

September 1998

AUTHORITY OF THE STATE WATER COMMISSION TO IMPLEMENT THE PROMISED PAYMENT PLAN

This memorandum discusses the authority of the State Water Commission to implement the promised payment plan as envisioned by the North Dakota Rural Water Systems Association. Under the promised payment plan, a four-year construction schedule and municipal, rural, and industrial water supply budget would be developed based on the \$66 million federal municipal, rural, and industrial water supply authorization contained in the Garrison Diversion Reformulation Act of 1986. If in any one year of the proposed four-year budget the federal payment fell short of the budgeted amount, the state would promise to cover the shortage until the federal dollars were received. Benefits of the promised payment plan identified by the North Dakota Rural Water Systems Association include full utilization of North Dakota's short construction season, lower project costs, better project design, increased initial sign-up of members, and orderly water development which would allow the best use of limited municipal, rural, and industrial water supply funds. The feasibility of this plan hinges on whether the State Water Commission has statutory authority to provide interim financing to implement the promised payment plan.

North Dakota Century Code (NDCC) Section 61-02-68.1 provides that the State Water Commission:

Pursuant to appropriate resolution, and in order to carry out the business of developing the water resources of this state as provided in this chapter, may borrow money and issue interim financing notes . . . in evidence thereof in order to provide owners with tax-exempt construction period financing. Such construction period financing may include the costs of construction of works or projects, funding of debt service reserves and capitalized interest, and the payment of the costs of issuance.

North Dakota Century Code Section 61-02-68.2 provides that the commission may enter into interim financing and loan agreements with any owner or owners to loan the proceeds of the commission's interim financing notes to any owner or owners for works or projects authorized by Chapter 61-02 anywhere within the state and to adopt the necessary resolution therefore without regard to limitations, provisions, or requirements of any law, except those of Chapter 61-02. However, before any such agreement may be entered into, an agency or instrumentality of the United States government or an agency of the state, including the Bank of North Dakota, must have

committed itself to make a grant or loan to such owner or owners. In addition, the commission may only provide interim financing less than or equal to the federal or state grant or loan commitment on each project and may not apply the proceeds of the notes and financing to any purpose other than expenses allowed by Section 61-02-68.1 and the project or works for which the loan agreement is made.

North Dakota Century Code Section 61-02-68.4 requires the commission to conduct a review of the feasibility of the project or works to ensure the projected water consumption, operating costs, construction costs, revenues, and other statistics are reliable and that the project will be able to pay its expenses before it may issue any interim financing notes pursuant to Section 61-02-68.1. Section 61-02-68.5 requires any interim financing agreement provide that the owner or owners receiving the proceeds of the interim financing must pledge and dedicate the proceeds of the loan or grant from the United States or the state as security for the interim financing notes issued pursuant to the loan agreement. Concerning the terms of interim financing notes, Section 61-02-68.6 provides that any resolution authorizing the issuance of interim financing notes must specify the principal amount, rate of interest, maturity date, and such other terms as may be specified in the resolution. However, the notes may not exceed three years from the date of issue, but the time of payment of the notes may be extended for a period of up to two years from the maturity date of the note. The interim financing notes and the interest on the notes must be secured by a pledge of, and be payable from, any grant or loan to be made by an agency or instrumentality of the United States government or the state as specified in Section 61-02-68.2.

Finally, the State Water Commission, in order to further secure the payment of the interim financing notes, is authorized and empowered to make any other or additional covenants, terms, and conditions and to do and perform such acts as may be necessary, convenient, or desirable in order to secure payment of its notes and to make the notes more acceptable to lenders.

North Dakota Century Code Section 61-02-68.12 provides that interim financing notes issued by the State Water Commission under Chapter 61-02 are not a debt or liability of the state and do not constitute a loan of the credit of the state or create any debt or debts, liability or liabilities on behalf of the state, and do not constitute a pledge of the faith and credit of the state but that all such notes are payable solely from

funds pledged or available for their payment as authorized in Chapter 61-02. Also, the notes do not constitute a charge, lien, or encumbrance, legal or equitable, upon any property of the commission other than the funds received pursuant to an interim financing agreement. Finally, Section 61-02-68.13 provides that the interim financing notes issued under Chapter 61-02 are legal investments for the state and political subdivisions, all national banking associations, state banks, trust companies, savings banks and institutions, savings and loan associations, investment companies,

executors, administrators, guardians, trustees, and other fiduciaries.

Thus, based upon these statutory provisions, it appears that the State Water Commission has the statutory authority to implement or facilitate the payment plan as envisioned by the North Dakota Rural Water Systems Association. However, if more explicit statutory authorization or approval is desired, then consideration could be given to amending the power and duties of the State Water Commission enumerated in NDCC Section 61-02-14.