

## NORTH DAKOTA LEGISLATIVE MANAGEMENT

## Minutes of the

**WATER TOPICS OVERVIEW COMMITTEE**

Tuesday, August 12, 2015  
Roughrider Room, State Capitol  
Bismarck, North Dakota

Representative Jim Schmidt, Chairman, called the meeting to order at 9:00 a.m.

**Members present:** Representatives Jim Schmidt, Curt Hofstad, Tom Kading, Naomi Muscha, Marvin E. Nelson, Todd Porter, Mark Sanford, Roscoe Streyle, Denton Zubke; Senators Jonathan Casper, Gary A. Lee, Larry Luick, Larry J. Robinson, Donald Schaible, George Sinner, Ronald Sorvaag, Jessica Unruh

**Members absent:** Representatives Bill Amerman, Dick Anderson, Jon O. Nelson; Senator Ray Holmberg,

**Others present:** Diane Larson, State Representative, Bismarck  
Senator Rich Wardner, member of the Legislative Management, was also in attendance  
See [Appendix A](#) for additional persons present.

At the request of Chairman Schmidt, Committee Counsel reviewed the [Supplementary Rules of Operation and Procedure of the North Dakota Legislative Management](#).

**WATERS OF THE UNITED STATES**

Ms. Jennifer Verleger, Assistant Attorney General, gave a presentation ([Appendix B](#)) on the Waters of the United States rule. She said the rule will expand federal jurisdiction to wetlands, tributaries, and waters adjacent to wetlands and tributaries. She said whether prairie potholes will be under federal jurisdiction will be determined by whether the wetlands has a significant nexus to a primary water. She said all waters located within the 100-year flood plain of a primary water and all waters located within 4,000 feet of the ordinary high water mark of a primary water impoundment or tributary with a significant nexus to a primary water will be under federal control.

In response to a question from Representative Streyle, Ms. Verleger said the state is arguing that there is not any significant body of water that will not be regulated under the Waters of the United States rule. She said the state is arguing that the rule is overbroad. She said the federal Environmental Protection Agency (EPA) has no idea how the rule will be implemented.

In response to a question from Senator Unruh, Ms. Verleger said it appears that there is not a prairie pothole that does not have a significant nexus.

In response to a question from Chairman Schmidt, Ms. Verleger said it appears that rural water districts will need a permit from the EPA to breach a dam that was previously used for watering livestock. She said the effect on water resource districts of the rule would be increased expense. She said water resource districts will not have to enforce the rule, but will have to be in compliance with it.

Mr. Wayne Stenehjem, Attorney General, provided testimony on the Waters of the United States rule. He said the Waters of the United States rule is controversial and objectionable. He said the rule will add more requirements for permits, which will create red tape and uncertainty. He said the rule adds many tributaries and wetlands next to tributaries to regulation by the EPA. He said water must nearly touch the 100-year flood plain to be covered under the rule, but the 100-year flood plain is not defined in rural areas. He said prairie potholes will be added to the regulation even if the pothole is usually dry or there is a barrier between the pothole and a water regulated under the rule.

Mr. Stenehjem said North Dakota and 11 other states have requested an injunction. He said the legal claims include that the rule violates the federal Clean Water Act, which only regulates navigable waters. He said the Clean Water Act provides that states primarily regulate intrastate waters. He said the rule is arbitrary and capricious. He said the rule uses the ordinary high water mark as a basis of regulation, but the term is not delineated, especially as to particular waters. He said this state has, at the cost of \$20,000 per mile, determined the high water mark for the Missouri River and Lake Sakakawea. He said the rule violates the National Environmental Policy Act because that

Act requires an assessment if there is a significant impact on the human environment. He said the United States Army Corps of Engineers (corps) found no such impact. He said the motion for the injunction was filed on August 10. He said the EPA has 14 days to respond. He said the rule is to become effective on August 28. He said he hopes to get the injunction before the rule becomes effective. He said to succeed, the burden is on this state to show irreparable harm by the rule and likely success on the merits. He said he has many affidavits showing the irreparable harm and a memorandum from the corps to the EPA, which states the final draft rule contains serious flaws, is legally vulnerable, and will be challenging to implement. He said 30 other lawsuits are pending.

In response to a question from Senator Luick, Mr. Stenehjem said the EPA contends the definition of navigable waters is murky and the rule clarifies the definition. He said he thinks the rule makes the definition less certain. He said if the rule went into effect on August 28, there will be no training for the corps or EPA staff at that time. He said application of the rule would be difficult with no training.

In response to a question from Senator Casper, Mr. Stenehjem said the rule could have been passed as a law, but was not because it is too controversial. He said under the equal footings doctrine, the state has claim to the intrastate water.

## BACKGROUND INFORMATION

Committee Counsel presented a background memorandum entitled [Water Topics Overview Committee - Background Memorandum](#), and reviewed 2013 Senate Bill No. 2233 and 2015 Senate Bill No. 2020.

### GARRISON DIVERSION AND RED RIVER VALLEY WATER SUPPLY PROJECT

Mr. Ken Vein, Chairman, Garrison Diversion Conservancy District, and Mr. Tim Mahoney, Mayor, Fargo, gave a presentation ([Appendix C](#)) on the Garrison Diversion Conservancy District, the Lake Agassiz Water Authority, the Red River Valley Water Supply Project work plan, organizational collaboration, and the federal municipal, rural, and industrial program. Mr. Vein said the sole purpose of the Red River Valley Water Supply Project is to provide a solution to the water supply and quality problems in the Red River Basin. Mr. Mahoney said the Lake Agassiz Water Authority was created by the Legislative Assembly in 2003 and represents affected local communities in selecting project features to meet the comprehensive water quality and quantity needs of the Red River Valley. He said because there will be a drought in the Red River Valley area which will require water for the people of Fargo, a pipeline is needed from the Missouri River. He said the work plan is to have a completed conceptual design by spring 2016 and complete the preliminary engineering by spring 2017.

Mr. Vein said the Red River Valley Water Supply Project needs to find a source of water without a federal nexus. He said this may have to be done through horizontal collector wells near Washburn. He said the wells would provide water through a 66-inch pipeline to the Bald Hill Creek for an outlet as one option.

In response to a question from Representative Porter, Mr. Vein said the Red River Valley Water Supply Project has been kept separate from providing water to central North Dakota. He said the pipeline could be made bigger to provide central North Dakota more water. He said an increase in pipe from 66 inches to 84 inches in diameter will double the capacity.

Representative Porter said now that the project is purely a state project, it is the responsibility of the Legislative Assembly to do the most good instead of only providing water to one area of the state.

In response to a question from Senator Wardner, Mr. Vein said he is comfortable the corps will allow an outlet into Lake Ashtabula behind the Bald Hill Dam. He said this is because the water behind the dam is already able to be used for water supply for Fargo.

In response to a question from Senator Luick, Mr. Vein said he has a letter from the United States government stating that moving treated water across the continental divide is not in conflict with the Boundary Waters Treaty of 1909.

Chairman Schmidt said the Red River Valley Water Supply Project needs to maximize benefits, and he agrees with Representative Porter that the project should evaluate providing water to central North Dakota.

Ms. Merri Mooridian, Administrative Officer, Garrison Diversion Conservancy District, answered questions for the committee. In response to a question from Representative Schmidt, Ms. Mooridian said the Garrison Diversion Conservancy District has not received municipal, rural, and industrial program funding from the federal government. She said she would inform the committee as soon as the Garrison Diversion Conservancy District received the funds.

In response to a question from Representative M. Nelson, Mr. Vein said the Red River Valley Water Supply Project is still working on the issues of cost-share, ownership, and operation and maintenance. He said the cost of operation and maintenance will be based on the amount of use by each local entity.

### VALLEY CITY FLOOD PROTECTION

Senator Robinson provided a handout ([Appendix D](#)) showing the work being accomplished on the Valley City flood control project.

### STATE WATER COMMISSION

Mr. Todd Sando, State Engineer, State Water Commission, gave a presentation ([Appendix E](#)) that provided a review of the office of State Engineer and the State Water Commission, Senate Bill No. 2020 priorities, the cost-share policy, the project prioritization process, the cost-share policy directives in Section 33 of Senate Bill No. 2020, and temporary water permits. In addition, he provided a handout ([Appendix F](#)) on Senate Bill No. 2020 water project earmarks and State Water Commission actions for the 2015-17 biennium. In addition, he provided a handout ([Appendix G](#)) of municipal water supply project funding needs by priority.

Chairman Schmidt requested more information in future meetings on carryover and projects budgeted, approved, expenditures, unobligated funds, and remaining unpaid amounts for projects.

Mr. Sando said the resources trust fund receives 20 percent of the oil extraction tax that is collected month-by-month. He said the forecast through June was for \$546 million and \$564 million was collected. He said the revolving loan fund contains \$11 million. He said there is \$100 million in the resources trust fund that is not allocated but may be used for planning future projects. He said the entire water budget is approximately \$1.1 billion. He said water projects take a long time and so there is a need for carryover. He said the largest carryover is for Fargo, which is \$100 million.

Chairman Schmidt said the State Water Commission needs to get the money out before construction prices go up.

In response to a question from Chairman Schmidt, Mr. Sando said the Fargo interior flood control continues to be completed.

Mr. Sando said the \$11 million provided for reimbursing rural and municipal water systems affected by local cost-share changes has been used to provide approximately \$9.5 million in reimbursement. He said the remaining \$1.5 million will not be reimbursed because the project was dropped off the list. The cost-share for those projects was up to 75 percent and the actual percentage depends on the needs. He said historically, the amount of cost-share has been 60 to 75 percent for the majority of projects. He said historically, the cost-share was for improvements, and usually expansions received nothing. He said the entire program was federal municipal, rural, and industrial water supply program money until last interim. He said improvements under the policy is a loan and not a grant under the new policy.

Chairman Schmidt said the water supply reimbursements were a one-time item.

In response to a question from Senator Robinson, Mr. Sando said the projects will have to be funded based on the buckets created by the designated funding requirements.

In response to a question from Representative M. Nelson, Mr. Sando said the extraction tax rate will be lowered on January 1, but at that time the state will not have to worry about the triggers. He said the amount of tax still depends upon production.

Representative Streyle said if the trigger would have happened, the money into the resources trust fund could have been reduced to nothing.

In response to a question from Senator Robinson, Mr. Sando said all commodities' prices are going down and steel is as low as it has been for the last 10 to 15 years. He said people that previously worked in the oil and gas production industry are moving into construction jobs.

In response to a question from Representative Streyle, Mr. Sando said he has a list of prioritized projects from the rural water systems but not from the municipal water systems.

In response to a question from Representative Streyle, Mr. Sando said local sponsors must request funding at least 30 days prior to a State Water Commission meeting. He said if the State Water Commission approves the funding request, a cost-share agreement is needed with the local sponsor. Once there is a cost-share agreement, the local sponsor may start the project. He said after that, there may be issues that need to be addressed. He said the local sponsor submits costs, and the costs are reviewed for eligibility. He said there is a prompt turnaround of days to weeks for submitted costs. He said there are over 200 active projects. He said the cost-sharing program is growing.

Representative Streyle said he is frustrated because the funding bill was passed with an emergency clause in April, and the next meeting of the State Water Commission did not distribute the money. He said the State Water Commission should meet every month, and not quarterly. He said the State Water Commission needs to approve more money for projects and quicker.

Representative Porter said the Legislative Assembly needs to make sure that there is not double dipping by local sponsors through using surge and impact funding for match funding for State Water Commission cost-share.

In response to a question from Representative Streyle, Mr. Sando said to receive funding, an entity must request funding. He said the State Water Commission cannot provide that funding until there is a request.

In response to a question from Representative Streyle, Mr. Sando said the State Water Commission wants guidance from the committee as to the application of the limitations on the cost-share policy contained in Section 33 of Senate Bill No. 2020. He said the prioritization list exceeds the money that is available.

In response to a question from Chairman Schmidt, Mr. Sando said if the committee waits to provide guidance until November 4, it could affect sponsors in beginning construction next year.

Senator Luick said he does not support bypassing a construction season, and funding needs to be fast-tracked.

Senator Robinson said the committee may wish to have further analysis before offering guidance.

Representative Streyle said the committee's decision is not to prioritize projects. He said projects need to be approved that are ready to go for rural projects, and cities need to get a list to the State Water Commission. He said the committee may be able to clarify what was meant by Section 33 of Senate Bill No. 2020, but any decision is clearly within the purview of the State Water Commission.

Chairman Schmidt said the committee does not want to provide direction as to which projects to fund. He said the committee wants the State Water Commission to follow through and fund what can be funded. He said the State Water Commission should continue in the direction it has used in the past, and if there are any issues, the committee will address the issues on November 4. He said if the State Water Commission has used a 60 percent grant for high priority and a 60 percent loan for low priority, the State Water Commission should continue doing that.

Chairman Schmidt summarized Section 33 of Senate Bill No. 2020. He said the legislation did include "up to" to keep flexibility. He said the legislation identified money and ability to move dollars. He said rural water has given a priority list and municipalities have provided a list but some projects are not shovel-ready. He said the municipalities should redo the list and get the list to the office of the State Engineer and State Water Commission. He said the State Water Commission and the office of the State Engineer should get the money out, and use the line of credit to get water to the people.

Ms. Teresa Sundsbak, General Manager, North Prairie Rural Water District, provided testimony on issues with the cost-share policy to the committee. She said she is concerned with ineligible items. She said crop damage can add \$500,000 to \$800,000 in loans for a large project. She said design and engineering is limited to 35 percent. She said with these limitations, the 75 percent grant is more like a 65 to 69 percent grant. She said the federal municipal, rural, and industrial program worked well, and that policy should be continued for the state projects. She said that program was simple and worked well.

Ms. Michelle Klose, Assistant State Engineer, State Water Commission, answered questions for the committee. In response to a question from Chairman Schmidt, Ms. Klose said that crop damage is a legitimate project cost and was paid for as part of the Southwest Water Authority and the Western Area Water Supply Authority. She said easements are not eligible for cost-share, because they are negotiated between the local entity and the landowner, and therefore are not competitive. She said if state money was involved, it would change the dynamics of the negotiations, and the price would increase. She said crop damages have been removed from cost-share.

In response to a question from Representative Streyle, Ms. Klose said the idea that state money will increase the cost of easements is a theory.

### **CENTRAL DAKOTA WATER SUPPLY**

Senator Sinner said CHS, Inc., decided against construction of a fertilizer plant in Jamestown.

Chairman Schmidt said he received an email that said the risk profile was too high of a hurdle. He said water supply issues were not a factor.

### **WATER PERMITS**

Mr. Sando provided a handout ([Appendix H](#)) on the impact of the in lieu of irrigation policy (ILOP) on industrial water use. He said the policy has been in existence since September 2010. He said these water permits are referred to as ILOP permits. He said with ILOP, irrigation permits are not changed, but are temporarily suspended, and temporary industrial permits are issued on a one-year basis. He said the office of the State Engineer is evaluating the situation to determine if ILOP will continue next year.

In response to a question from Chairman Schmidt, Mr. Sando said the permit holders are aware that the permits are for 12 months, and do not create a water right.

In response to a question from Chairman Schmidt, Mr. Sando said permits end or begin for various reasons. He said there are 34 ground water permits and 966 surface water permits. He said the office of the State Engineer needs to determine what to do with the program and may need a transition period.

In response to a question from Representative Zubke, Mr. Sando said there are other water sellers outside of ILOP permits.

Mr. Jon Patch, Director, Water Appropriations Division, State Water Commission, answered questions for the committee. In response to a question from Representative Hofstad, Mr. Patch said ground water is limited in the western part of this state.

In response to a question from Chairman Schmidt, Mr. Patch said the effect on loan repayment by the Western Area Water Supply Authority is not considered when issuing permits.

In response to a question from Representative Zubke, Mr. Sando said all people selling water have telemetry. He said there are separate numbers for water use for the three pipelines out of the Missouri River.

In response to a question from Representative Porter, Mr. Sando said he has been evaluating the effect of limiting ILOP on truck travel. He said most oil wells are within five miles of another source of water.

Mr. William Schuh, Assistant Director, Water Appropriations Division, State Water Commission, answered questions for the committee. In response to a question from Chairman Schmidt, Mr. Schuh said there are many combined ILOP and depots. He said if there were no more ILOP's, one-half would continue. He said there are 34 ILOP permits in 2015, representing 24 users. He said 14 of the 34 permits are associated with water deposits that will remain open without ILOP. He said of the 34 permits, 27 are located within five miles of a water depot that will remain open without ILOP. He said seven permits are located between 5 and 10 miles of a water depot that will remain open without ILOP. He said one permit is located between 10 and 15 miles of a water depot that will remain open without ILOP.

Mr. Mike Ames, Savage Water Solutions, Williston, provided testimony to the committee. He said his business started in 1946, and operates the Trenton transloading facility and workover services. He said he has a concern with the stop of the ILOP. He said the ILOP supports his services. He said his business developed a water depot with an ILOP permit. He said at first, other companies would not use surface water because of biota, but then changed their mind and used a biocide. He said the lack of rain has increased the nitrates in surface water, and the water is now again being rejected. He said there are aquifers fed by the river with lots of water, and his company has asked for conditional industrial permits and is still waiting for the permits. He said the office of the State Engineer says due to the backlog, it can't get permits to his company. He said because of this backlog, there needs to be the issuance of conditional industrial permits before pulling the ILOP. He said the ILOP should be kept for now.

Mr. Pat Wheeler, Independent Water Provider, McKenzie County, provided testimony to the committee. He said he supported what Mr. Ames said. He said he invested in a water depot five or six years ago, and it worked well until the Western Area Water Supply Authority started to compete with him. He said the Western Area Water



Supply Authority threatened to shut him down because of 7 U.S.C. 1926(b). He said the Legislative Assembly passed a law that stopped the Western Area Water Supply Authority from doing this. He said losing the ILOP would shut him down. He said he has been waiting for a conditional industrial permit for four to five years. He said there should be support for free enterprise over government control.

### FARGO FLOOD CONTROL

Mr. Darrell Vanyo, Chairman, Fargo-Moorhead Area Diversion Authority, provided written testimony ([Appendix I](#)) on the Fargo-Moorhead Area Diversion Project. He provided information on federal support, the public-private partnerships, Minnesota involvement, the Oxbow-Hickson-Bakke ring levy project, the North Dakota State University agricultural income impact study, mitigation, and the budget. He said \$69 million was provided last session, and \$244 million has been provided in total for the project.

Mr. Mahoney provided written testimony ([Appendix I](#)) on efforts for flood control within Fargo. He said there are 15 miles of permanent earthen levies and another mile of flood wall. He said this will reduce the need for 4 million sandbags in a flood fight. He said the Federal Emergency Management Agency (FEMA) has added 2,000 homeowners to the flood plain, which requires flood insurance. He said FEMA will remap in five years and that could put 20,000 homes in need of flood insurance. He said levies are important, but do not protect from the need for flood insurance.

Senator Sinner said his house was one of the 2,000 placed in the flood zone. He said he had voluntarily purchased flood insurance for \$340 to \$350 per year. He said it has gone up a couple of hundred dollars since mandated. He said FEMA has said it will increase premiums by 19 percent per year until the insurance program is fiscally sound. He said this could result in flood insurance costs of \$6,000 per year.

In response to a question from Senator Sinner, Mr. Mahoney said FEMA has said it will not raise the flood zone if there is a shovel in the ground for the project in the next five years. He said this will cause a delay in flood remapping by FEMA.

In response to a question from Senator Sinner, Mr. Mahoney said no insurance will be needed if the 2,000 homes in the city are protected, and there is a shovel in the ground.

In response to a question from Senator Wardner, Mr. Vanyo said the Red River Basin Authority and the Fargo-Moorhead Area Diversion Authority are not under an umbrella group. He said there are many other water-related groups that operate in the area.

In response to a question from Senator Casper, Mr. Vanyo said the buyout of homes looks outlandish when the price paid for a home is four to five times more than the assessed value. He said a federal project requires the use of the uniform relocation assistance program. He said assessments in townships can be low and one home assessed for \$533,000 was appraised for \$2.48 million by a federal appraiser. He said the buyout was for \$2.7 million. He said another property was appraised for \$716,000 and was bought for \$787,000. He said the price paid depends on the property and the need for the property. He said increases from the appraisal include things that have been overlooked.

In response to a question from Senator Casper, Mr. Mahoney said the assessed value must be within 90 percent of the fair market value. He said Fargo is at 95 percent. He said Fargo offered 110 percent for buyouts. He said rural areas have not kept up with the assessed values.

In response to a question from Senator Casper, Mr. Vanyo said within Oxbow, there was federal involvement that required using the housing of last resort analysis. He said this pays for a person in Oxbow who wants to say in Oxbow to be paid the difference between the appraised value and the cost of building the same home.

In response to a question from Senator Luick, Mr. Vanyo said the process for what happens to homes when they are purchased depends on the entity purchasing the home. He said it also depends on the home. He said some are salvaged and destroyed, and some are sold at auction.

In response to a question from Senator Luick, Mr. Mahoney said it is very difficult to move a house in Fargo.

In response to a question from Representative M. Nelson, Mr. Vanyo said the percentage of federal involvement was reduced when the project was determined to be completed on the North Dakota side instead of the Minnesota side.

In response to a question from Representative M. Nelson, Mr. Vanyo said the plan today is far beyond what the Minnesota plan did for protection. He said it protects more than 6,000 more structures. He said the Minnesota plan did not provide any benefit to the tributaries, and the North Dakota plan does. He said the federal process was first for the Minnesota plan and the altered project is a local cost.

In response to a question from Senator Luick, Mr. Mahoney said 150,000 acre-feet of water is behind the dam.

In response to a question from Senator Luick, Mr. Vanyo said the cemetery issues and farmstead issues were being addressed until the court ordered the wait for the Minnesota environmental impact statement. He said litigation lessens communications. He said this is a very complex situation and although people are apprehensive about what will happen, they need to wait until the studies are completed.

Mr. Keith Berndt, County Administrator, Cass County, answered questions for the committee. In response to a question from Senator Luick, Mr. Berndt said the project looked at higher levels of water in Fargo to get rid of the upstream storage, and could not find a way to get rid of upstream storage.

In response to a question from Senator Luick, Mr. Vanyo said both the corps and Minnesota said it was not possible to have distributive storage to get rid of the dam.

In response to a question from Senator Luick, Mr. Berndt said if the water is not being stored in basements in Fargo, it needs to be stored elsewhere.

In response to a question from Senator Luick, Mr. Berndt said even with high levies and distributive storage, there is not a place to store all the water because of every flood being different. He said the farther away from Fargo you get, the less storage works.

Senator Luick said he has a 255,000 to 280,000 acre-feet storage alternative that Fargo did not want to look at. He said using this storage would eliminate the need for the dam.

In response to a question from Senator Luick, Mr. Mahoney said the city did not block any alternative. He said there is not enough storage for the corps to look at this as an alternative.

Senator Luick said he will have tentative ideas for a better way of protecting Fargo at the next meeting.

Mr. Bruce Grubb, Interim City Administrator, Fargo, answered questions for the committee. In response to a question from Senator Lee, Mr. Grubb said the city has an elaborate capital improvement plan for the diking within Fargo. He said it is going as quickly as possible.

In response to a question from Senator Lee, Mr. Mahoney said the money is being spent as quickly as it can. He said the project moves forward with the greatest bang for the buck.

In response to a question from Senator Lee, Mr. Grubb said the project will be completed within the next four to five years. He said there will be need for some eminent domain and this takes time.

Chairman Schmidt said Section 9 of Senate Bill No. 2020 limits funding to Fargo until June 2021.

Ms. RaeAnn G. Kelsch, Lobbyist, MnDak Upstream Coalition, provided written testimony ([Appendix J](#)) to the committee. She said people are interested in the impacts to farmland, roads and infrastructure, cemeteries, and residences and farmsteads due to the flooding caused by the project.

In response to a question from Senator Casper, Ms. Kelsch said the MnDak Upstream Coalition is a grassroots group. She said the Joint Powers Agreement is between Richland and Wilkin Counties. She said they are different groups, although each can go to each others' meetings.

In response to a question from Senator Sinner, Ms. Kelsch said that there has been a lack of communication between the Fargo-Moorhead Area Diversion Authority and the MnDak Upstream Coalition.

Mr. Dave Morken, Chairman, MnDak Upstream Coalition, said the coalition was offered a seat on the authority, but with the lawsuit, it was not proper timing. He said there was no particular plan to have the coalition on the authority. He said he had some discussions Mr. Vanyo and both decided it would not work at that time.

Chairman Schmidt said the next meeting will be Wednesday and Thursday, November 4-5, 2015, with a joint meeting with the State Water Commission on Wednesday, November 4, 2015.

No further business appearing, Chairman Schmidt adjourned the meeting at 3:00 p.m.

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Timothy J. Dawson  
Counsel

ATTACH:10