N.D.A.G. Letter to Keller (July 6, 2000)

July 6, 2000

Mr. Ross Keller
Hatton City Attorney
PO Box 220
Hillsboro, ND 58045-0220

Dear Mr. Keller:

Thank you for your letter requesting my opinion on the effect of N.D.C.C. §§ 6-09.4-22 and 61-02-68.18 on the city of Hatton's (City) agreement with the Grand Forks-Traill Water Users, Inc. (Water Users). Since you submitted your request, a member of my staff has contacted you and the Water Users' attorney on several occasions to obtain further information and to clarify your request. Those discussions have resulted in a better understanding of your concerns and some modifications to our response to your initial request because the questions you asked have been reconsidered in light of some of the research we shared with you. This opinion will address the questions as they have been modified by those discussions.

The agreement the City has with the Water Users provides the Water Users will supply water to the City and the City will pay for the water supplied. The ultimate question that you have asked is the effect of N.D.C.C. §§ 6-09.4-22 and 61-02-68.18 on the agreement the City has with the Water Users.

Because the statutes are essentially the same, only N.D.C.C. § 61-02-68.18 is quoted below:

> 1. The service provided or made available by owners of water projects through the construction or acquisition of an improvement, or the improvement revenues, financed in whole or in part with a guarantee or loan to the owners of water projects from the commission or any other state entity, may not be curtailed or limited by inclusion of all or any part of the area served by the owners of water projects within the boundaries of any other owners of water projects, or by the granting of any private franchise for similar service within the area served by the owners of water projects, during the term of the guarantee or loan. The owners of water projects providing the service may not be required to obtain or secure a franchise, license, or permit as a condition of continuing to serve the area if it is included within the boundaries of another owner of a water project during the term of the guarantee or loan.

2. Under the circumstances described in subsection 1, nothing prevents the two owners of water projects and the commission or other state entity from negotiating an agreement for the right or obligation to provide the service in question, provided that an agreement is invalid unless the commission or other state agency or enterprise is a party to the agreement and unless the agreement contains adequate safeguards to ensure the security and timely payment of any outstanding notes of the commission issued to fund the loan.

N.D.C.C. § 61-02-68.18.

In the case at hand, the City is neither a "political subdivision" that is providing the water service under N.D.C.C. § 6-09.4-22 nor is it the owner of a water project that is providing the water service under N.D.C.C. § 61-02-68.18. Consequently, the statutes do not speak directly to, nor would they directly impact, the City. However, because the City has contracted with the Water Users, the statutes may have an indirect impact upon the City if the statutes are applicable to the Water Users.

N.D.C.C. §§ 6-09.4-22 and 61-02-68.18 apply only in situations where the entity supplying the water has a loan, guarantee, or other financial commitment from the State Bond Bank, the State Water Commission, or another appropriate state agency. In those circumstances, the entity supplying the water receives indirect protection for its existing water supply contracts during the term of the financial commitment because the statute protects the state's investment in the project by providing for "financial security for the [lender] with respect to loans made to finance facilities providing services." Hearing on S.B. 2086 Before the House Political Subdivisions Comm. 1997 N.D. Leg. (Feb. 27) (Testimony of Tom Tudor). In this way, the service provided cannot be curtailed or limited because of an annexation while the "debt [owed to the state] is outstanding unless the two political subdivisions, together with the [state], negotiate an agreement with respect to payment to the [state]." Id.

N.D.C.C. § 6-09.4-22 was enacted in 1997 with an effective date of August 1, 1997, and N.D.C.C. § 61-02-68.18 was enacted in 1999 with an effective date of April 9, 1999. According to the documentation you provided to this office, the agreement between the City and the Water Users was initially entered in 1972. The agreement has subsequently been amended as to the quantity and price for water on several occasions, the last being sometime prior to July 1, 1996.[1] Thus, when the City first entered its agreement with the Water Users, and when the last amendment of the agreement occurred, neither of the statutes in question had been enacted. In addition, neither statute was enacted prior to the Water Users' contract with the state for financing.[2] If the statutes apply to the Water Users' loan that existed prior to the

[1] The exact time is unknown because the agreement provided was unsigned.

[2] The documentation submitted provides that a loan from the Bank of North Dakota was obtained on February 22, 1989, and a subsequent loan was obtained from the federal government on June 21, 1996.

statutes' enactment, new requirements would be imposed upon the Water Users and, indirectly, upon the City. If the statutes now apply, the right of the Water Users and the City to take action regarding the services the Water Users provides to the City would be subject to the control of the Bank. If the statutes do not apply, the Water Users and the City could negotiate a change in the City's service without the Banks permission.

Both the United States Constitution and the North Dakota Constitution prohibit the enactment of a statute that impairs vested rights in an existing contract. U.S. Const. art. I, § 10; N.D. Const. art. I, § 18. Thus, generally, a contract will be interpreted under the law that is in effect at the time the contract is entered and a law enacted after the contract was entered will not affect the interpretation of the contract's terms. See Murry v. Mutschelknaus, 291 N.W. 188 (N.D. 1940) (interpreting a statute to apply prospectively only to avoid an unconstitutional impact on an existing contract). I will not address the constitutional issue here, however, because N.D.C.C. § 1-02-10 provides that no statute "is retroactive unless it is expressly declared to be so." See also Reiling v. Bhattacharyya, 276 N.W.2d 237, 240-41 (N.D. 1979) (reiterating the general premise that statutes will not be given a retroactive effect but will be applied prospectively only). Because of the constitutional prohibition on the impairment of contracts, the rule that the provisions of a statute may be imposed prospectively only applies particularly in cases involving contracts.

On its face, neither statute is declared retroactive. Neither does the legislative history of the statutes indicate any intent that either statute would be applied retroactively. Because retroactive application of the statutes would affect the rights of the City and the Water Users by limiting their ability to change certain terms of an existing contract without the lender's approval, I conclude that neither of these statutes applies to the current contract between the City and the Water Users.

Although neither of the above state statutes applies in this case, there is a similar federal statute, 7 U.S.C. § 1926(b), that appears to apply to the provision of water services to the City by the Water Users because of the involvement of the FmHA. I have not included a discussion about the effect of this statute upon the agreement between the Water Users and the City. However, I urge you to consider its impact in any discussions you pursue to renegotiate your agreement with the Water Users.

To answer your remaining questions I would have to speculate upon their resolution because the facts are not known at this time. Consequently, I cannot resolve those questions for you because given particular facts the results could vary greatly. For example, it is possible that the Water Users could pay the money owed to FmHA so the protections of 7 U.S.C. § 1926(b) would no longer apply. In that scenario, the water service contract could be renegotiated by involving only the Water Users.

In another scenario, it is possible that FmHA would not allow another water supplier to provide water to the City while the obligation to FmHA was outstanding. Thus, the Water Users would continue to provide service to the City.

It is also possible that the agreement between the City and the Water Users could be renegotiated as to its terms as long as the service provided was neither curtailed nor limited by including the area served in the boundaries of another political subdivision or by giving a private franchise within the area. Given the right facts it is also possible the City could enter another water supply contract under N.D.C.C. § 40-33-16 if the contract is approved by a majority of the voters in the City prior to execution of the contract. In that case, the facts required would include the City's successful negotiation of a release from its agreement with the Water Users and FmHA's permission to obtain water from another supplier.

Finally, given the right facts, if the City ignored the federal law and attempted to obtain water from another source, the City could be found liable in a court action and could ultimately be subject to injunctive sanctions. Rural Water Dist. No. 1, Ellsworth County, Kan. v. City of Wilson, Kan., 29 F.Supp.2d 1238, 1246 (D.Kan. 1998). 7 U.S.C. § 1926(b) would be enforced through a claim under 42 U.S.C. § 1983. Id. at 1245.

Sincerely,

Heidi Heitkamp
Attorney General

rms/pg