NORTH DAKOTA LEGISLATIVE MANAGEMENT

Minutes of the

WATER-RELATED TOPICS OVERVIEW COMMITTEE

Monday, March 15, 2010
Roughrider Room, State Capitol
Bismarck, North Dakota

Senator Tom Fischer, Chairman, called the meeting to order at 9:00 a.m.

Members present: Senators Tom Fischer, Joan Heckaman, Gary A. Lee; Representatives Duane DeKrey, Curt Hofstad, Jon Nelson, Darrell D. Nottestad

Members absent: Senator Arden C. Anderson; Representative Rick Berg

Others present: See Appendix A

It was moved by Representative DeKrey, seconded by Representative Hofstad, and carried on a voice vote that the minutes of the December 9, 2009, meeting be approved as distributed.

STATE WATER COMMISSION

Chairman Fischer recognized Mr. Dale Frink, State Engineer, State Water Commission. Mr. Frink discussed sovereign lands and distributed a graph and definition (Appendix B) of the roll of the ordinary high watermark in the determination of sovereign lands. In 1989, he said, the Legislative Assembly transferred authority to manage sovereign lands from the Land Department to the State Engineer. In 2005, he said, the Attorney General issued an opinion that the State Engineer has authority to issue sovereign land permits provided the State Engineer has a comprehensive land use policy. Based upon this opinion, he said, the office of the State Engineer developed the *North Dakota Sovereign Land Management Plan* and *Sovereign Land Management Statutes and Rules*. He said the plan was published in January 2007. To be navigable, he said, a stream must have been susceptible to navigation at statehood. He said commercial navigation can be shown from historical records as well as by judicial determination. He said the extent of sovereign lands is based upon the ordinary high watermark from one side of the stream to the other side of the stream or around a lake. He said North Dakota Administrative Code Section 89-10-01-03 defines ordinary high watermark as that "line below which the action of the water is frequent enough either to prevent the growth of vegetation or to restrict its growth to predominately wetland species. Islands in navigable streams and waters are considered to be below the ordinary high watermark in their entirety." He said the State Engineer has not pressed for determinations of navigability on meandered lakes based upon the theory that people would have traveled around the lake rather than across the lake even if the lake would have been susceptible to commercial navigation. He said this issue is important in areas of the state where oil and gas exploration is occurring.

In response to a question from Representative Hofstad, Mr. Frink said if a stream or lake is not navigable, the riparian landowners own the stream to the center or the lake to the center. However, he said, if the stream or lake is navigable, then the state owns the bed of the stream or lake. As the lake recedes or expands, he said, the boundary between the state-owned land and the riparian landowner moves. However, he said, lakes are treated differently from rivers because an increase or decrease in a lake level is more permanent while a river that temporarily overflows its banks does not change the ordinary high watermark of the river and expand the bed of the river to which the state would claim ownership.

In response to a further question from Representative Hofstad, Mr. Frink said a lake that expands to such an extent that it entirely floods a former riparian landowner and creates a new riparian landowner raises the question of who owns the land once the lake recedes. He said the better view is that as the lake recedes the former riparian landowner can reclaim the landowner's land. He said this is the reason that some landowners prefer to continue paying property taxes at a reduced rate on inundated lands. He said this would give the landowner evidence of ownership in any subsequent legal action.

Chairman Fischer recognized Mr. John Paczkowski, Director, Regulatory Division, State Water Commission. Mr. Paczkowski distributed a copy of the *North Dakota Sovereign Land Management Plan* (Appendix C) and the *Sovereign Land Management Statutes and Rules* (Appendix D). He said the State Engineer's office does not have enforcement capabilities; thus, the agency has entered a memorandum of understanding with the Game and Fish Department to provide enforcement on sovereign lands.

Chairman Fischer recognized Mr. Dave Laschkewitsch, Director, Administrative Services Division, State Water Commission. Mr. Laschkewitsch discussed the State Water Commission budget and distributed a cost center summary for the 2009-11 biennium for the State Water Commission (Appendix E), an analysis of the resources trust fund for the 2009-11 biennium

(Appendix F), an analysis of the project/grants/ contract fund for the 2009-11 biennium (Appendix G), and a list of State Water Commission anticipated projects for the 2009-11 biennium (Appendix H).

In response to a question from Senator Fischer, Mr. Dave Koland, Manager, Garrison Diversion Conservancy District, Carrington, said the conservancy district would report on the status of municipal, rural, and industrial water supply projects at a future meeting.

In response to a question from Representative Nelson, Mr. Laschkewitsch said the State Water Commission will report on the Northwest Area Water Supply Project injunction, as well as progress on the project throughout the interim.

In response to a question from Senator Fischer, Mr. Jack Olin, commissioner, State Water Commission, Dickinson, said water commissioners are fully informed concerning the State Water Commission budget and projects and are receiving an increasing amount of information from State Water Commission staff.

In response to a question from Representative Hofstad, Mr. Olin said Mr. Maurice Foley is also a member of the board of directors of the North Dakota Water Coalition.

DEVILS LAKE ISSUES

Chairman Fischer recognized Mr. Todd Sando, Assistant State Engineer and Director, Water Development Division, State Water Commission. Mr. Sando discussed Devils Lake flooding issues. He said the National Weather Service issued a revised flood forecast on March 5, 2010. He said the revised forecast indicates there is a 50 percent probability that Devils Lake will reach a level of 1,452.8 feet mean sea level this summer. He said the current level of Devils Lake is 1,450.19 feet mean sea level. He said there is a 90 percent chance the lake will reach 1,452 feet mean sea level and a 10 percent chance the lake will reach 1,454.2 feet mean sea level. He said if the lake reaches 1,452.8 feet mean sea level, the lake will flood an additional 27,000 acres. He said if the 10 percent forecast occurs, the lake will flood an additional 43,000 acres. At the 90 percent probability level, he said, the lake will flood an additional 20,000 acres. Since 1993, he said, the lake has increased from approximately 44,000 acres to approximately 160,000 acres in size. He said the storage of water in the lake has increased from approximately 600,000 acre-feet to approximately 3.3 million acre-feet. He said there are only approximately 1.6 million acre-feet of storage left in Devils Lake, and at the rate water is expected to flow into the lake there is a 10 percent possibility of an overflow from Devils Lake into the Sheyenne River. He said the State Water Commission is in the process of upgrading the Devils Lake Outlet from a capacity of 100 cubic-feet per second to 250 cubic-feet per second. He said the goal is to have the enhanced outlet operational by June 1, 2010.

In response to a question from Representative Nottestad, Mr. Sando said the city of Minnewaukan has three options to deal with Devils Lake. He said the city could explore a buyout similar to that done at Churchs Ferry, construct levies similar to those at Devils Lake, or explore moving the city westward.

In response to a question from Senator Fischer, Mr. Sando said it is essential that as much water be removed from Devils Lake via the outlet as possible. He said the water must come from the west end of Devils Lake to satisfy water quality concerns.

In response to a question from Representative Nelson, Mr. Sando said the State Water Commission would provide information on water treatment options for Devils Lake water passing through the outlet to the Sheyenne River at a future meeting.

GENERAL WATER ISSUES

Chairman Fischer recognized Ms. Jean Schafer, North Dakota Water Coalition. Ms. Schafer distributed a tentative schedule of North Dakota Water Education Foundation summer water tours (Appendix I).

Chairman Fischer recognized Representative DeKrey. Representative DeKrey requested that representatives of the Garrison Diversion Conservancy District report on progress of the Red River Valley Water Supply Project at a future meeting and that representatives of the North Dakota Rural Water Systems Association report on the comprehensive state plan and cost of providing water to areas of the state not served by municipal water systems.

In response to a question from Senator Fischer concerning the Northwest Area Water Supply Project, Mr. Frink said the federal court declined to lift the existing injunction on the project. However, he reminded the committee that the state may still proceed with design and construction activities that do not affect treatment decisions.

Chairman Fischer recognized Mr. Ben Varnson, Nelson County Water Resource District, Lakota. Mr. Varnson distributed a letter (Appendix J) from the Nelson County Water Resource District Board to Mr. Dale Frink concerning the preliminary estimate of the cost of the Michigan Spillway/enterprise project. He said the Nelson County Water Resource District has received a preliminary estimate that the cost of the project is $2,250,000.

No further business appearing, Chairman Fischer adjourned the meeting at 2:00 p.m.

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Jeffrey N. Nelson
Committee Counsel

ATTACH:10