

OPINION
74-611

November 7, 1974 (OPINION)

The Honorable Byron L. Dorgan
State Tax Commissioner and
Members of Advisory Committee
State Capitol Building
Bismarck, ND 58505

RE: Michigan-Wisconsin Pipeline Company, Condition Water

Permit (application 1901 A)

United Power Association and Cooperative Power Association

Condition Water Permit (application 1977)

Dear Commissioner Dorgan:

This is in response to your letter dated October 7, 1974, wherein you make the following request for an Attorney General's opinion:

I have attended the hearings of the Water Commission in which recent water permits were granted for a gasification plant and for a large electric generating complex. In both of these cases, a list of conditions which includes among other things, reclamation standards, emission control standards, etc., were attached to the issuance of the permits.

I have previously expressed fears that the conditions imposed by the State Water Commission may not be legally binding upon the corporation receiving the approved water permit. There are differing opinions among lawyers whether the Water Commission has the authority to attach standards to a water permit that are more stringent than current law requires (in this case I am talking about reclamation standards and clean air standards).

I know that the Water Commission and the Governor are attaching these conditions in order to provide the best possible protection for North Dakotans as a result of the approval of these projects. The conditions are designed to make certain that developments of the type that were approved are subject to very stringent regulations in order to protect North Dakota's quality of life.

However, if these conditions should not be able to stand the test of a court challenge, then we are all living with a false sense of security about these conditions.

For this reason, I believe that the Water Commission and more importantly, the people of North Dakota, should have the opinion of the Attorney General whether the imposition of conditions attached to water permits is legally binding action that the Water Commission has the authority to take.

Therefore, as a state official I am requesting that you issue a formal opinion on the validity of the conditions that have been attached to the UPA/CPA water permit and also the Michigan-Wisconsin Pipeline water permit.

It is our opinion that the conditions on the Michigan-Wisconsin Pipeline Company and United Power Association/Cooperative Power Association Conditional Water Permits granted by the State Engineer and approved by the State Water Commission are basically valid. However, as in all such cases, the courts would make the final dispositive determination as a validity. It is considered that a reasonable reading of each condition on the above referenced permits requires that they be interpreted to affect and control those actions of the applicants that relate to the use of waters of the state to be appropriated. Any condition that affects and controls actions of the applicants which do not reasonably relate to the use of the waters of the state to be appropriated is considered to demand of the applicants no more than required by applicable federal and state statutes, rules and regulations administered by federal and state agencies with direct statutory authority, specifically in the area of air pollution control, water pollution control and reclamation.

Section 61-01-01 of the North Dakota Century Code states, in part, that the waters of the state ". . . belong to the public and are subject to appropriation for beneficial use and the right to the use of these waters for such use, shall be acquired pursuant to the provisions of chapter 61-04." North Dakota Century Code 61-01-02 states, in part, that ". . . Beneficial use shall be the basis, the measure and the limit of the right to the use of water." (Supplement 1973) The attachment of conditions to a water permit is an appropriate means of applying the "beneficial use" requirements of the Century Code.

The North Dakota Legislative Assembly has set forth a state water resources policy as follows, in part:

61-01-26. Declaration of state water resources policy. In view of legislative findings and determination of the ever increasing demand and anticipated future need for water in North Dakota for every beneficial purpose and use, it is hereby declared to be the water resources policy of the state that:

1. The public health, safety and general welfare, including without limitation, enhancement of opportunities for social and economic growth and expansion, of all of the people of the state, depend in large measure upon the optimum protection, management and wise utilization of all of the water and related land resources of the state;
2. Well being of all of the people of the state shall be the overriding determinant in considering the best use, or combination of uses, of water and related land resources; .
. . .
4. Accruing benefits from these resources can best be achieved for the people of the state through the development, execution and periodic updating of comprehensive,

coordinated and well balanced short- and long-term plans and programs for the conservation and development of such resources by the departments and agencies of the state having responsibilities therefor; . . . (Supplement 1973)"

The first section of the State Water Commission chapter of the Century Code states:

"61-02-01. Water conservation, flood control, and abatement of stream pollution declared a public purpose. It is hereby declared that the general welfare and the protection of the lives, health, property, and the rights of all the people of this state require that the conservation and control of waters in this state, public or private, navigable or unnavigable, surface or subsurface, the control of floods, and the regulation and prevention of water pollution, involve and necessitate the exercise of the sovereign powers of this state and are affected with and concern a public purpose. It is declared further that any all exercise of sovereign powers of this state in investigating, constructing, maintaining, regulating, supervising, and controlling any system of works involving such subject matter embraces and concerns a single object, and that the state water conservation commission in the exercise of its powers, and in the performance of all its official duties, shall be considered and construed to be performing a governmental function for the benefit, welfare, and prosperity of all the people of this state."

Section 61-02-01 gives broad responsibility to the State Water Commission over the use of the waters of the state ". . . for the benefit, welfare, and prosperity of all the people of this state."

North Dakota Century Code 61-02-09 authorizes the commission to ". . . contract and be contracted with, in its corporate name." Although it is considered that the attachment of the conditions of the above referenced water permits is an appropriate exercise of the commission powers as an agency of the state, enforceable under the commission's grant of police power in North Dakota Century Code 61-02-44, it is also considered, in the case of UPA/CPA, that the conditions on its water permit are valid as a contract as agreed to be the applicant and the commission by "Resolution."

North Dakota Century Code 61-02-14 states, in part:

"Powers and duties of the commission. The commission shall have full and complete power, authority, and general jurisdiction:

1. To investigate, plan regulate, undertake, construct, establish, maintain, control, operate, and supervise all works, dams, and projects, public and private, which in its judgment may be necessary or advisable: . . .
- k. To provide for the storage, development, diversion, delivery, and distribution of water for the irrigation of agricultural land and supply water for municipal and industrial purposes; . . .

- n. To provide water for the generation of electric power and for mining and manufacturing purposes;
- 2. To define, declare, and establish rules and regulations:
 - a. For the sale of waters and water rights to individuals, associations, corporations, municipalities, and other political subdivisions of the state, and for the delivery of water to users;
 - b. For the full and complete supervision, regulation, and control of the water supplies within the state; . . . (Supplement 1973)
- 5. To exercise all express and implied rights, power and authority, that may be necessary, and to do, perform, and carry out all of the expressed purposes of this chapter and all of the purposes reasonably implied incidentally thereto or lawfully connected therewith;"

For the purposes of election power generation, mining and manufacturing the powers of the commission referred to above in section 61-02-14 must be considered together with the authority granted the commission in the following sections of the Century Code:

"61-02-27. Proposals with respect to use of disposition of waters to be presented to commission. All persons, including corporations, voluntary organizations, and associations, when concerned with any agreement, contract, sale, or purchase, or the construction of any works or project which involves the use and disposition of any water or water rights under the jurisdiction of the commission, shall present to the commission all proposals with respect to the use or disposition of any such waters before making any agreement, contract, purchase, sale, or lease in respect thereof."

"61-02-28. Plans, investigations, and surveys concerning use of waters - Special powers of commission. The commission may make plans, investigations, and surveys concerning the use of any and all waters, either within or without this state, for purposes of establishing, maintaining, operating, controlling, and regulating systems of irrigation, municipal, industrial, recreational, and fish and wildlife works and projects in connection therewith within the state. The commission shall have all necessary powers of purchasing and selling, leasing and assigning, rights and interests in the use or in the appropriation of waters concerned with such systems or irrigation projects or works in connection therewith, and shall possess full authority and jurisdiction to exercise and assert actual possession over the Corpus of all of such waters, and to secure control and regulation of the diversion thereof subject to rules and regulations and methods prescribed by the commission" (Supplement 1973)

"61-02-29. Commission to have full control over unappropriated public waters of state. The commission shall have full control

over all unappropriated public waters of the state, whether above or under the ground, to the extent necessary to fulfill the purposes of this chapter.:

"61-02-30. Commission acquiring water rights and administering provisions of chapter - Declaration of intention. The state engineer, subject to the approval of the commission, may grant water rights to any person, association, firm, or corporation, or to any municipality or to any state or federal agency, department or political subdivision in the manner provided by law."

"61-02-73. Construction of chapter. Nothing contained in this chapter shall be deemed to interfere with any vested rights to the use of water. This chapter being necessary for the welfare of the state and its citizens, it shall be construed liberally to effect the purposes thereof."

Section 61-02-29 gives ". . . full control over all unappropriated public waters of the state . . ." to the commission. The powers and duties of the commission as specified in section 61-02-14 authorizes the regulation and control of providing water for electric power generation, mining and manufacturing purposes. Section 61-02-14 also authorizes the commission to promulgate rules and regulations for that purpose. Sections 61-02-27 and 61-02-28 provide for broad authority to require, prior to any agreement, plans and proposals from any person or corporation concerned with the construction of a project designed for the use of waters of the state. The State Engineer's authority pursuant to chapter 61-04 of the North Dakota Century Code for the purpose of administration of the appropriation of waters of the state as required by North Dakota Century Code 61-01-01 is subject to the review and approval of the Commission under section 61-02-30. A reasonable understanding of the above discussed provisions of sections 61-02-14, 61-02-27, 61-02-28, 61-02-29, 61-02-30, and 61-02-73 leads to the conclusion that the commission has broad general powers over the regulation of appropriation of the waters of the state and that the commission is the sole state agency responsible for the overall development, utilization and conservation of the state's water resources.

Due process of law in the administration of the appropriation of water is guaranteed by the judicial review provisions of sections 61-04-07 and 61-04-25 of the North Dakota Century Code. The above referenced applicants are afforded the same rights to judicial review "from any decision of the state engineer which denies a substantial right" as any other applicant before the state engineer and the commission.

Finally, whether or not the assumed responsibility of the water commission in the area of air pollution control, water pollution control, reclamation and siting of power transmission facilities is desired should be a matter to be resolved by the legislature. It is well known that the commission, by entering the general areas of environmental protection, has crossed paths with other state agencies that have more direct statutory and regulatory authority. Perhaps any concern for the adequacy of environmental protection authority in the above mentioned areas should be directed at improving the

regulatory and statutory authority of the traditional air and water pollution control and reclamation state agencies. Because of the magnitude and complexity of energy conversion development and control in North Dakota and the gravity of inadequate state planning and regulation, it is suggested that a review and study of the existing powers and duties of the commission and other appropriate state agencies, and the desired role of the commission and other state agencies in the planning, regulation and control of energy development in North Dakota be initiated by the commission, other appropriate state agencies and the legislature to ensure the maximum conservation and beneficial use of the waters of the state and all other natural resources significantly affected by major energy development. The absence of promulgation of formal regulations, as a whole, by the state engineer and the state water commission as authorized by sections 61-03-13, 61-04-14, and 61-02-14(2) of the North Dakota Century Code is proof that much work needs to be done if the commission is going to be responsible for the administration, regulation and control of energy development and environmental protection in North Dakota.

Sincerely yours,

Allen I. Olson

Attorney General