

NORTH DAKOTA LEGISLATIVE MANAGEMENT

Minutes of the

**WATER TOPICS OVERVIEW COMMITTEE**

Monday, June 23, 2014

Lecture Rooms, Heritage Center, Capitol Grounds

Bismarck, North Dakota

Tuesday, June 24, 2014

Roughrider Room, State Capitol

Bismarck, North Dakota

Senator Tony Grindberg, Chairman, called the meeting to order at 1:00 p.m.

**Members present:** Senators Tony Grindberg, Ray Holmberg, Gary A. Lee, Larry Luick, Larry J. Robinson; Representatives Bill Amerman, Dick Anderson, Ron Guggisberg, Curt Hofstad, Curtiss Kreun, Scott Louser, Jon Nelson, Jim Schmidt, Vicky Steiner

**Members absent:** Representatives Naomi Muscha, Todd Porter

**State Water Commission members present:** Governor Jack Dalrymple, Tom Bodine representing Agriculture Commissioner Doug Goehring, Maurice V. Foley, Larry L. Hanson, George Nodland, Harley Swenson, Robert Thompson

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

**Others present:** Jessica K. Unruh, State Senator, Beulah  
See [Appendix A](#) for additional persons present.

**It was moved by Senator Robinson, seconded by Representative Guggisberg, and carried on a voice vote that the minutes of the April 10, 2014, meeting be approved as distributed.**

Governor Jack Dalrymple called the meeting of the State Water Commission to order at 1:05 p.m.

**JOINT WATER TOPICS OVERVIEW COMMITTEE AND  
STATE WATER COMMISSION MEETING**

The members of the Water Topics Overview Committee and the State Water Commission gave introductions focusing on their experience with water-related issues.

Mr. Todd Sando, State Engineer and Chief Engineer-Secretary, State Water Commission, gave a presentation ([Appendix B](#)) on 2013-15 water project funding priorities, the draft project prioritization guidance concept, and the draft cost-share policy. He said the 2015-17 project inventory includes 177 projects that may qualify for some type of funding assistance.

Mr. Bruce Engelhardt, Director, Water Development Division, State Water Commission, answered questions for the committee.

In response to a question from Senator Robinson, Mr. Engelhardt said there are cost overruns in most projects. He said on smaller projects there is flexibility because the State Engineer can approve cost overruns under \$50,000. He said if the amount is more, then the State Water Commission can act. He said a 10 percent contingency is included in most contracts and allows for cost overruns.

Representative Kreun said the mission of the State Water Commission is to improve the quality of life and economy. He said if an industry comes to an area in which there is not population growth, the industry should not be treated differently from when there is population growth.

In response to a question from Representative Kreun, Ms. Michelle Klose, Assistant State Engineer, State Water Commission, said the water project prioritization contains as a high-priority project addressing severe and

anticipated water supply shortages for domestic use. She said this is in areas with a three-year average population growth of greater than 3 percent. She said the list within the high-priority projects is not hierarchical.

Representative Kreun said the prioritization should not contain the three-year average population growth greater than 3 percent as a measure of population growth.

In response to a question from Commissioner Swenson, Representative Kreun said a community that is subsidized for growth will subsidize business.

Governor Dalrymple said the State Water Commission discussed the growth concept. He said all cost-share has to be brought through political subdivisions. If there is a large economic development situation, he said, the weight of multiple requests would support the project. He said the project would not be left out because there was not any population growth.

Representative Kreun said Valley City has growth in the industrial sector, but the population is down. He said the growth factor creates an uphill battle for Valley City.

Governor Dalrymple said the State Water Commission may make exceptions, and low-priority projects could be funded and high-priority projects not funded.

Commissioner Nodland said there are small communities with large population growth, and these communities have no recourse to pay for projects. He said these small towns need an edge.

Representative Nelson said the goal is not tie the hands of the State Water Commission. He said the commission needs flexibility.

In response to a question from Representative Nelson, Ms. Klose said affordability is considered when there is a lack of water supply. She said it is factored in when determining grants and the ability to pay for loans.

Commissioner Swenson said he had trouble with funding domestic use to support industry. He said the growth factor relates to domestic use. He said he does not want the State Water Commission choosing winners and losers for economic development projects.

Commissioner Thompson said large industrial projects fall under the special funding category.

Senator Holmberg said 3 percent seems arbitrary. He said this is always the case when number thresholds are used.

In response to a question from Senator Holmberg, Mr. Sando said defining rapid growth is a moving target. He said the 3 percent was based on 2012 figures. He said 2013 numbers suggest the number may need to be higher.

Representative Steiner said anything over 4 percent is rapid growth. She said this is based on the ability of a political subdivision to absorb the growth in a reasonable amount of time.

Mr. Sando said 3 percent is the starting number and 4 percent is a good number as well. He said Minot numbers have been skewed because of the flood.

Representative Hofstad said the Legislative Assembly asked for a methodology for the Legislative Assembly to prioritize projects. He said this is a broad filter. He said it allows flexibility. He said he is comfortable with the prioritization concept, and it fulfills the Legislative Assembly request.

Mr. Sando said the State Water Commission will fund in all prioritization categories, but there will be different cost-share.

Governor Dalrymple said there has been a huge expansion of the water programs. He said there needs to be a filter. He said there might be three projects that do not receive any money for every project that is funded.

In response to a question from Senator Robinson, Mr. Sando said with the growth of the budget and number of projects, the State Water Commission will need more staff.

In response to a question from Chairman Grindberg, Commissioner Swenson said a person from Grand Forks came to the State Water Commission and used the possibility of having a fertilizer plant as a justification for

expanding the water treatment plant. He said he understands the need, but the commission cannot fund economic development.

Representative Kreun said the water plant is for growth and water quality. He said he does not support defining rapid growth with a number in the policy.

Governor Dalrymple said nothing precludes the State Water Commission from supporting a regional project. He said he expects to see more joint political subdivision applications in the future. He said the prioritization is not a law or rule. He said it is merely a policy the commission uses, and the commission can change or make an exception at any time. He said the 3 percent is a guideline but could be altered in a second. He said the policy should have enough support so that the legislature does not feel it needs to set the growth rate at 3 or 4 percent and take away flexibility from the commission.

Representative Nelson said he would like to see incentives for regionalization and cooperation. He said one group omitted is the tribes. He said partnerships with the tribes and political subdivisions may help the tribes.

In response to a question from Representative Nelson, Ms. Klose said high-priority projects have higher cost-share. She said this supports regionalization which generally expands water supply. She said although not explicit in the prioritization, the concept is implicit in the cost-share rates.

Representative Schmidt said the prioritization policy is what was intended as a product when the bill last legislative session was written.

Mr. Sando said the State Water Commission seeks a resolution in support of the prioritization policy.

Representative Kreun said he was mostly in support of the policy with some concerns.

Mr. Sando reviewed the cost-share policy with a couple of proposed changes. He said the 60 percent cost-share grant for rural water systems received the most comments. He said the proposed change is to allow for a 75 percent cost-share.

In response to a question from Commissioner Swenson, Ms. Klose said the factors for consideration for water system expansion include affordable and sustainable water rates as determined by the Chief Engineer. She said "as determined by the Chief Engineer" makes the State Water Commission able to figure the rate over the appropriate amount of users.

Commissioner Nodland said the project receiving 75 percent grant funding could only receive 80 percent total cost-share, which leaves 5 percent for loans. He said exceptions beyond that can be made by the State Water Commission.

In response to a question from Representative Hofstad, Ms. Klose said affordability is important to each rural water system. She said as end users become more and more difficult to reach, it becomes less affordable. She said some end users are willing to pay and some are not. She said the policy provides that if the people at the end are willing to pay, then there may be a 75 percent grant. She said this does not guarantee a 100 percent service but gets in those areas at the end of the line.

Representative Hofstad said limiting cost-share to 80 percent may make the funding for the remainder through loans more complicated than it needs to be. He said there is a revolving loan fund, and it should be used the best it can. In response to a question from Representative Hofstad, Ms. Klose said although buyin may come from loans from the State Water Commission, the commission wanted some money from other sources, especially when the sources are available and should be used for appropriate projects.

Governor Dalrymple said the State Water Commission has specific examples of rural water systems being unable to open up new areas at 60 percent grant. He said in those examples, the 75 percent grant would have made it possible. He said this is why the change was made. He said the commission thinks it is important that there be some local stake. He said the money available for projects will not go very far if there is a 100 percent cost-share.

Commissioner Nodland said road projects are generally 10 to 20 percent local participation. He said there must be some skin in the game. He said usually the local entity can tax or increase rates to cover the local share.

Representative Hofstad said a 100 percent loan and grant from the State Water Commission provides skin in the game because the skin is the loan. He said it should not make a difference if it all comes from the commission. He said would it be easier to have a one-stop shop.

Governor Dalrymple said there are various loan sources that could help with the local share. He said the State Water Commission discussed keeping loan programs comparable so that all would be used. He said commission loans will be comparable with the State Department of Health loans and the state revolving fund. He said then the proper program will be chosen based on convenience or fit with the project. He said the Legislative Assembly should keep the statutory rate at a comparable rate.

Mr. Sando said the other proposed change provides that the top one quarter can be provided up to 80 percent loans for water projects that result in high rates. He said this quarter will be determined by comparison against those other projects submitted.

Mr. Engelhardt said there are roughly 80 projects submitted. He said the projects will be divided into peer group, and the top quarter in each peer group would be eligible for the 80 percent. He said what is the top quarter is determined by the State Water Commission, which provides for flexibility.

In response to a question from Commissioner Swenson, Ms. Klose said it would be difficult to categorize based upon statewide cost when there are over 240 cost-share requests. She said it would be difficult to implement on a statewide basis.

Mr. Engelhardt said the policy allows for the purchase of land for flood retention projects. He said it does not allow for the purchase of easements. He said most projects do not include money for purchase or easement because it is difficult to know whether the transfer is a good deal. He said when negotiations are neighbor-to-neighbor, there is one set of negotiations, but if there is state or federal money involved, the negotiations take on a different tenor. He said the allowance for cost-share for purchasing land is an exception to a general rule and should not be expanded to include easements.

Commissioner Thompson said sometimes a water project is able to get a free easement for a pipeline. He said the major cost to retention projects is the purchase of the land. He said there would not be any retention projects if there was not any cost-share.

In response to a question from Representative Schmidt, Mr. Engelhardt said the cost attributable to archaeological finds, including downtime and the archaeologist, are not in the policy but are addressed in agreements. He said these costs are not an eligible expense and the sponsor bears the cost.

In response to a question from Representative Schmidt, Mr. Engelhardt said three feet of free board is not uncommon for a Federal Emergency Management Agency (FEMA) requirement. He said the policy provides for two feet above the 100-year floodplain. He said the individual ring dike program has dikes designed by the Natural Resources Conservation Service and does not have to meet FEMA requirements.

In response to a question from Senator Lee, Ms. Klose said there is no change to the policy as it relates to litigation. She said the State Water Commission may defer payment, but the policy does not require the commission to defer payment.

In response to a question from Senator Lee, Ms. Klose said sometimes the State Water Commission needs to fund a project to get into litigation to resolve the issues.

In response to a question from Senator Lee, Ms. Klose said the draft environmental impact statement was issued on Friday for the Northwest Area Water Supply (NAWS) Project.

In response to a question from Representative Kreun, Ms. Klose said the acquisition plan is separate from the hazard mitigation grant program.

Governor Dalrymple said the State Water Commission has always placed credence on recommendations of the North Dakota Water Coalition. He said it is a group of most all water groups, and the recommendations are based on consensus. He said the commission does not automatically approve North Dakota Water Coalition recommendations.

Senator Robinson said the joint meeting provided for good dialogue and valuable interaction.

Chairman Grindberg said the process for developing the policies has been good. He said the meeting today with the State Water Commission was productive and properly timed. He said the committee seemed supportive of the policies presented at the meeting.

Chairman Grindberg recessed the meeting at 4:25 p.m. and called the meeting to order at 9:00 a.m. on Tuesday, June 24, 2014, in the Roughrider Room, State Capitol, Bismarck.

### **FLOOD INSURANCE**

Representative Louser provided handouts ([Appendix C](#)) that were the basis for his testimony on a state flood insurance program. He said the actuarial review of a program shows it probably is not something that could be done in this state. He said it is insolvent with 10,000 policyholders. He said North Dakota benefits from the national insurance program by receiving three and a half times the amount paid in premiums for claims. He said the federal program has a three-year fix.

### **FARGO-MOORHEAD DIVERSION PROJECT**

Mr. Darrell Vanyo, Chairman, F-M Area Diversion Authority, provided written testimony ([Appendix D](#)) on the Fargo-Moorhead Diversion Project.

In response to a question from Representative Schmidt, Mr. Vanyo said agricultural mitigation will provide financial compensation to landowners.

In response to a question from Senator Luick, Mr. Vanyo said Oxbow was catastrophically flooded in 2009.

In response to a question from Senator Luick, Mr. Vanyo said Oxbow has flood protection, but it is not certified to the 100-year level by FEMA.

In response to a question from Senator Luick, Mr. Vanyo said early on in the process the plan was to buy out homes in Oxbow and Hickson. He said there was resistance, so a levee alternative was developed with the Army Corps of Engineers.

In response to a question from Senator Luick, Mr. Vanyo said from day one, the Fargo project has had independent utility.

Senator Luick said to date, Hickson and Bakke have not flooded and Oxbow now has substantial protection.

In response to a question from Senator Luick, Mr. Vanyo said the Minnesota Department of Natural Resources has no authority as to the project and the start of construction on the levee. He said Oxbow does not have 100-year protection. He said construction on the levee should be done immediately because it is more cost-effective.

In response to a question from Senator Luick, Mr. Vanyo said the levee is the only solution to have 100-year protection when there is 500-year protection for Fargo-Moorhead. He said the levee has provided stability as to home prices and for the tax base for the Kindred School District. He said there are some negative impacts that will be mitigated.

Senator Luick said the flood protection in Oxbow is good for 10,000 years if the project in Fargo-Moorhead does not go through.

In response to a question from Senator Luick, Mr. Vanyo said it is a complex issue for agricultural producers to be provided a remedy if they will not be qualified for crop protection because of the project. He said it is complex because producers operate with a just-in-time mentality. He said most are waiting for funding for the project. He said a consultant has been hired, and the goal is to come up with numbers that are available for farmers.

In response to a question from Senator Luick, Mr. Vanyo said there are 14 projects for upstream storage on the Minnesota side. He said five are more ready. He said money from the Cass County sales tax was used for levy work in small communities and for retention. He said there are 96 water retention projects that encompass 100,000 acres. He said water boards and districts need to approach the authority. He said the authority supports retention and distributed storage, but it is never a replacement for the diversion.

In response to a question from Representative Hofstad, Mr. Vanyo said the storage is not part of the diversion project. He said retention is supported because it lessens the frequency of which the operation of the project will be required. He said it becomes less likely there will be backup of water on other people with the retention projects. He said it also lessens the chance of the need to use insurance by agricultural producers.

In response to a question from Representative Hofstad, Mr. Vanyo said the potential use of the project goes down with retention projects, but it does not affect the cost of the diversion project.

In response to a question from Representative Kreun, Mr. Vanyo said the ring dike around Oxbow was included in the project and is a mitigation factor.

In response to a question from Representative Kreun, Mr. Vanyo said the levee project around Oxbow has started because of an advance agreement with the Army Corps of Engineers for advance construction costs being credited to the federal portion of funding.

Mr. Keith Berndt, County Administrator, Cass County, answered questions for the committee. In response to a question from Representative Kreun, Mr. Berndt said the authority may spend more from the federal funds at first as long as there is the appropriate cost-share at the end. He said federal funding is always up to Congress, and if there is no federal funding, the cost of the levee could be a local responsibility.

Representative Kreun said it should be in writing that Fargo will pay for the levee if there is not federal funding. He said the state should not be responsible for these costs. He said the wording in the bill was to protect the state from the federal government.

In response to a question from Representative Kreun, Mr. Berndt said the language in the bill indicates prior to authorization, state money may be used only for the levee, not the channel.

In response to a question from Representative Louser, Mr. Vanyo said the one-half cent sales tax is a 20-year tax in Fargo and Cass County.

In response to a question from Senator Luick, Mr. Vanyo said the red line on the maps is a line drawn by the Army Corps of Engineers and does not have to be the line separating who is entitled to compensation for agricultural losses and who is not.

In response to a question from Representative Louser, Mr. Vanyo said he agrees some critical decisions are taking too long and there needs to be a plan to make sure the upstream interests are taken care of.

In response to a question from Representative Amerman, Mr. Vanyo said the total amount of acres that will need to be purchased is around 8,000 acres. He said around 2,000 acres have been purchased and some rented back to the producer. He said not all of the 2,000 acres are within the area needed because the purchase of units of land sometimes does not coincide with the land needed for the project. He said the process of purchasing land started last fall and will most likely pick up again in the fall when the harvest season is over.

In response to a question from Representative Amerman, Mr. Vanyo said the authority will pay taxes on the land and has hired a land management company to take care of the land. He said the authority is not in the land ownership business and most likely will sell the land that is not needed in the footprint.

## COMMITTEE REVIEW AND DIRECTIVES

Committee Counsel reviewed the activities of the committee through the interim to date.

Representative Hofstad said he was comfortable with the cost-share policy and prioritization schedule. He said he has angst with the revolving loan fund but will wait to see how it operates. He commended the State Water Commission with doing what was asked and the process the commission used to develop the policy and prioritization.

Representative Schmidt said he had concerns but supported the prioritization schedule and cost-share policy.

Representative Nelson said both are working documents, and there may be changes to them in the future.

Representative Hofstad said the cost-share policy to be approved included the draft changes.

**It was moved by Representative Hofstad, seconded by Representative Schmidt, and carried on a roll call vote that the committee accept and recommend to the Legislative Management the prioritization schedule and cost-share policy developed by the State Water Commission.** Senators Grindberg, Luick, and Robinson and Representatives Amerman, Guggisberg, Hofstad, Kreun, Louser, Nelson, Schmidt, and Steiner voted "aye." No negative votes were cast.

## WATER FUNDING NEEDS

Mr. Mike Dwyer, North Dakota Water Coalition, provided a handout ([Appendix E](#)) on statewide water funding needs. He said the process includes getting all of the projects identified and then looking at the revenue forecast to make suggestions to the State Water Commission for support by the Legislative Assembly.

In response to a question from Representative Schmidt, Mr. Dwyer said the potential initiated measure for conservation asks for 5 percent of the oil extraction tax.

In response to a question from Chairman Grindberg, Mr. Dwyer said the revolving loan fund begins January 1, 2015, and will be loaned out by the State Water Commission.

Committee Counsel said North Dakota Century Code Section 54-35-02.7, which provides for the Water Topics Overview Committee, has references to the studies that were completed this interim, and the section may need to be amended to not duplicate the studies in the future.

Senator Robinson requested a bill draft that would provide for the administration costs of the State Water Commission to be provided for by general funds other than the resources trust fund.

Chairman Grindberg said there will be one more meeting unless other issues arise.

In response to a question from Representative Nelson, Ms. Klose said something definitive on NAWWS will most likely not be available before the next legislative session. She said her guess is that the environmental impact study will be presented to the court in March of next year.

Representative Hofstad requested information from the Industrial Commission on the sweep of industrial sales and the ability of the Western Area Water Supply Authority to pay.

No further business appearing, Chairman Grindberg adjourned the meeting at 10:45 a.m.

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Timothy J. Dawson  
Counsel

ATTACH:5