

# WATER TOPICS OVERVIEW COMMITTEE

North Dakota Century Code Section 54-35-02.7 directs the Legislative Management during each interim to appoint a Water Topics Overview Committee in the same manner as the Legislative Management appoints other interim committees, and to designate a chairman. The committee must meet quarterly and is to operate according to the statutes and procedures governing the operation of other Legislative Management interim committees. This section originally created the Garrison Diversion Overview Committee in 1981 but was amended in 2009 to create the Water-Related Topics Overview Committee. The name was changed to its current form in 2013.

Section 54-35-02.7 provides the committee is responsible for:

1. Legislative overview of water topics and related matters;
2. The Garrison Diversion Project; and
3. Any necessary discussions with adjacent states on water topics.

In addition, the committee may meet with the State Water Commission (SWC) and must:

1. Work collaboratively with the SWC;
2. Report on the committee's project prioritization process;
3. Provide updates on allocated program expenditures; and
4. Report on the fund balances of projects, grants, and contracts.

In addition to its statutory obligations, the committee was tasked with receiving reports concerning water projects during the 2019-20 interim. Sections 12 and 14 of Senate Bill No. 2020 (2019) required the committee to receive reports "on a regular basis" and "quarterly," respectively, from the Garrison Diversion Conservancy District on the Red River Valley Water Supply Project (RRVWSP). Section 15 of Senate Bill No. 2020 required the SWC to report the results of a pilot project regarding implementation of a basinwide water plan to the committee by August 1, 2020.

The committee also was assigned one study. Senate Concurrent Resolution No. 4009 (2019) required the committee to study the feasibility and desirability of the water resource boards in each drainage basin forming a joint water resource board to plan and construct water conveyance projects based on basinwide needs.

Committee members were Representatives Jim Schmidt (Chairman), Tracy Boe, Chuck Damschen, Ron Guggisberg, Michael Howe, Bob Martinson, Jon O. Nelson, Todd Porter, Mark Sanford, and Denton Zubke and Senators David Hogue, Curt Kreun, Gary A. Lee, Larry Luick, Larry J. Robinson, Donald Schaible, and Ronald Sorvaag.

## RED RIVER VALLEY WATER SUPPLY PROJECT

### Background

Research suggests a strong possibility of a drought in the Red River Valley area within the next 5 decades. As the population in that area grows, the impact of such a drought would be even greater than the impact of droughts in prior years. The Red River Valley Water Supply Project was authorized by the Dakota Water Resources Act of 2000 to address this concern and provide a solution to the water supply and quality problems in the Red River Basin. That legislation also called for \$200 million of federal appropriations for the project. The Garrison Diversion Conservancy District, on behalf of the state, and the United States Bureau of Reclamation, on behalf of the federal government, executed a memorandum of understanding to begin studying these issues in 2000. After years of work, the United States Bureau of Reclamation issued a draft environmental impact statement for the project in December 2005. The draft included analyses of eight alternative plans for accomplishing the objectives of the project. After additional information was obtained, a revised draft environmental impact statement was released in January 2007. In the revised draft, both parties identified the Garrison Diversion Unit import to the Sheyenne River as the preferred alternative for bringing a reliable supply of quality drinking water to the Red River Valley area. This alternative includes the installation of a pipeline from Washburn to the Red River Valley area through the Sheyenne River north of Lake Ashtabula, which will act as a regulating reservoir. From there, water will be released into the Sheyenne River and flow into the Red River supplying water systems in the Red River Valley with a reliable supply of drinking water. This plan will provide flexibility for future expansion so water can be conducted to residents in central North Dakota as well.

In December 2007, the United States Bureau of Reclamation issued the final environmental impact statement for the project. The statement includes responses to public comments received on the prior iterations of the document, a final biological assessment prepared in compliance with the federal Endangered Species Act, an analysis of forecasted depletions and sedimentation on the Missouri River main stem reservoir system, and a review of climate change

literature. After due consideration and evaluation of technical, hydrologic, and design aspects, and water permitting and environmental impacts, the state and the United States Bureau of Reclamation each identified the Garrison Diversion Unit import to the Sheyenne River alternative as the preferred alternative. However, the federal government did not approve the project. As a result, it is now a state and local project, and the Garrison Diversion Conservancy District is the lead state entity on the project.

Section 12 of Senate Bill No. 2020 stated it was the intent of the 66<sup>th</sup> Legislative Assembly that the SWC provide a grant up to \$13 million for the RRVWSP to initiate construction of Phase 1 of the project if four conditions were met, and provide up to \$17 million more in the 2019-21 biennium. The bill also stated state funding should be provided for the project based on a 75 percent state cost-share. The conditions precedent to receipt of funds for the project in the biennium were:

1. Any funding received for the completion of the planning and permitting process of the RRVWSP must result in the following accomplishments:
  - a. The completed RRVWSP plan document must include alternative selection, water supply needs, projected project costs, easement acquisitions, environmental regulation compliance to include issuance of a final national pollutant discharge elimination system permit, and acquisition of all other state and federal permits required for the construction of any project features intended to be constructed with funding provided during the 2017-19 biennium and the 2019-21 biennium;
  - b. A signed United States Bureau of Reclamation water service contract agreeing to a minimum of 165 cubic feet per second over a minimum of 40 years or equivalent to ensure an adequate water source for the project's needs;
  - c. Prioritized project features for Phase 1 construction; and
  - d. A recommendation of funding options for all phases of the RRVWSP.
2. The SWC reviewed any associated appeals or litigation before releasing any funds for the project.
3. The Budget Section received and approved certification from the SWC and the State Engineer that all items listed in the first condition have been accomplished before any funding received to initiate construction of Phase 1 prioritized project features is spent and construction of Phase 1 begins.
4. The Garrison Diversion Conservancy District provided quarterly progress reports on the RRVWSP to the committee during the 2019-20 interim.

### **Testimony and Committee Deliberation**

The committee received testimony at each of its meetings regarding the status of the four conditions the RRVWSP had to meet before receiving funds during the biennium. The committee was informed the SWC provided a memorandum to the Budget Section on September 15, 2020, certifying the Garrison Diversion Conservancy District met all four conditions, and the Budget Section approved the certification on September 17, 2020. Testimony indicated satisfaction of the criteria resulted in a release of \$43 million for the project. The committee received testimony the SWC received a request for \$16.4 million for RRVWSP costs associated with the Missouri River intake, transmission pipeline, Sheyenne River discharge structure, property acquisition, and planning, and the remainder of the \$43 million available for the project was deferred. Testimony indicated four state permits for the RRVWSP were received during the interim, half the necessary easements were secured for the project corridor, and construction is anticipated to be completed by 2023. The committee was informed the RRVWSP sponsors would request \$50 million in the 2021-23 biennium for construction costs.

Representatives of the Garrison Diversion Conservancy District testified Missouri officials indicated the State of Missouri would file a lawsuit against North Dakota over the RRVWSP because the project would take water out of the Missouri River. Testimony indicated Missouri initiated litigation regarding the project on February 4, 2020, by suing the United States Bureau of Reclamation, Army Corps of Engineers, the Garrison Diversion Conservancy District, and other parties, and claiming the Bureau of Reclamation's environmental review of the project was flawed. North Dakota intervened in the lawsuit, which is pending as of the date of this report. Missouri's brief supporting a motion for summary judgment is due in November 2020.

## **COLLABORATION WITH THE STATE WATER COMMISSION, PROGRAM EXPENDITURES, AND REPORTS ON THE FUND BALANCES OF PROJECTS, GRANTS, AND CONTRACTS**

### **Background**

The State Water Commission was created in response to the drought of the 1930s and was charged with developing irrigation in the state. From 1937 to 1981, the Legislative Assembly funded the commission on a biennium-to-biennium basis with approximately \$500,000 to \$2,000,000 appropriated per biennium. The duties of the commission changed

with creation of the resources trust fund in 1981. When the resources trust fund was created, the proceeds of the fund were dedicated to financing the Southwest Pipeline Project, which was the first state water project. Since then, the number and scope of water projects overseen and regulated by the SWC increased dramatically. The State Water Commission now serves many functions, including allocating the state's waters, overseeing dam safety, managing sovereign lands, and approving and funding water projects throughout the state. The State Water Commission has a budget of more than \$968,000,000 for the biennium and is supported by the Office of the State Engineer.

### **Testimony and Committee Discussion**

At each committee meeting, a member of the SWC provided an update on SWC operations and activities, and a representative of the Office of the State Engineer provided an update on the SWC budget and the status of projects funded by the SWC. The committee met with the SWC in September 2020. During the joint meeting, the committee and SWC received testimony regarding the resources trust fund; SWC budget status and projections; financial needs for ongoing and anticipated projects; analyses of projects using the life cycle cost analysis, economic analysis, and planning engineer reviews; the Fargo area flood control projects; the SWC water development plan for the 2021-23 biennium; the Northwest Area Water Supply Project (NAWS); anticipated water-related legislation for the 2021 legislative session; concerns regarding drainage statutes; and multiple water projects. The committee was informed water infrastructure in the state is aging, especially in rural areas.

Representatives of the Office of the State Engineer provided testimony on the usefulness of the life cycle cost analyses and economic analyses to help evaluate which projects should be funded and how much funding each project requires. Testimony indicated the SWC lowered the threshold at which project sponsors are required to provide an economic analysis to the SWC to receive state funds to \$200,000. Although Section 61-03-21.4 requires economic analyses be performed for projects costing more than \$1 million, it was noted the statute does not prevent the SWC from requiring economic analyses for less expensive projects. The committee also was informed the emergency clause for SWC appropriations, which was included in Senate Bill No. 2015 (2019), the Office of Management and Budget appropriation bill, allowed the SWC to begin funding projects early in the 2019 construction season and facilitated greater progress on water projects during the interim.

Representatives of the SWC and Office of the State Engineer testified regarding the impact the significant drop in oil prices in 2020 had on the resources trust fund and the SWC budget. The committee expressed concern regarding the budget and an expectation the resources trust fund may have a shortfall of approximately \$170 million for the biennium. At the June 2020 meeting, the committee requested and received testimony from project sponsors and representatives of interest groups regarding the amount of funding that could be deferred for projects in light of the anticipated resources trust fund shortfall. Representatives of the SWC asked the committee to make a recommendation regarding allocation of the available funds remaining in the SWC budget. The committee approved a motion in June 2020 recommending the SWC stringently evaluate the prioritization of projects for which funding was requested and consider funding only projects the SWC deemed critical. In September 2020, the committee was informed the revenue available to the SWC was \$140 million less than anticipated at the beginning of the interim, and \$84 million was available to be allocated to water projects at that time. Testimony also indicated approximately \$92 million was needed for projects approved by the SWC. The committee was informed the SWC water development plan for the 2021-23 biennium shows a need for \$668 million for 315 projects, but new projections show the resources trust fund will have \$269 million for the biennium. The committee was informed legislative intent in Senate Bill No. 2020 would have the SWC allocate \$153.2 million of the \$269 million to the FM Area Diversion project, the Souris River flood control project, and the RRVWSP. Testimony indicated the 10-year outlook for water project funding shows significant shortfalls in revenue received from the resources trust fund.

The committee discussed the use of released carryover funds from the 2017-19 biennium. The committee was informed although carryover funds do not have to be used for the same project for which the funds originally were allocated, the carryover funds must be used for projects in the same appropriation categories (or "buckets") for which the funds were appropriated originally.

## **FARGO FLOOD CONTROL AND FM AREA DIVERSION PROJECT**

### **Background**

In 2009 and 2011, the Legislative Assembly provided \$45 million and \$30 million respectively for Fargo flood control. In 2013, the Legislative Assembly provided \$100 million for the Fargo flood control project to provide a total of \$175 million. In addition, the 2013 Legislative Assembly expressed legislative intent the state provide up to \$450 million for the project, with the remaining \$275 million to be provided over the next 4 bienniums. The 2013 Legislative Assembly limited the use of the funding designated for the Fargo flood control levee and dike protection until the Fargo flood control project received federal authorization, a project partnership agreement was executed, a federal appropriation was provided for project construction, and the budget for the Fargo flood control project was approved by the SWC. The 2015 Legislative Assembly provided an additional \$69 million for the Fargo flood control project and \$60 million for Fargo interior flood control projects, of which \$30 million is from the state disaster relief fund, to provide a total of \$304 million

for flood protection in Fargo. The Legislative Assembly also included legislative intent to provide up to \$570 million for Fargo flood control projects, an increase of \$120 million. The \$120 million is to be used for Fargo interior flood control projects and requires 50 percent matching funds from the FM Area Diversion Authority. These funds may be expended only for Fargo interior flood control projects, including levees and dikes, until a federal appropriation is provided for construction of the Fargo flood control project, at which time it may be used for a federally authorized Fargo flood control project. The Legislative Assembly also included legislative intent that funding for the Fargo flood control project will end June 30, 2021, if a federal appropriation has not been provided by that time. The 2015 Legislative Assembly provided legislative intent that the remaining funding be made available in equal installments over the next 4 bienniums. Money from the Cass County sales tax has been used for levy work in small communities and for retention.

In 2017, the Minnesota Department of Natural Resources indicated it would not approve a necessary permit for the Fargo flood control projects. In September 2017, a federal judge issued a preliminary injunction halting most work on the project, including land acquisition, design, procurement, cultural mitigation studies, and construction. The governors of North Dakota and Minnesota created a task force to develop a mutually acceptable plan, known as Plan B, for the project. A technical advisory group and policy group also were formed to work on the development of the plan. In March 2018, the FM Area Diversion Authority submitted Plan B to the Minnesota Department of Natural Resources for a permit.

In 2019, the Legislative Assembly appropriated \$65.5 million for the Fargo area flood control projects and expressed the legislative intent to provide no more than \$750 million for the project in total. Of the \$750 million, \$371 million had been made available for the project in previous bienniums. Of the remaining \$379 million, the Legislative Assembly expressed the intent \$66.5 million should be provided in each of the bienniums through the 2027-29 biennium, and \$47 million should be provided in the 2029-31 biennium.

### **Testimony and Committee Discussion**

The committee received testimony from representatives of the FM Area Diversion Authority at each meeting. The committee was informed the diversion authority hired an executive director to oversee operations in 2019. The diversion authority also organized a tour of the project for committee members to see the progress made on construction of project features. The committee received testimony federal contracts for the inlet control structure and the Wild Rice control structure were awarded, and construction was progressing on those structures. Testimony also indicated Plan B modifications to in-town protections were almost complete, the Office of the State Engineer had approved the mitigation plan for the project, and the Federal Emergency Management Administration (FEMA) provided a conditional letter of map revision. The committee was informed the FEMA letter confirmed 11,000 homes in North Dakota would no longer be in a flood plain and flood insurance would no longer be required for the homes after the project is complete.

A representative of the diversion authority testified it will request \$66.5 million from the state during the 2021-23 biennium. Testimony indicated the diversion authority also plans to request the Legislative Assembly commit to providing \$870 million in total for the project rather than the \$750 million the 2019 Legislative Assembly intended as the total amount of state funding to provide for the project. The committee received testimony the diversion authority anticipates receiving a total of \$900 million from the federal government for the project over several years, but the funds are not guaranteed. Testimony indicated the United States Army Corps of Engineers (USACE) may not be appropriated sufficient funds for the project or could allocate appropriated funds to other projects. Testimony indicated \$100 million was appropriated to the St. Paul district of the USACE and designated for the project this biennium. The committee was informed the diversion authority applied for a Water Infrastructure Finance and Innovation Act loan from the United States Environmental Protection Agency to help pay for the project, and the loan would require state matching funds. The committee received testimony in June 2020 that \$44 million would satisfy the project's immediate needs in light of the SWC budget shortfall, and the remainder of the funds intended for the project this biennium could be deferred.

Testimony indicated 406 properties were acquired for the project at a cost of \$282.3 million as of September 2020, but approximately 80 properties still need to be acquired. Testimony indicated six properties will be acquired through "quick take" eminent domain proceedings after September 2020. The committee was informed the project has a balance of \$83.2 million, which the diversion authority plans to use for future property acquisitions. Testimony indicated property appraisals comply with federal requirements, and audits of the process have not shown a failure to meet the requirements.

The committee was informed the contract for the public-private partnership project (P3 project) comprising part of the flood control project has not been awarded. Testimony indicated the final request for proposals is anticipated to be released in January 2021, and the P3 project developer will be selected in April 2021. The committee received testimony the diversion authority will not know the costs of the P3 project until late in the legislative session, and the costs will impact the request for funding. The committee expressed concern the costs will not be known when the SWC appropriations bill is introduced in 2021 and during hearings on the bill.

The committee received testimony Minnesota provided \$7 million for the project. Testimony indicated additional Minnesota funds would be provided through the Minnesota Department of Natural Resources hazard mitigation program. A representative of the diversion authority informed the committee a Minnesota water resource district initiated an administrative lawsuit regarding a permit issued by the department, and as of September 2020, the administrative law judge had 90 days to provide a recommendation regarding the permit to the department.

### **SOURIS RIVER BASIN FLOOD CONTROL**

The committee's meeting in Minot and tour of the project were canceled due to the Coronavirus (COVID-19) pandemic. The committee received an update on the Souris River basin flood control project at another meeting. Testimony indicated construction was continuing on Phase 1 of the project while Phases 2 and 3 were nearing completion. The committee received testimony all 10 phases of the project could be completed in 15 years if sufficient funding is available for construction. Testimony also indicated \$46 million of the \$82.5 million appropriated for the project this biennium would be used inside Minot, and the remaining \$36 million would be used outside Minot. The committee was informed Minot voters approved an increase in the local sales tax, and Minot may need to issue bonds to pay for the local cost-share for the project. In June 2020, the committee received testimony the funding request for the project for the biennium could be reduced to \$49.5 million in light of the SWC budget shortfall.

### **NORTHWEST AREA WATER SUPPLY PROJECT**

The committee received testimony from a representative of the Office of the State Engineer regarding the status of NAWS, which will provide water to approximately 81,000 people in Burke, Ward, Renville, Bottineau, and McHenry Counties. The project has been in development for at least 18 years but was interrupted by lawsuits initiated by Manitoba and Missouri which were resolved in 2017. The committee was informed contracts have been awarded for several portions of the project, and construction continues on several phases of the project. The project is funded by the Municipal, Rural, and Industrial Water Supply Program, which is a federal grant program administered by the SWC; a local cost-share from Minot; and state funds. The committee received information the statutorily created NAWS Advisory Council has not been holding meetings, and the committee expressed concern regarding the lack of meetings.

### **ALTERNATIVE FUNDING FOR WATER PROJECTS**

The committee received testimony regarding multiple sources of funding other than the SWC for water projects. Testimony indicated Water Infrastructure Finance and Innovation Act loans are available for flood control projects through the United States Environmental Protection Agency. Testimony also indicated the United States Department of Agriculture continues to provide funding for water projects, including projects for Indian tribes, through its Office of Rural Development. The committee received testimony regarding the amount of loans and grants the Office of Rural Development provided to water projects in the state. The committee was informed the Office of Rural Development provides guidelines for project sponsors regarding appropriate levels of engineering fees for projects.

The committee also received testimony regarding funding assistance available from state entities other than the SWC. The committee was informed funding is provided through the Department of Emergency Services (DES) hazard mitigation programs for flood protection and water infrastructure. Testimony indicated DES provided \$180.6 million through the hazard mitigation programs since 2009. The committee also received testimony state funding is available for water projects through the drinking water state revolving fund program and clean water state revolving fund program. The programs are operated by the Department of Environmental Quality, which receives some of the funds for the programs from the United States Environmental Protection Agency. Testimony also indicated projects eligible for the programs include new projects, projects to repair or replace equipment or systems, and refinancing projects.

### **TRIBAL INTERESTS IN WATER**

The committee received testimony from representatives of the Standing Rock Sioux Tribe, Turtle Mountain Band of Chippewa Indians, and the Indian Affairs Commission regarding tribes' needs for water projects. Testimony indicated the tribes would like increased communications with members of the Legislative Assembly and the SWC regarding the allocation of water, legal rights to water, and water project funding. Currently, the SWC may not provide funding for water projects sponsored by tribes. The committee was informed there is a need for the SWC to be able to provide state funds for tribal water projects. Testimony also indicated tribes are working with federal agencies and North Dakota's Congressional delegation to address funding needs.

### **WESTERN AREA WATER SUPPLY PROJECT**

The committee received testimony from representatives of the Western Area Water Supply Authority regarding the status of the Western Area Water Supply project. Testimony indicated the project sponsors planned to use \$22 million of the \$40 million to be received from the state during the biennium to expand supply, treatment, and transmission capabilities. Testimony indicated planning, permitting, and design of the expansion will take 4 years. In June 2020, representatives of the Western Area Water Supply Authority testified state funding for the project for the biennium could be reduced to \$30.4 million in light of the SWC budget shortfall.

## **SOUTHWEST PIPELINE PROJECT**

The committee received information regarding the status of the Southwest Pipeline Project, which is owned by the state and operated and maintained by the Southwest Water Authority. Testimony indicated funds for the report were included in the capital assets "bucket" of the SWC appropriations bill, and project administrators anticipated \$25.5 million for the biennium to upgrade project appurtenances, increase storage capacity, increase main transmission line capacity, expand rural distribution service areas, and add other system improvements. In June 2020, representatives of the project testified the immediate needs of the project could be funded with \$12 million to \$17 million in light of the SWC budget shortfall.

## **MUNICIPAL AND RURAL WATER SUPPLY PROJECTS**

The committee received testimony from representatives of the League of Cities and North Dakota Rural Water Systems Association regarding municipal and rural water supply projects. Testimony included information regarding the projects' statuses and funding needs. The representatives also testified regarding efforts to regionalize water supply systems. In June 2020, the representatives also testified \$5.5 million for municipal projects and \$7 million for rural water projects could be released in light of the SWC budget shortfall.

## **REPORTS**

### **Red River Valley Water Supply Project**

The committee received reports from the RRVWSP in August 2019, December 2019, June 2020, and September 2020. Although Section 14 of Senate Bill No. 2020 required the project sponsors to provide quarterly reports to the committee, the COVID-19 pandemic prevented the committee from meeting in the 1<sup>st</sup> quarter of 2020. The reports provided information on the project's status, budget, and plans, and anticipated requests for state funds.

### **Pilot Project Implementing a Basinwide Water Plan**

Section 15 of Senate Bill No. 2020 authorized the SWC to provide up to \$1 million for a pilot project to implement a basinwide water plan identifying water conveyance, flood control, and other water projects for the basin. To qualify for the funding, all the water resource districts, including joint water resource districts, in the basin must develop the plan and jointly apply for the funding. The bill required the SWC to report on the results of the pilot project by August 1, 2020. However, no qualifying project was submitted to the SWC for consideration.

## **BASINWIDE JOINT WATER RESOURCE DISTRICTS STUDY**

### **Background and Testimony**

Senate Concurrent Resolution No. 4009 (2019) required the committee to study the feasibility and desirability of the water resource boards in each drainage basin forming a joint water resource board to plan and construct water conveyance projects based on basinwide needs. Water resource districts have responsibilities to plan, construct, maintain, control, repair, or issue permits for a wide range of water projects, including dams, drainage systems, water conservation projects, water distribution and supply systems, dikes, culverts, and flood control projects. Members of the 2017-18 Water Topics Overview Committee expressed interest in having these responsibilities administered on a basinwide basis so water could be managed more efficiently.

The committee received information all land in the state is apportioned into 90 water resource districts, including at least 28 joint water resource districts, and each district has a board comprised of members appointed by county commissioners. Districts that cross county lines have board members appointed by multiple boards of county commissioners according to a formula in Section 61-16-07. Each water resource board develops an annual budget, and based on the water resource district's budget, each board of county commissioners may levy a tax up to four mills on each dollar of taxable valuations in the county or portion of county for the water resource district in which the county or portion of the county is included. A water resource district may issue warrants bearing interest at a rate set by the board.

The committee was informed water resource boards have statutory responsibilities to cooperate and plan on a basinwide basis. Section 61-16.1-10 requires water resource boards in a common river basin to meet jointly at least twice per year, cooperate and lend mutual assistance, jointly exercise their authority "to effectively resolve the significant and common water resource management problems" in the basin, and jointly develop a comprehensive plan for the river basin or region.

Water resource districts have authority under Section 61-16.1-11 to enter agreements with each other to form joint water resource districts. To form a joint water resource district, the relevant districts must provide to the SWC a petition signed by a majority of the water resource district's board members or no less than half of the landowners in each district. A joint water resource district may receive funds from the member districts or through taxes levied especially for the joint district in excess of any taxes levied for the member districts. Information provided to the committee indicated there is no statutory limit on the amount of taxes to which an individual parcel of land may be subject for water resource districts.

## **Conclusion**

The committee makes no recommendation regarding its study of the desirability or feasibility of forming basinwide joint water resource districts.