

Sixty-sixth
Legislative Assembly
of North Dakota

HOUSE BILL NO. 1320

Introduced by

Representatives Pollert, Headland

Senators G. Lee, Wanzek

A BILL for an Act to create and enact a new section to chapter 61-33 of the North Dakota Century Code, relating to determinations of navigability; to amend and reenact section 40-33-16, subsections 11 and 27 of section 61-24-08, section 61-33-01, subdivision e of subsection 3 of section 61-33.1-03, and subsection 8 of section 61-39-05 of the North Dakota Century Code, relating to sovereign land management definitions and Red River valley water supply project contract terms and elimination of voter approval requirements; and to provide for a state engineer review of determinations of navigability.

BE IT ENACTED BY THE LEGISLATIVE ASSEMBLY OF NORTH DAKOTA:

SECTION 1. AMENDMENT. Section 40-33-16 of the North Dakota Century Code is amended and reenacted as follows:

40-33-16. Municipality may purchase water for distribution.

1. Any city owning a system for the distribution of water for fire protection and other public purposes and for selling water to its inhabitants and industries, but for which the water supply is unsuitable or inadequate, may contract to purchase water at wholesale for ~~such~~those purposes from any person, firm, public or private corporation, or limited liability company able and willing to furnish the same, upon ~~such~~the terms and during ~~such~~the period, not exceeding forty years, as the city governing body ~~shall~~ deem deems appropriate. ~~Any such~~The contract ~~shall~~must be authorized by an ordinance submitted to the voters for approval by a majority of those voting on the proposition before it takes effect. ~~In and by such~~Pursuant to the ordinance and contract, the city may bind itself:

~~4.~~ a. To establish and maintain rates and charges for supplying water by it to its inhabitants and industries, either according to a prescribed schedule agreed upon or sufficient to produce net stated amounts for specified periods during the

1 life of the contract, or both, and to appropriate and use the same for payments to
2 become due under the contract, and, if the contract so provides, the city shall
3 be ~~is~~ obligated to pay for ~~such~~the water solely out of ~~such~~the net revenues;

4 2. b. To pay, at an agreed rate or rates, for all water taken by the city under ~~such~~the
5 contract and not resold by it; and

6 3. c. To do and perform any other acts or things ~~which, in the discretion of the~~
7 governing body, ~~are deemed~~ deems reasonable and appropriate for the
8 procurement of ~~such~~the water on the most efficient and economical basis.

9 2. Notwithstanding subsection 1, contracts to purchase water from the water supply
10 system created by the Red River valley water supply project may have a term
11 exceeding forty years and, if executed in relation to the initial construction of the
12 system, need not be submitted to the voters for approval.

13 3. If any payments under any contract are to be made solely out of net revenues, the
14 contract may fix and prescribe the method or basis on which net revenues are to be
15 computed.

16 **SECTION 2. AMENDMENT.** Subsection 11 of section 61-24-08 of the North Dakota Century
17 Code is amended and reenacted as follows:

18 11. To operate and maintain or to contract for the operation and maintenance of water
19 supply and irrigation works serving lands and uses within or outside the district, and in
20 connection therewith, to maintain a reserve fund to meet major unforeseen costs of
21 operation and maintenance. The acquisition, construction, operation, and maintenance
22 of dams, reservoirs, ground water storage areas, canals, conduits, pipelines, tunnels,
23 and any other plants, works, facilities, improvements, or property necessary to operate
24 or maintain water supply or irrigation works under this section are exempt from any
25 requirements for voter approval.

26 **SECTION 3. AMENDMENT.** Subsection 27 of section 61-24-08 of the North Dakota
27 Century Code is amended and reenacted as follows:

28 27. To enter water service contracts with municipalities, water districts, or other political
29 subdivisions in this state and public utilities in Minnesota as part of the Red River
30 valley water supply project, regardless of whether the acquisition, construction, or
31 reconstruction of any Red River valley water supply project is actually completed and

whether water actually is delivered under the contracts. These contracts with cities and water districts are authorized to be executed without limitation on term of years ~~notwithstanding any limitation to the contrary~~and, if the contracts are executed in relation to the initial construction of the system, without voter approval.

SECTION 4. AMENDMENT. Section 61-33-01 of the North Dakota Century Code is amended and reenacted as follows:

61-33-01. Definitions.

As used in this chapter, unless the context otherwise requires:

1. "Board" means the sovereign lands advisory board.
2. "Board of university and school lands" means that entity created by section 15-01-01.
3. "Navigable waters" means waters that were in fact navigable at the time of statehood, and that are used, were used, or were susceptible of being used in their ordinary condition as highways for commerce over which trade and travel were or may have been conducted in the customary modes of trade on water.
4. "Sovereign lands" means those areas, including beds and islands, lying within the ordinary high water mark of navigable lakes and streams. Lands established to be riparian accretion or reliction lands pursuant to section 47-06-05 are considered to be above the ordinary high water mark and are not sovereign lands.
- 4.5. "State engineer" means the person appointed by the state water commission pursuant to section 61-03-01.

SECTION 5. A new section to chapter 61-33 of the North Dakota Century Code is created and enacted as follows:

Navigability determinations.

1. Before making a determination that a body of water or portion of a body of water is navigable, the state engineer shall:
 - a. Develop and deliver to the state water commission a preliminary finding regarding the navigability of the body of water or portion of a body of water and the legal rationale for the preliminary finding; and
 - b. Consult with the state water commission in an open meeting and demonstrate the public need and purpose for the determination to be made.

- 1 2. After completing the requirements of subsection 1, the state engineer may proceed
2 with making a final determination of navigability by:
- 3 a. Providing reasonable public notice of the preliminary finding, legal rationale for
4 the preliminary finding, and opportunity for the public to provide comments for no
5 less than sixty days. The notice must:
- 6 (1) Include the address and electronic mail address to which public comments
7 may be sent and the deadline by which public comments must be received;
8 (2) Clearly identify the specific body of water or portion of a body of water for
9 which the finding of navigability is sought;
10 (3) State the state engineer will hold a public hearing regarding the preliminary
11 finding before a final determination of navigability is made, and provide the
12 date, time, and location of the public hearing;
13 (4) Be provided to the governing body of each soil conservation district, water
14 resource district, and county adjacent to the body of water or portion of a
15 body of water for which the preliminary finding was made;
16 (5) Be published in the official county newspaper for each county adjacent to
17 the body of water or portion of a body of water for which the preliminary
18 finding was made; and
19 (6) Briefly state the purpose of the hearing and describe the impact or effect a
20 determination of navigability will have on the property rights of persons who
21 own property adjacent to the body of water or portion of a body of water for
22 which the determination of navigability may be made; and
- 23 b. Holding a public hearing regarding the preliminary finding.
- 24 3. After completing the requirements of subsection 2 and making a determination of
25 navigability, the state engineer shall prepare a report regarding the determination,
26 including summaries of the information provided to the state water commission, the
27 public hearings held, and the public comments received. The state engineer shall
28 provide the report to the state water commission, send the report by certified mail to
29 any person that appeared at the public hearing required under subsection 2 or
30 provided written comments by the deadline, make the report available to the public,
31 including on the website for the office of the secretary of state, and provide public

notice of the report's availability. The report is final on the date it is provided to the state water commission.

4. A determination of navigability may be appealed directly to a court of competent jurisdiction in accordance with sections 28-32-42 through 28-32-46 and sections 28-32-50 and 28-32-51.

SECTION 6. AMENDMENT. Subdivision e of subsection 3 of section 61-33.1-03 of the North Dakota Century Code is amended and reenacted as follows:

e. ~~Subsection 3 of section~~ Section 61-33-01 and section 47-06-05, which provide all accretions are presumed to be above the ordinary high water mark and are not sovereign lands. Accreted lands may be determined to be within the ordinary high water mark of the historical Missouri riverbed channel based on clear and convincing evidence. Areas of low-lying and flat lands where the ordinary high water mark may be impracticable to determine due to inconclusive aerial photography or inconclusive vegetation analysis must be presumed to be above the ordinary high water mark and owned by the riparian landowner.

SECTION 7. AMENDMENT. Subsection 8 of section 61-39-05 of the North Dakota Century Code is amended and reenacted as follows:

8. ~~Enter a contract or contracts to provide for a supply of bulk water from the Garrison Diversion Conservancy District which contract or contracts may provide for payments to fund some or all of the Garrison Diversion Conservancy District's costs of acquiring, designing, constructing, or reconstructing one or more features of a Red River valley water supply project, which project the that the Garrison Diversion Conservancy District may acquire, design, construct, improve, and own, as well as the Garrison Diversion Conservancy District's costs of operating and maintaining one or more Red River valley water supply projects, whether the acquisition, construction, or reconstruction of any Red River valley water supply project actually is completed and whether water actually is delivered pursuant to the contract or contracts, and which contract or contracts the Garrison Diversion Conservancy District may execute.~~
Contracts executed under this subsection may be executed without limitation on the term of years and, if executed in relation to the initial construction of the system, need not be submitted to the voters for approval.

SECTION 8. REVIEWS OF NAVIGABILITY DETERMINATIONS DURING 2019-20

INTERIM. During the 2019-20 interim, the state engineer may review any determinations of navigability of a body of water or portion of a body of water made solely by the state engineer before the effective date of this Act. However, if a court of competent jurisdiction has determined a body of water or portion of a body of water is navigable or non-navigable, the state engineer does not need to review any state agency determination regarding the body of water or portion of a body of water. If the state engineer elects not to review any determinations of navigability of a body of water or portion of a body of water made solely by the state engineer before the effective date of this Act during the 2019-20 interim, those determinations must be vacated without prejudice to a subsequent determination of navigability under section 5 of this Act. In conducting the reviews under this section, the state engineer shall comply with the requirements in section 5 of this Act.