

SPECIAL COMMITTEE MEETING OF THE NORTH DAKOTA STATE
WATER CONSERVATION COMMISSION
Bismarck, North Dakota
June 2, 1943

A special committee meeting was held in the office of the State Water Conservation Commission on June 2, 1943. The committee consisted of Governor Moses, Commissioners Simons and Orlady. Governor Moses, Chairman, called the meeting to order at 9:25 a.m. with all members of the committee present; also Mr. Tucker, Secretary of the Water Commission.

The purpose of this meeting was to appoint a successor for Mr. Tucker, who is leaving for service with the U.S. Naval Reserve on June 4, 1943.

Governor Moses stated that a man had to be selected who was able to fill three positions: (1) Secretary of the Water Commission; (2) State Engineer; and (3) Chief Engineer of the Water Commission.

Mr. Tucker called to the attention of the committee the fact that he had recommended Mr. J. J. Walsh, Irrigation Engineer of the Water Commission, as his successor. It was stated that Mr. Walsh was very thorough and dependable.

Commissioner Simons suggested that we ask Mr. Walsh to take over temporarily, with the understanding that if he is dissatisfied, or the Commission is dissatisfied, the Commission will look for someone else. At this point Mr. Walsh was asked to come into the meeting - 10:05 a.m. The Governor told Mr. Walsh that the Commission would like to discuss with him the possibility of his taking over Mr. Tucker's job. Mr. Walsh said he would be glad to do this. Mr. Walsh stated that while with the Water Commission most of his work had been in the office. However, most of his previous work was in the nature of field work.

Governor Moses: "As Chief Engineer you will, of course, have to delegate a lot of the work. We have a lot of details that have to be followed up. The Members of the Commission will be available to you at all times. Commissioner Simons can assist you."

Mr. Walsh: "Do you have some definite policy for us to follow?"

Commissioner Simons: "Do you mean plans for future work?"

Mr. Walsh: "I mean preparing data."

Mr. Tucker: "I would like very much to discuss with you gentlemen and have you make the selection of projects for the post-war work."

Governor Moses: "Don't you think that the Commission should have a definite recommendation from you as to this list of projects?"

Mr. Tucker: "I have made my selection and Mr. Walsh will submit the list to you."

Commissioner Orlady informed the committee that he has been requested to travel to Williston and take part in a round table discussion, June 11, 1943, at the Stockmen's Annual Convention. He desired to know if he were to go as an official representative of the Water Commission, or on his own initiative.

Commissioner Simons moved that Commissioner Orlady be directed and authorized to attend that meeting as an official representative of the Water Commission, with travel expenses and per diem paid by the Water Commission. Governor Moses seconded the motion, Motion carried.

Commissioner Orlady requested some information which he could use in his discussion of the post-war program for North Dakota. This subject was to be taken up at an informal discussion later, with emphasis on the fact that the Water Commission's program embraces the entire state, and not just the northwest corner thereof.

An informal discussion on the Bureau's and Army's plans for North Dakota was held. Governor Moses cautioned Commissioner Orlady not to discourage the people at the Stockmen's Convention too much on the Missouri-Souris Diversion Plan of the Bureau's. He reminded the Committee that it is very important that the Commission does not advocate any particular diversion at this time.

Commissioner Simons: "Tell the convention also what the Army Engineers are going to do in North Dakota."

Governor Moses: "Our story is simply this - the Water Commission is keeping hands off and is watching the work that is now being done by the Federal Government due to the efforts of the Water Commission. The program is a state-wide program."

Mr. Charles Ferris, Bank Examiner, was called into the meeting at 11:10 a.m. He was asked to make a report on the progress of his audit of the Water Commission's books which he did. Mr. Ferris left the meeting.

Commissioner Simons moved that application be made for the transfer of Mr. Tucker's bond to Mr. Walsh, as soon as the audit of the books has been completed, and that the Chairman of the Commission be authorized to sign said application. Commissioner Orlady seconded the motion. Motion carried.

Mr. John C. Eaton came into the meeting at 11:15 a.m. in regard to the Mouse River controversy. Mr. Eaton was called upon to state his business.

Mr. Eaton: "I talked with Mr. Nels Johnson relative to legal work which he understood was going to be undertaken by the Commission in connection with the Mouse River. He told me the Commission is going to make a study of the legal aspects of this controversy."

Commissioner Simons: "I have already made some studies."

Mr. Eaton: "Johnson says they are insufficient. Mr. C. F. Kelsch is employed and paid by the Attorney General of North Dakota. The people within the Eaton Flood Irrigation Project do not feel that they should have to pay all of Mr. Johnson's fee because the project he is working on will lay the foundation for the rights of people all over the state. Therefore, he feels that the Commission should make some arrangement to pay him a small fee for work that he does in this connection."

Governor Moses: "When Mr. Johnson speaks of a small fee, what does he have in mind?"

Commissioner Simons: "He just advanced the idea that the Commission ought to hire him to prosecute the law suit which he insists we bring against the Fish and Wildlife Service. Frankly, Eaton, I don't think this is anywhere near the law suit stage. We have a better chance of getting what we want by negotiations."

Mr. Eaton: "Nels talked this over with Mr. Kelsch and he has gained the impression that Mr. Kelsch feels before the Commission can get anywhere, they have to find out the legal facts." "From talking to Johnson and Kelsch there may be some question as to whether or not they have a legal right to that water under their appropriation."

Commissioner Simons: "Suppose the people up there are right. There still remains

the question of whether this Commission is going to invest money in a law suit to find out if they are right."

Governor Moses: "This whole Mouse River Controversy looks like this to me - the people up there made some form of contract with the Fish and Wildlife Service and that agency went in there and made use of the water that is there. Since then the people want regress. The Commission is sympathetic towards the plight of the people up there. They apparently want the Commission to go in there and negotiate with the Service and then bring on a lawsuit. It seems to me that it is up to those people to present a brief to the Commission which is factual entirely and which shows what the situation is. Then we can go into the law and see what the legal position is. It is up to the people there to present the facts to us and to show what rights to the water they have, if any. This is not a matter principally for the Water Commission. The Water Commission should be sympathetic and do all it can after it has received a statement of facts to base legal action on."

Mr. Eaton: "I agree with you as far as our contract goes, but that is not very broad and all of our problems do not arise from that contract. There is law whereby the state engineer's office initiates action for the determination of water rights along a stream."

Governor Moses: "That is true."

Mr. C. F. Kelsch was called into the meeting at 11:30 a.m.

Governor Moses explained the position of the Water Commission in this matter to Mr. Kelsch. "The Water Commission does not have a complete factual story of the whole picture," he said. He further stated that the Commission went to Towner and had a hearing on May 20th and that the testimony of that did not present the facts. Governor Moses believes that before the Commission can do a thing on this problem, it will have to have a complete factual statement as to what the facts are and then a statement as to the legal principles involved. He stated that if the interested persons have a recourse as to the matter of law, the next step is to get it for them. He further believes this whole situation is a private problem of the private individual.

Governor Moses: "Do you have a clear picture of the legal question involved, Mr. Kelsch?"

Mr. Kelsch: I have not given it any specific study, but when I was up there on May 20th with the Commission I thought that the data we were getting was not specific enough, as you have indicated here. From a legal standpoint, here is how it stacks up:

1. You have your constitutional provision appropriating water for mining, irrigation and manufacturing.
2. You have your Water Commission law which gives you jurisdiction over all unappropriated water. My interpretation of that is that the Act cannot be construed as retroactive, if any construction would impair any invested water rights. In the case of this Mouse River situation, you have some riparian rights there. Now when you speak of riparian right, there must be a basis for the measurement of this right. Does it attach to the flood water, as well as the natural flow? Who is prior in right, the fellows who have a riparian right; the fellow who have a right under the appropriation? Is it a case of first in claim, first in right; or does the Fish and Wildlife Service have a prior and superior right? If the riparian right is limited to the natural flow or whether the water impounded is also water which will be termed as a part of the natural flow of the stream, is a question."

"I think the Governor is on the right track when he says you should have engineer-

ing data to establish what the average flow in acre feet was over a period of years. From that you could ascertain to what extent riparian rights are attached to that flow. To what extent that flow has been diverted by the impounding of this water, can also be determined. This data would be the basis for your decision."

Commissioner Simons: "While it does not appear in the law, it certainly enters into the equity of this situation. One of the equities of this deal is this - the efficient use of the water. If they have to have a flood in order to get efficient use of water, they are going to lose out."

Mr. Kelsch: "As far as this stream is concerned, we have a treaty with Canada under which an International Joint Commission was appointed and the treaty itself practically reads in it the decisions of the courts in our country and in Canada."

Commissioner Simons: "We have two positions; one is to fix the amount of the unappropriated water and to allocate it to the people entitled to it."

Governor Moses: "We will give some thought to the suggestions made by Mr. Eaton on behalf of Mr. Johnson. We will take this matter up at a regular Commission meeting. We have no power or right with the absence of the other two members of the Commission to take any action with reference to Mr. Johnson's proposal. We will take this up at the next meeting here in Bismarck. We will then go into it very carefully. I do think that we should have a factual statement from somebody. Does Mr. Johnson think he should be paid for securing this factual data?"

Mr. Kelsch: "I really think that the issues involved on this stream, if settled, will aid the Commission in establishing the law on all subsequent controversies and will establish a precedent and I think the Commission would be authorized to hire a lawyer. In view of the fact first that you have a novel problem here and that you have the difficult question of getting jurisdiction of a federal agency and determining the relative right of the priority of those rights, I think to have that settled in itself is good and for that purpose, you can spend the public money. I think it is entirely legitimate."

Governor Moses: "The Secretary should be instructed to communicate with Mr. Johnson and submit to the Commission in writing just exactly what he contemplates to be the scope of his employment if he is employed and what he expects to be paid. We should have a detailed statement from Mr. Johnson as to just exactly what he has in mind."

Mr. Milton Higgins telephoned that there was a change in the resolution on the acquisition of the Harke land for Project No. 326, as follows:

WHEREAS, it has come to the attention of the Commission that the name of J.S. Knauss, as it appears in the resolution, documents and papers relative to the condemnation of Parcel No. 3 consisting of a tract of land containing 1.693 acres approximately, being Lot 1 of Section 6, Township 138, Range 80, Burleigh County, North Dakota, which the Commission is condemning for the location of a pumping plant in connection with the irrigation of a tract of land south of Bismarck and known as Project No. 215, should be W. O. Ward.

Now, THEREFORE, the Secretary of this Commission is hereby directed and empowered to correct all resolutions, documents and papers of the Commission dealing with the same matter, changing the name of J.S. Knauss to W. O. Ward, nunc pro tunc.

DATED June 2, 1943.

Comm. Orlady moved the adoption of the above resolution. Comm. Simons seconded the motion. Motion carried.

Comm. Simons moved that Mr. J. J. Walsh be designated as the Acting Secretary and

Chief Engineer of the Water Commission and Ex Officio State Engineer with all of the powers and duties which attach to said office, upon the departure of Mr. Tucker for service with the U.S. Naval Reserve, with the same salary which is now being paid to Mr. Tucker. Commissioner Orlady seconded the motion. Motion carried.

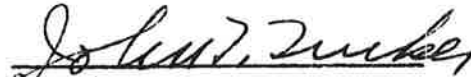
Governor Moses explained to Mr. Walsh that it may be necessary for him to continue at his present salary through the month of June on account of the arrangement of our funds. Mr. Walsh agreed to do this. Mr. Tucker is to submit a voucher for a thirty day period from the date he leaves the office, quoting the law as set forth in Section 51, Chapter 221, laws of 1941 for North Dakota.

S E A L

Respectfully submitted,

ATTEST:


Chairman


Secretary

NORTH DAKOTA STATE WATER CONSERVATION COMMISSION
 MONTHLY REPORT OF ACCOUNTS AS OF MAY 31, 1943
 1941-1943 APPROPRIATION

No.	Name of Account	Total Approp. 24 Mo.	Expended to 4-30-43	May Expenses	Total Refunds	Total Expenses 4-30-43	Balance Available June
1	Commissioners Per Diem	3,000.00	2,202.00	161.00		2,363.00	637.00
2	Administration Adm. Balance due 1937-1941	25,000.00 4,696.41	39,581.08	2,072.95	13,473.03	41,654.03	1,515.41
3	Construction Bond Guarantee Bal. Due 1939-41 appropriation	40,000.00 35,300.00	2,880.00			2,880.00	72,420.00
4	Maintenance Existing Dams	4,000.00	3,460.58		2,032.58	3,460.58	2,572.00
5	Engineering and Soil Survey	1,000.00	627.00	229.66		856.66	143.34
6	Little Missouri, Grand, Cannonball	700.00	587.18			587.18	112.82
7	Pembina, Tongue, Park Rivers, etc.	250.00	85.00	75.00		160.00	90.00
8	James, Wildrice Rivers, etc.	150.00	65.00	35.01		100.01	49.99
9	Investigations, Surveys, Designs, etc.	2,000.00	1,538.35	225.63	26.92	1,763.98	262.94
10	Evaluation Economic Benefits	300.00	179.61			179.61	120.39
11	Reports and Attendance at Conferences	1,500.00	1,190.37	200.00		1,390.37	109.63
12	Tri-State Waters Commission	7,500.00	5,325.67	458.76		5,784.43	1,715.57
13	Independent Investigations and reports	1,000.00	896.75	62.95		959.70	40.30
14	International and Interstate	1,500.00	1,134.59	263.46		1,398.05	101.95
15	Topographic Mapping	3,000.00	2,481.29			2,481.29	518.71
16	Cooperation in Obtaining Water Facil.	3,000.00	2,345.43	280.90	12.80	2,626.33	386.47
17	Designs, Reports and Conferences	500.00	427.71	50.00		477.71	22.29
18	Salary State Engineer	4,400.00	4,033.26	183.37		4,216.63	183.37
19	Hydrographic Survey	3,500.00	3,103.66	210.58		3,314.24	185.76
20	Post-War Planning, surveys, etc.	300,000.00					300,000.00
		442,296.41	72,144.53	4,509.27	15,545.33	76,653.80	381,187.94

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