

LETTER OPINION
95-L-117

May 17, 1995

Mr. Richard W. Olson
McConn, Fisher, Olson &
Daley, Ltd.
315 First Avenue N
PO Box 5788
Grand Forks, ND 58206-5788

Dear Mr. Olson:

Thank you for your letter on behalf of the city of Emerado requesting an opinion regarding the location of a hearing to be held concerning an application for a water permit under N.D.C.C. ch. 61-04. N.D.C.C. ? 61-04-06 provides that if "two or more municipal or public use water facilities request a local hearing, the state engineer shall hold the hearing in the county seat of the county in which the proposed water appropriation site is located. The request must be in writing and must be made within fifteen days of when the notice of application is mailed by the applicant pursuant to section 61-04-05."

Any person who wants to appropriate water for municipal or public uses must obtain a water permit from the state engineer. N.D.C.C. ? 61-04-02. The state engineer maintains a water permit file for each permit granted. A city that has received a permit can make arrangements to deliver water to other entities such as rural water associations, or vice versa. The state engineer may or may not have knowledge of these arrangements. In this case, the city of Emerado does not hold a water permit but obtains its water from Grand Forks Trail Water Users, Inc. In your letter, you refer to a water permit application hearing where the city of Cavalier requested a local hearing and a local hearing was held. In the case of Cavalier, both the city of Cavalier and North Valley Water Users Association, Inc., held water permits, and thus both were on the list of municipal or public use water facilities provided to the applicant.

Section 61-04-05 specifies who a water permit applicant must

notify of a proposed appropriation. The list of those who must be notified includes all persons holding water permits for the appropriation of water within a radius of one mile from the location of the proposed water appropriation site and all municipal or public use water facilities in the county in which the proposed water appropriation site is located. N.D.C.C. ? 61-04-05(2) and (3). The state engineer is required to provide to the applicant a list of those individuals or entities the applicant is required to notify. Id. Municipal or public use water facilities have 15 days after the applicant mails the notice to request a local hearing. N.D.C.C. ? 61-04-06. The list that the state engineer has been providing to water permit applicants only contains those entities that hold their own water permits.

Whether Emerado is entitled to request a local hearing depends upon whether Emerado is a municipal or public use water facility under N.D.C.C. ? 61-04-06. Words used in a statute are to be understood in their ordinary sense, unless a contrary intention is plainly meant, but words defined in the Century Code are to be used as so defined. N.D.C.C. ? 1-02-02. Because a municipal or public water use facility is not defined in the Code, it is not clear whether it encompasses entities that do not themselves hold water permits but receive water from other entities that do hold water permits.

Because "municipal or public use water facility" is not defined by statute, the ordinary and plain meaning of this term must be determined. See Kim-Go v. J.P. Furlong Enters., Inc., 460 N.W.2d 694, 696 (N.D. 1990). The American Heritage Dictionary 484 (2nd coll. ed. 1991) defines facility as "something created to serve a particular function." "Municipal or public use" means:

the use of water by the state through its political subdivisions, institutions, facilities, and properties, and the inhabitants thereof, or by unincorporated communities, subdivision developments, rural water systems, and other entities, whether supplied by the government or by a privately owned public utility or other agency or entity, for primarily domestic purposes, as defined herein.

N.D.C.C. ? 61-04-01.1(8). These definitions indicate that a municipal or public use water facility is an entity created to supply water primarily for domestic consumption, but they do

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not clearly resolve the question of whether an entity without a water permit and which obtains its water from a permit holder is such a facility. These sections of the Century Code therefore are ambiguous and of doubtful meaning in this respect. See Kim-Go, supra.

N.D.C.C. ? 1-02-39 provides that if a statute is ambiguous the legislative history, the consequences of a particular construction, and the administrative construction of the statute can be considered to construe the statute.

The state engineer has a record of any facility using water for municipal or public uses if that facility has obtained a water permit from the state engineer. Interpreting municipal and public use water facility to include everything created for the purpose of using or distributing or making available water for municipal or public purposes would require the state engineer to ascertain all such facilities, including many of which the state engineer has no record in addition to those which hold water permits. When enacting a statute, it is presumed the Legislature intends a result feasible of execution. N.D.C.C. ? 1-02-38(4). A construction of N.D.C.C. ch. 61-04 to require direct notice to entities of which the state engineer has no record would be impossible or nearly impossible to execute.

A review of the legislative history indicates that the state engineer provided considerable input into the drafting of the bill that resulted in the 1993 amendments to N.D.C.C. ?? 61-04-05 and 61-04-06. See the Interim Committee Minutes of the Legislative Council's Natural Resources Committee (1992-93). The minutes reflect the following:

In response to a question from Representative Hokana, Mr. David Sprynczynatyk, State Engineer, said the State Water Commission would provide a list of water permitholders and municipal or public use water facilities that a person applying for a water permit under North Dakota Century Code Section 61-04-05 would be required to notify.

In response to Mr. Sprynczynatyk's comments, Representative Hokana proposed that this requirement be included in the bill draft.

It was moved by Representative Aarsvold, seconded by Senator Langley, and carried on a voice vote that the bill draft relating to water permit applications be amended to provide that the person applying for

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an application notify persons holding water permits within a radius of one mile from the location of the proposed water appropriation site and municipal or public use water facilities located in the county in which the proposed water appropriation site is located and that the notification be to those persons on a list of permitholders provided by the state engineer.

Interim Committee Minutes of the Legislative Council's Natural Resources Committee (June 9-10, 1992) at 6 (emphasis added). The legislative history therefore supports limiting the construction of the notice and hearing requirements of N.D.C.C. ch. 61-04 to recorded permitholders.

After the legislation was enacted, the state engineer's office interpreted N.D.C.C. ch. 61-04 as requiring the state engineer to provide notice to municipal or public use water facilities based on whether those municipal or public use water facilities held water permits from the state engineer's office. A reasonable interpretation placed on a statute by the agency responsible for enforcing the statute is entitled to deference, especially when the interpretation does not contradict the statutory language. Turnbow v. Job Service North Dakota, 479 N.W.2d 827, 830 (N.D. 1992).

Based on the above, it is my opinion that the municipal or public use water facilities which are required to be on the list provided by the state engineer under N.D.C.C. ? 61-08-05 and which are entitled to request a local hearing under N.D.C.C. ? 61-04-06 are those facilities which hold their own water permits. This opinion, however, does not prevent the city from making a general request for a local hearing, which decision is in the discretion of the state engineer.

Sincerely,

Heidi Heitkamp
ATTORNEY GENERAL

jak/vkk