How the Strategic Decision to Construct the Missouri River Intake Provided $300 Million in Savings and Acted as a Catalyst for Federal Approvals

In order to understand why construction of the Missouri River Intake near Washburn was initiated, it is important to understand the history of the Red River Valley Water Supply Project (Project) and the Garrison Diversion Conservancy District's (Garrison Diversion) intentional strategy to put North Dakota in an advantageous legal position and avoid decades of litigation.

The Flood Control Act of 1944

Also known as the Pick-Sloan Missouri Basin Plan, the Flood Control Act of 1944 authorized a series of dams on the Missouri River and primarily focused on flood control in southern states and irrigation, water supply, recreation and habitat benefits in northern states. North Dakota has still not obtained many of the benefits it was promised in 1944 when North Dakota allowed over 300,000 acres of fertile river-bottom land to be flooded behind the dam.

Garrison Diversion Unit Act of 1965

Because studies indicated irrigation of the promised 1.2 million acres wasn't feasible, the project was reauthorized; and, in 1965, the U.S. Congress enacted legislation for the Garrison Diversion Unit (GDU), which reduced irrigation acres, and focused on municipal and industrial water supply. The Bureau of Reclamation (Reclamation) started construction on the GDU Principal Supply Works (Snake Creek Pumping Plant, McClusky Canal, New Rockford Canal) in the mid-1960s, but construction was halted after the National Environmental Policy Act (NEPA) was passed and litigation ensued. During the Carter Administration, the federal government settled with environmentalists and effectively agreed to halt the GDU Project. North Dakota then sued the federal government to continue the GDU Project, but to no avail.

Garrison Diversion Unit Reformulation Act of 1986

The GDU Reformulation Act of 1986 significantly reduced the amount of irrigation North Dakota could develop but added a renewed emphasis on municipal and rural (MR&I) funding for water supply. After the drought in the late 1980s, North Dakota redoubled its efforts to utilize the Missouri River to provide water to eastern North Dakota. When the Red River had zero-flow for ten days in 1988, there was significant concern about the impacts of similar droughts, particularly with the growing population and additional industrial development happening in the Red River Valley.

Dakota Water Resources Act of 2000

The Dakota Water Resources Act of 2000 authorized the Secretary of the Interior to study the water supply needs of eastern North Dakota, identify options to meet the needs, and ultimately have the federal government lead the construction of the preferred alternative. An Environmental Impact Statement (EIS) was completed by Reclamation from 2001 to 2007. While Reclamation identified a pipeline from the Missouri River to Lake Ashtabula as the Preferred Federal Alternative, the Bush Administration would not allow the signing of a Record of Decision (ROD) to allow the project to be built. Garrison Diversion and the State lobbied hard to try to get federal approval of the ROD, but no federal decision was forthcoming.

State Initiated Alignment in 2011

In 2011, the State opted to initiate a version of the Project without federal involvement. Governor Hoeven tasked Garrison Diversion with leading the effort on behalf of the State. Garrison Diversion began planning an alignment with an expanded geographic scope to include meeting the water needs of central and eastern parts of the state.

Garrison Diversion was careful not to trigger sufficient federal authorities such that would require an EIS and federal approval. Therefore, the initial planning avoided taking water from the McClusky Canal and focused on the Intake location near Washburn. This planning was done in close coordination with the State Water Commission and the Legislative Assembly, including the advice given from the Water Topics Interim Legislative Committee to not rely on the federal government for anything in this Project, given the unsupportive history.

When the Trump Administration began in 2017, Garrison Diversion and the Lake Agassiz Water Authority (LAWA) wanted to revisit the use of the McClusky Canal. A meeting was held with U.S. Interior Secretary Ryan Zinke to discuss the "option" of using the McClusky Canal as a water source. The thinking was that if it were merely an "option" for a water supply contract and an easement (as opposed to the federal government designing and building the project), the scope of the environmental review would be reduced, and it may be easier to get federal approval.

Limited Timeline of Approved Federal Permit

The Trump Administration granted a permit to Garrison Diversion under the Clean Water Act 404 in September 2018. During that same timeframe, the North Dakota Department of Environmental Quality issued a discharge permit for the water transferred from the Missouri River to Lake Ashtabula. Neither of these permits were appealed by Manitoba, environmentalists, or Tribal entities. The federal permit was only valid for four years, with one possible extension, which expired in March 2023.

Intake – To Build or Not to Build

In 2018-2019, Garrison Diversion and LAWA needed to decide whether to initiate construction on the Missouri River Intake right away in order to take advantage of the permit getting issued with no appeal or wait to find out if the Project would get approval to use the McClusky Canal as a water source. After significant consideration and meetings with the Governor's office and Legislative leadership, it was decided to initiate construction in late 2020 due to three primary points; 1) the permit was obtained, 2) the permit was not appealed, and 3) the concern of litigation over the Waters of the U.S. (WOTUS) definition and coverage under the Clean Water Act permit. Had Garrison Diversion not initiated construction of the Intake at that time, there was a strong possibility the Project would not be unable to get a permit from future Administrations. Additionally, it is clear the Project opponents would not miss an appeal deadline next time a permit was issued, which would leave the Project in years of NEPA litigation much like NAWS experienced.

Federal Approval to Use McClusky Canal – Thanks to the Intake Construction

In early 2021, and within days of the end of the Trump Administration, Garrison Diversion was able to secure federal approval through a Record of Decision for a limited portion of the entire Project, called the Eastern North Dakota Alternate Water Supply (ENDAWS), which allowed the use of the McClusky Canal as an optional water supply. Utilizing ENDAWS, the cost of the Project is $300 million less than building the full alignment to the Intake; even with the $20+ million cost of the Intake.

Additionally, by starting construction of the Intake, it took away Project opponents' legal arguments claiming the new alignment to use the Missouri River was just a ruse. Garrison Diversion and the State successfully defended a lawsuit brought by the State of Missouri in Missouri Federal District Court, winning the case in 2021. That case is specifically related to a smaller segment of the Project called the Central North Dakota Project, which is like an in-basin version of ENDAWS.

A Calculated Risk – And Future Use of the Intake

The decision to build the Intake first was a calculated risk, based upon a solid strategy to gain the approval the Project needed to move forward – and to reduce the cost of the construction by $300 million. The risks and decision were vetted at all levels of local and state leadership. Even when ENDAWS is constructed and utilized, the Intake will still be used by water systems and private industry, while also maintaining security and redundancy for central and eastern North Dakota.

As a final point encouraging the construction of the Intake, the Corps of Engineers (Corps) adopted an Interim Rule in 2018 to not allow the level of Lake Audubon to be more than 43 feet above the level of Lake Sakakawea due to concern that if there was too much water differential, that Highway 83 and the Snake Creek Embankment could wash out. As it sits today, if Lake Sakakawea drops dramatically, Lake Audubon will need to be kept low, potentially jeopardizing the ability to maintain sufficient water in the McClusky Canal. Having the security of a federally approved Intake installed provides security and important redundancy to meet the future water needs of the State.