

OPINION
65-467

September 28, 1965 (OPINION)

Mr. Milo W. Hoisveen

Secretary and Chief Engineer

Water Commission

RE: Waters - Water Commission - Authority

This is in response to your letter of September 20, 1965, in which you request an Attorney General's opinion relative to the seemingly apparent conflict of authority and responsibility of the State Engineer, the State Water Commission, and the Garrison Diversion Conservancy District.

You quote section 61-02-14(1) g, j, and k, (3), (5) and (7) which sets forth the State Water Commission's basic powers and duties and you also refer to 61-02-24 as authorizing the commission "to investigate, plan, cooperate, and make all contracts or compacts necessary or requisite with the United States."

In the last three paragraphs of your letter you ask the following questions:

In the last three paragraphs of your letter you ask the following questions:

- 1) "Are these sections of the North Dakota Century Code (61-24-13, 61-24-14 and 61-24-08(5) on conflict with 61-02-24 and 61-02-14 as set forth above?"
- 2) "May the District sell and furnish water without first obtaining a water permit from the State Engineer as required by section 61-04-02?"
- 3) "In view of these apparent conflicts am I correct in interpreting the state's water laws as requiring the Garrison Diversion Conservancy District to submit to the State Water Commission all proposed plans and specifications for all canals, dams, distribution systems, etc. which it proposes to cause to be constructed and all contracts to which it proposes to become a party?"
- 4) "Must it (Garrison Diversion Conservancy District) apply to the State Engineer for water permits prior to the sale or lease of any water?"

In answer to your first question, it is my opinion that there is no conflict. The Garrison Diversion Conservancy District may indeed furnish assurances of cooperation and, as principal or guarantor, enter into contracts with the United States for the construction,

operation and maintenance of works of the Garrison Diversion Unit. It must first, however, pursuant to 61-02-26 and 61-02-27, submit all proposals, plans, purposes and contemplated action to the State Water Commission for its consent and approval.

These two sections, together with 61-24-01, clearly indicate that the State Water Commission shall be the sole state agency responsible for the overall development, utilization and conservation of the state's water resources. Section 61-24-01, which declares the legislative intent for establishing the Garrison Diversion Conservancy District, states that the provisions of such section "shall not be construed to, in any manner, abrogate or limit the rights, powers, duties and functions of the State Water Commission, but shall be held to be supplementary thereto and an aid thereof." Sections 61-02-26 and 61-02-27 read as follows:

61-02-26. DUTIES OF STATE AGENCIES CONCERNED WITH INTRASTATE USE OR DISPOSITION OF WATERS. Every state officer, department, board, and commission heretofore or hereafter authorized by any law of this state to take any action, perform any duties, or make any contract which concerns the use or disposition of waters, or water rights, within the state first shall submit to the commission any plans, purposes, and contemplated action with respect to the use or disposition of such waters, and shall receive the consent and approval of the commission before making any agreement, contract, purchase, sale, or lease to carry into execution any works or projects authorized under the provisions of this chapter."

61-02-27. PROPOSALS WITH RESPECT TO USE OR 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."

Insofar as your second question is concerned, I believe the legislative intent, in regard to the ownership and appropriation of water, is clearly indicated in 61-01-01 which declares all waters within the state, with certain exceptions, to belong to the public and subject to appropriations for beneficial use pursuant to chapter 61-04. Section 61-04-02 requires all persons or legal entities to apply to the State Engineer for a water permit unless their proposed use is for domestic, livestock, fish, wildlife or other recreational purposes. It is my opinion, therefore, that the Garrison Diversion Conservancy District must apply for a water permit to the State Engineer prior to the sale, lease or purchase of any water.

In response to your third and fourth questions, which, in effect, repeal the first two, and in view of the above, it is my opinion that the Garrison Diversion Conservancy District, must submit to the State Water Commission, for its consent and approval, all proposed plans and specifications for all canals, dams, distribution systems, etc.,

which it proposes to cause to be constructed and all contracts, agreements and assurances to which it proposes to become a party. It is my further opinion that the Garrison Diversion Conservancy District must also apply to the State Engineer for water permits prior to the sale, purchase, or lease of any water.

HELGI JOHANNESON

Attorney General