

MINUTES

North Dakota State Water Commission Bismarck, North Dakota

April 23, 2008

The North Dakota State Water Commission held a meeting at the State Office Building, Bismarck, North Dakota, on April 23, 2008. Governor John Hoeven, Chairman, called the meeting to order at 9:30 A.M., and requested Dale L. Frink, State Engineer, and Chief Engineer-Secretary to the State Water Commission, to call the roll. Governor Hoeven announced a quorum was present.

STATE WATER COMMISSION MEMBERS PRESENT:

Governor John Hoeven, Chairman
Roger Johnson, Commissioner, North Dakota Department of Agriculture, Bismarck
Arne Berg, Member from Devils Lake
Maurice Foley, Member from Minot
Jack Olin, Member from Dickinson
Harley Swenson, Member from Bismarck
Robert Thompson, Member from Page

STATE WATER COMMISSION MEMBERS ABSENT:

Larry Hanson, Member from Williston
Elmer Hillesland, Member from Grand Forks

OTHERS PRESENT:

Dale L. Frink, State Engineer, and Chief Engineer-Secretary,
North Dakota State Water Commission, Bismarck
State Water Commission Staff
Approximately 50 people interested in agenda items

The attendance register is on file with the official minutes.

The meeting was recorded to assist in compilation of the minutes.

CONSIDERATION OF AGENDA

There being no additional items for the agenda, Governor Hoeven announced the agenda approved as presented.

**STATE COST PARTICIPATION
CONTRACTS RELATING TO
INDEMNIFICATION AND
POLITICAL SUBDIVISIONS
(SWC Project No. 1753)**

Secretary Frink explained that because the State of North Dakota can no longer invoke sovereign immunity, the State Water Commission requires an indemnification clause in its state cost participation contracts. Because of litigation

issues, it was determined that the state cost participation contract indemnity language be revisited. As a result, modifications are proposed with the intent to clearly inform the project owners that the State of North Dakota, its agencies, officers and employees, and the State Water Commission are not liable for claims resulting from the performance of the contract solely because the state allocated project funds. The proposal is intended to require the project owners are responsible for all costs, expenses, and attorney fees which may result from the contract.

The state cost participation contract requires the local sponsor to furnish a certificate of insurance and all endorsements to the State Water Commission before commencement of the contract. This insurance is to be secured and kept in force during the term of the contract.

Cities, counties and local water districts obtain their insurance through the North Dakota Insurance Reserve Fund (NDRIF). Representatives of the NDRIF recently informed their clients that their policy would cover their legal costs in defense of claims, and that the State of North Dakota can be named as an additional insured only during the construction portion of the project. However, total coverage limits are not increased with multiple-named insured and they become split between all named insured parties. Because the State of North Dakota is not able to add any additional insured entities to its policy, the local sponsors have questioned whether the state should require the locals to do so.

Secretary Frink explained that the Office of Attorney General reviews all of the state cost participation contracts and provides recommendations as their response. Although the State Water Commission strives to adhere to the recommendations provided by the Office of the Attorney General, the contract must be implemental and agreeable to both parties. The level of protection afforded to the State of North Dakota, therefore, becomes a policy decision. Secretary Frink presented a sample contract for cost participation for the State Water Commission's consideration that would add a new Section 10 to partially offset the state's requirements for long-term indemnification; and Attachment B, which contains the revised indemnification requiring an endorsement for the construction period of the contract.

It was the recommendation of Todd Sattler, Assistant Attorney General, that the discussion relating to the state cost participation contract involving indemnification and insurance issues be held in executive session, under the provisions of North Dakota Century Code § 44-04-19.1, for

the purpose of attorney consultation. The State Water Commission invited the following to participate in the executive session: John Hoeven, Governor-Chairman, State Water Commission; Arne Berg, Maurice Foley, Roger Johnson, Jack Olin, Harley Swenson, and Robert Thompson, State Water Commission members; Dale Frink, State Engineer and Chief Engineer-Secretary to the State Water Commission; Tom Trenbeath and Todd Sattler, North Dakota Office of Attorney General; and Todd Sando, David Laschkewitsch, and Sharon Locken, State Water Commission staff.

It was moved by Commissioner Johnson and seconded by Commissioner Foley that under the provisions of North Dakota Century Code § 44-04-19.1, the State Water Commission proceed into executive session on April 23, 2008 at 10:00 A.M., for the purpose of attorney consultation regarding the state cost participation contract indemnification and insurance issues.

Commissioners Berg, Foley, Johnson, Olin, Swenson, Thompson, and Governor Hoeven voted aye. There were no nay votes. Governor Hoeven announced the motion unanimously carried.

Following attorney consultation regarding the state cost participation contract indemnification and insurance issues, Governor Hoeven reconvened the open session of the State Water Commission meeting on April 23, 2008 at 10:40 A.M.

The State Water Commission discussed the sample contract for state cost participation and Attachment B relating to acknowledgement and assumption of risk, and indemnification. The Commission recommended the deletion of Section 10. Post Contract Ownership, in the contract; and the following sentence in Attachment B, Indemnification: "This indemnification does not include claims against the North Dakota State Engineer based solely upon the North Dakota State Engineer's regulatory authority to issue permits for the project indicated above, the State Engineer will defend that claim only and have responsibility for any liability that results from that claim only."

It was moved by Commissioner Johnson and seconded by Commissioner Swenson that the State Water Commission authorize the Assistant Attorney General to work with the appropriate parties to draft language for the state cost participation contract which provides that the local project sponsors are required to provide liability protection for the construction period only; and, further, that the local project sponsor shall provide indemnification for all issues under their control for the life of the project without a requirement for insurance.

A substitute amendment to the original motion was offered by Commissioner Thompson and seconded by Commissioner Berg that the State Water Commission approve draft Attachment B to the contract relating to acknowledgement and assumption of risk, and indemnification for future contracts with political subdivisions, as recommended by the secretary to the State Water Commission, but shall include the deletions previously recommended by the Commission.

Governor Hoeven called the question on the substitute amendment to the original motion, and asked for a roll call vote:

Commissioner Thompson voted aye; Commissioners Berg, Foley, Johnson, Olin, Swenson, and Governor Hoeven voted nay. The recorded votes were 1 aye; 6 nays. Governor Hoeven announced the substitute amendment to the original motion failed.

Sean Fredricks, representing the Red River Joint Water Resource District, Cass County Joint Water Resource District, and the Sargent, Richland and Dickey Water Resource Districts, conveyed his support of the Commission's efforts for a short-term solution to the liability and indemnification issues, which will allow those projects to proceed for which state cost participation has been allocated. Mr. Fredricks also agreed to work with the Assistant Attorney General and others as soon as possible to finalize the state cost participation contract language based upon the intent of the motion.

Governor Hoeven then called the question on the original motion, and asked for a roll call vote:

Commissioners Berg, Foley, Johnson, Olin, Swenson, Thompson, and Governor Hoeven voted aye. There were no nay votes. Governor Hoeven announced the original motion unanimously carried.

***NORTHWEST AREA WATER
SUPPLY (NAWS) PROJECT -
AUTHORIZE AWARD OF CONTRACT
4-2A, HIGH SERVICE PUMP STATION
(SWC Project No. 237-04)***

Bids were opened for Northwest Area Water Supply (NAWS) Project contract 4-2A on April 15, 2008. This contract involves the construction of a new 2 million gallon reservoir and an 18 million gallon high service pump station

adjacent to the Minot water treatment plant, as well as demolition of the existing high service pumps and backwash pumps, and the installation of new backwash pumps and controls. The project will pump water into the 36-inch pipeline installed under the NAWS 2-2A contract and the existing Minot water distribution system.

This project was granted approval to proceed with design and construction by Judge Rosemary Collyer on March 24, 2006, while the lawsuit with Manitoba is pending.

There were two bids opened from the following for contract 4-2A: John T. Jones Construction, Fargo, ND; and Comstock Construction, Fargo, ND. One bid was not opened due to an incomplete bid bond form. The bids opened were on the combined contract, no bids were received on the separated general, mechanical, or electrical contracts. The apparent low total base bid received was \$12,435,793.58 from John T. Jones Construction, Fargo, ND. The project engineer's estimate was \$15,400,000. The contract documents specify that the State Water Commission has 90 days to award the contract after the bid opening.

Michelle Klose, NAWS project manager, explained that the contract documents allow the State Water Commission to select the most advantageous bid. The contract documents required submission of experience on similar projects. The project engineer reviewed the bids and recommended the award of contract 4-2A to John T. Jones Construction, Fargo, ND. The contract will require approval by the Bureau of Reclamation, and the award of the contract and notice to proceed are dependent on the satisfactory completion of the contract documents by John T. Jones Construction, and the State Water Commission's legal counsel review.

It was the recommendation of Secretary Frink that the State Water Commission authorize the secretary to the State Water Commission to award Northwest Area Water Supply Project contract 4-2A, high service pump station, in the amount of \$12,435,793.58, to John T. Jones Construction, Fargo, ND, contingent upon a legal review of the contract documents by the state, and written concurrence by the Bureau of Reclamation that the contract prerequisites have been satisfied.

It was moved by Commissioner Olin and seconded by Commissioner Foley that the State Water Commission authorize the secretary to the State Water Commission to award Northwest Area Water Supply Project contract 4-2A, high service pump station, in the amount of \$12,435,793.58, to John T. Jones Construction, Fargo, ND. This action is contingent upon a legal review of the contract documents by the state, and written concurrence by the Bureau of Reclamation that the contract prerequisites have been satisfied.

Commissioners Berg, Foley, Johnson, Olin, Swenson, Thompson, and Governor Hoeven voted aye. There were no nay votes. Governor Hoeven announced the motion unanimously carried.

**APPROVAL OF AMENDMENT TO
FARGO-MOORHEAD AND UPSTREAM
FEASIBILITY STUDY, PHASE IB,
PROJECT MANAGEMENT PLAN
(SWC Project No. 1922)**

On August 15, 2002, the State Water Commission passed a motion to sponsor the Fargo-Moorhead and upstream feasibility study, Phase I, and approved a cost share of 50 percent of the non-federal eligible costs. Of the

Phase I costs, the State of Minnesota funded \$557,563, and the remaining balance of \$534,859 was North Dakota's share (the State Water Commission approved an allocation of \$267,430, and the Corps of Engineers funded the remaining balance of \$267,429). The Commission shared the non-federal partner status with the city of Moorhead who represented the interests on the Minnesota side of the Red River. The North Dakota study sponsors included the State Water Commission, city of Fargo, Southeast Cass and Richland Water Resource Districts, Red River Joint Water Resource Board, and the Red River Basin Commission.

The feasibility study is a watershed approach to reduce flood stages and restore aquatic ecosystems in the Red River basin upstream from Fargo-Moorhead. Phase I of the study had a primary goal of linking the existing mainstem models, identifying the flood damage risks in the urban areas, identifying the potential flood storage sites, and developing details for Phases II and III efforts. The Phase I total cost was approximately \$500,000 and was completed in April, 2006.

The city of Fargo and the Corps of Engineers have discussed the need for a detailed hydrologic analysis on the Wild Rice River and Antelope Creek which would support work on the proposed city of Fargo's flood control project. The Corps has developed a Phase IB project management plan that represents an amendment to the original feasibility study. This effort will develop a hydrologic model for the Wild Rice River, calibrate the model to the 1997 flood, and compute 50-year and 100-year existing and proposed conditions hydrographs. The proposal will expand the existing HEC-RAS modeling on the Wild Rice River and Antelope Creek and coordinate with other existing models on the Red River. Potential on-stream and off-stream flood storage sites will be identified and analyzed. The total cost to the Corps of Engineers and the non-federal sponsors is estimated at \$349,000, with the local share being \$204,000 which will be provided by the city of Fargo through cash and/or in-kind services.

A request from the city of Fargo was presented for the State Water Commission's consideration to continue its non-federal partner status and execute the amended Fargo-Moorhead and upstream feasibility study, Phase IB, project management plan. On April 22, 2008, the Fargo City Commission approved the project management plan and the local cost share commitment of \$204,000 for funding in-kind consultant services for Phase IB of the study.

It was the recommendation of Secretary Frink that the State Water Commission continue its non-federal sponsor status, and that the secretary to the State Water Commission be authorized to execute the amended Fargo-Moorhead and upstream feasibility study, Phase IB, project management plan.

It was moved by Commissioner Thompson and seconded by Commissioner Berg that the State Water Commission continue its non-federal sponsor status, and that the secretary to the State Water Commission be authorized to execute the amended Fargo-Moorhead and upstream feasibility study, Phase IB, project management plan.

Commissioners Berg, Foley, Johnson, Olin, Swenson, Thompson, and Governor Hoeven voted aye. There were no nay votes. Governor Hoeven announced the motion unanimously carried.

There being no further business to come before the State Water Commission, Governor Hoeven adjourned the meeting at 11:25 A.M.



John Hoeven, Governor
Chairman, State Water Commission

Dale L. Frink
North Dakota State Engineer, and
Chief Engineer-Secretary to the
State Water Commission

