

August 2009

WATER-RELATED TOPICS OVERVIEW COMMITTEE - BACKGROUND MEMORANDUM

North Dakota Century Code (NDCC) Section 54-35-02.7, enacted by the Legislative Assembly in 2009, directs the Legislative Management, during each interim, to appoint a Water-Related Topics Overview Committee in the same manner as the Legislative Management appoints other interim committees. This section provides that the committee must meet quarterly and is responsible for legislative overview of water-related topics and related matters and for any necessary discussions with adjacent states on water-related topics. The committee consists of nine members and the Legislative Management designates the chairman of the committee. The section provides that the committee is to operate according to the statutes and procedure governing the operation of other Legislative Management interim committees.

WATER IN NORTH DAKOTA

North Dakota is located in a region of central North America that bridges the divide between "too wet" and "too dry." The 100th meridian line of longitude roughly splits the state in half. East of this line, there is generally more precipitation in the form of snow and rain than west of the 100th meridian. North Dakota's extreme climate is largely driven by air masses from three areas: the Rocky Mountains, where the mountains block much of the Pacific moisture; the polar region, which brings much of the state's cold weather; and the Gulf of Mexico, which brings much of the state's precipitation. Several studies of lake sediment in North Dakota have demonstrated that the state is subject to long-term climatic variation, alternating between extended wet and dry cycles.

Surface Water Resources

North Dakota is separated into two major drainage basins by a continental divide running from the northwest to the southeast corners of the state. The northeastern portion of the state falls generally within the Hudson Bay drainage, while the southwestern part is drained by the Missouri River to the Gulf of Mexico. For planning purposes, the State Water Commission has divided the state into five major watersheds--the Missouri River Basin, James River Basin, Souris River Basin, Red River Basin, and Devils Lake Basin.

The Missouri River drainage system includes the major subbasins of the Missouri and James Rivers. The tributaries on the south and west sides of the Missouri River typically occupy small but sharply defined valleys. This area is well-drained with few natural lakes. The topography is characterized by rolling, hilly plains with numerous flat-topped, steep-sided buttes. The most prominent are located in the

Badlands along the Little Missouri River. Areas east of the Missouri River include glaciated areas that are characterized by many small lakes and wetlands.

The James River, which is a major tributary of the Missouri River, begins in the drift prairie of central North Dakota, but does not join the Missouri River until it reaches Yankton, South Dakota. The James River system is poorly to moderately drained with a large number of wetlands.

The Hudson Bay drainage includes the Souris River and Red River systems and the Devils Lake Basin. The Souris River (officially designated the Mouse River by NDCC Section 61-01-24) originates in Saskatchewan and then loops through North Dakota before it reenters Canada west of the Turtle Mountains. The topography is varied within the basin with hilly terrain in the southwest, a flat glacial Souris Lake plain in the east, and forested hills of the Turtle Mountains in the northeast.

The Red River winds northward almost 400 miles, forming the border between North Dakota and Minnesota. From the international boundary with Canada, the Red River flows another 155 river miles to Lake Winnipeg in Manitoba. The valley through which the river flows is the former bed of glacial Lake Agassiz. The ancient lakebed is extremely flat and is home to some of the most productive farmland in the world.

The Devils Lake Basin is currently a noncontributing subbasin of the Red River Basin. The drainage system is formed by chains of waterways and connecting lakes, many of which ultimately terminate in Devils Lake itself.

The flow in all North Dakota streams and rivers is seasonably variable. Runoff is greatest in early spring as a result of snowmelt water and spring rainfall. Many smaller streams experience little or no flow for extended periods during summer months, although dramatic flow variations in river discharges can be caused by changes in weather patterns, isolated storm events, evaporation rates, and snowpack conditions.

According to information in North Dakota's assessment database, provided by the State Department of Health to the United States Environmental Protection Agency, there are 138 manmade reservoirs and 109 natural lakes in North Dakota. Reservoirs comprise approximately 71 percent of North Dakota's total lake and reservoir surface acres, accounting for a surface area of 543,156 acres. Of this total, 480,731 acres, or 62 percent, of the state's entire lake and reservoir acres are contained within the two main stem Missouri River reservoirs--Lake Sakakawea and Lake Oahe.

The remaining 136 reservoirs share 62,425 acres with an average surface area of 459 acres.

The 109 natural lakes in North Dakota cover 218,616 acres with approximately 132,246 acres, or 60 percent, attributed to Devils Lake at an elevation of 1,446 feet mean sea level. The remaining 108 lakes average 800 acres with half being smaller than 250 acres.

There are an estimated 59,607 miles of rivers and streams in the state. These estimates are based on rivers and streams entered into the assessment database.

Ground Water Resources

Ground water underlies the land surface throughout the state. Ground water generally occurs in two major types of rock--unconsolidated deposits and bedrock. Unconsolidated deposits are loose beds of gravel, sand, silt, or clay of glacial origin. Bedrock consists primarily of shale and sandstone.

Aquifers of glacial origin are generally more productive to wells than aquifers found in the underlying bedrock. Bedrock aquifers underlie the entire state and tend to be more continuous and widespread than aquifers in the unconsolidated deposits. It is estimated that 60 million acre-feet of water is stored in the major unconsolidated aquifers in the state. The amount of water available in the major bedrock aquifers is estimated to be approximately 435 million acre-feet.

Water Permitting

North Dakota follows the prior appropriation doctrine for water appropriation. Prior appropriation is also known as the "first in time, first in right" appropriation system with the first entity to put water to a beneficial use acquiring the right to use the water over later or junior water appropriators.

When there are multiple water permit applications for water from the same source, and that source is insufficient to supply all the applications received by the State Engineer within a 90-day time period, the following order is used to determine priority, from first to last: domestic; municipal; livestock; irrigation; industrial; and fish, wildlife, and recreation. In 2008 there were a total of 3,628 water use permits in North Dakota. Irrigation represents the largest proportion, 62 percent; followed distantly by industrial, 9 percent; fish and wildlife, 8 percent; municipal, 8 percent; recreation, 5 percent; rural water, 3 percent; stock, 2 percent; and flood control, 1 percent; with the remaining comprising less than 1 percent each.

Water Project Funding

North Dakota funds the majority of its water projects through the State Water Commission. Funding funneled through the State Water Commission for water development has come from several sources, including the state's general fund; the Dakota Water Resources Act; the municipal, rural, and industrial water supply program; the resources

trust fund; and the water development trust fund. In addition to these sources, the State Water Commission is authorized to issue revenue bonds for water projects, and the commission has shared control of the drinking water state revolving loan fund.

Municipal, Rural, and Industrial Water Supply Program

A major source of grant funding for water supply development in North Dakota is the municipal, rural, and industrial water supply program. This program's funding was authorized by Congress through the Garrison Diversion Unit Reformulation Act of 1986. Federal funding channels through the Bureau of Reclamation to the state's federal fiscal agent--the Garrison Diversion Conservancy District. This program is jointly administered by the conservancy district and the State Water Commission. The Rural Development Agency provides funding through the United States Department of Agriculture for a majority of loans to cover the local share for municipal, rural, and industrial water supply projects.

The 1986 Garrison Diversion Unit Reformulation Act authorized a federal municipal, rural, and industrial water supply grant program of \$200 million. This funding has been exhausted. Additional federal funding was authorized for the municipal, rural, and industrial water supply program with passage of the Dakota Water Resources Act of 2000. That Act provided 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. An additional \$600 million, indexed for inflation, was authorized which includes a \$200 million grant for state municipal, rural, and industrial water supply programs; \$200 million for North Dakota tribal municipal, rural, and industrial water supply programs; and a \$200 million loan for the Red River Valley Water Supply Project.

Annual municipal, rural, and industrial water supply funding is dependent upon congressional appropriations. As of September 2008, \$228 million in federal funds has been approved for North Dakota's municipal, rural, and industrial water supply program with \$30 million for federal fiscal years 2007 and 2008.

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 constructing water-related projects, including rural water systems, and energy conservation programs. In November 1994

the voters of North Dakota approved a constitutional amendment, which is now 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 to the common schools trust fund and 50 percent to the foundation aid stabilization fund. North Dakota Century Code Section 57-51.1-07 provides that oil extraction tax revenues be distributed as follows: 20 percent to the resources trust fund; 20 percent allocated as provided in Article X, Section 24, of the Constitution of North Dakota; and 60 percent to the general fund. An analysis of the resources trust fund is attached as [Appendix A](#).

Water Development Trust Fund

North Dakota Century Code Section 54-27-25, created by 1999 House Bill No. 1475, established 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. Money in the fund must be transferred within 30 days of its deposit in the fund with 10 percent going to the community health trust fund, 45 percent to the common schools trust fund, and 45 percent to the water development trust fund. In the November 2008 general election, voters approved initiated measure No. 3 that amended NDCC Section 54-27-25 to establish a tobacco prevention and control trust fund. The measure provides for a portion of tobacco settlement funds received by the state to be deposited in this new fund rather than the entire amount in the tobacco settlement trust fund. Tobacco settlement money received under subsection IX(c)(1) of the Master Settlement Agreement, which continues in perpetuity, will continue to be deposited into the tobacco settlement trust fund and allocated 10 percent to the community health trust fund, 45 percent to the common schools trust fund, and 45 percent to the water development trust fund. Tobacco settlement money received under subsection IX(c)(2) of the Master Settlement Agreement relating to strategic contribution payments, which began in 2008 and continue through 2017, will, beginning in 2009, be deposited into the newly created tobacco prevention and control trust fund. The measure also provides that if in any biennium the tobacco prevention and control trust fund does not have adequate funding for the comprehensive plan, money may be transferred from the water development trust fund to the tobacco prevention and control trust fund in an amount determined necessary by the Tobacco Prevention and Control Executive Committee to adequately provide for the comprehensive plan. The 2009 Legislative Assembly, in Section 39 of House Bill No. 1015, provided that any money deposited in the water development trust fund under NDCC Section 54-27-25 may be spent only pursuant to legislative appropriation.

The tobacco settlement payment received by the state in April 2008 was the first payment that included funds relating to subsection IX(c)(2) of the agreement. This payment was received before the approval of the initiated measure and was deposited in the tobacco settlement trust fund and disbursed as provided for in NDCC Section 54-27-25 before amendment by the measure. Future tobacco settlement payments will be deposited in the tobacco settlement trust fund and the tobacco prevention and control trust fund pursuant to NDCC Section 54-27-25 as amended by the measure.

North Dakota Century Code Section 61-02.1-04, created by 1999 Senate Bill No. 2188, provides that the principal and interest on bonds issued for flood control projects, the Southwest Pipeline Project, and an outlet to Devils Lake must be repaid with money appropriated from the water development trust fund. An analysis of the water development trust fund is attached as [Appendix B](#).

Bonding

North Dakota Century Code Section 61-02-46 authorizes the State Water Commission to issue revenue bonds of up to \$2 million per project. The Legislative Assembly must authorize revenue bond authority beyond \$2 million per project. In 1991 the Legislative Assembly authorized full revenue bond authority for the Northwest Area Water Supply Project. 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. As of June 30, 2008, the State Water Commission has outstanding bonds totaling \$18.7 million for the Southwest Pipeline Project. There are no outstanding bonds for the Northwest Area Water Supply Project.

In 1999 the State Water Commission was authorized to issue up to \$84.8 million in appropriation bonds under the provisions of Senate Bill No. 2188. 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 Senate Bill No. 2188, the Legislative Assembly, in 2003, 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. As of June 30, 2008, the State Water Commission has outstanding bonds totaling \$87.7 million for other statewide water projects.

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 and bonds will be \$16.9 million for the 2009-11 biennium; however, funds must be available to make the August 1, 2011, payment. This payment occurs the second month of the new biennium before the receipt of any of that biennium's tobacco settlement dollars. That repayment will be \$8.4 million.

Drinking Water State Revolving Loan Fund

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

The State Water Commission's involvement with the fund is twofold. First, the State Department of Health must administer and disburse funds with the approval of the State Water Commission. Second, the State Department of Health must establish assistance priorities and expend grant funds pursuant to the priority list for the drinking water treatment revolving loan fund after consulting with and obtaining the commission's approval. The process of prioritizing newer modified projects is completed on an annual basis. Each year, the State Department of Health provides an intended use plan, which contains a comprehensive project priority list and a fundable project list. The 2008 comprehensive project priority list includes 91 projects with a cumulative total project funding need of \$326.7 million. The funding list of 18 projects includes \$36.4 million in loans from the total federal grants of \$100 million for fiscal years 1997 through 2008. Available funding for the program for 2009 is anticipated to be approximately \$8 million.

GARRISON DIVERSION CONSERVANCY DISTRICT

The Pick-Sloan Missouri Basin Program

On December 22, 1944, the United States Congress authorized the Flood Control Act of 1944, later renamed the Pick-Sloan Missouri Basin Program. The primary purpose of the Pick-Sloan Missouri Basin Program was for flood control, navigation, irrigation, and hydropower which would be facilitated by the construction of dams on the main stem of the Missouri River. These dams include Fort Peck, Garrison, Oahe, Big Bend, Fort Randall, and Gavins Point.

Under the plan, North Dakota was originally to receive its irrigation from water diverted from the Fort Peck Dam in eastern Montana. Originally known as the "Missouri-Souris Project," the project included 1.275 million acres of irrigation.

Between 1944 and 1965, soil surveys and studies were conducted to assess the feasibility of irrigating the 1.275 million acres originally planned for North Dakota. The studies indicated that the soil in northwestern North Dakota was not suitable for irrigation according to federal irrigation standards. Drainage problems caused by the unusual high density of glacial subsoil was a primary factor. As a result, the Bureau of Reclamation revised the diversion plan proposing instead to take water from the Garrison Dam and Reservoir and irrigate other lands to the east. With the new name "Garrison Diversion," the Bureau of Reclamation 1957 feasibility study on the redesigned project recommended irrigation of 1.007 million acres and other water development in central and eastern North Dakota.

Garrison Diversion Unit

Because of changes to the original plan and the language in the 1964 appropriations act requiring specific reauthorization for all units of the Pick-Sloan Missouri Basin Program, the Bureau of Reclamation returned to Congress for reauthorization. During the process of reauthorization, supporters of the project pointed to the many benefits for North Dakota and the need to compensate the state for land inundated by the construction of the Garrison Dam and Reservoir. Others in Congress criticized the large cost of even the scaled-down project, the conflict with federal farm policies, and the relatively small amount of money to be repaid by water users.

On August 5, 1965, Congress addressed these concerns by enacting legislation for the Garrison Diversion Unit. The primary focus of the plan was to include in the initial stage municipal and industrial water, fish and wildlife development, recreation, and flood control along with irrigation of 250,000 acres. Between 1968 and 1984, construction and preparatory activities progressed on many features.

Garrison Diversion Unit Commission

Even as construction advanced on the Garrison Diversion throughout the 1970s and 1980s, it became increasingly apparent that major issues, such as the environment, acquisition of land, economics of irrigation, and Canadian concerns about water flowing from the Missouri River Basin into the Hudson Bay Basin, would require reformulation of the project if it were to be completed. In 1984 construction was halted and a high-level commission was appointed by the Secretary of the Interior to study and recommend a change in direction.

The Garrison Diversion Unit Commission, in its final report issued December 20, 1984, recommended development of a Garrison Diversion Unit significantly different from the project described in the 1957 feasibility report and the project authorized in 1965.

The major recommendations were:

- Irrigation of 130,940 acres of land, none of which drains to the Hudson Bay. Of these, 17,580 acres would be located on the

Fort Berthold and Standing Rock Indian Reservations.

- A grant program of \$200 million to facilitate municipal, rural, and industrial water service for as many as 130 towns and cities, rural areas, and three Indian reservations.
- A water treatment facility to treat Missouri River water that would be transferred into the Hudson Bay drainage via the Sheyenne River and then the Red River. This would provide municipal, rural, and industrial water for Fargo, Grand Forks, and other cities and rural systems. The cost of building and operating the treatment plant was declared nonreimbursable.
- Mitigation of wildlife impacts on a new basin with specific wildlife features authorized beyond the mitigation requirements.
- Recreation development on a 50-50 cost-share basis.
- The cost of the commission plan was estimated at a total of \$1.12 billion in capital costs, including expenditures to date, and \$15.8 million in annual operation, maintenance, and replacement costs. Of major concern to North Dakota and the Garrison Diversion Conservancy District was the proposed elimination of the Lonetree Dam and Reservoir and replacement with the Sykeston Canal. The Lonetree Reservoir was to be the project's principal regulating reservoir; without it, future expansion was limited. The Lonetree Dam and Reservoir remained an authorized feature of the commission plan but construction funds may only be requested after a finding of need by the Secretary of the Interior and satisfactory consultation with the government of Canada.

Garrison Diversion Unit Reformulation Act

As a provision of the fiscal year 1986 appropriation, Congress stipulated that new construction contracts not be awarded or additional land acquired unless the project was reauthorized by March 31, 1986. The state and the Garrison Diversion Conservancy District subsequently elected to support reauthorization of the project. The Garrison Diversion Unit Reformulation Act of 1986 was signed into law May 12, 1986, to authorize the recommendations of the Garrison Diversion Unit Commission's final report. In conjunction with the new Act, a "statement of principles" was signed by all the primary stakeholders in the previous project conflicts.

Following the 1986 Act, activities began on municipal, rural, and industrial water supply projects; mitigation of wildlife habitat; and construction continued on some of the water delivery features. The continuing evaluation of a smaller Lonetree Reservoir as a project feature and further analysis of the recommended Sykeston Canal deferred progress with construction of the principal water delivery facilities. The President, in 1990, failed to include any

funding for the Garrison Diversion Project in his submitted fiscal year 1991 budget.

In connection with the administration's decision to terminate Garrison Diversion funding in fiscal year 1991, the Secretary of the Interior established a task group to develop a policy on support for future funding of the authorized project. The task group's decision was to continue funding only those features of the reformulated project which are consistent with the contemporary water needs, national priorities, and the history of Garrison Diversion, but not to fund features which would be used for mitigation. The recommendations also included continuation of the municipal, rural, and industrial water supply grant program; Indian municipal, rural, and industrial water supply programs; irrigation development on 17,580 acres to include two Indian reservations; continued operation of the Oakes Test Area research activities; recreation, fish, wildlife mitigation, and enhancement initiatives; and a minimum level of operation and maintenance on the already constructed main supply system facilities. Funding for these features would be considered by the administration within the context of national priorities. Funding for the completion of non-Indian project irrigation facilities and for related principal after supply works were completed would not be considered.

Collaborative Process

In November 1993, the North Dakota Congressional Delegation and the Governor requested that the Bureau of Reclamation initiate a collaborative process to find a consensus plan that would meet the contemporary water development and stewardship needs of the state. The collaborative process included representatives of the Standing Rock Sioux, Devils Lake Sioux, Three Affiliated Tribes, the Congressional Delegation offices, and the Governor's office. The Bureau of Reclamation provided technical and administrative support. Under the guides of the collaborative group, the bureau began a series of studies for the water supply needs of the state. In 1995 the North Dakota Legislative Assembly repealed a portion of the state laws dealing with the preservation of wetlands. The National Wildlife Federation interpreted this action as withdrawal of state support for the statement of principles and withdrew from the collaborative process.

Garrison Diversion Today

At present, Garrison Diversion has turned part of its focus toward supplying the Red River Valley with a reliable supply of quality drinking water. Research suggests that a strong possibility for a drought such as the one that occurred in the 1930s could hit the Red River Valley at some point in the next five decades. This drought could be of the same magnitude as the 1930s drought or maybe worse. With the rising population of cities such as Fargo and

Moorhead, the water demand during a drought would be even greater than in previous decades.

The Dakota Water Resources Act calls for \$200 million of federal appropriations for the Red River Valley Water Supply Project. A study began in 2000 with a memorandum of understanding signed between the state, represented by the Garrison Diversion Conservancy District, and the federal government, represented by the Bureau of Reclamation.

Also included in the Dakota Water Resources Act were appropriations for a \$200 million increase in a municipal, industrial, and rural water supply fund, \$200 million to meet Indian water needs, and \$32.5 million for environmental and recreational needs.

RED RIVER VALLEY WATER SUPPLY PROJECT

The Dakota Water Resources Act of 2000 authorized the Red River Valley Water Supply Project to provide a reliable supply of quality drinking water for the Red River Valley. The Act also mandated the preparation of an environmental impact statement with joint leadership between the federal government and the state. The Garrison Diversion Conservancy District was designated by the Governor to represent the state in the Red River Valley Water Supply Project. The purpose of the environmental impact statement was to evaluate alternatives to meet the long-term water needs of the Red River Valley in North Dakota and three cities in Minnesota--East Grand Forks, Moorhead, and Breckenridge.

A draft environmental impact statement was released by the Bureau of Reclamation and the state in December 2005. The draft environmental impact statement evaluated eight alternatives to meet the water supply needs of the Red River Valley. Of these, three utilized existing surface water and ground water sources in North Dakota and Minnesota, four imported water from the Missouri River, and one included the future of the Red River Valley if no project were built. The four import alternatives included water treatment plants to reduce the risk of transferring invasive species. A supplemental draft environmental impact statement was released on January 31, 2007, which contained revisions to the draft environmental impact statement and was written to incorporate responses to substantive comments related to environmental issues received on the draft environmental impact statement. New information became available, and additional analyses relevant to environmental concerns and issues were conducted in response to the comments. After the additional analyses, the supplemental draft environmental impact statement eliminated two of the alternatives contained in the draft environmental impact statement from further consideration and identified the Garrison Diversion Unit import to the Sheyenne River as the state and federally preferred alternative.

The final environmental impact statement was released by the Bureau of Reclamation and the state on December 21, 2007. This document includes responses to public comments received on the draft and supplemental draft environmental impact statements. It also contains a final biological assessment prepared in compliance with the 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 Bureau of Reclamation each identified the Garrison Diversion Unit import to the Sheyenne River alternative as the preferred alternative.

Proponents of this alternative note the Garrison Diversion Unit import to the Sheyenne River alternative provides positive benefits to the environment and harbors no significant negative environmental impacts. It meets the water needs of the Red River Valley now and in the future. This option also provides the core infrastructure for all water systems in the Red River Valley, thus offering the flexibility of future expansion. It has no technical constructability issues and is the least costly of the three Missouri River import alternatives. The Garrison Diversion Unit import to the Sheyenne River alternative would transport water through the McClusky Canal, then utilize a buried pipeline from a biota treatment facility to the Sheyenne River north of Lake Ashtabula. Lake Ashtabula would act as a regulating reservoir. From there, water would be released in the Sheyenne River and flow into the Red River supplying water systems in the Red River Valley with a reliable supply of drinking water.

WATER-RELATED LEGISLATION ENACTED IN 2009

State Water Commission

House Bill No. 1020 appropriates \$310,745,708 to the State Water Commission. The bill also appropriates \$12 million from federal fiscal stimulus funds made available to the state under the federal American Recovery and Reinvestment Act of 2009 for funding for the Southwest Pipeline Project. The bill also provides that \$45 million of the appropriation is for Fargo flood control projects and states that it is the intent of the 61st Legislative Assembly that a total of \$75 million be committed by the state to match a grant of federal funds for Fargo flood control. The appropriation of federal fiscal stimulus funds is an emergency measure.

House Bill No. 1305 appropriates \$2,792,000 from the permanent oil tax trust fund to the State Water Commission to provide a grant of up to \$864,000 to assist in the local cost-share of the Ray and Tioga Water Supply Project; provide a grant of up to \$985,000 to assist in the local cost-share of the Burke,

Divide, and Williams Water District Water Supply Project; provide a grant of up to \$593,000 to assist in the local cost-share of the Wildrose Water Supply Project; and provide a grant of up to \$350,000 to assist in the repayment of outstanding bonds associated with the Stanley water pipeline construction project. The bill is an emergency measure.

Senate Bill No. 2305 appropriates \$342,000 from the resources trust fund to the State Water Commission to conduct a Beaver Bay embankment feasibility study.

Senate Bill No. 2316 provides that the State Water Commission shall develop policies, including cost-sharing guidelines, which further the development of water retention projects for flood control and provide a report regarding the policies to the 62nd Legislative Assembly.

Appropriation of Water

House Bill No. 1286 revises the definition of domestic use for purposes of water appropriation from including irrigation of land not exceeding one acre in area for noncommercial gardens, orchards, lawns, trees, or shrubbery to irrigation of land not exceeding five acres for those purposes and defines irrigation use for purposes of water appropriation as including use of water for application to more than five acres of land rather than one acre and includes gardens, orchards, lawns, trees, or shrubbery within the definition of agricultural crops.

Water Resource Districts

Senate Bill No. 2251 increases the compensation for water resource district managers from \$45 per day to \$75, but not more than \$135, per day.

Senate Bill No. 2253 removes the requirement that if a water resource district board consists of three managers, one manager must be from a flood prone area, if any, within the district which is defined as a floodplain area of a river subject to periodic and recurring flooding. The bill also deletes language establishing staggered terms for initial water resource managers as water resource districts have all now established staggered terms for managers.

Senate Bill No. 2254 provides that a water resource district board may finance the maintenance of projects constructed by a federal agency, including the Soil Conservation Service or Natural Resources Conservation Services, without the need for the district to physically locate a maintenance contract with the federal agency.

Senate Bill No. 2255 allows water resource districts to utilize "quick take" eminent domain

proceedings for projects for which state funds have been appropriated.

Irrigation Districts

House Bill No. 1321 authorizes the board of directors of irrigation districts to hold mail ballot elections.

Garrison Diversion Conservancy District

Senate Bill No. 2298 authorizes the Garrison Diversion Conservancy District to issue revenue bonds for the Red River Valley Water Supply Project.

Southwest Water Authority

Senate Bill No. 2193 expands the powers and duties of the board of directors of the Southwest Water Authority to include the study of an analysis of options for providing additional water supplies to southwest North Dakota for purposes including domestic, rural water, municipal, livestock, energy development, industrial, mining, and other uses and to conduct engineering, legal, financial, educational, and other activities to further the completion of the Southwest Pipeline Project or other works or other projects necessary to provide adequate water supplies for southwest North Dakota. The bill also extends the authority of the Southwest Water Authority to levy taxes from 2010 to 2020.

House Bill No. 1278 adds a director from the city of Mandan to the board of directors of the Southwest Water Authority and provides that the current director from Morton County may not be a resident of Mandan.

Red River Valley Water Supply Project

Senate Bill No. 2317 revises the funding plan for the Red River Valley Water Supply Project to provide that it is the intent of the Legislative Assembly to provide state funding for one-third of the total cost of constructing the Red River Valley Water Supply Project, that any general fund appropriation for the project may be carried over to future bienniums, and that state funding for the project may be appropriated at the time and in the manner determined by the Legislative Assembly either concurrently or separately from federal and local funding for the project.

Senate Concurrent Resolution No. 4035 urges Congress to establish the Red River Valley Authority as an agency or authorized board of the federal government for the purposes of the regulation and control of water quality of the Red River and regulation and control of the retention and flow of water, including retention by dams or retention ponds or other areas, and of drainage on the Red River.

ATTACH:2

ANALYSIS OF THE RESOURCES TRUST FUND FOR THE 2007-09 AND 2009-11 BIENNIUMS

	2007-09 Biennium		2009-11 Biennium	
Beginning balance		\$32,655,609		\$79,318,154
Add estimated revenues				
Oil extraction tax collections	\$70,948,545		\$49,784,341	
Repayments and reimbursements	3,014,000		2,009,000	
Investment earnings/miscellaneous income	2,700,000		1,000,000	
Total estimated revenues		76,662,545 ¹		52,793,341
Total available		\$109,318,154		\$132,111,495
Less estimated expenditures and transfers				
State Water Commission - Grants, projects, and project administration (2009 HB 1020)	\$30,000,000 ²		\$131,769,495 ³	
State Water Commission - Beaver Bay embankment feasibility study (2009 SB 2305)			342,000	
Total estimated expenditures and transfers		30,000,000		132,111,495 ³
Estimated ending balance		\$79,318,154		\$0

¹Estimated revenues - 2007-09 - The estimated revenues for the 2007-09 biennium reflect actual revenues through April 2009 and estimated revenues for the remainder of the biennium based on the February 2009 legislative revenue forecast.

²Section 4 of Senate Bill No. 2020 (2007) appropriated \$69,352,698, or any additional amounts that become available, from the resources trust fund for defraying the expenses of the State Water Commission. The State Water Commission estimates 2007-09 expenditures from the resources trust fund to be approximately \$30 million.

³Sections 1 and 5 of House Bill No. 1020 (2009) appropriate \$188.4 million, or any additional amounts that become available, from the resources trust fund for defraying the expenses of the State Water Commission for the 2009-11 biennium. In addition, Senate Bill No. 2305 (2009) provides a \$342,000 appropriation from the resources trust fund to the State Water Commission for conducting a Beaver Bay embankment feasibility study. Total expenditures will be limited to funding available.

FUND HISTORY

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:

- Constructing water-related projects, including rural water systems.
- Energy conservation programs.

In November 1994 the voters of North Dakota approved a constitutional amendment, which is now Article X, Section 24, of the Constitution of North Dakota, to provide that 20 percent of oil extraction taxes be allocated as follows:

- Fifty percent (of the 20 percent) to the common schools trust fund.
- Fifty percent (of the 20 percent) to the foundation aid stabilization fund.

North Dakota Century Code Section 57-51.1-07 provides that oil extraction tax revenues be distributed as follows:

- Twenty percent to the resources trust fund.
- Twenty percent allocated as provided in Article X, Section 24, of the Constitution of North Dakota.
- Sixty percent to the general fund.

**ANALYSIS OF THE WATER DEVELOPMENT TRUST FUND
FOR THE 2007-09 AND 2009-11 BIENNIUMS**

	2007-09 Biennium		2009-11 Biennium	
Beginning balance		\$8,989,953		\$21,602,258
Add estimated revenues				
Transfers to date from tobacco settlement trust fund	\$27,672,929 ¹		\$0	
Projected remaining transfers from tobacco settlement trust fund			19,746,536	
Total estimated revenues		27,672,929 ²		19,746,536 ²
Total available		\$36,662,882		\$41,348,794
Less estimated expenditures and transfers				
State Water Commission (2007 SB 2020, 2009 HB 1020)				
Water projects		\$0 ³	\$13,866,925 ⁴	
Bond payments	13,992,714 ³		16,976,076 ⁴	
Administrative expenses	1,067,910 ³		0 ⁴	
Total estimated expenditures and transfers		15,060,624		30,843,001
Estimated ending balance		<u>\$21,602,258</u>		<u>\$10,505,793</u>

¹For the 2007-09 biennium five transfers totaling \$27,672,929 have been made from the tobacco settlement trust fund as of May 2009. Total transfers of \$116,176,803 have been made from the tobacco settlement trust fund to the water development trust fund.

²Revenues - Interest earned on the water development trust fund is deposited in the state general fund.

In 2006 certain tobacco companies began reducing their tobacco settlement payments to North Dakota contending that the Master Settlement Agreement allows for the payments to be reduced if they lose sales to small cigarette makers that did not participate in the agreement and if states do not enforce laws intended to make smaller tobacco companies set aside money for legal claims. The Attorney General's office has filed a lawsuit against the tobacco companies to collect full payment. Due to the uncertainty of the lawsuit, the Office of Management and Budget has reduced the estimated tobacco settlement revenues for the 2009-11 biennium by 3 percent. The water development trust fund share of the 3 percent reduction is \$994,778 for the 2009-11 biennium.

Approved by voters in the November 2008 general election, initiated measure No. 3 amends North Dakota Century Code (NDCC) Section 54-27-25 to provide that a portion of tobacco settlement funds received by the state be deposited in the newly created tobacco prevention and control trust fund rather than the entire amount in the tobacco settlement trust fund. Tobacco settlement money received under subsection IX(c)(1) of the Master Settlement Agreement, which continue in perpetuity, will continue to be deposited into the tobacco settlement trust fund and allocated 10 percent to the community health trust fund, 45 percent to the common schools trust fund, and 45 percent to the water development trust fund. Tobacco settlement money received under subsection IX(c)(2) of the Master Settlement Agreement, which began in 2008 and continues through 2017, beginning in 2009 will be deposited in the tobacco prevention and control trust fund. The amount received under subsection IX(c)(2) of the Master Settlement Agreement for 2008 was \$13,797,729. Remaining water development trust fund revenues have been estimated based on the Office of Management and Budget revised estimated collections less actual and anticipated strategic contribution payments. The measure also provides that if in any biennium the tobacco prevention and control trust fund does not have adequate funding for the comprehensive plan, money may be transferred from the water development trust fund to the tobacco prevention and control trust fund in an amount determined necessary by the Tobacco Prevention and Control Executive Committee to adequately provide for the comprehensive plan. The 2009 Legislative Assembly, in Section 39 of House Bill No. 1015, provided that any money deposited in the water development trust fund under Section 54-27-25 may only be spent pursuant to legislative appropriation.

Initiated measure No. 3 will result in the following estimated allocation of the revised estimated collections of the tobacco settlement payments through 2025:

	Actual and Estimated Total Tobacco Settlement Proceeds	Estimated Payments Under Master Settlement Agreement Subsection IX(c)(2) Deposited in the Tobacco Prevention and Control Trust Fund	Allocation of Actual and Estimated Payments Under Master Settlement Agreement Subsection IX(c)(1)		
			Common Schools Trust Fund	Water Development Trust Fund	Community Health Trust Fund
Actual payment April 2008	\$36.5 million	N/A	\$16.4 million	\$16.4 million	\$3.7 million
Actual payment April 2009	39.2 million	\$14.1 million	11.3 million	11.3 million	2.5 million
Estimated 2009-11 biennium	71.5 million	27.6 million	19.8 million	19.8 million	4.3 million
Estimated 2011-13 biennium	73.7 million	27.6 million	20.8 million	20.8 million	4.5 million
Estimated 2013-15 biennium	73.7 million	27.6 million	20.8 million	20.8 million	4.5 million
Estimated 2015-17 biennium	73.7 million	27.6 million	20.8 million	20.8 million	4.5 million
Estimated 2017-19 biennium	52.5 million	N/A	23.6 million	23.6 million	5.3 million
Estimated 2019-21 biennium	52.5 million	N/A	23.6 million	23.6 million	5.3 million
Estimated 2021-23 biennium	52.5 million	N/A	23.6 million	23.6 million	5.3 million
Estimated 2023-25 biennium	52.5 million	N/A	23.6 million	23.6 million	5.3 million
Total	\$578.3 million	\$124.5 million	\$204.3 million	\$204.3 million	\$45.2 million

³Section 5 of Senate Bill No. 2020 (2007) appropriated \$40,055,999, or any additional amount that becomes available, from the water development trust fund for the purpose of defraying the expenses of the State Water Commission. The agency anticipates expenditures will total \$15,060,624 for the 2007-09 biennium, including bond payments of \$13,992,714 and administrative expenses of \$1,067,910.

⁴The 2009-11 executive recommendation provided \$32,376,076, or any additional amount that becomes available, from the water development trust fund for the purpose of defraying the expenses of the State Water Commission for the 2009-11 biennium. The 2009 Legislative Assembly decreased funding from the water development trust fund and increased funding from the general fund by \$1,533,075 for administrative and support services to provide a total of \$30,843,001, or any additional amount that becomes available, from the water development trust fund for bond payments and water projects. Total 2009-11 biennium bond payments will be \$16,976,076. The remaining balance of approximately \$13.9 million will be available for State Water Commission projects.

FUND HISTORY

North Dakota Century Code Section 54-27-25, created by 1999 House Bill No. 1475, established 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. Money in the fund must be transferred within 30 days of its deposit in the fund:

- Ten percent to the community health trust fund.
- Forty-five percent to the common schools trust fund.
- Forty-five percent to the water development trust fund.

In the November 2008 general election voters approved initiated measure No. 3 that amended NDCC Section 54-27-25 to establish a tobacco prevention and control trust fund. The measure provides for a portion of tobacco settlement funds received by the state to be deposited in this new fund rather than the entire amount in the tobacco settlement trust fund. Tobacco settlement money received under subsection IX(c)(1) of the Master Settlement Agreement, which continue in perpetuity, will continue to be deposited into the tobacco settlement trust fund and allocated 10 percent to the community health trust fund, 45 percent to the common schools trust fund, and 45 percent to the water development trust fund. Tobacco settlement money received under subsection IX(c)(2) of the Master Settlement Agreement relating to strategic contribution payments, which began in 2008 and continues through 2017, will, beginning in 2009, be deposited into the newly created tobacco prevention and control trust fund. The measure also provides that if in any biennium the tobacco prevention and control trust fund does not have adequate funding for the comprehensive plan, money may be transferred from the water development trust fund to the tobacco prevention and control trust

fund in an amount determined necessary by the Tobacco Prevention and Control Executive Committee to adequately provide for the comprehensive plan. The 2009 Legislative Assembly, in Section 39 of House Bill No. 1015, provided that any money deposited in the water development trust fund under Section 54-27-25 may only be spent pursuant to legislative appropriation.

The tobacco settlement payment received by the state in April 2008 was the first payment that included funds relating to subsection IX(c)(2) of the agreement. This payment was received prior to the approval of the measure and was deposited in the tobacco settlement trust fund and disbursed as provided for in NDCC Section 54-27-25 prior to amendment by the measure. Future tobacco settlement payments will be deposited in the tobacco settlement trust fund and the tobacco prevention and control trust fund pursuant to Section 54-27-25 as amended by the measure.

North Dakota Century Code Section 61-02.1-04, created by 1999 Senate Bill No. 2188, provides that the principal and interest on bonds issued for flood control projects, the Southwest Pipeline Project, and an outlet to Devils Lake must be repaid with money appropriated from the water development trust fund.