

# NORTH DAKOTA LEGISLATIVE COUNCIL

## Minutes of the

### NATURAL RESOURCES COMMITTEE

Friday, March 7, 2008  
Harvest Room, State Capitol  
Bismarck, North Dakota

Senator Tim Flakoll, Chairman, called the meeting to order at 9:00 a.m.

**Members present:** Senators Tim Flakoll, Tom Fischer, Joel C. Heitkamp, Stanley W. Lyson; Representatives Ole Aarsvold, Chuck Damschen, Duane L. DeKrey, Donald D. Dietrich, C. B. Haas, Lyle Hanson, Brenda Heller, Darrell D. Nottestad, Todd Porter

**Members absent:** Senator Arden C. Anderson; Representative Louis Pinkerton

**Others present:** See [Appendix A](#)

It was moved by Representative DeKrey, seconded by Representative Aarsvold, and approved on a voice vote that the minutes of the October 31, 2007, meeting be approved as distributed.

#### SEVERANCE OF HUNTING ACCESS STUDY

At the request of Chairman Flakoll, the Legislative Council staff presented a bill draft [\[90032.0100\]](#) relating to severance of the right of access for hunting access from the surface estate.

Chairman Flakoll recognized Mr. Roger Rostvet, Deputy Director, Game and Fish Department. Mr. Rostvet said if the committee approves a bill making North Dakota Century Code (NDCC) Section 47-05-17--prohibiting the severance of the right of access for hunting access--permanent, the committee should consider an amendment that the provision does not apply to the private land habitat and access improvement program under Title 20.1. He distributed an amendment ([Appendix B](#)) that had been considered by the Senate during the 60<sup>th</sup> Legislative Assembly but not adopted. He said the Attorney General has advised the department that easements obtained for the private land habitat and access improvement program, especially long-term easements, should be recorded. He said this section raises the issue whether such interests may be severed and whether an instrument granting an easement for the private land habitat and access improvement program may be recorded. He said the proposed amendment comports with the legislative intent of the measure because it would act to increase access for hunting.

In response to a question from Representative Porter, Mr. Rostvet said Game and Fish Department easements range in term from annual to as long as

30 years. Oftentimes, he said, the payment for the easement is made at the beginning of the term and thus without an exemption for private land habitat and access improvement program easements, the department may be reluctant to acquire such easements.

In response to a question from Representative Haas, Mr. Rostvet said a buyout provision is included with the easement and thus follows the land rather than the landowner selling the property.

It was moved by Representative Hanson, seconded by Senator Fischer, and carried on a roll call vote that Section 3 of the bill draft removing the sunset provision from NDCC Section 47-05-17 be amended to add a provision that the section does not apply to the private land habitat and access improvement program under Title 20.1. Senators Flakoll, Fischer, Heitkamp, and Lyson and Representatives Aarsvold, DeKrey, Dietrich, Haas, Hanson, Heller, Nottestad, and Porter voted "aye." Representative Damschen voted "nay."

#### ONE-CALL EXCAVATION NOTICE SYSTEM CIVIL PENALTY STUDY

At the request of Chairman Flakoll, committee counsel presented a bill draft [\[90031.0100\]](#) relating to enforcement of one-call excavation notice system provisions.

Chairman Flakoll recognized Mr. Ron Ness, Chairman, North Dakota One Call Board, Fargo. Mr. Ness presented written comments ([Appendix C](#)) concerning the bill draft.

In response to a question from Representative Aarsvold, Mr. Ness said North Dakota One Call has several sources of revenue. He said each excavator who requests a location must pay a fee of \$1.24 and that each North Dakota facility operator that receives a ticket also pays a \$1.24 fee. He said this revenue is used to operate the notification center. He said the board retains 15 cents from each ticket issued for board expenses and advertising.

Chairman Flakoll recognized Mr. Todd D. Kranda, Kelsch Law Firm, Mandan. Mr. Kranda introduced Mr. Michael J. McGrath, United States Integrity and Compliance Coordinator, Alliance Pipeline, Inc., Eden Prairie, Minnesota. Mr. McGrath presented written comments ([Appendix D](#)) concerning the bill draft.

Mr. McGrath noted that current law requires that agricultural activities that disturb the soil to a depth of

18 inches or more are subject to one-call notification requirements. He said the proposed amendment to remove this limitation should be deleted. Also, he said, the term "excavators" as used in the proposed amendments to NDCC Section 49-23-06 should be changed to include underground facility operators as well as excavators.

Chairman Flakoll recognized Mr. John Morrison, Fleck Law Firm and Northern Border Pipeline Company. Mr. Morrison said Northern Border Pipeline Company operates a pipeline from the Montana border to the South Dakota border and generally supports the bill draft to enhance penalties for the one-call excavation notice system. However, he said, Northern Border Pipeline also believes that the 18-inch depth requirement should be retained.

Chairman Flakoll recognized Mr. David Crothers, North Dakota Association of Telephone Cooperatives, Mandan. Mr. Crothers said the North Dakota Association of Telephone Cooperatives disagrees with the entire premise of a civil penalty imposed by a volunteer board of directors. He said authorizing the Public Service Commission to enforce the one-call excavation notice system or allowing state's attorneys to enforce the current law are better options than those contained in the bill draft.

Representative DeKrey said the committee should consider moving the responsibility to adopt rules to assess a civil penalty for the one-call excavation notice system to the Public Service Commission. He said the commission has the expertise to administer such a program.

Senator Heitkamp agreed that the Public Service Commission may be a more appropriate agency for this authority.

Representative Haas said the one-call excavation notice system and the board are working well now. He said this bill draft may act as a hindrance to excavators and is ill-conceived.

In response to a question from Senator Flakoll, Representative DeKrey said the committee should consider a bill draft to move the authority to adopt rules to assess a civil penalty to the Public Service Commission and should retain the 18-inch limitation for the agricultural exemption for excavators.

Representative Porter said under current law the local state's attorney has the authority to enforce the law and it would be unnecessary to authorize the Public Service Commission to do something that state's attorneys are authorized under current law to do, which is to enforce the one-call excavation notice system laws.

Senator Lyson said he could not support the bill draft in its current form and encouraging state's attorneys to enforce the current law may be a more appropriate route to follow.

Senator Heitkamp encouraged the one-call board to consider the testimony presented at the committee meeting, meet, and submit a new proposal to the committee incorporating the suggestions presented to the committee.

## **DRAINAGE STUDY**

At the request of Chairman Flakoll, Mr. William Schuh, Water Appropriation Division, State Water Commission, presented a progress report ([Appendix E](#)) on the commission's assessment of the impact of tile drainage on the beneficial use of water by prior water appropriators.

In response to Mr. Schuh's comments, Representative Nottestad said he would like to publicly thank the Water Appropriation Division and the State Water Commission for dividing the application for a drainage permit between permits for traditional drainage and permits for tile drainage. He said this will greatly assist local water resource boards in performing their tasks.

## **STATE WATER COMMISSION OPERATION AND PROCEDURES STUDY**

Chairman Flakoll recognized Mr. Dale Frink, State Engineer and Chief Engineer-Secretary, State Water Commission. Mr. Frink discussed the State Water Commission's operations and procedures ([Appendix F](#)).

In response to a question from Senator Fischer, Mr. Frink said the State Water Commission prepares its budget in the same manner that it has done for several years. He said the State Water Commission's Planning Division has responsibility for preparing the budget request and works with local water resource district boards to identify the water needs of the state. He said the State Water Commission is involved in preparing the budget, but the budget is based upon revenues available to the commission. He said the Office of Management and Budget prepares the revenue estimates for the resources trust fund and other funds that may be available to the State Water Commission in preparing its budget. However, he said, the State Water Commission has the authority to adjust projects during a biennium because some projects move ahead faster than other projects based upon construction and permitting issues, and the State Water Commission may direct funds to where they are needed.

In response to a question from Senator Flakoll whether the Legislative Assembly wishes to ensure that a certain project is constructed on a certain timeframe it should specifically do so in the State Water Commission's budget, Mr. Frink said the current process works well. He said the State Water Commission has the authority to manage projects in a timely manner and to ensure that funds are available to projects as construction and permitting allows. He said it is difficult to know exactly how much money a certain project may require at some exact point in the distant future and allowing the State Water Commission to manage projects is more efficient.

In response to a question from Senator Heitkamp, Mr. Frink said the State Water Commission has reviewed the preferred alternative recommended by the Garrison Diversion Conservancy District for the

Red River Valley Water Supply Project and supports the preferred alternative. He said the preferred alternative solves the problem in a more cost-effective manner than the alternative studied by the Garrison Diversion Conservancy District.

Representative DeKrey requested that the State Water Commission provide information on the projected revenues for the resources trust fund for the 2007-09 biennium at a future meeting.

At the request of Chairman Flakoll, Mr. Dave Koland, General Manager, Garrison Diversion Conservancy District, Carrington, discussed the Red River Valley Water Supply Project in a PowerPoint presentation ([Appendix G](#)). Mr. Koland reviewed the decisionmaking process that was used to arrive at the Garrison Diversion Unit import to the Sheyenne River alternative or preferred alternative.

Chairman Flakoll recognized Mr. David Johnson, District Engineer, Garrison Diversion Conservancy District, Carrington. Mr. Johnson reviewed the Red River Valley studies ([Appendix G](#)), including the sources of water studied for the Red River Valley Water Supply Project, and the two Missouri River solutions to the Red River Valley water supply problem.

Chairman Flakoll recognized Mr. Steven L. Burian, Advanced Engineering and Environmental Services and Consultant, Lake Agassiz Water Authority, Grand Forks. Mr. Burian compared the two alternatives ([Appendix G](#)), including environmental impact; life expectancy; construction costs; annual operations, maintenance, and replacement costs; and review of engineering issues concerning the project. In summary, he said, the preferred alternative provides more flexibility, more reliability, additional environmental benefits, lower capital costs, and lower operations and maintenance costs. Also, he said, the preferred alternative would be significantly less expensive, \$659.8 million versus \$1.065 billion.

Chairman Flakoll recognized Mr. Koland who distributed a fact sheet ([Appendix H](#)) concerning North Dakota's usage of the Missouri River, a memorandum ([Appendix I](#)) documenting the engineering review processes for the Red River Valley Water Supply Project, a memorandum ([Appendix J](#)), comparing Red River Valley Water Supply Project alternatives, and a memorandum ([Appendix K](#)) documenting the decisionmaking process for the Red River Valley Water Supply Project study.

In response to a question from Representative Aarsvold, Mr. Johnson said the Garrison Diversion Conservancy District had conducted two studies concerning water quality in the Sheyenne River and Lake Ashtabula under the preferred alternative and concluded that the project would not have any adverse impact on water quality in either the Sheyenne River or Lake Ashtabula.

In response to a question from Representative Hanson, Mr. Koland agreed that evaporation would occur under the preferred alternative. However, he noted, that evaporation occurs on the McClusky Canal

now because the McClusky Canal is currently being used. He said seepage is not a large concern because of the soil types underlying the canal that would be constructed from the McClusky Canal to the headwaters of Lake Ashtabula under the preferred alternative.

In response to a question from Senator Fischer, Mr. Koland said under the preferred alternative, Missouri River water will be fully treated before it leaves the Missouri River drainage basin and enters the Hudson Bay drainage system.

In response to a further question from Senator Fischer, Mr. Koland said the preferred alternative does not require the approval of Canada. What the project does require, he said, is approval or certification from the Environmental Protection Agency and the United States Department of State that the project complies with the Boundary Waters Treaty of 1909.

Chairman Flakoll recognized Mr. Ben Varnson, Nelson County Water Resource Board. Mr. Varnson discussed several flood control issues in Nelson County ([Appendix L](#)) and a temporary construction easement and permanent maintenance easement ([Appendix M](#)).

Senator Fischer said indemnification clauses have been included in all of the new contracts between the State Water Commission and local water resource boards under which the district must agree to indemnify the state for any claims attributable to the project. He said districts have been unable to obtain insurance through the North Dakota Insurance Reserve Fund to indemnify the state and thus many water projects are on hold pending resolution of this issue.

At the request of Chairman Flakoll, Mr. Frink addressed the committee. He said the indemnification issue has been a very frustrating issue for the State Water Commission. He said liability is not a problem if the state owns and constructs a project, such as the Northwest Area Water Supply Project, Southwest Pipeline Project, or the Devils Lake Outlet. However, he said, when the State Water Commission provides funding for a project but is not involved in the design, construction, or operation of the project, the Attorney General has advised that the state should not accept any liability for the project and thus the State Water Commission requires an indemnification clause in the contract between the State Water Commission and the local project sponsor.

## STAFF DIRECTIVES

Senator Lyson requested that the Legislative Council staff review the legislative history for NDCC Section 47-05-01 to determine whether the right of conducting lawful sports upon land includes hunting or whether, since the right of taking game is specifically enumerated in the section, the right of conducting lawful sports upon land refers to sports other than hunting.

No further business appearing, Chairman Flakoll adjourned the meeting at 1:15 p.m.

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Jeffrey N. Nelson  
Committee Counsel

ATTACH:13