

## NORTH DAKOTA LEGISLATIVE MANAGEMENT

## Minutes of the

**WATER TOPICS OVERVIEW COMMITTEE**

Thursday and Friday, September 22-23, 2016  
Brynhild Haugland Room, State Capitol  
Bismarck, North Dakota

Representative Jim Schmidt, Chairman, called the joint meeting of the Water Topics Overview Committee and State Water Commission to order at 9:00 a.m.

**Members present:** Representatives Jim Schmidt, Bill Amerman, Dick Anderson, Naomi Muscha, Jon O. Nelson, Marvin E. Nelson, Todd Porter, Mark Sanford, Roscoe Streyle, Greg Westlind, Denton Zubke; Senators Jonathan Casper, Ray Holmberg, Gary A. Lee, Larry Luick, Larry J. Robinson, Donald Schaible, George Sinner, Ronald Sorvaag, Jessica Unruh

**Members absent:** Representative Tom Kading

**State Water Commission members present:** Governor Jack Dalrymple, Maurice V. Foley, Larry L. Hanson, George Nodland, Harley Swenson, Robert Thompson

**State Water Commission members absent:** Doug Goehring, Arne Berg, Douglas Vosper

**Others present:** Representative Bert Anderson, Crosby  
Chris Kadrmas, Legislative Council, Bismarck  
See [Appendix A](#) for additional persons present.

**It was moved by Senator Lee, seconded by Representative J. Nelson, and carried on a voice vote that the minutes of the August 24-25, 2016, meeting be approved as distributed.**

**RED RIVER VALLEY WATER SUPPLY PROJECT**

Chairman Schmidt called on Mr. Ken Vein, Chairman, Garrison Diversion Conservancy District and Mr. Tim Mahoney, Mayor, Fargo, for a presentation entitled [Red River Valley Water Supply Project](#), regarding the Red River Valley Water Supply Project (RRVWSP), its 90/10 cost share arrangement with the state, and intake structures.

In response to questions from Chairman Schmidt, Mr. K. Vein said several communities are signing up to reserve capacity in the project's pipeline. He said there are options for the quality of water that will be supplied, and project leaders likely will select minimal treatment levels rather than meeting drinking water standards because minimal treatment is more economically feasible.

In response to questions from Representative J. Nelson, Mr. Steven Burian, Chief Executive Officer, Advanced Engineering and Environmental Services, Inc., said water from the project will flow from the Missouri River and discharge into the Sheyenne River or Bald Hill Creek. He said treating the water will accomplish two goals--removing sediment from the water and preventing biofilm from forming on the pipes. He said the project is different from the Northwest Area Water Supply (NAWS) project, which is tied up in litigation, because NAWS involves a federal agency. The RRVWSP involves only state and local entities.

Ms. Tami Norgard, Attorney, Vogel Law Firm, said the issue in the NAWS litigation is whether that project complied with the National Environmental Policy Act. She said the RRVWSP does not have to comply with the Act because the RRVWSP does not involve a federal agency. She said it is important to begin construction on the RRVWSP soon so the project can rely on the current requirements for a Nationwide Permit 12 from the Army Corps of Engineers. She said the requirements for a Nationwide Permit 12 may change next year. She said using a Nationwide Permit 12 for the project is preferable to obtaining a Section 404 permit under the federal Clean Water Act.

In response to a question from Representative J. Nelson, Ms. Norgard said the McClusky Canal will continue to be an option under the project plans.

In response to a question from Senator Luick, Ms. Norgard said the project will be grandfathered under the federal Waters of the United States rules if the rules go into effect after the project obtains a jurisdictional determination from the Army Corps of Engineers. She said if she needs to argue in favor of grandfathering the project, she could argue the project sponsors have vested rights in the prior regulatory framework and made substantial expenditures in reliance on current regulations.

In response to a question from Commissioner Swenson, Ms. Norgard said it is hard to predict whether Canada or another state will sue.

In response to a question from Governor Dalrymple, Mr. K. Vein said the project needs \$20 million to meet the legal definition of "starting" for permitting purposes. He said the project needs to go beyond planning to meet that definition. He said the project could be complete by early 2019 if the Legislative Assembly approves the funding.

Mr. Mahoney said an 80/20 cost share with the state may work.

In response to a question from Senator Lee, Mr. K. Vein said the large number of entities interested in signing up for the project would increase the project's cost, but also spread that cost over more payers. He said the more costly the project is, the fewer small users will be able to afford it. He said the project has commitments for the biennium from the entities listed on slide seven of the presentation.

In response to a question from Representative M. Nelson, Mr. K. Vein said the capacity users purchase will be available to them in dry years and wet years. He said drought contingency planning was conducted using a population estimate for Fargo of 225,000 to 295,000 people over the next 50 years.

In response to a question from Commissioner Nodland, Mr. K. Vein said the project sponsors operated under the assumption there will be a 90/10 cost share with the state.

Chairman Schmidt said RRVWSP proponents need to provide legislators with the dollar amount of benefits, not just costs, of the project.

## FARGO DIVERSION PROJECT

Chairman Schmidt called on Mr. Mahoney for a [video presentation](#) on the Fargo diversion project.

In response to a question from Representative Streyle, Mr. Mahoney said the Cass County Joint Water Resource Board is exercising eminent domain for the project outside Fargo. He said Fargo is exercising eminent domain for the project inside the city limits.

Mr. Darrell Vanyo, Chairman, FM Area Diversion Authority, gave a presentation entitled [Presentation to Water Topics Overview Committee](#), and provided a [video presentation](#) about the project.

In response to questions from Senators Sorvaag and Lee, Mr. Vanyo said the Red River Partners referenced in his handout is a group of six consortia of 12 to 20 local, national, and international firms each.

In response to a question from Senator Luick, Mr. Vanyo said some of the condemnations for easements under the project plan will extend into Richland County. He said the current plan is the only plan that will meet the project's goals for flood protection.

In response to a question from Representative J. Nelson, Mr. Mahoney said he expects the Army Corps of Engineers to provide \$60 million to \$70 million for the project starting next year.

Representative J. Nelson said Mr. Mahoney was incorrect when he said CHS, Inc., did not build its fertilizer plant in Spiritwood because of a lack of water. He said nothing could be further from the truth, and documentation showed CHS, Inc., had adequate water supply for the plant. He said Stutsman Rural Water District took great effort to prove this to the Legislative Assembly.

Chairman Schmidt said he agreed with Representative J. Nelson and said he had received text messages from CHS, Inc., representatives stating the decision was not based on water supply issues. He said the text messages were in the committee's record.

Chairman Schmidt called on Ms. RaeAnn G. Kelsch, Lobbyist, MnDak Upstream Coalition, Mr. Nathan Burseth, Richland County Commissioner, and Mr. David Bliss, Counsel, Richland County Water Resource District, for a presentation regarding the Fargo diversion project.

Ms. Kelsch distributed a letter ([Appendix B](#)) from Governor Mark Dayton of Minnesota pertaining to the diversion project.

Mr. Burseth said Governor Dayton warned the Army Corps of Engineers not to proceed with the project until Minnesota has decided whether to approve it. He said Richland County has significant concerns about the Cass County Water Resource Board using eminent domain to take farms, homes, and easements from Richland County residents. He said the diversion project will impede growth in Richland County, but does not include flood mitigation plans for Richland County. He said residents of Christine will be negatively impacted. He said the current plan will not provide compensation to school districts or Richland County for the tens of millions of dollars in tax losses resulting from the project.

In response to a question from Chairman Schmidt, Mr. Burseth said Richland County shares the Chairman's concern about the timing of land takings and what will happen if Cass County finds out it cannot obtain the necessary easements after the project is almost complete.

In response to a question from Senator Sorvaag, Mr. Burseth said flow easements depreciate property values because they affect crop production, and flood insurance does not cover manmade floods.

In response to a question from Senator Lee, Mr. Burseth said Richland County's only recourse has been to file lawsuits, which are expensive. He said representatives of Richland County have met with Mr. Mahoney and shared their concerns.

In response to a question from Senator Holmberg, Mr. Burseth said he does not know whether state funds may be used for the FM Area Diversion Authority Board's legal fees.

In response to a question from Representative J. Nelson, Mr. Burseth said Richland County recommends moving the project north to avoid impacting Richland County while still protecting Fargo.

Mr. Bliss gave a presentation entitled [Water Topics Overview Committee September 23, 2016 Testimony of David R. Bliss](#), regarding legal issues of the Fargo diversion project. He said Minnesota requires alternative plans to be evaluated before a project is approved, but no alternatives were shown. He said Minnesota could sue in federal court to address this issue.

In response to a question from Chairman Schmidt, Mr. Bliss said he agrees the Army Corps of Engineers has changed the project from the original National Economic Development plan, which was the basis for the federal and state cost share for the project. He also said he believes the Army Corps of Engineers has not followed the *Economic and Environmental Principles and Guidelines for Water and Related Land Resources Implementation Studies*. He said there has been no cooperation from the FM Area Diversion Authority Board to address Richland County's concerns.

## REGIONALIZATION OF WATER SUPPLY PROJECTS

Chairman Schmidt called on Mr. Charles Vein, President, Advanced Engineering and Environmental Services, Inc., for a presentation ([Appendix C](#)) regarding regionalization and life cycle cost comparisons for water supply projects.

In response to a question from Chairman Schmidt, Mr. C. Vein said he did not know the status of the Cando water supply project.

Representative Westlind said the Cando water treatment plant needs major upgrades in the coming years, and joining to a regional system is imperative. He said it will cost less than \$4 per month per resident to join a regional system and options for managing the current plant's debt are being considered.

In response to a question from Chairman Schmidt, Mr. C. Vein said hundreds of cities in North Dakota have converted to regional water systems, and he is unaware of any that regret that decision.

Chairman Schmidt called on Mr. Blake Crosby, Executive Director, North Dakota League of Cities, and Mr. Eric Volk, Executive Director, North Dakota Rural Water Systems Association, for a presentation (Appendices [D](#), [E](#), [F](#), and [G](#)) on regionalization and water treatment plant operators.

In response to a question from Chairman Schmidt, Mr. Crosby said the Department of Health administers certification tests for water system operators, who must be certified and meet education requirements.

In response to a question from Representative Streyle, Mr. Crosby said he did not have estimates for how much it would cost each town to join regional systems.

In response to a question from Representative D. Anderson, Mr. Crosby said there are about 6,000 miles of water pipe in North Dakota, which rely on glued connections, and the glued pipe has many problems derived from poor installation techniques used in the 1970s and 1980s.

In response to a question from Representative Streyle, Mr. Garland G. Erbele, State Engineer, State Water Commission, said the State Water Commission considers both the cost of repairs and the cost of joining a rural water system when evaluating funding requests for new construction or repairs.

Representative J. Nelson said, at a minimum, communities should consider the size of pipe to use when building their own systems in case they want to join a regional system in the future.

In response to a question from Senator Robinson, Mr. Volk said he did not know the number of towns that have escrow accounts for repairing water supply systems. He said communities do not always have funds for maintenance.

Commissioner Swenson said the State Water Commission recently began requesting a maintenance reserve fund from communities seeking funds from the commission. He said the State Water Commission evaluates the cost per person of a project before funding it.

Commissioner Nodland said some communities bypassed the State Water Commission and obtained funding directly from the Legislative Assembly for water systems.

Chairman Schmidt called on Mr. David Glatt, Section Chief, Environmental Health Section, Department of Health, for a presentation ([Appendix H](#)) on regionalization of the water supply.

In response to a question from Chairman Schmidt, Mr. Glatt said the Environmental Health Section considers a community's needs, the cost comparison for using well water versus joining a rural water system, and the cost of complying with the federal Safe Drinking Water Act if the community does not join a regional system, when evaluating a community's loan application. He said the section respects local decisions about joining regional systems.

Representative J. Nelson said regionalization is often more expensive in the short term, but more cost effective over time. He said he was unsure whether the state can continue to afford to give low-interest loans to fund projects that do not make long-term financial sense.

Mr. Glatt said it is hard to find and keep qualified water treatment operators in many small communities, and regionalization removes that difficulty.

In response to questions from Representative Amerman, Mr. Glatt said the section hopes to have more enforcement against uncertified operators in the future, and there are fines the section can levy against uncertified operators.

In response to a question from Chairman Schmidt, Mr. Glatt said the section tries to work with communities that do not have certified operators, but the lead issue in Flint, Michigan, illustrates the severe ramifications from violating the federal Safe Drinking Water Act.

In response to a question from Senator Sinner, Mr. Glatt said some certified operators serve multiple communities.

In response to a question from Representative Streyle, he said the federal Safe Drinking Water Act requires operators to routinely monitor water quality, and uncertified operators often do not take samples frequently enough.

Chairman Schmidt called on Representative Bert Anderson for a presentation ([Appendix I](#)) regarding the decision by Crosby to join the Western Area Water Supply Project (WAWS).

In response to questions from Chairman Schmidt, Representative B. Anderson said Crosby had concerns about losing local control as a result of joining WAWS and held many meetings to discuss that issue before deciding to join WAWS. He said the WAWS board sets water prices for the city. He said the city could not find a certified water treatment plant operator for its own system and could not afford to repair its water treatment plant.

In response to questions from Senator Luick, Representative B. Anderson said Crosby had terrible water quality before joining WAWS. Because water had not been a major source of revenue for the city, he said, joining WAWS was not a big financial loss. He said he has heard no negative comments from Crosby residents about joining WAWS.

In response to a question from Representative Westlind, Representative B. Anderson said Crosby has been servicing debt on its old water treatment plant, but when the city joined WAWS, WAWS assumed the debt.

In response to a question from Representative Zubke, Representative B. Anderson said Crosby gave up some industrial water sales to join WAWS.

In response to a question from Representative J. Nelson, Representative B. Anderson said the rate for water in Crosby is higher than it was before joining WAWS.

## ZEBRA MUSSELS

Chairman Schmidt called on Mr. Terry Steinwand, Director, Game and Fish Department, for a presentation ([Appendix J](#)) on zebra mussels in the Red River.

## OFFICE OF RURAL DEVELOPMENT BUDGET AND FEE SCHEDULE GUIDE

Chairman Schmidt called on Mr. Mark Wax, Community Programs Director, Office of Rural Development, United States Department of Agriculture, for a presentation entitled [USDA Rural Development North Dakota 2015 Progress Report](#), regarding the 2017 fiscal year budget for rural water supply for the Office of Rural Development and the fee schedule guide for engineering services.

In response to a question from Chairman Schmidt, Mr. Wax said communities qualify for Office of Rural Development grants if the median household income of the community is lower than the state median household income. He said the Office of Rural Development looks at similar communities to help determine how much loan the applicant can afford to repay. He said any amount above that is provided as a grant.

In response to a question from Senator Sinner, Mr. Wax said the application process is extensive, and applicants must provide preliminary engineering and financial information. He said engineering firms often help applicants with the process.

In response to a question from Representative D. Anderson, Mr. Wax said the Office of Rural Development generally becomes engaged in a project when engineers work with a community.

In response to a question from Chairman Schmidt, Mr. Wax said the application process requires communities to provide an analysis of alternative projects. If a community is requesting money for a project other than the most economically feasible one, the community must justify that choice.

In response to a question from Representative J. Nelson, Mr. Wax said his office can provide applicants information about economic hurdles that may arise in the future, but is careful not to tread on local government decisions.

In response to a question from Representative Amerman, Mr. Wax said his office tracks whether communities approve projects for which funding is provided through a vote, but does not require a community to vote to approve a project before seeking funding.

In response to a question from Representative Westlind, Mr. Wax said his office accepts applications for funding throughout the year.

Mr. Wax said the engineering fee schedule guide distributed by the Office of Rural Development is a starting point for negotiations between communities and engineers. He said other factors can affect a final fee.

In response to a question from Chairman Schmidt, Mr. Wax said the guide was developed with input from various stakeholders, including engineering firms and communities that funded projects without help from the Office of Rural Development.

In response to a question from Chairman Schmidt, Mr. Wax provided a copy of the fee guide ([Appendix K](#)).

## NORTHWEST AREA WATER SUPPLY

Chairman Schmidt called on Ms. Jen Verleger, Assistant Attorney General, for a status update on the NAWS litigation. Ms. Verleger said the United States Bureau of Reclamation had issued a new Environmental Impact Study, and the plaintiffs have sued the state again. She said the state filed a motion for summary judgment in June and she expects a ruling sometime this winter. She said the state filed a motion asking the judge to modify her injunction so design work on the project could continue. She said the judge denied the motion and the state appealed to the District of Columbia Court of Appeals.

In response to a question from Chairman Schmidt, Ms. Verleger said it is hard to predict whether pursuing the RRVWSP would negatively impact the NAWS litigation, but she would argue the projects are completely separate.

## EASEMENTS OVER STATE LANDS

Chairman Schmidt called on Mr. Lance Gaebe, Commissioner, Department of Trust Lands, for a presentation ([Appendix L](#)) regarding easements on state lands.

In response to a question from Representative Streyle, Mr. Gaebe said the last time the Department of Trust Lands sold a tract of land was in October 2015 when the department sold land to the Minot Park District. He said the department does not sell more land because the department's land generates income.

In response to a question from Chairman Schmidt, Mr. Gaebe said the Department of Trust Lands does not require entities requesting easements to provide an archeological survey.

In response to a question from Representative D. Anderson, Mr. Gaebe said different state agencies have different policies and practices for granting easements over their land. He said the Department of Trust Lands aims to grant easements in as little as 3 weeks and requires a survey before granting the easement.

In response to a question from Senator Unruh, Mr. Gaebe said the Department of Trust Lands generally will not allow blanket easements over its land.

In response to a question from Representative Zubke, Mr. Gaebe said the department occasionally will allow an easement to be described in relation to a landmark such as a road instead of using a survey.

## STATE WATER COMMISSION PROJECTS AND POLICY

Chairman Schmidt called on Mr. David Laschkewitsch, Director, Administrative Services, State Water Commission, for a presentation ([Appendix M](#)) on the Water Commission project summary.

In response to questions from Chairman Schmidt, Mr. Laschkewitsch said Fargo city officials anticipate reducing budget carryover from \$150 million to about \$70 million by the end of the biennium. He also said the State Water Commission has not yet received a completed draft of the publication entitled *ND Water: A Century of Challenge*, which the committee approved.

In response to questions from Representative Streyle, Mr. Laschkewitsch said he understands Grafton will ask the State Water Commission to commit \$25 million at the next meeting. He said Grafton officials anticipate proceeding with the project, but will carry over about \$17 million in funding. He said Grand Forks has not requested that its money be obligated, and its project remains in the design phase.

Senator Holmberg said the Grand Forks City Council is in the final stages of designing the water plant and anticipates starting construction this year.

Mr. K. Vein said Grand Forks officials will ask the State Water Commission for the money at the next meeting, and construction is likely to begin in November or December.

In response to a question from Chairman Schmidt, Mr. K. Vein said local funds for the project will be covered by utility fees, and a sales tax increase is on the November ballot.

In response to a question from Chairman Schmidt, Mr. Laschkewitsch said the State Water Commission released \$500,000 for the Morton County Water Resource District.

In response to a question from Senator Luick, Mr. Laschkewitsch said the State Water Commission has allocated all the money appropriated for rural water supply.

Chairman Schmidt said the State Water Commission can ask the Budget Section to reallocate unobligated money from another category to rural water supply.

Representative Streyle said money should be reallocated if there will be carryover in some categories.

In response to a question from Representative J. Nelson, Mr. Laschkewitsch said the State Water Commission believes NAWS is very important, but the commission anticipates \$306 million in revenue and \$1 billion of requests. He said the commission will seek a budget that allocates funds to projects rather than purposes.

Commissioner Foley provided written comments ([Appendix N](#)) on Minot flood control issues, and requested enforcement powers to ensure dikes are in compliance with legal requirements.

Chairman Schmidt called on Mr. Craig Odenbach, Director, Water Development Division, State Water Commission, for a presentation ([Appendix O](#)) regarding the commission's legal drain policy.

In response to a question from Chairman Schmidt, Mr. Odenbach said the commission has struggled with the issue of whether dirt work on drains is operation and maintenance for which commission funds cannot be used.

In response to a question from Senator Lee, Mr. Odenbach said he will send the commission's project prioritization criteria to the committee. He said water supply and dam safety projects usually receive top priority, but prioritizing one project over another in the same category is difficult.

### **PEMBINA DIKE**

Chairman Schmidt called on Ms. Verleger for an update on the Pembina Dike litigation. Ms. Verleger said the plaintiffs in the case seek to remove a dike on the Canadian side of the border between North Dakota and Canada and are asking for damages due to property injuries. She said the lawsuit is based on Article 2 of the International Boundary Waters Treaty Act. She said in June 2016 the judge ruled the court does not have jurisdiction over the case, and the plaintiffs are appealing this decision. She said approximately \$1.7 million in legal fees have been spent, and about half those fees have come from the State Water Commission, which is not a party.

In response to a question from Senator Sinner, Ms. Verleger said the case is pending in a Canadian court because the defendants are Canadian.

### **PARKS AND RECREATION DEPARTMENT FUNDING**

Chairman Schmidt called on Mr. Jesse Hanson, Planning and Development Manager, Parks and Recreation Department, for a presentation on the status of the department's water recreation project. He said the department is in the planning stage of its project and has not yet requested funds from the State Water Commission. He said the department is negotiating with the Department of Corrections and Rehabilitation for management of sovereign lands.

In response to a question from Chairman Schmidt, Mr. Hanson said the delay in starting the project is due to difficulty accessing the sovereign land. He said the adjacent land is privately owned.

### **QUICK TAKE EMINENT DOMAIN**

Chairman Schmidt called on the Legislative Council staff to present three bill drafts [[17.0223.01000](#)], [[17.0224.02000](#)], and [[17.0259.01000](#)], regarding the use of quick take eminent domain by water resource boards. She said two of the bill drafts were not changed from the last meeting. She said one of these bill drafts would eliminate the authority of water resource boards to use quick take eminent domain and the other would require water resource boards to obtain the approval of county commissioners before using quick take eminent domain. She said the third bill draft was a revision of bill draft [[17.0224.01000](#)], which also was presented in the last meeting. She said the revision, which was requested by Senator Lee, will require a 75-day process for negotiation between a landowner and water resource board before the water resource board may take possession of a right-of-way using quick take eminent domain.

In response to a question from Chairman Schmidt, the Legislative Council staff said the bill draft could be amended to allow the water resource board to show the landowner had constructive notice of the documents the board is required to send if the landowner refused to accept or sign for delivery of the documents.

In response to a question from Representative Amerman, the Legislative Council staff said water resource boards may initiate the process for quick take eminent domain at any point in a project under the bill draft.

Commissioner Swenson said 75 days may be too long to make water resource boards wait to take possession of a right-of-way.

Senator Sorvaag said projects are not planned and carried out overnight, and 75 days is not too long to make water resource boards wait.

Senator Unruh said the 75-day period will not result in delayed construction.

In response to a question from Commissioner Nodland, Chairman Schmidt said the committee is examining quick take eminent domain because the Legislative Management directed the committee to study the issue.

Chairman Schmidt invited public comment on quick take eminent domain.

Mr. Greg Larson, Vice Chairman, Burleigh County Water Resource District, presented a written statement ([Appendix P](#)).

In response to a question from Senator Luick, Mr. Larson said the district had never used quick take eminent domain before the current instance.

In response to a question from Senator Sorvaag, Mr. Larson said a 75-day wait would not affect the district's work.

Mr. Aaron Norby, Bismarck, presented a written statement ([Appendix Q](#)).

In response to a question from Representative Streyle, Mr. Norby said he did not know whether blanket easements remain a common practice.

Mr. Greg Johnson, North Dakota Society of Professional Land Surveyors, presented a written statement ([Appendix R](#)) on behalf of the North Dakota Society of Professional Land Surveyors.

Mr. Jaret Wirtz, Executive Director, Western Area Water Supply, said WAWS did not initiate condemnation of Mr. Norby's land and does not intend to do so. He said WAWS provides a certificate of survey when it uses quick take eminent domain.

In response to a question from Senator Sorvaag, Mr. Wirtz said WAWS cannot receive reimbursement for easement work until a project is approved.

In response to a question from Commissioner Swenson, Mr. Wirtz said the work to obtain an easement is reimbursable even if the easement itself is not.

Commissioner Swenson said this is a distinction without a difference and the State Water Commission does not pay legal fees to obtain easements.

Mr. Mike Dwyer, Executive Secretary, North Dakota Water Resource Districts Association, said his association supports the revised bill draft with the 75-day negotiation process and would support including a constructive notice provision.

Mr. Sean Fredericks, Counsel, Red River Joint Water Resource District, said he supports the language in the revised bill draft.

Mr. Pete Hanebutt, Director of Public Policy, North Dakota Farm Bureau, said the Farm Bureau supports private property rights and will follow the issue of quick take eminent domain. He said he will share the bill drafts with his membership.

Representative Zubke said additional information on blanket easements is necessary.

Senator Sinner said he has concerns about adding costs to projects if blanket easements were prohibited.

In response to a request from Representative Porter, the Legislative Council staff said she found no indication that blanket easements terminate on their own when a pipeline is laid unless specified on the document.

It was moved by Senator Robinson, seconded by Representative M. Nelson, and failed on a roll call vote that the committee approve and recommend to the Legislative Management the bill draft requiring water resource boards to obtain the approval of county commissioners before exercising quick take eminent domain. Representative M. Nelson and Senators Robinson and Schaible voted "aye." Representatives Schmidt, Amerman, Anderson, Muscha, J. Nelson, Porter, Sanford, Westlind, and Zubke and Senators Casper, Holmberg, Lee, Luick, Sinner, Sorvaag, and Unruh voted "nay."

It was moved by Representative Zubke, seconded by Senator Sorvaag, and carried on a roll call vote that the bill draft requiring water resource boards to engage in a specified negotiation process with land owners before exercising quick take eminent domain be amended to permit evidence of constructive notice to satisfy the requirement for water resource boards to deliver certain documents to landowners. Representatives Schmidt, Amerman, Anderson, Muscha, J. Nelson, M. Nelson, Porter, Sanford, Westlind, and Zubke and Senators Casper, Holmberg, Lee, Luick, Robinson, Schaible, Sorvaag, Sinner, and Unruh voted "aye." No negative votes were cast.

It was moved by Senator Sorvaag, seconded by Senator Lee, and carried on a roll call vote that the committee approve and recommend to Legislative Management the bill draft, as amended, requiring water resource boards to engage in a specified negotiation process with land owners before exercising quick take eminent domain. Representatives Schmidt, Amerman, Anderson, Muscha, J. Nelson, M. Nelson, Porter, Sanford, Westlind, and Zubke and Senators Casper, Holmberg, Lee, Luick, Schaible, Sorvaag, Sinner, and Unruh voted "aye." Senator Robinson voted "nay."

### **AUTHORITY OF WATER RESOURCE BOARDS TO CONDEMN LAND IN OTHER WATER RESOURCE DISTRICTS**

Chairman Schmidt called on the Legislative Council staff to present research on whether water resource boards may lawfully exercise eminent domain in other water resource districts. She said there have been no North Dakota court cases to settle this issue. She said a court likely would rule the plain language in North Dakota Century Code Section 61-16.1-09(12) allows a water resource board to condemn an easement or right-of-way in another water resource district if it was necessary for the exercise of another power of the board. She said the relevant language in that section has existed for several decades and predates the current iteration of water resource boards, but there is no legislative history explaining the intention behind it.

In response to questions from Senator Luick, the Legislative Council staff said the statute does not contain language indicating it would apply differently if there are negative impacts on the water district where the condemnation occurred. She said there is a strong argument a county in one part of the state could take an easement in another part of the state if it is necessary to a water resource district's project, but the only way to have absolute certainty about the statute is to have a court rule on it. She said the statute at issue is found in the chapter regarding water resource boards, and statutory language on other topics likely would not modify it. She said she would have to see the language at issue to know with certainty.

In response to questions from Senator Lee, the Legislative Council staff said landowners whose land was condemned could go to court for an injunction or to disagree over the amount of compensation owed.

Ms. Kelsch said government entities should not have eminent domain authority outside their geographic boundaries. She said entities that exercise eminent domain need to be accountable to individuals whose land they take. She said Section 61-16.1-09(5) arguably prevents water resource boards from taking land in other districts.

### **INDUSTRIAL WATER USE**

Chairman Schmidt called on Ms. Bethany Kurz, Principal Hydrologist, Energy and Environmental Research Center, for a presentation regarding the Bakken Water Opportunities Assessment report ([Appendix S](#)).

In response to question from Chairman Schmidt, Ms. Kurz said it would take an extremely large amount of water being pushed into geologic formations to create the risk of seismic activity.

In response to a question from Senator Luick, Ms. Kurz said water chemistry in the Bakken Formation changes over time, but the water salinity probably does not change.

### **MISSOURI RIVER ISSUES**

Chairman Schmidt called on Mr. Mike Gunsch, Advisory Board Member, Missouri River Advisory Council, for a presentation on Missouri River issues.

## UNITED STATES BUREAU OF RECLAMATION FUNDING FOR WATER PROJECTS

Chairman Schmidt called on Mr. David Rosenkrance, Dakotas Area Manager, United States Bureau of Reclamation, and Mr. Duane DeKrey, General Manager, Garrison Diversion Conservancy District, for a presentation on Bureau of Reclamation funding for municipal, residential, and industrial water projects. Mr. Rosenkrance said the bureau has seen an increase in the amount of carryover funds due to delayed construction. He said the carryover for North Dakota projects this year will be \$58.1 million, \$25.1 million of which is due to state projects and \$33 million of which is due to tribal projects. He said Congress has appropriated more money to the bureau for rural water projects than the President of the United States has requested in 4 of the last 5 years.

In response to questions from Chairman Schmidt, Mr. Rosenkrance said the bureau can reimburse the cost of meeting National Environmental Policy Act requirements, but the reimbursement is taken out of project funds. He provided a list of projects ([Appendix T](#)), the amounts the sponsors have, and how long the sponsors have had the funds.

In response to questions from Representative Zubke, Mr. Rosenkrance said the President of the United States request \$7.4 million for rural water projects this year, but the bureau does not have its final budget yet. He said the bureau tries to allocate half the money to the state and half to tribes.

In response to a question from Representative J. Nelson, Mr. Rosenkrance said the bureau provides maintenance and construction funding to tribes and tries to follow the tribes' priorities when allocating funds. He said the bureau also considers tribes' capabilities, serves as a technical resource for the tribes, and provides operation and maintenance for tribal water systems.

In response to a question from Representative M. Nelson, Mr. Rosenkrance said the bureau must obtain congressional approval to take water out of a watershed. He said there is approval to do so for NAWS, but not for the Red River.

## OTHER BUSINESS

**It was moved by Senator Sorvaag, seconded by Senator Schaible, and carried on a roll call vote that the Chairman and the Legislative Council staff be requested to prepare a report and the bill draft recommended by the committee and to present the report and recommended bill draft to the Legislative Management.** Representatives Schmidt, Amerman, Anderson, Muscha, J. Nelson, M. Nelson, Porter, Sanford, Westlind, and Zubke and Senators Casper, Holmberg, Lee, Luick, Schaible, Sorvaag, Sinner, and Unruh voted "aye." Senator Robinson voted "nay."

**It was moved by Senator Sorvaag, seconded by Senator Holmberg, and carried on a voice vote that the committee be adjourned sine die.**

No further business appearing, Chairman Schmidt adjourned the committee sine die at 11:30 a.m.

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Claire Ness  
Counsel

ATTACH:20