

NORTH DAKOTA LEGISLATIVE COUNCIL

Minutes of the

GARRISON DIVERSION OVERVIEW COMMITTEE

Thursday, September 21, 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; Senators Layton Freborg, Aaron Krauter, John T. Traynor, Terry M. Wanzek

Members absent: Representatives Mick Grosz, Pam Gulleason, David Monson, Eugene Nicholas, Francis J. Wald; Senators Joel C. Heitkamp, Gary J. Nelson

Others present: See Appendix A

It was moved by Senator Freborg, seconded by Senator Wanzek, and carried on a voice vote that the minutes of the July 5, 2000, committee meeting be approved as distributed.

GARRISON DIVERSION UNIT PROJECT

At the request of Chairman Dorso, committee counsel distributed a letter from Governor Schafer to Mr. William Yellowtail, Regional Administrator, EPA Region VIII, United States Environmental Protection Agency, concerning state assumption of 404 permits under the Clean Water Act, a copy of which is attached as Appendix B. He also reviewed a memorandum entitled *Effect of the National Wildlife Refuge and National Wildlife Refuge System Improvement Acts on Projects Such as an East End Devils Lake Outlet*. The memorandum discusses the effect of the National Wildlife Refuge Act and the National Wildlife Refuge System Improvement Act on construction of an outlet from the east end of Devils Lake to West Stump Lake. The memorandum concludes that although it appears the state could pursue acquisition of the refuge or an exchange of state land for the refuge, seek a determination that construction of an outlet is compatible with the use of the refuge, or request that the refuge manager invoke emergency provisions, no option appears to be a feasible solution.

In response to a question from Senator Traynor, committee counsel agreed that if Stump Lake were navigable at the time of statehood, then the state would have received title to the lakebed under the equal footing doctrine. However, he said, he did not know if a determination on the navigability of Stump Lake had ever been done.

In response to Senator Traynor's question, Mr. David A. Sprynczynatyk, State Engineer and

Secretary, State Water Commission, said when the refuge was established, only the islands in Stump Lake were declared to be a refuge and as the lake level rises and falls the refuge increases or decreases.

In response to a question from Representative Dorso, Mr. Warren L. Jamison, Manager, Garrison Diversion Conservancy District, Carrington, said he and Mr. Sprynczynatyk would visit with representatives of the Bureau of Reclamation and the United States Fish and Wildlife Service on whether these agencies would be amenable to exploring an exchange of the national wildlife refuge located in the Stump Lake system with other land that could be acquired by the state as a refuge and exchanged for the refuge in the Stump Lake system.

At the request of Chairman Dorso, committee counsel distributed a status report on the Garrison Diversion Unit Project prepared by the Bureau of Reclamation, a copy of which is attached as Appendix C. The report outlines construction activities, fish and wildlife mitigation and enhancement activities, recreation activities, operation and maintenance activities, study activities, and the status of the 2001 Garrison Diversion appropriation.

At the request of Chairman Dorso, Mr. Jamison addressed the committee. He said the Garrison appropriations bill has passed the Senate and includes language supported by representatives of Missouri which restricts changes in the operation of the Missouri River. He said the Senate version of the bill includes \$4 million more than the administration's \$20 million proposal.

Mr. Jamison said the Dakota Water Resources Act is close to passage in the Senate but is moving slower in the House of Representatives. He said the changes that have been negotiated in the House are harmless or helpful, but the few issues that remain will be difficult to resolve.

In response to a question from Representative Dorso, Mr. Jamison said it is unlikely the Dakota Water Resources Act will be attached to the Cal-Fed Water Project legislation for California.

Mr. Sprynczynatyk said the Northwest Area Water Supply Project has been delayed approximately two years due to the National Environmental Policy Act process. He said Canadian interests have raised the

issue of the transfer of biota from Missouri River drainage to the Hudson Bay drainage area. To allay their concerns, he said, it has been agreed that the water will be pretreated at Lake Sakakawea or Lake Audubon and then treated to drinking water standards at Minot for distribution. He said he believes the project complies with the Boundary Waters Treaty of 1909.

In response to a question from Representative Dorso, Mr. Jamison said a proposed amendment to the Dakota Water Resources Act would provide that "if the Secretary [of the Interior] selects a project feature under this section that would transfer water from the Missouri River to the Sheyenne River water supply and release facility or from the Missouri River to such other conveyance facilities as the Secretary selects under this section, no later than 90 days after completion of the final environmental impact statement the Secretary shall translate to Congress a comprehensive report which provides a detailed description of the proposed feature, a summary of the major issues identified in the environmental impact statement, likely effects if any on other states bordering the Missouri River and the state of Minnesota, and a description of how the project features comply with the Boundary Waters Treaty of 1909. No project feature or features which would transfer water from the Missouri River to the Sheyenne River water supply and release facility or from the Missouri River to such other conveyance facilities as the Secretary selects under this section shall be constructed unless such feature is specifically authorized by an act of Congress approved subsequent to the Secretary's transmittal." He said this language has the effect of requiring that if the state is going to use existing or proposed features to deliver Missouri River water to the Red River drainage basin, the project must be approved by Congress. Other changes, he said, relate to wildlife mitigation and the extension and additional funding of the wetlands trust.

In response to a question from Representative Dorso, Mr. Jamison said the committee must remember that of the \$24 million contained in the Senate Appropriations Committee bill for Garrison this amount includes construction funds; municipal, rural, and industrial water supply project funds; moneys for studies; mitigation funding; operation and maintenance funding for Indian rural water systems; funds for work on the Jamestown Dam; and \$3.5 to \$4 million for other items. He said the funding for the municipal, rural, and industrial water supply program is anticipated to be \$7 million as opposed to \$10 million for fiscal year 2000. He said the House version currently contains \$20 million for Garrison, and if the Senate and House conferees split the difference, as they have in the past, the extra \$2 million will be allocated toward Indian municipal, rural, and industrial water supply projects as well as other Garrison features. He said the Northwest Area Water Supply

Project accounts for most of the remaining Garrison municipal, rural, and industrial water supply program appropriation authorization.

At the request of Chairman Dorso, committee counsel reviewed a bill draft relating to the acquisition of farmland or ranchland by nonprofit organizations.

At the request of Chairman Dorso, Mr. Jamison addressed the committee. He said the Garrison Diversion Conservancy District Board of Directors would support this legislation but suggested the advisory committee should be made optional.

At the request of Chairman Dorso, Mr. Joe Satrom addressed the committee. He said this legislation, which prevents landowners from selling their property to whom they wish, is unique, and he would support any effort to lessen the hurdles that private landowners must surmount to sell their land. He said the conservation groups he has been associated with are financially sound and would have no trouble paying the property taxes of a proposed acquisition in perpetuity. He said this provision of state law is an abridgment and an insult to the private property principles upon which this country was founded. Also, he said, the law is an impediment to working with the federal government and national conservation groups on issues such as Garrison Diversion.

In response to Mr. Satrom's comments, Senator Wanzek noted that conservation groups are nonprofit organizations that do not pay income taxes, and farmers and ranchers find it difficult to compete with these organizations to purchase property.

Mr. Mark A. Johnson, Executive Director, North Dakota Association of Counties, addressed the committee. He said the bill draft should not be amended as it provides for an advisory committee and local input in acquisitions of farmland or ranchland by nonprofit organizations.

Mr. Sprynczynatyk addressed the committee. He discussed the Garrison municipal, rural, and industrial water supply program, Northwest Area Water Supply Project, Southwest Pipeline Project, statewide water development program and management plan, and Devils Lake flooding. A copy of his written comments is attached as Appendix D.

In response to a question from Representative Dorso, Mr. Sprynczynatyk said the State Water Commission has implemented an interim financing program for rural water projects whereby the commission allocates municipal, rural, and industrial water supply funds for rural water projects with the anticipation that federal funds will be forthcoming.

In response to a question from Representative Dorso, Mr. Sprynczynatyk said of the \$35 million in appropriation authority remaining under the Garrison Diversion Unit Reformulation Act of 1986 for the Garrison municipal, rural, and industrial water supply program, \$24 million is allocated for the Northwest Area Water Supply Project.

In response to a question from Senator Traynor, Mr. Sprynczynatyk said \$20 million in bonding authorization for the proposed Devils Lake outlet would be sufficient for a temporary outlet.

In response to a question from Representative Dorso, Mr. Sprynczynatyk said in March 2000 the State Water Commission issued \$32.1 million in bonds for construction of water projects. Of this amount, he said, \$27.5 million was for construction, and \$4.6 million for interest, bond issuance costs, and debt retirement. He said of the funds allocated for construction, \$9 million has been allocated for Grand Forks flood control, \$4.5 million for the Southwest Pipeline Project, and the remainder held in an account with the interest being used to pay interest on the bonds.

Concerning the statewide water development program and management plan, Mr. Sprynczynatyk said the State Water Commission is revising the plan for submission to the 2001 Legislative Assembly. He said the plan updates the list of proposed water projects for the state; establishes priorities for evaluating these projects in terms of funding; analyzes various funding sources, including the water development trust fund, the resources trust fund, state funds, local funds, other federal funds, and bonding; and provides a list of recommended projects for the 2001-03 biennium. He said the recommended projects total approximately \$74 million during the next biennium. He said the \$74 million accounts for projects already authorized, several new projects, and debt retirement on outstanding bonds. He said the commission is estimating that the resources trust fund will receive \$12.5 million next biennium, the water development trust fund will receive \$44 million from tobacco settlement funds, and the remaining \$17 million to be bonded.

Mr. Sprynczynatyk distributed a draft of the Pembina River Basin storage study, a copy of which is on file in the Legislative Council office. A summary of the study is contained in Appendix D. He said neither the Pembina Dam in Canada nor the Pembilier Dam in North Dakota is attractive for flood control on the Pembina River. He said construction of the Pembilier Dam and resultant reservoir would inundate the Pembina Gorge which is unlikely to be environmentally acceptable, and thus it is unlikely the dam would ever be constructed.

At the request of Chairman Dorso, committee counsel presented a bill draft relating to the effective date of the assumption of the Section 404 program of the Clean Water Act by the state.

Mr. Sprynczynatyk addressed the committee. A copy of his written comments concerning the bill draft is included in Appendix D. He said the Governor has sent a letter to the Environmental Protection Agency initiating the process for the state to assume jurisdiction of the Section 404 program under the Clean Water Act. One decision that must be made, he said,

is whether the office of the State Engineer or the Environmental Health Section of the State Department of Health is the most appropriate state agency to administer the program. He said the state would be able to administer the Section 404 program more efficiently and expeditiously but emphasized the state would still have to follow all applicable federal environmental laws and rules in issuing permits.

Mr. Francis J. Schwindt, Chief, Environmental Health Section, State Department of Health, addressed the committee. A copy of his written comments concerning the bill draft is attached as Appendix E.

In response to a question from Senator Traynor, Mr. Schwindt said the Environmental Protection Agency would still retain oversight over Section 404 program permits whether the program is administered by the United States Army Corps of Engineers or the state.

In response to a question from Representative Dorso, Mr. Schwindt agreed there is room for negotiation when a state assumes jurisdiction of the Section 404 program. Based upon the willingness of the federal government to move these programs to the states, he said, it may be more amenable to negotiating items favorable to the states.

Representative Dorso said this bill draft should be introduced as an agency bill by either the State Water Commission or the State Department of Health.

Concerning the proposed landfill in southern Saskatchewan, Mr. Schwindt reported that on June 29 the Saskatchewan Environment and Resource Management Agency issued a report which included comments submitted by the state of North Dakota. He said the agency requested that the applicant address the issues identified in the report, and the applicant has agreed to develop a full environmental impact analysis for the project.

STATE AID DISTRIBUTION FUND

Mr. Jamison addressed the committee. He said when the state aid distribution fund allocation formula was revised in 1997, the distribution to certain political subdivisions such as the Garrison Diversion Conservancy District and the Southwest Water Authority was left to the discretion of the board of county commissioners. He said some counties have distributed state aid distribution funds based on the old formula and some have reduced it to zero, which makes it difficult to plan district budgets. Due to this uncertainty, he said, the conservancy district has been holding any funds received from this source in escrow.

Mr. Johnson addressed the committee. A copy of his comments concerning the history of the fund and the revision of the formula in 1997 is attached as Appendix F. In summary, under the old formula, he said, the state aid distribution program rewarded political subdivisions that increased taxes and penalized political subdivisions that held the line and did

not raise taxes or could not raise taxes because of statutory caps. He said the North Dakota Association of Counties does not want to see the conservancy district suffer as a result of the revised formula but would like to work something out without returning to the Legislative Assembly.

In response to Mr. Johnson's comments, Representative Boucher said it appears that the conservancy district can spend the money it has received from political subdivisions pending resolution of this issue.

In response to a question from Representative Boucher, Mr. Johnson said the North Dakota Association of Counties will urge counties that are members of the conservancy district to support the conservancy district, and said the current formula is working very well. He said political subdivisions would not want to approach the Legislative Assembly every session for funding of the state aid distribution fund.

MISSOURI RIVER ISSUES STUDY

Mr. Mike Dwyer, Executive Director, North Dakota Water Education Foundation and BOMMM Joint Board, addressed the committee. He said the BOMMM Joint Board is still working on developing a

strategic plan concerning the Garrison reach of the Missouri River but has not reached a consensus since the committee's last meeting. He said the Missouri River coordinated resource management program does not have any legislation to recommend at this time.

Mr. Sprynczynatyk addressed the committee. A copy of his written comments concerning Missouri River issues is included in Appendix D. He said both Lake Sakakawea and Lake Oahe are at 10-year lows due to the low runoff the past several years.

It was moved by Senator Wanzek, seconded by Senator Freborg, and carried that the chairman and the staff of the Legislative Council be requested to prepare a report and to present the report to the Legislative Council.

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

Jeffrey N. Nelson
Committee Counsel

ATTACH:6