

N.D.A.G. Letter to Enget (Oct. 23, 1992)

October 23, 1992

Mr. Wade G. Enget
Stanley City Attorney
P.O. Box 369
Stanley, ND 58784

Dear Mr. Enget:

Thank you for your September 1, 1992, letter requesting an opinion as to whether the city of Stanley must get voter approval for a project by which the city of Stanley will be constructing a pipeline to hook up with an existing water distribution system known as R & T (hereafter Project). R & T is a water distribution system owned by the cities of Ray and Tioga.

The Project will be funded as follows: 65% of the funds will be federal funds in the form of municipal, rural, and industrial water service monies; and 35% will come from other funds, including a low interest loan from the State Water Commission. You indicated to a member of my staff that no special or general assessments or bond issues will be required to fund the Project. You also indicated that the city of Stanley intends to enter into an agreement with R & T for the purchase of water from R & T's water distribution system.

Because the financing does not include bonds, or special or general assessments, any voter approval requirements in N.D.C.C. chs. 21-03, 40-22, 40-24, and 40-35 are not relevant to your inquiry. There are two sections of law that are relevant, both found in N.D.C.C. ch. 40-33 on municipal utilities. The first section is N.D.C.C. § 40-33-16:

40-33-16. Municipality may purchase water for distribution. Any city owning a system for the distribution of water for fire protection and other public purposes and for selling water to its inhabitants and industries, but for which the water supply is unsuitable or inadequate, may contract to purchase water at wholesale for such purposes from any person, firm, or public or private corporation able and willing to furnish the same, upon such terms and during such period, not exceeding forty years, as the city governing body shall deem appropriate. Any such contract shall be authorized by an ordinance submitted to the voters for approval by a majority of those voting on the proposition before it takes effect. In and by such ordinance and contract, the city may bind itself:

1. To establish and maintain rates and charges for supplying water by it to its inhabitants and industries, either according to a prescribed schedule agreed upon or sufficient to produce net stated amounts for specified periods during the life of the contract, or both, and to

appropriate and use the same for payments to become due under the contract, and, if the contract so provides, the city shall be obligated to pay for such water solely out of such net revenues;

2. To pay, at an agreed rate or rates, for all water taken by the city under such contract and not resold by it; and
3. To do and perform any other acts or things which, in the discretion of the governing body, are deemed reasonable and appropriate for the procurement of such water on the most efficient and economical basis.

If any payments under any contract are to be made solely out of net revenues, the contract may fix and prescribe the method or basis on which net revenues are to be computed.

N.D.C.C. § 40-33-16 requires voter approval for entering into a contract for the purchase of water. If the city of Stanley agrees, by the terms of the water purchase contract itself, to complete the Project (such agreement can be part of the contract, as indicated by N.D.C.C. § 40-33-16(3)), then it is my opinion that approval of the contract by the voters as required by N.D.C.C. § 40-33-16 would include approval of the Project. However, another section of N.D.C.C. ch. 40-33 may require voter approval when the Project has not been incorporated as part of the water purchase contract.

N.D.C.C. ch. 40-33 requires voter approval, except under certain limited circumstances. N.D.C.C. § 40-33-02 provides:

40-33-02. Acquiring, erecting, or improving plant, system, or line without election prohibited -- Exception. No municipal officers shall purchase, erect, nor substantially enlarge, improve, or extend an existing plant, nor lease from others any plant, system, or line provided for in section 40-33-01, unless the proposition shall have been submitted by a resolution of the governing body to the qualified electors of the municipality at an annual or special election called, held, and conducted upon the notice and in the manner specified by this title for the election of the governing body of the municipality, and shall have been approved by a majority of the electors voting thereon. If, however, the cost of any enlargement, improvement, or extension will be paid out of the earnings of the plant and the cost does not exceed the sum of five thousand dollars, or if eighty percentum or more of the cost of any waterworks, mains, water system and equipment or appliances therefor is to be paid by special assessments or by the earnings of the plant or by both it shall be unnecessary to submit the proposition to the electors of the municipality; or in order to provide for a greater and more adequate water supply to meet the needs of the municipality for domestic use, for fire protection, or for sanitation and sewage disposal, regardless of cost the governing body thereof may by resolution provide for the needed improvement and facilities in cooperation with the state or federal

government, or any agency thereof, without an election, provided funds for such cooperation or for defraying the entire cost thereof are available in the municipal utilities fund as defined by section 40-33-10.

Based on the information provided regarding the financing of the Project, it appears that the exceptions to the requirement of voter approval, outlined in the second sentence of N.D.C.C. § 40-33-02, do not apply. If, in fact, the exceptions do not apply, it is my further opinion that N.D.C.C. § 40-33-02 requires the Project be approved by the electors in the city.

In conclusion, if the Project is part of the water purchase contract, it must be approved by the voters pursuant to N.D.C.C. § 40-33-16. If the Project is not part of the water purchase contract, it must be approved by the voters pursuant to N.D.C.C. § 40-33-02, unless the Project fits within the exceptions in N.D.C.C. § 40-33-02.

Sincerely,

Nicholas J. Spaeth

las/pg