

# NORTH DAKOTA LEGISLATIVE COUNCIL

## Minutes of the

### NATURAL RESOURCES COMMITTEE

Wednesday, October 31, 2007  
Roughrider 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, Arden C. Anderson, Tom Fischer, Stanley W. Lyson; Representatives Ole Aarsvold, Chuck Damschen, Duane L. DeKrey, Donald D. Dietrich, Brenda Heller, Darrell D. Nottestad, Louis Pinkerton, Todd Porter

**Members absent:** Senator Joel C. Heitkamp; Representatives C. B. Haas, Lyle Hanson

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

At the request of Chairman Flakoll, committee counsel reviewed the [Supplementary Rules of Operation and Procedure of the North Dakota Legislative Council](#).

Chairman Flakoll addressed the committee. He thanked the members of the committee for serving on the Natural Resources Committee and Representative Nottestad for serving as vice chairman of the committee. He referred to a memorandum entitled [Interim Committee Measures - Sponsorship and Disposition - 2007](#). He said this memorandum shows that 67 percent of bills sponsored by the Legislative Council were enacted during the 60<sup>th</sup> Legislative Assembly, while 59 percent of bills introduced by individual legislators or at the request of a state agency were enacted. He said this attests to the importance of the interim process. He said Representative Al Carlson, Chairman of the Legislative Council, has assigned two additional responsibilities to the interim Natural Resources Committee. He said the chairman has assigned responsibility to receive periodic reports from the State Water Commission relating to the implementation of 2007 Session Laws chapter 559 authorizing the State Water Commission to issue bonds for the Red River Valley Water Supply Project and to receive periodic reports on the development of the digital elevation model for the Red River Basin. A letter from Representative Carlson to Chairman Flakoll is attached as [Appendix B](#).

At the request of Chairman Flakoll, committee counsel reviewed a background memorandum entitled [One-Call Excavation Notice System - Civil Penalty - Background Memorandum](#). The memorandum reviews the North Dakota one-call excavation notice system and the one-call excavation notice systems in South Dakota, Minnesota, and Montana. Committee counsel also distributed the written comments of Mr. David Crothers, North Dakota Association of Telecommunications Cooperatives, a copy of which is

attached as [Appendix C](#). Mr. Crothers said rural telecommunications companies have some early reservations about creating civil penalties and believe the "one-call" system has worked quite well in North Dakota since its adoption.

Chairman Flakoll recognized Mr. Don Nett, Director of Education and Public Relations, North Dakota One Call. Mr. Nett distributed a summary of state one-call laws and provisions, a copy of which is attached as [Appendix D](#) and a draft of a one-call enforcement bill, a copy of which is attached as [Appendix E](#). He also distributed a copy of the 2007-2008 Edition of the *North Dakota One-Call Handbook*, a copy of which is on file in the Legislative Council office. He introduced Mr. Ronald Ness, Manager of Systems Operations, Cass County Electric Cooperative, Fargo, and Chairman of the Board of North Dakota One Call.

Mr. Ness addressed the committee. He said the rationale for the one-call excavation notice system is to promote the safety of individuals excavating near underground facilities and to protect those underground facilities from excavators. Under current law, he said, a person who damages an underground facility is responsible for repair of the facility and is liable for any lost product as a result of the damage.

Mr. Ness said the North Dakota One Call Board is interested in having a civil penalty placed in North Dakota law for several reasons. He said the absence of a civil penalty in North Dakota's law limits the amount of grant funding available to the North Dakota Public Service Commission from the federal Office of Pipeline Safety. He said enforcement legislation would motivate operators, excavators, and underground facility owners to comply with the notice law. He said the federal Office of Pipeline Safety is encouraging states to enact enforcement procedures for their one-call excavation notice systems. He said 43 states have some type of enforcement provision in their one-call excavation notice laws.

Mr. Ness said when the one-call excavation notice system law was enacted, many felt that a civil penalty was not necessary. However, in the last 10 years, he said, the number of excavations as well as the number of damage claims has increased. He said some of the stakeholders feel that some excavators and contractors are well aware of the law's requirements but find it cheaper to go ahead with the excavation and then pay for any damage incurred after the excavation.

Mr. Ness said that under the proposed bill draft, the proceeds of any civil fines would be used for education, advertising, and the costs of enforcing and collecting the penalty.

Mr. Ness said the North Dakota One Call Board is not sure of its authority to impose a civil penalty or whether it has the authority to adopt administrative rules.

In response to a question from Senator Lyson, Mr. Ness said imposition of a civil penalty would be based upon the information contained in the complaint or report. He said the North Dakota One Call Board is not considering adding an investigator to investigate damage claims.

In response to a question from Representative Porter, Mr. Ness said the one-call excavation notice system and board is funded by a \$1.24 fee for each excavation ticket issued by the center. He said all but 15 cents of the cost of each ticket is used to fund the one-call excavation notice center in conjunction with Gopher State One Call in Minnesota. He said the 15-cent balance is used by the board for education and administrative purposes.

In response to a question from Representative Porter, Mr. Ness said although under the proposed bill draft the board would retain civil penalties, the board would not have a conflict of interest because the board would only be responding to a complaint filed with the board and would not have the authority to initiate complaints.

Representative Porter noted that the bill draft does not include a provision for administrative review of a penalty assessed by the North Dakota One Call Board nor does the bill draft provide for judicial review of a penalty assessment.

In response to a question from Senator Lyson, Mr. Ness said it is the intent of the board not to provide information on complaints filed with the board as the purpose of the penalty is to promote compliance with the system and not act as a source of information on whether one contractor may be better than another contractor.

In response to a question from Representative Nottestad, Mr. Ness said the Public Service Commission is aware of the bill draft but has not expressed an opinion concerning the bill draft or whether the commission should be the entity to enforce the civil penalty.

Chairman Flakoll requested that the Legislative Council staff be requested to draft the bill draft submitted by North Dakota One Call into Legislative Council form and style for purposes of facilitating committee discussion at future meetings. He invited members of the committee to comment on what changes or additions they would like to see in the bill draft.

Representative Porter said the bill draft should include a process for administrative and judicial review of any civil penalty assessed by the North Dakota One Call Board.

Representative DeKrey said the bill draft should include an agricultural exemption for agricultural producers conducting excavations on their own property.

Representative Porter said the proceeds of any civil penalty or assessment should be placed in a fund and the fund should be subject to legislative appropriation.

Representative Porter noted that proposed North Dakota Century Code Section 49-23-06(4)(k) provides that evidence introduced in the proceedings before the board constitute the record and evidence at the trial of a case in court and that no additional evidence other than that introduced before the board may be introduced at court trial. Representative Porter said this provision should be deleted and the board should be able to utilize any information at its disposal in making a decision.

Senator Lyson said the record of complaints and civil penalties assessed should be public information available to landowners to determine whether an excavator or contractor is reputable.

Representative Dietrich said the proceeds of any civil assessment or penalty should be placed in a recovery fund with a portion of the proceeds used to pay for damage caused by excavators who are financially unable to pay for the damage caused by their excavation.

In response to a question from Senator Lyson, Mr. Ness said the civil penalty proposed in the bill draft should be sufficient to deter persons who intentionally damage underground facilities.

In response to a question from Representative Porter, Mr. Ness said it would be unlikely that the North Dakota One Call Board would assess a civil penalty against a landowner who accidentally damaged an underground facility because it would be unlikely that a complaint would be filed and even if it was, the board would take into account that the damage was caused by a landowner and was caused accidentally.

## **SEVERANCE OF HUNTING ACCESS STUDY**

At the request of Chairman Flakoll, committee counsel reviewed a background memorandum entitled [Severance of Hunting Access From Surface Estate Study - Background Memorandum](#).

Chairman Flakoll recognized Mr. Roger Rostvet, Deputy Director, Game and Fish Department. Mr. Rostvet said House Bill No. 1146 reflects the concern of the Legislative Assembly with hunting access. He said the Game and Fish Department will spend approximately \$12 million this biennium in securing access for hunters in North Dakota. He said the department does have some concerns with the bill, especially whether the department will be able to acquire easements and interests in property to increase access for hunting in North Dakota. He said if the department is required to acquire fee interests in

land rather than easements, it would dramatically increase the cost of providing hunting access in the state.

In response to Mr. Rostvet's comments, Representative Porter said one of the concerns of the Legislative Assembly in enacting House Bill No. 1146 was out-of-state interests acquiring fee interests and then selling that interest and reserving the hunting rights and not allowing hunting on that property. Thus, he said, the nonresident interest group could effectively prevent hunting on large tracts of land and not run afoul of the state's restrictions on the amount of property a nonprofit entity may acquire in the state.

Chairman Flakoll recognized Mr. Wade Moser, Executive Director, North Dakota Stockmen's Association. Mr. Moser distributed a resolution adopted by the North Dakota Stockmen's Association at its most recent meeting concerning access rights. A copy of the resolution is attached as [Appendix F](#). He said the North Dakota Stockmen's Association has a great deal of concern with severing certain land use rights and that the association opposes the sale of hunting, recreational, and access rights that effectively sever those rights from the surface of the land.

Chairman Flakoll requested that the Legislative Council staff be requested to prepare a bill draft revising 2007 House Bill No. 1146 by removing the sunset clause for committee discussion at future committee meetings.

### **MISSOURI RIVER AND MASTER MANUAL REVIEW STUDY**

At the request of Chairman Flakoll, committee counsel reviewed a background memorandum entitled [Missouri River and Master Manual Review Study – Background Memorandum](#).

Chairman Flakoll recognized Mr. Dale Frink, State Engineer and Secretary, State Water Commission. A copy of Mr. Frink's written testimony is attached as [Appendix G](#). Mr. Frink discussed how the state might pursue additional uses of the Missouri River and how the state could promote a congressional review of the Flood Control Act of 1944.

Chairman Flakoll recognized Mr. Terry Steinwand, Director, Game and Fish Department. Mr. Steinwand distributed an article from *North Dakota Outdoors* entitled State's Newest Forage Fish ([Appendix H](#)) concerning the gizzard shad. Mr. Steinwand said the state has repeatedly appealed to the United States Army Corps of Engineers to implement immediate and long-term operational measures to conserve water in the Missouri River system. He said the corps' management of the river to benefit downstream navigation interests has adversely impacted North Dakota's fisheries and recreational opportunities. In the last seven years, he said, Lake Sakakawea has experienced 60 percent walleye mortality and the condition of the walleye is down to 80 percent on a scale of fish health. He said the lake is currently at 1,812 feet mean sea level and must reach a level of

1,825 feet mean sea level for rainbow smelt and walleye to spawn naturally. Since 2000, he said, approximately \$7 million has been spent on boating access on the Missouri River system. Of that amount, he said, the Game and Fish Department has expended approximately \$2,750,000. He said shore access for fishing is also becoming an issue. He said the state has lost approximately 95 percent of its shore fishing access on Lake Sakakawea and is also experiencing access losses on Lake Oahe.

Mr. Steinwand said although the *Master Manual* was revised several years ago, the question that needs to be asked is whether the objectives of the Flood Control Act of 1944 are outdated. He said it is clear that flood control; municipal, rural, and industrial water supply projects; and water for energy generation is still necessary. However, he said, navigation should not have the priority it does under the Flood Control Act of 1944 based on current economic benefits.

Chairman Flakoll recognized Mr. Mike McEnroe, North Dakota Chapter, The Wildlife Society. A copy of Mr. McEnroe's written comments is attached as [Appendix I](#). Mr. McEnroe said the Flood Control Act of 1944 has locked in an outdated river management scheme that is counter to contemporary social, economic, and environmental needs. He said the chapter is urging the committee to request the North Dakota Congressional Delegation to implement the appropriate studies and public hearings to amend the Flood Control Act of 1944. He said these studies and hearings should focus on meeting the contemporary needs of the Missouri River Basin through sustainable management of the Missouri River. He urged the committee members to urge their legislative counterparts in other basin states to take similar action with their congressional delegations.

In response to a question from Representative DeKrey, Mr. Frink said he is not aware of any studies or plans to transfer Missouri River water to the southwest United States.

In response to a question from Representative Pinkerton, Mr. Frink agreed there is very little navigation on the Lower Missouri River. He said the annual tonnage transported between Sioux City and St. Louis is less than one million tons per year.

In response to a further question from Representative Pinkerton concerning water quality in Lake Sakakawea, Mr. Frink said the quality of water in Lake Sakakawea is still very good and suitable for the Northwest Area Water Supply Project even given low water conditions.

Chairman Flakoll recognized Mr. McEnroe. Mr. McEnroe said the United States Army Corps of Engineers is doing exactly what Congress directed it to do in the Flood Control Act of 1944. He said the state cannot expect the corps to change its management of Lake Sakakawea and the Missouri River Basin until Congress changes its directive by amending or reforming the Flood Control Act of 1944.

Chairman Flakoll distributed a letter from former Governor William L. Guy concerning management of the Missouri River system, a copy of which is attached as [Appendix J](#).

### **RED RIVER VALLEY WATER SUPPLY PROJECT BONDS**

Chairman Flakoll recognized Mr. Frink. A copy of Mr. Frink's comments concerning authorization of the State Water Commission to issue bonds for the Red River Valley Water Supply Project is attached as [Appendix K](#). Mr. Frink said the State Water Commission does not intend to issue bonds for this project during this biennium. However, he said, the commission's bond counsel has determined that there likely will be a need for some legislative language changes before these bonds may be issued.

In response to a question from Representative Nottestad, Mr. Frink said the concern of the bond counsel is with using tobacco money for bond repayments in light of declining tobacco settlement payments as a result of declining tobacco consumption.

In response to a question from Senator Fischer, Mr. Frink said in response to the United States Fish and Wildlife Service's biological opinion calling for a spring pulse, the corps is attempting to mimic the natural hydrograph of the river where there are increased flows in the spring. He said the state of Missouri is opposed to this management technique because it believes the spring pulse will flood downstream farmers and overtop dikes in Missouri. He said North Dakota does not necessarily agree with the spring pulse either because the state would rather see the water conserved in Lakes Sakakawea and Oahe, but the state and the corps must comply with the Endangered Species Act.

### **DRAINAGE STUDY**

Chairman Flakoll recognized Mr. William Schuh, Water Appropriation Division, State Water Commission. Mr. Schuh presented a progress report on the commission's assessment of the impact of tile drainage on the beneficial use of water by prior water appropriators. A copy of his comments is attached as [Appendix L](#). He said the study is on track for its completion date.

In response to a question from Representative Nottestad, Mr. Schuh said the study will not include the impact of tile drainage on downstream landowners.

In response to a question from Senator Flakoll, Mr. Schuh said there are currently no impediments to conducting the study. However, he said, one potential impediment is obtaining information from the drainage industry as the industry may not wish to provide certain information concerning its clients.

In response to a further question from Senator Flakoll, Mr. Schuh said the State Water Commission is not considering any rule change as a result of

preliminary information gathered in conducting the tile drainage study.

### **RED RIVER BASIN MAPPING INITIATIVE**

Chairman Flakoll recognized Mr. Chuck Fritz, Director, Red River Basin Institute, Fargo. Mr. Fritz discussed the Red River Basin Mapping Initiative. A copy of Mr. Fritz's PowerPoint presentation and information concerning the Red River Basin Mapping Initiative is attached as [Appendix M](#). He said the objectives of the project are to collect high-resolution elevation data, to establish third-party quality assurance and quality control, to establish a web-based public data archival and dissemination vehicle, and, to promote public outreach. He said the benefits of the project include benefits to agriculture and precision farming, water resource management and decisionmaking, utilities management, pre-D modeling, civil works planning and development, conflict resolution, resource monitoring and assessment, and problem identification.

In response to a question from Senator Fischer, Mr. Fritz said the initial mapping was scheduled to begin this fall but has been pushed back to next spring.

In response to a further question from Senator Fischer, Mr. Fritz said the two major challenges for the program are coordination of the funding partners and the securing of a nonfederal match from local project sponsors.

In response to a question from Senator Flakoll, Mr. Fritz said the surveys are conducted at night and in the spring and fall when there is no vegetation or snow to ensure accuracy of the mapping. He said the goal is a seamless basinwide elevation model and even though the surveys will be taken at different seasons and different years, the model should be seamless.

### **RED RIVER VALLEY WATER SUPPLY PROJECT**

Chairman Flakoll recognized Mr. Dave Koland, General Manager, Garrison Diversion Conservancy District, Carrington, who discussed the Red River Valley Water Supply Project. A copy of Mr. Koland's written comments is attached as [Appendix N](#), a copy of the slides used in his PowerPoint presentation is attached as [Appendix O](#), a copy of a brochure on the Red River Valley Water Supply Project is attached as [Appendix P](#), and a copy of a brochure relating to the Lake Agassiz Water Authority is attached as [Appendix Q](#). Mr. Koland also distributed a copy of the 2006 Garrison Diversion Annual Report, a copy of which is on file in the Legislative Council office.

Mr. Koland said the Red River Valley Water Supply Project was authorized by the Dakota Water Resources Act. He said that Act mandated an environmental impact statement with joint leadership between the federal government and the state of North Dakota. Concerning the current status of the

project, he said, the final needs and options report was released in November 2005, the draft environmental impact statement was released in December 2005, the supplemental draft environmental impact statement was released on January 31, 2007, and the final environmental impact statement is anticipated to be released yet this fall. He said if a 1930s-type drought hit the Red River Valley today, with current water demands the Red River Valley would be short every year with a greatest monthly shortage of 46 percent. He said the Red River Valley Water Supply Project contemplates a three-pronged solution--a supplemental water supply project, water conservation measures, and drought management plans.

Mr. Koland said the next steps for the Red River Valley Water Supply Project will be completion of the environmental impact statement and record of decision this fall and once that is completed, it will take three years to construct the project.

In response to a question from Representative Pinkerton, Mr. Koland said the cost of constructing a pipeline from the Missouri River to the Red River Valley is approximately \$1.2 billion while the cost of the proposed project to deliver water to Lake Ashtabula is approximately \$700 million. He said it is the least costly alternative that will satisfy the minimum water needs of the Red River Valley.

In response to a question from Senator Lyson, Mr. Koland said water will be delivered to the Red River Valley for three purposes--municipal, industrial, and 20-cubic feet per second for streamflow augmentation in the Sheyenne River.

In response to a question from Senator Fischer, Mr. Koland said that a portion of the 20 cubic feet per second delivered to the Sheyenne River for stream augmentation is a federal responsibility, but the exact amount of the federal reimbursement is subject to negotiation.

### **COMMITTEE DISCUSSION**

In response to a question from Representative DeKrey, committee counsel said hunting rights or access for hunting is a property right that can be

severed from the surface estate. He said research did not reveal any other state that prohibits the severance of hunting rights or hunting access and thus whether prohibition of the right of access is a compensable taking would be a question of first impression in North Dakota. He noted that the state does place some restraints on the transfer of property. For example, he said, the state limits the time period for which easements can be acquired and perpetual easements are prohibited. He said nonprofit corporations are limited in the amount of property they may acquire and that generally corporate farming is prohibited.

Chairman Flakoll recognized Senator Lyson. Senator Lyson said a number of his constituents have a problem with allowing the severance of hunting rights and such agreements should be addressed in a lease rather than in a deed that is recorded.

In response to a question from Representative Aarsvold, committee counsel said that if the hunting right is severed from the surface estate, the hunting right or right of access would be the dominant estate and the landowner could not do anything to thwart the owner of the hunting rights' ability to exercise the owner's rights. However, he said, the person owning the hunting right or access for hunting purposes must still comply with state laws and rules governing the taking of game.

### **STAFF DIRECTIVES**

Representative Pinkerton requested the Legislative Council staff be requested to provide information on the increased cost of electricity to North Dakota consumers as a result of the United States Army Corps of Engineers' management of the Missouri River main stem system.

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

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Jeffrey N. Nelson  
Committee Counsel

ATTACH:17