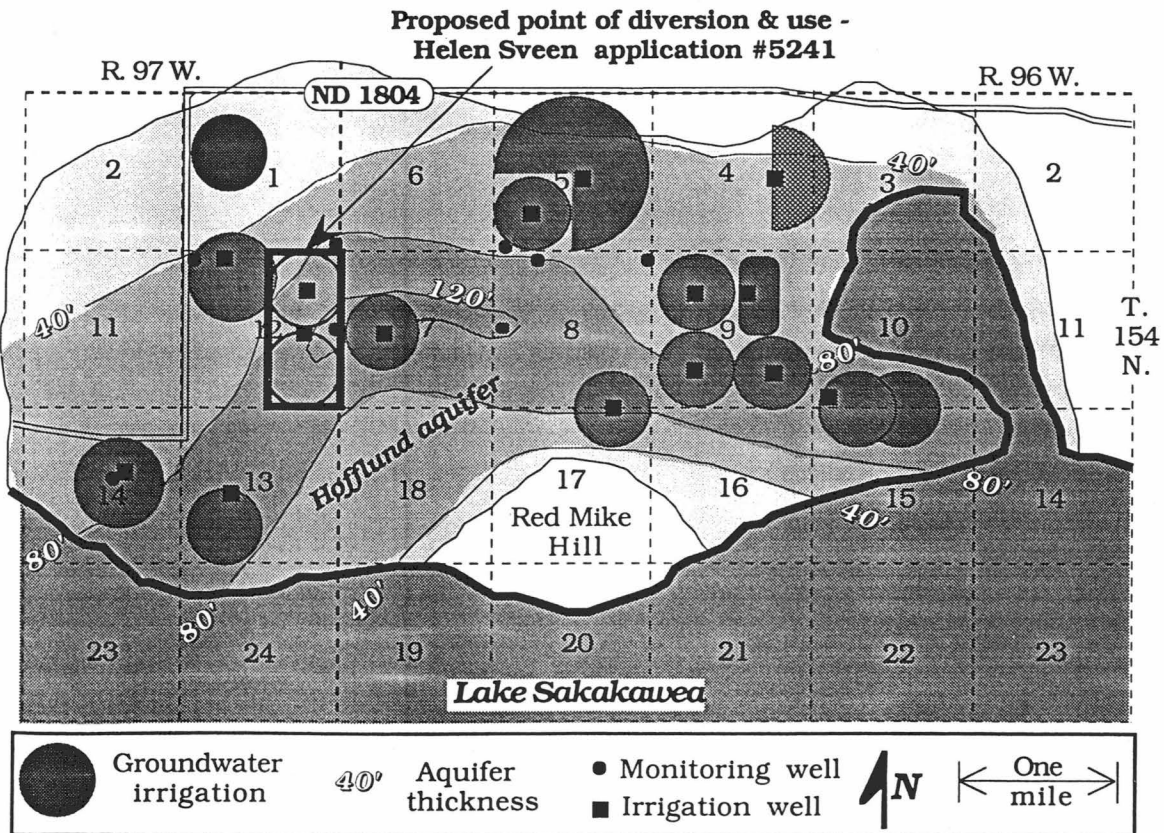
/S/ David A. Sprynczynatyk
State Engineer
900 East Boulevard
Bismarck, ND 58505

North Dakota State Water Commission
Office Memo

To: David Sprynczynatyk, State Engineer, through *MOZ*
Milton O. Lindvig, Director, Water Appropriations Division
From: Alan Wanek, Hydrologist
Subject: Helen M. Sveen water permit application #5241
Date: 30 October 1998

Proposed irrigation project:

Helen Sveen water permit application #5241 is for use of 410 acre-feet of water per year to irrigate 272 acres of land at a maximum pumping rate of 1,600 gallons per minute. The point of diversion is proposed to be in the east half of Section 12, T. 154 N., R. 97 W., overlying the western part of the Hofflund aquifer, as shown below. The priority date is 27 March 1998. The permit application hearing took place on 14 September 1998.



Irrigation wells and pivot systems were installed for the project in the spring of 1998. The irrigation wells are located near the northern center pivot and 1/4 mile north of the southern center pivot, near the quarter line.

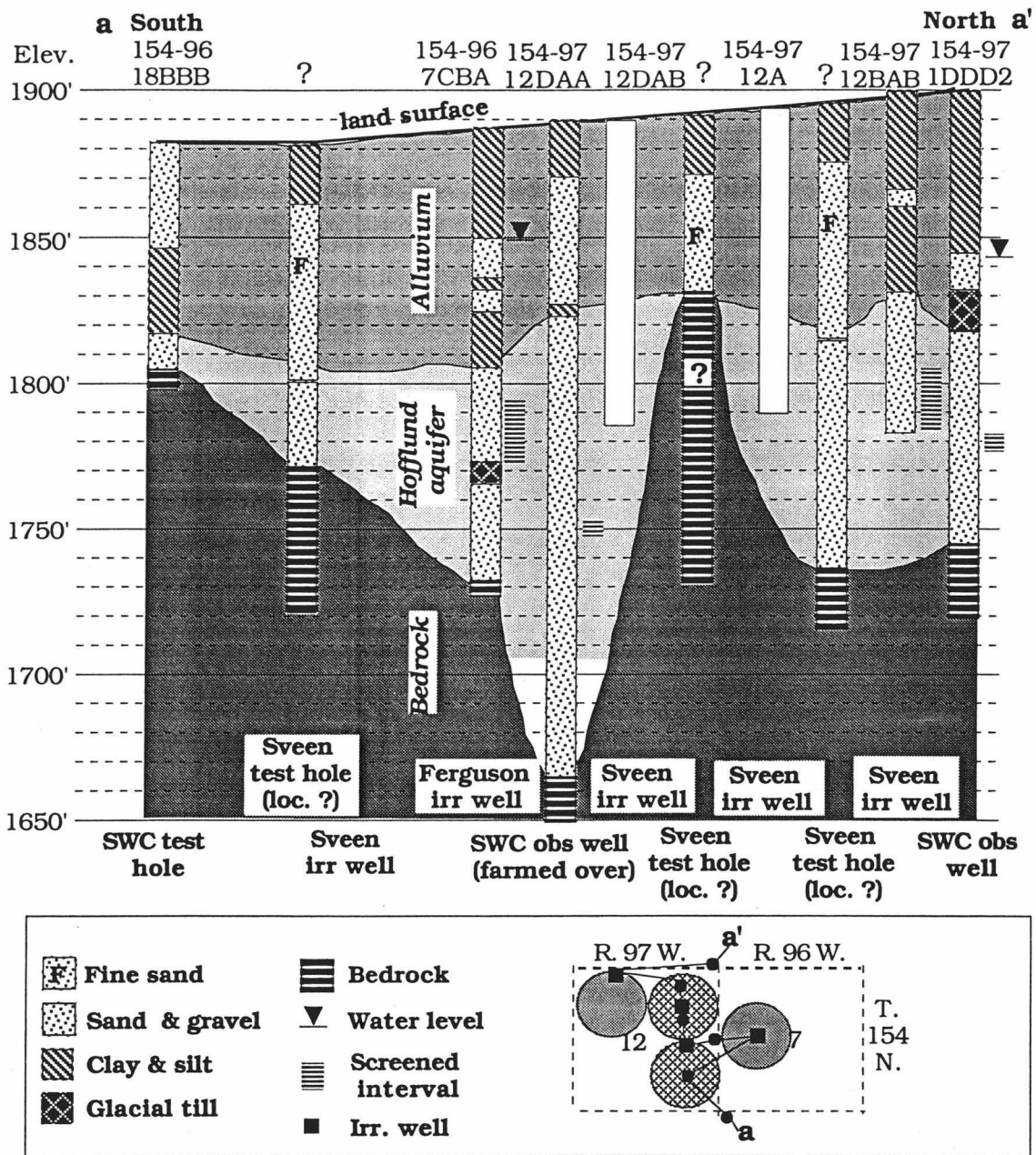
The irrigation system was operated during the summer of 1998 under authorization of a temporary water permit. The wells and systems had been installed prior to approval of a permit apparently due to miscommunication among the owner, renter, irrigation supply company, and driller. That the wells were installed before a water permit was issued has been addressed elsewhere.

Hydrogeology of the area:

The Hofflund aquifer underlies the Nesson Valley, a three by five mile terrace along the north side of the Missouri River valley, overlooking Lake Sakakawea. The terrace is at an elevation of about 1860 to 1900 feet above sea level. Land surface is underlain by sandy, silty, argillaceous alluvium, glacial till, sand and gravel comprising the Hofflund aquifer, and bedrock.

The Hofflund aquifer near the proposed project area consists of sand or sand and gravel extending from about 80 feet depth to an irregular bedrock surface, sometimes at about 150 feet depth, as shown on the south to north cross section on the next page. The base of the aquifer is at about 1750 feet elevation but extends to about 1675 feet elevation in two test holes. The irrigation wells for the proposed project extend into the upper part of the aquifer, as mapped from area test drilling.

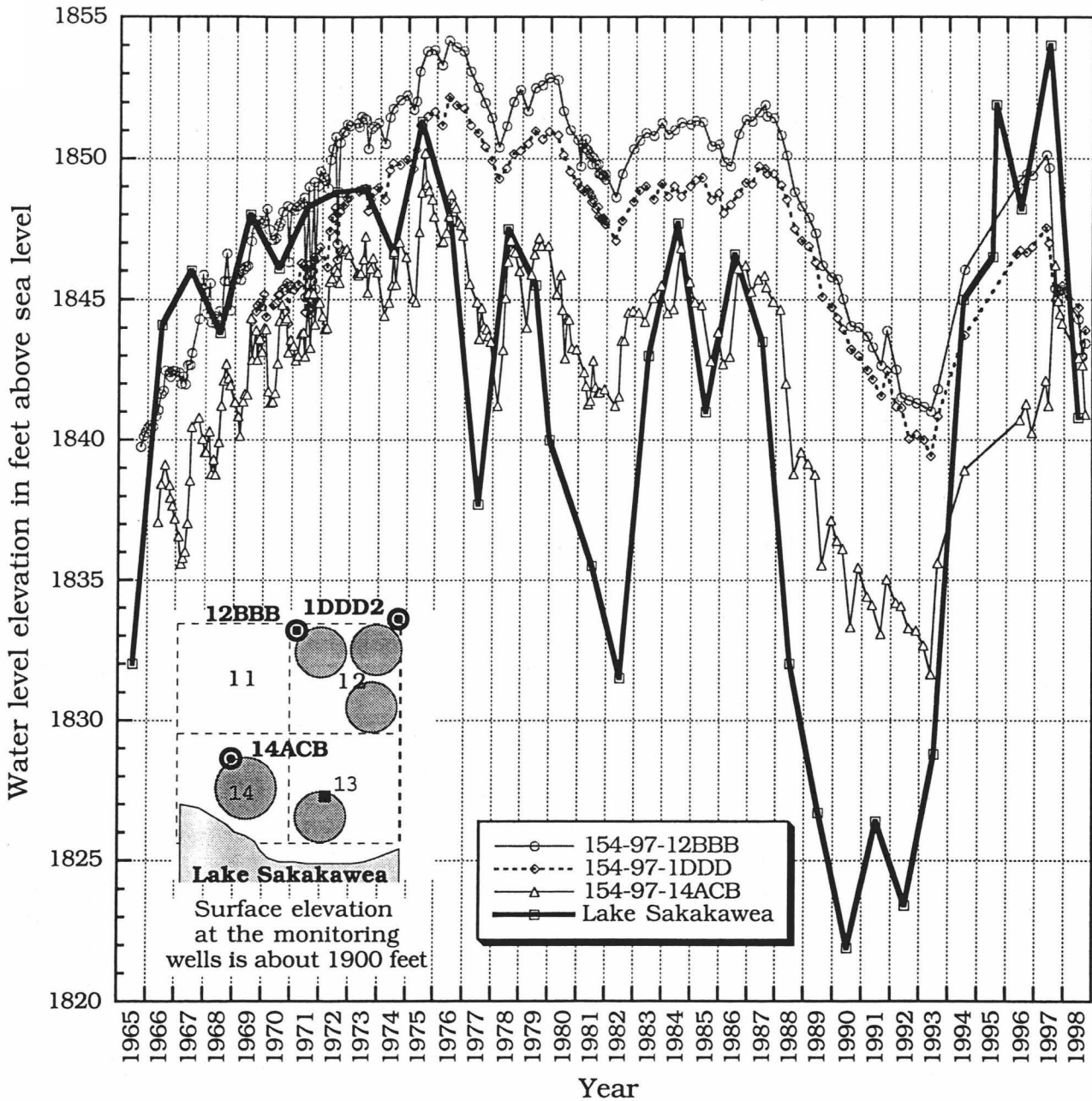
Aquifer water levels are about 55 feet below land surface and are influenced by the level of Lake Sakakawea. The Hofflund aquifer interval extends from the approximate low water level of Lake Sakakawea in recent years (about 1820 feet elevation) to the approximate probable level of the base of the alluvial valley fill underlying the lake.



South to north cross section in the western Hofflund aquifer

Water levels in the Hofflund aquifer are influenced by the level of Lake Sakakawea. Water levels in the monitoring wells in the western Hofflund aquifer, along the north side of Section 12 and one mile southwest of the proposed development are shown on the hydrograph on the next page, along with a June 30 annual water level elevation of Lake Sakakawea (at Riverdale).

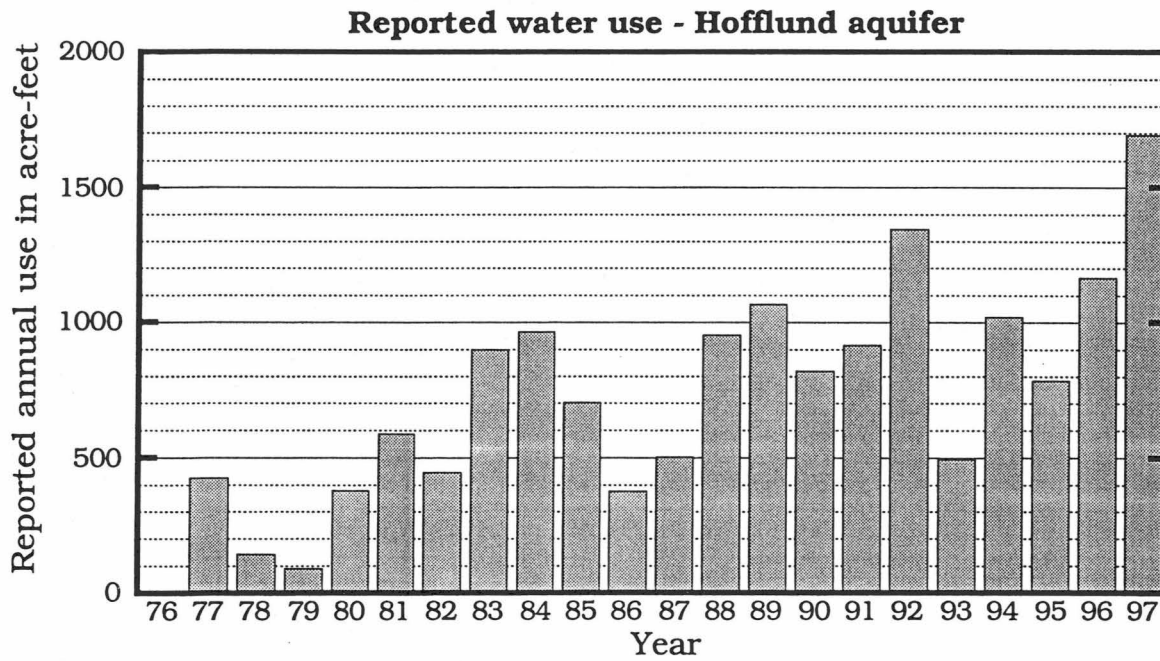
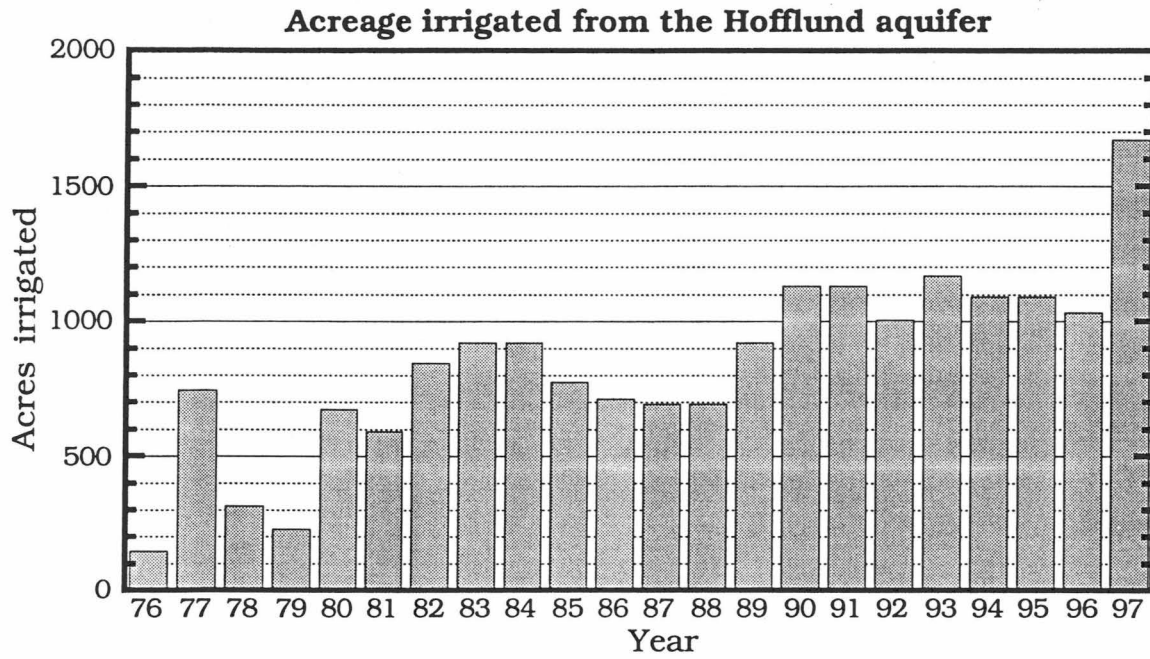
Water levels - western Hofflund aquifer



Water use:

About 1100 acres of land have been reported irrigated in recent years using water from the Hofflund aquifer. In 1997 irrigated acreage increased to 1670 acres. About ten inches of water are reported applied annually over the irrigated land, plus or minus about five inches,

depending on weather conditions. Acreage irrigated from ground water and reported annual water use are shown on the following graphs.



Criteria for issuance of a permit:

Section 61-04-06 of the North Dakota Century Code lists the criteria to be considered when evaluating a water permit application. As stated in Section 61-04-06, *The state engineer shall issue a permit if he finds all of the following:*

- 1. The rights of a prior appropriator will not be unduly affected.*

The lake level is the dominant control of aquifer water levels near the proposed project. Based on the level of irrigation development and the size of the aquifer and in particular considering the hydraulic connection of the aquifer to Lake Sakakawea, the Hofflund aquifer is not thought to be overappropriated.

Area senior water users near the proposed project include four irrigation wells located within one mile of the proposed irrigation project. Senior water rights are not expected to be unduly affected by the proposed water use. There were no objections filed with the application or expressed at the hearing.

- 2. The proposed means of diversion or construction are adequate.*

Irrigation wells and pivot systems are in place, completed in the Spring of 1998, as discussed earlier.

- 3. The proposed use of water is beneficial.*

Irrigating cropland is a beneficial water use.

- 4. The proposed appropriation is in the public interest. In determining the public interest, the state engineer shall consider all of the following:*

a. The benefit to the applicant resulting from the proposed appropriation.

Irrigation will give the applicant greater ability to control water distribution to crops, enhance crop yields and provide opportunity for greater crop diversity.

b. The effect of the economic activity resulting from the proposed appropriation.

The higher crop yields possible with irrigation increases economic activity.

c. The effect on fish and game resources and public recreational opportunities.

The effect on fish and game resources and public recreational opportunities from the proposed water use are expected to be negligible.

d. The effect of loss of alternate uses of water that might be made within a reasonable time if not precluded or hindered by the proposed appropriation.

The proposed appropriation is not expected to have an effect on possible future water use from the Hofflund aquifer.

e. Harm to other persons resulting from the proposed appropriation.

Based on the analysis included in this memo, no harm to other persons is expected as a result of development of the proposed appropriation.

f. The intent and ability of the applicant to complete the appropriation.

The appropriation has been completed.

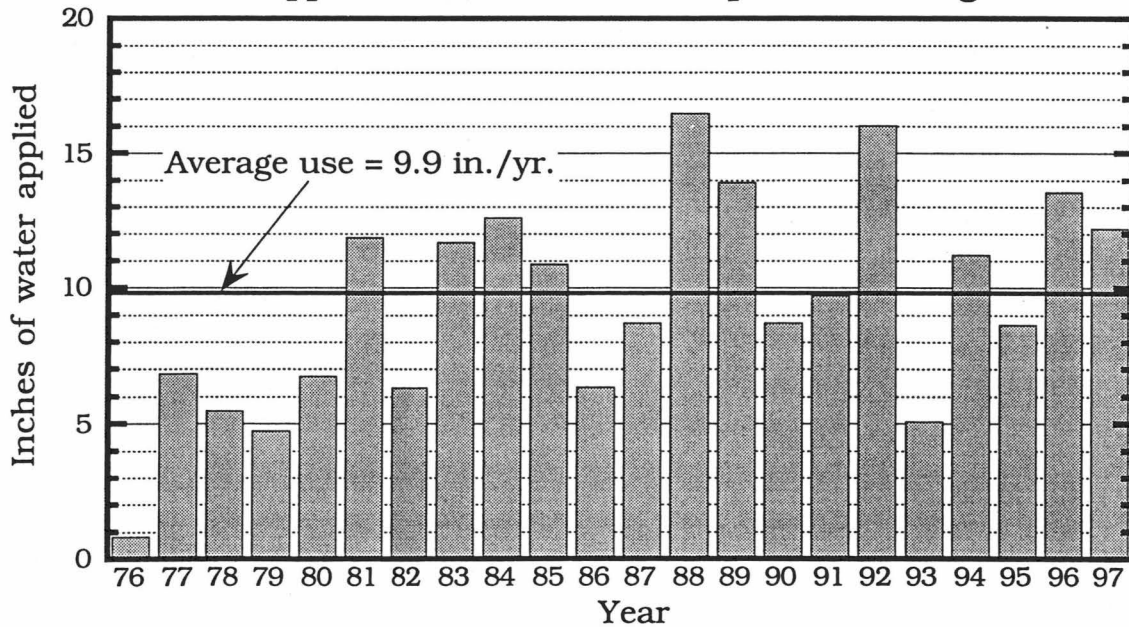
Based on the factors to be considered when evaluating a water permit application it has been determined that the public interest criterion has been met.

Water requirement for the land:

The application is for 410 acre-feet of water to irrigate 272 acres of land (136 acres per pivot), equal to 18.1 inches of water over land (18 inches over 272 acres equals 408 acre-feet). The land proposed to be irrigated is covered by a soil developed on alluvial sediments.

The average annual application of water over the Hofflund aquifer, derived from the reported water use, is shown on the following graph. On average, about six inches of water are reported applied over irrigated land during wet years, about 10 inches are reported during average years, and about fifteen inches are reported during dry years.

Inches of water applied from the Hofflund aquifer over irrigated land



Other recently granted ground water permits from the Hofflund aquifer have been for 18 inches of water per year over the irrigated acreage. The requested 410 acre-feet will be recommended to be granted, rather than to recommend cancellation of two acre-feet.

Point of diversion and planned acreage development:

The proposed point of diversion is the E1/2 of Section 12, T. 154 N., R. 97 W. The irrigation wells are located within the area proposed as a point of diversion and no closer than about 1/4 mile from the perimeter of the area.

Pumping rate:

The applied for pumping rate is 1,600 gallons per minute, equal to 5.9 gpm/acre for 272 acres.

Efficient development of irrigation in the aquifer:

Well driller's reports have not been received for the irrigation wells installed for the proposed irrigation project. Fred Henning, who was present during at least part of the installation, said he thought the wells were about 100 or 110 feet deep. If so, the wells, as shown on the cross section on page 3, may not fully penetrate the aquifer. A standard condition on water permits is,

"The well(s) shall be placed in such a location, constructed to such a depth, have such an efficiency, and pumped at such a rate that will not unreasonably restrict further development of the aquifer systems."

In order that possible future irrigation development in the Hofflund aquifer is not unnecessarily restricted by wells that they may not be

efficiently located in the lower part of the aquifer, the following condition, expanding on the standard condition, above, will be recommended to be added,

"The irrigation wells in the east half of Section 12 of T. 154 N., R. 97 W., may not be completed at such a depth to allow for the efficient development of irrigation using water from the Hofflund aquifer. The presence and use of wells in the east half of Section 12 shall therefore not be sufficient reason for future limitation of development of the aquifer, even though such future development may cause a decline in the water level of the aquifer and thereby reduce the producing capacity of the production wells associated with this permit."

Recommendation:

It is recommended that 410 acre-feet of water per year be granted to irrigate 272 acres of land at a maximum pumping rate of 1,600 gallons per minute. Standard conditions shall apply, with the addition of the condition discussed above. The beneficial use date shall be 1 December 2000.



Alan Wanek, Hydrologist

NORTH DAKOTA STATE WATER COMMISSION
OFFICE MEMO

TO: David A. Sprynczynatyk, State Engineer through Milton O. Lindvig, Director Water Appropriation Division

FROM: Scott Parkin, Hydrologist; William Schuh, Hydrologist

SUBJECT: Water Permit Application #5141 filed by Greg A. Marquardt

DATE: September 8, 1998

M O Lindvig
W Schuh

Water permit application #5141 was received on June 23, 1997 and requested an annual use of 200 acre-ft of ground water at a maximum pumping rate of 1,200 gpm from points of diversion in the SW1/4 of Section 9 and the SE1/4 and NE1/4 of Section 8, Township 142 N, Range 70 W, Kidder County for irrigation of 128 acres of land in the same SW1/4 of Section 9 (Fig. 1).

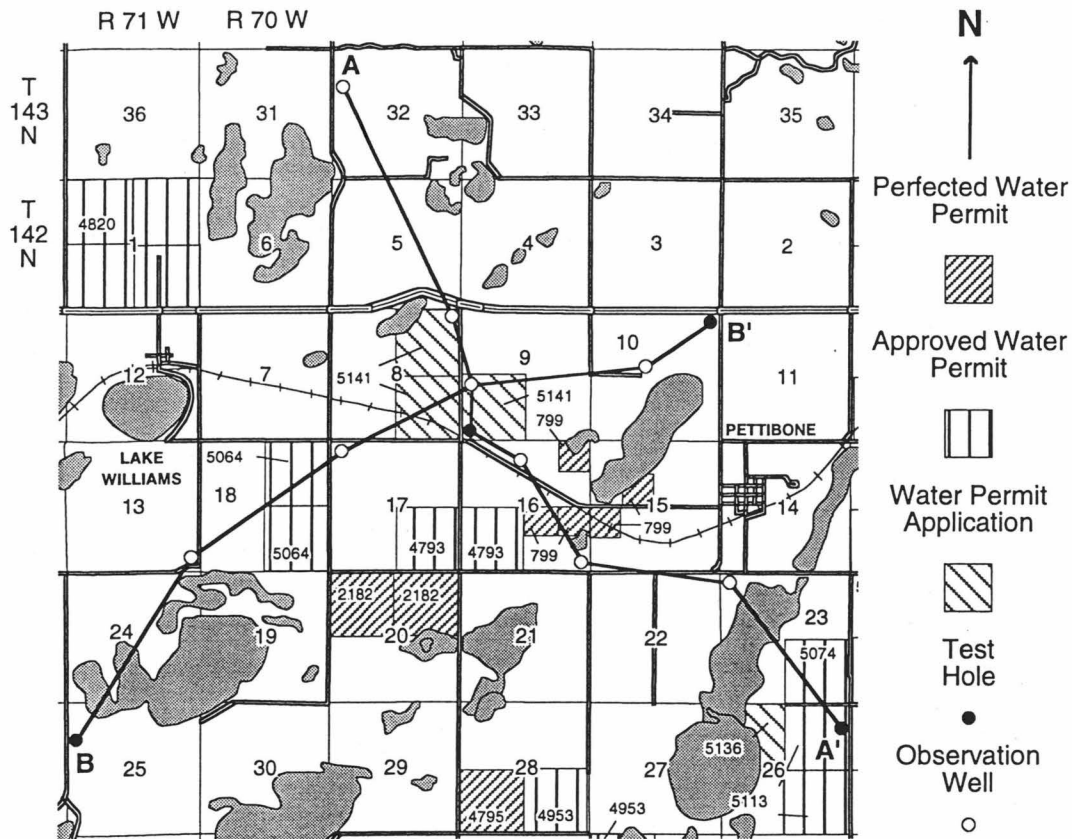


Figure 1. Plan view of the permit application area showing the locations of points of diversion, test holes, observation wells and hydrogeologic sections A-A' and B-B'.

DESCRIPTION OF PERMIT APPLICATION AREA

The proposed water development overlies a portion of the Kidder County aquifer complex. The aquifer complex is comprised of surficial and buried intervals of saturated outwash separated by lacustrine deposits or till or both. Lacustrine deposits and till are commonly aquitards and result in buried confined or leaky-confined aquifer intervals. Surficial aquifer intervals without overlying aquitards are unconfined (Fig. 2).

Recharge to the aquifer occurs from direct infiltration of precipitation overlying the aquifer complex and infiltration of redistributed moisture from adjacent upland areas of till. Natural discharge from the aquifer is due to evapotranspiration of ground water from surficial aquifer intervals.

Recharge commonly occurs in spring. During the winter, snow accumulates and a frost zone develops. Spring meltwater temporarily accumulates in depressional areas and infiltrates after the frost zone dissipates.

Evapotranspiration of ground water occurs within depressional areas. When depth to the underlying water table is less than the combined height of the capillary water zone and the depth of the root zone, the water table is coupled or interconnected with the land surface allowing for discharge of ground water through evapotranspiration. The maximum rate of evapotranspiration occurs when the water table is at or above land surface and decreases with increasing depth of the water table below land surface.

Precipitation during the months of October through May frequently results in spring recharge and higher water-table elevations in surficial aquifer intervals. During the months of June through September, water-table elevations usually decline due to evapotranspiration. However, significant precipitation events during the summer can also result in recharge to the aquifer.

Permanent and semi-permanent wetlands that overlie the Kidder County aquifer complex are frequently "windows" to the local water table. The surface-water level within a wetland often fluctuates with the water table in response to changing climatic conditions. Temporary wetlands that overlie the aquifer complex are shallow depressional areas where surface water accumulates for short periods of time. The depth to the water table underlying a temporary wetland depression is usually greater than the combined height of the capillary water zone and the depth of the root zone. Surface water within temporary wetlands infiltrates and becomes interstitial water or is lost to the atmosphere due to evapotranspiration or both.

Two observation wells are located in the NW1/4 of Section 16 (Fig. 1). Observation well 14207016BAD2 is screened from 29 to 32 ft below land surface within a surficial aquifer interval comprised of sand and gravel (Fig. 2).

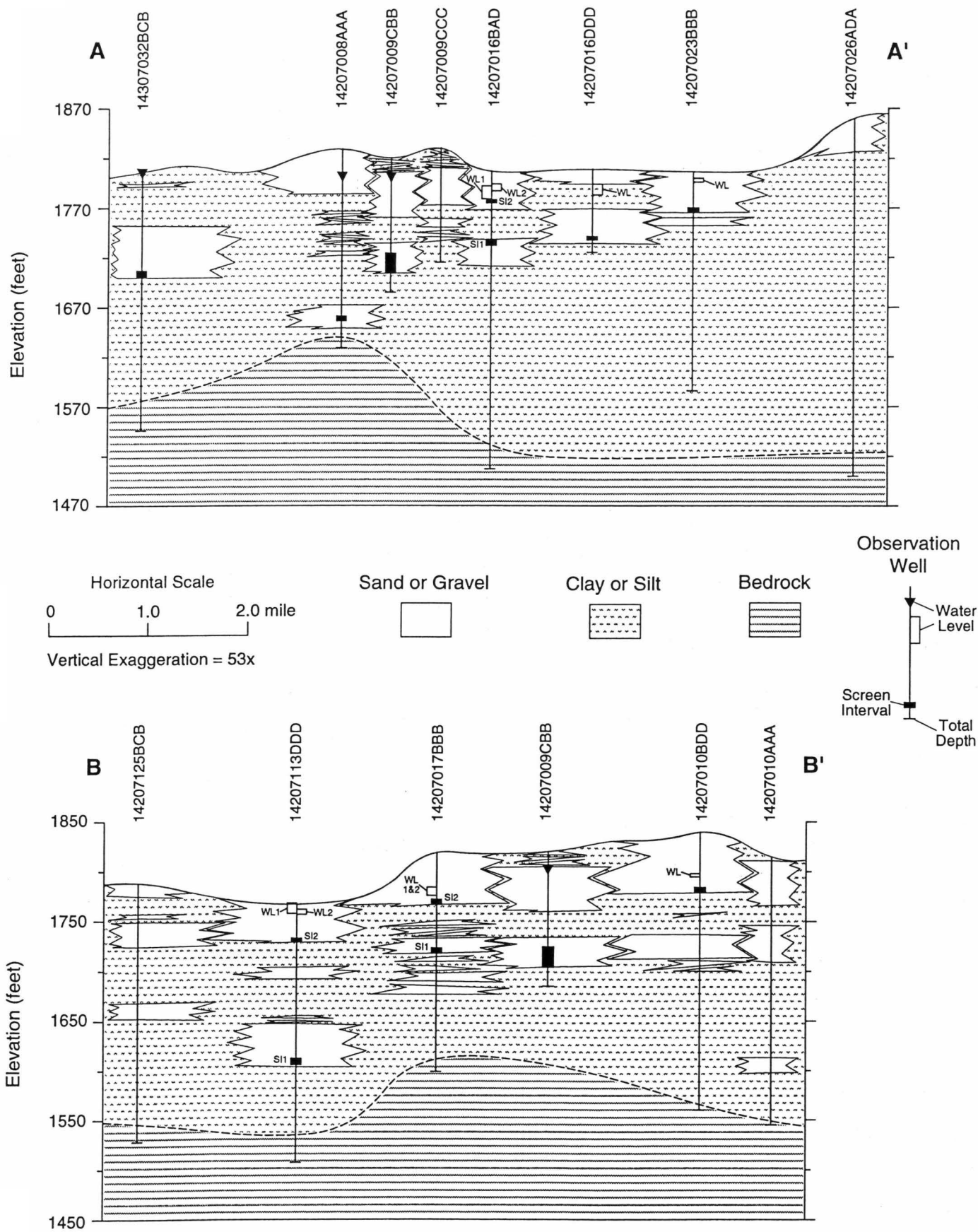


Figure. 2 Hydrogeologic sections A-A' and B-B' shown on Figure 1.

The water-level hydrograph for observation well 14207016BAD2 indicates a long-term pattern of water-level fluctuation in response to changing climatic conditions (Fig. 3).

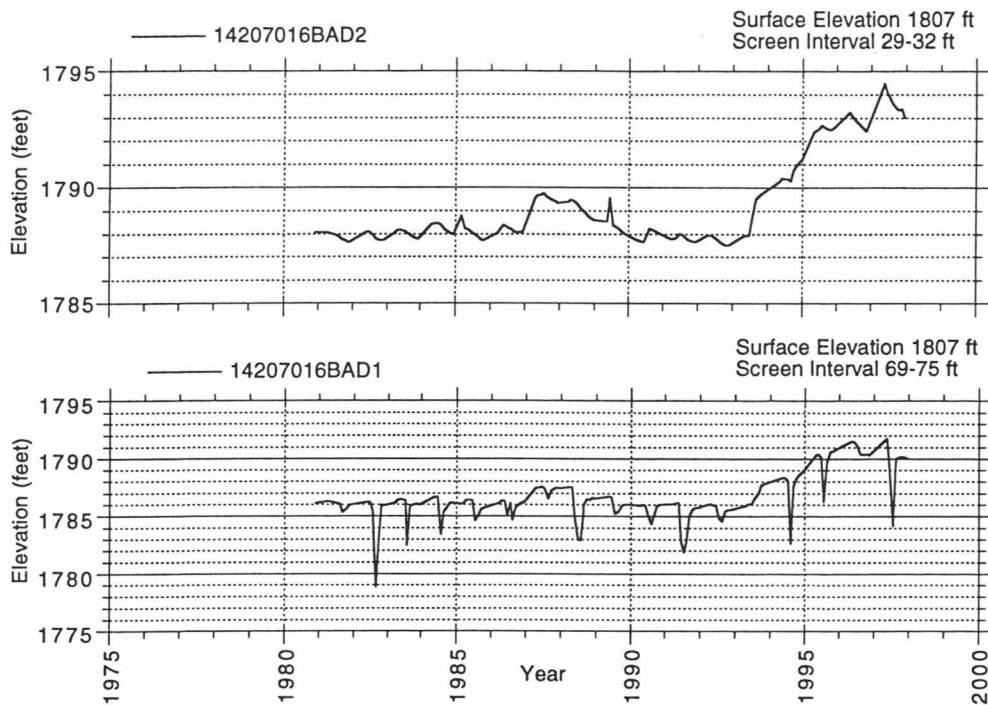


Figure 3. Water-level hydrographs for observation wells 14207016BAD2 and 14207016BAD1.

Observation well 14207016BAD1 is screened from 69 to 75 ft below land surface within a buried aquifer interval comprised of sand and gravel (Fig. 2). The water-level hydrograph for observation well 14207016BAD1 indicates a long-term pattern of water-level fluctuation in response to changing climatic conditions and up to 8 ft of seasonal water-level drawdown and recovery during the irrigation season (Fig. 3).

Two observation wells are located in the northwest corner of Section 17 (Fig. 1). Observation well 14207017BBB2 is screened from 47 to 52 ft below land surface within a surficial aquifer interval comprised of sand and gravel (Fig. 2). The water-level hydrograph for observation well 14207017BBB2 indicates a long-term pattern of water-level fluctuation in response to changing climatic conditions (Fig. 4).

Observation well 14207017BBB1 is screened from 96 to 101 ft below land surface within a buried aquifer interval comprised of sand and gravel (Fig. 2). The water-level hydrograph for observation well 14207017BBB1 indicates a long-term pattern of water-level fluctuation in response to changing climatic conditions and nearly 5 ft of seasonal water-level drawdown and recovery during the irrigation season (Fig. 4).

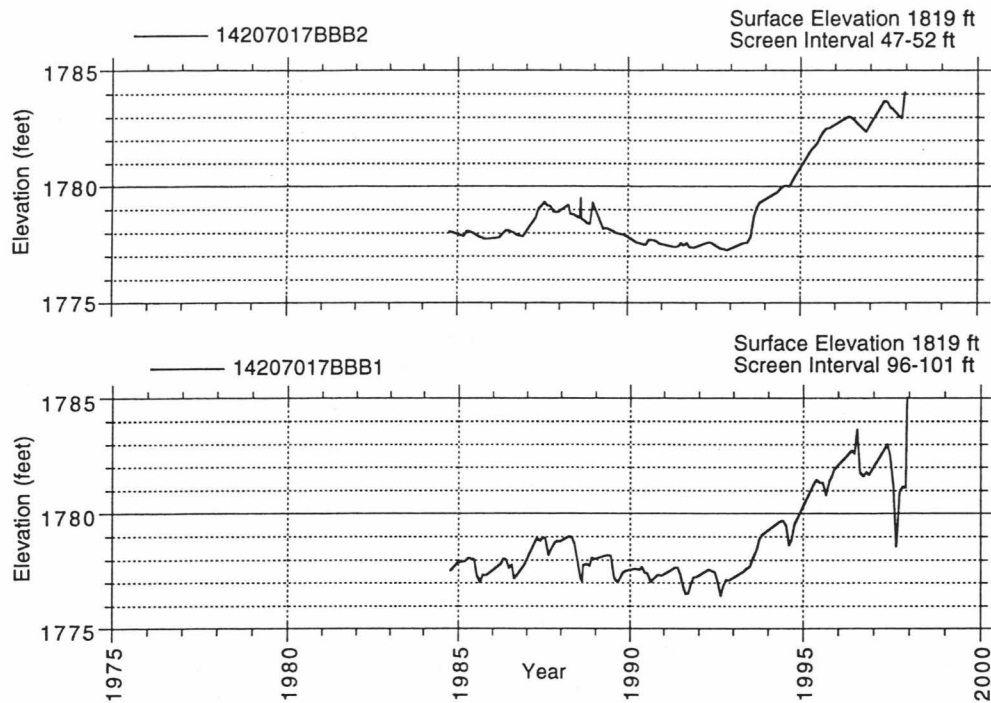


Figure 4. Water-level hydrographs for observation wells 14207017BBB2 and 14207017BBB1.

Test well 14207009CBB was constructed by the applicant near the northwest corner of the SW1/4 of Section 9 (Fig. 1). Land-surface elevation near the test well is about 1,820 ft. The well log indicates near-surface sand and gravel from 15 to 60 ft below land surface and a buried aquifer interval from 86 to 116 ft below land surface. The screen interval for the observation well is from 96 to 116 ft below land surface (Fig. 2).

The top of the buried aquifer interval underlying the northwest corner of the SW1/4 of Section 9 is at an elevation of about 1,734 ft and has a saturated thickness of 30 ft (Fig. 2). The water-level is estimated to be at least 45 ft above the top of the aquifer interval, based on a minimum water-level elevation of 1,779 ft in observation well 14207016BAD1 (Fig. 3). Pumping of the test well indicated a specific capacity of 20.8 gpm per ft of drawdown after 1.5 hours of pumping at a rate of 50 gpm.

Water-quality analyses from water samples collected in observation well 14207016BAD1 indicate a medium salinity hazard and a low sodium hazard for irrigation application. Ground water from the buried aquifer interval underlying the SW1/4 of Section 9 should be suitable for irrigation of all soils and crops.

At the present time, 3,034 acre-ft of ground water has been appropriated for irrigation of 2,189 acres of land within the permit application area shown on Figure 1. Since the spring of 1996, 1,410 acre-ft of ground water for irrigation of 940 acres of land has been

appropriated and a portion of the irrigation has not been developed. Water use has averaged about 750 acre-ft a year during the last 3 irrigation seasons (Fig. 5). Acres irrigated has averaged about 790 acres per year during the same time period. Maximum water use occurred in 1997 when 982 acre-ft of ground water was used to irrigate 1,083 acres of land. The average annual application of irrigation water has been 10.6 inches per acre during the years of 1976 through 1997.

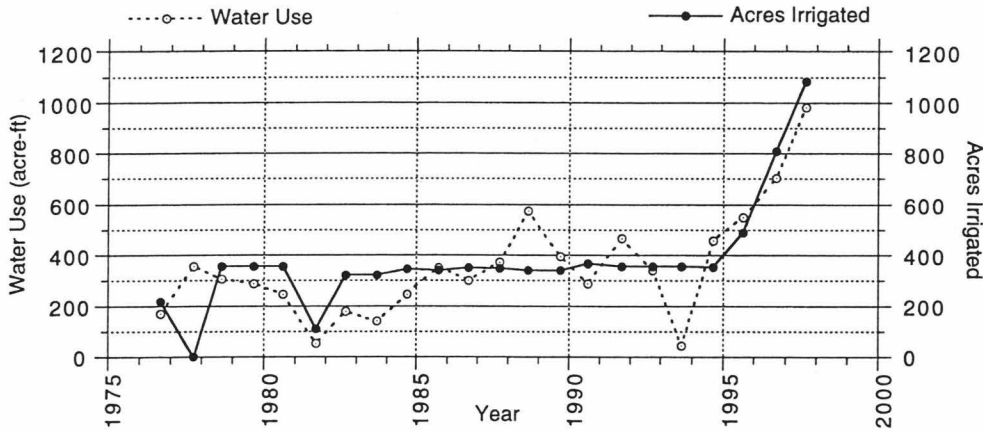


Figure 5. Reported water use and acres irrigated for the permit application area shown on Figure 1.

WATER PERMIT APPLICATION #5141

The applicant plans to construct a center-pivot irrigation system and production well in the SW1/4 of Section 9, Township 142 N, Range 70 W, Kidder County. Water permit application #5141 requests an annual appropriation of 200 acre-ft of ground water at a pumping rate of 1,200 gpm for irrigation of 128 acres of land. The proposed irrigation will result in a maximum annual application of 1.56 ft of water at a rate of 9.4 gpm per irrigated acre of land. The proposed irrigation will require 192 acre-ft of ground water at a pumping rate of 900 gpm, based on a maximum annual application of 1.5 ft of water at a rate of 7 gpm per irrigated acre of land.

The proposed water development must meet the following criteria for issuance of a permit (N.D.C.C. 61-04-06).

1. *The rights of a prior appropriator will not be unduly affected.*

The proposed irrigation will result in seasonal water-level drawdown and recovery within aquifer intervals. However, hydrographs for observation wells in the permit application area indicate that prior appropriators will not be unduly affected. Pumping for

Water Permit #5141 will be from the lower confined unit of the Kidder County Aquifer Complex. Other water permits have been perfected (#799 and #2182) and approved (#4793, and #5064) within two miles of the proposed point of diversion in the northeast corner of SW 1/4 Section 9. Pumping for all of these water permits is from the lower confined aquifer unit (although there appears to be some leakage), with the exception that a portion of permit #799 is from Ranch Lake. As shown on figures 3 and 4 both the lower confined unit and the upper unconfined unit have continued to maintain water pressures well above those of the period before development. Aerial infrared photos taken in 1994 and 1997 indicate that Ranch Lake has also continued to gain water. Finally, points of diversion for all of these prior appropriators are a mile or more from the proposed point of diversion for Water Permit #5141. It is therefore unlikely that Water Permit #5141 will adversely impact the beneficial uses of any neighboring prior appropriators.

2. The proposed means of diversion or construction are adequate.

Production wells must be constructed in compliance with requirements of the North Dakota Department of Health and the North Dakota Board of Water Well Contractors. In 1997 three test holes were drilled in SW 1/4 of Section 9 by Kamoni Water Wells. Results indicated that the Kidder County aquifer complex was locally comprised of about 60 feet of surficial unconfined sand and gravel, and about 30 feet of confined coarse sand and gravel at 86 to 116 feet below land surface. A 1.5 hour pump test at 50 gpm in the northwest corner of SW 1/4 Section 9 indicated a specific capacity of 20.8 gpm/foot. For a saturated thickness of 30 feet this should yield up to 600 gpm from a single well. Two wells in SW 1/4 of Section 9 will likely be required to achieve the desired pumping rate of 900 gpm. Test holes indicate that the proposed pumping rates are likely attainable.

3. The proposed use of water is beneficial.

The use of water for irrigation is beneficial.

4. The proposed appropriation is in the public interest. In determining the public interest, the state engineer shall consider all of the following:

a. The benefit to the application resulting from the proposed appropriation.

The applicant should benefit from irrigation, based on a high potential for increased income.

b. *The effect of the economic activity resulting from the proposed appropriation.*

The proposed irrigation should result in an increase in economic activity, based on increased yield of conventional crops and production of high value crops such as potatoes.

c. *The effect on fish and game resources and public recreational opportunities.*

In a letter dated October 14, 1997, Cheryl Willis of the U.S. Fish and Wildlife Service has expressed concern over proposed "pumpage of up to 200 acre-feet of water, in Kidder County, North Dakota. The proposed points of diversion are located in the NE 1/4 and SE 1/4 of Section 8, and in the SW 1/4 of Section 9, T142N R70W, for the purpose of irrigating 128 acres located in the SW 1/4 of Section 9, T142N R70W." In the letter of October 14, it is stated that the Service "is concerned about the impacts of these proposed diversions, as all of Section 8 and the S 1/2 of Section 9, T140N, R70W are covered by a wetland easement and are part of the National Wildlife Refuge System." The Service notes in particular "A significant wetland is located in NW 1/4 Section 8 and may be impacted by ground-water pumping. If the wetland area is connected to the aquifers, then water table drawdown caused by well pumping would aggravate the effects of annual evaporation losses and climatic cycles " The Service goes on to state that "If pumping adversely affects the wetland area, then the proposed appropriation would not be in the public interest because of (1) the effect on fish and game resources."

First, regarding the amount of pumpage and the locations cited, Water Permit Application # 5141, the amount applied for will be modified to 192 acre-feet rather than 200 acre-feet, and the point of diversion is now only the SW 1/4 of Section 9, T142N R 70W.

Second, regarding the general description of easement locations as all of Section 8 and the S 1/2 of Section 9, no areas are specifically delineated as wetlands in the letter of the Service, except for reference to a "significant wetland " located in NW 1/4 of Section 8. It is therefore somewhat difficult to determine the exact locations of concern to the Service. This assessment will rely on the U.S. Geological Survey 7.5 Minute quad map (flown in 1972), the Soil Survey Map based on aerial photos taken in 1972, Water Commission aerial infrared photos taken in 1994 and 1997, an ASCS photo taken in 1991, a viewing of ASCS slides of aerial photographs taken from the early 1980s through 1996, and visual inspections of the field made on April 13, 1998, and May 19, 1998. A brief overview of surface water on Section 8 and the S 1/2 of Section 9 is as follows.

[1] In NW 1/4 Section 8 the only large wetland is Standish Lake, which occupies an area of about 39.5 acres (based on planimeter measurements on the U.S. G.S. 7.5 minute Series map). Standish Lake extends also into the NE 1/4 of Section 8.

[2] The only other wetland noted in NW 1/4 Section 8 is small, consisting of about 1/2 acre near the midpoint of the NW 1/4 along its eastern border.

[3] An ephemeral wetland of about 4 acres is mapped on the western edge of the border between the NW and SW 1/4 Sections.

[4] In the S 1/2 of Section 9 the only wetland area visible on the U.S.G.S 7.5 m Quad Series map, the Soil Survey Photo, and in the visual inspection of May 16 is about 1/4 of an approximate 11 acre wetland located in the extreme southeast corner. This wetland is adjunct to Ranch Lake, a large body of water located in Sections 10, 15, and 16. Water-level elevations indicate that water in this wetland would likely move through the subsurface to Ranch Lake. Inspection on May 13 indicated that this wetland is currently connected on the surface to Ranch Lake.

[5] Standing water was observed in some locations of the NE 1/4, SW 1/4, and SE 1/4 of Section 8 during a field visit on April 16, 1998. None of these had been mapped as wetlands on the U.S.G.S. 7.5 Minute Series map (1972) or in the Soil Survey photo (1972). Photographic evidence indicates they first appeared in 1995.

Evaluation of Potential Impact

In order to evaluate these likely impacts, the local hydrologic system must be assessed.

Hydrologic Characteristics of Wetlands

Each of the wetlands in question appears to be a window on the water table. All wetlands will be treated as surface exposures of the upper unconfined unit of the aquifer.

Confined or Unconfined?

Well driller's reports from SW 1/4 Section 9 show an unconfined surficial unit of the aquifer from the surface to about 60 feet, and a deeper unit from 86 to 116 feet. The two units are separated by what the driller calls clay. The permit applicant has stated his intention to draw water from the deeper unit. If the unit is fully confined, then the chances

of impact on the wetlands are least. If the upper and lower aquifer units are locally connected, the pumped waters are more likely to effect the surficial unit and surface water bodies.

Local lithology described above indicates that the aquifer in the lower unit proposed for pumpage is confined. However, hydrographs shown in figure 1 indicate a close long-term relationship between piezometric head in stacked piezometers in the surficial and deeper units. Pumping causes some fluctuation of water pressure in the lower units that are characteristic of confinement. This means that short-term direct impact from pumping drawdown on surface wetlands is likely to be mitigated by pumping in the confined unit. One effect of leaky confinement would be to spread the impact of pumping on the overlying unconfined unit over a broader area, decreasing impact on local wetlands. Another effect of partial confinement would be to spread the impact from pumping over time, partially offsetting combined effects of pumping and temporary climatic extremes. In the long term, however, pumping effects on water levels in the leaky confined unit must equilibrate with the overlying unconfined unit.

Assessment of Wetland Impact

[1] Standish Lake is the largest wetland on Sections 8 and 9, and the only wetland of significant size in NW 1/4 Section 8. Standish Lake appears to be a permanent wetland. Slope of the banks approaching the wetland are steep, about 0.05 feet per foot, and from the shore of the wetland bottom appears to drop off quickly. Local landowners of long tenancy have stated that Standish Lake retained water throughout the 1930s while other larger water bodies in the area, including Ranch Lake, were dry. If Standish Lake is viewed as an exposure of the unconfined upper unit of the aquifer, and its surface elevation is controlled by the local ground-water surface elevation, then the short-term effect of pumping from the upper unconfined unit at 125 and 190 acre-feet per year from a point about 4,000 feet from the lake would be less than one inch (Table 1). While the effect of long-term pumping under unconfined conditions may be greater than this, pumping from the confined unit would mitigate this effect, depending on the permeability of the confining layer. Even if several inches of drawdown were to occur, it would comprise only a small portion of the increase in the area water table (> 5 feet), and a very small portion of the depth of the lake itself. Such minor relative changes would not likely have a major adverse impact on fish and wildlife.

[2] The small (1/2 acre) wetland in NW Section 8 lies about 5,000 feet from the closest point of diversion in SE 1/4 Section 9. Because of the small size of the wetland, there is a possibility of direct short-term impact from pumping drawdown. A Theis analysis was

conducted for 100 days of pumping for a total of 190 acre-feet (average overall rate of 82,764 cubic feet per day) and 125 acre-feet (average overall rate of 54,450 cubic feet per day) with a K of 150 feet per day, a saturated thickness of 25 feet, (transmissivity is 3,750 ft.²/d), and a storage coefficient of 0.20. Drawdown is shown on Table 1.

Table 1. This drawdown after 100 days of pumping in an unconfined aquifer having hydraulic properties described in the previous paragraph.

Annual Pumpage (acre-feet)	Drawdown at 1,000 feet (ft)	Drawdown at 2,000 feet (ft)	Drawdown at 3,000 feet (ft)	Drawdown at 4,000 feet (ft)	Drawdown at 5,000 feet (ft)
125	1.81	0.6	0.18	0.05	0.01
190	2.75	0.92	0.28	0.07	0.02

These results indicate that there is little likelihood of direct impact from pumping drawdown at the wetland in the SE corner of the NW quarter of Section 9. Any potential longer-term effect would be partially mitigated by partial confinement at the point of diversion. Serious damage to fish and wildlife resources from pumpage would not be expected.

[3] An ephemeral wetland of about 4 acres is mapped on the western edge of the border between the NW 1/4 and the SW 1/4 of Section 8. All analyses for wetland [2] discussed above apply to this wetland as well. There is little likelihood of short-term effect from pumping in SE 1/4 of Section 9. Any potential longer-term effect would be partially mitigated by partial confinement at the point of diversion. Serious damage to fish and wildlife resources from pumpage would not be expected.

[4] About 4 acres of an approximate 11-acre wetland are located in the SE 1/4 of Section 9 (figure 7). This wetland is adjunct to Ranch Lake. An aerial infrared photograph taken in 1994 showed separation from Ranch Lake. This is similar to indications from the Soil Survey aerial photo (1972) and the U.S.G.S 7.5 minute quad map (from a 1972 aerial photo). However, an aerial infrared photograph taken in 1997

indicates that the wetland and Ranch Lake are now fully connected, and the open water area of the wetland is now about 3 times (11 acres) that shown in previous photos (about 3 acres). This wetland is located about 5,000 feet from the proposed point of diversion in the NE corner of SW 1/4 Section. Direct impact from pumping, as indicated by Theis drawdown shown on Table 1, would not be significant. Potential long-term pumping impact would be mitigated by partial confinement at the point of diversion. In addition, the hydrologic connection of the wetland with Ranch Lake, a Lake having a surface area in excess of two hundred acres, will buffer the impact of pumping on the wetland.

Under current conditions, wetland [4] is a part of Ranch Lake. Potential effects of pumpage on Ranch Lake were examined for Conditional Water Permit Application #4827 (Memorandum from Craig Odenbach and Kevin Swanson to the State Engineer, 4/12/95), and it was concluded that direct withdrawal of up to 331 acre-feet from Ranch Lake would not adversely impact the lake. Total amounts of pumpage allowed by water permits in the vicinity of Ranch Lake include 331 acre-feet direct pumpage from the lake (Conditional Water Permit #4827) and 114.4 acre-feet of pumpage from ground-water within a half mile of the lake (Water Permit # 799). Aerial infrared photographs taken in August of 1994 and August of 1997 have indicated that, regardless of current water development, Ranch Lake has expanded greatly since 1994, connecting with wetland [4] and flooding low-lying areas in the north half of SW 1/4 of Section 15, Township 140, Range 72.

Under drier conditions, such as those at the time of the 1972 aerial photo for the U.S.G.S. 7.5 Minute Series maps, and apparently as late as 1994 (from the aerial infrared photo cited above), wetland [4] was not connected on the surface with Ranch Lake. Elevations of wetland [4] were slightly higher (1796 feet) than Ranch Lake (1794 feet), and therefore the wetland served as a local recharge area for ground-water flow into Ranch Lake. Under such conditions, any decrease in the wetland elevation in SE Section 8 due to pumping would result in partial compensation through decreased flow into Ranch Lake. Under such conditions decreases in water elevations exceeding 2 feet would result in ground-water movement from Ranch Lake into the Wetland. Thus, even under drier conditions the connection with Ranch Lake would mitigate long-term effects of pumping.

[5] Several flooded low areas were observed in Section 8 on April 16, 1998. An aerial infrared photograph taken in August of 1997 indicated four flooded areas. The largest, in NE 1/4 Section 8, had a total non cropped area of 11.8 acres, and a flooded area of about 6 acres. In SE 1/4 Section 8 an area of about 2 acres is uncropped, and In SW 1/4 Section 8 a non cropped area of about 6 acres with 3 flooded acres are also visible. These can be seen on the appended copy of the aerial infrared photo. In a brief discussion on May 13, 1998, Mr. Greg Marquardt stated that these areas had only been

flooded for a couple of years. Mr. Marquardt's statement is corroborated by the historical record of maps and aerial photos. An aerial infrared photo taken in August of 1994 indicated that these areas were not flooded. The U.S.G.S. 7.5 Minute quad map did not separate any of these flooded areas as wetlands (1972). The Soil Survey aerial photo (1972) showed no water or separation from normal field operations in any of these low areas, and the Soil Survey Map classified these areas as Arvilla Sandy Loam. The Arvilla Series is classified as consisting of "deep somewhat excessively drained soils on glacial outwash plains". On the ASCS aerial photo taken in July or August of 1991, only a small portion of the flooded area in SW 1/4 Section 8 is delineated as a wetland. The largest flooded area in NE 1/4 Section 8 is in CRP, but has no indication of a delineated wetland. Aerial photo slides were viewed in the ASCS office (Steele, ND) on April 16. Photos taken in late summer of 1984, 1986, 1988, 1992, and 1993 all indicated that the flooded areas were normally farmed and were in row crops. Both 1986 and 1993 were wet years. Photos taken in 1995 and 1996 both indicated that the currently flooded area in NW 1/4 Section 8 was wet. It thus appears that these flooded areas are a window on the water table, and represent a gradual and delayed response to recharge resulting from large precipitation and floods in 1993, and subsequent wet conditions. Flooding first appeared in 1995.

The small flooded areas in SW and SE 1/4 Section 8 are 3,000 to 4,000 feet distant from the proposed point of diversion in the northwest corner of NE 1/4 Section 9. Under normal rates of withdrawal, the maximum unconfined drawdown after one hundred days of pumping at these flooded areas would be only about a tenth to a half an inch at the specified distances. The dampening of drawdown effect in the surficial aquifer caused by pumping beneath a partially confining layer, would further mitigate impact.

The larger flooded area in the southeast corner of NE 1/4 Section 8 is located about 1,000 feet or less from the proposed point of diversion. The depth of the flooded area is unknown, but would seem to be less than 4 feet from visual inspection. Direct drawdown under unconfined conditions at this wetland would likely be about 2 to 3 feet after a hundred days of pumpage. This amount of drawdown would be mitigated somewhat by partially confined conditions at the point of diversion. It would also be mitigated somewhat by a local adjustment of the storage coefficient which would be 1 rather than 0.2 where water is fully ponded on the surface. The higher storage coefficient would decrease the rate of loss, but would be partially offset by the tendency of water in the wetland to equilibrate to the level of water in the surrounding aquifer matrix in nearby areas that are not ponded. While the exact loss from this flooded area cannot be quantified with certainty, it is possible that some impact may occur. Impact may be negligible, or it may be sufficient to nearly drain the area.

Although the area discussed in NE 1/4 Section 8 has been flooded since 1995 and is a window on the water table, the wetland status at this location is questionable. According to U.S. Fish and Wildlife Service criteria:

Wetlands are lands transitional between terrestrial and aquatic systems where the water table is usually at or near the surface of the land or covered by shallow water. For purposes of this classification wetlands must have one or more of the following attributes: 1) at least periodically, the land supports predominantly hydrophytes, 2) the substrate is predominantly undrained hydric soil, and 3) the substrate is non soil and is saturated with water or covered by shallow water at some time during the growing season each year. (Cowardin et al, 1979, p3)

First, vegetation at this site does not appear to be hydrophytic. During a road inspection on April 16, 1998, the field had the appearance of a flooded agricultural field, without wetland species. In another inspection on May 19, the flooded area and its surroundings appeared to be covered with pasture grasses. The only species present indicating wet conditions were some sedges on the northeast edge near the county road, and these may have been present before because of proximity to the ditch. Neither does it appear to have been "predominantly hydrophytic" at any time in the recorded past. As discussed above, a historical record of aerial photos dating back to the early 1970s indicates that the field has been a part of the normal crop rotation throughout the period of record until 1995. Thus, the land has no record, even under current flooded conditions, of supporting a predominantly hydrophytic plant community. Second, the soil is not classified as hydric. The soil series mapped is Arvilla which is somewhat excessively well drained. Third, there is no historical record of this location being flooded prior to 1995, and events causing the current flooding seem to be associated with movement of groundwater from recharge areas along the till boundary of the aquifer about two miles north of the flooded area to discharge areas following large floods in the summer of 1993. Similar large increases in water levels have occurred throughout this part of Kidder County, including in established wetlands. It would thus appear that flooding at this location is anomalous and will be transitory, similar to the passage of a flood peak, and will likely disappear on its own as the flood peak passes. Moreover, ASCS aerial photos with delineated wetland areas for CRP in the 1990s show no indication that the newly flooded areas were previously considered as possible wetland locations. For such a transitory phenomenon, it would be difficult to attribute sufficient fish and wildlife value to effect the approval of the proposed beneficial use.

Summary of Impact

With respect to Standish Lake and wetlands in NW 1/4 Section 8, SW 1/4 Section 8, and SE 1/4 Section 9, the potential for water-level drawdown sufficient to cause severe impact on fish and wildlife is unlikely. Newly flooded areas in NE 1/4 Section 9 may be drawn down considerably by pumping, but for such a transitory phenomenon, it would be difficult to attribute sufficient fish and wildlife value to effect the approval of the proposed beneficial use.

d. *The effect of loss of alternate uses of water that might be made within a reasonable time if not precluded or hindered by the proposed appropriation.*

The proposed irrigation should not unduly effect future alternate uses of water in the permit application area.

e. *Harm to other persons resulting from the proposed appropriation.*

The sole issue of potential harm was expressed in a letter dated October 14, 1997, wherein Cheryl Willis of the US Fish and Wildlife Service stated that the "Service is concerned about the impacts of these proposed diversions, as all of Section 8, and the S1/2 of Section 9, T142N R70W, are covered by a wetland easement and are part of the National Wildlife Refuge System." and "If pumping adversely effects the wetland area, then the proposed appropriation would not be in the public interest because of ... (2) harm to the Service and its real property interests;.."

Regarding potential damage to "real property interests of the U.S. Fish and Wildlife Service", a letter received from the applicant on May 12, 1998, indicated that the terms of the U.S. Fish and Wildlife Service easement (dated 7/5/74) specifically exempted Standish Lake. A copy of the letter and easement with the description of the exemption is appended with this memorandum. Affects on other wetlands discernible on the property at the time of the issuance of the easement were discussed above in section (d), should be small in relation to normal climatic variation. The largest likely effect from pumping on local surface water in the described land parcels is the possible decrease in the water level of a newly flooded area of about 11 acres (about 6 acres actually flooded) that has been in existence in NE 1/4 of Section 8 since 1995. As discussed above, this flooded area does not appear to meet the U.S. Fish and Wildlife Service criteria of a wetland. The soil is not hydric, vegetation is not predominantly hydrophytic, and there is no indication that the area was flooded for even a small portion of any year prior to 1995. The flooding of this parcel of land appears to be the peak of the 1995 flood recharge as it passes through the landscape to discharge areas. It is expected to be transitory and to recede on its own, even without the impact of pumping. To deny the proposed water permit to

protect the surface-water level elevation of what is essentially a flood would not meet the public interest factors in NDCC Section 61-04-06.

In addition to likely minor hydrologic impact, there is some question concerning the nature of the "real property interests of the U.S. Fish and Wildlife Service". The referenced rights and interests are stipulated by the terms of an easement. Because the easement is, in some respects, permissive of agricultural activities, and because the easement contains no explicit reference to prohibition of irrigation or pumping, the exact nature of the real property rights of the U.S. Fish and Wildlife Service with reference to the applications of water permit #5141 is not clear, and there appears to be some area of possible legal dispute. It is not appropriate that the State Engineer should make a legal determination over the rights and interests contained in the easement, or that disputes over such rights and interests, if they exist, should be decided by a prohibition of a water permit. These matters should be resolved by U.S. Fish and Wildlife Service and the landowner.

f. *The intent and ability of the applicant to complete the appropriation.*

The applicant apparently has the intent to complete the proposed irrigation development. Based on existing hydrologic information, aquifer intervals underlie the requested point of diversion and the applicant has the ability to complete the appropriation.

The proposed irrigation meets all the criteria for issuance of a permit. Therefore, it is recommended that conditional water permit #5141 should be issued for:

- annual use of 192 acre-ft of ground water at a maximum pumping rate of 900 gpm from the SW1/4 of Section 9, Township 142 N, Range 70 W, Kidder County for irrigation of 128 acres of land in the same SW 1/4 of Section 9.

Conditional water permit #5141 should include the following conditions:

1. The well(s) shall be placed in such a location, constructed to such a depth, have such an efficiency, and pumped at such a rate that will not unreasonably restrict further development of the aquifer system;
2. The well(s) shall be located no less than 660 feet from the east and south perimeter of the SW1/4 of Section 9 described in the permit; any location closer than 660 feet must be approved by the State Engineer prior to the construction of the well;

3. The annular space between the casing of the production well(s) and the drilled hole shall be sealed in accordance with the rules of Water Well Construction and Water Well Pump Installation, Article 33-18;
4. The irrigation well(s) shall be constructed with a measuring port and a tube having a minimum 3/4-inch inside diameter installed in the annular space between the pump column and the well casing and extending to the top of the bowl assembly or submersible pump to allow the measurement of water levels in the well(s). The bottom end of the tube shall be plugged and the bottom 2 feet perforated. Any other facility for water level measurement must be approved by the State Engineer;
5. A completion report for the production well(s) shall be filed with the State Engineer within 30 days of completion of construction, or before the beneficial use of water, whichever ever occurs first. The report shall include, but not limited to, information on the location, depth, length and type of casing used, length and type of screen used, depth to which the annular space was sealed, a log of the materials penetrated by drilling, static water level, and pumping water level;
6. Prior to the beneficial use of water, an automatic backflow prevention device (check valve) shall be installed in the above ground portion of the pipeline near the pump discharge. The injection of fertilizer, pesticides, other chemicals, or crop stimulants into the pipeline shall be downstream from the check valve;
7. Prior to the beneficial use of water, instrumentation shall be installed from which the quantity of water pumped can be determined. The instruments are subject to approval by the State Engineer and shall be available for inspection by representatives of the State Engineer;
8. The pumping rate shall be subject to the results of an aquifer test; and
9. Failure to comply with any order of the State Engineer may result in forfeiture of this water permit.

Of the original water permit application, points of diversion in the SE1/4 and NE1/4 of Section 8, Township 142 N, Range 70 W, Kidder County, annual use of 8 acre-ft of ground water and 300 gpm pumping rate initially requested should be denied and nothing should be held in abeyance. Beneficial use of the appropriated water should occur on or before October 1, 2000.

References

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- USDA-SCS. 1988. Soil Survey for Kidder County, North Dakota.

NORTH DAKOTA STATE WATER COMMISSION
OFFICE MEMO

To: David A. Sprynczynatyk, State Engineer through *M O Z*
Milton O. Lindvig, Director, Water Appropriation Division
From: William M. Schuh, Hydrologist *WMS*
Subject: The letter of the U.S. Fish and Wildlife Service (Cheryl C. Williss),
received July 6, 1998, regarding water permit application #5141.
Date: September 8, 1998

In response to the Draft Memorandum from Scott Parkin and William Schuh to the North Dakota State Engineer (dated May 25, 1998), concerning Water Permit Application #5141, Ms. Cheryl Williss, of the U.S. Fish and Wildlife Service expressed several concerns in a letter to David Sprynczynatyk, dated June 30, 1998. This memorandum is a response to concerns stated in that letter.

Page 1, par 2 and 3. These paragraphs refer to a model used to assess potential impact on Standish Lake in the NE 1/4 and NW 1/4 quarters of Section Section 8, Township 142 N, Range 70 W in Kidder County ND. In it the Service expresses concern over the use of the model, stating that:

"Although we are not directly impacted by the impacts to Standish Lake, we still feel very strongly that you should not be relying on a model that has not been accepted by the water resources community to conduct analyses that become public information" (p1, par 2.)

In the following paragraph (par. 2) the Service raises several specific issues concerning the use of the circular model.

Regarding questions concerning use of the "circular model", we do not believe that the model, which is nothing more than an application of Darcy's law and mass balance principles, applied to simplified boundary conditions for a quick assessment of potential impact, is sufficiently new or original to require publication or presentation to the entire water resource community. However, the statement in the letter that the Service is *"not directly impacted by impacts to Standish Lake"*, and the fact that

Standish Lake is specifically exempted in the text of the lease, are sufficient to indicate no potential harm to the Service with respect to Standish Lake. For this reason, we are withdrawing the circular flow analysis in the memorandum, as applied to Standish Lake.

P1, par. 4, p2, par. 1. The Service states that *"The wetlands were described as "windows on the water table," so the State Water Commission is now recognizing that these wetlands are directly connected to at least the surficial ground water system. The Water Commission also recognizes that the aquifer units may be connected and that pumping from the deep unit may impact the surficial system and, hence, the wetlands."*

The wetlands are, of course, surface exposures of the water table. We are not aware of any instance in which a Water Commission hydrologist has indicated otherwise, nor are we aware of any staff hydrologist who has ever believed that wetlands in Kidder County are not connected "at least to the surficial ground water system". These hydrologic relationships are axiomatic. However, assessment of potential impact of aquifer pumping on any given wetland is more complicated than simply noting "connection". Impact of pumping on a wetland is strongly affected by the local disposition of the wetland, the depth and location of the point of diversion, local lithology with respect to separating or confining layers within the aquifer or underlying the wetland, the distribution and properties of aquifer materials, relative contributions of precipitation, evapotranspiration, surface water and local ground water to the wetland, the amount and timing of pumping stress, and other factors. These processes must be considered in local circumstances to assess local impact on wetlands.

P 2, par 2. "Analysis for the 4 acres of the 11-acre wetland located in SE 1/4 of Section 9 is somewhat difficult to follow.... the discussion goes on to include conclusions reached in an analysis performed for Conditional Water Permit

Application #4827, and discussed Permit #799, yet no cumulative analysis for these three permits is presented."

This discussion (p13, subsection [4]) simply demonstrates that the wetland in question has historically been closely connected with Ranch Lake, has functioned as a recharge wetland for the lake, and is now a part of Ranch Lake. The discussion of the water permits in question pointed out that amounts of water allocated and pumped under water permits #4827 (directly from Ranch Lake and #799 (from local ground-water near Ranch Lake), which are in closer proximity than the proposed point of diversion, have not reduced water levels in Ranch Lake or in the wetland, which have continued to rise and which now have merged. In addition to being about a mile distant from the wetland, the production well planned at the proposed point of diversion is to be placed in a confined aquifer unit. It is unlikely that pumping at that distance from a confined unit will unduly affect the wetland, which is in the surficial aquifer, and the ground-water outflow of which is controlled by the level of a large body of water like Ranch Lake at lower water elevations.

The combination of (1) rising water levels in the wetland under current water-use in close proximity to the wetland; (2) a close hydrologic connection and current merge with Ranch Lake, which contains a large amount of water relative to all current water uses; (3) lack of short-term impact from pumpage under the most conservative (unconfined) Theis drawdown scenario; and (4) the fact that pumping is occurring from what stratigraphic and hydrographic data indicate to be a leaky confined unit a mile distant from the wetland in question, are sufficient to justify the conclusion of little likely impact on the wetland from the proposed development.

"The Service questions the existence of the local ground water divide, given the depiction of regional ground-water gradients in Figure 7 (of the permit memo)."

No model is necessary to prove the existence of the divide. It is demonstrated by eastward water-level gradients from the wetland (el. 1796) to Ranch Lake (el.

1794), and the north-westward gradient from the wetland to Standish Lake (el. 1784) on the U.S.G.S. 7.5 minute series quad map (1972) . Since two gradients oppositely directed must intersect, it is clear that there must be a local ground-water divide between the wetland and Standish Lake at the time of mapping. It is common for two wetlands having different elevations (and therefore a regional-scale gradient) to be separated by a local ground-water divide (0 gradient) where there is an intervening recharge upland.

Page 3, par. 3. *The conclusions regarding the "several flooded low areas" in Section 8 are nebulous: "Impact may be negligible, or it may be sufficient to drain the wetland." ... We agree that these wetlands... as a result of the high "transitory" ground water flood peak caused by the large precipitation in 1993. However, we disagree that these wetlands are not covered under the easement." (Followed by interpretation and text of easement).*

This statement pertains to the discussion of a flooded area in NE Section 8, located near the point of diversion. The discussion in the draft Memorandum from Scott Parkin and William Schuh to the North Dakota State Engineer (dated May 25, 1998) details (1) soil survey information which indicate that this area was classified as well drained to somewhat excessively drained; (2) the aerial photographic record which indicates that throughout the period of record prior to 1995 this area was normally cropped and showed no evidence of even temporary or seasonal flooding; and (3) observations that this area lacks hydrophytic vegetation characteristic of defined wetlands, and would not be classified as "wetlands" under the prescribed definitions of the Service. The discussion in the memorandum indicates that impact on this flooded area from pumping at the proposed point of diversion will likely be small because of confined conditions at the point of diversion which separate the flooded area from the pumped area. However, the provision of possible impact is pointed out because of the possibility of leaky local confinement which we cannot fully ascertain

and quantify with existing information. It is interesting to note that the statement of the Service that :

"These areas have been wet since 1995 and could remain wet for years, during which time the wetland characteristics alluded to on Pages 17 and 18 would become more pronounced. Since they are naturally occurring they are covered under the easement. "

This indicates a belief that any landowner holding an easement must allow any newly flooded area to remain flooded until it acquires wetland characteristics, regardless of field history, climatic conditions, and boundaries of surface waters at the time of and prior to the determination of the easements. Some might dispute this interpretation of the Service's rights under easement, particularly in the light of the Eighth Circuit Court's decision in *U.S. vs. Johansen* 93 F.3d 459 (8th Cir. 1996) .

However, the Service's objection to our statements that these flooded areas are not covered under the easement is understood, inasmuch as the statements constitute a legal interpretation that we are not qualified to make. These matters should be determined by the Service and lease holders. Except for Standish Lake which is specifically exempted in both the lease agreement and in correspondence with the Service, all statements in the memorandum Sections (c) and (e) interpreting the rights of the Service or Landowners are deleted from the final memorandum.

Conversely, neither is it appropriate that the State Engineer should use the water appropriation process to enforce Service's own interpretation of its easements. The Service is aware that there are parties who consider the terms of many leases to be far from clear with respect to delineation of wetland boundaries, and with respect to pumping of ground water. The flooded area in question has always been in routine crop rotation within record and memory, was not present at or before the time of the lease agreement, nor for nearly 20 years after it. It's soil is classified as somewhat excessively well drained, and the site has none of the defining vegetative or

hydrologic characteristics of a wetland under the definition of the Service. In addition, the site has never been recorded as flooded for even part of the year until recent large floods that have been interpreted as disasters in many parts of the nation, including North Dakota. From the standpoint of water appropriation, it would not be reasonable for the State Engineer to deny a water permit for failure to provide absolute certainty that pumping will cause no decrease in the surface elevation of a flooded area under such conditions. To apply such an extreme interpretation would clearly place limits on the beneficial use of water that were never intended in the priority system for beneficial use defined in North Dakota Century Code Chapter 61-04 and in associated administrative rules.

Page 2, par 4 and 5, states that

"the period of expansion (irrigation) occurred during a period of abundant precipitation, and it remains to be seen how the aquifer will respond to these expanded demands once climatic trends return to more average conditions"

and on page 3, par 1 and 2 the Service states that

In order to protect the interests of all water users, as well as the Federal Land Interests acquired by the Service through easement process, the State Water Commission needs to be conducting more regional analysis.

and states further that

"the Service would be willing to cooperate with the State to conduct these kinds of analyses".

As stated previously, the nature and extent of Federal Land Interests are defined by the terms of the easements, and should be resolved between the Service and lease holders.

With respect to other water users, the current lack of a regional model poses no danger to beneficial use. Regional, or aquifer-wide models can be useful tools for exploring relative water-level response to various applied stresses. However, both

experience, and ample published literature have indicated that they are often inadequate as predictive tools, and require a great deal of data acquisition and knowledge of the hydraulic behavior of the aquifer before they can exceed the usefulness of more general assessment methods in predicting water-level response. The SWC staff has developed computer models as aids in assessment of impact of pumping stress on some aquifers that are heavily appropriated. However, in early phases of aquifer development the incremental development method has proven to be most useful. Pumping effects from initial water permits are closely monitored for hydrologic effect. Information from monitoring is used to assess needs for further exploratory drilling, stratigraphic investigations, and monitoring well placements. It is through this process that information necessary for successful modeling, if such models become necessary, is obtained.

With initial incremental development, pumping of ground-water usually results in incremental changes in water levels, followed by stabilization of the water table from capture of evapotranspiration as the aquifer reaches a new equilibrium. Within reasonable limits such stabilized steps in water levels are known as "developmental decline", and do not threaten the sustainable yield of the aquifer for beneficial use. The earlier (pre 1995) hydrographs in the memorandum showed no evidence of developmental decline, with full aquifer recovery following pumping in both confined and unconfined units. Hydrographs show a similar full recovery and lack of developmental decline in piezometric head following 1995 with higher water levels from larger recharge and increased pumping. The lack of any observed developmental decline indicates that the cumulative effects of all pumping to date on water levels have been negligible.

Contrary to the statement of the Service that other water users are jeopardized by not using a regional model, in the current state of water development in Kidder County there is no evidence to indicate that beneficial uses for existing water permits

are endangered in any way near the proposed point of diversion. As we have pointed out in a previous letter (William Schuh to Cheryl Williss, July 17, 1998), the water appropriation procedures employed by the SWC have been successful in protecting beneficial use and sustainable yield. If it were to become apparent that an aquifer were over appropriated and that existing permitted water uses were likely to be impaired, there are provisions for curtailing pumping from the most junior appropriators.

Water-level responses to water development in Kidder County are being closely monitored on an ongoing basis, and are nowhere near a point of concern near the proposed point of diversion. If the volume of water appropriated should reach a degree where granting further water permits would be questionable, the appropriate evaluation techniques will be used. If such a case would involve a regional-scale model, the SWC staff is capable of developing and applying the model without the assistance of the Service.

In summary, the Service has no direct interest in the water of Standish Lake. In assessing potential impact of pumping on Standish Lake, current and historical conditions of Standish Lake indicate no likely significant adverse impact from proposed pumping. The SWC and the Service agree that the "circular model" should be further reviewed and tested. The SWC and the Service agree that This analysis indicates that there is unlikely to be significant impact on small wetlands in the NW and SW quarters of Section 8 due to proposed pumping in Section 9. The Service is uncertain of potential impact on a wetland in SE corner of Section 8, but the SWC believes that many current, historical, and hydrological factors indicate that impact is likely to be small. These are listed above. The SWC and the Service agree that pumping may effect water levels in a flooded area of NW Section 8 that has been present since 1995. The SWC staff agree with the Service that they do not have sufficient legal expertise to state definitively that the Service has no rights pertaining to

the flooded area. However, conversely the SWC staff does not agree that the rights and interests of the Service are sufficiently clear to warrant the prohibition of a water permit to the applicant. The matter of appropriate wetland boundaries on the applicants land should be resolved between the Service and the holders of its easements.

TESTIMONY ON SENATE BILL 2107

House Natural Resources Committee

**David A. Sprynczynatyk, State Engineer
and Secretary to the State Water Commission**

February 25, 1999

Mr. Chairman and Members of the Committee, my name is David Sprynczynatyk. I am the North Dakota State Engineer and Secretary to the State Water Commission and appear today in support of Senate Bill 2107.

This bill makes two changes to the procedures for obtaining water permits in order to more efficiently comply with the Administrative Agencies Practice Act. The first change relates to when the State Engineer must hold hearings on water permit applications. It will eliminate the need to hold hearings on applications where no one has objections or concerns about the proposed appropriation. Under current law, whenever a water permit is required to appropriate water, the State Engineer must hold a hearing on the proposed appropriation. Any person present at the hearing can testify with regard to the proposed appropriation. In addition, any person may file written comments with the State Engineer for the State Engineer's consideration.

In the vast majority of cases no one appears at the hearings and in many cases no written comments on proposed appropriations are filed with the State Engineer. For example, in 1998 the State Engineer conducted 126 hearings on water permit applications. At 44 of the hearings no one appeared to testify and no written comments were filed. At 77 of the hearings written comments only were filed with the State Engineer, generally prior to the date of the hearing. Only at 15 of the hearings did someone appear to testify.

Senate Bill 2107 requires the State Engineer to hold hearings only when a request to do so is made. Notice of the proposed appropriation would continue to be given in the same manner as required by law. Under current law, notice is given to all record title owners and all persons holding water permits located within one mile of the proposed point of diversion, and to all municipal or public use water facilities located in the county where the proposed water appropriation site is located. The notice is also published in the official county paper. The notice contains facts related to the proposed appropriation such as the place of appropriation, amount of water, source, and the use. This bill changes the content of the notice by requiring the notice to also state the date written comments regarding the proposed appropriation must be filed with the State Engineer.

Once comments are received, the State Engineer would conduct the evaluation required by N.D.C.C. § 61-04-06. Pursuant to that section, a permit may only be issued if the State Engineer finds that the rights of prior appropriators will not be unduly affected, the proposed means of diversion or

construction are adequate, the proposed use of water is beneficial, and the proposed appropriation is in the public interest.

During the evaluation, the State Engineer would consider all comments filed. Knowing what the concerns may be regarding a proposed appropriation will assist the State Engineer in determining whether the criteria in N.D.C.C. § 61-04-06 will be met. Once the evaluation is complete, the State Engineer will issue a recommended decision.

Anyone who filed written comments will receive a copy of the State Engineer's recommended decision on the application and the basis for the recommendation. Within 30 days of receiving the recommended decision, the applicant and any person who filed written comments can file additional written comments with the State Engineer or request a hearing on the application or both. If no request for a hearing is made, the State Engineer will consider the additional comments, if any are filed, and issue a final decision. If a request for a hearing is made, the State Engineer will designate a time and place for the hearing and notify the applicant and any person who filed written comments of the date and time of the hearing. The State Engineer will consider the testimony and any other information presented at the hearing and issue a final decision on the application.

Under current law, the State Engineer receives written comments through the date of the hearing and oral and written testimony at the hearing. The State Engineer considers the comments and, if necessary, conducts an analysis of the issues raised. This often requires the State Engineer to conduct further investigations or utilize other relevant information and evidence. Under N.D.C.C. § 28-32-07, an administrative agency can use other evidence and information or conduct further investigations provided a copy of any of the information used is provided to all parties to the proceeding and all parties are given the opportunity for another hearing. Current procedures can result in the State Engineer holding two hearings.

With the proposed change, all comments, concerns, and objections should be filed in writing with the State Engineer's office by the date specified in the notice. The State Engineer's office would be able to address the concerns in the initial evaluation of the application. This will allow the concerns of all parties to be addressed in one hearing, if one is necessary, and meet the requirements of N.D.C.C. § 28-32-07. Attached is a table that lists the steps in the water permit application process.

The original bill was unclear as to whether the State Engineer could hold a hearing if no request to do so was received. The Senate approved an amendment providing specific authority for the State Engineer to hold a hearing to obtain additional information and receive public input even though no one else requested the hearing.

The second change proposed in Senate Bill 2107 relates to the evaluation of water permit applications. The State Engineer's office has 11 hydrologists and water resource engineers who are assigned responsibility for several water

sources within geographical areas of the state. The hydrologist or water resource engineer becomes knowledgeable about the hydrologic and geologic characteristics of that geographic area and is responsible for evaluating water permit applications in the geographic area of expertise. When an application is received, the hydrologist or water resource engineer conducts an independent evaluation of the application based on the criteria set out in N.D.C.C. § 61-04-06, as described earlier, and makes a recommended decision to the State Engineer on the proposed application.

The North Dakota Administrative Agencies Practices Act, N.D.C.C. § 28-32-12.2(1), appears to prohibit the hydrologist or water resource engineer who evaluates the application from making a recommended decision on the application to the State Engineer. The change proposed in this bill would allow the hydrologist or water resource engineer to conduct the evaluation of an application and make the recommendation on it to the State Engineer. This will allow the State Engineer's office to continue to efficiently utilize staff resources and prevent the duplication of efforts that would be required if one project manager conducted the evaluation and another project manager was required to conduct another analysis and make the recommended decision.

Both the State Engineer and the State Water Commission support Senate Bill 2107 and request your favorable consideration of the bill.

Thank you.



OFFICE OF ADMINISTRATIVE HEARINGS


STATE OF NORTH DAKOTA
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Allen C. Hoberg
Director

701-328-3260
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MEMORANDUM

TO: Senator John T. Traynor

FROM: Allen C. Hoberg, Director 
Office of Administrative Hearings

RE: Office of Administrative Hearings billing rate and average charge

DATE: March 16, 1999

The Office of Administrative Hearings' current hourly rate for billing all state agencies under its jurisdiction is \$60.34/hour. OAH bills each agency for each 1/10 of an hour spent by the designated ALJ on any work related to the agency matter. It does not bill separately for support staff time or for travel costs (e.g., mileage, meals, hotel). The Workers Compensation Bureau is an example of an agency not under OAH jurisdiction for which OAH bills by agreement with the agency. OAH bills the Bureau at \$90.00/hour for assignments handled by contract, temporary ALJs. When OAH permanent ALJs handle WCB hearings, OAH bills the Bureau at \$60.34/hour, but also charges the Bureau for any travel costs.

OAH's billing rate for agencies under its jurisdiction is likely to increase again for the 1999-2001 biennium. It has increased every biennium. OAH's billing rate is determined by an independent consultant based on our actual cost of providing hearing officer services for the past biennium, *i.e.*, the 1999-2001 billing rate will be based upon 1997-1999 actual costs.

It is very difficult to estimate the average cost per hearing of providing hearing officer services for any agency's hearings. I do not know the complexity of the hearings being considered for inclusion under OAH jurisdiction or the current agency average length of hearing. Perhaps the agency would be better able to provide information about average length of hearing. Besides the actual length of the hearing, *i.e.*, time actually spent in the hearing, there is frequently considerable time spent in prehearing matters (e.g., hearing officer review of the file, prehearing conferences, if necessary, issuing notices of hearing and specification of issues, *etc.*). Also, there may be considerable time spent in post-hearing matters (e.g., reading briefs, if necessary, reading a transcript or listening to hearing tapes, if necessary, writing the decision, *etc.*). Generally, we find

that at least three times as much time is spent on an administrative matter, prehearing and post-hearing, as is actually spent in the hearing itself.

The length of hearings can vary so considerably, too, even within a particular category of hearings for an agency. For example, professional licensing hearings range from one hour to two weeks. The average length of time for a professional licensing hearing is probably about one to one-and-one-half days. OAH does not keep statistics which total the hours spent on each agency matter. However, after talking to several ALJs, I would estimate that the average length of time for an OAH hearing (for all types of hearings conducted by all agencies for which OAH conducts hearings) is between three to four hours. The average total time spent on an agency matter (prehearing, hearing, post-hearing) is probably between 12 and 18 hours. Therefore, the average cost to an agency per matter going to hearing would be about \$720 to \$1300. Of course, considerably less time may be spent on any particular matter, especially if the matter does not go to hearing (e.g., it is settled before hearing), and considerably more, too. For example, if a hearing lasted two full days it would likely be more complex. This could result in considerable more prehearing and post-hearing time for the hearing officer.

Again, because even a particular type of agency matter can vary so considerably in the amount of time involved for each matter, it is very difficult to estimate the average cost. However, if the agency that currently conducts its own hearings can more accurately estimate the average length of time now involved in each matter (prehearing, hearing, and post-hearing), you can better estimate their cost in using OAH (for this biennium) by multiplying that estimate by \$60.34/hour. Again, please remember that amount will increase for the 1999-2001 biennium.

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Office of the State Engineer

MEMORANDUM

TO: Senator Jack Traynor
FROM: *David* David A. Sprynczynatyk, State Engineer
DATE: March 17, 1999
RE: Senate Bill No. 2107 – House Natural Resource Amendments

The “separation of functions” provision of the administrative practices act prohibits any one who serves as an investigator in the investigatory or prehearing stage of an adjudicative proceeding from serving as a hearing officer. N.D.C.C. § 28-32-12.2(1). An adjudicative proceeding includes administrative matters involving a hearing, or the opportunity for a hearing, on an application seeking a right, privilege, or an authorization from an agency. N.D.C.C. § 28-32-01(1). A water permit application proceeding is an adjudicative proceeding. This is true regardless of whether a hearing is held, because, under the bill, an opportunity for a hearing is provided.

Before the State Engineer can issue a water permit, the State Engineer must conduct an evaluation and must find that the rights of prior appropriators will not be unduly affected, the proposed means of diversion are adequate, the proposed use is beneficial, and that the proposed appropriation is in the public interest. N.D.C.C. § 61-04-06. The prohibition in N.D.C.C. § 28-32-12.2(1) appears to prohibit the hydrologists and water resource engineers who evaluate the water permit applications to determine if it meets the statutory criteria for issuance from serving as hearing officers and making recommended decisions on the applications to the State Engineer.

Senate Bill No. 2107, as originally introduced, exempted water permit application proceedings from the separation of functions provision in N.D.C.C. § 28-32-12.1(1), thus allowing the hydrologist or water resource engineer who conducted the investigation/evaluation of the application to make the recommended decision on the application to the State Engineer. The amendments adopted by the House Natural Resource Committee remove from the bill the language that exempted water permit application proceedings from the separation of functions requirement.

There are 11 hydrologists and water resource engineers in the office of the State Engineer. They are assigned responsibility to evaluate applications within their geographical area of expertise. The State Engineer’s office processes more than 100 water permit applications a year. Without the exemption, water permit

MEMORANDUM TO: Senator Jack Traynor
Page 2
March 17, 1999

application proceedings will be subject to N.D.C.C. § 23-32-12.1(1). This will require the agency to either separate functions within the Office of the State Engineer or to utilize the Office of Administrative Hearings to serve as hearing officer. If the separation is done within the agency, one hydrologist or water resource engineer will be required to conduct the technical evaluation of the application required by statute, and another hydrologist or water resource engineer will be required to act as a hearing officer and make a recommended decision on the application. The recommended decision will be based on whether the application meets the criteria set out by statute, N.D.C.C. § 61-04-06.

Senate Bill No. 2107 as originally introduced would allow the State Engineer's office to efficiently utilize limited staff resources to evaluate water permit applications. The House Natural Resource amendments will result in duplication of efforts because one hydrologist or water resource engineer will conduct the evaluation required by law, and another will be required to review it, be satisfied with the evaluation, consider additional information from other parties, and make a recommendation.

The bill as introduced required the Office of the State Engineer to ensure that all parties are afforded due process. Under the administrative practices act, a hearing officer can be disqualified for cause, such as bias. N.D.C.C. § 28-32-08.1. In addition, any party aggrieved can appeal the State Engineer's decision and the court will not affirm a decision if the party has not received a fair hearing. N.D.C.C. § 28-32-19. These provisions should ensure parties to a water permit application proceeding receive a fair, impartial hearing.

Without the exemption in the original bill, the separation of functions provision will apply to all water permit application proceedings, regardless of whether a hearing is held. We anticipate that we would hold approximately five to ten hearings a year.