

NORTH DAKOTA LEGISLATIVE COUNCIL

Minutes of the

GARRISON DIVERSION OVERVIEW COMMITTEE

Wednesday, July 5, 2000
Harvest Room, State Capitol
Bismarck, North Dakota

Representative John Dorso, Chairman, called the meeting to order at 10:00 a.m.

Members present: Representatives John Dorso, Merle Boucher, Mick Grosz, Pam Guleson, Eugene Nicholas; Senators Joel C. Heitkamp, Aaron Krauter, Gary J. Nelson, Rod St. Aubyn, John T. Traynor

Members absent: Representatives David Monson, Francis J. Wald; Senators Layton Freborg, Terry M. Wanzek

Others present: See Appendix A

It was moved by Senator Krauter, seconded by Senator Nelson, and carried on a voice vote that the minutes of the September 17, 1999, committee meeting be approved as distributed.

GARRISON DIVERSION UNIT PROJECT

At the request of Chairman Dorso, committee counsel distributed a memorandum from Mr. Francis J. Schwindt, Chief, Environmental Health Section, State Department of Health, to Mr. Murray G. Sagsveen, State Health Officer, State Department of Health, concerning the proposed Estevan landfill project in Saskatchewan. A copy of the memorandum is attached as Appendix B. Committee counsel reviewed a memorandum entitled *National Environmental Policy Act and Treaty Implications of Projects Such as a Devils Lake Outlet - The Role of the Environmental Protection Agency in Projects Such as a Devils Lake Outlet*. The memorandum discusses the National Environmental Policy Act and treaty implications of constructing a project such as an outlet to Devils Lake as well as the role of the Environmental Protection Agency in such a project. Committee counsel also reviewed a memorandum entitled *Analysis of the Tobacco Settlement Trust Fund for the 1999-2001 Biennium* which was presented to the Budget Committee on Health Care at its June 27, 2000, meeting. The analysis shows the estimated revenues for the tobacco settlement trust fund for the 1999-2001 biennium are \$52,183,788, and the estimated revenues for the water development trust fund for the 1999-2001 biennium are \$23,482,705.

At the request of Chairman Dorso, Mr. David A. Sprynczynatyk, State Engineer and Secretary, State Water Commission, addressed the committee. He said the State Water Commission applied for a Section 404 permit to construct a channel from Devils Lake to Stump Lake approximately one year ago.

However, he said, the United States Fish and Wildlife Service is objecting to the permit because of the impact the outlet would have on a national wildlife refuge located in Stump Lake. Whenever a project impacts a national wildlife refuge, he said, a study must be done to determine whether the proposed project would adversely impact the refuge under the Refuge Compatibility Act. He said the State Water Commission has modified its plan for the outlet in an attempt to meet the concerns of the United States Fish and Wildlife Service and is awaiting a decision by the United States Army Corps of Engineers on whether to issue the Section 404 permit.

In response to a question from Senator Traynor, committee counsel said under the National Environmental Policy Act, the United States Army Corps of Engineers would be required to study the total environmental impact, including the impact in Canada, of a proposed outlet to Devils Lake.

In response to a question from Representative Dorso, Mr. Sprynczynatyk said several states have assumed jurisdiction of the Section 404 permitting program under the Clean Water Act. He said the cost of assuming jurisdiction would be approximately \$800,000 per biennium. He said the reason the state would want to assume jurisdiction of the program is that it could review permit requests in a more expeditious manner but noted the state would have to comply with all environmental laws in determining whether to issue a permit.

In response to a question from Representative Boucher, Mr. Sprynczynatyk said the state is bound by the provisions of the Boundary Waters Treaty of 1909 and assuming jurisdiction of the Section 404 program would not change the state's treaty obligations in any way. He emphasized the state would have to comply with all federal environmental requirements but could proceed in a more efficient and expeditious manner in handling permit applications.

Representative Dorso said the state would recoup the cost of assuming the Section 404 program, approximately \$800,000 per biennium, by making permitting decisions in a more timely manner. As a result of project delays, he said, the costs of projects have increased more than the \$800,000 the program would cost per biennium.

In response to a question from Representative Dorso, Mr. Sprynczynatyk said the State Engineer has the authority to assume the permitting process

now but does not have the funding. He said whether the State Engineer or the State Department of Health would be the most appropriate agency to handle a state 404 program would be a policy decision for the Legislative Assembly. He noted, however, many Section 404 permits involve wetlands that would fall within the purview of the State Engineer's office while the national pollutant discharge elimination system is a water quality issue handled by the State Department of Health.

In response to a question from Senator Nelson, Mr. Sprynczynatyk said the first step for a state to assume jurisdiction over the Section 404 program is for the Governor to send a letter to the administrator of the Environmental Protection Agency notifying the administrator that the state intends to assume jurisdiction. The next step, he said, is for the state to prepare a document outlining the state's authority for the program and how the state intends to carry out the program. The third step, he said, is a statement from the Attorney General specifying that the state has sufficient authority to implement the program. At that point, he said, memorandums of understanding would be entered with the Environmental Protection Agency and the Secretary of the Interior and, upon approval, authority would be delegated to the state.

In response to a question from Senator St. Aubyn, Mr. Sprynczynatyk said the legislation and funding must be in place before the Environmental Protection Agency will allow a state to assume jurisdiction of the Section 404 program.

It was moved by Senator St. Aubyn, seconded by Representative Boucher, and carried on a roll call vote that the chairman of the Legislative Council be requested to send a letter to the Governor requesting that the Governor send a letter to the administrator of the Environmental Protection Agency to commence the process for North Dakota to assume jurisdiction over the Section 404 program under the Federal Water Pollution Control Act. Representatives Dorso, Boucher, Grosz, Gulleon, and Nicholas and Senators Heitkamp, Krauter, Nelson, St. Aubyn, and Traynor voted "aye." No negative votes were cast.

Concerning the letter, Senator Nelson said, it should note that the Governor is preparing the 2001-03 budget and that the Governor should consider assumption of the Section 404 program in preparing the executive budget.

It was moved by Senator Nelson, seconded by Representative Boucher, and carried on a roll call vote that the Legislative Council staff be requested to prepare a bill draft providing for the assumption of the Section 404 program by the state of North Dakota with the responsibility of administering the program placed with the State Engineer. Representatives Dorso, Boucher, Grosz, and Gulleon and Senators Heitkamp, Krauter, Nelson, St. Aubyn, and Traynor voted "aye." No negative votes were cast.

At the request of Chairman Dorso, Mr. Warren L. Jamison, Manager, Garrison Diversion Conservancy District, Carrington, addressed the committee. Concerning the fiscal year 2001 Garrison appropriation, he said, the appropriation is pending in Congress. He said the President included \$21.3 million for the Garrison Diversion Unit Project in his budget. However, he said, the Garrison Diversion Conservancy District and the state's congressional delegation requested more funding so the request that was sent to the Senate was for \$28 million. He said the President's original request of \$21.3 million has been approved by a committee in the House. He said the additional funds are primarily for development of water projects on the state's Indian reservations as the authorization for expenditures on the state's reservations has been exhausted.

Concerning the Dakota Water Resources Act, Mr. Jamison said, a workshop was held on May 15 with representatives of the state of Missouri to work out several differences concerning the Act. Although a final resolution has not been reached, he said, progress is being made. He said the legislation for the Lewis and Clark project in South Dakota has passed Congress, but the Dakota Water Resources Act was not a part of that legislation. Thus, he said, one option is to attach the Dakota Water Resources Act to future water legislation that may include legislation relating to the Fort Peck project in Montana, the Cal-Fed or Delta Bay restoration project in California, the Animas-LaPlata Indian Settlement legislation, legislation relating to the Rocky Boys Indian Settlement in Montana, and two projects important to Representative Dolittle of California.

Mr. Jamison said the board of directors of the Garrison Diversion Conservancy District is also concerned about the operation of the Natural Resources Acquisition Advisory Committee. He said the committee advises the Governor whether proposed property acquisitions by nonprofit organizations should be approved. He said the board of directors of the Garrison Diversion Conservancy District questions whether the committee is effective or provides any useful purpose. He said the board of directors is urging the committee to review the membership of the advisory committee, or whether the committee itself should be abolished.

In response to Mr. Jamison's comments, Representative Dorso said one option would be to allow the Governor, if he felt he needed advice on a certain acquisition, to form a committee to make a recommendation. However, he noted, the Governor is not required to follow the recommendation of the advisory committee, and perhaps the advisory committee could be abolished.

It was moved by Senator Nelson, seconded by Senator St. Aubyn, and carried on a voice vote that the Legislative Council staff be requested to prepare a bill draft to repeal the Natural Resources Acquisition Advisory Committee but to retain the requirement that the Governor hold

hearings on proposed property acquisitions by nonprofit organizations.

Mr. Jamison next addressed the issue of the allocation of state aid distribution funds. He said North Dakota Century Code Section 57-39.2-26.1 requires each county to reserve a portion of its allocation for further distribution to or expenditure on behalf of townships, rural fire protection districts, rural ambulance districts, soil conservation districts, county recreation service districts, county hospital districts, the Garrison Diversion Conservancy District, the Southwest Water Authority, and other taxing districts within the county, excluding school districts, cities, and taxing districts within cities. However, he said, this distribution formula does not work well for the conservancy district because it is a multicounty district, and counties have determined the conservancy district's share is zero, a nominal amount, or an adequate and fair percentage. He said the uncertainty makes it difficult to plan conservancy district budgets.

Mr. Jamison distributed a fact sheet the conservancy district is using to explain the Dakota Water Resources Act, an editorial from the Tuesday, June 27, 2000, edition of the *Winnipeg Free Press*, and a summary of a trip several conservancy district representatives took to Winnipeg to discuss the Act. Copies of these materials are attached as Appendix C.

In response to a question from Representative Boucher, Mr. Jamison said representatives of the conservancy district met with members of the government as well as the minority party in Manitoba to discuss the Dakota Water Resources Act.

At the request of Chairman Dorso, Mr. Sprynczynatyk reviewed the Garrison municipal, rural, and industrial water supply program; the Northwest Area Water Supply Project; the Southwest Pipeline Project; Devils Lake flooding; the Pembina River Basin flood control study; and the Missouri River Coordinated Resource Management Program. A copy of Mr. Sprynczynatyk's presentation is attached as Appendix D. He said the State Water Commission has learned that in developing the municipal, rural, and industrial water supply program, one of the most important steps is to develop regional water supply systems. He said forming regional water systems allows efficiencies to be gained and ultimately to lower the cost of providing water to users.

In response to a question from Representative Dorso, Mr. Sprynczynatyk agreed that a problem exists when subsequent property owners would like to hook up to a rural water system when the original property owner declined to participate in the system. He said this results in insufficient capacity as well as hookup fees. Even if landowners are willing to incur the additional hookup fee, he said, the pipeline often does not have enough excess capacity to serve them.

In response to a further question from Representative Dorso, Mr. Sprynczynatyk said there is nothing in

state law that prohibits a rural water system from offering rural water to a subsequent property purchaser, but the problem is one of money and capacity. He said rural water systems would like to serve as many customers as possible to lower the cost for all users.

Concerning Devils Lake flooding, Mr. Sprynczynatyk said, there is a two percent chance the lake will spill into the Sheyenne River by the year 2015. Although this seems small, he said, in hydrologic terms it is significant. He said the state is continuing to hold water in the upper Devils Lake Basin, to raise roads to maintain the transportation infrastructure, and to pursue construction of an outlet. He also distributed a fact sheet published by the United States Geological Survey entitled *Climatology and Potential Effects of an Emergency Outlet, Devils Lake Basin, North Dakota*, a copy of which is attached as Appendix E.

Concerning a twin lakes outlet, Mr. Sprynczynatyk said, a federal permit is not required because the proposed outlet avoids the Spirit Lake Nation Indian Reservation. He said the proposed outlet also avoids wetlands, thus no dredged or fill material will be placed in a navigable water. However, he said, the project may need a national pollutant discharge elimination system permit from the Environmental Protection Agency.

Concerning the issuance of bonds to finance construction of flood control projects, Mr. Sprynczynatyk said, the State Water Commission issued \$32 million in bonds in late March. He said approximately \$10 million of the bond proceeds have been disbursed.

MISSOURI RIVER ISSUES STUDY

At the request of Chairman Dorso, committee counsel presented a background memorandum entitled *Missouri River Issues Study - Background Memorandum*. The memorandum describes the four areas of study called for in the resolution, i.e., Missouri River streambank erosion and bank stabilization; the Pick-Sloan Missouri Basin program; the United States Army Corps of Engineers master manual; and land and natural resource issues, water management, land use, and development of a long-range vision for the Missouri River in North Dakota. Committee counsel also distributed a packet of newspaper articles concerning the Missouri River which was submitted by the Sierra Club, a copy of which is on file in the Legislative Council office.

At the request of Chairman Dorso, Mr. Mike Dwyer, Executive Director, North Dakota Water Education Foundation and Burleigh, Oliver, Morton, Mercer, and McLean (BOMMM) Counties Joint Water Resource Board, addressed the committee. He said the BOMMM Counties Joint Water Resource Board has established the Missouri River coordinated resource management program. He said this program is designed to coordinate the efforts of groups interested in the reach of the Missouri River

between Garrison Dam and Lake Oahe to address natural, cultural, recreational, agricultural, and economic resources of the Missouri River in North Dakota. He said this group has realized that North Dakota must not let the incredible resource of the Missouri River slip away but must undertake a planning procedure to look to the future to protect the benefits of the Missouri River. He said the coordinated resource management program is composed of a technical group and a vision group. He said the technical group is working to secure technical data on sediment, river channel conditions, impacts based on certain river flows, land use patterns, and other related issues while the vision group is to open a dialogue among the various stakeholders in the Missouri River, to identify differences and areas of agreement, to provide coordination, and to reach a consensus on a recommended plan for the long-term future of the Missouri River. He also distributed a draft strategic plan prepared by the vision group of the coordinated resource management program, a copy of which is attached as Appendix F. The strategic plan identifies 10 issues to be addressed in the plan, e.g., aquatic habitat, land use issues, riverbank erosion, endangered species/sandbar habitat, floodplain management/delta formation, riparian woodlands/adjacent wetlands, historical/archaeological features, water quality, regulatory/jurisdictional issues, and master manual/reservoir operation. The strategic plan identifies goals, rationale, tasks, recommendations, and timelines for each of these 10 issues.

In response to a question from Senator St. Aubyn, Mr. Dwyer said river setback requirements are established by zoning regulations in each county.

Mr. Dwyer also said the issue of the duration of conservation easements is under consideration by the vision group of the coordinated resource management program.

At the request of Chairman Dorso, Mr. Andy Mork, Chairman, Burleigh, Oliver, Morton, Mercer, and McLean Counties Joint Water Resource Board, addressed the committee. He said as a result of construction of dams on the Missouri River, the streambanks have experienced a great deal of erosion. He said beginning in the late 1970s and early 1980s, much of the needed bank stabilization was done. He said three-fourths of the needed protection is in place, and only 25 percent of the needed bank stabilization efforts need to be completed. He said the cost of the remaining needed stabilization is approximately \$13.7 million and reminded the committee that construction of the dams on the upper Missouri has resulted in \$17 to \$18 billion in flood protection and navigation benefits.

Mr. Mork said the Federal Emergency Management Agency is completing a restudy of the flood danger in the Bismarck area and is proposing an increase of six inches to one foot in the floodplain level. He said the only solution to delta formation in south Bismarck is bank stabilization. Although it will

not be a cure, he said, it will delay damage caused by formation of the delta. If a buyout or dredging is needed in south Bismarck, he said, it would be very expensive. He said a small amount of money spent on bank stabilization now will delay this needed expense. He distributed a handout entitled *High Bottom Land-An Endangered Resource Garrison to Oahe-Missouri River*, a copy of which is attached as Appendix G.

At the request of Chairman Dorso, Mr. Ronald D. Sando, Consultant, Burleigh, Oliver, Morton, Mercer, and McLean Counties Joint Water Resource Board, addressed the committee. He said the change in the floodplain being contemplated by the Federal Emergency Management Agency will have a significant impact on existing and future development in south Bismarck. He said the change will affect flood insurance and the availability of loans. He said delta formation has increased over the last 15 years, and if streambank and river bottom erosion continues at the same rate, it will have a significant impact on the city of Bismarck.

In response to a question from Representative Guleson, Mr. Sando said the vision group has not addressed the issue of what entity is responsible for funding bank stabilization; however, he said, there is some sentiment that since the bank erosion is caused by the operation of the Garrison Dam, the federal government should pay for the erosion caused by the dam.

In response to Representative Guleson's question, Mr. Mork said many private landowners are willing to undertake the expense of bank stabilization but are unable to obtain Section 404 permits from the United States Army Corps of Engineers to place rock riprap in a navigable body of water.

In response to a question from Senator Nelson, Mr. Mork said the bank stabilization undertaken between Sioux City, Iowa, and St. Louis, Missouri, to stabilize the banks for navigation was paid for by the federal government.

Mr. Sando said some opposition to bank stabilization is a result of the belief that if the banks are stabilized, it will allow development of the riverbanks to the river's edge. However, he noted, a large percentage of the Missouri River reach between Garrison Dam and Bismarck is owned by the federal government where development would not be possible.

In response to a question from Representative Dorso, Mr. Sando said in addition to streambank erosion, the river is degrading its bed. If the delta in south Bismarck is dredged, he said, it will upset the gradient of the river, and the river will degrade its bed to seek its equilibrium and eventually form a deep narrow channel.

At the request of Chairman Dorso, Mr. Gary Raedeke, Sierra Club, addressed the committee. He said the one thing all can agree on is that the Missouri River in North Dakota is a unique resource, and people who live along the river where it has been channelized in the lower Missouri River Basin do not

have the opportunities people residing in the upper basin have. He noted the Supreme Court has held that the public has an interest in the river to the high water mark, and thus public interest, as well as private interest, is involved in the future of the Missouri River. If the state or federal government were to continue rock riprapping of erosion sites, he said, it would violate the state's public trust responsibility to manage the river for the people of North Dakota. He noted before construction of the Missouri River dams, the land along the river flooded twice each year and could not be used productively. Since construction of the dams, he said, land along the river can be used by private landowners; thus, they have received a benefit as a result of construction of the dams. He said there was actually more erosion before construction of the dams than today. He said the erosion rate was 222 acres per year prior to construction of the dams; whereas, today it is only 22 acres per year. He said landowners along the river have already received substantial benefits at no cost as a result of construction of the dams.

Mr. Raedeke said public interests, fish and wildlife interests, and recreation interests must be considered as well as what the losses are to private landowners. He said it has been estimated that in the next 50 years, 1,100 acres will be lost on the Garrison reach to erosion. If you take the agricultural value of this land, he said, it is \$274,000; whereas, the estimate of hardening the 17 highly erodible miles identified by the State Water Commission is \$13.6 million with a maintenance cost of \$2 million to \$3 million per year. He said the purchase of sloughing easements should be explored which would allow landowners to receive some benefit for flood prone, highly erodible land.

Mr. Raedeke said the issue of delta formation is not new, and it has long been known that as fast-moving water that is carrying a significant sediment load hits slack water it drops the sediment to form a delta. He said studies are also conflicting concerning the source of the sediment. He said some studies have shown that the sediment is coming from the Missouri River tributaries and not its banks. Concerning rock riprapping, he said, as hot spots are ripped new hot spots develop until the entire river is armored from the Garrison Dam to Lake Oahe.

At the request of Chairman Dorso, Ms. Carol Two Eagles, Mandan, addressed the committee. She

said the river should be preserved and maintained in its natural state, and just because someone can afford to purchase a lot and build an expensive home along the river does not mean they should be allowed to build at the expense of the public.

At the request of Chairman Dorso, Mr. Donald Vig, Valley City, addressed the committee. He said the Devils Lake problem should be resolved by storing water in the upper basin and closing drains rather than constructing an outlet to the Sheyenne River which would degrade that river.

DIRECTIVES

Senator Traynor requested the Legislative Council staff prepare a memorandum concerning the impact of the Refuge Compatibility Act on the ability of the United States Army Corps of Engineers to issue a Section 404 permit for an outlet between Devils Lake and West Stump Lake.

Senator Heitkamp requested the Legislative Council staff request representatives of the State Department of Health to appear at the committee's next meeting to comment on the bill draft relating to state assumption of the Section 404 program and whether the State Engineer or the Environmental Health Section of the State Department of Health is the appropriate state agency to administer the program.

Representative Dorso requested the Legislative Council staff invite a representative of the North Dakota Association of Counties to appear at the committee's next meeting to discuss the allocation of the state aid distribution fund.

Representative Dorso requested the Legislative Council staff request the State Engineer to provide information concerning the cost of constructing the proposed Pembillier Dam.

No further business appearing, Chairman Dorso adjourned the meeting at 2:45 p.m.

Jeffrey N. Nelson
Committee Counsel

ATTACH:7