OPINION
78-215

October 26, 1978 (OPINION)

Mr. Vern Fahy
State Engineer
900 East Boulevard
Bismarck, ND 58505

Dear Mr. Fahy:

This is in response to your letter dated September 18, 1978, wherein you make the following request for an Attorney General's opinion:

> Enclosed, for your review, are rules and regulations adopted by the State Water Commission on September 14, 1978. If approved by your office, I will forward them to the Legislative Council for publication in the North Dakota Administrative Code.
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> These regulations are to be promulgated under specific statutory and implied authority contained in Sections 61-03-13, 61-04-03, and 61-04-06 of the North Dakota Century Code.
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> Section 61-03-13 provides in part: "The State Engineer shall make all general rules and regulations necessary to carry into effect the duties devolving upon his office . . ."
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> Section 61-04-03 provides, in part:
>
> > The application for a permit to make beneficial use of any waters of the state shall be in the form required by the rules and regulations established by the state engineer. Such rules and regulations shall prescribe the form and contents of, and the procedure for filing, the application . . . (emphasis added)
>
> Section 61-04-06 prescribes the criteria for issuance of a conditional permit. Contained therein are "public interest" provisions which govern the State Engineer's actions concerning consideration and issuance of conditional water permits.
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> These statutory provisions, when read in conjunction with the public trust responsibilities defined by the North Dakota Supreme Court in United Plainsmen v. North Dakota State Water Conservation Commission, 247 N.W.2d. 457 appear to authorize the additional notice requirements specified in the enclosed regulations.

The proposed rules and regulations of the State Engineer submitted with your request and entitled, "Governing Applications For Conditional Water Permits For Irrigation Purposes," Sections 89-03-03-01 through 89-03-03-07 which provide for substantive regulation.

In order to determine the authority of the State Engineer to adopt these proposed rules and regulations it is necessary to consider the

legislative delegation of authority to grant a water appropriation permit pursuant to Chapter 61-04 of the North Dakota Century Code. The basic permit requirements of Chapter 61-04 have been a part of state law since 1905.

It is elementary that an administrative agency must receive its authority to promulgate rules and regulations from the Legislative Assembly, and that those regulations may not be legislation in and of themselves, but may only carry into effect the will of the Legislature. 1 Am. Jur.2d., Administrative Law, Section 132. In your letter of September 18, 1978, four suggested grounds of authority for the adoption of the regulations in question are cited:

1. Section 61-03-13, N.D.C.C.

2. Section 61-04-03, N.D.C.C.

3. Section 61-04-06, N.D.C.C.

4. United Plainsmen v. North Dakota State Water Conservation Commission, 247 N.W.2d. 457 (N.D.)

The suggested authority contained in the Century Code Sections will be considered first.

Regardless of what language is used to grant the authority for promulgation of rules and regulations, the law in this state as well as all others is clear that an administrative agency may adopt only those regulations which are in harmony with the statutes. This means not only that the regulations must be those sort generally described in Section 61-03-13 (" . . . general rules and regulations necessary to carry into effect the duties devolving upon his office . . . "), but that any regulations must be in harmony with all other statutory authority on the subject sought to be covered by the regulations as well. Bruce Motor Freight, Inc. v. Lauterbach, 247 Iowa 956, 77 N.W.2d. 613, 616 (1956); Dumont v. Commissioner of Taxation, 278 Minn. 312, 154 N.W.2d. 196, 199 (1967); McGuire v. Viking Tool and Dye Company, 258 Minn. 336, 104 N.W.2d. 519, 528 (1960). The language of such sections as 28-32-02 and 61-03-13, granting rulemaking authority, must therefore be read only as general rule making authority, limited in effect by the language, purpose and effect of other Century Code sections in the same substantive area as that sought to be regulated.

It can be seen from an examination of Chapter 61-04 that many sections provide for the procedure and substantive criteria which must be followed in the application for and the issuance of a water appropriation permit. Applicable sections are:

> 61-04-01.2. RIGHT TO USE WATER - BASIS. A right to appropriation water can be acquired for beneficial use only as provided in this chapter. Beneficial use shall be the basis, the measure, and the limit of the right to the use of water.
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> 61-04-03. APPLICATION FOR WATER PERMIT - CONTENTS - INFORMATION TO ACCOMPANY. The application for a permit to make beneficial use of any waters of the state shall be in the form

required by the rules and regulations established by the state engineer. Such rules and regulations shall prescribe the form and contents of, and the procedure for filing, the application. The application, along with all other information filed with it, shall be retained in the office of the commission after approval or disapproval of the application. The state engineer may require additional information not provided for in the general rules and regulations if he deems it to be necessary.

61-04-04. FILING AND CORRECTION OF APPLICATION. The date of the receipt of the application provided for in section 61-04-03 in the commission office shall be noted thereon. If the application is defective as to form, incomplete, or otherwise unsatisfactory, it shall be returned with a statement of the corrections, amendments, or changes required, within thirty days after its receipt, and sixty days shall be allows for the refiling thereof. If the application is corrected as required and is refiled within such time, it, upon being accepted, shall take priority as of the date of its original filing. Any corrected application filed after the time allowed shall be treated in all respects as an original application received on the date of its refiling. The application may be amended by the applicant at any time prior to the commencement of administrative action by the state engineer as provided in sections 61-04-05 through 61-04-07.

61-04-05. NOTICE OF APPLICATION - CONTENTS - PROOF - FAILURE TO FILE SATISFACTORY PROOF. When an application is filed which complies with the provisions of this chapter and the rules and regulations established thereunder, the state engineer shall instruct the applicant to: (1) give notice thereof by certified mail in the form prescribed by regulation, to all record title owners of real estate within a radius of one mile from the location of the proposed water appropriation site, except where the one-mile radius extends within the geographical boundary of a city the notice shall be given to the governing body of such city and no further notice need be given to the record title owners of real estate within the geographical boundary of the city; and (2) publish notice thereof, in a form prescribed by regulation, in a newspaper of general circulation in the area of the proposed appropriation site, once a week for two consecutive weeks. Such notice shall give all essential facts as to the proposed appropriation, among them the places of appropriation and of use, amount of water, the purpose for which it is to be used, the name and address of the applicant, and the time and place of a hearing on the application by the state engineer. Proof of publication shall be filed with the state engineer within sixty days from the date of his instructions to make publication. In case of failure within the time required to file satisfactory proof of publication in accordance with the rules and regulations applicable thereto, the application thereafter shall be treated as an original application filed on the date of receipt of proof of publication in proper form.

61-04-06. HEARING - CRITERIA FOR ISSUANCE OF PERMIT. Upon the receipt of the proof of publication, the state engineer shall

conduct a hearing on the application. The state engineer shall issue a permit if he 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 economy 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.

If approved, the approval shall be noted on the application, and the state engineer shall issue a conditional water permit allowing the applicant to appropriate water. Provided, however, the commission may, by resolution, reserve unto itself final approval authority over any specific water permit in excess of five thousand acre feet. The state engineer may cause a certified transcript to be prepared for any hearing conducted pursuant to this section. The costs for the original and up to seven copies of the transcript shall be paid by the applicant.

61-04-06.2. TERMS OF PERMIT. The state engineer may issue a conditional permit for less than the amount of water requested, but in no case may he issue a permit for more water than can be beneficially used for the purposes stated in the application. He may require modification of the plans and specifications for the appropriation. He may issue a permit subject to fees for water use, terms, conditions, restrictions, limitations, and termination dates he considers necessary to protect the rights of others, and the public interest. Conditions and limitations so attached shall be related to matters within the jurisdiction of the state engineer; provided, however, that all conditions attached to any permit issued prior to July 1, 1975, shall be

binding upon the permittee.

61-04-06.2. PRIORITY. Priority in time shall give the superior water right. Priority of a water right acquired under this chapter dates from the filing of an application with the state engineer, except for water applied to domestic, livestock, or fish, wildlife, and other recreational uses in which case the priority date shall relate back to the date when the quantity of water in question was first appropriated, unless otherwise provided by law.

Priority of appropriation does not include the right to prevent changes in the condition of water occurrence, such as the increase or decrease of stream flow, or the lowering of a water table, artesian pressure, or water level, by later appropriators, if the prior appropriator can reasonably acquire his water under the changed conditions.

61-04-07. REJECTION OF APPLICATIONS - APPEAL TO DISTRICT COURT. If the state engineer determines that an application does not meet the criteria prescribed in section 61-04-06, he shall reject the application. He shall decline to order the publication of notice of any application which does not comply with the requirements of the law and the rules and regulations thereunder. Any applicant, within sixty days from the date of refusal to approve an application, may appeal to the district court of the county in which the proposed place of diversion or storage is situated, from any decision of the state engineer which denies a substantial right. In the absence of such appeal, the decision of the state engineer shall be final.

61-04-09. APPLICATION TO BENEFICIAL USE - INSPECTION - PERFECTED WATER PERMIT. On or before the date set for the application of the water to a beneficial use, or upon notice from the owner that water has been applied to a beneficial use, the state engineer shall cause the works to be inspected, after due notice to the holder of the conditional water permit. Such inspection shall be thorough and complete, in order to determine the actual capacity of the works, its safety, and efficiency. If the works are not properly and safely construed, the state engineer may require the necessary changes to be made within such time as he shall deem reasonable and shall not issue a perfected water permit until such changes are made. Failure to make the changes shall cause postponement of the priority under the water permit for such time as may elapse from the date set for completing the changes until the changes are actually made to the satisfaction of the state engineer, and any application subsequent in time may have the benefit of such postponement of priority. When the works are found in satisfactory condition, after inspection, the state engineer shall issue the perfected water permit, setting forth the actual capacity of the works and such limitations or conditions upon the water permit as state in the conditional water permit as authorized by section 61-04-06.2; provided, however, that all conditions attached to any permit issued prior to July 1, 1975, shall be binding upon the permittee.

These sections create all of the prerequisites for obtaining a permit and, when read together, create a logical scheme, each specifying a separate and logically connected step in an entire process.

As to the requirement of a minimum age, proposed in rule 89-03-03-04, no such requirement exists in current law. In fact, Section 61-04-02 says "any person, before commencing any construction for the purpose of appropriating waters . . . shall first secure a water permit . . ." (Emphasis added) "Person" is not defined anywhere in Chapter 61-04 as being a natural person 18 years old or older.

Concerning the requirement of residency contained in proposed rule 89-03-03-05, the same may be said with regard to Section 61-04-02: nowhere is "person" or "permit applicant" defined as "resident owner." In fact, the Legislature has specifically provided in Section 61-04-02 that "An applicant for a water permit to irrigate need not be the owner of the land to be irrigated."

As to the maximum acreage and notice requirement or proposed regulations 89-03-03-06 and 07, no such requirement exists in the current law. On the contrary, a procedure has been established by the Legislature in Section 61-04-05 which expressly provides for notice after the filing of a completed water appropriation permit application.

Clearly, none of these Century Code sections make the requirements specified in the proposed regulations. The legal question then must be not whether the law authorizing the adoption of regulations (Sections 28-32-02, 61-03-13, and 61-04-03), when read by themselves authorize the proposed regulations, but whether the State Engineer may adopted proposed regulations which add new and substantive requirements for a water appropriation permit, over and above those requirements already enacted by the Legislative Assembly. Medical properties, Inc. v. North Dakota Board of Pharmacy, 80 N.W.2d. 87 (N.D. 1956) is a North Dakota case directly in point.

In Medical Properties the plaintiff corporation sought a permit from the defendant Board of Pharmacy in order to establish and operate a pharmacy located in the Dakota Clinic at Fargo, North Dakota. The evidence shows that all of the stockholders of the corporation were physicians and manager of the Clinic, none of them being a licensed pharmacist. The Board of Pharmacy denied the application for a permit on the grounds that the applicant was ineligible to operate a pharmacy because its stockholders were not duly registered pharmacists themselves, as required by rule (k) of the regulations of the board. Regulation (k) provided as follows:

> The Board of Pharmacy of the State of North Dakota shall hereafter refuse to grant a permit or license for the operation of pharmacies or drugstores, in the State of North Dakota to individuals who are not owners thereof and who are not registered pharmacists in the State of North Dakota or to corporations which are not owned and controlled by pharmacies registered in the State of North Dakota, unless the issuance of permits to other individuals or corporations is a necessity from the standpoint of public health and welfare.

On appeal of the district court's reversal of the Pharmacy Board's decision, the Supreme Court noted that under Chapter 43-15 of the North Dakota Century Code, the Pharmacy Board had the authority to "prescribe rules and regulations in regard to granting permits and renewals for establishing and operating pharmacies." In spite of the broad grant of authority to promulgate regulations, however, the Supreme Court also found that the Chapter declared that "corporations" could engage in the drug business and that no conditions of ownership had been specified by the Legislature. Thus, the Court believed that "any" corporation may apply for a permit to establish and maintain a pharmacy under the statute." (Emphasis added)

In making this holding, the Court said:

> Under the statutes the Board has power to make rules only for the administration of the duties assigned to it by the statute. The Board has no right to make a rule include any substantive matter not included in the statute under which it is acting. Any such new matter would constitute legislation.
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> * * *
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> The regulation attempts to prescribe the kind of corporation that may apply for a permit to maintain a pharmacy. It establishes a qualification for a corporation to own a drugstore not prescribed by statute. It makes it a condition that any corporation applying for a permit must be owned by pharmacists. That limits the provision of a statute. It bars certain corporations from owning a pharmacy. The statute does not give the Board the right to make ownership of the stock a condition for the issuance of a permit to a corporation. The statute says that corporations irrespective of stock ownership may apply for a permit and operate a pharmacy if otherwise qualified. The Board has no authority to make a limitation in that right of a corporation. It is a new feature affecting property rights and ownership and amounts to new legislation. (Emphasis added)

Quoting from 42 Am. Jur., Public Administrative Law, Section 100, p. 358, 360, the Court said:

> The administrative officer's power must be exercised within the framework of the provision bestowing regulatory powers on him and the policy of the statute which he administers. He cannot initiate policy in the true sense, but must fundamentally pursue a policy predetermined by the same power from which he derives his authority. Thus, where a right is granted by statute, the officer administering such statute may not by regulation add to the conditions of that right a condition not stated in the statute, nor may he bar from that right a person included within the terms of the statute, even though such inclusion is not express, but only by judicial construction. (Emphasis added) (Citations omitted)

The North Dakota Supreme Court's holding in Medical Properties has recently been reaffirmed in Lanterman v. Dorgan, 255 N.W.2d. 891

(N.D. 1977).

Likewise, in Cavanagh v. Coleman, 72 S.D. 274, 33 N.W.2d. 282 (1948), cited with approval in the North Dakota Medical Properties case, a funeral director and embalmer sought to obtain a South Dakota embalmer's license on the grounds that, since he held a license issued by the state of Pennsylvania, he was eligible for a South Dakota license under South Dakota Section 27.1407, which provided for issuance of a South Dakota license on the basis of reciprocity. The Board of Embalmers and Funeral Directors denied Cavanagh's license application for the reason that Cavanagh's Pennsylvania license had been issued without a written examination and that Cavanagh had not practiced under his Pennsylvania license for two years, as required by a rule of the Board of Embalmers and Funeral Directors. The rule relied on by the Board stated that "applicants for a South Dakota license by reciprocity . . . shall have held and practiced under (the license issued in the other state) for not less than two consecutive years immediately preceding the filing of his application with this Board." The South Dakota Supreme Court found, notwithstanding the fact that the Board had the authority to promulgate rules and regulations, that the Board's regulation requiring two consecutive years of practice was void because nowhere in the applicable law governing admission of embalmers to practice in South Dakota by reciprocity, did the statute require that the holder of the out-of-state license must have practiced for two years. The Court held that inasmuch as the Board had added an additional requirement as a prerequisite to practice in South Dakota, which prerequisite was not included in the law, that the Board had legislated, rather than "filled in the details" by regulation.

The attempts by the regulatory Boards in the Medical Properties and Cavanagh cases are directly analogous to the attempt by the proposed rules and regulations of the State Engineer to promulgate additional prerequisites to obtaining a water appropriation permit not contained in the statutes. In Chapter 61-04, the Legislative Assembly has placed no age or property limits upon the applicants, but has specifically provided that "any person" may appropriate waters after first obtaining a permit. The fact that the State Engineer is granted authority to promulgate regulations regarding the "procedure for filing" cannot be read to allow the State Engineer to legislate in an area where the Legislature has spoken and declared by statute the substantive prerequisites to obtaining a permit.

The same reasoning applies to the maximum acreage and notice procedures proposed in regulations 89-03-03-06 and 07. The Legislative Assembly has established in Section 61-04-02 who may apply for a water appropriation permit, and in Sections 61-04-01.2, 61-04-06 and 61-04-06.2, what the substantive criteria are for issuance of that permit. Nowhere in those sections is there a mention of a maximum acreage limitation or the type of preapplication notice requirement proposed by these regulations. By choosing not to limit who may apply for a water appropriation permit, the Legislature has created a substantial right in all persons to apply for a permit without limitation and, to limit that right by regulations of any agency is a substantive limitation and not a procedural one. In Medical Properties, the court found that a limitation on who was eligible for a permit was a substantive limitation, saying:

> The Board has no right to make a rule include any substantive matter not included in the statute under which it is acting. Any such new matter would constitute legislation.

It is considered that the limitations proposed by the State Engineer are substantive in effect and character, and thus fall within the prohibition of the Medical Properties and Cavanagh cases. As the Supreme Court of Michigan said in Coffman v. State Board of Examiners in Optometry, et al., 331 Mich. 582, 50 N.W.2d. 323 (1951), "an administrative agency may not under the guise of its rule making power, abridge or enlarge its authority or exceed the powers given to it by the statute, the source of its powers."

The final authority relied upon in proposing these regulations is the case United Plainsmen v. North Dakota State Water Commission, supra. In that case, the North Dakota Supreme Court reversed the district court dismissal of a complaint charging the State Water commission and the State Engineer with failure to devise comprehensive water conservation plans. Plaintiffs maintained that such plans were mandatory under Section 61-02-26 of the North Dakota Century Code. The Court did not agree. However, the Court did not rule that the Commission and the State Engineer were relieved of planning responsibility with respect to the issuance of water permits and held that ". . . the discretionary authority of state officials to allocate vital state resources is not without limit but is circumscribed by what has been called the Public Trust Doctrine." (Page 460)

The Supreme Court stated that under the Public Trust Doctrine, "the state holds the navigable waters, as well as the lands beneath them, in trust for the public." It went on to cite Article XVII, Section 210, of the North Dakota constitution, which provides:

> All flowing streams and natural water courses shall forever remain the property of the state for mining, irrigating and manufacturing purposes.

The Supreme Court cited Section 61-01-01 of the North Dakota Century Code, as further defining the public waters of the state and an expression of the Public Trust Doctrine. The Court also recognized Sections 61-04-06 and 61-04-07 as providing " . . . a means by which those who seek use of public waters can petition the state engineer for water permits." (Page 462)

Finally, the Court expressed the extent and limit of its holding by stating:

> "In the performance of this duty of resource allocation (by the State Engineer) consistent with the public interest, the Public Trust Doctrine requires, at a minimum, a determination of the potential effect of the allocation of water on the present water supply and future water needs of this state. This necessarily involves planning responsibility." (Page 462)

Nowhere in the United Plainsmen case does the Supreme Court consider or affirm the authority of the State Engineer to make the type of

proposed rules considered here or the authority upon which they could possibly be adopted.

Upon review of the statutes and case authority relied upon in your letter and other statutes and cases cited above, it is considered that the State Engineer is lacking in delegated authority to adopt these proposed rules and regulations, that these proposed rules and regulations are contrary to legislative authority and intent of Chapter 61-04 of the North Dakota Century Code, and that they are therefore a usurpation of legislative authority and would be found void and of no legal effect by a court of competent jurisdiction.

It is well understood and appreciated that the intent and purpose of the State Engineer in proposing these regulations is to more wisely and fairly administer the appropriation of the waters of the state to beneficial use in the public interest. The stated intent of the proposed regulations provides:

> 89-03-03-01. INTENT. The limitations and procedural requirements for certain water permit applications for irrigation purposes contained in this chapter are designed:
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> 1. To provide opportunity for a maximum number of farmers on the land.
>
> 2. To widely distribute the benefits which accrue from utilizing waters of the state.
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> 3. To promote the family owned and operated farm.
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> 4. To maximize the benefits of water resources which North Dakota law declares to be a public resource to the greatest number of irrigators.

Our holding in this opinion does not conclude that statutory authority is lacking to provide for these intended purposes. To the contrary, it is our observation that apparent authority has been provided for by the Legislature to the State Engineer and the State Water Commission to meet many of the intended purposes of the proposed regulations. There follows a discussion of that statutory authority.

Pursuant to Section 61-04-06 (text, supra) the State Engineer, after an application is filed, is to conduct a hearing on the application and make finds on the (1) rights of prior appropriators; (2) adequacy of the means of diversion or construction; (3) beneficial use; and (4) public interest. The State Engineer is provided with statutory discretion in determining the public interest which includes consideration of the loss of alternative uses of water and the harm to others resulting from the proposed appropriation.

Section 61-04-06.2 provides, in part, that the State Engineer " . . . may issue a permit subject to fees for water use, terms, conditions, restrictions, limitations, and termination dates he considers necessary to protect the rights of others, and the public interest. (Emphasis added)

In an opinion dated November 7, 1974, to the State Tax Commissioner regarding the validity of conditions on water permits issued pursuant to Chapter 61-04 for the purpose of operating energy generation and production facilities, we stated:

> "The attachment of conditions to a water permit is an appropriate means of applying the 'beneficial use' requirement of the Century Code.
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> * * *
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> 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 N.D.C.C. 61-01-01 is subject to the review and approval of the (State Water) Commission . . . . A reasonable understanding of the above discussed provisions of (Chapter 61-02 of the North Dakota Century Code) 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.
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> 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. (Copy of Opinion enclosed)

In the case of United Power Association v. Mund, 267 N.W.2d. 825 (N.D. 1978), concerning an eminent domain proceeding brought by certain public utilities against a property owner, the North Dakota Supreme Court in discussing conditions attached to the plaintiff's water permit makes the following statement:

> What is crucial is that the State of North Dakota, through its water commission, now has the power to impose a sanction for a failure to comply with that condition (among others). That sanction is a severe one: forfeiture of the conditional or perfected water permit. We think the power, vested in the North Dakota State Water Commission, to work a forfeiture of UPA-CPA's water permit provides support for the trial court's conclusion that a public use exists. This is because a public right to benefit, guaranteed by regulatory agency controls, inheres in the permit. (Page 828)

From the above cited statutes, prior Opinion, and the cited case authorities it would appear that the State Engineer and the State Water Commission have sufficient statutory authority to accomplish the intended purposes of the proposed regulations by reason of the substantive findings to be made pursuant to Section 61-04-06 upon application for a water permit, and through the terms and conditions authorized to be attached to a water permit pursuant to Section

61-04-06.2 of the North Dakota Century Code.

For the reasons stated above, proposed rules and regulations 89-03-03-04 through 89-03-03-07 are returned, without approval, for your reconsideration consistent with this opinion.

Sincerely,

ALLEN I. OLSON

Attorney General