

**October 11, 2017  
Minutes**

**Little Missouri River Commission  
Ramada Grand Dakota Hotel  
Dickinson, North Dakota  
3:00 PM (Mountain Time)**

**Little Missouri River Commission Members Present**

Gene Allen, Golden Valley County  
Melissa Baker, ND Parks and Recreation Department  
Garland Erbele, ND Office of the State Engineer and State Water Commission  
Dave Glatt, ND Department of Health  
John Hanson, Slope County  
Pam Hestekin, Bowman County  
Joe Schettler, Dunn County  
Dudley Stuber, Billings County

**Greeting and Introductions**

State Engineer Garland Erbele served as Interim Chair, and called the meeting of the Little Missouri River Commission (LMRC) to order at 3:00 P.M. (Mountain Time). Introductions were then made by LMRC members.

**Approval of Agenda**

*A motion was made by Schettler, seconded by Baker, and passed unanimously to approve the meeting agenda.*

**Approval of Meeting Minutes**

*A motion was made by Hestekin, seconded by Glatt, and passed unanimously to approve meeting minutes from the August 29, 2007 meeting.*

*A motion was made by Hanson, seconded by Baker, and passed unanimously to approve meeting minutes from the August 9, 2017 meeting.*

**Discussion Regarding Stakeholder Input**

Erbele opened the discussion regarding future stakeholder input opportunities at LMRC meetings. Baker suggested that those types of discussions should take place either at the beginning of the meetings or before individual items on agendas that require action. Allen agreed with this concept. Glatt also thought it would be beneficial to allow stakeholder input before action items, and to provide an opportunity before the close of meetings in case there are issues that should be considered for future agendas.

*A motion was made by Allen, seconded by Glatt, and approved unanimously to allow public input before action items are considered for a vote, and at the conclusion of meetings to allow additional topics to be brought to the LMRC's attention for consideration on future agendas.*

### **Election of Officers**

*Stuber nominated Schettler to serve as Chairman of the LMRC. Schettler's nomination was seconded by Allen and unanimously approved. Baker abstained from the vote.*

*Erbele nominated Allen to serve as Vice-Chairman of the LMRC. Allen's nomination was seconded by Hanson and unanimously approved.*

Chairman Schettler asked about the potential role for a Secretary-Treasurer. Erbele said that the Parks and Recreation Department has traditionally served in that capacity, with the exception of the most recent 2017 meetings. Baker echoed Erbele's comments and said that the Parks and Recreation Department would be happy to take on that role in the future. Baker also suggested that it would be beneficial to designate the State Water Commission as a standing agenda item to make sure the LMRC and the Water Commission maintain necessary communication.

*A motion was made by Allen, seconded by Stuber, and unanimously approved to have the North Dakota Parks and Recreation Department serve in the role as Secretary for the LMRC.*

### **Terms of Board Members**

Chairman Schettler opened discussion regarding terms of LMRC members. Erbele offered to cover what was required by law. NDCC 61-29-04 says "The county members shall serve terms of office as follows: two members shall serve one-year terms, two members shall serve two-year terms, and two members shall serve three-year terms."

Erbele suggested that it might be wise to offer the three-year terms to the officers to maintain continuity. Then split up the one and two-year terms between the other county members.

Hanson asked if there is a limit to the number of terms that can be served by the appointed county members. Baker said that is a question that is related to bylaws. They have not been able to find any LMRC bylaws, and have looked extensively. Erbele pointed out that this matter was not addressed in statute.

Hanson asked how the LMRC would decide on the one and two-year terms if the officers were given the three-year terms. Erbele said the Water Commission had brought a deck of cards to the meeting. It was suggested that the county representatives draw from the deck of cards. The two highest cards would receive two-year terms, and the lowest two cards, one-year terms.

*A motion was made by Stuber, seconded by Hestekin, and unanimously passed to draw cards for the one and two-year terms.*

*A motion was made by Baker, seconded by Stuber, and unanimously passed to allow the Chair and Vice-Chair positions to hold the three-year terms.*

State Water Commission staff then provided a deck of cards and the remaining county representatives each drew a card. The two highest cards were drawn by the representatives from Slope and Bowman Counties, who will serve two-year terms. The two lowest cards were drawn by the representatives from Billings and McKenzie Counties, who will serve one-year terms.

### **Open Records/Public Meeting Laws Presentation**

(See Attachment – Presentation by ND Attorney General’s Office)

### **Discussion of Bylaws**

Baker explained that they have not been able to find any bylaws for the LMRC at their agency, or in the state’s archives. Baker further went on to say that it would be beneficial for the LMRC to have bylaws. Other members of the LMRC were in agreement.

*A motion was made by Baker, seconded by Hanson, and unanimously passed to establish a sub-committee of three to develop a set of LMRC bylaws.*

Baker volunteered to chair the sub-committee. Erbele volunteered the State Water Commission to assist. Hanson also volunteered to serve on the committee.

### **Temporary Water Permit Interim Policy**

(See Attachment – Presentation by ND Office of the State Engineer and Temporary Water Permit Interim Policy)

Following the presentation by Jon Patch, Director of Water Appropriations, ND State Water Commission, there were several questions from LMRC members and members of the audience.

Glatt asked how the Office of the State Engineer came up with the 30 cfs threshold at the Long X Bridge as a minimum flow that results in a cease of pumping for industrial uses. Patch explained that it is a balance of recognizing the intent of the Little Missouri State Scenic River Act to keep the river in a free-flowing and natural state while allowing water to be put to a beneficial use as allowed for in NDCC Chapter 61-29. The 30 cfs represents about 8% to 10% of the median flow for much of the summer.

Chairman Schettler explained that they are expecting two frac jobs near his ranch this winter. As part of that effort, Schettler said they can expect trucks to pass by their ranch every three minutes hauling frac water.

Patch provided a proposed recommendation for LMRC consideration. The recommendation read: “The Little Missouri River Commission (LMRC) has reviewed and considered the Temporary Water Permit Revised Interim Policy in the Little Missouri River basin developed by

the Office of the State Engineer presented to it at the August 9, 2017 LMRC meeting. The LMRC concurs with the policy and recommends that the State Water Commission adopt it as a permanent policy of the SWC and Office of the State Engineer.”

Glatt asked Patch if there are requirements to move pumps during high flows so equipment isn't taken downstream or inundated by the river. Patch explained that most of the equipment involves pumps and suction, so it needs to be close to the river. The agency has been actively sending the message to permit holders that they need to be careful about higher flows, and that they need to avoid contaminating the river with their equipment.

Hestekin said they experienced that very issue near their ranch. They told the permit holder that water levels in the river would go up in the spring and likely would flood their equipment if not moved. The company who had the pump in place did not move it, it was flooded, and the Hestekins had to help them remove it from the river with their farm equipment.

Patch said the permit holders are aware of flood-related issues, but others may not be. Glatt indicated that the Department of Health would like pumping equipment located out of the flood hazard area. Or, built so flooding or higher flows are not an issue.

Baker asked if the Water Commission educates permit holders about flood-related dangers. Patch answered that education would be helpful, but that it's hard to educate when they're spending most of their time regulating.

Glatt suggested that this issue could be addressed with a simple statement in the permits that are issued to applicants. Baker suggested that as part of educational efforts, the agency could provide information where permit holders could get river flow information.

Patch reminded the group that this would all mean putting conditions on private landowners who are operating on their own land. Glatt agreed but also pointed out they are using waters of the state – that they likely don't want to knowingly pollute.

Erbele asked Patch if the Office of the State Engineer could develop a condition for permits related to informing them about water fluctuations being an issue. Patch said that would be a possibility and they could also provide links to gage information. Patch also said they could work with the Planning and Education Division at the State Water Commission to help them with educational efforts.

Chairman Schettler asked Patch how #3 in the temporary policy came about. It reads: “Pumps and motors shall be sheltered from view for those wishing to travel along the waterway.” Patch responded that it was an effort to recognize the requirements of the Little Missouri Scenic River Act – to keep it wild and scenic and to keep pumping equipment less disruptive to the aesthetics of the valley while traveling on the waterway.

Baker said she applauds the Office of State Engineer for taking recreational uses into consideration with the temporary policy, but also indicated it lacks some specificity. Baker suggested that as the policy evolves from temporary to more permanent, the State Engineer should review how things are going after a year to make sure it is sufficiently addressing the intent of the Little Missouri Scenic River Act (Act). This concept should be included in any motion.

Stuber asked if there are any bonding requirements for placing pumps near the river. Patch said there are not.

A member of the audience made the comment that 30 gallons per minute is not a lot of water. Patch clarified that the threshold is actually 30 cubic feet per second – which is a good balance. The audience member went on to suggest that they don't want to see drilling and fracking stop, but that it's also important to watch out for the well-being of the river.

Glatt asked if the Office of the State Engineer will ever reevaluate the 30 cfs threshold. Patch responded that this is the first year it has been in place, but it is possible it will be reevaluated sometime in the future.

Glatt indicated that the 30 cfs isn't going to stay forever. Patch responded that the temporary permits are only issued for up to one year and the permit holders are responsible to keeping an eye on river discharge levels. As a result, it's not a good idea to change the threshold often.

Hanson suggested that one-year thresholds are reasonable. However, 2017 should not be the standard. Patch responded that the thresholds were established for dry periods. During wet periods, the thresholds would not be an issue.

Erbele indicated that the agency would bring this issue back before the LMRC in 2018 so they have a chance to evaluate how this policy actually works in the field.

Audience member, Mike McEnroe, commented that based on the total acre-feet (af) allocated as listed on a slide, there would have been over two-hundred permits issued if they were limited to 200 af each. Patch responded that the 200 af caps are for temporary permits on the mainstem of the Little Missouri River only. McEnroe asked if permits on the tributaries can be for more than those on the mainstem. Patch responded yes they can, but they are based on hydrologic review and watershed yield to ensure that downstream users with implied water rights, such as livestock use, are protected.

Audience member, Tracy Potter, urged the LMRC members to vote no on the proposed recommendation for the temporary water permit policy. Potter went on to say that back in the 1970s, the North Dakota Legislature recognized that the Little Missouri River is special. Potter went on to say that he did not think the LMRC had enough information at this time to make a decision on the policy, and that they should defer action. Potter thanked the LMRC for providing the opportunity to comment.

Schettler asked Potter if he had an alternative solution in mind for the LMRC to consider. Potter did not provide an alternative for consideration.

Allen asked Patch if he could give an example of other industrial water users, and if this policy is not put in place, what happens with the permitting process. Patch responded that if he was referring to conditional water permits, those are a water right and have to be put to beneficial use to keep them. The Office of the State Engineer has not issued any conditional water permits for industrial water uses from the Little Missouri River.

Allen then asked if Bully Pulpit Golf Course is an example of an entity that can draw water from the Little Missouri River under a permit. Patch responded yes. Allen then replied that there are other uses drawing water from the river.

Audience member, Jim Fuglie, asked why the Office of the State Engineer did not issue any conditional permits for industrial water use. Dan Farrell from the Office of the State Engineer responded that no conditional industrial water permit requests were received until the recent oil activity began to accelerate in the last few years.

Fuglie asked if the agency had conditional permits for industrial use on file, and if so why weren't they granted? Farrell responded that they have been in a queue for review. Fuglie asked if they were not granted because of a lack of water. Farrell responded that the agency didn't even get that far into the process.

Erbele asked Patch to clarify that the industrial permits that are being used now are temporary and that one reason why conditional permits were not being applied for and issued is because industrial use is transient and would not necessarily be long term or permanent from specific locations. Patch responded that was the case and that the industrial water users' needs were being met with the temporary permits and the conditional permit applications were in queue pending a full technical and public interest analysis as all water right applications are given. Patch said that upon discovery of the provision in the Little Missouri State Scenic River Act that diversion for other than agricultural, recreational, or temporary uses are expressly prohibited, recommendations will be for the State Engineer to deny the industrial conditional water permit applications in the Little Missouri River basin.

An audience member asked Patch what the percent of flow in the Little Missouri River is used for fracking. Patch said he didn't have an exact number, but suggested it might be around 1% of the annual flow.

Audience member, Jan Swenson, said she had two requests of the LMRC. The first is that there needs to be more consideration than a gage going up or down to make permit decisions. She went on to say that there are big flows in the river in the spring, so it makes sense to take more water at that time. Swenson went on to say that she has lots of questions about how the river

will be affected. When water is used for irrigation, it comes back to the system. But not with fracking. How will those efforts impact a temperamental river?

Swenson asked the LMRC to take more time to look at the temporary policy – there is no need to rush. She referred to a presentation that involves water re-use that is being presented to the Interim Legislative Water Topics Committee by UND’s EERC.

Baker asked if the interim policy has an expiration date. Patch responded that it does not, but that the Governor’s Office wanted the agency to get input from the LMRC, which is why they were re-established.

Baker then asked what the consequences are if the policy remains interim. Patch said there is no problem with that – they will continue to work from the interim policy.

Hanson asked if the last line in the recommendation should be changed because it uses the word “permanent” – maybe it should be temporary.

*A motion was made by Allen to adopt the proposed policy recommendation with a language modification - changing permanent to temporary. There was no second, so the motion failed.*

Schettler asked if the Office of the State Engineer wants a recommendation from the LMRC at the next meeting. Erbele responded no – however long it takes to make a decision that they’re comfortable with is fine. The agency will just continue to follow the interim policy.

Schettler went on to say that as a permit holder himself, he doesn’t think the policy is out of line – other than #3. He went on to say that landowners have to construct something man-made to cover a pump, which seems inconsistent. Hanson agreed, and said it is not practical.

Audience member Scott Kleeman commented that he is a permit holder. As a landowner, he doesn’t want diesel on the ground, and he doesn’t want to suck the river dry. He has a daughter at the ranch he worries about with all of the truck traffic. He said the truck situation is not practical, and commended the Office of the State Engineer for doing a great job of managing the river. He went on to say he thinks they need to keep allowing the use of river water, or with all of the potential for truck traffic, the area will be in a terrible situation.

*Erbele made a motion to table the issue and revisit it at a future time. The motion was seconded by Hanson.*

Baker asked for clarification that the action would just result in the Office of the State Engineer using the temporary policy, and that the agency would not make it permanent without future input from the LMRC. Patch indicated that would be the intent.

*The motion passed unanimously.*

*A motion was made by Baker that the LMRC should have a discussion at the next meeting to identify what additional information they will need to make a decision on the temporary water permit interim policy. The motion was seconded by Hestekin and passed unanimously.*

### **Long X Bridge Update**

(See Attachment – Presentation by ND Department of Transportation)

After the presentation, Erbele asked if the Long X Bridge is on the historic registry. Matt Linneman, Department of transportation, said it is not, but it is eligible.

Baker asked what the maintenance plan is if the decision is made to keep the old bridge. Linneman said they are looking for partners to make that work.

Baker asked when the Draft EIS will be completed. Linneman said they hope to have something in the next two to three months.

Allen observed and commented that the new bridge proposal has two piers in the river bottom, while the older bridge only has one. Linneman said the proposed project is not a truss bridge, so the longer the spans, the higher the project costs.

Audience member, Tracy Potter, asked about the costs of rehabilitating the old bridge. Linneman said it would be \$10 million to \$12 million.

Baker suggested that future information be sent to the Parks and Recreation Department and the Office of the State Engineer.

Schettler suggested that the LMRC have a representative on the bridge advisory group, and went on to say it should probably be McKenzie County since they are most impacted by the project.

### **Little Missouri River Endangered Species Presentation**

(See Attachment – Presentation by ND Game and Fish Department)

### **Proxies**

Allen said he will make a recommendation to Golden Valley County Commissioners to identify a proxy for him.

### **Other Business**

Nothing added.

### **Future Meetings/Topics**

Schettler suggested the LMRC look at the last week of January to meet. Erbele said the Water Commission will work with Parks and recreation to line up the next meeting date.

*A motion was made by Erbele, seconded by Stuber, and unanimously approved to adjourn the meeting.*