

NORTH DAKOTA LEGISLATIVE COUNCIL

Minutes of the

AGRICULTURE AND NATURAL RESOURCES COMMITTEE

Thursday, January 12, 2006
Roughrider Room, State Capitol
Bismarck, North Dakota

Representative Chet Pollert, Chairman, called the meeting to order at 9:00 a.m.

Members present: Representatives Chet Pollert, LeRoy G. Bernstein, Michael D. Brandenburg, Chuck Damschen, Rod Froelich, Lyle Hanson, Craig Headland, Scot Kelsh, Keith Kempenich, Matthew M. Klein, Jon O. Nelson, Mike Norland, Dorvan Solberg, Gerald Uglem; Senators Bill L. Bowman, Stanley W. Lyson, David O'Connell, Herb Urlacher

Members absent: Representatives Tom Brusegaard, Joyce Kingsbury, Eugene Nicholas; Senator Joel C. Heitkamp

Others present: See Appendix A

It was moved by Senator O'Connell, seconded by Representative Klein, and carried on a voice vote that the minutes of the November 17, 2005, meeting be approved as distributed.

RESERVED WATER RIGHTS STUDY

Chairman Pollert recognized Mr. Clive J. Strong, Chief Assistant Attorney General, Idaho Attorney General's office, Boise, Idaho, who discussed [*the negotiation and quantification of federal and Indian reserved water rights in Idaho and other western states.*](#)

Mr. Strong discussed the Snake River Basin adjudication, alternatives for quantification of Indian reserved water rights, state processes for negotiation of tribal claims, the Idaho reserved water rights adjudication process, the Shoshone-Bannock negotiations, the Nez-Perce negotiations, the Northwestern Band of Shoshoni negotiations, the Shoshone-Paiute negotiations, and general principles concerning the adjudication and quantification of federal and Indian reserved water rights.

Mr. Strong said the Snake River Basin adjudication was a general stream adjudication of all water rights in the Snake River Basin within Idaho. He said the purposes of the Snake River Basin adjudication were to obtain an accurate list of all state-based water rights, quantify all federal reserved water rights in the basin, and determine hydraulically connected water sources. He said the Snake River Basin adjudication was the second largest general stream adjudication in the United States. He said the Snake River Basin adjudication encompassed 150,000 water right claims, 20,000 of which were federal and tribal water right claims. To date, he said, 120,000 claims have been

decreed and it is expected that the remaining claims will be decreed within the next five years.

Mr. Strong said the Shoshone-Bannock Tribe filed a claim for irrigation in the amount of 782,107 acre-feet per year of water. He said the final decreed amount was 581,031 acre-feet of water per year. He said the claim filed by the Nez-Perce Tribe was recognized at 50,000 acre-feet of water per year with the settlement pending. He said the claim for the Shoshone-Paiute Tribe of 451 acre-feet per year is also pending. He said other entities such as the United States Department of Energy, United States Department of Defense, United States Department of Veterans Affairs, General Services Administration, United States Geological Survey, United States Fish and Wildlife Service, United States Army Corps of Engineers, and National Park Service also filed federal reserved water rights claims in the Snake River Basin adjudication. He said there were federal claims for 5,970 acre-feet of water per year, of which 5,963 acre-feet of water per year were dismissed, thus recognizing federal claims for 7 acre-feet of water per year.

Concerning the process of adjudication and quantification of federal reserved water rights, Mr. Strong said the process usually begins when the situation ripens by the presence of a strong desire to settle water rights in a basin, a sense of urgency is present, and the key players are involved. The next step, he said, is preparation for the adjudication process. He said it must be decided who will be present at the negotiation table, the spokespersons and resources must be identified, preparatory analyses must be completed, working relationships must be established, and information must be shared. He said there is no one right or correct water adjudication method, but what is important are the intangible factors such as the relationships of the parties, information, and the motivation of each of the parties to reach an agreement. The next step, he said, is to reach a local agreement. He said local agreements are reached by establishing and negotiating protocols, identifying the major goals and issues of the adjudication, developing strategies and proposals, finding alternative means to meet these objectives, and reaching agreement through compromise. The next step, he said, is authorization by the state and local parties followed by federal review and approval. Next, he said, the agreement must be approved in a tribal referendum, court

approval may be required, and congressional appropriations may need to be secured to fund the settlement. Finally, he said, the agreement must be implemented.

Mr. Strong said there are at least three alternatives for quantification of Indian reserved water rights. He said these include litigation, negotiation, and a combination of litigation and negotiation. He said the Wind River adjudication in Wyoming is an example of quantification of Indian reserved water rights through litigation, the Warm Springs settlement in Oregon is an example of quantification of Indian reserved water rights through negotiation, and the states of Montana, Colorado, Arizona, and New Mexico have utilized litigation and negotiation to quantify Indian reserved water rights. He said there are at least four processes for negotiation of tribal reserved water rights claims. He said Oregon specifies that the state engineer conduct negotiations on behalf of the state. He said Montana has established a compact commission that conducts negotiations on behalf of the state. In Colorado, Washington, and Idaho, he said, negotiations are conducted by the executive branch. In Arizona, he said, water users have initiated negotiation of tribal reserved water rights claims. He said water users in Arizona have led the effort to settle tribal claims in order to quantify the amount of water reserved for tribes and to add finality to tribal claims. Regardless of the approach to negotiate tribal reserved water rights claims, he said, most states form a multimember negotiating team consisting of a political official for policy direction, a senior management official for continuity of negotiations, a technical representative, a legal representative, and a lead negotiator. Concerning the process followed in Idaho, he said, the Governor was the lead negotiator, supported by the Attorney General. He said these executive officials worked closely with the Idaho Legislature while the state director of water resources provided technical support to all parties involved in the negotiations. He said Idaho's process began with a historical research of all federal claims followed by a technical review of those claims. Next, he said, the legal representative evaluated the risks of litigation and chance for settlement. Next, he said, Idaho developed a process for the involvement for key constituents, provided periodic updates to the Governor and the Legislature, and provided a public process for approval of reserved water rights settlements.

In response to a question from Representative Pollert, Mr. Strong said whether a settlement needs to be approved by a state legislative body or Congress depends on the nature of the settlement. He said if the settlement only quantifies and adjudicates water rights, conceivably the water rights can be settled in a judicial decree without legislative approval. However, he said, if the settlement includes something in addition to water rights, such as an economic development package or other services requiring state or federal funds, then the settlement would require

legislative approval. He said it is best that the legislative body be involved from the beginning because it is not known at the beginning of the process what form the settlement will take. For example, he said, if the settlement includes state recognition of a tribal water right, the settlement may require legislative approval.

Mr. Strong said the technical review is important because it determines what the historical diversions have been and cropping patterns are on the reservation to determine the duty of water. Also, he said, the technical review will reveal what the potential is to develop water on the reservation. He said this is important because a federal reserved water right is not limited to actual beneficial use but includes both present and future water needs.

Mr. Strong said 10 factors are necessary for successful reserved water right negotiations. He said there must be an uncertain outcome, realistic expectations, stakeholder involvement and continuity of stakeholders, a sense of urgency, mutual respect and trust, equal access to technical data and facts, avoidance of sovereignty issues, funding, a forum for conducting sensitive discussions, and clear boundaries on negotiations.

In response to a question from Representative Froelich, Mr. Strong said the Idaho state negotiating team did not include a tribal representative. However, he said, state negotiators did spend time on the state's reservations and met with tribal leaders and members to determine tribal water needs. However, he agreed with Representative Froelich that tribal representatives on the state negotiating team may be beneficial to the process.

Mr. Strong also reviewed the Shoshone-Bannock negotiations, the Nez-Perce negotiations, the Northwestern Band of Shoshoni negotiations, and the Shoshone-Paiute negotiations. In conclusion, he said, the negotiation process should be tailored to the needs of the parties. He said there is not one best practice but the process should be designed to facilitate the interests of the stakeholders involved. He said a team approach with legislative involvement usually works well. Also, he said, the state must do its homework before starting negotiations. By this, he said, the state must understand what the claims are, what it is willing to negotiate, and at what point the state is willing to walk away from negotiations if a good agreement is not achievable. He said the state should insist on a strong federal commitment to the negotiation process. He said the state must ensure that the tribe is committed to negotiations and finally the state must know the limits of what it is willing to negotiate.

In response to a question from Senator Bowman, Mr. Strong said once a water right settlement is quantified, negotiated, and finalized, the agreement is final and cannot be renegotiated. He said one of the objectives of quantification and adjudication of water rights is finality, which provides a basis upon which the interested parties can make future decisions.

In response to a question from Representative Pollert, Mr. Strong said the western states have taken the position that the reserved water rights doctrine only applies to surface water and does not apply to ground water. He said the only case in which a reserved water right to ground water has been found is *Capparet v. United States*, 426 U.S. 128 (1976). However, he said, that case rests upon several unique facts, one of which is that the ground water was being expressed as a surface supply. Thus, he said, there is no clear legal precedent whether the reserved water rights doctrine applies to ground water.

In response to a question from Representative Pollert relating to off-reservation reserved water rights, Mr. Strong said the Idaho litigation and cases are premised on the basis that a reserved water right is associated expressly with reserved lands. Thus, absent the reservation of lands, he said, there can be no reserved water right and thus the right would not extend off-reservation.

In response to a question from Senator Urlacher, Mr. Strong said all reserved water rights negotiations and agreements in Idaho are premised on the prior appropriation doctrine. If there is a shortage, he said, subordination agreements are used whereby a senior appropriator may agree to and be compensated for subordinating that person's right to take a certain quantity of water, making that water available to a junior appropriator.

In response to a question from Senator Urlacher, Mr. Strong said the quantity of the reserved right is established using the practicable irrigable acreage standard developed by the Supreme Court in *Arizona v. California*, 373 U.S. 546 (1963). To determine the practicable irrigable acreage of a reservation, he said, one must perform a soil study to see if the soil is susceptible to agricultural use, study the available water supply, determine whether water can be delivered to the appropriate area, and then conduct an economic analysis to see if it is economically feasible.

Chairman Pollert recognized Mr. Thomas Davis, Turtle Mountain Band of Chippewa, Belcourt. Mr. Davis said the Turtle Mountain Band of Chippewa desires a cooperative agreement with the state that benefits both the state and the tribe. He said the tribe knows it can commence litigation to settle its reserved water rights claims but prefers to quantify its reserved water rights through negotiations with the state.

In response to a question from Representative Pollert, Mr. Jon Patch, State Water Commission, said the commission has issued water permits to both tribal and nontribal entities on the Shell Valley aquifer.

In response to a question from Representative Pollert, Mr. Patch said North Dakota is a prior appropriation state with the date of appropriation measured from the date the appropriator obtains a water permit from the State Engineer. He said North Dakota Century Code Section 61-04-06.1 only applies if there are competing uses to water when a permit has not been issued. Thus, he said, if there is a

competing use, the State Engineer will use the priority established by that section.

ENERGY-INTENSIVE ECONOMIC DEVELOPMENT STUDY

At the request of Chairman Pollert, committee counsel distributed a summary of the Energy Policy Act of 2005 prepared by the United States Senate Committee on Energy and Natural Resources Press Office. A copy of the summary is on file in the Legislative Council office.

Chairman Pollert recognized Ms. Linda Butts, Director, Economic Development and Finance Division, Department of Commerce. Ms. Butts presented the [Coal Country Development Initiative Report](#) prepared by Trillium Planning and Development, Inc., Yale University Industrial Environmental Management Program, Minneapolis, Minnesota. A copy of Ms. Butts' written comments is attached as Appendix B.

Chairman Pollert recognized Mr. Kevin Magstadt, Community Development Manager, Montana-Dakota Utilities Company. Mr. Magstadt discussed the activities that Montana-Dakota Utilities Company uses in assisting the state and communities it serves in the retention and attraction of energy-intensive development projects to the state. A copy of Mr. Magstadt's written comments is attached as Appendix C.

Chairman Pollert recognized Mr. Dennis Boyd, Senior Governmental Affairs Representative, Public Affairs Department, MDU Resources Group, Inc. Mr. Boyd discussed recent and ongoing company activities that have an economic impact on the state. A copy of Mr. Boyd's written comments is attached as Appendix D.

In response to a question from Representative Damschen, Mr. Boyd said as a regulated utility, Montana-Dakota Utilities Company would not be able to include the cost of excess capacity in its rate base.

Chairman Pollert recognized Mr. Curtis Jabs, Senior Legislative Representative, Basin Electric Power Cooperative. Mr. Jabs discussed incentive programs that encourage energy-intensive industries to locate in the state. A copy of Mr. Jabs' written comments is attached as Appendix E.

Chairman Pollert recognized Ms. Kathy Aas, Xcel Energy, Minot. Ms. Aas described what Xcel Energy is doing to support economic development and attract business to the state. She focused on Xcel's low rates, which help stimulate economic activity, Xcel's financial support of economic development in the state, and how Xcel further increases the value of its investments through the leadership role of its employees in economic development activities at the state and community level. A copy of Ms. Aas' written comments is attached as Appendix F.

Chairman Pollert recognized Ms. Karlene Fine, Executive Director and Secretary, Industrial Commission. Ms. Fine discussed implementation of

the North Dakota Transmission Authority. A copy of her written comments is attached as Appendix G.

In response to a question from Senator Urlacher, Ms. Fine said the figure that North Dakota has an estimated 800-year supply of lignite reserves is based upon the current extraction rate of 30 million tons of lignite per year.

Chairman Pollert recognized Mr. Ron Ness, President, North Dakota Petroleum Council. A copy of the tables used by Mr. Ness in his presentation is attached as Appendix H. A brochure on North Dakota oil and gas industry facts and figures distributed by Mr. Ness is on file in the Legislative Council office. Mr. Ness said the state must address its workforce needs or its attempt to attract energy-intensive businesses and industries to the state will be in vain. He said a significant portion of the workforce currently employed in North Dakota's energy industry will retire over the next 5 to 10 years. He said North Dakota does not have the people to replace these people and North Dakota's technical training programs are seriously lacking. He said there are 150 unfilled jobs that pay \$50,000 or more per year on Job Service North Dakota's web site for jobs in the energy industry.

Mr. Ness said as of December 2005, the North Dakota oil industry is producing 102,000 barrels of oil per day. He said this is the first time North Dakota has been over 100,000 barrels of oil per day since 1988. He said there are 33 rigs operating in the state with drilling rigs and workover rigs sitting idle because there are no people to man them. Also, he said, there are currently 27 rigs operating in Richland County, Montana. He said there are 3,400 producing wells in the state and the state's oil industry produced \$40 million in tax revenues in the first quarter. He said the Williston Basin is the strongest oil play in the lower 48 states but companies are hampered by a lack of available workers.

In response to a question from Representative Solberg, Mr. Ness said the demand from employers in the Williston area for training of oilfield workers at Williston State College is phenomenal. However, he said, he is disappointed with the North Dakota University System and its ability to respond to the needs of the state's employers.

ENDANGERED SPECIES ACT AND NOXIOUS WEEDS

Chairman Pollert recognized Mr. Jeff Olson, Program Manager, Plant Industries Division, Department of Agriculture, who discussed notification and requests for assistance by individuals who believe local weed boards have not eradicated or controlled noxious weeds satisfactorily. A copy of Mr. Olson's written comments is attached as Appendix I.

Representative Pollert recognized Mr. Jim Gray, Department of Agriculture, who discussed the future of North Dakota's endangered species protection

program. A copy of the slides used by Mr. Gray in his PowerPoint presentation is attached as Appendix J.

Mr. Olson distributed a schedule of the projected balance of the EARP Fund as of June 30, 2007. A copy of this projection is attached as Appendix K.

Mr. Gray said the Environmental Protection Agency will start adding county bulletin reference language to pesticide labels in 2006. He said the state will be required to have county bulletins in place within the next year. He said existing North Dakota bulletins will not be adequate. He said the Department of Agriculture is facing three options. Option 1, he said, is to have the Environmental Protection Agency prepare the county bulletins as it would for most other states. Option 2, he said, is for North Dakota to develop its own county bulletins under a state-initiated plan. Option 3, he said, is a hybrid approach. Under this approach, he said, the Environmental Protection Agency will develop the bulletins and the state could provide recommendations and counterarguments. He said option 1 would not result in any staff or cost increases for the state. If option 2 is selected, he said, there will be significant costs for the state and option 3 will result in some costs for the state. He said the Department of Agriculture will be required to enforce whichever bulletins are published, regardless of who prepares them. He said this enforcement responsibility will increase the workload of an already overextended pesticide field staff. Thus, he said, the state will need to determine if the benefits of a state-initiated plan or hybrid approach are worth the investment of state dollars. If the answer to this query is no, he said, then the state does not have to do anything. However, if the answer to this query is yes, he said, then funding this effort will need to be addressed in the upcoming legislative session.

Chairman Pollert recognized Mr. Brian Kramer, North Dakota Farm Bureau. Mr. Kramer said the Endangered Species Act issues are very important for North Dakota agricultural producers and the Farm Bureau would be willing to work with other stakeholders concerning these issues and formulate a recommendation for the Legislative Assembly to consider.

Chairman Pollert recognized Mr. Dan Wogsland, Executive Director, North Dakota Grain Growers Association and North Dakota Durum Growers Association. Mr. Wogsland said the Grain Growers Association and the Durum Growers Association have not taken a formal position concerning whether the Department of Agriculture should assume the bulletin responsibility. However, he said, these organizations are extremely concerned with this issue and are willing to work with other commodity groups and the Legislative Assembly in formulating the best recommendation for North Dakota.

STAFF DIRECTIVES

Senator Bowman requested that the Legislative Council staff arrange for the presentation of information concerning the relationship between property rights and the Endangered Species Act.

No further business appearing, Chairman Pollert adjourned the meeting at 3:45 p.m.

Jeffrey N. Nelson
Committee Counsel

[ATTACH:11](#)