

APPENDIX K

LEGAL AND INSTITUTIONAL ANALYSIS OF STATE WATER LAW

RED RIVER VALLEY WATER NEEDS ASSESSMENT

PHASE 1B

INSTREAM FLOW NEEDS ASSESSMENT

LEGAL AND INSTITUTIONAL ANALYSIS OF STATE WATER LAW
FOR THE
INSTREAM FLOW NEEDS ASSESSMENT

A legal and institutional analysis of State Water Law was conducted to identify legal and institutional instream flow related opportunities and needs for the Sheyenne River and the Red River of the North, North Dakota and Minnesota. The analysis emphasized North Dakota Water Law. The analysis is an update to Nelson et al. (1978). In Nelson et al. (1978), the U.S. Fish and Wildlife Service's Biological Services Program identified and evaluated the most promising institutional methods for reserving instream flows to benefit fish and wildlife in North Dakota. The text dealing with legal issues associated with the protection of North Dakota instream flows was taken from several sources, but primarily from Krenz (1998), Delmore (1997), Sagsveen (1977), and supplemented by other information provided by staff of the North Dakota State Water Commission as well as information posted on the North Dakota Water Law web site.

In a 1986 survey of the United States and Canadian provinces, Reiser et al. (1989) identified legislation protecting instream flow in 16 States, 12 of which were west of or along the 100th meridian. Instream flow regulations in the Western States have more recently been reviewed by McKinney and Taylor (1988) and MacDonnell et al. (1989). Thirteen of the States have specifically designated recreation as a legitimate reason for protecting instream flows (i.e., beneficial use). Only six (6) of the States allow for protection of instream flows for aesthetic or scenic reasons. However, several of the States allow instream flow rights to protect water quality as a way of protecting aesthetic quality. In several states, natural resource department personnel consider water quality protection to be the means for preserving aesthetic quality of riverine areas (Shelby et al. 1982). Aquatic life, water quality, and recreation are directly benefitted by the designation of other uses as a "beneficial use." In California, the State's granting and regulation of permits and licenses, water quality management, and application of the public trust doctrine all offer opportunities that sometimes have the effect of protecting instream flows (Gray 1989).

The traditional requirements for a valid water claim in the West include: (1) intent to apply the water to a beneficial use, (2) actual diversion of water from a naturally occurring water body, and (3) application of the water to a beneficial use within a reasonable time. The designation of "beneficial use" water rights for preserving fish and wildlife habitat, water quality, or for maintaining riverine resources for recreational use has not been the primary impediment to instream flow regulations (Shelby et al. 1982). The difficulty most often encountered is the traditional requirement that water be diverted from natural water courses in order to establish a water right under the Prior Appropriation doctrine (Tarlock 1978, 1979). The appropriation doctrine emphasizes diversion under the principles of beneficial use and "first in time" being "first in right."

North Dakota Water Law

Section 3 of Article XI of the North Dakota Constitution states, “All flowing streams and natural water courses shall forever remain the property of the state for mining, irrigating and manufacturing purposes.” The appropriation of water in the State of North Dakota is by statute the responsibility of the State Engineer. Chapter 61-04 of the North Dakota Century Code (N.D.C.C.) addresses the appropriation of water in the State. The State Engineer has adopted rules contained in Chapters 89-03-01, 89-03-02, and 89-03-03 of the North Dakota Administrative Code. The manner in which hearings are conducted by the State Engineer pursuant to the provisions of Chapter 61-04 are bound by Chapter 28-32 of the N.D.C.C., more commonly known as the Administrative Agencies Practice Act.

N.D.C.C. § 61-28-02(11) defines waters of the state as: “all waters within the jurisdiction of this state including all streams, lakes, ponds, impounding reservoirs, marshes, watercourses, waterways, and all other bodies or accumulations of water on or under the surface of the earth, natural or artificial, public or private, situated wholly or partly within or bordering upon the state, except those private waters that do not combine or effect a junction with natural surface or underground waters just defined.”

N.D.C.C. § 61-04-01.1 defines beneficial use as: “a use of water for a purpose consistent with the best interests of the people of the state.”

N.D.C.C. § 61-04-01.1 defines fish, wildlife, and recreation use as: “the use of water for the purposes of propagating and sustaining fish and wildlife resources and for the development and maintenance of water areas necessary for outdoor recreation activities.”

Chapter 61-04-01.2 requires that a right to appropriate water can be acquired for beneficial use only as provided in Chapter 61-04 (Appropriation of Water). Beneficial use shall be the basis, the measure, and the limit of the right to the use of water.

Chapter 61-04 requires that an appropriation of water involve an actual diversion and works before a water permit may be issued. The legislature has not provided a mechanism for the issuance of water permits specifically for the preservation of a naturally occurring instream flow. However, under existing state law, a water permit can be issued for a project to divert or store water and release it to maintain an instream flow. The existing water permit issued for the Garrison Diversion Project allows project water to be delivered to satisfy instream flow needs and the water is protected from downstream diversion under existing state law.

N.D.C.C. § 61-04-06 (emphasis added below) lists the factors the State Engineer must consider in making a determination about whether to issue a water permit. That section provides, in part:

The State Engineer shall issue a permit if the state engineer finds all of the following:

1. The rights of a prior appropriator will not be unduly affected.
2. The proposed means of diversion or construction are adequate.
3. The proposed use of water is beneficial.
4. The proposed appropriation is in the public interest. In determining the public interest, the State Engineer shall consider all of the following:
 - a. The benefit to the applicant resulting from the proposed appropriation.
 - b. The effect of the economic activity resulting from the proposed appropriation.
 - c. The effect on fish and game resources and public recreational opportunities.
 - d. The effect of loss of alternate uses of water that might be made within a reasonable time if not precluded or hindered by the proposed appropriation.
 - e. Harm to other persons resulting from the proposed appropriation.
 - f. The intent and ability of the applicant to complete the appropriation.

There are six factors the State Engineer must consider when determining whether a proposed appropriation is in the public interest (4.a.-f. above). The six factors are considered and the determination of public interest is a judgment decision made by the State Engineer. One of the six factors the State Engineer must consider is the effect on fish and game resources and public recreational opportunities (4.c.). This is the avenue through which impacts to aquatic resources are considered in the existing appropriation process.

Chapter 28-32 specifies that the decision must be based on information introduced into the hearing record. Section 89-03-01-06.3 identifies a list of data commonly used in evaluating permit applications which, unless specifically excluded by the hearing officer, are automatically included in the hearing record, and all parties attending the hearing are informed that this information has been taken into the record. Section 89-03-01-06.1 outlines the procedure to be used by the State Engineer to consider additional information not made a part of the record during the hearing process.

When there are competing applications for water from the same source, and the source is insufficient to supply all applicants, the State Engineer shall adhere to the following order of priority (N.D.C.C. § 61-04-06.1 Preference in granting permits):

1. Domestic use.
2. Municipal use.
3. Livestock use.
4. Irrigation use.
5. Industrial use.
6. Fish, wildlife, and other outdoor recreational uses.

In determining whether the proposed appropriation is in the public interest, the State Engineer must evaluate each of the items listed above in N.D.C.C. § 61-04-06.2 (4.a.-f.). If, when

evaluated and balanced with the other factors, the State Engineer determines that the potential effect on fish and game resources or public recreational opportunities would be detrimental, and on a whole that the public interest would not be served by issuance of a water permit, the State Engineer could deny the permit, or could issue the permit with conditions to protect fish and game resources or public recreational opportunities. Such a condition could require, if supported by the evidence, the requirement that water may be diverted from a stream or lake only when flows exceed a certain level. If an applicant requests a permit to impound water, a condition could be added to require releases to be made to augment flows. The determination of what elements of the public interest are impacted, and what the public interest requires is committed to the sound discretion of the State Engineers. Shokal v. Dunn, 707 p. 2d 441 (1985).

Reservations of Water

N.D.C.C. § 61-04-31 contains a procedure where, through the adoption of rules, the State Engineer may establish a moratorium on the withdrawal of water, thereby in effect protecting existing instream flows. This section provides:

1. Whenever it appears necessary to the State Engineer, or when so directed by the State Water Commission, the State Engineer may by regulation:
 - a. Reserve and set aside waters for beneficial utilization in the future; and
 - b. When sufficient information and data are lacking to allow for the making of sound decisions, withdraw various waters of the state from additional appropriations until such data and information are available.
2. Prior to the adoption of a regulation under this section, the State Engineer shall conduct a public hearing in each county in which waters relating to the regulation are located. The public hearing shall be preceded by a notice placed in a newspaper of general circulation published within each of the counties.
3. Regulations adopted hereunder shall be subject to Chapter 28-32.

The legislative history to N.D.C.C. § 61-04-31 provides “[t]he recent drought has emphasized that certain streams may not have unappropriated water available for further beneficial use. It is the State Engineer’s opinion that he should be authorized to place a moratorium on further appropriations in streams having limited or no unappropriated water available.” Hearing on S. 2062 Before the Senate Comm. on Natural Resources, 45th N.D. Leg. (January 13, 1977) (Testimony of Murray Sagsveen, Counsel, State Water Commission).

This section may not provide much protection if a reservation can only be made where little or no unappropriated water exists. Reservations cannot affect senior rights, and if little or no water is available for appropriation at the time the reservation is made, there may not be sufficient water to support fish and wildlife. In addition, reservations do not create vested property rights and are subject to administrative decisions to lift or remove the reservation and allow unappropriated water to be appropriated.

There are five streams in North Dakota for which conditional water permit applications are not accepted. The North Dakota State Water Commission voted in 1960 to place a moratorium on the issuance of additional water permits on the mainstems of Apple and Cedar Creeks and the Green, Cannonball, and Grand rivers. A review of State Water Commission meeting minutes reveals that the moratoriums resulted from concerns with low flows being experienced at the time. This occurred during a drought period, and it appears from the minutes that no analysis was conducted to assess the level of appropriation. These moratoriums are still in effect today.

These five streams are the only bodies of water for which a moratorium has been placed on the issuance of new conditional water permits. There have been other instances where applications have been denied because there would have been sufficient water available only on an infrequent basis. In these instances, the State Engineer judged that, due to the inadequacy of the water supply during most years, it was not in the public interest to issue a permit. This does not mean that new applications are not accepted for these streams; applications are accepted and evaluated on their specific merits.

Applications for water from ground water sources are processed and evaluated in the same manner as those for surface water sources. In instances where a ground water appropriation may impact a surface water supply, the evaluation process takes the potential interaction into account. In some instances, if a ground water withdrawal would have a significant adverse impact on a senior appropriator on a surface water source, the application could be denied. In some instances, however, the ground water contribution to a stream is regarded as an inefficient capture system. In such cases, permits for the withdrawal of water from a stream to which aquifer discharges have been conditioned so that their right to withdraw water from the stream shall not restrict development of the ground water source. In these instances, the benefit of developing the greater resources of the ground water system is determined to be superior to the benefit derived from the maintenance of the ground water discharge to the surface water system.

The authority of the State Engineer to enforce the water appropriation laws are explained in Section 61-04-29. This section provides that the State Engineer has the authority to enjoin the unauthorized use of water or issue orders as necessary to administer the provisions of Chapter 61-04. Section 61-04-30 provides that any person who uses a significant quantity of water without a permit or violates the terms of their permit or an order of the State Engineer is guilty of a Class A misdemeanor. Section 61-04-32 provides that a water permit holder who has their water supply illegally diminished is entitled to damages sufficient to cover the cost of alternatives necessary to ensure the delivery of the permitted quantity and quality of water.

Water Permits for Instream Flows Associated with the Construction of Works

The use of water for fish, wildlife, and recreation is considered a beneficial use of water. The State Engineer can issue water permits for such uses provided there is a diversion of the water. An applicant for a water right could specifically receive the right to impound water in a reservoir

or dam for the purpose of making releases of the water impounded to augment stream flows. The water released would be protected from appropriation by others.

Attorney General Opinions/Judicial Opinions

The authority to establish or protect instream or minimum flows is authority granted by the legislature to a specific entity such as a state agency. The Attorney General cannot establish or protect instream or minimum flows through the issuance of an opinion but could issue an opinion on whether the authority exists for an agency of the state to establish or protect instream flows. The Attorney General has not issued an opinion on this issue.

A requirement for an instream flow can be established judicially. There are decisions in other jurisdictions that impose the public trust doctrine in the area of water rights to protect instream flows. Beck, Waters and Water Rights § 14-03 (c) (4) (C). The North Dakota Supreme Court has applied the public trust to water rights, but the ruling is extremely limited. See United Plainsmen v. North Dakota State Water Conservation Comm., 247 N.W. 2d 457 (N.D. 1976). The decision only requires study and planning in the allocation of water resources to determine the effects of allocation on present water supplies and future water needs.

In the early 1980's, the State Water Commission and State Engineer brought a lawsuit to stop the draining of Rush Lake, a meandered non-navigable body of water. The state claimed that the construction of drains and dikes built by a landowner substantially diminished the lake and threatened to totally destroy it. The North Dakota Supreme Court held that protecting the integrity of the waters of the State is a valid exercise of the State Water Commission's duties pursuant to N.D.C.C. § 61-02-14, as well as being part of the state's affirmative duty under the "public trust" doctrine. North Dakota State Water Com'n v. Board of Managers, 332 N.W. 2d 254, (N.D. 1983). The court allowed the draining to take place, however, because the state had tacitly approved the draining by being involved in resolving the disputes over the draining. This case provides authority for the State Water Commission to establish levels necessary to protect the integrity of the state's waters. That authority may be limited to instances where permits have not already been issued.

Instream Flow and Water Quality

Where instream flows affect water quality and are impacted by man-induced activity, the North Dakota Health Department appears to have some authority over the flow itself. N.D.C.C. § 61-28-02(7) defines pollution as: "the manmade or man-induced alteration of the physical, chemical, biological, or radiological integrity of any waters of the state." Where human activity directly impacts stream flows such as to change dissolved oxygen levels for water temperature in a manner which could affect aquatic life the Department has authority and has exercised such authority in the past. In a letter to the U.S. Army Corps of Engineers on February 22, 1995, the Department indicated that Federal activity which could change the temperature of the thermocline and result in the reduction of water quality may come within Department

enforcement authority.

Legislation

A number of states have enacted laws allowing the acquisition of instream rights. The right of appropriation for preservation of instream flows is generally a public right. Waters at § 14.03 (c) (4) (C). Legislation can be introduced by either a state agency or a legislator.

Another method to protect instream flows is by the adoption of legislation that preserves natural flows in certain named bodies of water. The legislative assembly enacted N.D.C.C. ch. 61-29, which is known as Little Missouri State Scenic River Act. Its purpose is to preserve the Little Missouri River in a free-flowing natural condition. N.D.C.C. § 61-29-06 prohibits channelization, reservoir construction, or diversion, other than for agricultural or recreational purposes, and dredging within the confines of the river and tributary streams of the river. Riparian landowners are not prohibited from using the river for domestic or livestock water purposes.

State Water Commission Internal Policies

The information presented below was derived from the North Dakota Water Law web site. This material was obtained from a working draft of internal State Water Commission policies dated October 1, 1998.

The 1999 State Water Management Plan is a comprehensive vision for water management for the 21st Century. It provides a vision in which water is used efficiently and is allocated through laws that conform to the prior appropriation doctrine. State Water Plan recommendations are directed toward the improved management and utilization of the State's water resources. The State Water Commission has produced a working draft of policy input from the public involvement process as of August 11, 1998, which includes the following recommendation pertaining to instream flows:

“It is recommended that the State Water Commission determine if it is in the public interest to seek appropriate waters in the state for instream flow purposes, insofar as those waters do not impede on prior appropriations”.

The following comment accompanies the above recommendation: “Instream flows protect many non-consumptive uses such as fish and wildlife habitat, aquatic life, recreation, aesthetic beauty, transportation, navigation, hydropower and water quality. Many of these uses have direct effects on the economy while others represent intangible values, and the public interest. The state engineer has no authority to directly establish minimum stream flows through the appropriation process due to the necessity of works or construction of works required by the North Dakota Administrative Code 89-03-01-07. For future interest, a requirement for an instream flow, however, could be established judicially. The state engineer could establish a base line stream

flow to protect the integrity of the state's water pursuant to NDCC 61-02-14, and under the public trust doctrine. However, due the implied references to prior appropriations in such cases, the authority for such action may be limited”.

“The State Water Commission could support efforts to obtain storage and natural flow rights to improve and maintain instream flows when in the public interest. The NDCC could be expanded to enable the State Water Commission to transfer acquired water rights to instream flow water rights. By law similar provisions are made to protect other water users and the agricultural base of an area. The state does, to a very limited extent, preserve natural flow levels on the Little Missouri River, NDCC 61-29 and 61-29-06 as part of the Little Missouri State Scenic River Act”.

Federal Authority

There are several Federal laws that may create requirements for instream flows. The following identified Federal laws are not intended to be exclusive. There may be other Federal laws and authorities, such as laws requiring Federal permits or licenses or laws governing public land management decisions, that provide opportunities to protect instream flows.

- (1) The Endangered Species Act: The designation of streams or lakes as critical habitat for endangered species often results in protection of stream flows or minimum flows because there must be a sufficient quantity of water available to maintain water quality standards needed for the habitat to survive.
- (2) The Clean Water Act: The Clean Water Act has been construed by the United States Supreme Court to allow the imposition of a minimum flow requirement in § 401 certifications. Section 401 requires states to provide a certification that state water quality requirements will be met if a federal license or permit is issued for any activity resulting in a discharge into navigable waters. The United States Supreme Court held that the Clean Water Act is not just concerned with water quality, but also issues of quantity that may affect quality. PUD No. 1 of Jefferson County v. Washington Dep't of Ecology, 114 S. Ct. 1900 (1994). Section 401 certifications are required when Section 404 permits are issued.
- (3) Federal Reserved Water Rights: When the United States withdraws land from the public domain and reserves it for a Federal purpose, appurtenant water then unappropriated is implicitly reserved to the extent necessary to accomplish the purposes of the reservation. United States v. New Mexico 426 U.S. 696, 699-700 (1978). Courts have recognized implied federal reserved water rights for varied federal reservations, including national forests, monuments, parks, recreation areas, wildlife refuges, and Indian reservations. United States v. Jesse, 744 P.2d 491, 494 (Co. 1987). The status of reserved rights for wilderness areas is unsettled. The reserved water rights doctrine is construed narrowly

and the right includes “only that amount of water necessary to fulfill the purpose of the reservation, [and] not more.” Cappaert v. United States 426 U.S. 128, 141 (1976). For example, the United States’ claims for reserved water rights in national forests for recreational, scenic, or wildlife values and stock watering have been denied because the purposes of the reservation of national forests were to secure favorable conditions of water flows and to furnish a continuous supply of timber for the use and necessities of the people. United States v. New Mexico, 426 U.S. 696.

- (4) National Wild and Scenic Rivers Act: The National Wild and Scenic Rivers Act seeks to preserve unique stream in free-flowing conditions. It establishes a procedure by which rivers may be recommended for inclusion, studies, and eventually listed under the wild and scenic rivers system. The Wild and Scenic Rivers Act specifically provides that the designation of any stream or portion of a stream as a national wild, scenic or recreational river “shall not be construed as a reservation of the waters of such stream for purposes other than those specified in this chapter, or in quantities greater than necessary to accomplish these purposes”. 16 USCA 1284 (c).

Arguably, although stated in the negative, this language establishes a reserved right to water in a river corridor to meet its specific flow needs and the purposes of the Act, which are to maintain the inherent values of river flows and allow rivers to flow freely for the benefit and enjoyment of the public. 16 USCA § 1271. This is a non-consumptive reservation of water. Generally, reserved water rights have a priority date based on the date Congress reserves land. With a river designation, no land is being reserved, however, if a reserved right is created, the priority date would likely be the date Congress makes the designation. Vested rights prior to the date of creation generally would not be affected. The Act does contain language indicating that vested water rights may be condemned. 16 USCA § 1284(b) provides that “any taking by the United States of a water right which is vested under either State or Federal law at the time such river is included in the national wild and scenic rivers system shall entitle the owner thereof to just compensation.”

- (5) The Fish and Wildlife Coordination Act: Although we are not aware of this Act being used to establish instream flows, it does require that wildlife conservation be given equal consideration with other objectives of water resources development.

Minnesota Water Law

Minnesota Statute 103G.265 requires the Minnesota Department of Water Resources to manage water resources to ensure an adequate supply to meet long-range seasonal requirements for domestic, agricultural, fish and wildlife, recreational, power, navigation, and quality control purposes. The Water Appropriation Permit Program exists to balance competing management objectives that include both development and protection of Minnesota’s water resources.

Water law in Minnesota is governed by riparian rights. Riparian water rights, or eastern water law, state that the owner of land containing a natural stream or abutting a stream is entitled to receive the natural flow of the stream limited only by the equal rights of the other riparian owners. The riparian owner is protected against the diversion of water except for domestic purposes upstream from his property and from the diversion of excess floodflows toward his property.

The Minnesota Department of Natural Resources has established minimum instream flows using a hydrologic method (i.e., 90 % exceedance flow) as a guideline. Using this method, the Minnesota Department of Natural Resources established a minimum instream flow for the Red River of the North of 38 cfs at Fargo, North Dakota.

State Treatments of a Previous Instream Flow Recommendation

The following was extracted from the Garrison Diversion Conservancy District, Instream Flow Needed for Aquatic Life White Paper prepared by Houston Engineering, Inc. (Houston Engineering, Inc. December 1997) and is presented here for informational purposes.

The Souris-Red-Rainy River Basin Commission (1972) recommended a *minimum* instream flow of 7 cubic feet per second (cfs) at Fargo, North Dakota, to provide a factor of safety for water needs and ensure that some minimal riverflow is maintained below each withdrawal point. The basic flow needs at each withdrawal point consist of the minimum base flow and the allocated withdrawals. The Souris-Red-Rainy River Basin Commission (1972) also suggested a target flow of 100 cfs at Fargo, North Dakota, to protect the fishery value of the river and to aid in waste assimilation.

Because the Red River of the North is a resource shared by the States of North Dakota and Minnesota, each State has been involved in recommending instream flows. As previously stated, the Minnesota Department of Natural Resources, which follows eastern water law, established a minimum instream flow for the Red River of the North of 38 cfs at Fargo, North Dakota.

As previously stated, the North Dakota State Water Commission, which follows western water law, considers instream flow needs during the issuance of water appropriation permits. The State Water Commission presently has no *legal* requirement for maintaining minimum instream flows. One proposal, using the Tennant Method (Tennant 1976), put forward by the North Dakota Game and Fish Department to the State Water Commission for instream flows within the Red River of the North at Wahpeton, North Dakota, during discussions of the ProGold appropriations permit (ProGold is a “value added” high fructose corn syrup processing plant, which began operations in 1997), consisted of the following:

!	April - May	551 cfs (100% of mean annual discharge)
!	June - September	220 cfs (40% of mean annual discharge)
!	October - March	110 cfs (20% of mean annual discharge)

Legal and Institutional Analysis Summary

It does appear that there are means and measures available in North Dakota Water Law to protect instream flows, whether it be by appropriations, judicially, acquisition and transfer, water quality enforcement mechanisms, or in the planning process. These means and measures should be further investigated in Phase II of the Red River Valley MR&I Water Needs Assessment. Minnesota appears to have a mechanism in place by which they can establish minimum instream flows. Minnesota Water Law should be further investigated in Phase II of the Red River Valley MR&I Water Needs Assessment.

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