

Report to the Legislative Water Topics Committee 10-1-14

Summary

The passage of HB 1338 directed the State Board of University and School Lands to conduct a study of the United States Army Corps of Engineers (USACE) held lands around Lake Sakakawea and around Lake Oahe to address the concerns of adjacent landowners. The major impetus of the study was to develop different options for the Legislature concerning noxious weed control, public access to these lands, and to look into the possibility of transferring these lands away from the USACE to a different entity or individuals along with those associated costs of transferring and maintenance. It also was to include consideration for the interests of the ND Indian Tribes.

This study resulted from the 2013 House Bill 1338 directing the Board of University and School Lands to study options to address the concerns of landowners adjacent to the United States Army Corps of Engineers (USACE) lands surrounding Lake Sakakawea and Lake Oahe in North Dakota (ND).

The scope of work involves determining different options for the Legislature relating to the USACE lands surrounding Lake Sakakawea and Lake Oahe. The particular concerns are noxious weeds growing on USACE lands, continued public recreation access to these lands, and the possibility of transferring these lands back to Tribal governments and the State of North Dakota (ND) or adjacent/original landowners. While this conversation may have started with the USACE's lack of control of noxious weeds, a major part of this study is the transfer of USACE excess land and who should be the final benefactor/owner of the land. The study also includes consideration for the interests of the North Dakota Indian Tribes. There are diverse opinions on what the final outcome should be. For purposes of this study, excess lands are defined as USACE lands from the take line to the 1854' elevation around Lake Sakakawea and to the 1620' elevation around Lake Oahe.

The methodology used was to review the previous work that had been done, to gather public input to explore various options that might be available or feasible, and to conduct personal interviews with various stakeholders and governmental agencies' personnel. To gather this input, we used a combination of a mail survey, local public meetings, follow up telephone interviews, and a final public meeting in Bismarck. This information has been compiled to formulate different options for the final report. Estimated costs were secured from different governmental agencies for the various option implementations.

The review of information section should give the reader an accurate picture of what was done in South Dakota (SD), how it transpired, and how that has worked out for their state. It should also give accurate information on how the Payment in Lieu of Taxes (PILT) and the Sec. 7 of the 1941 Flood Act payments work.

This study is to give the Legislature different options concerning these lands. Option One is status quo or no change. The study is to address the concerns of the adjacent landowners to these lands. One major concern is weed control. Most adjacent landowners felt if they were the landowners, they would do a better job of weed control than the United States Army Corps of Engineers (USACE). Therefore Option Two was created showing the transfer of these lands back to the original landowners or their heirs. Option Three transfers the land from the USACE to the State of ND and the state manages the transferred land. Options Four and Five had

similar features with land being transferred back to the State of ND and the two adjacent Indian Tribes, showing different management options for those lands. Options Six and Seven came from the input at two of the regional public meetings. With Option Six the USACE retains the ownership of these lands but some of the management is turned over to local, state, or tribal agencies. The impetus behind this option is the lands would be better managed with more local control. Option Seven is a direct transfer back to preferential lease holders. Grazing lease holders, North Dakota Game and Fish (NDGF), Morton County Parks and Recreation Board, and North Dakota Parks and Recreation (NDPR) would be examples of preferential lease holders. For your reference, there is a side by side option comparison under the options tab.

House Bill 1338

**Sixty-third Legislative Assembly of North Dakota
In Regular Session Commencing Tuesday, January 8, 2013**

HOUSE BILL NO. 1338

(Representatives Brandenburg, Froseth, Heller, Kasper, Kreidt, Kretschmar, Rohr, Schmidt, Onstad)

(Senators Schaible, Unruh, Warner)

AN ACT to provide for a board of university and school lands study of private lands owned adjacent to lands under the control of the United States army corps of engineers and a report to the legislative management.

BE IT ENACTED BY THE LEGISLATIVE ASSEMBLY OF NORTH DAKOTA:

SECTION 1. STUDY BY BOARD OF UNIVERSITY AND SCHOOL LANDS - REPORT TO LEGISLATIVE MANAGEMENT. During the 2013-14 interim, the board of university and school lands shall study options to address the concerns of landowners adjacent to land under the control of the United States army corps of engineers surrounding Lake Sakakawea and Lake Oahe. The study must include consideration of control of noxious weeds, protecting public access for hunting and fishing, the costs of possible transition of land from the United States army corps of engineers, and the costs associated with maintaining any property that may become a responsibility of the state. The study must also include consideration of the interests of North Dakota Indian tribes. The board may establish a task force consisting of landowners, hunting and fishing organizations, the game and fish department, the parks and recreation department, the North Dakota national guard, and other parties that utilize the land for access. Before October 1, 2014, the board shall provide to the legislative management a report on the outcome of this study.

The 2013 HB 1338 directed the State Board of University and School Lands to conduct a study:

- This study is to give the Legislature options regarding USACE lands around Lake Sakakawea above 1854' and Lake Oahe above the 1620' elevations.
- This study was to address:
 - Noxious weed control
 - Public access to these lands
 - Costs for each option
 - Was to include consideration for the interests of the ND Indian Tribes.
 - Review previous work, including the 2013 HB 1338, 2009 HB 1459, and what had been done in SD under the Title VI land transfer and the Blunt Reservoir and Pierre Canal project.
- These issues have had a history of diverse opinions on what can be or should be done to address these issues.
- Some of these same issues have come up in previous legislative sessions.
- Eide Bailly LLP was awarded this study in January of this year.

Methodology

- Review previous work, including 2013 HB 1338, 2009 HB 1459, and what had been done in SD under the Title VI land transfer and the Blunt Reservoir and Pierre Canal project.
- Send out a non-scientific study to various stakeholders to gather information.
- Scheduled five regional public meetings and one general public meeting in Bismarck to secure additional stakeholder information.
- Conduct interviews with various stakeholders, ND officials/agencies, SD officials, and USACE officials to gather additional information.
- Compile and formulate this information into options along with cost estimates for each option.

Misconceptions or misinformation

1. Survey costs

- Survey costs are often cited as an impediment to land transfers.
- In SD, no surveying was done under Title VI.
- The SD legislature passed a provision to allow elevation to be used as a legal boundary.
 - Title was passed using a quick claim deed.
- Survey costs could run from \$3,500 to 5,000 per lineal mile, using modern surveying technology.
 - There could possibly be some economies in size in a large project.

2. Weed control below 1854' and 1620'

- USACE is still responsible for noxious weed control below the 1854' and 1620' elevations, if the excess lands are transferred back to the Tribal governments, the state, and/or individuals.
- Most of the weed problem is below the high water mark.

- The noxious weed problem is a larger issue during the low water years and more so at the upper end of the dams, especially when the lake is back in the river channel.
- USACE has lost their flexibility move budget funds from one area to another, during low water years when the noxious weeds are a bigger problem.
- USACE works with the local county weed boards and independent contractors.
 - USACE at Lake Sakakawea created a noxious weed task force over 10 years, for advising on noxious weed control, primarily Salt Cedar.
- The state or county has no noxious weed control jurisdiction over USACE.

3. Grazing

- According to the USACE, it has some flexibility in different grazing options including early turnouts.
- Grazing is handled differently between the two lakes.
- Grazing is not an authorized use, only an interim use.
 - Grazing is usually used in conjunction with wildlife management.
 - The USACE lease is 23 pages.

4. Public access

- Stricter use of the zoning has been implemented.
 - There is less public access than in the past.
 - Primarily because of
 - The endangered species laws and the cultural resources laws.
 - New generation of off road vehicles.
- This appears to be less of an issue in SD, under SDGFP management.
- Lake Sakakawea lands are still open to walk in access.

5. 1999 Title VI (CRST, LBST, and State of SD Terrestrial Wildlife Habitat Restoration Act)

- Involved the Oahe, Big Bend, Fort Randall, and Gavin's Point projects in SD.
- In SD, all the lands above 1620' around Lake Oahe were transferred back to SD or the adjoining tribes except those lands required for dam management and the Lake Oahe lands adjoining the Standing Rock reservation.
- In SD, the lands were transferred back to SDGFP, an agency with a dual mission.
- A \$180 million trust fund went along with this for perpetual management.
 - \$108 million to SD
 - \$72 million to the tribes, held in trust with BIA
- Title VI was accomplished when Tom Daschle was Senate Majority Leader and the federal government had a balanced budget.
- The Lake Oahe portion was offered to ND and to Standing Rock at the same time, they both opted out.
- Title VI came under the authority of the 1959 Fish and Wildlife Coordination Act
 - Lake Sakakawea was completed before this act, therefore only Lake Oahe in ND would have qualified.
- Title VI lands are perpetually zoned for only recreation and wildlife use.

6. SDGFP management

- SDGFP has a dual mission of both recreation and wildlife.
- They use the income from the \$108 million trust fund to help manage these lands.
- Numerous park and lake access areas have been added or upgraded.
- SDGFP has a 25 year lease with the USACE, from the water's edge to the 1620' elevation.
 - SDGFP's manages all the grazing leases and all the easements, including below the 1620' elevation.
 - USACE is still responsible for weed control below 1620'.
 - USACE has management responsibilities for cultural resources and endangered species below 1620'.
- The game and fish side of the agency manages about 100 grazing leases around Lake Oahe.
 - They meet with each tenant every year.
 - The SDGFP grazing lease is 2 pages long versus the USACE 23 page lease.
 - SDGFP has fewer grazing restrictions than the USACE.
- SDGFP needs to follow all federal applicable laws in the management of these lands.

7. Blunt Canal project (Pierre Canal and Blunt Reservoir project)

- The Blunt Canal project was authorized with the construction of Lake Oahe to supply irrigation to central SD.
 - This project was started but was stopped in the 1980's after farmers petitioned to have it stopped because the soil types were not conducive to irrigation.
- A compromise bill was written for Congress to de-authorize this project along with an appropriation to handle the transfer costs.
- The taken lands that had been disturbed with the project's construction were transferred to the SDGFP's.
- The undisturbed taken lands that were being leased to the original landowners, were sold back to the preferential leaseholders.
 - The preferential lease holders were the original landowners who were leasing the lands from the USACE.
- A new archeological study was required before any of these lands could be transferred back to the preferential lease holders and the SDGFP.

8. PILT (Payment In Lieu of Taxes) and Sec 7 payments (Section 7 of the 1941 Flood Control Act).

- PILT payments go directly to the counties for taken lands.
 - The PILT payments are for all taken lands, including the inundated land under the lakes.
 - If the lands above 1854' and 1620' were transferred from the federal government, the PILT payments would only stop on those lands above those elevations.
 - The majority of the PILT payments come from lands below the 1854' and 1620' elevations.

- Sec 7 payments are 75% of the lease revenue collected by USACE on lands, such as grazing leases.
 - These payments are made directly to the state which in turn reimburses each county for their pro rata share.
 - These payments would stop, if the land above 1854' and 1620' was transferred from the USACE to another entity or individual.
- To summarize the PILT and Sec 7 payments, if the lands above 1854' and 1620' were transferred back to the State of ND, a Tribal government, or an individual; then:
 - A small portion of the PILT payments would stop above the 1854' and 1620' elevations.
 - The majority of the PILT payments would continue on the land below the 1854' and 1620' elevations.
 - All the Sec. 7 payments would stop.
 - The new owner would collect 100% of the lease payments versus the county collecting 75% of the lease payments under Sec. 7.

9. Public lands (2009 information)

- ND ranks 12th in the country with 3.38 acres of public land per capita.
- The top 10 states per capita are mountain states and Alaska.
- SD ranks 11th and is the only other Great Plains state ahead of ND.

Options:

1. Status Quo

- With this option nothing changes. There are various special interest groups have indicated they are satisfied with the present situation and generally are not concerned about weed control or restricted public access.

2. Return to original owners

- One major concern is weed control. Most adjacent landowners felt if they were the landowners, they would do a better job of weed control than the USACE.
- Option Two was created showing the transfer of these lands back to the original landowners or their heirs.

3. Return to State of ND and the state manages the land

- Option Three transfers the land from the USACE to the State of ND and the state manages the transferred land.
- The state would bear the costs of managing these lands.

4. Return to the State of ND and the adjoining tribes, each manage their own land.

- Options Four and Five had similar features with land being transferred back to the State of ND and the two adjacent Indian Tribes, showing different management options for those lands.
- Under each option either the state or the tribal government would bear the management costs.

5. **Return to the State of ND and the adjoining tribes. The state, tribal government or a local government manages the land.**
6. **USACE retains ownership but the state, tribal government, or a local government manages selected portions of the land, while the USACE manages the balance of the land.**
 - Options Six and Seven came from the input at two of the regional public meetings.
 - With Option Six the USACE retains the ownership of these lands but some of the management is turned over to local, state, or tribal agencies.
 - The impetus behind this option is the lands would be better managed with more local control.
 - Different agencies or government entities would choose which parcel they were interested in managing, then petition the USACE to take over the management for that parcel.
7. **These lands are transferred back to the State of ND and the state transfers these lands to preferential lease holders.**
 - Option Seven is a direct transfer back to preferential lease holders, via the State of ND. Grazing lease holders, North Dakota Game and Fish (NDGF), Morton County Parks and Recreation Board, and North Dakota Parks and Recreation (NDPR) would be examples of preferential lease holders.
 - Some stakeholders fear that any transfer back to the state would be a conduit to transfer back to private individuals.
 - They are against any transfer back to individuals or in some cases the tribes.

Please see the attached “Options—side by side comparison” spread sheet.

Options--Side by Side comparison.

	Option 1	Option 2	Option 3	Option 4	Option 5	Option 6	Option 7
Brief Option Description:	Status Quo	Return to original owners	Return to State of ND, state manages	Return to State of ND & Tribes, each manage their own land.	Return to State of ND & Tribes. Tribes, local gov, & state manages	USACE retains ownership but turns over management to tribes, state, & local gov.	Transfer land to ND and ND transfers land to preferential lease holders.
1 What would it take to make each option happen?	NA	Act of Congress	Act of Congress	Act of Congress	Act of Congress	Tribes, state, or local gov. would need to seek a lease from the USACE.	Act of Congress
2 Other related factors related to each different option.	Nothing changes	Federal Government typically doesn't sell land to private individuals.	It takes an act of Congress and there is no ground swell support behind this. The tribes may not support this.	It takes an act of Congress and there is no ground swell support behind this. The tribes may or may not support this.	It takes an act of Congress and there is no ground swell support behind this. The tribes, local governments, and special interest groups may or may not support this.	This potentially can happen with state, tribal, and/or local governments petitioning the USACE for a lease arrangement.	Federal Government typically doesn't sell land to private individuals. There are deed restrictions under Title VI in SD.
3 With each option, who would be the ultimate owner of the land?	USACE	Original owners or their heirs.	State of ND	State of ND & the tribes	State of ND & the tribes	USACE retains ownership	Preferential lease holders.
4 With each option, who would manage the land?	USACE & present lease holders	Original owners or their heirs.	State of ND	State of ND & the tribes	State of ND, the tribes, or a local governmental agency.	State of ND, the tribes, local government, or the USACE.	Preferential lease holders.
5 Will there be a net loss of public lands?	No	Yes	No	Yes & No, tribal land or BIA controlled land is not necessarily public lands.	Yes & No, tribal land or BIA controlled land is not necessarily public lands.	No	Yes
6 Can the zoned use of these lands be changed?	No	Maybe, depends on Congress and what the act says.	Maybe, depends on Congress and what the act says. SD was not able to change the stated use under Title VI.	Maybe, depends on Congress and what the act says. SD was not able to change the stated use under Title VI.	Maybe, depends on Congress and what the act says. SD was not able to change the stated use under Title VI.	No	Maybe, depends on Congress and what the act says.
7 Will these lands need to be re-surveyed?	NA	Maybe, depends if the ND Legislature passes a law to allow an elevation as a boundary.	Maybe, depends if the ND Legislature passes a law to allow an elevation as a boundary.	Maybe, depends if the ND Legislature passes a law to allow an elevation as a boundary.	Maybe, depends if the ND Legislature passes a law to allow an elevation as a boundary.	NA	Maybe, depends if the ND Legislature passes a law to allow an elevation as a boundary.
8 If these lands don't need to be resurveyed, what is the cost to the state of ND?	NA	Low, most of the closing costs are picked up by the new landowner or the Federal Government. The state would probably have administration costs during the transfer.	High, the state would have administration costs during the transfer and maintenance & operating costs after the transfer.	High, the state would have administration costs during the transfer and maintenance & operating costs after the transfer. The costs would be less because the tribes would be responsible for their own management.	High, the state would have administration costs during the transfer and maintenance & operating costs after the transfer. The state may need to support local government entities with weed control and recreation areas. Tribes would have their own costs.	Medium, the state, tribes, and local governments may pick and chose which lands they want to lease and manage. The state may need to support local governmental entities with weed control and the recreational areas.	Low, most of the closing costs are picked up by the new landowner or the Federal Government. The state would probably have administration costs during the transfer.
9 Will there be more public recreational opportunities?	No, it will be the same.	Maybe with a public access easement. Otherwise, probably no extra campgrounds, state parks, etc.	Maybe, if the state revitalizes some of the existing campgrounds and parks that the USACE is presently managing.	Maybe, if the state revitalizes some of the existing campgrounds and parks that the USACE is presently managing. Tribes would manage their own, it is unknown what they would do.	Maybe, if the state revitalizes some of the existing campgrounds and parks that the USACE is presently managing. Local governments may encourage extra opportunities. Tribes would manage their own, it is unknown what they would do.	Possibly, if local governmental entities and the state had an extra push for more recreational opportunities.	Maybe with a public access easement. Otherwise, probably no extra campgrounds, state parks, etc.
10 Will public access be enhanced?	No, it will be the same.	Maybe with a public access easement.	Probably, as it appears it was improved in SD under Title VI.	Maybe, as it appears it was improved in SD under Title VI. Tribes would manage their own, it is uncertain what they would do.	Possibly, with more local control and it appears it improved in SD under Title VI. Tribes would manage their own, it is uncertain what they would do.	Possibly, if local governmental entities and the state had an extra push for more public access opportunities. It would also depend on how much land the state, local governments, or the tribes would be interested in leasing.	Maybe with a public access easement.
11 Will noxious weed control improve?	Probably not, the USACE has lost its flexibility to move dollars around from one area to another. It has a hard time budgeting for changing lake levels.	More than likely on their own land but the USACE will still be responsible on the elevations below 1854' and 1620'.	Probably on the state's land but the USACE will still be responsible on the elevations below 1854' and 1620'.	Probably on the state's land but the USACE will still be responsible on the elevations below 1854' and 1620'. It is unknown if the tribes will have the budget for weed control on their land.	More than likely, with local control will improve on the state's land but the USACE will still be responsible on the elevations below 1854' and 1620'. It is unknown if the tribes will have the budget for weed control on their land.	More than likely, with local control will improve on the state's land but the USACE will still be responsible on the elevations below 1854' and 1620'. It is unknown if the tribes will have the budget for weed control on their land.	More than likely on their own land but the USACE will still be responsible on the elevations below 1854' and 1620'.
12 Would the present leaseholders, such as the NDGF, NDPR, and the Morton County Park Board, be able to keep their present leases?	Yes	Probably not.	Yes	Yes	Yes	Yes	Yes, they would all be preferential lease holders.