

FISCAL NOTE
Requested by Legislative Council
01/20/2015

Bill/Resolution No.: HB 1400

- 1 A. **State fiscal effect:** *Identify the state fiscal effect and the fiscal effect on agency appropriations compared to funding levels and appropriations anticipated under current law.*

	2013-2015 Biennium		2015-2017 Biennium		2017-2019 Biennium	
	General Fund	Other Funds	General Fund	Other Funds	General Fund	Other Funds
Revenues						
Expenditures				\$25,000,000		
Appropriations						

- 1 B. **County, city, school district and township fiscal effect:** *Identify the fiscal effect on the appropriate political subdivision.*

	2013-2015 Biennium	2015-2017 Biennium	2017-2019 Biennium
Counties			
Cities			
School Districts			
Townships			

- 2 A. **Bill and fiscal impact summary:** *Provide a brief summary of the measure, including description of the provisions having fiscal impact (limited to 300 characters).*

This bill provides for the purchase of inundated land under a terminal lake.

- B. **Fiscal impact sections:** *Identify and provide a brief description of the sections of the measure which have fiscal impact. Include any assumptions and comments relevant to the analysis.*

This bill allocates \$25,000,000 of the State Water Commission's funding to be used for purchase of land under a terminal lake. Because it does not provide any additional appropriation authority the funding will have to be taken from other planned projects.

3. **State fiscal effect detail:** *For information shown under state fiscal effect in 1A, please:*

- A. **Revenues:** *Explain the revenue amounts. Provide detail, when appropriate, for each revenue type and fund affected and any amounts included in the executive budget.*

- B. **Expenditures:** *Explain the expenditure amounts. Provide detail, when appropriate, for each agency, line item, and fund affected and the number of FTE positions affected.*

This bill allocates \$25,000,000 of the State Water Commission's funding to be used for purchase of land under a terminal lake.

- C. **Appropriations:** *Explain the appropriation amounts. Provide detail, when appropriate, for each agency and fund affected. Explain the relationship between the amounts shown for expenditures and appropriations. Indicate whether the appropriation or a part of the appropriation is included in the executive budget or relates to a continuing appropriation.*

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Agency: ND State Water Commission

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Date Prepared: 01/23/2015

2015 HOUSE ENERGY AND NATURAL RESOURCES

HB 1400

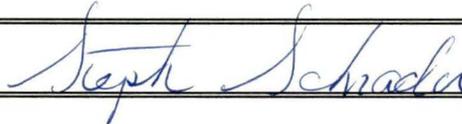
2015 HOUSE STANDING COMMITTEE MINUTES

Energy and Natural Resources Committee Pioneer Room, State Capitol

HB1400
1/29/2015
Job # 22854

- Subcommittee
 Conference Committee

Committee Clerk Signature



Explanation or reason for introduction of bill/resolution:

To provide for the purchase of inundated land under a terminal lake.

Minutes:

Attachments 3

Chairman Porter opens hearing.

Rep. Curt Hofstad: District 15

We have been dealing with flooding in Devils Lake since 1992. We have had people asking for help for reducing the level of the lake for remuneration for loss to the lake. Truly we do pick winners and losers when we cut a check to someone who has lost land to the lake. That has always been an issue for us. We have always taken the approach the Best thing we can do is get water off of the lake. We've accomplished getting two outlets, one on the west side and one on the east side. It has truly stabilized that lake. We have repaired the infrastructure and our community is a different community. We can manage the water that comes into the lake with the water we can take out of the lake, as long as the flows are somewhat normal. Devils Lake is a different community; we have in businesses coming there, we have industry coming there, but the problem is those people that are still underneath that lake have not been compensated. They have lost everything that they have, in some cases, land that has been in there families for generations. We have tried to resolve this issue under prevent plant, we have talked about issues under the farm program. The last farm program has a terminal lake assistance program. They have authorized 25 million dollars of federal dollars. They haven't appropriated the money, but they have authorized it. What they have said is that is the states match this 50/50, that program would be in place. The terminal lakes assistance program is a lake that has no outlet. I suspect there are many lakes across North Dakota that fall into that category. The issue with Devils Lake is that it is a sovereign body of water. The State of North Dakota owns the land underneath that lake. The federal legislation calls for that those land owners produce a clear title and they must be at an elevation 1445 and below.

Vice Chairman Damschen: Do you know if in the federal provision if there's is any restriction on future riparian rights of adjacent land owners, if the lake level goes down?

Rep. Curt Hofstad: I think that will have to be solved in the courts, because the sovereignty of that lake goes to the ordinary high water mark. Those riparian land owners have certain rights; they have right to access, to put in a dock, grazing rights, and I think they have rights to that land as it comes back out of the ordinary high water mark. Who stands in line as that lake expands and takes one land owner after the other. I don't think the court is clear as to who would hold title to that land as it would come out of water.

Rep. Dick Anderson: Mouse River Ranchers requested 25 million dollars today to have their land that's inundated by flooding compensated for.

Rep. Curt Hofstad: The program is a terminal lakes assistance program and it talks about a body of water with no outlet. I don't know that it's just a Devils Lake issue or a North Dakota issue, I don't think the money applies only to Devils Lake.

Rep. Mike Lefor: Right now the state owns the land, correct?

Rep. Curt Hofstad: Yes, the land that is underneath that lake is owned by the state of North Dakota.

Rep. Mike Lefor: So what happened was, these people formally owned the land it gets flooded, now it's sovereign so it's state land?

Rep. Curt Hofstad: That's correct.

Chairman Porter: Riparian issue, if an individual accepts the money out of this program then the title of that land is the state of North Dakota's along with the minerals, that will become public land when the lake recedes back?

Rep. Curt Hofstad: That is correct. The federal legislation says that the land owner has to provide clear title and the land is then owned by the state of North Dakota for perpetuity. The land is then used for conservation purposes.

Chairman Porter: Currently, land that is under Devils Lake, the land owners have the ability to maintain ownership of some of that land above the ordinary high water mark by paying a reduced property tax and then maintaining title of the property that is fully covered by that body of water.

Rep. Curt Hofstad: That is correct.

Chairman Porter: Could I get a google map so I could see what land would be paid for and bought using this type of a program? Under the terminal lake assistance program is there anything that mandates that all of the waters inundated then become the land of the state, and the person who is paying or has their taxes abated can maintain a checkerboard situation out of a program like this?

Rep. Curt Hofstad: It's a voluntary program so it could be a checker board program, as the lake receded.

Chairman Porter: We're saying that 25 million is earmarked for this, that it cannot be used for other water projects inside of the state as we see the decline in oil prices and the decline in the amount of money available to the Water Resources Trust Fund next biennium. Is there language that can be put in place that says that we're all in but we're not putting the money forward until the federal government brings their money? Do we have to take this money, put it off to the side and wait for them a long time before they would decide if they're funding this or not.

Rep. Curt Hofstad: I would like the committee to craft some language that would do just that. We're trying to throw this back to the federal government, saying okay, if you're really serious about this let's see the appropriation. I think the challenges would be great for them to fund this.

Vice Chairman Damschen: Are we relinquishing some rights to the federal government for any type of an easement or control? When I think of riparian rights I envision the fight over Churches Fairy back in the draught of the late 80s, early 90s. Some of those lakes were seeded in in pie shapes by the adjacent land owners.

Rep. Curt Hofstad: What was different about that, I think, is that, at the time, it was not a sovereign body of water.

Vice Chairman Damschen: But you're not aware of any language in the federal proposal that this bill works in coordination with, that gives up ownership?

Rep. Curt Hofstad: No, I think the federal legislation is specific that the state of North Dakota owns the land. The state of North Dakota will own the land it has to be passed with a clear title to the State of North Dakota. State of North Dakota owns it in perpetuity and has to use it for conservation purposes.

Representative Dennis Johnson, District 15

Over the years we have been trying to start a program to help the Ag community up there. There are over 800 structures in that lake and all the cultivated land and pasture land that's under that lake. It's been so frustrating trying to figure out how to help our ag friends up there then to see this bill come along of the Farm Bill. Is it the best thing possible we could have, I'm not sure, but it's the only game in town right now. I think if we can somehow give the opportunity to the guys that want to participate. I can't see everyone wanting to participate because of the ramifications that it could create if the lake does dry up again. I liked to see if we can see if we can make it better.

Rep. Bill Devlin, District 23

I echo and support what the previous two representatives said. There's a slight typo in here. When we did this it was Devils Lake and Stump Lake, they are kind of interconnected up there but they're two separate lakes. Stump Lake is in our district and Devils Lake in theirs. In answer to the question, when I was visiting with a congressional aide about this bill, in their opinion they drafted the farm bill the way they did there are only three lakes in the United States that meet the criteria for this terminal lake and Stump Lake and Devils Lake are two of them. I'm not sure if he's correct, but that's what he said.

Representative Vigesaa, District 23

I support this bill.

Nuetral:

Jeff Frith, Manager of the Devils Lake Basin Joint Water Resource Board

Written testimony #1

Rep. Dick Anderson: Is there an actually perfect size for that lake, have you discussed it?

Frith: We have discussed it, Ramsey County Commission, Devils Lake Joint Board, several of the adjoining counties sat down and came up with 1446ft would be a good elevation to maintain the lake. That's the natural divide between Devils Lake and Stump Lake it would maintain both bodies of water. I think the elephant in the room at that point is, what do you do with the land below that; if you're stabilizing it are you then taking that land from the previous owners below those elevations?

Oppostion:

Paul Becker, Chairman Ramsey County Water Resource District

Testimony #2

Rep. Mike Lefor: Expound on annual payments, I don't understand what you mean by that?

Becker: I think what we would be looking at, rather than selling this, the land owner would retain ownership. Right now, the concept of ownership is muddy. The state, I believe does own the land. There was a WRP program that was put into effect a few years ago, and this mirrors the WRP program except that the WRP programs excluded any land that were under more than 6.5 feet of water. It was a onetime payment, but it was for a 30 year easement. If we could somehow extrapolate that back into a 30 year annual payment, I think that would be more palatable. The Land owners, would still own the land.

Rep. Curt Hofstad: This is really not our bill, this is federal legislation that we are responding to. What if this went through and that appropriation was there, would you want those people who want to participate in this opportunity have that ability, or would you like this to go away?

Becker: I would hate to take that away from somebody else, but I think there must be a better solution.

Rep. Curt Hofstad: But, this is not our legislation, it's the federal government. The only thing that they are allowing us to do is put 25 million in the bucket. There are no negotiations, there's nothing we can change.

Becker: I think you probably should work on it. One of the things that was discussed was the 400/200, the way I read the legislation is that it does not limit the state of North Dakota. I think if the state goes through with it, it should be at a higher level of payment.

Vice Chairman Damschen: The language that I heard was that the state would own the land in perpetuity; we would never be able to sell it back to private landowners. Is that a concern?

Becker: Yes.

John Paczkowski, Chief-Regulatory Section North Dakota State Water Commission
Written testimony #3

Rep. Glen Froseth: Does the ownership fluctuate with the waterline?

Paczkowski: Yes.

Vice Chairman Damschen: If there was a bill that just involved North Dakota paying storage retroactive, whatever date you want to look at, would that be in the same category to using state money to pay for storage on state land or would it be retroactive and pay former land owners?

Paczkowski: Whether the state would be interested in paying to store water in Devils Lake is something to be considered.

Rep. Curt Hofstad: Has there or is there any instances where the state of North Dakota has sold sovereign land? Could you or have you?

Paczkowski: There is an administrative code there is terminology that says the state cannot relinquish ownership of sovereign lands.

Rep. Curt Hofstad: What about the rights of the adjacent land owner. Because he does have certain rights; he has a right to graze, the right to put a dock in, a right to regain ownership when that water goes down off his land. Is that something that could be purchased?

Paczkowski: The adjacent landowner has rights down to the ordinary low water mark. They cannot be at the detriment to those lands between the ordinary low water mark and the ordinary high water mark. They can't be at the detriment of the public's use of that. That boundary, the ordinary high watermark, delineates private ownership from public ownership. Absolut ownership stops at the ordinary high watermark.

Chairman Porter closes hearing.

2015 HOUSE STANDING COMMITTEE MINUTES

Energy and Natural Resources Committee
Pioneer Room, State Capitol

HB1400
2/5/2015
Job # 23313

- Subcommittee
 Conference Committee

Committee Clerk Signature



Explanation or reason for introduction of bill/resolution:

To provide for the purchase of inundated land under a terminal lake.

Minutes:

Attachments 0

Chairman Porter opens hearing.

Rep. Curt Hofstad: moves a Do Not Pass.

Rep. Mike Lefor: Second

Rep. Curt Hofstad: There are truly too many obstacles: Likely it will never be funded by the federal government. We are asking the state of North Dakota to buy land that already belongs to them because all of this land is sovereign land. Our constitution says that we cannot pick winners and losers.

Vote: yes 12, no 0, absent 1.

Carrier: Rep. Curt Hofstad

Chairman Porter closes hearing.

Date: 2/5/15
 Roll Call Vote #: 1

**2015 HOUSE STANDING COMMITTEE
 ROLL CALL VOTES
 BILL/RESOLUTION NO. HB 1400**

House Energy and Natural Resources Committee

Subcommittee

Amendment LC# or Description: _____

Recommendation: Adopt Amendment
 Do Pass Do Not Pass Without Committee Recommendation
 As Amended Rerefer to Appropriations
 Place on Consent Calendar

Other Actions: Reconsider _____

Motion Made By Rep. Hofstad Seconded By Rep Lefor

Representatives	Yes	No	Representatives	Yes	No
Chairman Porter	✓		Rep Hunskor	✓	
Vice Chairman Damschen	✓		Rep Mock	✓	
Rep D Anderson	✓		Rep Muscha		
Rep Brabandt	✓				
Rep Devlin	✓				
Rep Froseth	✓				
Rep Hofstad	✓				
Rep Keiser	✓				
Rep Lefor	✓				
Rep Nathe	✓				

Total (Yes) 12 No 0

Absent 1

Floor Assignment Rep Hofstad

If the vote is on an amendment, briefly indicate intent:

REPORT OF STANDING COMMITTEE

HB 1400: Energy and Natural Resources Committee (Rep. Porter, Chairman)
recommends **DO NOT PASS** (12 YEAS, 0 NAYS, 1 ABSENT AND NOT VOTING).
HB 1400 was placed on the Eleventh order on the calendar.

2015 TESTIMONY

HB 1400

1400
1/29/15

#1
DEVILS LAKE BASIN
JOINT WATER RESOURCE BOARD

SERVING
CAVALIER, EDDY, NELSON, PIERCE, RAMSEY, ROLETTE, TOWNER & WALSH COUNTIES
524th Avenue NE, #27, Devils Lake, ND 58301 – Phone: 701-662-7076 Fax 701-662-7096
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**TESTIMONY TO NORTH DAKOTA LEGISLATURE HOUSE
COMMITTEE ON ENGERY AND NATURAL RESOURCES**

HB 1400

My name is Jeff Frith I am from Devils Lake and I am the Manager of the Devils Lake Basin Joint Water Resource Board. Mr. Chairman, ~~Members~~ Vice Chairman and distinguished members of the committee I would like to thank you for allowing me the time to address the committee today. The testimony I am providing is neither in support of nor opposed to House Bill 1400 just merely providing some factual information.

First off a little background information: The Devils Lake Basin is 3810 square mile sub-basin of the Hudson Bay drainage system located in Northeastern North Dakota. Since 1993, Devils Lake has been in a prolonged wet cycle and has risen over 28 feet to a current level of 1451.60' this is down from a historical high of 1454.40' above sea level which was reached in June of 2011.

- **Devils Lake spilled into Stump Lake at elevation 1446.3 amsl. In the summer of 1999. The last significant spill into Stump Lake occurred in the early 1800s.**
- **Since glaciation, Devils Lake has been fluctuating from dry to overflowing; this variability is the normal condition of the lake.**
- **Devils Lake has reached its spill elevation of 1458' and has overflowed into the Sheyenne and Red Rivers at least twice during the past 4,000 years.**
- **The last Devils Lake spill into the Sheyenne River occurred less than 2,000 years ago.**
- **The volume of water in Devils Lake has increased over 4.5 times since the spring of 1993. Devils Lake & Stump Lake now covers over 177,000 acres and have a volume of 3,648,206 acre feet of water.**
- **For every foot of elevation increase the lake consumes 9 to 10 thousand acres of highly productive farmland.**
- **At their spill elevation, Devils Lake and Stump Lake would cover more than 261,013 acres.**

- At today's elevation of 1451.60 the Devils Lake area has lost 122,840 acres of privately owned, productive agriculture land. The loss of which has had a tremendous economic impact not only to those families that lost the land but the entire region's economy is affected. Since 2010 NDSU studies have indicated an economic impact of lost agricultural production to be around two hundred million dollars...annually.

ELEVATIONS AND ACAGE AS PERTAINING TO THIS LEGISLATION

- 1993 Pre flooding elevation 1423' and 54,267 combined acres of Devils Lake & Stump Lake.
- Acres of lakes at 1445' – 126,041 difference between 1993 data is 71,774 acres
- Acres of lakes at 1446' – 132,246 difference between 1993 data is 77,979 acres
- Acres between today's elevation (1451.60') and 1446' – 44,861 acres

The land that is underneath the waters of Devils Lake was once part of multi-generational family farms and belonged to the men and woman who helped build this great state. In the past as the waters continued to consume acre after acre, farmstead after farmstead there were programs to insure buildings and dwellings were protected and compensated when inundated but nothing for the land or the income it once produced. The loss of that land has brought great heartache and anguish to those who lost so much over the years but also to those who wanted, wished and tried to find a solution and end the suffering that so many were dealing with.

As I mentioned in my opening statement that I neither support nor oppose this legislation I do however have some questions that have been brought to me by affected landowners.

- Is the price \$400/200 per acre for cropland/pasture or is that just the state's share?
- At what elevation will the land be eligible for purchase?
 - The federal legislation states that a depth greater than 6.5 feet. Is that a moving target as the lake elevations fluctuate?
- What will be allowed on the land once purchased and if/when it dries out?
 - Could it be used for any agricultural purpose such a haying or grazing?
 - Could it be sold back to the original landowner?
 - Would any type of buildings be permitted on it?
 - Could infrastructures such as roads, bridges and such be able to be maintained in order to access adjacent lands that weren't sold?
- How would state ownership of this land affect local tax rolls?
- Could the land that is purchased be considered part of a wetland mitigation bank for other dryland projects?
- Would the selling landowner be responsible for a capital gains tax or other taxes, either from the state or federal governments?

This legislation isn't perfect however I am not sure since it is tied to federal legislation if anything can be changed. While I do see some issues as it is currently written I do not want to be the one standing in the way of a landowner whose land has been underwater for 15 plus years and them receiving some kind of a payment. I applaud the sponsors who drafted the legislation and you for your willingness to bring it forward and at the very least open up the conversation about compensating landowner.

THANK YOU FOR YOUR TIME!

Respectfully Submitted,
 Jeff W. Frith, Manager
 Devils Lake Basin Joint Water Resource Board

1400
1/29/15

#2

Ramsey County Water Resource District

524 4th Ave NE #12

Devils Lake, ND 58301

Testimony of Paul Becker, Chairman

Ramsey County Water Resource District

Presented to the House Energy and Natural Resources Committee

on

HB1400

January 29, 2015

Chairman and members of the House Natural Resources Committee:

Ramsey County Water Resource District has some concerns with HB1400.

1. Getting compensation to flooded land owners is very important and long overdue.
2. We have a problem with the State ownership without a chance to reown the land. Most of this land has been flooded more than 15 years; could we have a contract between the State and Landowner for an additional 15-25 years with annual payments as opposed to an outright purchase? This land has been used for water storage for all of these years with no compensation. Without stabilization the Lake will go down at some time in the future, give the landowner the option of using it for its best use at this time. This could be done with a State Waterbank Program. Most of the landowners that are in this situation want to retain ownership of their land, make the changes to allow this.
3. This would allow this land to be brought back to the tax rolls. Land values are too low; an annual payment would allow the land to remain in local ownership. The State will have annual costs when the land is out of the water with this bill.

4. This bill does not address the 40,000 acres that are above the 1445 elevation.

#3

1400
1/29/15

TESTIMONY ON HOUSE BILL NO. 1400

House Energy and Natural Resources Committee

**John Paczkowski, Chief – Regulatory Section
North Dakota State Water Commission**

January 29, 2015

Mr. Chairman and members of the Energy and Natural Resources Committee, my name is John Paczkowski. I am the Chief of the Regulatory Section for the State Water Commission. On behalf of the State Engineer, Todd Sando, I am here to inform you that House Bill No. 1400 seems to be contradictory to existing state law and the state constitution regarding the purchase of property under Devils Lake.

First, the bill would require the use of state money to pay for land already owned by the state. The state engineer and the North Dakota Supreme Court have determined Devils Lake to be navigable at the time of statehood, and therefore, a sovereign water body under N.D.C.C. chapter 61-33. As a sovereign water body, according to N.D.C.C. § 61-33-03, all possessory interests belong to the state of North Dakota. In establishing the limit of the state's possessory interests in Devils Lake, the North Dakota Supreme Court in the *Matter of Ownership of the Bed of Devils Lake* (1988) directed that the state's ownership interest extends to the ordinary high water mark. The state engineer has determined the current ordinary high watermark to be the water's edge and that the ordinary high watermark moves as the level of Devils Lake fluctuates. As a result, any lands beneath Devils Lake are sovereign and are owned by the state.

Secondly, the bill arguably violates Article X, Section 18 of the Constitution of North Dakota, also known as the anti-gift clause. As stated previously, the state currently retains possessory interests in the area under Devils Lake. If the bill were to be enacted, the state would be using state money to make donations to or aid an individual, which is potentially contradictory to the constitutional language.

The State has spent hundreds of millions of dollars dealing with flooding in the Devils Lake Basin, including the construction and operation of two outlets that have helped to lower the level of Devils Lake. In addition there are also federal and state programs that are currently being used within the Devils Lake basin that compensate landowners for retaining water. Programs include the NRCS Water Bank Program, the NRCS Regional Conservation Partnership Program, the Working Wetlands in North Dakota program, the North Dakota Agriculture Water Bank program, and the Water Storage Piggyback program.

Thank you for the opportunity to comment on this matter. I will be happy to answer any questions you might have.