NATURAL RESOURCES COMMITTEE

The Natural Resources Committee was assigned three studies. Section 2 of House Bill No. 1146 (2007) directed a study of issues related to the severance of hunting access from the surface estate. House Concurrent Resolution No. 3026 (2007) directed a study of the feasibility and desirability of establishing legislation for the enforcement and assessment of civil penalties for violation of the one-call excavation notice system. House Concurrent Resolution No. 3044 (2007) directed a study of how the state might pursue additional uses of Lake Sakakawea and Missouri River waters for such beneficial purposes as domestic and industrial uses, recreation, fish and wildlife, and irrigation, and how the state, to enhance its use of the lake and river, might promote congressional review of the 1944 Flood Control Act and a reexamination by the Corps of Engineers of the way in which it manages the Missouri River system.

The Legislative Council also assigned to the committee responsibility for overview of the Garrison Diversion Project and related matters and any necessary discussions with adjacent states on water-related topics, to receive a report from the Game and Fish Department by July 1, 2008, regarding the department's findings and recommendations resulting from its study of hunter safety education requirements and hunter safety for all ages of hunters, and to receive a report from the State Water Commission by July 1, 2008, regarding the commission's findings and recommendations resulting from its assessment of the impact of tile drainage on the beneficial use of water by prior water appropriators.

The chairman of the Legislative Council also assigned to the committee responsibility to review State Water Commission operation and procedures; 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 a digital elevation model for the Red River Basin.

Committee members were Senators Tim Flakoll (Chairman), Arden C. Anderson, Tom Fischer, Joel C. Heitkamp, and Stanley W. Lyson and Representatives Ole Aarsvold, Chuck Damschen, Duane L. DeKrey, Donald D. Dietrich, C. B. Haas, Lyle Hanson, Brenda Heller, Darrell D. Nottestad, Louis Pinkerton, and Todd Porter.

The committee submitted this report to the Legislative Council at the biennial meeting of the Council in November 2008. The Council accepted the report for submission to the 61st Legislative Assembly.

SEVERANCE OF HUNTING ACCESS FROM SURFACE ESTATE STUDY

Background

North Dakota Century Code (NDCC) Section 47-05-17--Section 1 of House Bill No. 1146--prohibits severance of the right of access for hunting access. This section provides that the right of access to land to shoot, shoot at, pursue, take, attempt to take, or kill any game animals or game birds; search for or attempt to locate or flush any game animals and game birds; lure, call, or attempt to attract game animals or game birds; hide for the purpose of taking or attempting to take game animals or game birds; and walk, crawl, or advance toward wildlife while possessing implements or equipment useful in the taking of game animals or game birds may not be severed from the surface estate. The prohibition does not apply to deeds, instruments, or interests in property recorded before the effective date of the Act (August 1, 2007). Section 2 directed a study of issues related to the severance of hunting access from the surface estate. Section 3 provided an effective date through July 31, 2009, and after that date the Act is ineffective. The legislative history reflects the concern of the Legislative Assembly with the severance of hunting rights.

Generally, property may be viewed as a bundle of sticks with each stick in the bundle representing a separate property interest. If one owns all the sticks or interests in a piece of property and, thus, all of the interests in that piece of property, that person is said to own the property in fee simple absolute. The terms "fee simple" and "fee" are synonymous with fee simple absolute, the largest quantum of interest that a landowner can possess. There are two other kinds of fees simple--the fee simple determinable and the fee simple subject to a condition subsequent. These are defeasible fees or determinable fees and also are referred to as base or qualified fees. Another type of property interest is the life estate. Life estates are generally measured or operative during a lifetime.

The right of fishing and taking game or hunting is an interest in property or one of the sticks that comprises a property interest. This right may be severed from the remaining interests or sticks comprising a property interest and is transferable. North Dakota Century Code Section 47-05-17, however, prohibits the severance of the right of access for hunting access from August 1, 2007, until July 31, 2009.

Research has not revealed any other state that has enacted a similar provision prohibiting or restricting the severance of the right of access for hunting access.

In an attempt to determine the extent of the practice of severing the right of access for hunting access from the surface estate, the Legislative Council staff conducted a survey of the state's county recorders. Twenty-two of the 53 county recorders responded--Adams, Barnes, Burke, Burleigh, Cass, Dickey, Divide, Grant, Kidder, McHenry, McIntosh, McKenzie, McLean, Nelson, Oliver, Ramsey, Renville, Slope, Stark, Towner, Walsh, and Wells Counties. The county recorders of Adams, Barnes, Burke, Dickey, Divide, Grant, McIntosh, McKenzie, Oliver, Ramsey, Slope, Stark, Towner, Walsh, and Wells Counties reported that to the best of their knowledge they had not recorded any documents severing the right of access for hunting access. The remaining seven counties that responded reported that

they had each recorded one or several but not a great number of documents severing the right of access for hunting access.

Testimony and Committee Activities

Representatives of the Game and Fish Department testified that the department will spend approximately $12 million this biennium in securing access for hunters in North Dakota. 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. A question concerning NDCC Section 47-05-17, however, is 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.

The committee considered a bill draft to remove the July 31, 2009, expiration date from NDCC Section 47-05-17, in effect making the prohibition on the severance of the right of access for hunting access permanent. The committee received testimony from representatives of the North Dakota Stockmen's Association that the 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 severs those rights from the surface of the land. Representatives of the North Dakota Farmer's Union also testified in support of the bill draft.

Representatives of the Game and Fish Department testified that if NDCC Section 47-05-17 is made 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. The committee received testimony from a landowner that the bill draft relating to severance of the right of access for hunting access from the surface estate infringes on the rights of private property owners and Section 47-05-17 should be allowed to expire.

Recommendation

The committee recommends House Bill No. 1045 to remove the July 31, 2009, expiration date from NDCC Section 47-05-17 and to provide that the prohibition on the severance of the right of access for hunting access does not apply to the private land habitat and access improvement program under NDCC Title 20.1.

ONE-CALL EXCAVATION NOTICE SYSTEM CIVIL PENALTY STUDY

Background

House Concurrent Resolution No. 3026 directed a study of the feasibility and desirability of establishing legislation for the enforcement and assessment of civil penalties for violation of the one-call excavation notice system. Proponents of the study noted that the provisions of the North Dakota one-call excavation notice system do not include a civil process for the enforcement of the one-call excavation notice system or for any civil penalty assessment for violation of the system. Proponents of the study noted that stakeholders had been working on a bill to provide for a civil process for enforcement and provisions for the assessment of a civil penalty to present to the 60th Legislative Assembly. However, complications arose from not being able to determine how to carry out a penalty phase and what entity would be responsible for administering a penalty provision. Representatives of North Dakota One Call testified that it has been studying penalties and enforcement provisions specific to the one-call excavation notice system because the Public Service Commission has encouraged North Dakota One Call to initiate enforcement legislation and the Public Service Commission suffers federal grant fund reductions due to the absence of state one-call enforcement provisions; Northern Border Pipeline and Alliance Pipeline have requested such legislation in response to "near miss" excavations adjacent to their buried facilities; and recently enacted federal legislation includes language encouraging state one-call systems to provide enforcement of their statutes to protect pipelines and other utilities.

North Dakota One-Call Excavation Notice System

The North Dakota one-call excavation notice system is governed by NDCC Chapter 49-23. The notification center is governed by a nonprofit corporation. Section 49-23-04 provides that, except in an emergency, an excavator must contact the notification center and provide an excavation or location notice at least 48 hours before beginning any excavation, excluding Saturdays, Sundays, and holidays, unless otherwise agreed between the excavator and operator. The notification center is required to provide a toll-free telephone number, assign an inquiry identification number to each excavation notice, and retain a record of all excavation notices received for at least six years. The notification center is required to immediately transmit the information contained in an excavation notice to every operator that has an underground facility in the area of the proposed excavation. The notification center is required to inform persons giving notice of intent to engage in an excavation activity the names of participating operators of underground facilities to whom the notice will be given and to establish procedures for assuring positive response from the affected operator and all emergency excavation notices. An operator, within 48 hours or any extension of that period, after receiving excavation notice from the center, excluding Saturdays, Sundays, and holidays, unless otherwise agreed between the excavator and operator, is required to locate and mark or otherwise provide the approximate horizontal location of the underground facilities of the operator.

As used in NDCC Chapter 49-23, "excavator" means a person who conducts excavation, and "operator" means a person who owns or operates an underground facility, including a master meter operator with underground facilities or a state or local governmental entity. An underground facility is an underground line, facility, system, and its appurtenances used to produce, store, convey, transmit, or distribute communications, data, electricity, power, television signals, heat, gas, oil,

petroleum products, water, steam, sewage, hazardous liquids, and other similar substances. Privately owned and operated underground facilities that do not extend beyond the boundary of the private property are excluded from the definition of underground facility.

North Dakota Century Code Section 49-23-06 contains a penalty for damage to facilities. If any damage occurs to an underground facility or its protective covering, the excavator is to notify the operator as soon as reasonably possible. When the operator receives a damage notice, the operator is to dispatch, as soon as reasonably possible, personnel to the damaged area to investigate. If the damage endangers life, health, or property, the excavator responsible for the work is to take immediate action to protect the public and property and to minimize the hazard until arrival of the operator's personnel or until emergency responders have arrived and taken charge of the damaged area. This section requires the excavator to delay backfilling in the immediate area of the damaged underground facilities until the damage has been investigated by the operator, unless the operator authorizes otherwise. Repair of damage must be performed by the operator or by qualified personnel authorized by the operator. An excavator who knowingly damages an underground facility and who does not notify the operator as soon as reasonably possible or who backfills in violation of this section is guilty of a Class A misdemeanor. If an excavator fails to comply with Chapter 49-23 or damages an underground facility, the excavator is liable for all damages caused by the failure to comply with the chapter and for all damages to the facilities and must reimburse the operator for the cost of repair and restoration, loss of product, and interruption of service occurring because of the damage or injury to the facilities, together with reasonable costs and expenses of suit, including reasonable attorney's fees. Reimbursement to the operator is not required if the damage to the underground facility was caused by the sole negligence of the operator or the operator failed to comply with the relevant provisions of Chapter 49-23.

South Dakota

The South Dakota Statewide One-Call Notification Board is an agency of state government administered by the South Dakota Public Utilities Commission and funded solely by revenue generated by the one-call notification center. South Dakota Codified Laws Sections 49-7A-18 and 49-7A-19 contain penalties for violating the relevant provisions of the South Dakota one-call excavation notice system. Except for penalties for intentional violations and in addition to all other penalties provided by law, a person who violates or who procures, aids, or abets in the violation of the relevant sections of the South Dakota one-call excavation notice system or any rules adopted pursuant to these sections may be assessed a penalty of up to $1,000 for the first violation and up to $5,000 for a subsequent violation that occurs within 12 months of the initial violation. An intentional violation is subject to a penalty of up to $5,000 for the first violation and up to $10,000 for each subsequent violation that occurs within 12 months of the initial violation. If the penalty is not paid to the One-Call Notification Board, the Public Utilities Commission, at the request of the board, is required to bring an action in the name of the state to recover the penalty.

Minnesota

The Minnesota one-call excavation notice system is governed by Minnesota Statutes Chapter 216D. The Minnesota Notification Center is governed by a nonprofit corporation approved in writing by the Commissioner of Public Safety. Section 216D.08 provides a civil penalty for violation of the chapter. A person that is engaged in excavation for remuneration or an operator that violates the relevant sections of Chapter 216D is subject to a civil penalty to be imposed by the Commissioner of Public Safety not to exceed $1,000 for each violation per day of violation. The commissioner may negotiate a compromise settlement of a civil penalty. In determining the amount of the penalty, or the amount of the compromise settlement, the commissioner is required to consider the appropriateness of the penalty to the size of the business of the person charged, the gravity of the violation, and the good faith of the person charged in attempting to achieve compliance after notification of a violation. The penalty is subject to judicial review. Penalties collected are deposited in the state treasury and credited to the pipeline safety account to be applied to the reduction of expenses or costs assessed by the commissioner against persons regulated under the system. Penalties collected are appropriated annually to the Commissioner of Public Safety.

The Commissioner of Public Safety is authorized to adopt rules establishing reasonable guidelines for imposing penalties. The rules must provide for notice that a penalty is assessed and may exempt activities from penalties unless the excavator or operator has evidence of a course of action in disregard of the chapter. State district courts have jurisdiction to restrain violations of Minnesota Statutes Chapter 216D on petition by the Attorney General on behalf of the state of Minnesota.

The Commissioner of Public Safety has adopted rules for the assessment of civil penalties and maximum penalties. Subpart 3 of Section 7560.0800 of the Minnesota Code of Agency Rules provides that in assessing a civil penalty the Office of Pipeline Safety of the Department of Public Safety must consider the nature, circumstances, and gravity of the violation; the degree of the person's culpability; the person's history of previous offenses; the person's ability to pay; good faith on the part of the person in attempting to remedy the cause of the violation; the effect of the penalty on the person's ability to continue in business; and past reports of damage to an underground facility by a person. Concerning maximum penalties, penalties imposed against excavators may not exceed $1,000 for each violation per day of violation. However, penalties imposed against an operator that engages in the transportation of gas or hazardous liquids or that owns or operates a gas or hazardous liquid pipeline facility may not exceed $10,000 for each violation for each day that the violation persists, except that the maximum civil

penalty may not exceed $500,000 for a related series of violations.

Montana

Excavations near underground facilities in Montana are governed by Montana Code Annotated Section 69-4-501 et seq. If an underground facility is damaged by an excavator that has failed to obtain information as to its location, the excavator is liable to the owner of the underground facility for the entire cost of the repair of the facility. The excavator also is liable to the underground facility owner that is a member of a one-call notification center for a damage fee. The damage fee is 25 percent of the total cost of repairing the underground facility not to exceed $125 for the first incident, 50 percent of the total cost of repairing the underground facility not to exceed $500 for the second incident, and $1,000 for the third and any subsequent incident. An underground facility owner may levy only one fee for each incident. If there is more than one underground facility affected by an incident, then each underground facility owner that is a member of a one-call notification center may levy one damage fee for that incident. The underground facility owner may enforce collection in a court of competent jurisdiction. An excavator subject to repair charges and damage fees may have those costs reviewed by a court of competent jurisdiction.

Testimony and Committee Activities

Representatives of North Dakota One Call testified that 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 a person who damages an underground facility is responsible for the repair of the facility and is liable for any lost product as a result of the damage. Representatives of North Dakota One Call said the board is interested in having a civil penalty placed in North Dakota law for a variety of reasons. First, the absence of a civil penalty in North Dakota's law limits the amount of grant funding available to the Public Service Commission from the federal Office of Pipeline Safety. Second, enforcement legislation would motivate operators, excavators, and underground facility owners to comply with the notice law. Several stakeholders testified that they believed 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.

Committee Considerations

The committee considered a bill draft that would have made North Dakota One Call a state agency funded by revenue generated by the One-Call Excavation Notice Center. Under the bill draft, in addition to any other penalty provided by law, an excavator that violated or procured, aided, or abetted in the violation of NDCC Chapter 49-23 or any rule adopted to implement the chapter would have been subject to a civil penalty of up to $500 for the first violation, up to $1,000 for the second violation, and up to $5,000 for the third and each subsequent violation that occurred within 24 months of the initial violation. An excavator who intentionally violated and intentionally procured, aided, or abetted in the violation of Chapter 49-23 or any rule adopted to implement the chapter would have been subject to a civil penalty of up to $1,000 for the first violation, up to $5,000 for the second violation, and up to $10,000 for the third and each subsequent violation that occurred within 24 months of the initial violation. These penalties would have been construed as civil and not criminal in nature. Complaints would have been brought to the North Dakota One-Call Board for resolution. Upon receipt of a complaint, the chairman of the North Dakota One-Call Board would have been required to appoint a panel consisting of three members or five members of the board for the purpose of determining whether there was probable cause to believe there had been a violation of Chapter 49-23 or a rule adopted to implement that chapter. The board would have been required to deposit all civil penalties collected by the board in a special account that would have been used for educational programs, advertisements, penalty recovery expenses, and damage caused by excavators that were financially unable to pay for the damage caused by their excavation. Actions or proceedings of the board would have been reviewable by the district court for the county in which the property subject to the complaint was located.

The committee also considered a bill draft that would have established a civil penalty, but provided that the penalty would be imposed by the Public Service Commission rather than the North Dakota One-Call Board.

Conclusion

Representatives of the Public Service Commission testified that after thorough review of its existing statutory authority, it determined that the commission already has sufficient authority to enforce the one-call excavation notice system and to assess a civil penalty. Thus, the committee determined, with the concurrence of the Public Service Commission, that legislation is not necessary.

MISSOURI RIVER AND *MASTER MANUAL* REVIEW STUDY

House Concurrent Resolution No. 3044 directed a study of how the state might pursue additional uses of Lake Sakakawea and Missouri River waters for such beneficial purposes as domestic and industrial uses, recreation, fish and wildlife, and irrigation, and how the state, to enhance its use of lake and river, might promote congressional review of the Flood Control Act of 1944 and a reexamination by the Corps of Engineers of the way in which it manages the Missouri River system. The resolution notes that a significant natural resource issue for the state, as well as the nation, is management of the Missouri River and Lake Sakakawea and that since enactment of the Flood Control Act of 1944, which governs Missouri River management, numerous economic, environmental, and social changes have occurred in the Missouri River Basin. The resolution

also notes that the United States Army Corps of Engineers' management of the Missouri River system is outdated and restricts the ability of the state and its citizens to use Lake Sakakawea and Missouri River water creatively, judiciously, and consistently with contemporary needs and opportunities.

Missouri River

The Missouri River extends 2,619 miles from its source at Hell Roaring Creek and 2,321 miles from Three Forks, Montana, where the Jefferson, Madison, and Gallatin Rivers converge. The Missouri River is the longest river in the United States, draining one-sixth of the country. The Missouri River system consists of six dams and reservoirs located in Montana, North Dakota, South Dakota, and Nebraska. The Missouri River system has a capacity to store 73.4 million acre-feet of water, which makes it the largest reservoir system in North America. The United States Army Corps of Engineers operates the system to serve the congressionally authorized project purposes of flood control, navigation, irrigation, hydropower, water supply, water quality, recreation, and fish and wildlife. Runoff from above-the-system dams is stored in the six reservoirs where it serves several other project purposes. Water is released from the system as needed for downstream purposes. Released water from the lowest dam in the system--Gavins Point Dam--flows down the lower river, which includes the bank stabilization and navigation project from Sioux City, Iowa, to St. Louis, Missouri.

The State Water Commission issued its most recent state water management plan in 1999. The objectives of the *1999 State Water Management Plan* are to develop a comprehensive vision for water management for the 21st century, to illustrate how North Dakota water resources are managed and the responsibilities associated with that management, and to identify changes that should occur to improve water management. The *1999 State Water Management Plan* has been updated and supplemented by biennial water development reports, the most recent of which was issued in December 2006. The plan notes that nearly 96 percent of North Dakota's surface water is located in the Missouri River and its reservoirs. Lake Sakakawea and Lake Oahe account for approximately 97 percent of all available water storage. The largest use of Missouri River water is for energy production, of which roughly 96 percent is nonconsumptive. The total annual North Dakota consumptive water use from the Missouri River accounts for slightly over 1 percent of the annual flow of the river as it leaves the state.

The *1999 State Water Management Plan* notes that the greatest opportunities for development of Missouri River water are irrigation and municipal, industrial, and rural water supply. Federal support for the development of North Dakota irrigation has declined with the numerous reauthorizations of the Garrison Diversion Project. Originally planned to irrigate 1.2 million acres, the Dakota Water Resources Act of 2000 retains authority for only 73,100 acres of irrigated land.

The *1999 State Water Management Plan* notes that the state has significant potential for new irrigation development in 6.1 million acres of irrigable soils. However, without a supply project, many of these areas do not have an adequate source of water. To date the state, local entities, and private business have provided much of the needed capital and infrastructure requirements in those areas that have been developed. The plan identifies irrigation potential along the banks of Lake Sakakawea and on the Standing Rock and Fort Berthold Indian Reservations. Raw water from the Southwest Pipeline Project could supply a small amount of water for irrigation. The plan notes that each successful irrigation project, in a state ranked last among the 17 western states in terms of full irrigation, would provide economic opportunities. However, an important element to the success of these projects will be access to federal power. Project pumping power, provided through the original Pick-Sloan Missouri River Basin Program, is necessary to further ensure the success of future irrigation projects.

The *1999 State Water Management Plan* notes that the need for Missouri River water for municipal, rural, and industrial water purposes has grown since 1980. Much of this growth can be attributed to increases in population in communities along the Missouri River and the development of the Southwest Pipeline Project. The plan notes that with the addition of the Missouri West Water Supply Project and the Northwest Area Water Supply Project, Missouri River water will be supplied to much of western North Dakota and to more than 95,000 people.

Water Project Funding

The *1999 State Water Management Plan* notes that water development in North Dakota will not move forward without adequate fiscal resources to support it. As the cost of new projects increases and the money available at federal and state levels decreases, funding mechanisms for water development must change. The report states that the state must explore future alternatives for funding water development in a fair and equitable manner and consistent with the state's vision of water management.

Federal Funding for Water Development

The federal government provides a number of water-related funds to the state. Most federal funding, measured in total financial commitment available for water development, is allocated through a municipal, rural, and industrial water supply program. Under this program funds are disbursed to the Garrison Diversion Conservancy District and allocated through a joint powers agreement with the State Water Commission.

The United States Army Corps of Engineers and the Natural Resources Conservation Service regularly provide technical and funding assistance to resolve water management issues, such as flood control at Grand Forks and Devils Lake. The United States Geological Survey and Environmental Protection Agency provide important aid in monitoring and research efforts.

With regard to other federal funding, the United States Army Corps of Engineers provides significant assistance to the state for flood control projects. The Environmental Protection Agency, Bureau of Reclamation, United States Geological Survey, and Natural Resources Conservation Service also contribute to the state's water development efforts in many different ways, including studies, project design, and project construction.

State Funding for Water Development

North Dakota funds a majority of its water projects through the State Water Commission. The funding funneled through the commission for water development comes from several sources, including the state's general fund; the Dakota Water Resources Act's municipal, rural, and industrial water supply program; the resources trust fund; and the water development trust fund. In addition to these sources, the commission also is authorized to issue revenue bonds for water projects. The commission also has shared control of the drinking water state revolving loan fund.

Municipal, Rural, and Industrial Water Supply Program

The municipal, rural, and industrial water supply program receives funding through the federal Dakota Water Resources Act, which channels grant funding through the Bureau of Reclamation. Rural development funding through the United States Department of Agriculture has provided the majority of loans to cover the local share of municipal, rural, and industrial water supply projects.

The Garrison Reformulation Act of 1986 authorized a federal municipal, rural, and industrial water supply grant program of $200 million. To date all of that funding has been obligated. Efforts to obtain additional federal funding authorization for the municipal, rural, and industrial water supply program were successful with the passage of the Dakota Water Resources Act of 2000. The Act provides resources for general, municipal, rural, and industrial water supply projects; the Northwest Area Water Supply Project; the Southwest Pipeline Project; and a project to address water supply issues in the Red River Valley. Under the Act, an additional $600 million was authorized, which includes a $200 million grant for state municipal, rural, and industrial water supply projects; a $200 million grant for Indian, municipal, rural, and industrial water supply projects; and a $200 million loan for a Red River Valley Water Supply Project. Annual municipal, rural, and industrial water supply funding is dependent upon congressional appropriation, and project delays have resulted due to varying amounts of annual appropriations. As of December 2006, $6.6 million in federal funds had been approved for the state's municipal, rural, and industrial water supply program for federal fiscal years 2005 and 2006.

Resources Trust Fund

The resources trust fund was created pursuant to passage of measure No. 6 in the November 1980 general election. Measure No. 6 created a 6.5 percent oil extraction tax, 10 percent of which was to be allocated to the resources trust fund. In June 1990 the Constitution of North Dakota was amended to establish the resources trust fund as a constitutional trust fund and provide that the principal and income of the fund could be spent only upon legislative appropriations for construction of water-related projects, including rural water systems and energy conservation programs. In November 1994 the voters of North Dakota approved a constitutional amendment, codified as Article X, Section 24, of the Constitution of North Dakota, to provide that 20 percent of oil extraction taxes be allocated as follows: 50 percent of the 20 percent to the common schools trust fund and 50 percent of the 20 percent to the foundation aid stabilization fund. North Dakota Century Code Section 57-51.1-07 provides that 20 percent of oil extraction tax revenues be distributed to the resources trust fund, 20 percent of the revenues allocated as provided in Article X, Section 24, of the Constitution of North Dakota, and 60 percent of the revenues to the general fund. The 60th Legislative Assembly appropriated $69,352,698, or any additional amount that becomes available, from the resources trust fund for the purpose of defraying the expenses of the State Water Commission. The total expenditures will be limited to available funding. Additional new revenue into the resources trust fund will come from Southwest Pipeline Project reimbursements; municipal, rural, and industrial water supply program loan repayments, which amount to $1 million per biennium through 2017; interest; and future oil extraction tax revenue.

Water Development Trust Fund

North Dakota Century Code Section 54-27-25 establishes a water development trust fund to be used for the long-term water development and management needs of the state. This section creates a tobacco settlement trust fund for the deposit of all tobacco settlement money obtained by the state. Ten percent of the money in the fund must be transferred within 30 days of its deposit in the fund to the community health trust fund, 45 percent of the money to the common schools trust fund, and 45 percent of the money to the water development trust fund.

North Dakota Century Code Section 61-02.1-04 provides that the principal and interest on bonds issued for flood control projects, the Southwest Pipeline Project, and the Devils Lake Outlet must be repaid with money appropriated from the water development trust fund.

Bonds

The State Water Commission has bonding authority under NDCC Section 61-02-46 to issue revenue bonds of up to $2 million per project. The Legislative Assembly must authorize revenue bond authority beyond the $2 million per project. In 1991 the Legislative Assembly authorized full revenue bond authority for the Northwest Area Water Supply Project, and in 1997 the Legislative Assembly authorized $15 million of revenue bonds for the Southwest Pipeline Project. In 2001 the Legislative Assembly raised the Southwest Pipeline Project bonding authority to $25 million.

In 1999 the Legislative Assembly authorized the State Water Commission to issue up to $84.8 million in appropriation bonds. The Legislative Assembly's intent was to partially fund flood control projects at Grand Forks, Devils Lake, Wahpeton, and Grafton and to continue funding for the Southwest Pipeline Project. In March 2000 the State Water Commission issued bonds generating $27.5 million, thus reducing available bonding authority to $57.3 million. Recognizing the need for water development projects in addition to those identified in 1999, in 2003 the Legislative Assembly allowed authority for the unissued $57.3 million to expire but then authorized $60 million of bonding authority for statewide water development projects. In June 2005 the State Water Commission issued bonds generating $60 million. In 2005 the Legislative Assembly authorized an additional $7 million of bonding authority for statewide water development projects during the 2005-07 biennium. Because tobacco settlement dollars are not projected to remain uniform each year, the State Water Commission has established a repayment schedule to correspond with the projected tobacco receipts. Although repayment amounts are based on the projected receipts, the scheduled repayments must be made regardless of the actual receipts. Payments for existing water development bonds will be $14 million for the 2007-09 biennium.

Drinking Water State Revolving Loan Fund

An additional source of funding for water supply development projects is the drinking water state revolving loan fund. Funding for this program is distributed in the form of a loan program through the Environmental Protection Agency administered by the State Department of Health. The drinking water state revolving loan fund provides below market interest rate loans of 3 percent to public water systems for capital improvements aimed at increasing public health protection and compliance with the federal Safe Drinking Water Act.

Master Manual

The *Missouri River Master Water Control Manual* or *Master Manual* is the guide used by the United States Army Corps of Engineers to operate the system of six dams on the Missouri River main stem reservoir system--Fort Peck, Garrison, Oahe, Big Bend, Fort Randall, and Gavins Point Dams.

First published in 1960 and subsequently revised during the 1970s, the *Master Manual* was revised in March 2004 to include more stringent drought conservation measures. The 2003 amendment to the 2000 biological opinion presented the United States Fish and Wildlife Service's opinion that the regulation of this system would jeopardize the continued existence of the endangered pallid sturgeon. The United States Fish and Wildlife Service provided a reasonable and prudent alternative to avoid jeopardy to the pallid sturgeon that included a provision for the United States Army Corps of Engineers to develop a plan to implement a bimodal "spring pulse" from Gavins Point Dam. Working with the United States Fish and Wildlife Service, tribes, states, and basin stakeholders, the United States Army Corps of Engineers developed technical criteria for the bimodal spring pulse releases. In March 2006 the *Master Manual* was revised to include technical criteria for a spring pulse. The March 2006 revisions were challenged by the state of Missouri in *Missouri v. United States Army Corps of Engineers* (Civil No. 06-1616). The United States District Court for the District of Minnesota found that the United States Army Corps of Engineers did not violate the National Environmental Policy Act by preparing an environmental assessment rather than supplementing the final environmental impact statement when it implemented the revisions to the *Master Manual*. The court found that the corps also complied with the National Environmental Policy Act in its consideration of a range of alternatives to the revisions. The court found that the corps fully analyzed the environmental impacts of the revisions and adhered to all administrative and regulatory requirements and that therefore the revisions to the *Master Manual* were not made arbitrarily, capriciously, or contrary to law.

In September 2007 the United States Army Corps of Engineers released the draft of the *2007-08 Annual Operating Plan for the Missouri River Main Stem System*. The draft annual operating plan presents pertinent information and plans for regulating the Missouri River main stem reservoir system through December 2008 under widely varying water supply conditions. The plan provides a framework for the development of detailed monthly, weekly, and daily regulation schedules for the system's six individual dams during the coming year to serve the congressionally authorized project purposes; to fulfill the corps' responsibilities to American Indian tribes; and to comply with environmental laws, including the Endangered Species Act.

Testimony and Committee Activities

The Missouri River Association of States and Tribes is a regional interstate organization formed by joint resolution of the Governors of Wyoming, Montana, North Dakota, South Dakota, Nebraska, Iowa, and Kansas and the Mni Sose Intertribal Water Rights Coalition. The organization was formed to help resolve issues of concern to the basin states and tribes; to serve as a forum to foster communication and information exchange among the member states, tribes, and various other governmental units; and to facilitate the management of the natural resources of the Missouri River Basin, including water resources and fish and wildlife, while considering economic, historical, cultural, and social impacts in the basin. A representative of the association reported that the association took action at its February 25, 2008, meeting to request a study to determine whether changes are needed to the congressionally authorized purposes of the Missouri River main stem reservoir system in order to best meet the contemporary needs of the basin. The Corps of Engineers has indicated that it will not initiate such a study without a congressional directive and funding.

The Missouri River main stem reservoir system is operated in accordance with the Flood Control Act of

1944 for various authorized purposes, including flood control, water supply, irrigation, hydropower, navigation, recreation, and fish and wildlife. Over 60 years have passed since the Flood Control Act of 1944 was enacted. While the construction of the reservoir system and other works have resulted in large project benefits from some of the authorized purposes and much less for others, it has also created substantial environmental impacts, such as a large loss of wetlands and habitat for a number of native species. As a result, two birds and one fish are now listed as threatened or endangered under the Endangered Species Act, and many other species have suffered major declines. The need for protection of historical and cultural resources is now well documented.

The representative of the Missouri River Association of States and Tribes reported that while some of the authorized purposes, such as flood control and hydropower, have provided substantial benefits as expected, other purposes, such as irrigation and navigation, have not come anywhere close to the expectations when the project was authorized. Other project purposes, such as municipal and industrial water supply, have become increasingly important as the population has grown and multiyear droughts have occurred. In addition to the negative impacts to recreation and water supply, and the expense of modifications required to lower water supply intakes in the reservoirs and on the river downstream, extended drought and low reservoir levels caused by current system operations have caused serious impacts to hydropower production. The Western Area Power Administration, which markets power to wholesale customers in the basin, has had its ability to meet firm power demands severely impacted, with much of that impact due to loss of generating efficiency resulting from low reservoir levels. This has resulted in a 37.3 percent increase in rates to wholesale customers since January 2004 to cover the cost of purchasing power in the open market. Still other project purposes, such as recreation have grown far more than expected. Ecosystem restoration has become essential to recover the endangered species, avoid actions that jeopardize the continued existence of the endangered pallid sturgeon, and allow other project purposes to continue to generate economic benefits.

The committee reviewed United States S.3258, making appropriations for energy and water development and related agencies for the fiscal year ending December 30, 2009. Section 108 of the bill would authorize the Secretary of the Army to conduct a study, at a total cost of $25 million, of the projects located within the Missouri River Basin with the express purpose to review the original project purposes based on the Flood Control Act of 1944, as amended, and other subsequent relevant legislation and judicial rulings to determine if changes to the authorized project purposes and existing federal water resource infrastructure may be warranted.

The director of the Game and Fish Department and a representative of the North Dakota Chapter of The Wildlife Society emphasized the need for the committee to request the North Dakota congressional delegation to call for appropriate studies to amend the Flood Control Act of 1944 to meet the contemporary needs of the Missouri River Basin.

Conclusion

The committee authorized the chairman to send a letter to the chairman of the United States Senate Committee on Appropriations stating that the Natural Resources Committee, in concurrence with the chairman of the Legislative Council, supports Section 108 of S.3258. The letter stated that as selected representatives of North Dakota, the members of the Natural Resources Committee believe that Congress needs to objectively evaluate the original project purposes to determine whether meaningful changes may be warranted and to establish a timeline to meet those changes. As the Secretary of the Army studies current and future needs of the Missouri River Basin, the committee requested that the study include the economic, social, health, environmental, irrigation, and cultural needs of the Missouri River Basin. The letter concluded that the issue is one of great importance to the state and urged the Senate Committee on Appropriations, the Congress of the United States, and the President to support the study.

GARRISON DIVERSION PROJECT AND RED RIVER VALLEY WATER SUPPLY PROJECT

The committee has responsibility for overview of the Garrison Diversion Project and related matters and any necessary discussions with adjacent states on water-related topics. The Garrison Diversion Conservancy District is an instrumentality-political subdivision of the state created in 1955 to construct the Garrison Diversion Unit of the Missouri River Basin Project as authorized by Congress on December 22, 1944. Amendments enacted by Congress in 1986 and 2000 have changed the Garrison Diversion Unit from a million-acre irrigation project into a multipurpose project with an emphasis on the development and delivery of municipal and rural water supplies. The mission of the Garrison Diversion Conservancy District is to provide a reliable, high-quality, and affordable water supply for the benefit of North Dakota.

The Dakota Water Resources Act of 2000, an amendment to the Garrison Diversion Reformulation Act of 1986, authorizes $200 million for construction of the Red River Valley Water Supply Project to meet the needs of the Red River Valley. The Act authorized two studies. The Secretary of the Interior has conducted a comprehensive study of the water quality and quantity needs of the Red River Valley and possible options for meeting those needs. The Secretary and the state, represented by the Garrison Diversion Conservancy District, jointly prepared an environmental impact statement concerning all feasible options to meet the comprehensive water quality and quantity needs of the Red River Valley. The final environmental impact statement was released in December 2007.

Representatives of the Garrison Diversion Conservancy District briefed the committee on the decisionmaking process that was used to arrive at the Garrison Diversion Unit import to the Sheyenne River--the preferred alternative--to deliver water to the Red River Valley. The Red River Valley study examined water from the Lake of the Woods, Minnesota ground water sources, the Red River and Red Lake River, and the Missouri River. The study determined Missouri River water to be the best source of water and identified two Missouri River water solutions. The first alternative is to import Missouri River water through the Garrison Diversion Unit to the Sheyenne River. The second alternative is to import Missouri River water to the Red River Valley. Although either alternative solves the problem, however, each operates differently. The Sheyenne River alternative imports water to Lake Ashtabula for distribution while the Missouri River alternative imports water directly by pipeline to water systems in the Red River Valley. Both alternatives are supplemental water supplies and rely on a combination of in-basin and Missouri River water. Neither alternative is a replacement water supply project like the Northwest Area Water Supply Project or Southwest Pipeline Project.

Representatives of the Garrison Diversion Conservancy District presented a comparison of the two alternatives, including environmental impacts; life expectancy; construction costs; annual operations, maintenance, and replacement costs; and a review of engineering issues concerning the projects. Representatives of the Garrison Diversion Conservancy District reported that the Garrison Diversion Unit import to Sheyenne River alternative--the preferred alternative--provides more flexibility, more reliability, additional environmental benefits, lower capital costs, and lower operations and maintenance costs. The preferred alternative would be significantly less expensive--$659.8 million versus $1.065 billion.

HUNTER SAFETY EDUCATION REPORT

The Legislative Council assigned the committee the responsibility to receive a report from the Game and Fish Department by July 1, 2008, regarding the department's findings and recommendations resulting from its study of hunter safety education requirements and hunter safety for all ages of hunters. Representatives of the Game and Fish Department reported that the department reviewed existing hunter safety education requirements, the minimum hunting age requirements of other states, and the hunter education age requirements of other states. The representatives reported that the department is conducting an ongoing study of the recruitment and retention of hunters in North Dakota. They also reported that the department has several considerations under review, including removing barriers to hunting, such as the families field initiative, hunter education in schools, and outdoor programs.

TILE DRAINAGE REPORT

The Legislative Council assigned the committee the responsibility to receive a report from the State Water Commission by July 1, 2008, regarding the commission's findings and recommendations resulting from its assessment of the impact of tile drainage on the beneficial use of water by prior water appropriators.

The State Engineer requires a drainage permit be obtained for subsurface drains. However, some water resource districts are reticent to enforce the permit requirement for tile drains because of concern that the requirement may not be supported by state law. The committee learned that the State Engineer is seeking clarification from the Attorney General regarding the authority for requiring drainage permits for tile drains.

Representatives of the State Water Commission reported that as of June 2008 there were a total of 131 approved permits for tile-drained fields and 34 permit applications pending approval. All approved permits were distributed within 11 counties, and all except one were near or within the Red River Valley. According to the commission database, estimated statewide drained acreage is 22,963 acres.

Commission representatives reported that potential conflict between tile drainage and pumping for beneficial use of water could occur only when tile drainage is implemented over aquifers. Approximately 20 percent of all current tile drain permits are located over glacial aquifers. Approximately 35 percent of land overlying aquifers consists of potentially drainable soils, so the maximum net percent of all potentially drainable lands that might be in conflict with ground water appropriators would be approximately 7 percent.

Using a 20th century participation distribution, tile drains would be estimated to flow in 15 percent to 35 percent of years. The actual percent would vary with tile depth and local crop, soil, and management conditions. The years in which tile drains would flow would be those with the most plentiful water, some of which would have excess water and flood conditions. Times of potential conflict with ground water appropriators are, thus, limited.

State Water Commission representatives reported that drainage usually is targeted to waterlogged areas. Natural recharge and discharge in areas of high water table overlying glacial aquifers is highly transitory. Most recharged waters in shallow water table areas are removed naturally through runoff or evaporation within one year or two years. Thus, most recharged waters are not available for long-term storage and use for appropriation and beneficial use in dry years. Because properly designed wells have deeper placement in an aquifer, these wells capture ground water more efficiently than tile drains, and, as a result, have the capability to dewater tile drains that may be competing with them.

State Water Commission representatives reported that tile drainage can cause a reduction in the saturated thickness of surficial unconfined aquifers which, in turn, may cause a small decrease in the pumping rate within nearby well fields. This would be significant only in areas of very thin aquifers. Thin surficial aquifers would be a poor choice of location for a high-capacity well field.

State Water Commission representatives reported that in most cases, even in thin aquifer areas, small

effects on prior appropriators caused by decreased saturated thickness could be offset by constructing additional efficiently designed wells. In the specific case of the Traill Rural Water District, the maximum estimated effect of large-scale tile drainage near the well field on pumping capacity from the well field would be less than 2 percent.

State Water Commission representatives reported the only law relating to water appropriation and subsurface drainage in states neighboring North Dakota is a specific exemption of tile drainage from requiring a water permit in Minnesota.

Recommendation

State Water Commission representatives reported the potential negative effects of tile drainage on prior ground water appropriators using wells are limited to rare circumstances and are small and potentially remediable when and where they may occur. The commission recommends no changes in state law regarding potential conflicts between the beneficial use of water by prior appropriators and tile drainage.

STATE WATER COMMISSION OPERATION AND PROCEDURES REVIEW

The chairman of the Legislative Council directed that the committee review State Water Commission operations and procedures.

The State Engineer reported that developing the State Water Commission's budget is a complex process beginning several months before a legislative session. The budget request submitted to the Governor is developed with input from many sources. Revenue projections prepared by the Office of Management and Budget are the basis for much of the budget. These revenues include general funds, the resources trust fund, water development trust fund, federal funds, local funds, and miscellaneous revenues. A combination of these funds makes up the base budget, and the funds available for water projects often are determined after subtracting the cost of agency operations from total revenues. The funds for individual projects are normally not listed by line item, but the larger projects are detailed in a narrative.

The State Engineer reported that part of the budget process includes contact with water stakeholders by commission staff for identification of funding needs during an upcoming legislative session. This information is compiled in a biennial update report to the state water management plan. Because the total funding needs listed in the report often exceed the funds available, project prioritization is necessary. The State Engineer reported that the North Dakota Water Coalition provides a convenient and efficient mechanism for obtaining this input by bringing the various water groups together in one place. This allows stakeholders to learn about other projects and also allows important dialogue between project sponsors. The water coalition attempts to reach a consensus for prioritizing funding, but the commission has final approval of the distribution of funds. During the commission's budget hearing, the water coalition's recommendations are provided, but the budget approved by the Legislative Assembly generally only lists a total amount for all projects. This allows the commission to make adjustments during a biennium based on how fast or slow individual projects are progressing.

Concerning assistance to project sponsors in the permitting and construction process, the State Engineer reported that if a project sponsor employs its own engineer the commission does not get involved directly in construction and project management. If the commission does the engineering it is involved in all phases of development. Commission engineers usually inspect projects completed by local entities. Commission staff are directly involved in the permitting process if the permits are issued by the State Engineer. If it is appropriate and necessary, the commission provides limited assistance or advice in obtaining federal permits or permits from other entities. However, obtaining required permits is primarily the responsibility of a local project sponsor as it is the owner of the project.

Concerning urban and rural funding issues and commission cost-sharing policies and rules, the State Engineer reported that the commission has a standing committee that periodically reviews cost-share policies and processes. This committee holds publicized meetings to facilitate public involvement and to explore ways to improve the commission's responsiveness to project sponsors in meeting the full range of development needs. Commission staff makes every effort to consistently apply these policies as it processes funding requests and makes recommendations to the commission. The commission's cost-share policies have evolved to comply with changes in development needs and available funding.

Concerning the relationship and involvement of the State Water Commission with the Red River Valley Water Supply Project, the State Engineer reported that the commission is supportive of the Garrison Diversion Conservancy District as the entity designated by the Governor and the Legislative Assembly as the state's lead authority for the Red River Valley Water Supply Project. The Garrison Diversion Conservancy District and the State Water Commission undertake a significant amount of coordination in the project.

Indemnification Issue

The committee learned that the State Water Commission has had an indemnification clause in its contracts for years which local political subdivisions signed without an insurance endorsement. The Attorney General has recommended that an insurance endorsement should be included for the life of a project. This was recommended because a commitment to indemnify is not sufficient unless there are funds to fulfill the commitment. Because political subdivisions, particularly water resource districts, do not have much in the way of assets, an insurance policy provides security to make the indemnification valid. The North Dakota Insurance Reserve Fund, however, declined to offer the endorsement and, thus, many water projects were on hold pending resolution of this issue.

The State Engineer reported that the issue stems, in part, from the Devils Lake landowners' lawsuit in which landowners around Devils Lake sued the state and county water resource districts claiming inverse condemnation of their property due to flooding allegedly caused by water projects built in the Devils Lake Basin. The state was named as a defendant in the lawsuit because of its partial financial assistance for construction of many of the projects and postconstruction regulation of these projects. Although the state loosely participated in many of the projects, at no point did the state assume ownership beyond its regulatory authority. Although the state and local water resource district boards prevailed at the district court level, the plaintiffs have appealed the district court decision to the Supreme Court. The State Water Commission, Attorney General, and the North Dakota Insurance Reserve Fund have spent over $1 million defending this lawsuit and the State Engineer reported that plaintiffs have suggested it would require $25 million to settle the case. The State Engineer reported that whether the state prevails in the case, it exposed liability issues for any water project in which the state has even a minimal relationship or role.

The State Engineer reported that on April 23, 2008, the State Water Commission approved an interim, possibly long-term, solution to the liability and indemnification issue regarding state cost-share contracts with local political subdivisions for water projects. This agreement was developed following considerable discussion between the State Water Commission, the Attorney General, the Risk Management Division of the Office of Management and Budget, the North Dakota Insurance Reserve Fund, and representatives of local political subdivisions. The State Engineer reported that the commission would require only an endorsement for the construction period of a project. The North Dakota Insurance Reserve Fund has agreed to provide this endorsement. The State Engineer reported that the commission will continue to require full indemnification from project owners without an insurance endorsement beyond the construction phase of the project. The State Engineer reported that the commission is entering agreements with political subdivisions and will use the new indemnification clause at least through the upcoming legislative session during which the Legislative Assembly may wish to review this issue.

RED RIVER VALLEY WATER SUPPLY PROJECT BONDS

The chairman of the Legislative Council directed that the committee receive periodic reports from the State Water Commission regarding the implementation of 2007 Session Laws Chapter 559. Chapter 559 authorizes the commission to provide $40 million of the nonfederal share of funds necessary to construct the Red River Valley Water Supply Project by issuing bonds not to exceed $40 million plus the cost of issuance of the bonds, capitalized interest, and reasonably required reserves. The principal and interest on the bonds issued for the project are payable from the water development trust fund from funds transferred from the tobacco settlement trust fund. The remaining $60 million, to comprise a total of $100 million to meet the $100 million state share of Phase 1 of the project, is to be funded over three bienniums. The $60 million is to be derived from $30 million from the general fund and $30 million from the resources trust fund. The state is to provide an additional $100 million of municipal, rural, and industrial water supply funds for Phase 2 of the Red River Valley Water Supply Project to meet the $200 million state share of the project.

The State Engineer reported that the Red River Valley Water Supply Project is in the environmental impact statement process phase of development. After the environmental impact statement process is complete, the project must then be approved by Congress because the preferred alternative for water delivery involves the use of Missouri River water. As a result, the State Engineer reported that it is not anticipated there will be a need for the issuance of bonds in the 2007-09 biennium. However, the State Engineer reported that its bond counsel believes the state will have to pledge additional sources of revenues before these bonds may be issued. Thus, the Legislative Assembly may need to address some changes to the authorization legislation during the 2009 legislative session.

RED RIVER BASIN MAPPING INITIATIVE

The chairman of the Legislative Council directed that the committee receive periodic reports on the development of the digital elevation models for the Red River Basin. The committee learned that highly accurate digital elevation models and associated imagery are essential to improving disaster preparedness, protecting existing infrastructure, evaluating and planning flood and drought damage mitigation projects, enhancing agricultural production, and strengthening decisionmaking capacity at all levels of government. Current technology allows for efficient collection and processing of digital elevation model data across large land areas through the use of airborne light detection and ranging laser and global positioning system technologies and digital photography platforms. The objectives of the Red River Basin mapping initiative are to collect high-resolution elevation data, to establish third party quality assurance and quality control, to establish a web-based public data archival dissemination vehicle, and to promote public outreach. 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. The goal of the Red River Basin mapping initiative project is a basinwide elevation model and, even though surveys will be taken at different seasons and different years, the model should be seamless. The committee learned that the two major challenges for the program are coordination of the funding partners and the securing of a nonfederal match from local project sponsors.