

# MICROFILM DIVIDER

OMB/RECORDS MANAGEMENT DIVISION

SFN 2053 (2/85) 5M



ROLL NUMBER

DESCRIPTION

2182

2001 SENATE NATURAL RESOURCES  
SB 2182

2001 SENATE STANDING COMMITTEE MINUTES

BILL/RESOLUTION NO. SB 2182

Senate Natural Resources Committee

Conference Committee

Hearing Date 1-26-01

Tape Number	Side A	Side B	Meter #
1	X		23.4 - 58.9
		X	Start - 51.5
2	X		Start - 4.1
2-8-01 2	X		14.4 - 18.3
Committee Clerk Signature <i>Jana Yarnes</i>			

Minutes:

SENATOR KENNETH SOLBERG of District 7, cosponsor of SB 2182 presented a short history of the flooding project of lowlands that helps produce hay crops along the Mouse River. This project was started in the mid 1930's, but water rights were never secured. There was a window of opportunity in 1965, but was again missed. This bill will open up a window again and allow the Eaton Irrigation Project to apply for a water permit to secure the water rights once and for all. He acknowledged there is some local problems but they could be handled.

REPRESENTATIVE JON NELSON of District 7, cosponsor of Bill 2182 expressed the need of the flood irrigation project for maximum foliage production. The local problems of this bill can be handled locally by the bill sponsors and the State Water Commission.

SENATOR DAVID O'CONNELL added his support of Bill 2182.

MILTON LINDVIG, Director of the Water Appropriations Division of the State Water Commission testified in support of Bill 2182. (See attached testimony).

He answered several of SENATOR TRAYNOR's questions that there was other intervening users of the river and when water appropriations were made the Eaton Project was always considered. If this bill is passed there will not be a public publication of the application.

SENATOR TRAYNOR: asked if a 20 year user of the Mouse River waters, who would have a right of prescription to the water, would those people be cut out. Would this bill cut off their rights?

JULIE KRENZ, of the Attorney General's Office, stated that the bill has a provision that was in the original law, that provides that if a prescriptive user fails to file within the time period, his rights are deemed abandoned and forfeited. There is hearing process although not specially stated in the bill and may be applied here.

ORLIN OIUM, land owner in the Eaton Irrigation Project and history buff, gave a history on the Eaton Irrigation Project.

CLIFF HANRETTY, Chairman of the Eaton Flood Irrigation Board, testified that without the project it could put 45 land owners out of business which would be a large economic lose to the Towner community. The flooded meadows is a great resting area for wildlife, migratory birds, and also a great nesting area for waterfowl and upland game.

JOCK EATON, owner of the Eaton Ranch, testified that the bill was not to defeat anyone's rights, not an attempt to gain priority over previously permitted or holders of water rights based on prescription but rather to get on record as a formal perfected water right holder. He felt all the members that have served on the board and the members of the State Water Commission believe that the Eaton Ranch was a formally permitted water user, and only when the Water Commission set about in examining into water rights holders on the Mouse River, did the present situation come to light. He wanted to make aware the anticipated testimony, of the up stream neighbors



who claim the damn has caused flooding of their land and he acknowledged this might have happens and probably has for 63 years. He pointed out to the committee that granting a permit under regular statutory procedure does not give the water user the right to flood someone else's land. In other words their rights under the law would not be prejudiced in the slightest by the passage of this bill but would only give a perfected water right should the project meet the requirements of the Water Commission.

VERN KONGSLIE, representing the Kongslic family presented testimony opposing Bill 2182.  
(See attached testimony).

SENATOR CHRISTMANN asked if the damn was operated properly at a level of 1461 would his family be happy.

VERN KONGSLIE stated that even at the 1461 level the water is held too long killing quality feed grasses.

SENATOR KELSH: asked to who operates the damn gates and makes decisions.

VERN KONGSLIE stated the board made up of only the flood project benefactors make the decisions but do not follow the operating plan.

SENATOR TRAYNOR : asked since Eaton's did not file a claim by July 1, 1965, their claim was declared abandoned and forfeited by whom.

JOE CICHY, legal representee of the Kongslic family, explained the statute declared that if the application was not submitted by that date the claim was abandoned and forfeited.

VERN KONGSLIE clarified that they have not taken legal action for claim of damages, are not against the project or water right appropriations, they just would like the project to be run correctly so there is not damage to their property.

JOF CICHY wanted to explain the constitution issue, that under present law the Eatons can get their permit listed so they would be under legal protection. He felt the real issue is the priority date and if you give them a priority date earlier than other appropriators that could sponse litigation with regard to taking someone's water rights. There is also the issue of applications that established their rights and then requested an earlier priority date because of beneficial use clause which may put them in front of someone else.

SENATOR FISCHER closed the hearing on SB 2182.

Discussion was held.

Milton Lindvig was asked to clarify some issues for the committee.

MILTON LINDVIG said that the operating elevation level of the damn at 1461 had been set in 1933 and 1934 and feels this a well engineered level. He said the State Water Commission has been working with the Kongslies and District and the Flood Irrigation Board and will provide copies of the letters of correspondence with the Kongslies. They will be asking for operating plans from the McHenry County Board of Flood Irrigation for each season and will provide a schedule for flooding. He stated it was the State Water Commission's authority and intent to enforce the operating damn level of 1461. He felt there might be another issue in that the flooding has been going on for an excess of 20 years so has there been a prescriptive right obtained by the board or the project to flood the Kongslie land? With all of the circumstances that occurred beginning in 1937, that issue has not been cleared up at ail, so there might have been a prescriptive right but it has not been documented.

JULIE KRENZ confirmed that there was a operating plan of the damn submitted and that there is an issue of prescriptive right because long nature of the flooding. They have informed the board

and Kongslies that if the board operates the level of the damn that impacts the Kongslies, they have to go to court and show us before they can operate at that level.

Discussion was held to understand the different levels of the damn in testimony. The damn levels of 1461, 1461.5 and 1462 were all used and there seems to be some confusion to the actual level.

Additional testimony including copies of correspondence and requested material was presented to the Committee clerk at a later date and was distributed to the Committee Members (See attached).

**FEBRUARY 8, 2001**

SENATOR FISCHER reopened discussion on SB 2182.

SENATOR EVERY: made a motion for a "DO PASS" of SB 2182.

SENATOR TRAYNOR second the motion.

Discussion was held that there seems to be two issues about this bill. The bill itself as to prescriptive water rights and the issue of the incorrect way the damn has been operated. It was agreed that SENATOR FISCHER as chairman of the Senate Natural Resources Committee would write a letter to the State Water Commission expressing that this issue should be corrected and that the damn would be operated correctly.

SENATOR FISCHER called for a roll vote of SB 2182. The vote indicated 6 YAYS, 0 NAYS, AND 1 ABSENT.

SENATOR TOLLEFSON will carry SB 2182.

**FISCAL NOTE**  
 Requested by Legislative Council  
 01/15/2001

Bill/Resolution No.: SB 2182

Amendment to:

1A. **State fiscal effect:** *Identify the state fiscal effect and the fiscal effect on agency appropriations compared to funding levels and appropriations anticipated under current law.*

	1999-2001 Biennium		2001-2003 Biennium		2003-2005 Biennium	
	General Fund	Other Funds	General Fund	Other Funds	General Fund	Other Funds
Revenues						
Expenditures						
Appropriations						

1B. **County, city, and school district fiscal effect:** *Identify the fiscal effect on the appropriate political subdivision.*

1999-2001 Biennium			2001-2003 Biennium			2003-2005 Biennium		
Counties	Cities	School Districts	Counties	Cities	School Districts	Counties	Cities	School Districts

2. **Narrative:** *Identify the aspects of the measure which cause fiscal impact and include any comments relevant to your analysis.*

It is anticipated that a very limited number of applicants would be able to take advantage of this bill. The additional water permit applications would be processed by the State Water Commission using budgeted appropriation authority. This bill has no fiscal impact.

3. **State fiscal effect detail:** *For information shown under state fiscal effect in 1A, please:*

A. **Revenues:** *Explain the revenue amounts. Provide detail, when appropriate, for each revenue type and fund affected and any amounts included in the executive budget.*

B. **Expenditures:** *Explain the expenditure amounts. Provide detail, when appropriate, for each agency, line item, and fund affected and the number of FTE positions affected.*

C. **Appropriations:** *Explain the appropriation amounts. Provide detail, when appropriate, of the effect on the biennial appropriation for each agency and fund affected and any amounts included in the executive budget. Indicate the relationship between the amounts shown for expenditures and appropriations.*

Name:	Dale Frink	Agency:	Water Commission
Phone Number:	328-4941	Date Prepared:	01/18/2001

Date: 2-8-01  
 Roll Call Vote #: 1

2001 SENATE STANDING COMMITTEE ROLL CALL VOTES  
 BILL/RESOLUTION NO. 2182

Senate NATURAL RESOURCES Committee

Subcommittee on \_\_\_\_\_  
 or  
 Conference Committee

Legislative Council Amendment Number \_\_\_\_\_

Action Taken Do Pass no re-referral

Motion Made By Every Seconded By Traynor

Senators	Yes	No	Senators	Yes	No
Sen. Thomas Fischer, Chairman	✓		Sen. Michael A. Every	✓	
Sen. Ben Tollefson, Vice Chair.	✓		Sen. Jerome Kelsh	✓	
Sen. Randel Christmann	✓				
Sen. Layton Freborg					
Sen. John T. Traynor	✓				

Total (Yes) 6 No 0

Absent 1

Floor Assignment Tollefson

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

**REPORT OF STANDING COMMITTEE (410)**  
February 8, 2001 4:26 p.m.

**Module No: SR-23-2803**  
**Carrier: Tollefson**  
**Insert LC: . Title: .**

**REPORT OF STANDING COMMITTEE**

**SB 2182: Natural Resources Committee (Sen. Fischer, Chairman) recommends DO PASS**  
(6 YEAS, 0 NAYS, 1 ABSENT AND NOT VOTING). SB 2182 was placed on the  
Eleventh order on the calendar.

2001 HOUSE NATURAL RESOURCES

SB 2182

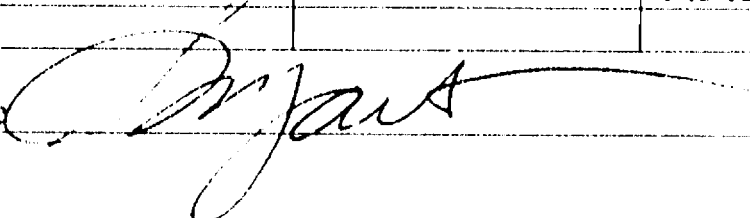
2001 HOUSE STANDING COMMITTEE MINUTES

BILL/RESOLUTION NO. SB 2182

House Natural Resources Committee

Conference Committee

Hearing Date March 16, 2001

Tape Number	Side A	Side B	Meter #
1		x	1117 to end
2	x		1 to 1267
Committee Clerk Signature 			

Minutes:

Chairman Earl Rennerfeldt, Vice Chair Jon O. Nelson, Rep. Brekke, Rep. DeKrey, Rep. Droydal, Rep. Galvin, Rep. Keiser, Rep. Klein, Rep. Nottestad, Rep. Porter, Rep. Weiler, Rep. Hanson, Rep. Kelsh, Rep. Solberg, Rep. Winrich.

Chairman Rennerfeldt: I will open the hearing on SB 2182.

Sen. Solberg - District 7: SB 2182 deals with the Eaton irrigation project, and through the research of records and so forth they found out they did not have water rights. What this bill does is moves (in line 10) the date from July 1, 1965 to December 31, 2001. It allows the window to be reopened for them to apply for the water rights. It does not give them water rights, it just allows them to apply. The chairman of the Senate Natural Resources committee wanted to relay to you that he would by direction of the committee be writing a letter to the State Water Commission asking that the problems be addressed with the issuing of the permit.



Written testimony also submitted by Rep. Merle Boucher in support of this bill.

Milton Lindvig - Director, Water Appropriation Division State Water Commission: (See written testimony). I am here in support of SB 2182.

Vice Chair Nelson: In the other cases on the upper Souris River, did the state engineer try and persuade those people not to apply for a water permit as well. Is that the reason the permit was not perfected?

Lindvig: Those three projects now have storage. They did have water rights associated with them through the Burlington Project. That is what they are all a part of. Those rights where the lands are now under private ownership, those rights were assigned to those lands. The dams are no longer used for those irrigation rights by those individuals, as a result the dams are under local jurisdiction. There is no storage rights for those dams, so there is a requirement for storage rights.

Orlin Oium: I want to bring out what happened before the Eaton Irrigation Project. Early in the homesteading days the floods that came naturally every four years weren't enough to keep the production of hay where the ranchers would like to have it. They determined they wanted to stabilize the hay crop and their herds, they would have to have some control of the spring runoff, or they would have to pump. In 1903 the county superintendent of schools, who was also the surveyor was hired by the county to enhance the drain on the northern end of the present project. In 1911, the first water rights were asked for and they started using pumps and before W.W.II (gives history). In December 1918 after working towards it for many years, a formal request was made by JB Eaton, he asked for assistance in an overflow irrigation project south of Towner. The project went ahead in the 1930's with water rights of the local ranchers included in this project. Since 1937 when the gates were first closed, our pumps haven't been used. In 1938 the water

covered Erie pond which was called a complete flood for the first time using the Eaton flood irrigation. Any questions?

Cliff Hamery: This irrigation project supplies hay for the owners of about 3 to 4 tons per acre with no fertilizer. Without this production these ranchers would be out of business. It would be a big economic loss for the Towner area and McKenzie County. We have passed resolutions around from the city of Towner and McHenry County Commissioners supporting this resolution. (see copies). Last year when we had high flows from Canada and extremely high rain fall this land and the adjacent land was too wet to hay, this was a \$900,000 loss in hay production which converts into a \$5,000,000 loss in the Towner Area. This irrigation project is one of the most environmentally friendly projects in the water quality according to the soil conservation groups that served this project four or five years ago. They say that we are returning 10 times cleaner water to the river than we are putting on. The water has time to settle out. This is also beneficial for migratory birds, a resting area in the spring. Also nesting habitat. Any questions?

Jock Eaton - Owner Eaton Ranch: Our ranch is immediately adjacent to a fair stretch of the Mouse River. The way this dam operates has been made plain to you. I wish to address an objection that will be made by upstream landowners named Kongslies. These people are long time residents. Keep in mind when you hear their objections that this dam has been putting water occasionally on a small portion of their land and within the 6000 plus acre project since 1937. They did not make an objection of any kind until the last four or five years. I told my board that we have a prescriptive water right. We have been doing this well over the 20 year time period. It seems to me they are here to oppose this bill in order to achieve their own private end which is compensation for occasional flooding. I want to assure this committee that whether or not this board gets the formal permit should this bill be passed has nothing to do with and cannot

possibly adversely affect their right to bring a claim against the water board for such flooding as may occur. Are there any questions?

Chairman Rennerfeldt: Any questions? Anyone else here to testify in favor of this bill? Any opposition?

Stu Wacker - US Fish and Wildlife Service: US Fish and Wildlife Service opposes this bill because it alters current state water laws for determining water rights and priority dates. (see written testimony).

Vice Chair Nelson: The other landowners that you speak of whose rights have been pre-empted, how many land owners are you aware of?

Wacker: I am speaking in general. There have to be some landowners throughout this state that are going to be affected by this bill.

Vice Chair Nelson: With the passage of this bill. The current numbers being used, would they be changed? The way the system is being handled today, would that be changed with the passage of this bill?

Wacker: I is my understanding that what this bill is going to do is change the dates of which are water rights were perfected and it is going to put the Eaton water irrigation district before those dates.

Vice Chair Nelson: But in practice isn't that what's being done today?

Wacker: According to the permits that have been issued, I believe it is 7b is senior and 90a is senior to our permits on the Souris, this would entail additional water rights to those, in my understanding.

Vice Chair Nelson: The point I am trying to make is that the system as it is currently being used is the numbers may or may not change. The reality of the day is when the Eaton Irrigation

System floods this land, you have an agreement of understanding. First of all would you agree this project is important to the community and the county of McHenry?

Wacker: I certainly from the testimony I hear, I would agree with that.

Vice Chair Nelson: In that event then, I would consider threats as to what would happen if this bill passes and all of these people are (inaudible). I would think that life continues on the way it has been the last 20 years.

Wacker: All we are doing here today is saying we object to this because what it does, is it changes our water right.

Vern Kongsli: I appear in opposition to SB 2182. (See written testimony).

Rep. DeKrey: My question is for Milt. I am missing something here. There is a lot of irrigation going in, in my area right now, and I have an operator out there who was actually fined by the State Water Commission because he started using water before his permit took effect and he had to give up a year or whatever. How in the world did this irrigation district operate this long, for this many years and no body ever noticed it before?

Lindvig: As I was attempting to point out in my testimony. This has been a process that started back in the 1930's. The advice of the state engineer is somewhat of a mystery to us as to why he gave that advice. He could have very well taken and accepted a permit application after Sept. 1. It would have been in agreement with the statute at that time. I think they could have done that, they had a statement of intent, they had plans filed and so forth. Several years ago, 1993 we started a process of perfecting the water permits on the Souris River, that included the claims by US Fish and Wildlife Service. We start at the beginning and work on. The Eaton project is the first on the list. As we looked at the conditions and the agreement and so forth, it was obvious

that something had really gone wrong in that whole process. So this is an attempt to try to get this back into a position where I think where everybody has felt it has been in the past 60 years.

Rep. DeKrey: The way I am understanding this is, we want to go from when the permit was applied to when they start actually using the permit? Is that a fair assessment? The date of the permit is now the date of your water right?

Lindvig: If I understand your statement, what you say is correct.

Rep. DeKrey: That is a pretty tragic state law. We have people that know they have irrigation water under their land and they will apply for their permits and they have no financial means to pump that, but they hope that 15-20 years down the road that they can develop that right, but they went by state law and applied for their rights here, and now we are going to say that doesn't mean anything, it is when it is actually developed that it is going to count?

Lindvig: It will only apply to any appropriations that were started before 1943. So it would have to have been 20 years prior to 1963. So the only projects that would qualify is those that have been in operation since 1943. So it is very narrow, it would not apply to any existing permits that have been obtained through the proper procedures.

Vice Chair Nelson: Would you explain the prescriptive water rights to me?

Lindvig: A prescriptive water right would be a right that has been obtained by putting the water to beneficial use.

Vice Chair Nelson: Would the Eaton project qualify for this, the prescriptive water right?

Lindvig: This is actually taking a prescriptive right and recognizing it as a prescriptive right and then it would be termed an appropriated right. A water right would be incorporated into an appropriated system. As it has been in the past, always recognized as a proper use, but it is in the work we were starting to do in the 1990's, giving them a protective water right for the quantities

they are putting to beneficial use. The quantity of water that can be obtained and the water right is only that amount that is being put to beneficial use. That is the basis of the measure of a water right.

Vice Chair Nelson: The claim that the Kongslic Family has, do you feel that their recourse is violated with passage of this particular bill or would that be addressed in the permit stage of this, when this bill is passed and the permit is applied for.

Lindvig: We see it as two separate issues and that certainly the Kongslic's have a legitimate issue to bring forth. We have been working with that issue and one of the things we have done is to require an operating plan for the Eaton Dam. We have been working with them and through that plan.

Vice Chair Nelson: We just got through talking about the Corps of Engineers being unresponsive to people's needs, I don't like to hear that about the State Water Commission.

Lindvig: We don't believe that we are. If I may I could make copies of the entire records that have taken place over the last couple of years and provide them to the committee for review.

Rep. Keiser: Did I understand that in this particular instance the water commission didn't perform its duty. It should have years ago, either intervened and said either you have a permit or you don't have a permit, get one or get out. So you are now saying with the passage of this bill that those people that we made a mistake for, we are going to kind of grandfather them in? But what about all of the people that the water commission took legal action with previously that were taking water but hadn't gotten a permit? Do those people have any recourse at this point?

Lindvig: You raise a good point. This legislation is trying to deal with a matter that I think everybody in the 1930's were acting in good faith. Up to that point, in all other state engineers that have been in place since that time, have viewed it as being a legitimate appropriation. They

had an agreement, but when you start looking at it critically, all of the players to those events now are gone, and the record is not clear, as a result we are trying to right a wrong. It only deals with those old projects that were in existence prior to 1943. I think that all the processes since that time, have been in compliance with state law.

Rep. Keiser: They have been in compliance because the water commission did its job.

Lindvig: Yes.

Rep. Nottestad: In your estimation if this bill passes, will it permit this group that has the problem take additional water for irrigation and thus deprive others from irrigating on the Mouse River?

Lindvig: No, we don't believe it will change anything, because the volumes associated with the project is not going to change. The 10,000 acre feet mentioned in the agreement will still prevail and that is what we would use. And also the quantity of the water that the project uses to facilitate the full operation is a little over 13,000 feet when it is in full operating level.

Approximately half of that water is released back to the Souris River after it has been used to flood the meadows. So we don't see any other people who are going to be deprived of water in this process.

Rep. Nottestad: When you issued additional permits, did you take this 10,000 acre feet into consideration even though it was questionable as to the legality of that irrigation?

Lindvig: Yes, we did.

Chairman Rennerfeldt: Further questions?

Joe Cichy - Attorney for Kongsli Family: I filed on behalf of Mr. Kongsli a complaint with the State Water Commission state engineer in June of 1999 for the illegal appropriation of water. In this case it is almost two years and nothing has been done. So that is one of the problems. The

other issue I want to address is the Eaton Irrigation Project has three water rights, apparently they are not for sufficient enough quantities of water to flood the project, but they did know that water rights were available. ND prior to 1953 had a dual system for water rights. It had the appropriation system and the riparian system. That is why the Eaton project didn't need a permit until 1963 when the Legislature changed the law to require that everybody had a permit so the state could better manage the water resources. They were aware of it. They didn't need a permit in 1935 because they were riparian owners and they could use the water on that right. What about prescriptive rights, in a recent court case it was decided that where a state permit was needed you can't get prescriptive rights. So the Eaton Irrigation project does not get the prescriptive water rights for their water, they can't. If it floods the Kongsle's property that can be achieved if certain criteria was met. They haven't met those criteria and they don't have a right to flood the Kongsle's property. There is also a problem with priority, priority is the key issue here. The Eaton Irrigation Project can come in right now and apply for a permit. The question is, is there not water available? There may be in certain time, but it would be based entirely on the date of application. Not back in 1932 or 1931. These folks that did make application between 1962-1965 they can go back now, because we changed the standards. The priority date was established as the date they appropriated the water, now the standards have changed. I ask that you recommend a Do Not Pass.

Rep. DeKrey: Is it your opinion that there is a legal battle going on and it is being brought to the Legislature to try and solve it rather than going through the court system?

Cichy: As far as my clients are concerned, no. These legal issues are different than water rights issues. Because he doesn't have a water right, in that respect, no.



Vice Chair Nelson: I would understand that the riparian right would not take priority over a permit that was applied for?

Cichy: There are no riparian rights in ND at the present time. When they changed to the system of permitting, someone with riparian rights could come in and establish an appropriation right through the permit and have it relate back to when they began appropriating the water. An actual riparian right begins when they start using the water. At that time they could, right now, they cannot.

Vice Chair Nelson: So if I understand you correctly, if they would have used that window between 1962 and 1965, that riparian right would have had a priority. I am assuming we are talking priority over the US Fish and Wildlife, who has the largest permit, don't they?

Cichy: I am not sure, it would have had equal status with permissive right. The priority is the key thing. They would have had a priority based on when they first started using the water. I am not sure what the basis of Fish and Wildlife rights were.

Vice Chair Nelson: Your contention is that they knew that they had that window and they should have taken advantage of that and that would have put the burden of proof on the people at the Eaton Irrigation Project and not the state engineer?

Cichy: I believe so, they had a right pursuant to the riparian doctrine, which was in effect in ND until 1963. Everybody in the state in 1963 were notified that they need to protect their rights. The statute clearly states void and forfeited.

Rep. DeKrey: Is there a fiscal note attached to this?

Chairman Rennerfeldt: It says this bill has no fiscal impact.

Rep. DeKrey: I was sure Milt testified that they would have to publish in every county in the state this change in the laws, so everybody in the state would have the opportunity to come into the state engineer and make permit. I think there would be a fiscal impact to that.

(some discussion).

Rep. DeKrey: I have another question for Milt. We are wet right now, if we get back into this area like we were in 1989, 1999. On this dam, back in those dry years, was there still enough water for everybody?

Lindvig: My most recent memory of draught would be the 1988-1992 period. During that period the water had to be very carefully managed. I think there may have been some years that some did not get enough water, because there just wasn't enough water available in the natural process. But as far as the major appropriators, the US Fish and Wildlife Service and the Eaton Project along with some flood irrigation projects operated in the spring of the year that were senior to the US Fish and Wildlife Service, they did get some water. During the 88-92 period. Sometimes there was just no runoff either.

Rep. DeKrey: So it is possible then if we change this by passing it and we rearrange those water rights in that area, some of the people in the last drought that did not get water, may not get water under this new permit they would have?

Lindvig: I don't see it that way, but it would happen, because we would be operating in essentially the same way as we thought the system existed.

Chairman Rennerfeldt: Is there any further opposition to this bill?

Rep. Keiser: Can I ask Joe a question? How does it work? Water rights might be very different than contract law, but once contracts are signed and established the Legislature can't just come

back in and reverse the contracts and the dates and those sorts of things. If we were to pass this law, would this go to the Supreme Court?

Cichy: I believe it does, if there is a takings. Somebody who loses his rights. I think it could, my client won't be there, but there may be other people there.

Chairman Rennerfeldt: I will close the hearing on SB 2182.

2001 HOUSE STANDING COMMITTEE MINUTES

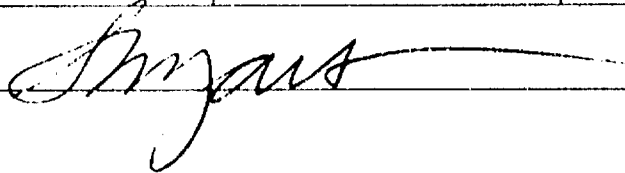
BILL/RESOLUTION NO. SB 2182

House Natural Resources Committee

Conference Committee

Hearing Date March 23, 2001

Tape Number	Side A	Side B	Meter #
1	x		1 to 565

Committee Clerk Signature 

Minutes:

Chairman Earl Rennerfeldt, Vice Chair Jon O. Nelson, Rep. Rep. DeKrey, Rep. Drovdal, Rep. Galvin, Rep. Keiser, Rep. Klein, Rep. Nottestad, Rep. Porter, Rep. Weiler, Rep. Hanson, Rep. Kelsh, Rep. Solberg, Rep. Winrich.

Chairman Rennerfeldt: I will call the House Natural Resources Committee to order. Call the roll.  
Let's act on SB 2182, prescriptive water rights. There are no amendments to the bill.

Vice Chair Nelson: I move a Do Pass on SB 2182.

Rep. DeKrey: I second that.

(Rep. Nelson explains the bill. Discussion ensued.)

Chairman Rennerfeldt: Everybody understand that? Any more discussion? Call the roll.

**MOTION FOR A DO PASS ON SB 2182**

**YES, 13      NO, 1**

**1 ABSENT AND NOT VOTING**

Page 2  
House Natural Resources Committee  
Bill/Resolution Number SB 2182  
Hearing Date March 23, 2001

**CARRIED BY REP. NELSON**

Date:  
Roll Call Vote #:

2001 HOUSE STANDING COMMITTEE ROLL CALL VOTES  
BILL/RESOLUTION NO. SB 2182

House Natural Resources Committee

Subcommittee on \_\_\_\_\_  
or  
 Conference Committee

Legislative Council Amendment Number \_\_\_\_\_

Action Taken Do pass

Motion Made By Rep Nelson Seconded By Rep. DeRuy

Representatives	Yes	No	Representatives	Yes	No
Earl Rennerfeldt - Chairman	✓		Lyle Hanson	✓	
Jon O. Nelson - Vice Chairman	✓		Scot Kelsh	✓	
Curtis E. Brekke			Lonnie B. Winrich	✓	
Duane DeKrey	✓		Dorvan Solberg	✓	
David Drovdal	✓				
Pat Galvin	✓				
George Keiser		✓			
Frank Klein	✓				
Darrell D. Nottestad	✓				
Todd Porter	✓				
Dave Weiler	✓				

Total (Yes) 13 No 1

Absent 1

Floor Assignment Rep. Nelson

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

**REPORT OF STANDING COMMITTEE (410)**  
**March 23, 2001 11:01 a.m.**

**Module No: HR-51-6523**  
**Carrier: Nelson**  
**Insert LC: . Title: .**

**REPORT OF STANDING COMMITTEE**

**SB 2182: Natural Resources Committee (Rep. Rennerfeldt, Chairman) recommends DO  
PASS (13 YEAS, 1 NAY, 1 ABSENT AND NOT VOTING). SB 2182 was placed on the  
Fourteenth order on the calendar.**

2001 TESTIMONY

SB 2182



January 26, 2001

Testimony before Senate Natural Resource Committee  
Fort Lincoln Room  
Senator Thomas Fischer, Chairman  
Senate Bill 2182

My name is Vern Kongsle and I appear in opposition to Senate Bill 2182.

My brothers, Lynn and Justin and I own farmland and hay land southwest of Towner near the Souris River. My father and mother also are actively involved in the ranching operation. My father has lived his whole life on this ranch. Some of our land is affected by the McHenry County Irrigation District more commonly known as the Eaton Irrigation Project. Due to mismanagement by the project's landowners, our land has been illegally flooded several times in the past so that the project's landowners would have additional hay land flooded to which they are not entitled by law. They also have used the dam for flood control, which is illegal.

The Eaton Dam was built in the 1930's to divert water to seven ponds created by a system of dikes and culverts with head gates to control the release of water from the individual ponds. Robert Kennedy, the state engineer, provided a basic operation plan for the project to follow in his second report in the 1930's. This type of irrigation must be managed carefully. In recent years the Eaton Irrigation Project has been holding the water on the land too long causing damage to our land.

In 1970 an injunction was filed by the upstream landowners against the Eaton Project because they refused to open the discharge gates of the dam during high flows. Settlement was made out of court with the Eaton Project agreeing to open the discharge gates of the dam and promising to operate the project correctly. However, controversy prevailed between the upstream landowners not under the Eaton Project and the landowners under the Eaton Project each spring when the Eaton Dam was closed for irrigation. When the water level was brought up to elevation 1462 on the Eaton Dam several hundred acres of the upstream landowners not under the project were being flooded. Since this land was being farmed the water was not welcome.

By keeping the water above the authorized elevation of 1461 additional acres of meadow outside the project were being flooded for the landowners who participated in the Eaton Project. The contour of the Mouse River valley has a very gentle slope of about four inches per mile which means any deviation from the correct operating contour can affect a large area. The upstream landowners not under the project complained to the Eaton Project Board but were answered with "we are operating within the law."

The upstream landowners asked to see documentation that would prove the correct operating level and authority to appropriate the water. The upstream landowners were told by the Eaton Project that they did not know where the records were kept. The upstream landowners then complained to the McHenry County Commission who appoints the Eaton Project Board members. The McHenry County Commissioners then appointed an upstream landowner to the Eaton Board in 1974. The operation of the dam was somewhat better the next few years.

In 1998 the Eaton Project closed the dam about February 7. On April 1, 1998 the dam level was nine inches over the 1461 contour level and was flooding our farmland. Lynn Kongsliie contacted an Eaton board member who was also the water master and informed him that our land was being flooded and requested the dam discharge gates be adjusted to the 1987 contour level. He refused to adjust the contour level and he did not even inspect our land to confirm our complaints.

Lynn contacted Robert White from the State Water Commission who met with Lynn and the water master later that week. After a tour of our land and of the dam Mr. White advised the water master that the Eaton Project was operating over the legal contour level and that he needed to release the excess water downstream. Lynn asked Mr. White if the Eaton Project had proper permits to irrigate and Mr. White responded that the permits were on file at the State Water Commission.

We (Vern, Lynn, and Justin Kongsliie) have had our attorney investigate and file formal complaints against the Eaton Project with the State Water Commission since 1998. Our attorneys received a letter on October 6, 2000 to the State Water Commission which I have attached to my testimony covers most of our complaints of the Eaton Project. But the State Water Commission has not addressed the key issues raised in the letter and they have not taken any action to resolve these complaints.

This Bill raised a number of concerns from a statutory standpoint relation to the prior appropriation doctrine and the state's water laws. The most significant issue is the priority date. Presently, North Dakota Century Code § 61-04-06.3 provides that the priority date of a water right is the date upon which the application is filed with the state engineer's office. The statute which this bill is attempting to amend provides a priority date relating back to the date when the water was first put to beneficial use. This Bill would allow the Eaton Project a priority date from the time the project was surveyed or construction began. This would be in the early 1930's.

The Eaton Project like all other appropriators in the state had two years from July 1, 1963 to perfect a water right. By failing to do this by July 1, 1965, Eaton's claim to a water right was considered abandoned and forfeited. Consequently, the Eaton Irrigation Project (for whom this legislation was drafted and proposed) by not making application for a water permit between 1963 and 1965, forfeited whatever right it may have had and had no legal right to be appropriating water without holding a valid permit under existing law. Consequently, since 1965, the Eaton Project has been violating state law. The State Water Commission has done nothing to stop the illegal appropriation. It knew of the illegal appropriation, condoned it, and condoned the operation of the dam in such a fashion as to allow our lands to be damaged by flooding. All other appropriators in the state had to follow state law. To allow an entity 35 years after their water right was extinguished to come in and legislate a water right superior to almost all other upstream appropriators is a dangerous precedent.

All appropriators on the system whose priority date is after the date claimed by the Eaton Project will become junior appropriators to the Eaton permit and as a practical matter will lose their right to appropriate water. This is water that they have been legally appropriating for 35

years. This is a significant property right that will be taken from them. To grant the Eaton Project a priority date earlier than current appropriators may be an unconstitutional taking of property.

Another consequence of this Bill if passed is that those appropriators who failed to make application during the two year period required under existing law and who stopped appropriating water because they did not have a permit, would have no right to apply for and receive a perfected water permit with a priority date relating back to when they first began using the water. They would be penalized because they honored the law. This on its face is unfair.

I ask that you vote "Do Not Pass" on this piece of legislation. The passage of this Bill would result in an unlawful taking of property and could spawn considerable litigation. It would condone and legitimize 35 years of illegal and unlawful activity by the Eaton Project. Also, on a statewide basis all those who did comply with the law and had a priority date established as the date when the water was first put to beneficial use can now come back in and seek to have that priority date changed to the date when the survey work or other actual preparation for the appropriation of water had begun.

The passage of this Bill could not only create an administrative nightmare, it could face a constitutional challenge and is unfair to all present and former appropriators on the Souris River.

John M. Olson  
Attorney

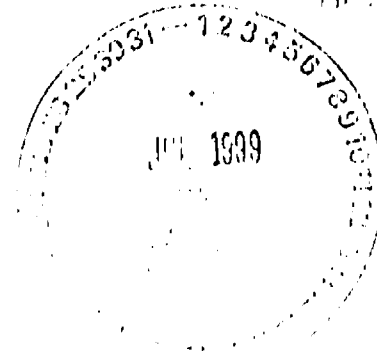
Joseph J. Cichy  
Attorney

OLSON CICHY  
ATTORNEYS



*Must  
Julien*

701-223-4817  
1115 N. 10th Street  
Bismarck, ND 58502-0817  
FAX: 701-223-4834  
TEL: 701-223-4835



June 30, 1999

David A. Sprynczynatyk  
State Engineer  
900 East Boulevard  
Bismarck, ND 58505-0850

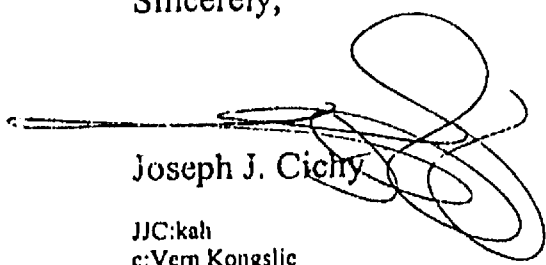
RE: **Water Issues**  
**Our File No. 99-52**

Dear Mr. Sprynczynatyk:

Enclosed please find the original complaint regarding the Eaton irrigation project. Also enclosed is an admission of service. Please sign the admission of service and return back to my office.

Thank you for your attention to this matter.

Sincerely,

  
Joseph J. Cichy

JJC:kah  
c:Vern Kongslic

H:\US\KAH\Water\SprynczynatykLTR.wpd

**BEFORE THE OFFICE OF THE NORTH DAKOTA STATE ENGINEER REGARDING  
WATER PERMITS NUMBER 90B AND 7D RELATING TO THE EATON  
IRRIGATION PROJECT.**

I Joseph J. Cichy, on behalf of my clients, Vern Kongslic and Lynn Kongslic, complainants, file this complaint relative to the above referenced water permits alleging that the operators of the permit are exceeding the water usage limitations of their permit operating the permits in violation of its operation plan and operating the permits in such a fashion as to damage complainants' property. Also the works associated with the water permits are not adequate and cause damage to complainant's property. This complaint is brought pursuant to N.D.C.C. Chapter 61-04.

Dated this 24<sup>th</sup> day of June, 1999.

OLSON CICHY ATTORNEYS, P.C.  
Attorney for Vern and Lynn Kongslic  
115 North 4th Street  
P.O. Box 817  
Bismarck, ND 58502-0817  
(701) 223-4524

  
By: Joseph J. Cichy ID#03783



Office of the State Engineer

July 16, 1999

Mr. Joseph J. Cichy  
PO Box 817  
Bismarck, ND 58502

RE: Eaton Irrigation Project  
Your File No. 99-52

Dear Mr. Cichy:

I have received the complaint you filed on behalf of Vern Kongslic and Lynn Kongslic dated June 30, 1999. We have reviewed the complaint and before we take any action with regard to the complaint, more information is needed. Specifically, we need more factual basis for the conclusions the operators of Water Permits No. 90B and 7D are exceeding the volume of water authorized, how the use of the permits violates the Eaton Irrigation District's operation plan, how and to what extent your clients' property has been damaged by such operation, and in what manner the works associated with the permits are not adequate and cause damage to your clients' property.

In addition, we request that you specify which statute or rule is being violated, what relief you are requesting, and what authority the State Engineer has to grant such relief.

Sincerely,

David A. Sprynczynatyk  
State Engineer

DAS:JK:rp/PS/IRR/EAT

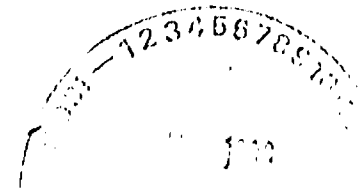
John M. Olson  
Attorney

Joseph J. Cichy  
Attorney

**OLSON CICHY**  
ATTORNEYS



August 5, 1999



David A. Sprynczynatyk  
State Engineer  
North Dakota State Water Commission  
900 East Boulevard  
Bismarck, ND 58505-0850

**RE: Water Issues**  
**Our File No. 99-52**

Dear Dave:

Vern and Lynn Kongslic would like to meet with Milt Lindvig and Bob White concerning the problems that they are experiencing with the operation of the Eaton Irrigation Project. In your letter you ask that they provide you with their concerns and I believe that your office has been provided with those concerns in the past and a meeting could fully air them again. Specifically as the project is being presently operated it is causing flooding on the Kongslics' land. It is their understanding of the operation plan that once the ponds are full that the gate is lowered on the dam and the Souris River is allowed to flow freely. As I believed as been indicated to your staff excess water is appropriated because the river is held above its operating level which also caused additional and prolonged flooding to my clients property. Also, because the manner in which the culvert is operated to flood pond seven, and the inadequately sized culvert that diverts water into the pond, the water has to be held inordinately high in the channel to fill the pond, thus causing extended flooding on my client's property.

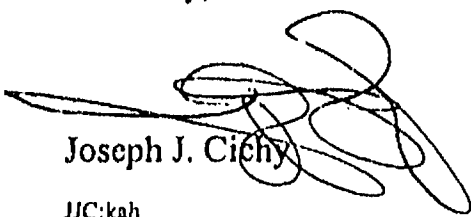
It is my understanding that someone who appropriates more water than they are allowed under a permit violates chapter 61-04 of the North Dakota Century Code. At this point what my clients are requesting from your agency is that the Project be required to operate in such a fashion as to not exceed elevation 1461, the elevation established in the operating plan. It is my understanding that your office has been working on this for quite some time. The relief being sought from your agency is enforcement of the terms and conditions and operating plan of the permits which you have the authority to enforce pursuant to N.D.C.C. Chapter 61-04. Specifically N.D.C.C. § 61-04-29 provides that the State Engineer may issue administrative orders requiring the immediate cessation of water use when the State Engineer has reason to believe that such use is unauthorized.

Also, 61-04-11 requires that if specific works used for the carriage of water adversely affect property the State Engineer can take appropriate action. That is what is being requested relative to the filling of pond seven.

David A. Sprynczynatyk  
August 5, 1999  
Page 2

Consequently my clients would like meet with your people to discuss these issues. I will not be present at that meeting, if such meeting is held. Please contact Vern directly if the meeting can be set up and if such a meeting is not possible, please contact me directly.

Sincerely,

  
Joseph J. Cichy

JJC:kah  
c:Vern Kongslie

\\AUSKAT\Water\Sprynczynatyk51.TR.wpd





Office of the State Engineer  
WATER APPROPRIATION DIVISION  
(701)328-2754

August 16, 1999

Mr. Joseph J. Cichy, Attorney  
Olson Cichy Attorneys  
P.O. Box 817  
Bismarck, ND 58502-0817

Dear Mr. Cichy:

In response to your letter of August 5, 1999, a meeting has been scheduled for 10:00 a.m. September 1, 1999 at Towner between Vern and Lynn Kongsli, and Milton Lindvig and Robert White of this office. The site of the flooding will be visited so the Kongslies can explain their view as to the cause and the manner in which the property is inundated. It is intended that any additional information needed will also be identified.

If you have questions or comments on the meeting, please contact Milton Lindvig of this office or me.

Sincerely yours,

*for* David A. Sprynczynatyk  
State Engineer

DAS:mb/227

cc: Vern Kongsli



Office of the State Engineer

WATER APPROPRIATION DIVISION  
(701)328-2754

June 20, 2000

Mr. Joseph J. Cichy  
Olson Cichy Attorneys  
P. O. Box 817  
Bismarck, ND 58502-0817

Dear Mr. Cichy:

Reference is made to your letter of May 19, 2000, regarding the alleged encroachment of water on the Kongslied land due to the operation of the dam for the Eaton irrigation project. The purpose of this letter is to provide a progress report on the efforts of this agency to address the issue.

In accordance with the request made in your letter of August 5, 1999, Robert White and Milton Lindvig of this office did meet with Lynn and Vern Kongslied on September 1, 1999, at Towner where they showed a video taken at the Eaton dam and at various other locations upstream from the dam. It showed the water level and its relationship to certain features and landmarks, some of which were on Kongslied property. After viewing the video and discussing certain aspects of it they took us on tour of the area. The tour included Eaton dam, the culverts and ditch to pond 7, the portion of the Kongslied land that is periodically inundated, and the features on pond 1.

At that time and later, it was recommended to Lynn and Vern Kongslied that the elevation of the property subject to flooding be determined. Because of the low topographic relief of that area, the elevations from the 7.5 minute quadrangle maps were of little use. A more detailed survey would provide the data needed to ascertain the cause or causes of the flooding of the Kongslied land. The survey was completed and map with the elevation points was provided to this office on March 8, 2000.

For the past several weeks our efforts have focused on two factors. One is determining the effects of the operation of Eaton dam at elevation 1461 and the relationship or effects to the Kongslied property. A computer generated map with the elevation of the Kongslied property shown at one-half foot contour intervals has been made. From the map, the area below elevation 1461 was calculated. This information is being compared with aerial

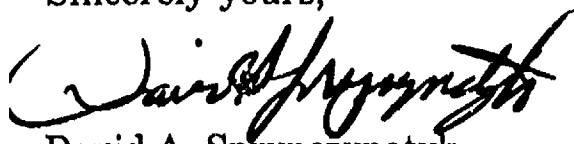
photos taken on April 12, 1994, when the ponds in the irrigation project were full.

The second factor is reviewing the operation of the dam and the filling of the 7 ponds. Information presented in your letters suggests that certain project deficiencies exist that result in an adverse impact to the Kongsli property. It is further indicated that the design-operating plan prepared in 1934 states that the gates on the dam are to be opened as soon as the ponds are filled. These issues are being addressed by reviewing information on the operation of the dam and the filling of the 7 ponds. As a part of this process the flow records for the Mouse River are being analyzed to determine the frequency of years when the flow is adequate to fill the ponds in the shortest possible time. This will influence the length of time the level of the water behind the dam must be held at elevation 1461.

The technical analysis of the issue is nearing completion, which will provide a better understanding of the causes of the flooding of the Kongsli property. From this, a strategy can be proposed for reaching a solution to the problem. It is planned that a response to your letter will be completed no later than August 1, 2000.

The alleged flooding of the Kongsli land has not been brought to the attention of the McHenry Board of Flood Irrigation by this office as a result of your letter. It is noted that copies of your correspondence were not provided to that Board. Your complaint and subsequent correspondence has been interpreted by this agency as a request to conduct an investigation of the causes of flooding of the Kongsli property. However, in view that this is a long-standing issue, other factors will likely influence any solution. Therefore, when a response is made, it will be necessary to inform the Board of the issue by copy of our letter with copies of your letters attached. The iteration to some solution from that point will depend upon the facts surrounding the issue and the application of state law.

Sincerely yours,



David A. Sprynczynatyk  
State Engineer

DAS:mb

5446 F4727

NORTH DAKOTA STATE WATER COMMISSION  
OFFICE MEMO

MEMO TO: Milton O. Lindvig, Director, Water Appropriation Division  
FROM: Robert R. White, Water Resource Engineer  
SUBJECT: Kongsle Complaint  
DATE: August 14, 2000

On August 6, 1999, we received a letter from Joseph Cichy, attorney for Vern and Lynn Kongsle, landowners in the Towner area. The letter raised several points regarding the operation of the Eaton Irrigation Project (Project) and how the operation is impacting land owned by Vern and Lynn Kongsle.

- 1) Mr. Cichy said the project is being operated in such a manner that it is causing flooding on the Kongsle land. It is the Kongsles understanding of the operating plan that once the ponds are full the dam's gates are to be opened and the "Souris River is allowed to flow freely."
- 2) Excess water is being appropriated because the river is held above its operating level, this causes additional and prolonged flooding on the Kongsle land.
- 3) The culvert that diverts water to pond 7 is "inadequately sized" and being operated improperly, causing the water to be held inordinately high in the channel in order to fill pond 7. This causes extended flooding on the Kongsle land.

Mr. Cichy also asked that we meet with the Kongsles to discuss the points raised in the letter.

This memo will only address the issue of the flooding of the Kongsle land.

On September 1, 1999, we met with Vern and Lynn Kongsle in Towner. They provided a history of the problems they have had with the Eaton Dam over the years, and a video they made of the Souris River and the dam during spring runoff. They said the dam is not being operated correctly and is causing flooding on their land by storing water behind the

dam at an elevation above 1461 which is the operating level for the dam in the 1934 design report. They also said they would not object if the dam were operated in accordance with the 1934 design report. They indicated that the following steps must be taken to minimize the flooding of their land:

1) The dam should be operated no higher than contour elevation 1461. They believe a portion of their land is at or below the contour elevation, however, if the dam is operated so as not to exceed contour they would not object.

2) The gate to pond 7 should be fully open during the spring runoff period. They believe this would allow for faster filling of the pond and therefore allow for the Eaton Dam gates to be fully opened sooner. The access road to the dam had a bridge over the channel to pond 7, which has been replaced with two 60-inch culverts. They believe these culverts are not adequate to pass the flow in the channel. Also, the channel to pond 7 should be cleaned out, as there are a large number of dead trees in the channel which retards the flow and plugs the culverts (see photos).

3) They want the low - level drawdown tube, which was left in place when the new dam was constructed, to be opened during the spring runoff. They believe this would help prevent the river exceeding the contour elevation.

The Kongslies have said they are not as concerned with the flooding of their land caused by the elevation of 1461 as they are with the length of time that elevation is maintained

The Kongslies had a survey made to establish the relationship between the elevation of their property and the Eaton Irrigation Project's contour elevation of 1461 feet. It is my understanding that the site survey elevations are referenced to the known elevation of a large culvert installed years ago in the road near the Vern Kongsli Sr. residence. According to Vern Kongsli Jr., he has a drawing dated September 1990, done by the Sverdrup Corporation of St. Louis Missouri, which shows the location of the culvert and his father's land. He is not sure when the elevation of the

culvert was determined. Mr. Kongsle said Kadrmas, Lee and Jackson, who did the survey work, believed the elevation of this culvert would not have changed because of its large size. Using the culvert as the initial benchmark, levels were run to scattered points at various locations on the Kongsle land. The elevations of these points were calculated from the known elevation of the culvert. The elevations of the culverts and the various points on the Kongsle land were not referenced directly to the elevation of the Eaton Dam.

The Kongsles provided a site survey map showing the elevations of their land and the culvert that drains a portion of their land into the Souris River. Based on the map, the tops of the culverts that drain the Kongsle land have the following elevations:

West culvert: Upstream - 1461.09

Downstream - 1460.71

East culvert: Upstream - 1461.12

Downstream - 1460.62

There are no elevations of the culvert invert, however, the culverts are 60 inches in diameter, therefore, assuming the invert is 60 inches less than the surveyed top of culvert elevation results in the following elevations:

West culvert: Upstream - 1456.09

Downstream - 1455.71

East culvert: Upstream - 1456.12

Downstream - 1455.62

When the elevation of the water impounded by the Eaton Dam is at 1461, the water level at the upstream end of the east culvert is about 2 - 3 inches over the top of the culvert, which is at elevation 1461.12. The elevation survey of the Kongsle land shows most of the land being above the 1461 contour elevation; however, there are portions below that elevation. Hydrologist Royce Cline grided the x-y point data using Arcview Spatial Data Analyst, using tension splines. The area of land less than or equal to elevation 1461 was then calculated from the grid. The area was calculated to be about 9.3 acres (see Figure 1).

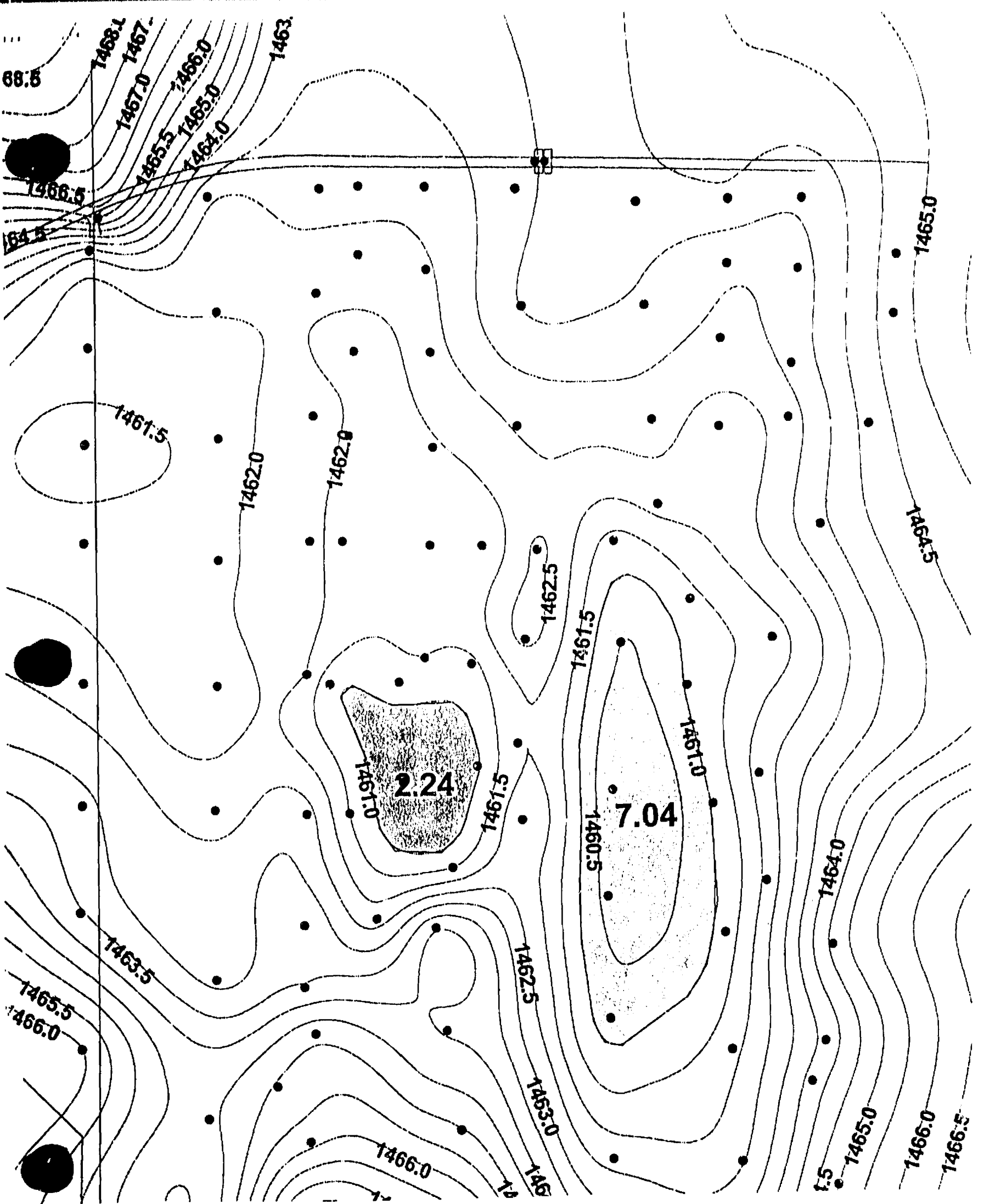


Figure 1

On April 12, 1994, the State Water Commission had KBM, Inc. take aerial photos of the project. At the time the ponds were at contour elevation. Using the photos and VectorWorks, I calculated the area of the flooded Kongsli land to be about 29 acres (see Figure 2). This does not include the channel upstream of the culverts.

Vern Kongsli said he flagged the outline of the land that was flooded this year when the dam was at elevation 1461. When the water receded he measured the flagged area and determined the flooded area to be about 28 - 29 acres.

The Kongsli land appears to be impacted in two ways: 1) When the water level behind the Eaton Dam is held at an elevation of 1461 or more, water is backing onto areas of the Kongsli land which lie below, or at that elevation. 2) By holding the water level at 1461, the drainage of the local area runoff is impeded, resulting in the flooding of additional acreage on the Kongsli land. Therefore, the sooner the gates are opened after filling the ponds, depending on the flow in the river, the sooner the river stage will drop and allow the Kongsli land to drain.

The Eaton Irrigation Project was designed to be operated with a pool elevation of 1461.0 feet while the ponds were filling, but according to design reports prepared for the project, the dam gates were to be opened soon after the ponds were filled.

In the preliminary report titled, Flood Irrigation on the Mouse River, dated April 10, 1933, Robert E. Kennedy, State Engineer, stated, "Ponds on the Eaton ranch filled by natural floods have been held as long as eight weeks. The effect lasted two years. With an assured supply it is assumed that six inches an acre will be used each year. The mean annual precipitation is about 15 inches. That makes the total average annual depth of water applied about 21 inches....The water needed from the river then for 5800 acres would be 2900 acre-feet....The project would probably be in operation not to exceed four to six weeks a year. The time required to fill the ponds if separated by weir dams 100 feet long at such elevations that the water would flow six inches deep over their crests is about 3 1/2



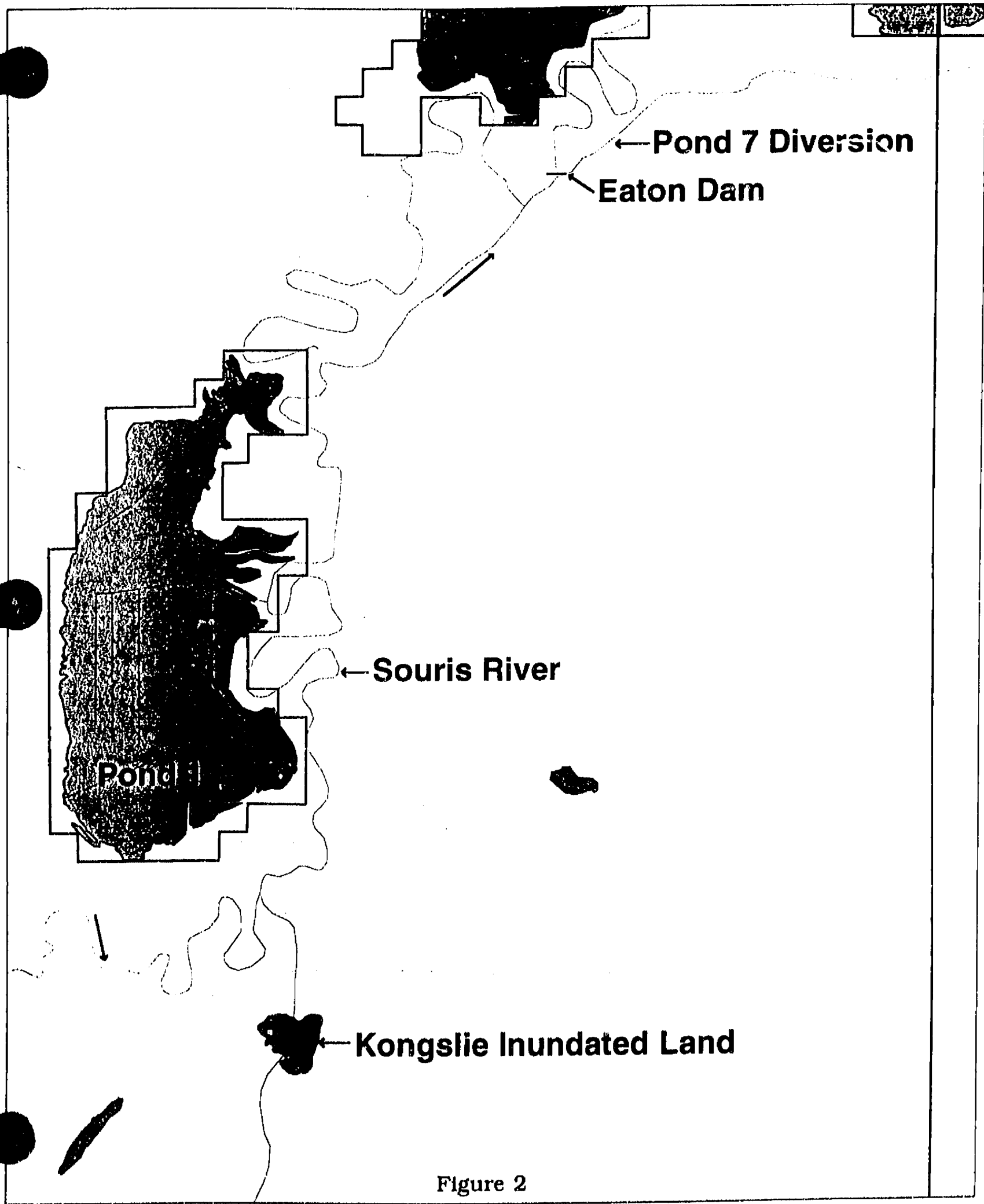


Figure 2

days provided further there was 120 second-feet flowing the river when ponding began."

In the second report on the Eaton Flood Irrigation Project dated July, 1934, Robert E. Kennedy, State Engineer, stated, " During this filling process the gates in the main structure should be regulated in order to secure a fairly uniform water level (elev. 1461) behind the dam. When all ponds are full the gates of the main dam should be opened and the normal stream flow be permitted to pass.....The process of filling will normally require about five days."

The Kongsles believe the dam should be operated as it states in the reports. However, the reports prepared for this project were design reports. The time to fill the ponds was grossly underestimated. According to members of the McHenry County Board of Flood Irrigation (Board), it actually takes from two to four weeks to fill the ponds, with water held on the ponds for up to three weeks. They would normally like to start diverting water between April 1 - April 30. The flow to the ponds on the west side of the river should be in the range of 250 - 300 cfs, with flows of about 100 - 150 cfs to pond 7 on the east side of the river. Flow rates higher than these can create problems such as overtopping gates, dikes, and roads, and erosion of dikes. Upon completion of the project the operators found it necessary to keep the gates on the dam closed after the ponds were filled in order to retain the water in the ponds. If the dam gates are opened immediately after filling the ponds the water will start to drain off the land before the soil profile is entirely saturated. They prefer to start to drain the ponds by mid-May. If a landowner desires to retain the water on his land longer than other landowners he can do so. If he does not want to flood his land he still has to pass water through his pond to fill downstream ponds. He can then drain his pond immediately. The time it takes to fill the pond is dependent on several factors such as snow and ice cover in the ponds and diversion channels, streamflow and stage in the river. Project operation schedules indicate that 5 to 7 weeks are required to fill the ponds and hold water for a duration of time sufficient to saturate the soil.

The following tables show the availability of water at the USGS gages near Verendrye and Bantry on the Souris River, and the USGS gage near Karlsruhe on the Wintering River. The availability is shown as a percent of the days of the month that various flows are available in the Souris River for the period of record at the gages. For example, a flow of 250 cfs is available 67.57 percent of the days in the month of March, based on the historical record at Verendrye.

The Souris River near Verendrye records are continuous from April 1937 to the current year. The Souris River near Bantry has a continuous period of record from March 1937 to the current year. The Wintering River near Karlsruhe has a continuous period of record from 1937 to the current year.

#### Verendrye

cfs	Feb (%)	Mar (%)	Apr (%)	May (%)	Jun (%)	Jul (%)
100	11.85	37.48	67.08	51.56	44.17	39.73
150	9.10	32.05	58.39	44.91	35.52	31.59
200	6.46	26.06	51.09	39.97	30.21	26.73
250	4.72	21.66	46.20	37.70	28.12	22.27
300	2.98	19.51	42.71	35.48	24.79	18.64
350	2.58	17.46	40.05	32.81	22.71	14.29
400	2.30	16.18	37.60	31.25	21.15	11.16
450	1.52	15.26	35.26	29.89	19.69	8.96
500	0.84	14.23	33.85	28.33	17.86	7.37
550	0.56	12.75	32.45	27.42	16.20	6.50
600	0.51	11.83	31.56	26.61	13.80	5.79

#### Wintering

cfs	Feb (%)	Mar (%)	Apr (%)	May (%)	Jun (%)	Jul (%)
100	-	6.80	20.73	7.61	3.23	1.38
150	-	4.18	12.60	4.39	1.96	-
200	-	2.47	8.49	2.52	0.74	-
250	-	1.86	5.89	1.76	0.05	-

300	-	1.56	4.79	1.41	0	-
350	-	1.36	3.75	1.11	0	-
400	-	1.16	3.02	0.96	0	-
450	-	1.11	2.29	0.81	0	-
500	-	0.96	1.61	0.55	0	-
550	-	0.66	1.25	0.20	0	-
600	-	0.45	1.09	0.05	0	-

**Bantry**

cfs	Feb (%)	Mar (%)	Apr (%)	May (%)	Jun(%)	Jul (%)
100	10.34	30.29	62.29	69.10	59.17	48.80
150	7.19	23.03	54.79	62.10	50.52	39.73
200	4.72	18.90	49.90	56.40	41.88	35.54
250	3.20	15.93	46.61	52.62	35.94	30.93
300	2.64	13.00	43.85	48.99	33.65	27.09
350	1.63	10.94	41.88	45.87	31.35	23.04
400	1.12	9.27	39.95	41.68	29.17	18.23
450	0.22	7.76	38.02	39.42	27.45	14.23
500	0.06	7.11	36.15	37.10	26.46	11.98
550	-	6.05	34.38	35.08	25.05	9.68
600	-	5.65	32.55	33.11	23.23	8.60

According to the Verendrye records flows greater than or equal to 450 cfs (300 west side and 150 east side) are available 15.26 percent of the days (4.7 days) in March, 35.26 percent of the days (10.6 days) in April, and 29.89 percent of the days (9.3 days) in May, for the period of record.

A combination of the flow data from the Souris and the Wintering Rivers, reveals that in the month of March the flow at Verendrye is 350 cfs or greater 17.46 percent of the days (5.4 days) and in the Wintering 100 cfs occurs 6.8 percent of the days (2.1 days). The same flows during the month of April occur 40.05 percent of the days (12 days) at Verendrye and 20.73 percent of the days (6.2 days) in the Wintering.

The following information was obtained from the dam operation records for the years 1994 - 2000, provided by Scott Mueller of the McHenry County Board of Flood Irrigation. The following dates of items such as when the dam was first closed, east and west side gates were closed, and when the gates were opened, are shown. Even though this is a very short period in the overall history of the project, it does provide some insight as to the operation of the project. The entire record for the years 1994 - 2000 accompanies this memo.

2000

2/29: Dam gates closed

2/29: West gates partially open

3/3: West gates fully open

3/5: East gate partially open

3/14: East gate closed - stick in gate - gate open 2"

4/28: Pond 7 at contour

5/9: Dam gates partially open

5/24: Dam gates fully open

1999

3/28: East gate open

4/7: East gate closed - stick in gate - gate open 2"

1998

2/7: Dam gates closed

2/9: West gates open

2/26: Water starting to go through west side

3/30: Dam above contour - West gates fully open

3/30: East gate partially open

4/18: East gate closed - pond 7 at contour - dam over contour

5/1: Start to drain pond 1

5/11: Dam gates open

1997

3/30: Dam gates open - west gates fully open - east gate partially open

4/4: Tried to shut west gates - sticks in gates

1996

3/21: Three west gates fully open - east gate froze shut

4/14: East gate partially open

4/22: East gate partially closed - sticks in gate

5/8: West gates closed

1995

3/11: Dam gates closed

3/15: West gates fully open - east gate partially open

3/19: Dam gates fully open

4/14: Dam gates closed- west and east gates closed

4/15: Dam gates fully open

1994

3/3: Dam gates closed - west gates fully open

3/22: East gate open to 4'

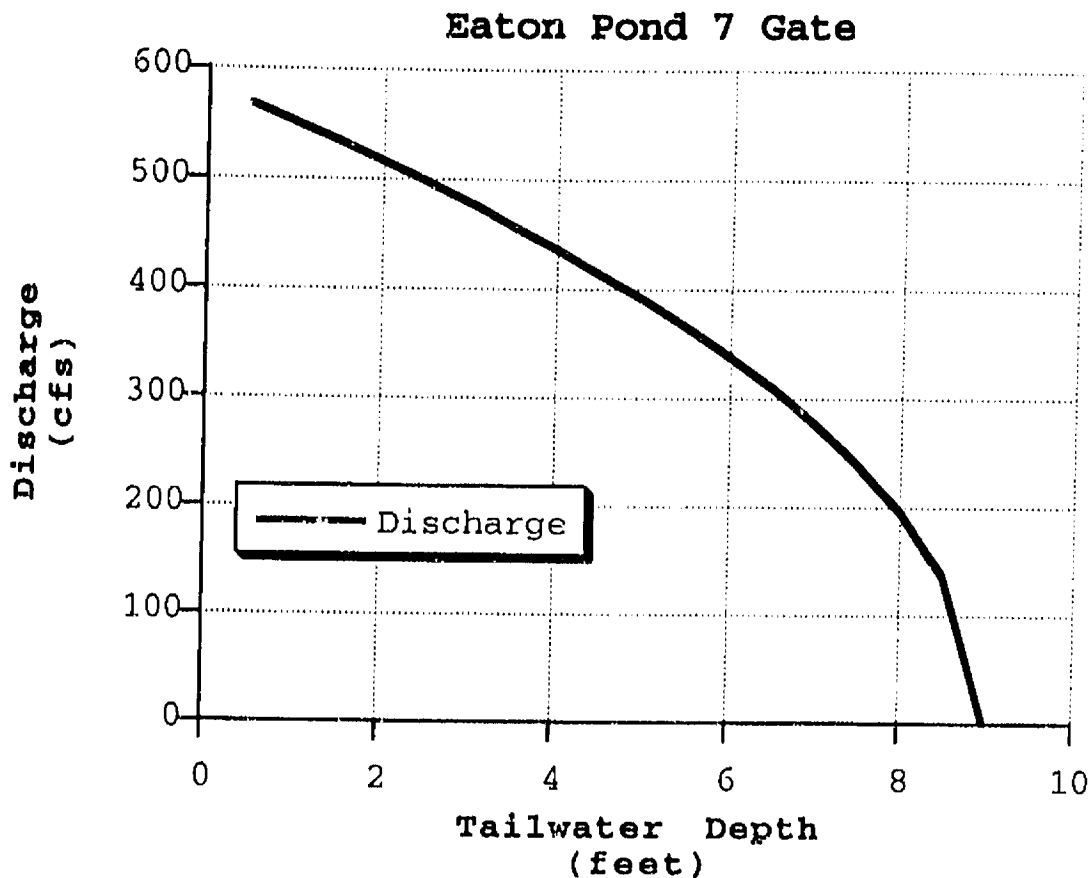
5/13: Dam gates open

It is apparent that the landowners attempt to divert water onto the project as soon as the spring runoff starts. In years such as 2000, when the spring runoff forecast is small, the dam is closed prior to the start of the runoff in order to capture what water is available in the river.

The Board is attempting to resolve some of the issues. They have advised that a request has been made to the McHenry County Commission for another culvert through the access road, which crosses the ditch leading to pond 7. However, the Board has also pointed out that the gate to pond 7 cannot be opened entirely because the pond 7 diversion ditch on the east side of State Highway 14 cannot handle the high flows of water. It was observed that when there was a bridge on the access road rather than the two culverts, the pond 7 gate was opened entirely and water backed up in the diversion ditch, through the culverts under Highway 14. It is understood that the County Commission has agreed to install another culvert through the access road. It is also understood that

the dead trees in the channel to pond 7 have been removed. However, the inability of the diversion ditch on the east side of Highway 14 to handle the higher flows will still prevent the pond 7 gate from being fully opened. It should be noted that this is not a new problem, it has existed since the project was first operated.

The discharge capacity of the gate was calculated with the water impounded by the dam at contour elevation 1461, and pond 7 gate tailwater elevations ranging from 0.5 feet above the invert level of the gate to the contour elevation. There is not enough information to accurately determine the actual tailwater depth. At times there will tend to be higher tailwater downstream due in part to debris in the channel and the low channel capacity in the diversion ditch downstream of Highway 14. The accuracy of the calculated flow through the gate is dependent on several factors such as the accuracy of headwater and tailwater elevations, size, shape and condition of the gate, and discharge coefficient used. The following graph shows that as the tailwater elevation increases the discharge decreases. As example, if the dam is at contour elevation 1461 and the pond 7 gate tailwater depth is 3 feet, the flow would be about 478 cfs. If the contour elevation remains 1461 and the pond 7 tailwater depth increases to 5 feet, the flow through the gate would be about 390 cfs. This occurs because as the tailwater elevation increases and the headwater elevation remains the same, the head differential decreases, causing the reduction in discharge through the gate.



The Kongslies have indicated they want the low - level drawdown tube, which was left in place when the new dam was constructed, to be opened during the spring runoff. They believe this would help prevent the river exceeding the contour elevation. The low - level outlet was originally a 72 inch CMP. In 1959 it was replaced with a 48 inch CMP. The 1988 construction permit describes the outlet as a "60 inch lower Fish Tube". Based on the information in our files and conversations with the landowners I believe the present low - level outlet is the 48 inch CMP.

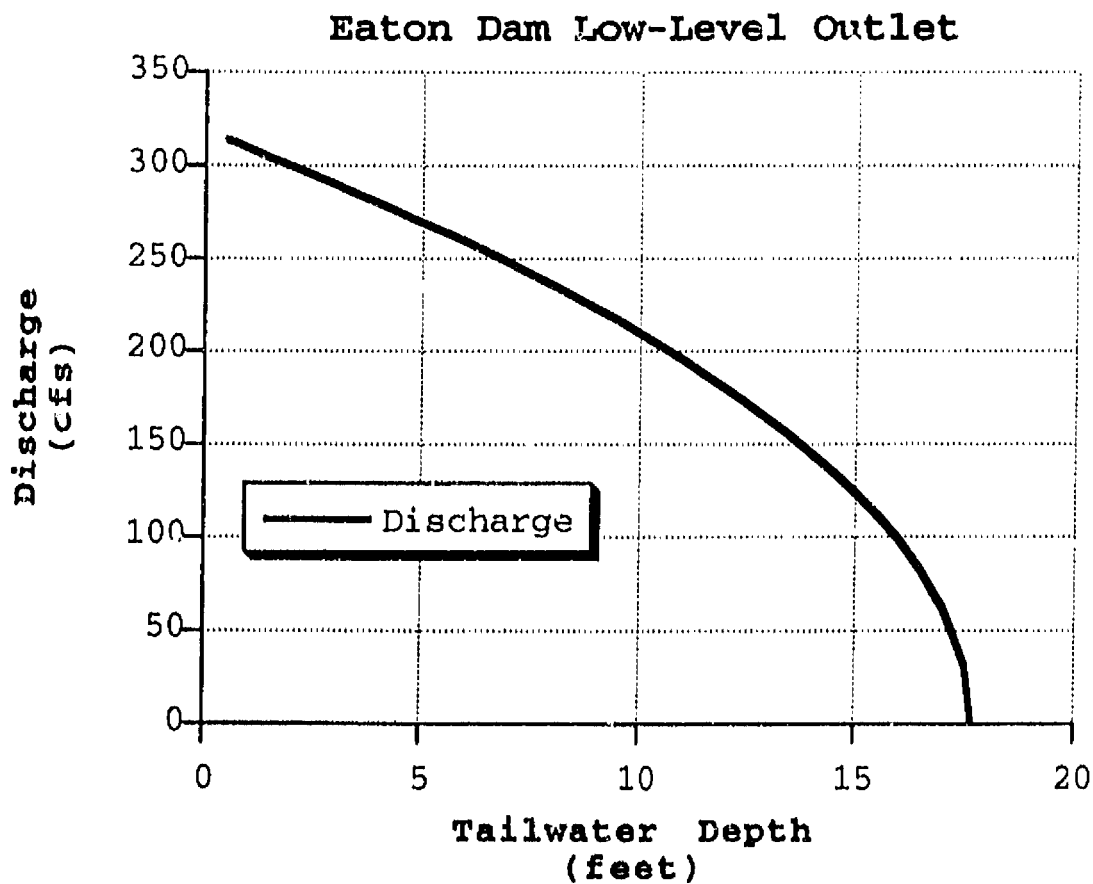
In order to determine the impact, if any, the operation of the low - level outlet might have on the Kongslic land, the discharge capacity of the culvert was calculated with the water impounded by the dam at contour elevation 1461, and tailwater elevations ranging from 0.5 feet above the invert level of the outlet to the contour elevation, similar conditions as for the pond 7 gate calculations. As for the pond 7 gate, the accuracy of the calculated flow through the culvert is dependent on several factors such as the accuracy of headwater and tailwater elevations, size, shape and



condition of the culvert, and discharge coefficient used. The following graph shows that as the dam tailwater elevation increases the low - level outlet discharge decreases. This is because as the tailwater elevation increases and the headwater elevation remains the same, the head differential decreases, causing the reduction in discharge through the culvert. At times of high flow through the dam gates there will tend to be higher tailwater downstream, due in part to the low channel capacity downstream of the dam.

The 4 foot diameter culvert has a cross - sectional area of 12.6 square feet. This is about 3.1 percent of the combined cross - sectional area of the two dam gates. Even at maximum capacity the flow through the culvert will be minor compared to the flow through the gates.

Based on the information provided, holding water at an elevation of 1461 behind the dam backs water up to and through the culverts onto



Kongsle land which lies below, or at elevation 1461. The elevation of a portion of the Kongsle land is high enough that it would not be flooded at

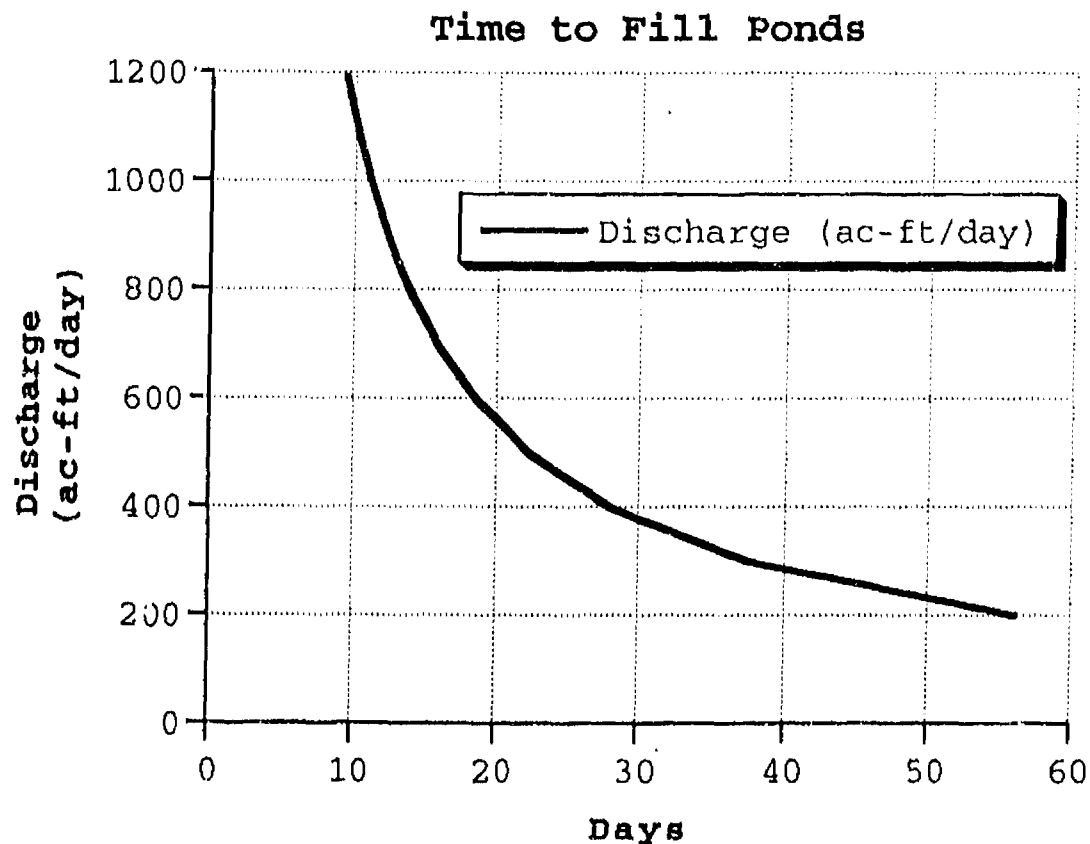
elevation 1461, however, local runoff cannot drain properly when water is held at 1461, resulting in flooding above 1461. The Kongslies have indicated that they do not object to the dam being operated to hold the water level at elevation 1461 as long as the water is released in a timely fashion so as not to damage the their land. If the project were operated so the gates on the dam were opened by April 30 in most years, or soon after the soil profile has been saturated, the drainage of the water from the Kongsle land would be expedited.

In April, 1994, the State Water Commission had color infrared photos taken of the Project when the ponds were at contour elevation. The flooded portions of the land shown on the photos were digitized using MapInfo, and the acres irrigated in each pond were determined. Elevations of structures associated with the ponds were obtained from plans of the project filed with the State Engineer in July 1934. Using these elevations and the acres determined with MapInfo, the volume of water in each pond was determined. In a memo to Milton G. Lindvig, Director, Water Appropriation Division, dated February 7, 1996, I calculated the flooded area of the ponds to be 6,466 acres, with a corresponding storage volume of 11,155 acre-feet. The following table shows the area and capacity of the various ponds.

**Eaton Irrigation Project Data Table**

<b>Pond Number</b>	<b>Surface Area (acres)</b>	<b>Volume (ac-ft)</b>
Pond 1	876	1,751
Pond 2	325	584
Pond 3	425	511
Pond 4	683	1,366
Pond 5	1,320	2,112
Pond 6	1,378	2,205
Pond 7	1,459	2,626
<b>Project Total</b>	<b>6,466</b>	<b>11,155</b>

As stated previously, the flows needed to flood the land on the west side of the river should be on the order of 250 - 300 cfs, with an additional 100 - 150 cfs needed on the east side. Ideally, if the water behind the dam was at contour elevation and the flow in the river was at least 450 cfs, 300 cfs could be diverted to the west and 150 cfs diverted to the east. An estimate of the time to fill the ponds can be made using the 11,155 acre-feet of storage volume and a flow of 450 cfs (900 acre-feet/day). Once the diversion has started it would take 12.4 days to fill the ponds. The following graph can be used to estimate length of time to fill the ponds based on the diversion rate.



A more accurate estimate of the time to fill the ponds can be made calculating the time for the west side and the east side separately. Using a storage volume of 8,529 acre-feet and a diversion flow of 300 cfs (600 acre-feet/day), for ponds 1 - 6 on the west side, it would take 14.2 days to fill the ponds. Using a storage volume of 2,626 acre-feet and a diversion flow of 150 cfs (300 acre-feet/day) for pond 7 on the east side, it would take 8.8 days to fill the pond. The actual time to fill the ponds is dependent on many conditions that may lengthen or shorten the time significantly. Conditions such as whether the meadows were wet at freeze-up, snow and ice cover in the ponds and diversion channels, the timing of the spring runoff, streamflow in the river, elevation of water behind the dam, etc., may affect the length of time to fill the ponds.

The soils within the Project and on the Kongsli land are primarily Ludden clays with areas of Fossum and Arveson soils, among others. According to the SCS North Dakota Irrigation Guide the Ludden soils are characterized as deep, level, poorly drained, slightly and moderately saline, with slow permeability (0.06 - 0.2 inches/hour), very slow runoff and available water holding capacities of 0.13 - 0.18 in/in. The depth to water table is listed as 1 - 3 feet. The McHenry County Soil Survey describes the soil as having slow intake and slow percolation. The estimated time to saturate the Ludden soil profile is about 5.2 days with an additional 3 days for the edge of the ponds. The Fossum and Arveson soils are also characterized as deep, level, and poorly drained, however, the permeability is moderately rapid to rapid (2.0 - 20.0 inches/hour). They have very slow runoff and low to moderate available water holding capacities (0.05 - 0.18 in/in). The depth to water table is listed as 0 - 4 feet for these soils. The estimated time to saturate the Fossum and Arveson soil profile is about 4.6 days with an additional 3 days for the edge of the ponds. Therefore, the estimated time to saturate the soil profile is about 5 days with an additional 3 days for the edge of the ponds.

In a letter to Cliff Hanretty, Chairman of the McHenry County Board of Flood Irrigation, dated February 8, 2000, Kevin K. Sedivec, Assistant

Professor/Rangeland Specialist with the Animal and Range Sciences Department at NDSU explained the impacts of both short-term and long-term flooding of hay meadows.

According to Mr. Sedivec if short-term flooding meadows that contain primarily non - hydric plants, flooding should be restricted to less than 14 days and preferably less than 10 days in the spring. If flooding longer than 10 - 14 days, many of the plants will die and bare ground will be present.

If long-term flooding of meadows that contain primarily non - hydric plants, flooding of greater than 10 days and less than 30 days will change the plant composition to a wet meadow classification. This type of meadow will be very productive for hay, however the plant species composition will change from an upland composition to a low land composition.

Mr. Sedivec also said: "Flooding of more than 30 - 40 days in spring should be eliminated or the land will convert to semi-permanent vegetative plant community and no longer considered a meadow capable of being classified as a hay meadow."

Once the soil profile is saturated there is no need to hold the water in the ponds and the dam gates can be opened, thereby allowing the water on the Kongsli land to drain. Therefore, the time to fill the ponds and allow for the soil profile to become saturated is about 22 days or 3 weeks. It must be remembered that this time is for a flow in the river of 450 cfs and (300 cfs diverted onto the west side and 150 onto the east side), and the dam at contour elevation 1461.

The following conclusions and recommendations summarize the findings of this memo:

Conclusions:

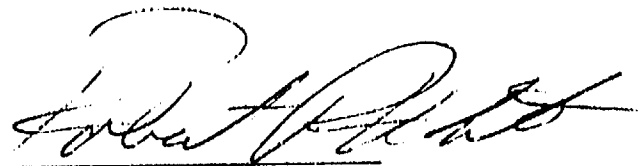
- 1) The number of acres of Kongsli land flooded increases as the water level elevation behind Eaton Dam increases.
- 2) As much as 28 acres of Kongsli land are flooded at water elevation 1461 feet as a result of local runoff being impeded from

flowing into the Souris river due to the elevation of the water behind the dam.

- 3) Project operation schedules indicate that 5 to 7 weeks are required to fill the ponds and hold water for a duration of time sufficient to saturate the soil.
- 4) Diverting water to the ponds usually starts between April 1 and April 30.
- 5) Landowners prefer to start draining the ponds about mid-May.
- 6) If the gates were opened immediately after filling the ponds, depending on the flow in the river, the river stage would drop sooner and allow the Kongsle land to drain sooner.
- 7) It is unclear whether the McHenry County Board of Flood Irrigation has gained the right to encroach on Kongsle land as a result of the longstanding nature of this issue.

Recommendations:

- 1) Require an annual operating plan from the McHenry County Board of Flood Irrigation in accordance with NDCC Section 61-03-26.
- 2) The depth of the water table in the various ponds should be determined each fall in order to plan for water management operations the following spring.
- 3) Annually determine the date the soil profile is frost free. This would determine the date when water can be drained from the ponds.



Robert R. White  
Water Resource Engineer



Breach in dike at pond 1



Another view of same breach as above photo



Upstream end of 2 - 60 inch culverts in roadway over pond 7 diversion channel - both culverts plugged



Looking upstream at pond 7 diversion channel from above culverts - large number of dead trees in channel





72 inch X 60 inch pond 7 diversion gate



Looking at pond 7 diversion channel downstream of pond 7 gate



Logjam upstream of Eaton Dam



Logjam at trashrack on Eaton Dam

## **TESTIMONY ON SENATE BILL 2182**

### **Senate Natural Resources Committee**

**Milton Lindvig, Director, Water Appropriation Division  
State Water Commission**

**January 26, 2001**

Mr. Chairman and Members of the Senate Natural Sources Committee, I am Milton Lindvig, Director of the Water Appropriation Division for the State Water Commission and I appear in support of Senate Bill 2182.

Senate Bill 2182 amends ND Century Code Section 61-04-22, Prescriptive Water Right. It will reinstate the opportunity for a person who has used or attempted to appropriate water from any source for a beneficial purpose over a period of 20 years prior to July 1, 1963, to make application to the State Engineer for a water permit. It is deemed that a person shall have acquired a right to the beneficial use of the water without having filed or prosecuted an application to acquire such a right if the user files an application with the State Engineer by December 31, 2001. If the State Engineer finds that the application substantiates the claim and it is approved, it would be a perfected permit with a priority date relating back to the date when the first step was taken to appropriate the water in the quantity stated in the application. The first step could consist of surveying, drilling, damming, ditching, diking, or other actual preparation for the appropriation of the water. The first step must have been followed by due diligence resulting in the appropriation of the water. The use of the "first step" to determine the priority date is consistent with North Dakota Century Code Section 61-01-03, which provides that the priority date for pre-1905 water rights relates back to initiation of the claim followed by diligent efforts to complete surveys and put water to beneficial use. 1905 is the year the water permitting system was enacted. The bill also provides that the State Engineer must publish notice in each official county newspaper of the deadline for filing an appropriation permit under this section.

Section 61-04-22 was enacted in 1957 to set up a procedure whereby water users who had at least a 20 year history of appropriating water could obtain a prescriptive right. It was similar in all respects to a right gained by following the statutory application process except that the priority date related back to the date that water was first appropriated. There were a number of such water users in the state and the State Engineer recommended legislation that would allow those uses to be converted to appropriative rights. Approximately 40 water users made the required filing between 1957 and 1965, but for various reasons, there were others that did not file. Under present law, if the entities were to apply for a water

application and bring legal rights and relationships into conformity with what people believed existed for the past 66 years.

There are three other projects that do not have water permits to which this legislation may also apply. All are dams built under the authority of various Federal programs in the 1930's or early 1940's, but are now under local jurisdictions. One of the projects is a channel dam on the Mouse River a short distance upstream from Minot and another consists of two dams on the Des Lacs River near Burlington. Another is a Works Progress Administration dam in Adams County.

If perfected permits are issued for these projects, there would not be an adverse impact to junior appropriators on the rivers on which the projects are located. All of the projects are considered when managing water appropriations from those streams. We are not aware of any other projects that would be eligible to apply for a water permit under this legislation, but if there are, we believe it would only be a few.

Your favorable consideration of this bill is requested. Thank You.

TESTIMONY IN SUPPORT OF SB 2182  
House Natural Resources Committee  
Representative Earl Rennerfeldt, Chairman

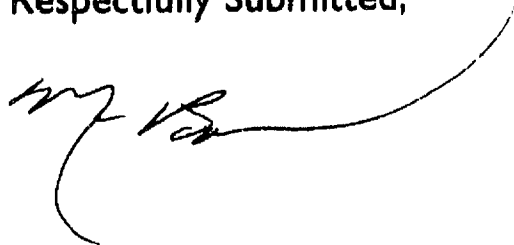
Chairman Rennerfeldt, and members of the Natural Resources Committee.

My name is Merle Boucher Representative from District 9. I come before you today in support of SB 2182.

This piece of legislation is needed to update the current statute on water rights. Over the years people assumed their water rights and acted as if they held those water rights. However, they were not technically registered with the State Engineer. If challenged, these individuals could in effect have their rights stripped. This bill would get these individuals "on board" to protect against such possible challenges. It would simply legalize traditional precepts of water rights.

I ask for your support on SB 2182 to protect the interests of North Dakotans.

Respectfully Submitted,

A handwritten signature in black ink, appearing to read 'Merle Boucher', with a long, sweeping underline that extends to the right.

Merle Boucher



# United States Department of the Interior

## FISH AND WILDLIFE SERVICE

Wetland Acquisition Office  
3425 Mirlam Avenue  
Bismarck, North Dakota 58501



### **TESTIMONY OF STUART WACKER,**

### **U.S. FISH AND WILDLIFE SERVICE,**

### **ON SENATE BILL SB 2182, MARCH 16, 2001**

Mr. Chairman and members of the House Natural Resources Committee; thank you for the opportunity to appear before you today. My name is Stu Wacker and I am representing the U. S. Fish and Wildlife Service (Service) in testifying today on Senate Bill 2182. The Fish and Wildlife Service opposes this bill because it alters current State water laws for determining water rights and priority dates, especially with regard to the Service's water rights at Upper Souris and J. Clark Salyer National Wildlife Refuges (NWR), located on the Souris River. This bill will also

affect other landowners' water rights and those of the Eaton Flood Irrigation District.

On September 1, 1934, pursuant to State water laws, the Service, then known as the Bureau of Biological Survey, an agency of the U.S. Department of Agriculture (USDA), filed for water rights for projects at Upper Souris NWR and Lower Souris NWR, now known as the J. Clark Salyer NWR. The Service complied with all State water laws in securing these water rights and was given a priority date of September 1, 1934.

The Eaton Flood Irrigation District water rights at that time consisted of three permits with priority dates of 1932, 1915, and 1915, respectively. Two of these permits set forth only a maximum diversion rate, not a total quantity of water, while the third permit included an annual amount grossly in excess of the water needed for the acreage listed on the permit.

In 1935, the USDA and the McHenry County Board of Flood Irrigation executed an agreement that stated that the Eaton Project is "entitled to receive up to 10,000 acre-feet each spring or such lesser amount of water as enters the Upper Souris Reservoir (Lake Darling) during that spring's run-off". It was never suggested that this 10,000 acre-feet was to be in addition to the three Eaton permits.

It is generally held that when a State adopts an administrative procedure for obtaining water rights, that procedure is considered the exclusive means by which a water right may be obtained. However, it appears that the Eaton District is now trying to circumvent existing State law because it failed to follow that law in appropriating and perfecting its water rights.

SB 2182 would reverse and contradict years of existing State water law on appropriation and priority dates, not to improve the State law, but to pre-empt existing, established rights of the Service and other



landowners, and give them to another. While the Service opposes SB 2182 because it would pre-empt our water rights and those of other landowners, secured in accordance with existing State water laws, the State should seemingly be wary of opening up State water law and water rights to legislative recall.

Attached to my testimony is a copy of the Service's November 8, 1996, letter to then-State Engineer David Sprynczynatyck expressing our concerns and the legal basis for objecting to the proposed change in priority date and volume for the Eaton water rights. In that 1996 letter the Service said that it was open to discussion of alternatives which could resolve our concerns. The Service has never received a response to our 1996 letter from either the State Engineer or Mr. Eaton regarding those concerns or our offer to discuss alternatives.

If SB 2182 is passed, the Service will consider its options to protect its existing water rights, as well as reconsider whether we should continue

operations pursuant to the 1935 Agreement with the Eaton Project. And, the Service will also take advantage of the provisions of SB 2182 to secure additional, and earlier, water rights for our refuges.

I thank you for the opportunity to provide the Fish and Wildlife Service's comments.

BA/WTR  
NR ND  
Mail Stop 60190

Mr. David A. Sprynczynatyk  
State Engineer  
900 East Boulevard  
Bismarck, North Dakota 58505

NOV 0 8 1996

Dear Mr. Sprynczynatyk:

The North Dakota State Water Commission is currently attempting to perfect all water rights on the Souris River pursuant to North Dakota Century Codes §§ 61-04-01.2 & 61-04-09. In connection with this effort, Milton Lindvig, Director of the Water Appropriation Division, has recommended perfecting the Eaton Flood Irrigation District's water rights at a quantity of 13,681 acre-feet, consisting of 3,681 acre-feet pursuant to Permits No. 7D, 89B, and 90B (priorities relating back to the date of filing of those applications), and 10,000 acre-feet pursuant to the 1935 Agreement with the United States (priority date December 18, 1933, which relates to the day on which survey work apparently commenced).

On the advice of our attorneys, the Fish and Wildlife Service must oppose these recommendations because we believe they are based on a flawed interpretation of both applicable state law and the 1935 Agreement. In submitting these comments, the United States does not submit to the jurisdiction of the State, including the State Water Commission, for the purpose of adjudicating or otherwise affecting any water right or other property interest of the United States. Submission of these comments does not constitute a waiver of the United States' sovereign immunity or of any other rights or remedies available to the United States to protect federal property interests such as the water rights appurtenant to Upper Souris and J. Clark Salyer National Wildlife Refuges, including recourse to the United States District Court for the District of North Dakota. We have been advised by our attorneys that the administrative confirmation of the Eaton Project's water rights does not constitute a general adjudication of water rights pursuant to the McCarran Amendment, 43 U.S.C. § 666(a), and is therefore not a binding determination of the relative rights of the Eaton Project and the United States.

On September 1, 1934, pursuant to Section 8270 of the 1913 Compiled Laws of North Dakota, the Bureau of Biological Survey notified the North Dakota State Engineer that the United States intended to "utilize certain specified unappropriated waters as of the date of this notice, in the State of North Dakota," including unappropriated waters of the Souris (a.k.a. Mouse) River and all of its tributaries.

Within 3 years of the 1934 notice, the Biological Survey submitted descriptions of the projects and amounts of water claimed. Included were the Upper Souris Project (within the Upper Souris National Wildlife Refuge), consisting of Lake Darling Reservoir and several structures for the creation and inundation of marsh areas, and the Lower Souris Project (within the Lower Souris National Wildlife Refuge, subsequently renamed the J. Clark Salyer National Wildlife Refuge), consisting of a smaller reservoir and structures for the creation and inundation of marsh areas. Water stored in the Upper Souris Project was to be used both for the inundation of marsh areas in the Upper Souris Project and for delivery to the Lower Souris Project.

At that time, owners of lands located between the Upper and Lower Souris Projects held three permits (Nos. 7D, 89B, and 90B, with priority dates of 1932, 1915, and 1915, respectively) to use water from the Souris River for irrigation purposes. The quantity of water covered by the permits is unclear because two of the permits set forth only a maximum diversion rate, while the third provided an annual amount grossly in excess of the common water duty for the acreage listed. Although it appears some water was pumped pursuant to Permit Nos. 89B and 90B, it is possible that the full permitted quantity of water was not put to use within the time required by North Dakota law. It is also unclear whether the necessary steps were taken to perfect Permit No. 7D within the required time frame.

Assuming timely compliance with statutory requirements, the amount of water covered by the permits can be quantified by applying the water duty later relied upon in the 1935 agreement (1.25 acre-feet per acre). This method indicates a use of 2,060 acre-feet. Applying this duty to Permit Nos. 89B and 90B, and accepting the excessive quantity stated in Permit No. 7D, yields a maximum diversion of 2,987.5 acre-feet.

However, Mr. Lindvig has now performed calculations to determine the volume of water that should be associated with Permit Nos. 89B and 90B. First, the volume of water needed to cover the 6,466 acres served by the project (calculated using aerial photographs and as-built plans for the project) was determined to be 11,155 acre-feet (there was an error in the surface volume total in the letter sent to the Eaton Irrigation District). Note that storage is not a permitted use under any of the three permits. Then, a volume of water needed to satisfy a 1.71 inch infiltration into the top foot of soil (921 acre-feet) was added to obtain a total volume of 12,076 acre-feet. This volume was divided by the project surface acreage to obtain an application rate of 1.87 acre-feet per acre, far in excess of the 1.25 acre-feet per acre water duty used in the 1935 agreement. This 1.87 acre-feet per acre water duty was then multiplied by the acreage listed in Permit Nos. 89B and 90B to obtain volumes of 1470 and 621 acre-feet, respectively. These volumes were added to the excessive quantity stated in Permit No. 7D to obtain a volume under these permits of 3,681 acre-feet. Note that when the 3,681 acre-foot volume determined for Permit Nos. 7D, 89B, and 90B is added to the 10,000 acre-feet in the 1935 agreement, the total (13,681 acre-feet) equals the volume of water calculated to be needed by the project including the infiltration volume (12,076 acre-feet), plus the volume of water calculated to be stored in the channel (1605 acre-feet) at an elevation of 1461 msl. We believe this entire calculation is faulty.

In December 1933, field work commenced on an expansion of irrigation within the Eaton Project and construction of the required diversion works. However, the District did not follow the "conventional procedure" required by North Dakota law to first obtain a permit to appropriate water for this additional use. Apparently State Engineer Kennedy initially misunderstood the legal effect of the Biological Survey's notice and the priority of the associated water right, and therefore urged the District to file an application for an enlargement of the old Eaton right before the Biological Survey could "complete" its appropriation. Accordingly, on September 7, 1934, the District requested for the first time to enlarge the Eaton irrigation right and asked the State Engineer to prepare and forward the appropriate application. However, by then Mr. Kennedy had apparently realized that, under Section 8270, the Biological Survey had accomplished a withdrawal of all waters unappropriated as of September 1, 1934, with the Biological Survey's water right enjoying a priority of that date. He recommended that the District abstain from filing an application, apparently out of concern that the filing of such an application would establish a priority date subsequent to the Biological Survey's withdrawal, and instead suggested that a priority date of December 18, 1933, would be appropriate for the Irrigation District.

There is no evidence that an application was ever filed to appropriate water in excess of the amount provided by the original permits. However, State Engineer Kennedy informed the Biological Survey that he had determined that the Eaton Project had a priority over the federal withdrawal of the Souris River, since the District had made application to him for water.

Based on Mr. Kennedy's statement that the Eaton Project had applied for a water right prior to the United States' September 1, 1934, withdrawal of the Souris River, the United States Department of Agriculture executed an agreement on November 24, 1935, with the Board of Flood Irrigation of McHenry County (the "1935 Agreement"). A recital to the 1935 Agreement stated that the Board "has certain water rights for irrigation purposes and proposes to construct a dam to be known as the Eaton Dam...." to provide for operation of both the Souris and Eaton Projects, the parties agreed that "the irrigation project is entitled to receive up to 10,000 acre-feet each spring or such lesser amount of water as enters the Upper Souris Reservoir during the spring's run-off." In exchange, the Board promised to pass all other water through the proposed Eaton Dam, and to undertake certain measures to facilitate the conservation of migratory birds. Apparently the 10,000 acre-foot quantity was negotiated by the parties based on the calculation that a 1.25 acre-feet/acre water duty was appropriate for a district containing 8,000 acres, which included the land for which water had been appropriated pursuant to the original permits. At no time during these negotiations was it suggested that the 10,000 acre-feet would be in addition to the quantity of water available pursuant to the permits.

Construction of the Eaton Dam was completed in spring of 1937, with the completed project irrigating 6,436 acres of land (see the May 8, 1937, newspaper article). Although use of the 1.25 acre-feet/acre duty negotiated in 1935 would indicate that the Eaton Project would require

only 8,045 acre-feet, the District immediately began demanding delivery of 10,000 acre-feet from storage in the Upper Souris Project in addition to the amount of annual run-off below the Refuge. The Biological Survey responded with its interpretation of the 1935 Agreement, setting forth several points to which it (and, subsequently, its successor, the U.S. Fish and Wildlife Service) has consistently adhered: (1) the Eaton Project's maximum entitlement under the 1935 Agreement is 10,000 acre-feet or such lesser quantity as flows into the Upper Souris Project's Lake Darling during the spring run-off; (2) this entitlement could be satisfied by any source, including inflow to the Souris River between Lake Darling and the Eaton Dam; and (3) in no circumstances could the Eaton Project require releases of water stored in Lake Darling prior to the spring run-off or carried over from previous seasons.

Although the Biological Survey consistently released water in accordance with its interpretation of the 1935 Agreement, a series of disagreements ensued between the Biological Survey and the Eaton Project concerning annual releases from Lake Darling. One source of these disagreements was the District's desire for additional releases -- from Lake Darling's carryover storage -- despite evidence that the 10,000 acre-feet (or less) quantity specified in the 1935 Agreement may have been in excess of the Eaton Project's requirements. (Note the comment from the District's attorney at the February 25, 1942, Mouse River Hearing held in the office of the State Water Commission that "...10,000 acre-feet of water was sufficient for the Eaton Project, and in fact might be more than necessary at times....")

On February 19, 1958, then State Engineer Hoisveen issued a Certificate of Completion of Works for Permit Nos. 7D, 89B, and 90B, providing for the diversion of 10,000 acre-feet with a priority date of April 17, 1937. Mr. Lindvig's analysis provided no explanation for State Engineer Hoisveen's departing from State Engineer Kennedy's previous determination of a 1933 priority date, recognizing in the Certificate that April 17, 1937, was the appropriate priority for the Eaton Project's diversions. However, North Dakota law provides for the postponement of a water right's priority in certain circumstances, including the postponement of priority in connection with the inspection of diversion works and issuance of a Certificate of Completion of Works. 1905 N.D. Laws ch. 34, § 25, amended 1961 and subsequent, (providing that if, following his inspection of the works, the State Engineer requires changes to the works, failure to complete the changes within the specified time period will result in postponement of priority until the date on which alteration of the diversion works has been completed to the State Engineer's satisfaction). Mr. Lindvig also has not explained why he is now overruling State Engineer Hoisveen's finding that 1937 was the correct priority date and returning to the Kennedy determination of 1933.

More important, there is no apparent legal basis for this increase in the quantity of water diverted pursuant to these permits. Rather, North Dakota law at that time expressly prohibited such expansion of permitted rights: "When the [diversion] works are found in satisfactory condition, after inspection, the state engineer shall issue his certificate of construction, setting forth the actual capacity of the works and such limitations upon the water right as shall be warranted by the condition of the works, but in no manner extending the rights

described in the permit." 1905 N.D. Laws ch. 34, § 26 (repealed 1965) (emphasis added); see also 1905 N.D. Laws ch. 34, § 29 (repealed 1965); upon verifying application of water to beneficial use, the State Engineer shall issue a license to appropriate "to the extent and under the conditions of the actual application thereof to a beneficial use, but in no manner extending rights described in the permit" (emphasis added). Although the State Engineer did not have the authority to expand the quantity of water, his action reflects the common understanding that the 10,000 acre-feet quantity was the maximum amount to be diverted by the Eaton Project, and that the water used pursuant to the permits was subsumed within this amount.

As for Mr. Lindvig's assertion that the 1935 Agreement "is the basis for a portion of the water right for the Eaton project," under North Dakota law a private agreement between two parties cannot serve as the basis for a water right and similarly such an agreement cannot determine priorities of water rights. He provides no explanation of how, in express contravention of applicable North Dakota law, the Eaton Project could contractually "create" a right to divert water in excess of the amount provided by the original permits. Generally, where a state adopts an administrative procedure for obtaining water rights, as North Dakota did in 1905, that procedure is considered the exclusive means by which a water right may be obtained. Even if it were possible to base a water right under North Dakota law on a private agreement, the 1935 Agreement would serve as a particularly inappropriate basis for such a right, given that the 1935 Agreement was premised on the incorrect assumption (based on an apparent misstatement of fact by the State Engineer) that the Eaton Project had filed an application to appropriate water and was, therefore, prior in right to the Upper and Lower Souris Projects.

Since 1905, North Dakota law has clearly and unambiguously required all persons desiring to appropriate public waters to make an application to the State Engineer. 1905 N.D. Laws ch. 34, § 19 (amended 1953 and subsequent). The Eaton Project did not comply with the required procedures and therefore failed to initiate, let alone perfect, a water right for a quantity of water in excess of, at most, 2,987.5 acre-feet. It is clear that any appropriation of additional water by the Eaton Project would be subsequent to the September 1, 1934, priority of the Upper and Lower Souris Projects.

The Service is certainly open to discussing alternatives which will resolve its concerns about the Eaton Project water rights. However, if Mr. Lindvig's recommendations are adopted, the Service will consider an appropriate legal challenge to that action and reconsider whether it should continue operations pursuant to the 1935 Agreement.

If you would like to schedule a meeting to discuss these issues, please contact Cheryl Williss at 303 236-5321, ext. 223.

Sincerely,

/s/TERRY T. TERRELL

Regional Director

March 16, 2001  
Testimony before House Natural Resource Committee  
Pioneer Room  
Representative Earl Rennerfeldt, Chairman  
Senate Bill 2182

My name is Vern Kongsli and I appear in opposition to Senate Bill 2182.

My brothers, Lynn and Justin and I own farmland and hay land southwest of Towner near the Souris River. My father and mother also are actively involved in the ranching operation. My father has lived his whole life on this ranch and my brothers and I are the fourth generation to farm this land. Some of our land is affected by the McHenry County Irrigation District more commonly know as the Eaton Irrigation Project. Due to mismanagement by the projects landowners, our land has been illegally flooded several times in the past so that the projects landowners would have additional hay land flooded to which they are not entitled by law. They also have used the dam for flood control, which is illegal.

The Eaton Dam was built in the 1930's to divert water to seven ponds created by a system of dikes and culverts with head gates to control the release of water from the individual ponds. Robert Kennedy, the state engineer, provided a basic operation plan for the project to follow in his second report in the 1930's. This type of irrigation must be managed carefully. In recent years the Eaton Irrigation Project has been holding the water on the land too long causing damage to our land and also to the land under the project. Attached are documents from Professor Kevin Sedivec, Extension Rangeland Specialist from North Dakota State University confirming our complaints.

In 1970 an injunction was filed by the upstream landowners against the Eaton Project because they refused to open the discharge gates of the dam during high flows. Settlement was made out of court with the Eaton Project agreeing to open the discharge gates of the dam and promising to operate the project correctly. However, controversy prevailed between the upstream landowners not under the Eaton Project and the landowners under the Eaton Project each spring when the Eaton Dam was closed for irrigation. When the water level was brought up to elevation 1462 on the Eaton Dam several hundred acres of the upstream landowners not under the project were being flooded. Since this land was being farmed the water was not welcome.

By keeping the water above the authorized elevation of 1461 additional acres of meadow outside the project were being flooded for the landowners who participated in the Eaton Project. The contour of the Mouse River valley has a very gentle slope of about four inches per mile which means any deviation from the correct operating contour can affect a large area. The upstream landowners not under the project complained to the Eaton Project Board but were answered with "we are operating within the law."

The upstream landowners asked to see documentation that would prove the correct operating level and authority to appropriate the water. The upstream landowners were told by the Eaton Project that they did not know where the records were kept. The upstream landowners



then complained to the McHenry County Commission who appoints the Eaton Project Board members. The McHenry County Commissioners then appointed an upstream landowner to the Eaton Board in 1974. The operation of the dam was somewhat better the next few years.

In 1998 the Eaton Project closed the dam about February 7. On April 1, 1998 the dam level was nine inches over the 1461 contour level and was flooding our farmland. Lynn Kongsliie contacted an Eaton board member who was also the water master and informed him that our land was being flooded and requested the dam discharge gates be adjusted to the 1987 contour agreement. He refused to adjust the contour level and he did not even inspect our land to confirm our complaints.

Lynn contacted Robert White from the State Water Commission who met with Lynn and the water master later that week. After a tour of our land and of the dam Mr. White advised the water master that the Eaton Project was operating over the legal contour level and that he needed to release the excess water downstream. Lynn asked Mr. White if the Eaton Project had proper permits to irrigate and Mr White responded that the permits were on file at the State Water Commission.

We (Vern, Lynn, and Justin Kongsliie) have had our attorney investigate and file formal complaints against the Eaton Project with the State Water Commission since 1998. Our attorneys October 6, 2000 letter to the State Water Commission which I have attached to my testimony covers most of our complaints of the Eaton Project. But the State Water Commission has not addressed the key issues raised in the letter and they have not taken any action to resolve these complaints. I also have attached some of the letters of our correspondence with the State Water Commission and some email messages to the Senate Natural Resource Committee.

This Bill raised a number of concerns from a statutory standpoint relation to the prior appropriation doctrine and the state's water laws. The most significant issue is the priority date. Presently, North Dakota Century Code &61-04-06.3 provides that the priority date of a water permit is the date upon which the application is filed with the state engineer's office. The statute which this bill is attempting to amend provides a priority date relating back to the date when water was first put to beneficial use. This Bill would allow the Eaton Project a priority date from when the project was surveyed or construction began. This would be in the early 1930's.

The Eaton Project like all other appropriators in the state had two years from July 1, 1963 to perfect a water right. By failing to do this by July 1, 1965, Eaton's claim to a water right was declared abandoned and forfeited. Consequently, the Eaton Irrigation Project (for whom this legislation was drafted and proposed) by not making application for a water permit between 1963 and 1965, forfeited whatever right it may have had and had no legal right to be appropriating water without holding a valid permit under existing law. Consequently, since 1965, the Eaton Project has been violating state law. The State Water Commission has done nothing to stop the illegal appropriation. It knew of the illegal appropriation, condoned it, and condoned the operation of the dam in such a fashion as to allow our lands to be damaged by flooding. All other appropriators in the state had to follow state law. To allow an entity 35 years after their water right was extinguished to come in and legislate a water right superior to almost all other upstream appropriators is a dangerous precedent.

All appropriators on the system whose priority date is after the date claimed by the Eaton Project will become junior appropriators to the Eaton permit and as a practical matter will lose their right to appropriate water. This is water that they have been legally appropriating for 35 years. This is a significant property right that will be taken from them. To grant the Eaton Project a priority date earlier than current appropriators may be an unconstitutional taking of property.

Another consequence of this Bill if passed is that those appropriators who failed to make application during the two year period required under existing law and who stopped appropriating water because they did not have a permit, would have no right to apply for and receive a perfected water permit with a priority date relating back to when they first began using the water. They would be penalized because they honored the law. This on its face is unfair.

I ask that you vote "Do Not Pass" on this piece of legislation. The passage of this Bill would result in an unlawful taking of property and could spawn considerable litigation. It would condone and legitimize 35 years of illegal and unlawful activity by the Eaton Project. Also, on a statewide basis all those who did comply with the law and had a priority date established as the date when the water was first put to beneficial use can now come back in and seek to have that priority date changed to the date when the survey work or other actual preparation for the appropriation of water had begun.

The passage of this Bill could not only create an administrative nightmare, it could face a constitutional challenge and is unfair to all present and former appropriators on the Souris River. Present law provides for the Eaton Project to apply for the proper permits so there is no need to pass this bill.

E mail 1-28-01

Dear Senator

I want to thank you for the opportunity to testify against senate bill 2182. I would like to comment on a question that was asked of Mr Milton Ligvig about the top elevation of the Eaton Dam. The water master answered 1461.5 feet. That is not the whole story. The top of the dam was actually 1466 feet until 1988. The original dam had discharge tubes with head gates and had no spillway on top of the dam. In the spring of 1987 the Eaton Project had the water at 1462.25 feet elevation which was 15 inches over the designed contour level of 1461 feet. Several hundred acres of our neighbors and our own farmland was illegally flooded that spring. Our neighbor Ramon Anderson and my brother Lynn and myself met with the Eaton board and showed them their documents we had found in their attorneys office and requested that they operate their dam according to the engineers operating plan. The Eaton Board hired a surveyor to check the elevation of the dam and mark the 1461 foot elevation level on the upstream side of the dam. They also agreed to operate the project properly.

In 1988 and 1989 the Eaton Dam received a major reconstruction. Some of the discharge tubes and head gates were removed and replaced with two large radial discharge gates that each have a spillway elevation of 1461.5 feet when the gates are fully closed. The rest of the dam still has a top elevation of 1466 feet. Depending on the rate of flow with the discharge gates closed the depth of the water going over the top of the closed gates could be several inches resulting in a total elevation of 1462 or more which causes flooding of our land. These discharge gates must be regulated on a daily basis to stay at the 1461 foot level.

Also the State Water Commission is trying to say we have only 9.3 acres of land affected but we disagree. In 1994 the State Water Commission and the Eaton Project had aerial photos taken of all the ponds and also of our land when the elevation of the project was at 1461 feet. The state engineer then calculated the acres being irrigated for each landowner from these photos. Each landowner is then assessed a water tax for these acres. Since our land is not under the project we are not taxed but the state engineer calculated our acres being flooded at 1461 to be about 28 acres. The 9.3 acres talked about in the Jan 19, 2001 letter from the State Water Commission comes from a survey done by a certified surveyor we hired in March of 2000. Our purpose of the survey was not to attempt to determine how many acres were being flooded at 1461 elevation but to simply establish some reference points on our land so we knew when the Eaton Project was operating over the 1461 elevation. We would have had to done a more detailed survey to determine the acres being flooded but we already knew that from the 1994 aerial survey.

Also the Jan 19, 2001 State Water Commission letter claims that the water backed on our land is from local runoff being prevented from draining which is hogwash. How come before and after the irrigating process when the Eaton dam discharge gates are open we have no water on this land.

We would appreciate a no vote on Senate Bill 2182 until the State Water Commissions resolves our claims. After thinking about this bill after the testimony we feel this bill could affect the issue of prescriptive easement rights for our land. We intend to discuss this more with our attorney.

Sincerely

Vern Kongsli  
Lynn Kongsli  
Justin Kongsli

208 5<sup>th</sup> Ave NW  
Towner ND 58788

P.S. Dear Senator:

I forgot to mention in my message earlier today that we have offered to sell an easement on our approximately 30 acres of our land to the Eaton Project but they have not been willing to discuss that option with us. In order to perfect their water rights this situation must be resolved. As our attorney stated at the hearing present law allows for the Eaton Project to apply for water permits without passing this Bill 2182. Thank you again for your time.

Vern Kongsli  
Lynn Kongsli  
Justin Kongsli  
Towner ND 58788

Department of Animal and Range Sciences

College of Agriculture

Hultz Hall

P.O. Box 5727

Fargo, ND 58105-5727

5 September 2000

Doug Dragseth  
McHenry County Extension Agent  
Box 118  
Towner, ND 58788-0118

Re: Eaton Irrigation Project - Ground Tour 31 July 2000

A survey of plant species composition and plant cover on three ponds associated with or adjacent to the Eaton Irrigation Project was conducted 31 July 2000. Pond #1 and #7 appeared to be a classic lowland/wet meadow in transition (to a wetland type). Current dominant graminoid plant species composition is spike rush (*Eleocharis* spp.), prairie cordgrass (*Spartina pectinata*), cattail (*Typha* spp.), and quackgrass (*Agropyron repens*). Broad leaf plants include arrowgrass (*Triglochin maritima*), spotted hemlock (*Cicuta maculata*), and water plantain (*Alisma triviale*). Based on the current species composition, this meadow would be classified as a seasonal wetland. Graminoid species that should be present but were absent or dramatically reduced include reed canary grass (*Phalaris arundinacea*), northern reed grass (*Calamagrostis stricta*), and slough sedge (*Carex atherodes*).

This pond should contain the prairie cordgrass and spike rush, but not as dominant species. I noted areas of bare soil which is classic of transition, death due to flooding and transition to new species tolerant of standing water. Forage production would be sacrificed since reed canary grass, northern reed grass and slough sedge are more productive (and palatable to livestock) than spike rush and cordgrass. Also to note, arrowgrass and hemlock are toxic to all classes of livestock. Both these species are indicative to marshes, sloughs, and temporary and seasonal wetlands in McHenry county.

The presence of quackgrass would indicate salts occur in these soils. Flooding actually provides a benefit to these soils, keeping salt deposits lower in the soil profile and minimizing their effects to the outer edges of the meadows. Timing of flooding on these meadows is very beneficial to their production and species composition as long as the flooding occurs early in the spring and released within 30 days into the growing season (about late May). I can imagine the last few years have been difficult to minimize flooding on these meadows past late May with the high rainfall totals. Since these soils remain saturated for an extended period of time, high rain events following water release periods will naturally extend the flooding period. Meadows and wetlands are naturally cyclic and plant species change can occur quickly, either towards a wetland or back to a meadow. This event does take time, but usually less than three years, depending on salts in the soil.

The third location toured was a wet meadow field adjacent to the flooding zone that is impacted by flooding. This field was classified as a wet meadow field not in transition. It contained a nice representative of desirable graminoids with some spotted hemlock and little to no arrowgrass. The field must receive spring flooding, either naturally or man caused, with no long duration of flooding into late May. Spike rush and cordgrass were present but at natural levels.

I hope this report is helpful in classifying these ponds. If any questions, feel free to contact me.

*Kevin*

Kevin Sedivec, Ph.D.

Extension Rangeland Specialist

Department of Animal and Range Sciences

College of Agriculture

Hultz Hall

P.O. Box 5727

Fargo, ND 58105-5727

February 8, 2000

Cliff Hanretty  
847 68<sup>th</sup> Drive NE  
Towner, ND 58788

Re: Impacts of flooding on non-wetland classified hay meadows

Impacts of flooding on hay meadows will vary by meadow type, duration of flooding within the year, and number of consecutive years flooded. I will discuss this review in two phases: short-term flooding (one year) and long-term flooding (consecutive years of flooding).

Short-term flooding:

Short-term flooding will have the least negative impact; however, drastic changes can still occur. If flooding meadows that are dominated by non-hydric plants (such as western wheatgrass, big bluestem, switchgrass, Kentucky bluegrass, smooth brome grass, etc.), flooding should be minimized to less than 14 days, preferable less than 10 days in spring or severe death to the plants will occur. These communities will have little to no long-term damage if flooding and hydric conditions are eliminated within these time frames. If flooding occurs longer than 10-14 days, death of many of the plants will occur and bare ground will be present early, with annuals and biennials invading as well as barnyard grass and stinkgrass. These communities will revert back to their natural state within 2-4 years.

If flooding meadows that are classified as wet meadows and contain hydric grasses and sedges (such as hollowgrass, northern reedgrass, cordgrass, mid sedges, etc.), flooding should be minimized to less than 30 days, preferable less than 21 days in spring or severe death to the plants will occur. These communities will have little to no long-term damage if flooding and hydric conditions are eliminated within these time frames. If flooding occurs longer than 30 days, death of many of the plants will occur and bare ground will be present early, with annuals and biennials invading as well as spike rushes, Baltic rush, barnyard grass, stinkgrass, and possibly foxtail barley. These communities will revert back to their natural state within 1-3 years.

Other wetland types such as semi-permanent wetlands provide hay meadows in years of consecutive drought periods and are probably not an issue. However, long-term flooding can and will revert the wet meadow zones and non-wet meadow zones to semi-permanent vegetative status that will take many years to revert back.

Long-term flooding:

Long-term flooding of the non-hydric meadows of greater than 10 days and less than 30 days will change the plant species composition to a wet meadow classification, which will create a hay

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Meadow very productive in terms of tonnage of a desirable hay for livestock feed. The positive issues here are a high forage producing site, the negatives are loss in upland plant species composition to a low land species composition.

Long-term flooding of the wet meadow zones will convert the grass species composition to a more sedge, rush, phragmites, cattail, bulrush species mix. These species are productive but less palatable to livestock and will provide a marginal to poor hay feed. These areas will not withstand haying machinery until late in the season when feed quality is poor and palatability is less desirable. In wet years, these areas will remain flooded for an extended period of time and found unsuitable for haying in those years and a total loss occurs.

Flooding of more than 30-40 days in spring should be eliminated or the land will convert to semi-permanent vegetative plant community and no longer considered a meadow capable of being classified as a hay meadow. My interpretation of these events are based on experience, visiting with other range scientists, and review of the document "Prairie Basin Wetlands of the Dakotas: A Community Profile" by Kantrud et al. 1989. This document is a U.S. Department of the Interior publication (Biological Report 85 (7.28) - September 1989).

Sincerely,



Kevin K. Sedivec, Ph.D.  
Asst. Professor/Extension Rangeland Specialist  
Animal and Range Sciences Department  
North Dakota State University  
Fargo, ND 58105



**OLSON CICHY**  
ATTORNEYS



P.O. BOX 817  
115 North 4th Street  
Bismarck, ND 58502-0817  
Phone: 701-223-4524  
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X  
John M. Olson  
Attorney

Joseph J. Cichy  
Attorney

May 19, 2000

David A. Sprynczynatyk  
State Engineer  
900 East Boulevard  
Bismarck, ND 58505-0850

**RE: Water Issues**  
**Our File No. 99-52**

Dear Mr. Sprynczynatyk:

I write this letter on behalf of my clients, the Kongsle family from the Towner area. This letter relates to the Eaton Irrigation (District).

Numerous requests have been made by the Kongsles to require the District to operate its works in a manner so it does not flood and damage their property. It is my understanding that much of the land being irrigated may not have a state water permit or has a conditional permit at best.

Your office is aware that the District appropriates more water for longer periods of time than the permit allows and that my clients' land is being damaged by the mismanagement of the works. Attached is a letter from Dr. Kevin Sedivec from the NDSU Department of Animal and Range Sciences regarding the damage caused by flooding. This District has flooded the Kongsle's land for 60-90 days over the past few years which clearly damages their property. As you are aware, N.D.C.C. § 61-04-06.2 allows you to modify the plans and specifications of an appropriation and that the permit may be conditioned in a manner you deem necessary to protect the rights of others. In this case, nothing has been to protect the rights of the Kongsles. Also, under N.D.C.C. § 61-04-11 if your office finds that any works used for the storage, diversion or carriage of water are unsafe or a menace to property you are to notify at once the entity in charge and specify the changes necessary to ameliorate the problem. Complaints have been made concerning the operation of the project, the elevation the water is held, the use of the irrigation works for flood control and the duration that the water is held and nothing has been done. The District must be notified and required to put the works in a safe condition.

Some of the dikes used to control the water do not hold water. Because of these breaches in the dike system the District hold the water higher and longer to counter that problem. Also, there is not state water permit either conditional or perfected that authorizes the flooding of 3,300 acres.

X  
David A. Sprynczynatyk  
May 19, 2000  
Page 2

It appears the District is violating state law, which requires before anyone can appropriate water, they must acquire a permit from the state engineer. As you are aware, riparian rights were extinguished in the 1950s with a two year window to make application for water rights that had been formerly based upon riparian rights. Based on my research, that was not done. Consequently, the irrigation district is violating N.D.C.C. Chapter 61-04 and has been doing so since the late 1950s with nothing done by the state engineer's office. Also the reconstruction of the works (i.e. the dam with gates) for the irrigation project was to include a fish tube. That is clearly stated in the dam permit. It is our understanding that there is no fish tube in the dam which violates not only the terms and conditions of the permit, but also North Dakota Game and Fish Department's related statutes that require fish tubes.

A complaint was filed on behalf of my client on July 1, 1999. Subsequent to that time, meetings have been held between my clients and State Engineer personnel discussing the specific problems that are occurring. To date, neither I nor my clients have received any notice of any action taken by the State Engineer's office in this matter.

This matter has been before the State Engineer for some time with no progress being made. Specific definitive action must be taken within the next thirty (30) days to resolve the damage issues the operation of the irrigation district is causing my clients or legal action will be brought to force the State Engineer to act on these matters as the law requires

I would appreciate your prompt attention to this.

Sincerely,

  
Joseph J. Cichy

JJC:kah  
c:Vern Kongsliu

G:\KAH\Water\Sprynczynatyk7LTR.wpd



99-52  
COPY  
TO CLIENT  
AND FILE

Office of the State Engineer

September 21, 2000

Mr. Joseph J. Cichy  
Olson Cichy Attorneys  
P. O. Box 817  
Bismarck, ND 58502-0817

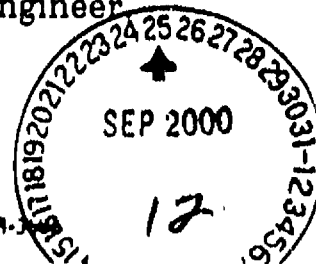
Dear Mr. Cichy:

This is in reply to your letter of August 5, 1999, and a follow-up to our letter of June 20, 2000, which responded to your letter of May 19, 2000.

It is understood that the principal issue is the alleged flooding of land owned by the Kongsle family as a result of the operation of the Eaton dam, which is a part of the Eaton flood irrigation project managed by the McHenry County Board of Flood Irrigation (Board). The dam is located on the Souris River a short distance downstream from the Kongsle property. The gates on the dam are closed each spring to raise the water level in the river so as to cause the water to flow through gates and inundate meadows to facilitate the growth of hay used as livestock forage. Gates and levees control the flooding of the meadows and create seven different ponds. It is alleged that when the water level behind the dam is higher than elevation 1461 feet above mean sea level (MSL), additional and prolonged flooding of the Kongsle land occurs. It is stated that an operating water level greater than 1461 MSL may be used to facilitate the filling of pond 7 due to an inadequately sized culvert.

Another factor that has come to light during the past several months is the length of time the gates on the dam remain closed after the ponds are filled in order to hold the water level high and complete the saturation of the soil profile over the maximum area. It is believed that the water is held on the ponds for an excessive period of time, which may result in damage to the grass. This practice is believed to extend the period the Kongsle land is flooded. A copy of a letter dated February 8, 2000, from Dr. Kevin K. Sedivec, Rangeland Specialist at North Dakota State University to Mr. Cliff Hanretty was provided by you, which presents information on this issue.

The third issue addressed relates to the volume of water used when the water level behind the dam exceeds elevation 1461 feet resulting in more water being appropriated than is authorized. It is believed that this may also violate the proposed operating plan prepared in 1934 by Robert E. Kennedy, State Engineer.



Mr. Joseph J. Cichy  
September 21, 2000  
Page 2

As stated in my letter of June 20, 2000, Milton Lindvig and Robert White of this office met with Lynn and Vern Kongsliie on September 1, 1999, at Towner. They were shown a video of water conditions in the immediate vicinity of Eaton dam and upstream from the dam during several spring flooding periods. Portions of the video showed water conditions on the Kongsliie property. As a part of that meeting the Kongsliies took them on a tour of the area. It included Eaton dam, the culverts and ditch to pond 7, features on pond 1, and the portion of Kongsliie land that is periodically flooded.

Since September 1999 additional information has been provided by Vern and Lynn Kongsliie. A map showing MSL elevations of the Kongsliie property subject to flooding was prepared by Kadrmas, Lee, & Jackson, PC (KLJ) and a copy was given to Mr. White in March 2000. In June 2000, a video was provided by Vern Kongsliie that shows water conditions on the Kongsliie land and on the Eaton project from early spring until June. All of this information as well as information in State Water Commission files was used in conducting a detailed study of the issues raised in your letter. The results of the study are presented in a North Dakota State Water Commission Office Memo dated August 14, 2000, a copy of which is enclosed.

The issue of flooding of the Kongsliie land due to the operation of the Eaton dam was analyzed using the information provided by the Kongsliies and aerial photographs taken in April 1994. A computer generated analysis of the elevations made at various points on the Kongsliie land indicates that 9.3 acres are below elevation 1461 feet and subject to flooding from the Souris River when the stage of the river is at that elevation. A computer generated calculation using an aerial photograph made in 1994 showed 29 acres flooded on the Kongsliie land, which does not include the area of the channel leading to the Souris River. In 2000, Vern Kongsliie outlined the flooded area with flags while the water level behind the dam was at elevation 1461. When the water receded, the area was measured and the flooded area was calculated to be about 28 to 29 acres. This is approximately the same as the flooded acreage calculated from the 1994 aerial photograph. The flooding of the acreage above elevation 1461 feet is likely due, at least in part, to local runoff being impeded from flowing to the Souris River because of the water level behind the dam. Thus, the total number of acres flooded will vary with the amount of runoff.

According to the report entitled "Second Report on the Eaton Flood Irrigation Project" by the State Engineer Department dated July 1934 the Eaton Irrigation Project was designed to be operated with a pool elevation behind the dam of 1461 feet while the ponds were being filled. When the ponds were filled the gates were to be opened and the normal stream flow permitted to pass. The length of time required to fill the ponds was estimated to be about five days. This estimate may have been based on the estimated volume of water needed for the project that is presented in the preliminary report entitled "Flood Irrigation on the Lower Mouse

Mr. Joseph J. Cichy  
September 21, 2000  
Page 3

River" dated April 10, 1933, and prepared by Robert E. Kennedy, State Engineer. Actual project operations have shown that the time required to fill the ponds is greater than the five days. Depending on the flow in the river and ground conditions the time required to fill the ponds can be quite variable but is always in excess of five days.

Project operations have demonstrated that the gates on the dam must remain closed for some period of time in order to provide additional water to the ponds as the water infiltrates into the soil after the frost zone has dissipated. The time required for the frost zone to dissipate is dependent upon its depth and temperatures at the time of flooding and may require several days. Using the permeabilities of the soils subject to flooding, the time required to fill the soil profile is approximately five days with an additional three days for saturating the pond perimeters after frost dissipation.

The volume of water required to fill all of the ponds on the project is calculated to be 11,155 acre-feet. With a diversion rate of 150 cubic feet per second (cfs) to pond 7 under the most favorable conditions, the time required to fill it is 8.8 days. At a diversion rate of 300 cfs, ponds 1 through 6 will fill in 14.2 days. Allowing four days for frost dissipation, the total time elapsed from the time the diversion gates are opened until the gates of the dam can be opened is 26 days under favorable conditions. Assuming ground and runoff conditions are 80 percent favorable, the length of time would increase to 32 days. The number of days for the frost zone to dissipate is an estimate. If it occurs in a shorter period of time, the gates can be opened sooner. Please refer to the Office Memo for a more detailed explanation.

In his letter of February 8, 2000, Dr. Kevin K. Sedivec discusses the length of time certain types of grasses should be subject to flooding. Meadows containing non-hydric grasses should not be inundated for more than 10 to 14 days otherwise a change in plant types will occur. The flooding of areas with hydric grasses must be limited to less than 30 days. In both cases the plant types will change to those less suitable for livestock forage when the respective timeframes are exceeded. It is apparent that the duration of flooding of the ponds should be based on saturating the soil above the water table in the shortest possible time without unduly affecting the plant community while achieving maximum forage production.

It is understood from discussions with Lynn and Vern Kongsle that the duration of the flooding of their land is a significant concern because it prevents the timely seeding of a crop or in the commencement of growth of the grass for livestock forage. If the water was drained from the area by the end of April or early May, the damage to the land may not be significant. Thus, opening the gates on the dam at the earliest possible date would result in draining the Kongsle land, unless the natural river stage is greater than elevation 1461 such as occurred in 1999.

Mr. Joseph J. Cichy  
September 21, 2000  
Page 4

The McHenry County Board of Flood Irrigation (Board) has an agreement with the U.S. Biological Survey (predecessor to the U.S. Fish & Wildlife Service) for 10,000 acre-feet of water, which is to be furnished before water is used by the U.S. Fish & Wildlife Service Service). In addition, Water Permits 7D, 89B, and 90B allocate water to lands within the Eaton project. The total volume of water allocated by these permits is 3,681 acre-feet. The combined allocations are adequate for the entire volume of water needed by Eaton project to function as designed and includes the volume of water stored by the dam while the ponds are filling. Much of the water diverted is ultimately returned to the Souris River.

Water was first put to beneficial use by the Eaton project in April 1937. Water has been used each year since in greater and lesser amounts depending on availability. It is requested that this office intercede and require that the project be operated so that the elevation of the water impounded by the dam does not exceed 1461 so as to reduce flooding on the Kongslied land. According to information provided by the Board, the dam was operated in 2000 so as to maintain a 1461 water level elevation. It appears that such a requirement could confine the flooding by backwater from the dam to approximately 9.3 acres based on the computer generated contours of the survey conducted by KLJ. However, additional acreage is subject to flooding as determined by measurement for the flood years of 1994 and 2000. At least a portion of the flooding is likely due to local runoff being impeded from moving to the Souris River when the water level is at elevation 1461. There may also be some land that lies below elevation 1461 that was not identified by the survey.

N.D.C.C. § 61-04-29 is presented as the authority to take enforcement action to limit the operation of the Eaton project to keep water off of the Kongslied land on the basis that the use of the water is unauthorized. We are in a process of reviewing the Eaton project's water rights. Until that review is complete, it would be premature to institute an action under N.D.C.C. § 61-04-29.

You also mention that the authority in N.D.C.C. § 61-04-11 can be used to ameliorate the problem. That section provides that if the State Engineer finds works are unsafe and a menace to property, the State Engineer will notify the owner of changes necessary to put the works in a safe condition. This authority appears to address situations where the works themselves are unsafe and their failure would result in harm. A situation of this type does not exist here. The works are not "unsafe", but their operation is causing impacts to the Kongslied's property.

You also mention N.D.C.C. § 61-04-06.2. That section does authorize the State Engineer to require modifications of plans and specifications for an appropriation and to place conditions on permits necessary to protect the rights of others. As mentioned earlier, we are in the process of evaluating the water rights for the

Mr. Joseph J. Cichy  
September 21, 2000  
Page 5

project. Conditions to protect the rights of others may be placed on the permit. However, it is unclear at this point as to what right the Board may have gained through time to flood or cause impacts to the lands of the Kongslye family. This will be discussed in more detail later.

Relative to the matter of the fish tube, the application to construct the dam indicated that it would have a drawdown pipe described as a 60-inch lower "fish tube." We are not sure why it was described as a "fish tube." There are no conditions in the permit on how the pipe is to be operated, such as a requirement that it be open during spring runoff. There does not appear to be a violation of the dam permit nor does there appear to be a violation of state law. N.D.C.C. § 20.1-06-15 only requires fishways to be maintained in dams if ordered by the director of the Game and Fish Department. That section also prohibits anyone from constructing a fishway without the approval of the director. To our knowledge the director of the Game and Fish Department has neither ordered a fishway to be installed in the Eaton project dam nor has the director approved construction of such a fishway. The tube was a part of the dam constructed in 1936 and 1937.

Notwithstanding the above, there may still be a way to help alleviate some of the Kongslyes' concerns. Under N.D.C.C. § 61-03-21 the operator of a reservoir having a capacity of more than 1,000 acre-feet is required to file an annual operating plan. The filing of an operational plan is the responsibility of the Board. The plan would provide information on the estimated length of time the gates of the dam will be closed in order to fill the ponds and would be based on the early February snowpack and antecedent conditions. The plan should address soil moisture conditions, frost depth and the estimated length time the water may have to be held in the ponds to achieve soil saturation without adversely affecting hay production. This would have to be discussed with the Board, but could result in an operating plan that reduces the impacts to the Kongslyes' land. The plan would be subject to revision as conditions may change between the time it is prepared and when the ponds are filled.

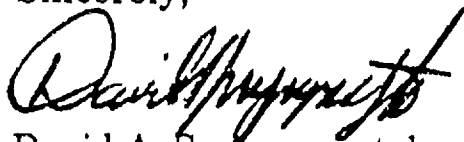
It is requested in your August 5, 1999, letter that the State Engineer require the project be operated at an elevation not to exceed 1461. The project was designed to operate at elevation 1461 and it appears to be necessary to operate at this level to properly irrigate the land in the project. Our investigation shows that the operation of the project is impacting the Kongslyes' land. The State Engineer has the authority to require the modification in the operation of Eaton dam so as not to cause harm to the Kongslyes. As mentioned above, it is not clear what right the Board may have to cause impacts to the Kongslyes' land through its operation of the Eaton dam. Due to the longstanding nature of the operation of the project, a right may have been acquired by adverse possession or prescription to flood the Kongslyes' land. We can work with the Board to approve an operating plan that attempts to minimize the time water remains on the Kongslyes' land. However,

Mr. Joseph J. Cichy  
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before the State Engineer would require the Board to modify its operation of the project in a manner different than it has in the past, the Board would be given opportunity to provide proof of its right to cause impacts to the Kongslies' land. We would accept as proof a judgment from a court or an easement from the Kongslies.

In summary, there appears to be an opportunity for the Board to revise certain management and operational practices of the project that may reduce the impact of flooding on the Kongsлие land. The revisions would attempt to minimize the length of time the gates to the dam are closed which would reduce the length of time the Kongsлие land is inundated. The enclosed memo presents further discussion on the management considerations.

Sincerely,



David A. Sprynczynatyk  
State Engineer

DAS:MOL/227  
Enclosure

copy w/enc.: Clifford Hanretty, Chairman  
Jonathan C. Eaton, Attorney  
McHenry County Board of Flood Irrigation

Enclosures:

Letter and complaint from Joseph J. Cichy dated 6/30/99  
Letter from State Engineer to Joseph J. Cichy dated 7/16/99  
Letter from Joseph J. Cichy dated 8/5/99  
Letter from Joseph J. Cichy, dated 5/19/00  
Letter from State Engineer to Joseph S. Cichy dated 6/20/00  
Office memo dated 8/14/00



John M. Olson  
Attorney

Joseph J. Cichy  
Attorney

OLSON CICHY  
ATTORNEYS



P.O. BOX 817  
115 North 4th Street  
Bismarck, ND 58502-0817  
Phone: 701-223-4524  
Fax: 701-223-0855

October 6, 2000

David A. Sprynczynatyk  
State Engineer  
900 East Boulevard  
Bismarck, ND 58505-0850

RE: Water Issues  
Our File No. 99-52

Dear Mr. Sprynczynatyk:

Thank you for your letter of September 21, 2000 in which you suggested actions to be taken by the Eaton Board. You indicated: "There appears to be an opportunity for the Board to revise certain management operation practices of the project that may reduce the impact of the flooding on the Kongslied land." First, the project's operation must cause no damage to the Kongslied's property. Second, this revised operation plan needs to be done and needs to be done very soon, however, no time parameters were stated in your letter. The Board's operation of the project damages my client's property and I believe that a short time frame must be set.

You also stated: "Before the State Engineer would require the Board to modify its operation of the project in a manner different than it has in the past, the Board would be given an opportunity to provide proof of its right to cause impacts to the Kongslied's land. We would accept as proof a judgment from a court or an easement from the Kongslied." First, the Board must operate its project so no damages result, and it must adhere to that operation plan until such time that it proves it has an easement. So long as the dam is operated so no damages result to the Kongslied's the Board can take as long as it wants. Otherwise, to allow the Board to appropriate water in a fashion that damages my client's property, violates state law and cannot be allowed by the state engineer. It is the Board's responsibility to establish its rights to flood another's land. Therefore, it is imperative that this matter be resolved without further damage to my clients, and thus must be completed before next spring's runoff.

By document dated June 30, 1999, my clients filed a complaint concerning the Eaton Irrigation Project. The complaint alleged that the project exceeds the quantity of water it could lawfully appropriate, the operation plan is being violated, the dam is being used for flood control and the works are not adequate. All of these violations have been established and the State Engineer's office has done nothing to correct them.

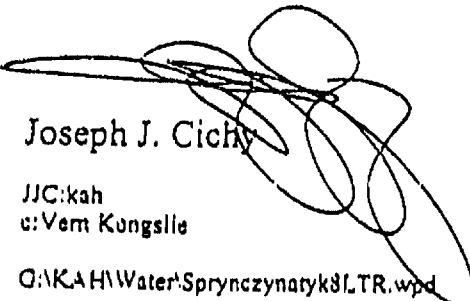
David A. Sprynczynatyk  
October 6, 2000  
Page 2

In reviewing your report you indicated it is necessary to appropriate over 11,000 acre feet of water to fill the ponds that are flooded by the irrigation project. You also indicated that the project has 3,681 acre feet of water under state permits. While there maybe an agreement with the Fish and Wildlife Service for 10,000 acre feet of water, there was no water delivered from Lake Darling this year for this project. This has also occurred in previous years. It is my understanding that there is an instream flow component, however, no additional water was released this spring from Lake Darling. Consequently, the Eaton Irrigation Project violated state law by unlawfully appropriating nearly 7,500 acre feet of water for its project this past season. Pursuant to N.D.C.C. § 61-04-30 that constitutes a class A misdemeanor and we are curious as to why enforcement action has never been taken against the Eaton Project for its numerous violations of state law.

Also, my clients expressed concerns about pond one and the inefficiency of the works associated with that. They are wondering if an order has been issued requiring the Eaton Project to repair those dikes to enable the Board to operate its project more efficiently and reduce the damage to Kongsli's property. Because the pond does not function as it should, the dam gates are kept closed for a longer period of time resulting in more water for longer time periods on my client's land.

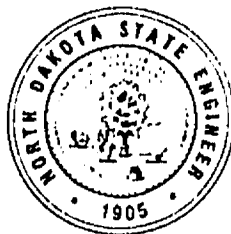
The written operation plan is not being followed. The dam is being used as a flood control device. The present unwritten management plan damages the Kongsli's property. As stated above these issues must be resolved very soon. I would appreciate responses to these questions and issues and hope this matter can be moved quickly so my clients do not face another spring of flooding on their property.

Sincerely,

  
Joseph J. Cichy

JJC:kah  
c: Vern Kongsli

G:\KAH\Water\Sprynczynatyk31.TR.wpd



Office of the State Engineer

WATER APPROPRIATION DIVISION  
(701) 328-2754

October 26, 2000

Mr. Jonathan C. Eaton, Attorney  
McHenry County Board of Flood Irrigation  
Heritage Place, Suite 200  
201 South Main  
Minot, ND 58701

Mr. Clifford Hanretty, Chairman  
McHenry County Board of Flood Irrigation  
847 68th Drive NE  
Towner, ND 58788

Dear Mr. Eaton and Mr. Hanretty:

Enclosed for your information and records is a copy of a letter dated October 6, 2000, from Mr. Joseph J. Cichy responding to the letter from this office dated September 21, 2000.

We would appreciate receiving comments from the Board on the issues discussed.

Sincerely,

Milton O. Lindvig  
Director, Water Appropriation Division

MOL:rp/227  
Enclosure

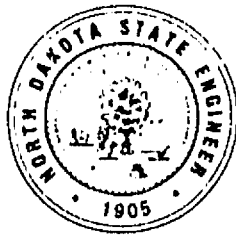
copy: Joseph J. Cichy

STATE WATER COMMISSION

File Copy

No. 227

Date 10-26-00



Office of the State Engineer

WATER APPROPRIATION DIVISION  
(701)328-2754

January 19, 2001

Mr. Joseph J. Cichy  
Olson Cichy Attorneys  
P.O. Box 817  
Bismarck, ND 58502-0817

Dear Mr. Cichy:

Reference is made to your letter of October 6, 2000, regarding certain aspects of the operation of the Eaton flood irrigation project and the related water appropriation.

In your letter of August 6, 1999, it was asked "that the project be required to operate in such a fashion as to not exceed elevation 1461 feet, the elevation established in the operating plan." In 1994 and again in 2000 it was documented that an operating level of elevation 1461 feet results in the flooding of approximately 29 to 30 acres of the Kongslied land. From survey data provided by the Kongslied, it was calculated that approximately 9.3 acres are at or below elevation 1461 feet and subject to flooding when the river stage is at that elevation. As indicated in the letter from this office dated September 21, 2000, the flooding of the land above elevation 1461 feet is likely due, at least in part, to local runoff being impeded from moving to the Souris River because of the water level behind the dam. At that time it was our understanding that the acreage flooded with the river level behind the dam at elevation 1461 feet may be acceptable and issue was the period of time that the land is inundated. An excessive period of time results in damage to existing grasses and delays the planting of crops. The development of an operating plan, as discussed in the letter from this office, would identify the proposed period of inundation and keep it to a minimum. Thus, the impacts to the Kongslied land would be kept to a minimum.

The water allocation for the Eaton flood irrigation project is in two forms. Water Permits 7D, 89B, and 90B allocate 3,681 acre-feet of water for lands within the Eaton project. The McHenry County Board of Flood Irrigation also has an agreement with the U.S. Department of Agriculture, Bureau of Biological Survey, predecessor to the U.S. Fish and Wildlife Service, for the first 10,000 acre-feet of water to occur each spring in the upper Souris

Mr. Cichy  
January 19, 2001  
Page 2

Basin. The U.S. Fish and Wildlife Service does not store and release any water from Lake Darling for the Eaton project. The agency passes the first 10,000 acre-feet of runoff each year through Lake Darling for the Eaton project before it begins to store water for its project purposes. There is no instream flow component associated with the allocations to either the U.S. Fish and Wildlife Service or the McHenry County Board of Flood Irrigation.

Records furnished by the McHenry County Board of Flood Irrigation (Board) indicate that the dam has been operated during recent years so as to maintain a water level elevation behind the dam of very near 1461 feet. The operating plan described in the design report prepared in 1934 identified that same operating water elevation. It is suggested in your letter that the dam is being operated as a flood control device. At the above elevation the volume of water stored by the dam is estimated to be 1,605 acre-feet. This stored volume is required for the project to be operated effectively. Flood control is not an identified feature of the project and all of the water stored and diverted are for the purpose of flood irrigation.

The State Engineer has not issued an order to repair the breach in the dike on pond 1. It is understood that pond one is the first to fill. The operating plan will define a proposed schedule for filling the ponds and allowing time for the soil on the ponds to be saturated. After that process has been completed, the gates on the dam will be opened allowing pond one to drain. Because the soil in pond one will be saturated, there appears to be no reason for the gates on the dam to remain closed to continue to hold water in pond one. Therefore, it does not appear the efficiency of the system is significantly affected by the breach. It will be asked that the operating plan address the significance of the breach in the dike as it may relate to the management of the water level in pond one.

Relative to the document filed June 30, 1999 alleging certain operational violations by the Eaton irrigation project, we believe that the deficiencies you describe in that document and your letter dated August 5, 1999, were addressed in our letter dated September 21, 2000. The meeting with the Kongslies and a tour of the area was conducted and relevant information was obtained. This and other information was analyzed and discussed in our September 21, 2000 letter and in the Office Memo by Mr. Robert White dated August 14, 2000. We believe that these efforts are providing a basis for a solution addressing the impacts of flooding to the Kongslie land. The Board will be advised of the need to file an operating plan for the Eaton Dam. This plan will provide information on the operation of the dam and the project from the time the gates are closed until they are opened. We can work with the Board to approve an operating plan that attempts to minimize the length of time water remains on the Kongslie land. However, because of the long standing nature of the operation of the project, a right

Mr. Cichy  
January 19, 2001  
Page 3

may have been acquired by adverse possession or prescription to flood the Kongsliie land. Before the State Engineer would require the Board to modify its operation of the project in a manner substantially different than it has in the past, the Board would be given the opportunity to provide proof of its right to cause impacts to the Kongsliie land.

As stated previously, we believe there is an opportunity for the Board to revise certain management and operational practices of the project that should reduce the impact of flooding on the Kongsliie land. The changes would attempt to minimize the length of time the gates on the dam are closed, which would reduce the length of time the Kongsliie land is inundated.

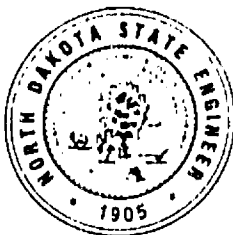
Sincerely yours,



Dale L. Frink  
Interim State Engineer

DLF:MOL:mb/ 227

cc: Clifford Hanretty, Chairman  
Jonathan C. Eaton, Attorney  
McHenry County Board of Flood Irrigation



Office of the State Engineer

WATER APPROPRIATION DIVISION  
(701)328-2754

January 26, 2001

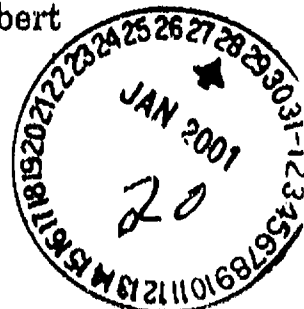
Mr. Clifford Hanretty, Chairman  
McHenry County Board of Flood Irrigation  
847 68th Drive NE  
Towner, ND 58788

Dear Mr. Hanretty:

During the past few months this office has been exchanging correspondence with Mr. Joseph J. Cichy, Attorney for Kongsli family, relative to the flooding of the Kongsli land by operation of the dam associated with the Eaton flood irrigation project. You have been provided copies of that correspondence.

In the letter from this office to Mr. Cichy dated September 21, 2000, the filing of an annual operating plan for the dam was discussed. North Dakota Century Code Section 61-03-21 requires that the operator of a reservoir having a capacity of more than 1,000 acre-feet of water file an annual operating plan with the State Engineer. It has been calculated that the reservoir behind the Eaton dam stores 1,605 acre-feet when the water level is at an elevation 1,461 feet. Therefore, an operating plan for 2001 is required. The plan needs to present information on when the gates will be closed, the estimated length of time required to fill the ponds and saturate the soil, and when the gates on the dam will be opened. This would be based on the early February snowpack and antecedent conditions. The plan must address current soil moisture conditions, frost depth, and the estimated length of time the water may have to be held in the ponds to achieve soil saturation. The plan also needs to describe the manner in which the breach in the dike around pond one affects the efficiency of filling and holding water in that unit of the project.

As indicated in the previous correspondence, the Kongslies are also concerned about length of time their land is flooded. Consideration should be given to identifying a method of determining when the frost zone dissipates beneath the flooded ponds. After the frost has dissipated, one can estimate the length of time required to saturate the soil. In a North Dakota State Water Commission Office Memo dated August 14, 2000, Mr. Robert White, Water Resource Engineer, provides information on the estimated



99-5

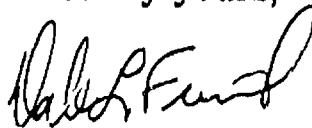
X  
Mr. Hanretty  
January 26, 2001  
Page 2

time required to fill the ponds and to saturate the soil. From this information estimates can be made as to the period of time the gates on the dam will need to be closed to achieve the irrigation of the land in the respective ponds and maximize the production of quality livestock forage. Enclosed is a copy of Mr. White's memo.

The statute requires that the operating plan be filed between February first and February fifteenth. The plan is effective for the year in which the plan is filed. As conditions change through late winter or early spring, it may be desirable to update the plan to reflect the changed conditions.

If there are questions on the preparation of the operating plan, please call Milton Lindvig, Robert White or me and we will be glad to discuss them with you.

Sincerely yours,



Dale L. Frink  
Interim State Engineer

DLF:MOL:mb/227

Encl.

cc: Jonathan C. Eaton  
✓ Joseph J. Cichy



X -

**OLSON CICHY**  
ATTORNEYS



John M. Olson  
Attorney

Joseph J. Cichy  
Attorney

P.O. BOX 817  
115 North 4th Street  
Bismarck, ND 58502-0817  
Phone: 701-223-1900  
Fax: 701-223-1888

February 1, 2001

Milt Lindvig  
State Water Commission  
900 East Boulevard  
Bismarck, ND 58505-0850

**Re: Water Issues**  
**Our File No. 99-52**

Dear Milt:

Please provide me a copy of the operation plan for the McHenry County Board of Flood Irrigation's project. Based upon Dale's letter of January 26, 2001, to the Board, that should be filed within the next couple of weeks, I would appreciate you forwarding me a copy.

If you have any questions concerning this, please contact me.

Sincerely,

Joseph J. Cichy

JJC:kah  
c: Vern Kongslie

G:\KAH\Water\LindvigLTR.wpd

09.52



Office of the State Engineer  
WATER APPROPRIATION DIVISION  
(701)328-2754

March 8, 2001

Mr. Joseph J. Cichy  
Attorney  
P.O. Box 817  
Bismarck, ND 58502-0817

Dear Mr. Cichy:

In response to your letter dated February 1, 2001, I am enclosing a copy of the Eaton Dam Operating Plan - 2001 prepared by the McHenry Board of Flood Irrigation.

Sincerely yours,

Milton O. Lindvig, Director  
Water Appropriation Division

MOL:mb/227

Enc.

cc: Jonathan C. Eaton  
Clifford Hanretty



23

**Eaton Dam Operating Plan - 2001**  
Submitted by the McHenry County Board of Flood Irrigation

Per the 1989 United States/Canada Souris River Basin Agreement, Saskatchewan is required to prepare forecasts of the maximum 30-day and 90-day runoff volumes on February 1 and thereafter on the 15 and last day of the month until runoff occurs.

At the February 6, 2001 meeting of the International Souris River Board (ISRB), Sask Water presented their February 1 forecast of this years spring runoff, and the operating plan for pre-spring runoff releases from the Canadian dams. The plans provided at the ISRB meeting were to stage the Alameda release up to 9.3 cms and hold for 45 days. A 3 cms release would be made for 30 days from either Rafferty or Boundary starting March 1. The Boundary and Rafferty operating plans are being worked on at this time. The following Alameda Dam release schedule has been slightly modified from the February 6 schedule:

Alameda Dam:  
2/14/01 - 2 cms  
2/15/01 - 4 cms  
2/16/01 - 7 cms  
2/19/01 - 9 cms  
3/01/01 - 10 cms

Because Sask Water has predicted a greater than 1 in 10 year event at the Sherwood Crossing, the Corps of Engineers will operate the United States portion of the flood control project. The following is the short-term release schedule for Lake Darling which is based upon the Alameda release schedule and the expected spring runoff. The objective will be to match inflow with outflow plus approximately 25 to 50 cfs to keep Lake Darling elevation level or decreasing very slowly.

Lake Darling:

2/09/01 - 53 cfs

2/10/01 - 75 cfs

2/12/01 - 125 cfs

2/14/01 - 175 cfs

2/16/01 - 250 cfs

2/20/01 - 325 cfs

The Lake Darling elevation as of 2/9/01 was 1595.82 feet.

The target drawdown level of Lake Darling based upon the local runoff forecast of 35,000 cubic decameters is 1596.0 feet.

On February 9 the National Weather Service provided their spring flood outlook. The outlook says the potential for "minor to moderate" flooding exists for locations upstream of Towner. The potential for "moderate to major" flooding exists from Towner to Westhope. This assumes normal precipitation for the next 6-8 weeks along with the current snowpack.

Based on the spring runoff forecasts from Sask Water and the National Weather Service, the gates on the dam will remain open until about the first of April or after runoff starts, at which time the gates will closed. Because of snow and ice in the meadows and diversion channels this year, it is likely water will be stored behind the dam until it is at elevation 1461 before starting to divert water to the meadows. This will facilitate the opening of the diversion channels more effectively to move water onto the meadows. The predicted spring runoff this year should allow the diversion of water to both the east and west sides simultaneously. Maintaining the water behind the dam at elevation 1461 will allow the diversion of flows to the ponds on the west side of the river at the rate of 250 - 300 cfs, and at a rate of about 100 - 150 cfs to pond 7 on the east side of the river. The water level behind the dam will be maintained at elevation 1461 until all ponds are full and the meadows are saturated. The ponds will be monitored to determine when the frost zone is dissipated.

The estimated time to fill the ponds and allow the soil to saturate after the frost zone is dissipated is a minimum of 26 days under the most favorable conditions. However, because of this years unfavorable snow and ice conditions and with cold spring weather it may take considerably longer than 26 days. When the meadows have been saturated the dam gates will be opened to allow the flow in the river to pass through, however, the water may be held on the ponds for up to three weeks resulting in an estimated time to operate the project this year of 5 - 7 weeks. The drainage of the meadows should begin about mid - May.

The operating plan is based on early spring runoff and weather conditions. Changes in runoff forecasts and weather conditions may require changes in this plan.

Signed: Cliff Hamlett

John M. Olson  
Attorney

**OLSON CICHY**  
ATTORNEYS

P.O. BOX 817  
115 North 4th Street  
Bismarck, ND 58505-0817  
Phone: 701-223-0824  
Fax: 701-223-0855



J. Cichy  
ney

March 12, 2001

Milt Lindvig  
State Water Commission  
900 East Boulevard  
Bismarck, ND 58505-0850

**Re: Water Issues**  
**Our File No. 99-52**

Dear Milt:

My clients and I have reviewed the proposed operation plan for the Eaton Irrigation Project for the year 2001. There is one significant flaw in the operation plan and that is that at the operation elevation of 1461, approximately thirty (30) acres of my client's land is being flooding. The Eaton Irrigation Project has no right or easement of any sort to flood my client's property. As previous correspondence has indicated, an easement from the Kongslies is necessary or a court must order that a prescriptive easement exists before the Project has the right to flood the Kongslie property. Neither of these are in existence. Therefore, the operation plan as proposed cannot be approved in its present form as it violates state law and the State Engineer's rules.

Also, the Project's works are in need of repair. For any operation plan to operate efficiently, corrective action is necessary. Failure to make necessary repairs also is a violation of state law and rules.

My clients are eager to resolve these issues and are ready and willing to sit down and discuss these matters with the managers of the Eaton Project and you. I would also appreciate it if you would facilitate that meeting at the earliest possible time so this matter may be resolved before the legislature adjourns.

I look forward to hearing from you.

Sincerely,

Joseph J. Cichy

JJC:kah  
c: Vern Kongslie  
Representative Jon Nelson  
Senator Ken Solberg  
Senator Tom Fischer

G:\KAHWater\LindvigLTR.wpd

## TESTIMONY ON SENATE BILL 2182

House Natural Resources Committee

Milton Lindvig, Director, Water Appropriation Division  
State Water Commission

March 16, 2001

Mr. Chairman and Members of the House Natural Resources Committee, I am Milton Lindvig, Director of the Water Appropriation Division for the State Water Commission and I appear in support of Senate Bill 2182.

Senate Bill 2182 amends ND Century Code Section 61-04-22, Prescriptive Water Right. It will reinstate the opportunity for a person who has used or attempted to appropriate water from any source for a beneficial purpose over a period of 20 years prior to July 1, 1963, to make application to the State Engineer for a water permit. It is deemed that a person shall have acquired a right to the beneficial use of the water without having filed or prosecuted an application to acquire such a right if the user files an application with the State Engineer by December 31, 2001. If the State Engineer finds that the application substantiates the claim and it is approved, it would be a perfected permit with a priority date relating back to the date when the first step was taken to appropriate the water in the quantity stated in the application. The first step could consist of surveying, drilling, damming, ditching, diking, or other actual preparation for the appropriation of the water. The first step must have been followed by due diligence resulting in the appropriation of the water. The use of the "first step" to determine the priority date is consistent with North Dakota Century Code Section 61-01-03, which provides that the priority date for pre-1905 water rights relates back to initiation of the claim followed by diligent efforts to complete surveys and put water to beneficial use. 1905 is the year the water permitting system was enacted. The bill also provides that the State Engineer must publish notice in each official county newspaper of the deadline for filing an appropriation permit under this section.

Section 61-04-22 was enacted in 1957 to set up a procedure whereby water users who had at least a 20 year history of appropriating water could obtain a prescriptive right. It was similar in all respects to a right gained by following the statutory application process except that the priority date related back to the date that water was first appropriated. There were a number of such water users in the state and the State Engineer recommended legislation that would allow those uses to be converted to appropriative rights. Approximately 40 water users made the required filing between 1957 and 1965, but for various reasons, there were others that did not file. Under present law, if the entities were to apply for a water

permit, the priority date is established the date the application is filed with the State Engineer.

One of the water users that did not file for a prescriptive water right is the Eaton Flood Irrigation Project near the City of Towner. A water permit from the State Engineer has never been issued though the project was initiated in the early 1930's and flood irrigation has been carried out annually since 1937. We believe it did not file because, even though it had not filed a formal application in 1933 or 1934, it has been treated as if a water right existed since that time. The Eaton Project may well have acquired a water right by prescriptive use for over twenty years under the law enacted in 1957, but this bill would give it and others with similar circumstances, an opportunity to obtain a perfected water permit without going to court.

The initial planning for flood irrigation projects along the Mouse River is documented by a report issued by the State Engineer dated April 1933. Records indicate that a petition signed by landowners was filed with the McHenry County Board of Flood Irrigation in September 1933 and the first work on the Eaton Flood Irrigation Project, which consisted of surveying, began in December 1933. A detailed design report was prepared in 1934 and construction of the works started in 1936. Water was first put to beneficial use in April 1937.

During August and September 1934, correspondence was exchanged between Mr. J. C. Eaton, project proponent, and the State Engineer regarding the need for a water permit. However, no application was filed. This correspondence indicates that the State Engineer discouraged the filing of an application by the Board. On September 1, 1934, the Bureau of Biological Survey, a part of the U. S. Department Agriculture and predecessor to the U. S. Fish and Wildlife Service, filed a claim with the State Engineer for all unappropriated waters in the Mouse River Basin for a period of three years. Correspondence between the State Engineer and Mr. Eaton dated September 1934 indicates that the State Engineer advised against applying for a water permit, even though he had indicated to the Biological Survey that a notice of intent to appropriate water had been filed by the Board. It was also implied that the Board should seek an agreement with the Biological Survey for the use of water from the Mouse River.

An agreement between the U. S. Department of Agriculture and the McHenry County Board of Flood Irrigation was signed on November 29, 1935, which provided that the Eaton project was entitled to the first 10,000 acre-feet of water from the upper basin each year. The agreement continues in effect. However, the State Engineer cannot issue a perfected water permit to the Board because a water permit and right could not be obtained in this manner in 1935 and it cannot be done today. Therefore, the enactment of this legislation will allow the State Engineer to issue a perfected water permit to the Board, subject to substantiation of the



application and bring legal rights and relationships into conformity with what people believed existed for the past 66 years.

There are three other projects that do not have water permits to which this legislation may also apply. All are dams built under the authority of various Federal programs in the 1930's or early 1940's, but are now under local jurisdictions. One of the projects is a channel dam on the Mouse River a short distance upstream from Minot and another consists of two dams on the Des Lacs River near Burlington. Another is a Works Progress Administration dam in Adams County.

If perfected permits are issued for these projects, there would not be an adverse impact to junior appropriators on the rivers on which the projects are located. All of the projects are considered when managing water appropriations from those streams. We are not aware of any other projects that would be eligible to apply for a water permit under this legislation, but if there are, we believe it would only be a few.

Your favorable consideration of this bill is requested. Thank You.

# The City Commission

508 1st St. NW  
Towner, ND 58788

## RESOLUTION IN SUPPORT OF SENATE BILL 2182

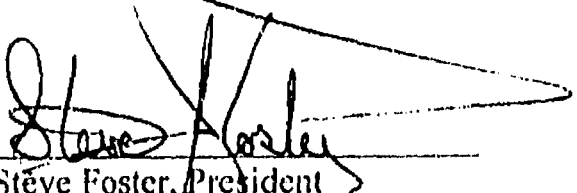
WHEREAS, Senate Bill 2182 has been introduced to the 2001 North Dakota Legislature;

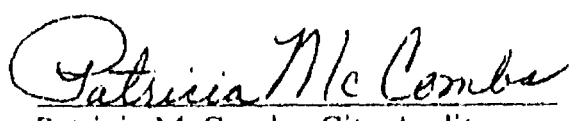
WHEREAS, passage of Senate Bill 2182 is an important economic factor in McHenry County and the City of Towner;

WHEREAS, Senate Bill 2182 will only ratify several decades of actual practice in effect in McHenry County, North Dakota;

NOW, THEREFORE, IT IS HEREBY UNANIMOUSLY RESOLVED that the 2001 North Dakota Legislature is urged to pass Senate Bill 2182.

Dated this 6th day of February, 2001, City of Towner, North Dakota.

  
Steve Foster, President  
Towner City Commission

  
Patricia McCombs, City Auditor



McHenry County Auditor  
PO Box 147  
Towner, ND 58788  
(701)537-5724

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**RESOLUTION IN SUPPORT  
OF SENATE BILL 2182**

WHEREAS, Senate Bill 2182 has been introduced to the 2001 North Dakota Legislature;

WHEREAS, passage of Senate Bill 2182 will create an economic hardship on the residents of McHenry County;

WHEREAS, Senate Bill 2182 will only nullify several decades of actual practice in effect in McHenry County, North Dakota;

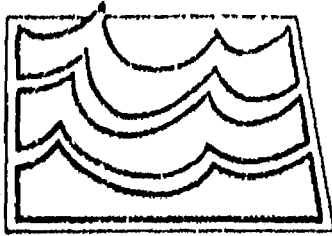
NOW, THEREFORE, IT IS HEREBY UNANIMOUSLY RESOLVED, that the 2001 North Dakota Legislature is urged to pass Senate Bill 2182.

Dated this 6th day of February, 2001.

Scott Mueller,  
Commission Chair

Number Name	Use	Status	Priority Date	Location	Acre-foot	Acres	Rate	Storage
00007D EATON FLOOD IRRIGATION DISTRICT	Flood Irrigation	Conditional	4/17/37	15507714DA	1,590.00	530.00		0
00089B EATON FLOOD IRRIGATION DISTRICT	Flood Irrigation	Conditional	4/17/37	15707530BA	1,470.00	786.00	4,398.20	0
00090B EATON FLOOD IRRIGATION DISTRICT	Flood Irrigation	Conditional	4/17/39	15507606BC	621.00	332.00	1,840.00	0
Agreement with Fish and Wildlife					10,000.00			
00017C STEEN, WALTER AND BONNIE	Flood Irrigation	Perfected	12/26/13	15608426AD	50	25	924	0
00017C01 WILDWOOD, INC.	Irrigation	Perfected	12/26/13	15608426AD	145	72.5	2,679.60	0
00017C02 EHR, FRED AND MARGARET	Flood Irrigation	Perfected	12/26/13	15608426AD	96	48	1,774.10	0
00017C03 WILDWOOD, INC.	Flood Irrigation	Perfected	12/26/13	15608426AD	49	24.5	905.5	0
00059B KLEVEN, DARWYN	Flood Irrigation	Perfected	3/19/12	15608410CB	472.4	236.2	1,346.4	0
00082B JOHANSON, KENNETH L	Flood Irrigation	Perfected	12/26/13	15608422AA	300	150	4,488.00	0
00091B EKLUND, DANIEL R.	Flood Irrigation	Perfected	6/9/15	15608415BA	160.4	80.2	435.7	0
00091C KUDA, ALAN P. and HUGHES, KUDA, KATHLEEN	Flood Irrigation	Perfected	6/9/15	15508415AC	84.8	42.4	230.3	0
221 FISHER SAND & GRAVEL	Industrial	Conditional	1/28/38	15508321CA	630	0	673.2	0
00222A MINOT STATE UNIVERSITY	Irrigation	Perfected	9/6/38	15508314DB	30	30	600	0
234 MINOT COUNTRY CLUB	Irrigation	Perfected	1/29/40	15508307CB	244.6	149.5	673.2	0
263 MINOT, CITY OF	Municipal	Conditional	1/21/47	15508323BB	560	0	347.2	0
298 JONES, KETH	Flood Irrigation	Conditional	8/13/47	15307907DB	48.6	24.3	225	0
328 MINOT, CITY OF	Municipal	Perfected	12/12/49	15508323CC	6,700.00	0	4,123.90	0
451 STROMBERG, MARLO and KELLY	Irrigation	Perfected	7/10/52	15608404CD	62	62.8	1,346.40	0
558 FEIST, DONOVAN R.	Irrigation	Conditional	6/3/53	15408130BD	105.4	105.4	534.1	0
649 WESTHOPE, CITY OF	Municipal	Perfected	7/28/55	16307930CD	678.9	0	450	0
651 MINOT, CITY OF	Municipal	Conditional	9/8/55	15508323CC	6,382.00	0	4,128.90	0
00651A MINOT PARK DISTRICT	Irrigation	Perfected	9/8/55	15508322CD	318	159	500	0
660 MINOT, CITY OF	Municipal	Conditional	2/6/56	15508324BD	723.8	0	450	0
657 MINOT PARK DISTRICT	Irrigation	Conditional	1/1/21	15508324AD	52.4	233.9	50	0
00667A MINOT, CITY OF	Municipal	Conditional	1/1/21	15508323CC	340	0	6,000.00	0
677 LOWESS GARDEN - % PHILIP LOWE	Irrigation	Perfected	7/6/56	15508219BC	21	10.5	134.4	0
00860P MINOT, CITY OF	Irrigation	Perfected	1/1/14	15608423CD	112.1	56.2	0	0
00861P MINOT, CITY OF	Irrigation	Conditional	1/1/14	15608405DB	140	70	0	0
00889P JOHANSON, JAMES L	Irrigation	Conditional	1/1/14	15508401C	146	73	0	0
00889P01 TALBOT, LUCILLE M.	Irrigation	Conditional	1/1/14	15508318BW	28	14	0	0
2493 ALL SEASONS WATER USERS ASSN. INC.	Rural Water	Conditional	6/10/76	16307931BAAA	60	0	50	0
4102 U.S. FISH AND WILDLIFE SERVICE	Fish and Wildlife	Conditional	6/13/89	16107914A	572	0	0	0
4261 U.S. FISH AND WILDLIFE SERVICE	Fish and Wildlife	Conditional	6/25/90	15907803A	696	0	0	0
4286 U.S. FISH AND WILDLIFE SERVICE	Fish and Wildlife	Conditional	8/27/90	16007819B	458	0	0	0
<b>Totals</b>					<b>34147.4</b>	<b>3315.4</b>	<b>39313.1</b>	<b>0</b>

The Bureau of Biological Survey claimed an annual use of 61,000 acre-feet on 20,300 acres, from April 1 to November 1, and an additional storage right of 120,000 acre-feet from January 1 to December 31. The Service has established a water right with a priority date of August 28, 1937.



# North Dakota State Water Commission

900 EAST BOULEVARD • BISMARCK, ND 58505-0850 • 701-328-2750 • TDD 701-328-2750 • FAX 701-328-3696

WATER APPROPRIATION DIVISION  
(701)328-2754

March 13, 2001

Mr. Clifford Hanretty, Chairman  
McHenry County Board of Flood Irrigation  
847 68<sup>th</sup> Drive NE  
Towner, ND 58788

Dear Mr. Hanretty:

Enclosed for your information is a copy of a letter received from Mr. Joseph J. Cichy regarding operating plan for the Eaton Dam.

Sincerely yours,

Milton O. Lindvig, Director  
Water Appropriation Division

MOL:mb/227

cc: Jonathan C. Eaton w/enclosure  
Joseph J. Cichy

Governor John Hoeven  
XXXXXXXXXXXXXXXXXXXXXXXXXXXX  
CHAIRMAN

Dale L. Frink  
XXXXXXXXXXXXXXXXXXXXXXXXXXXX  
XXXXXXXXXXXXXXXXXXXXXXXXXXXX  
Interim State Engineer

**I** Representative Earl Rennerfeldt,  
**O** Chairman, House Natural Resources  
Committee

**F R O M**  
**N. D. STATE WATER COMMISSION**  
STATE OFFICE BUILDING  
BISMARCK, NORTH DAKOTA 58505

**SUBJECT:** Senate Bill 2182 PROJECT NO. DATE: March 16, 2001

FOLD

In response to the discussion on SB 2182, I am providing for the Committee's information copies of the correspondence and the office memo regarding flooding and water right issues associated with the Eaton Flood Irrigation Project. Also included is a copy of the Agreement between the Board of Flood Irrigation and the U.S. Dept. of Agriculture. As requested, a list of all water appropriations from the Mouse River in North Dakota is enclosed. If anyone has questions on this information we will be pleased to answer them.

PLEASE REPLY TO → SIGNED

Milton O. Lindvig, Director  
Water Appropriation Division

*Milton O. Lindvig*

DATE

SIGNED

SEND PARTS 1 AND 3 INTACT. PART 3 WILL BE RETURNED WITH REPLY  
DETACH THIS COPY - RETAIN FOR ANSWER

UNITED STATES DEPARTMENT OF AGRICULTURE

OFFICE OF THE SECRETARY

AGREEMENT

THIS AGREEMENT, made and entered into by and between the Department of Agriculture, by and thru the Secretary of Agriculture, for the United States of America, party of the first part, and the Board of Flood Irrigation of McHenry County, North Dakota, party of the second part.

WITNESSETH, that whereas, there has been established by the party of the first part, under the supervision of the Bureau of Biological Survey, upon the Mouse River, referred to officially by the United States as the Souris River, certain areas for the restoration and propagation of migratory waterfowl, consisting of two permanent projects, one known as the Upper Souris Project, and the other as the Lower Souris Project, and extensions of said projects, and

WHEREAS, in connection therewith, for the purpose of providing an adequate water supply a reservoir is being constructed by the Government on the Upper Souris Project, which, when completed, will impound approximately 112,000 acre feet, and

WHEREAS, for the successful operation of said project, it is essential and necessary that the Bureau of Biological Survey control the release of its stand waters, and from time to time regulate the flow of water on the Mouse River, so to maintain levels therein thruout the marsh areas, best suited to the propagation and breeding of waterfowl, and

WHEREAS, the party of the second part is a duly organized board under the laws of the State of North Dakota, for the establishment of an irrigation project involving certain meadow lands in Townships 157 N., Rge. 76 West; 157 N. Rge. 75 West; 156 N. Rge. 76 West; 155, N. Rge. 76 West and 155 N. Rge. 77 West in McHenry County, North Dakota, involving a total acreage of approximately 8,000 acres, for which said project the said Board has certain water rights for irrigation purposes and proposes to construct a dam to be known as the Eaton Dam, and

WHEREAS, said irrigation project will be located between the Upper Souris and Lower Souris projects, the upper of which has the Reservoir for impounding waters for reasonable use in the Lower Souris project of the party of the first part, and it will be necessary for the water required for the Lower Souris Migratory Waterfowl Refuge area to pass thru the Dam of the said irrigation project.

NOW THEREFORE, it is stipulated and agreed by and between the respective parties that the said parties will cooperate so as to carry out the purposes of both projects, and in that regard it is agreed that the purpose of the said

irrigation project is to supply to the hay lands within the project one irrigation each spring. It is agreed that the irrigation project is entitled to receive up to 10,000 acre-feet each spring or such lesser amount of water as enters the Upper Souris Reservoir during that spring's run-off; and that the hay on the lands so flooded within the project shall be cut not earlier than the 15th day of July of any year, so as to permit wild waterfowl broods to mature.

IT IS UNDERSTOOD AND AGREED, that as to the waters which the party of the first part impounds in its Upper Souris Reservoir, the party of the second part has no claim except as to the use of the equivalent of the spring run-off to the extent of 10,000 acre-feet, as aforesaid, and that the party of the second part will make proper provision for the return of excess water impounded upon the meadows during the irrigation season, to the river channel below the Eaton Dam, and when said Eaton Dam is in operation and closed, that at least seven days previous notice will be given as to the time the party of the second part shall desire to have said Dam opened, and the waters released, said notice to be given in writing to the party of the first part, addressed to the Bureau of Biological Survey, Minot, North Dakota:

IT IS FURTHER UNDERSTOOD AND AGREED, that the amount of water stipulated in this agreement has been based on the best engineering estimates now available but it is recognized that a further study of this project by the Mouse River Committee may result in a determination that either a lesser or greater quantity of water can be beneficially used by the Eaton Project. (The Mouse River Committee, hereafter provided, will be empowered to study the water utilization problems of the Mouse River and to recommend to the State Engineer the proper amount of water, be it more or less than 10,000 acre-feet, to which the Eaton Project is to be entitled. The parties to this agreement stipulate that they will accept such recommendation.)

IT IS FURTHER UNDERSTOOD AND AGREED that a Mouse River Committee consisting of three members is to be appointed by the Governor of North Dakota and the Secretary of the United States Department of Agriculture. This Committee will appoint a competent water master. Under the supervision of this committee the Dam gates of the Eaton irrigation project are to be opened as soon as the spring irrigation is complete, but in no event later than July 15 of any year, and are to remain open throughout the remainder of the year, for the purpose of permitting the U. S. Biological Survey to transfer water from the Upper Souris Project to the Lower Souris Project.

IT IS FURTHER UNDERSTOOD AND AGREED, that it is desirable to further the propagation of wild waterfowl: that it is desirable to avoid commercialization of the shooting of waterfowl in this area; that, therefore, the Board of Flood Irrigation of McHenry County will cooperate to further the conservation of migratory waterfowl.

It is an express condition of this agreement that it shall not be assigned in whole or in part, that no member of or delegate to Congress or resident Commissioner after his election or appointment, and either before or after he has qualified and during his continuance in office, and no officer, agent or employee of the Government shall be admitted to any share or part of this contract or agreement or to any benefit to arise therefrom; and that no convict labor shall be employed in carrying out any of the terms of this agreement in accordance with Executive Order signed May 18, 1905. The provision herein with respect to the interest of members of or delegates to Congress and Resident



Commissioners in this agreement shall not be construed to extend to any incorporated company where such contract or agreement is made for the general benefit of such incorporation or company. (Section 3741 Revised Statutes, and Sections 114-116, Act of March 3, 1907.)

IN WITNESS WHEREOF, the parties have executed this agreement on this 29<sup>th</sup> day of November, one thousand, nine hundred and thirty-five.

United States of America  
Department of Agriculture

By: H. A. Wallace  
Secretary of Agriculture

BOARD OF FLOOD IRRIGATION OF WENHRY COUNTY

By: L. G. Hardie  
Its President

By: J. E. Eaton  
Its Secretary