

## NORTH DAKOTA LEGISLATIVE MANAGEMENT

Minutes of the

**WATER TOPICS OVERVIEW COMMITTEE**

Tuesday and Wednesday, June 14-15, 2016

South Convention Room, Sleep inn

Minot, North Dakota

Representative Jim Schmidt, Chairman, called the meeting to order at 10:00 a.m.

**Members present:** Representatives Jim Schmidt, Bill Amerman, Dick Anderson, Curt Hofstad, Naomi Muscha, Jon O. Nelson, Marvin E. Nelson, Mark Sanford, Roscoe Streytle, 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:** Representatives Tom Kading, Todd Porter

**Others present:** Matthew M. Klein, State Representative, Minot  
Scott Louser, State Representative, Minot  
Robin Weisz, State Representative, Hurdsfield  
Chris Kadrmas, Fiscal Analyst, Legislative Council  
See [Appendix A](#) for additional persons present.

**It was moved by Senator Robinson, seconded by Representative Hofstad, and carried on a voice vote that the minutes of the March 7-8, 2016, meeting be approved as distributed.**

Chairman Schmidt announced there would be an optional tour of Minot after the meeting that afternoon.

**DEVILS LAKE BASIN WATER ISSUES**

Chairman Schmidt called on Senator Lee for an update on recent meetings of the Devils Lake Outlet Management Advisory Board. Senator Lee informed the committee that the board met on May 3, 2016, in Carrington. He said there were two primary agenda items for that meeting--water quality in the Devils Lake area and the target water level for Devils Lake for this year. He said water quality can be a concern due to sulfate levels, but those levels are lower than the current permit allows. Additionally, he said, sulfate levels can be managed by blending water from the lake's east and west outlets. He said the lake level at the time of the meeting was 1,450 feet above mean sea level. He said the board voted for a target lake level of 1,448 feet above mean sea level for this year. At maximum capacity, he said, the pumps can keep the water at 1,446 feet above mean sea level.

Chairman Schmidt called on Representative Hofstad to provide an overview of Devils Lake Basin issues. Representative Hofstad provided a history of the basin and noted the basin has had problems since at least 1993. He said that year rain inundated the basin, which did not have natural outlets. He said the heavy rain created problems for residents of Minnesota and Canada as well as downstream interests in North Dakota. As a result, he said, a west outlet for the lake was built and the pumps that remove water from the lake were increased, but the lake continued to rise. He said an east outlet was built later. He said the outlets and pumps can remove up to 600 feet of water per second from the lake. He emphasized it is crucial, in his view, to maintain operation of the pumps to restore agricultural land that has been inundated by the lake, even though there are recreational interests that support turning them off. He also described the need to rebuild roads that were formerly submerged so residents can use the roads to access their land.

In response to a question from Representative J. Nelson, Representative Hofstad said water projects will have impacts for generations and are a good use of funds.

In response to a question from Representative M. Nelson, Representative Hofstad said owners of property that is inundated by water are generally paying property taxes. Representative Hofstad said most of the property under water has been abated, however, so those taxes are minimal, but the property could be taken by the state if the taxes are not paid. He said there is a question about what property the state owns. He said the state owns up to the ordinary high-water mark.

Chairman Schmidt called on Mr. Jeff Frith, Board Manager, Devils Lake Basin Joint Water Resource Board, for a presentation ([Appendix B](#)) on the Devils Lake Basin. Mr. Frith discussed the current and historic lake levels their impacts on agriculture and the economy. He said studies from North Dakota State University show the total economic impact from inundation of agricultural land in the basin between 2010 and 2016 has been \$1.144 billion. He said there has been a \$133.7 million economic impact in 2016 alone and an estimated loss of 109 jobs in the area this year. He said for every one foot rise in lake level, between 9,000 and 10,000 acres are inundated and there is a direct economic impact of nearly \$3 million per year plus secondary economic impacts of \$7.9 million per year. He said these impacts more than justify the cost of operating the lake's outlets. He said landowners currently have to build temporary dirt roads to access their land.

Mr. Frith identified short-term and long-term needs for the Devils Lake Basin area. He said they need consistent operation of the east and west lake outlets, a road recovery plan for reclaimed roads, state funding to help defray the road recovery plan costs, a committee to study optimal lake elevation, a lake stabilization plan, which he said was of utmost importance, and landowner compensation for inundated land.

In response to a question from Chairman Schmidt, Mr. Frith said about 60,000 acres have been reclaimed by operating the east and west outlets.

In response to a question from Representative Anderson, Mr. Frith said stakeholders agreed a few years ago the lake level should be about 1,446 feet above mean sea level. Mr. Frith said the compromise was based in part on what the pumps could handle and was intended to balance the needs of agriculture and tourism. He said he believes the optimal level should be lower and there is a considerable amount of deeded land below the 1,446-foot level. He said development would increase around the lake if the level were more predictable.

In response to questions from Senator Sinner, Mr. Frith said a tremendous amount of industry, including camp sites, fishing guide services, and hotels, has developed around Devils Lake. Mr. Frith said many tourism providers would be hurt if the lake level fell below 1,440 feet above mean sea level. He said there is little that can be done to add water to the lake if the level drops. He said a lake stabilization plan that will keep the water at a steady level needs to be implemented. He said part of the plan needs to be an inlet for dry years.

In response to a question from Senator Lee, Mr. Frith said townships or other government entities need plans to elevate roads to avoid repeat inundation and ensure access to residents' land. Mr. Frith said he does not know how high the roads would need to be.

Chairman Schmidt called on Mr. Jon Kelsch, Construction Section Chief, State Water Commission, to comment on the capacity of the Devils Lake outlets. Mr. J. Kelsch said operating the outlets creates some flooding concerns. He said capacity increases as you go downstream but 600 cubic feet per second is generally the maximum capacity. He said the basin has to be very low before pumping can start and there is a 7 to 10 day lag time for water to get into the lake.

In response to a question from Senator Sinner, Mr. J. Kelsch said the pumps cannot run in the winter due to ice and water quality concerns.

In response to a question from Senator Robinson, Mr. J. Kelsch said operating the pumps at 600 cubic feet per second raises the river less than two feet.

## **PUBLIC COMMENT**

Ms. Karen Hausmann of Churchs Ferry read her written testimony ([Appendix C](#)).

In response to a question from Senator Luick, Ms. Hausmann said the optimal lake level is where deeded land is not submerged.

In response to a question from Representative M. Nelson, Ms. Hausmann said she would oppose funds from the Federal Emergency Management Agency (FEMA) for rebuilding roads because of the associated red tape and expensive requirements. Ms. Hausmann said she would appreciate state funds to build roads for farmers to access their land. She said she did not expect all depopulated residential areas to be repopulated because rural power cooperatives have pulled out of them. She said it would be unrealistic to rebuild all residential roads.

Mr. Dale Anderson presented his written testimony ([Appendix D](#)). He said he is not in favor of compensation for his inundated land but is in favor of keeping the outlet pumps running. He said he supports compensation to residents whose deeded land is inundated between 1,425 and 1,445 feet above mean sea level.

Mr. Garland Hoistad testified about his family farm. He described the impact of flooding on residents as devastating and said the state should help restore the area. He said many Devils Lake Basin area farmers were unable to access their land between 2010 and 2015, when prices were high and conditions were otherwise good. He said 50 percent of his land is inundated when the lake is at 1,445 feet above mean sea level.

Mr. Ardon Herman testified about his proposal to remove a sand plug from a coulee to allow water to flow via gravity through a natural outlet at about 100 cubic feet per second. He said, as an alternative, the community could let the water erode the sand down to a level where electrical pumping isn't needed. He said he believed it would take 2 to 3 months of erosion to remove about 11 inches of soil. He said water could be brought in from the Rock Lake watershed if the Devils Lake level became too low.

Mr. Mikal Erickstad testified he wants the outlet pumps to keep running. He said there needs to be a plan to rebuild roads so farmers can access their land. He said he wants to farm his land and does not want government compensation for it.

Mr. William Wakefield testified the Devils Lake region has lost about 20 percent of its population. He said for every foot of water drained off the lake, there is a \$30 million positive impact on the local economy. He said the outlet pumps need to continue operating.

Representative Hofstad commented that, when the pumps were designed, engineers thought their capacity of 600 cubic feet per second would stabilize the lake, but they were wrong. He said the roads need to be rebuilt so farmers can return to farming their land, but he has concerns about using FEMA funds for road construction. He said FEMA often does not provide enough money to adjust the road grades to prevent future problems.

In response to a question from Senator Sinner, Representative Hofstad said FEMA assessed the road when the lake was lower and is now unwilling to reassess them under new circumstances. Representative Hofstad said FEMA will not provide funds to build the roads higher than they needed to be under the prior conditions when the lake was lower.

## **SOURIS RIVER BASIN ISSUES**

Chairman Schmidt called on Mr. Ferris Chamberlin, Chief of the Water Management District, United States Army Corps of Engineers, for a presentation ([Appendix E](#)) on the Souris River Basin Reservoir System for Water Supply and Flood Control.

Chairman Schmidt called on Ms. Liz Nelsen, Regulator, Souris River Basin, Army Corps of Engineers, to address questions from the committee. Ms. Nelsen noted that the Army Corps of Engineers will assume control over the water levels in the basin if either of two triggers is present. She said the basin has three reservoirs with flood control storage and multiple agencies work together each year to perform a spring forecast of water levels. She said the corps creates a graph each year to help identify how best to meet target water levels.

In response to a question from Representative Anderson, Ms. Nelsen said the 1989 Agreement Between the Government of Canada and the Government of the United States of America for Water Supply and Flood Control in the Souris River Basin is being reviewed for possible updates. Ms. Nelsen said Canada is not willing to take on additional risk at this time.

In response to a question from Representative M. Nelson, Ms. Nelsen said the 1989 agreement was signed during a drought and does not address issues resulting from high rainfall levels.

In response to a question from Representative Streyle, Ms. Nelsen said it took 5 to 10 years for the agreement to undergo review and signature by all participating governments in 1989.

Representative Anderson commented that the 2011 flood killed many trees that now pose the risk of jamming the river. He said the timing of water releases from the dam needs to improve to minimize problems for downstream residents who have crops and herds that are impacted by the releases. He said there needs to be more communication with downstream residents about the timing of the releases.

Chairman Schmidt called on Mr. Dave Ashley, Chairman, Souris River Joint Water Resource Board, for a presentation ([Appendix F](#)) on the status and goals of the Mouse River Enhanced Flood Protection Project.

Chairman Schmidt called on Mr. Lynn Kongsli, Chairman, Mouse River Basin Preservation Coalition, to comment on how management of the Mouse River impacts downstream landowners. Mr. L. Kongsli said ranchers' ability to grow and cut hay for their cattle is severely impacted when water levels remain high through the summer.

He said downstream landowners bear the brunt of floods and said his ranch had significant losses in the 2011 and 2013 floods. He said it would be better to build a dam in the United States rather than building a second one in Canada because of the limitations Canada places on water management.

Chairman Schmidt called on Mr. Cliff Hanretty, Chairman, Eaton Flood Irrigation District, to comment on efforts to mitigate impacts on downstream interests. Mr. Hanretty said 38 landowners around Towner are involved in the Eaton Dam irrigation project, which is intended to protect ranchers' land. He said the Eaton Dam project filters water naturally and returns cleaner water to the system. He said ranchers in the area lost production for the past 5 years due to flooding and said dams have hurt downstream interests. He said the best way to manage water is to return to natural flow conditions.

Chairman Schmidt called on Mr. Frank Durbian, Souris River Basin Complex Manager, United States Fish and Wildlife Service. Mr. Durbian said the Fish and Wildlife Service is not a flood control agency but acts as an active partner with the Army Corps of Engineers to mitigate flooding. When there is a 1-in-10-year or greater flood event, the Army Corps of Engineers takes control of water flow through the dam. In the 1980s, the Fish and Wildlife Service entered into an agreement to use Lake Darling to manage spring runoff, not summer rains, and protect Minot from flooding. He said the system was designed to prevent flooding from 1-in-100-year flood events resulting from snow melt. He said the Fish and Wildlife Service is now working with international partners to manage wetter conditions.

In response to a question from Representative M. Nelson, Mr. Durbian said the Fish and Wildlife Service obtained flood easements so it could use flooding as part of the mitigation efforts.

In response to a question from Representative Streyle, Mr. Durbian said he would look into the impact of lowering the threshold where the Army Corps of Engineers takes control of water flow.

In response to a question from Chairman Schmidt, Mr. Durbian said there is a committee that meets weekly beginning in February to forecast water levels from the spring runoff and develop a water management plan. Mr. Durbian said he cannot answer whether the Fish and Wildlife Service has enough time to implement the Army Corps of Engineers' orders under the water management plan to prevent flooding. He said it is a very dynamic and complicated process.

In response to a question from Representative Hofstad, Mr. Durbian said the system works well for its intended purpose, which is managing snow melt, but the problem in recent floods has been rainfall. Mr. Durbian said he could not answer whether the drawdowns by the dam could have started earlier in the year to prevent flooding.

In response to a question from Representative J. Nelson, Mr. Durbian said he would look into whether the J. Clark Salyer National Wildlife Refuge was used to mitigate flooding for the upper Souris River Basin. Mr. Durbian said he would propose studying whether Lake Darling could be kept one foot lower, spillways could be widened, gates could be added, and low-water crossings could be put on county roads.

In response to a question from Representative M. Nelson, Mr. Durbian said the Army Corps of Engineers does not control the dikes in the J. Clark Salyer area refuge. Mr. Durbian said the Fish and Wildlife Service will open those dikes before they are full this year.

### **PUBLIC COMMENT**

Mr. Vern Kongsle, Towner, commented that he is part of the Mouse River Basin Preservation Coalition. He said the coalition does not want the government to spend more money on dams because dams end up harming downstream producers.

### **QUICK TAKE EMINENT DOMAIN**

The Legislative Council staff presented a memorandum entitled [Eminent Domain "Quick Take" Authority for Water Resource Districts](#) to the committee members. The Legislative Council staff also distributed a letter ([Appendix G](#)) from the Vogel Law Firm opposing any expansion of quick take authority on behalf of firm clients Ted and Lyndon Juhl, as well as a letter ([Appendix H](#)) from the North Dakota Water Resource Districts Association, an email ([Appendix I](#)) from the Cass County Water Resource Districts, and an email ([Appendix J](#)) from the Traill County Water Resource District all supporting the availability of quick take authority for water resource districts.

### **PUBLIC COMMENT**

Mr. Jurgen Suhr, Vice Chairman, Maple River Water Resource Board, testified in favor of quick take. He said the Maple River County Dam could not have been built in 2015 without the use of quick take.

In response to a question from Senator Luick, Mr. Suhr said two landowners had been dissatisfied with the prices offered for their land. Mr. Suhr said they settled with one of them just before construction of the dam began but did not finish negotiating with the other landowner until construction was almost done.

In response to a question from Senator Sinner, Mr. Suhr said land from about 10 landowners was taken for the dam and quick take authority was used as leverage in the negotiations with them.

In response to a question from Representative Hofstad, Mr. Suhr said three townships benefited from the dam.

Mr. Bruce Anderson, Member, Barnes County Water Resource Board, presented his written testimony ([Appendix K](#)) in favor of quick take authority for water resource boards. He said the Barnes County Water Resource Board has not used quick take but would if necessary. He said one landowner could hold up a project and thereby significantly increase the time and cost of the project to the detriment of other residents.

Mr. Shawn Olauson, Member, Barnes County Water Resource Board also testified in favor of quick take. He said negotiating prices with landowners is best but quick take is a negotiating tool.

In response to a question from Representative Hofstad, Mr. Olauson said the Barnes County Water Resource Board mainly works on drainage projects that benefit large groups of landowners. Mr. Olauson said he may view quick take differently if it were used for projects that benefit only a couple landowners.

Mr. Jason Siegert, Chairman, Traill County Water Resource Board, testified in favor of quick take. Mr. Siegert said the district board has used quick take as leverage to negotiate reasonable prices with landowners whose land is needed for projects.

Mr. Ashley testified in favor of quick take. He said the Souris River project benefits thousands of people and should not be held up by one landowner. He said holdouts delay construction and increase costs. He said construction delays will postpone removal of the flood plain designation for much of Minot and will cost residents approximately \$20 million per year in flood insurance premiums.

In response to a question from Representative Hofstad, Mr. Ashley said it would be hard to draw the line between big projects that might warrant the use of quick take and small projects that might not.

Mr. Robert Thompson, Commissioner, State Water Commission, testified in favor of quick take.

Representative Hofstad commented that the State Water Commission does not have authority to use quick take except for three specified projects.

Mr. Sean Fredericks, Attorney, Red River Joint Water Resource Board, testified in favor of quick take. He said he worked with Senator Tom Fisher in 2009 on the bill giving water resource districts quick take authority and the intent was to give them quick take authority for any project that involves cost-sharing by the state. He said most water resource district projects are small but may impact entire watersheds, so quick take authority should not be limited to big projects. He said one landowner can halt a project and create floods for many landowners if quick take authority is not available for the project. He said there is no evidence that quick take authority has been abused and, under state law, water resource districts have to negotiate with landowners before initiating quick take.

In response to a question from Senator Luick, Mr. Fredericks said a water resource district has to pass a resolution to use quick take. He said the resolution must identify the final offer of compensation to the property owner. Mr. Fredericks said the water resource district has to give the landowner a reasonable amount of time to respond to the resolution before going onto the land. He said if the landowner does not accept the final offer, the water resource district can file in court, at which time the water resource district has the right to access the land. He said the landowner can appeal the amount of compensation offered, but the district maintains access to the land during the litigation and can begin work on the project. He said the Red River Joint Water Resource Board goes one step further than legally required and asks judges for hearings so it can obtain court orders before beginning construction on projects where quick take is used.

Representative Weisz expressed opposition to the use of quick take. He said North Dakotans have a strong history of protecting individual property rights. He said traditional eminent domain authority balances the interests of landowners and those who seek to take land for the greater good. He said landowners lose all their leverage in negotiations when quick take authority is available. He said the vast majority of water resource district projects are not critical or time sensitive but are often for individual benefit rather than the common good. He said water resource districts are unelected boards and some of the board members may benefit individually from exercising quick take. He said price is the only issue that landowners can appeal when quick take is used. He asked the

committee to consider which types of projects should be eligible for quick take and to review how many water projects were undertaken prior to 2009 when quick take authority was given to water resource districts. He said there did not seem to be a problem completing those projects without quick take.

In response to a question from Representative J. Nelson, Representative Weisz said that judges have discretion only over the price of the property at issue when a landowner appeals a quick take action.

In response to a question from Representative Amerman, Representative Weisz said he opposes quick take authority for water resource districts, not other entities.

Ms. RaeAnn Kelsch testified in opposition to quick take as a representative of the MNDAK Upstream Coalition. She said North Dakotans have a strong history of respecting property rights. She said she has two clients whose land is subject to quick take now. She said the clients support flood control measures for Fargo but oppose using quick take for a dam that will take 50,000 acres of land. She referred to a letter from the Cass County Joint Water Resource District that indicates the State Engineer will condemn land in Richland County via quick take action by the Cass County Joint Water Resource District. She said that process is scary. She said quick take should not be used at this point in the Fargo flood control project because there has been no project authorization and no state or federal appropriations have been made for anything outside of the oxbow. She said there is a difference between obligated money and appropriated money. She said the federal Office of Management and Budget lists water projects for which money has been appropriated in its annual budget but has not included the Fargo project in that list. She said there was only a mention of the Fargo project in the Army Corps of Engineers budget. She said if the legislature does not eliminate quick take, the legislature should at least limit it. She said she has one client who put his land in a living trust to pay nursing home costs for his mother but is now at risk of losing that land to quick take.

In response to a question from Representative Hofstad, Mr. Eric Volk, Executive Director, North Dakota Rural Water Systems Association, said there are still a couple of combined utility and water resource boards. Chairman Schmidt said he serves on a combined board that does not want to use quick take. Chairman Schmidt said there is a big difference between a water project for agricultural production and one intended to protect lives.

In response to a question from Senator Luick, Chairman Schmidt said quick take is used quite infrequently but is used as a hammer when it is used.

Senator Sorvaag commented that the threat of quick take is used more often than the actual quick take process.

Representative Hofstad said he takes exception to landowners being threatened by their government.

### **SOUTHWEST WATER AUTHORITY**

Chairman Schmidt called on Ms. Mary Massad, Chief Executive Officer, Southwest Water Authority, to present the water authority's annual report ([Appendix L](#)).

### **STATE WATER COMMISSION ADMINISTRATION AND STATE ENGINEER**

Chairman Schmidt called on Mr. Dave Laschkewitsch, Director, Administrative Services, State Water Commission, to introduce the new State Engineer, Mr. Garlan Erberle.

Senator Sorvaag reported on his meeting with engineers and others regarding engineering fees for water projects. He said the group discussed the need for more studies before building in small communities to ensure overbuilding is not occurring. He said small communities carry a lot of debt for water projects so they need to make sure they get maximal value for their investments. He said the group discussed developing guidelines small communities can use to evaluate water projects.

Chairman Schmidt said a bill passed in 2013 (House Bill No. 1206) requiring the use of a cost-benefit ratio for evaluating water projects. He said residents who are impacted by a project should know whether the cost-benefit ratio for the project is not positive. He said he is going to ask some engineering firms to present some life cycle cost analyses at the committee's September meeting.

Chairman Schmidt called on Mr. Laschkewitsch for a presentation ([Appendix M](#)) of the commission's monthly project and budget report. Mr. Laschkewitsch said he expects Fargo to request \$69 million at the next State Water Commission meeting.

In response to a question from Representative M. Nelson, Mr. Laschkewitsch said loans and grants are not consolidated in the report.

In response to questions from Chairman Schmidt, Mr. Laschkewitsch said the commission is down to about \$1 million on rural water supply issues but will discuss the issues further. Mr. Laschkewitsch confirmed that Grafton still anticipates proceeding with its project.

Mr. Laschkewitsch said there is \$1.1 million in the rural water project category that is not committed. He said the commission is hoping to have an injunction against Northwest Area Water Supply lifted so the commission can use the \$10 million committed for that project to design it.

Chairman Schmidt commented that money should not be moved from one category, or "bucket", to another.

In response to a question from Chairman Schmidt, Mr. Laschkewitsch said the commission would need a \$200 million line of credit, which was authorized by the Legislative Assembly, to fully fund all unobligated needs.

In response to a question from Senator Robinson, Mr. Laschkewitsch said the commission has not taken a line of credit before. Mr. Laschkewitsch said a traditional line of credit would be a temporary fix with a short-term payoff. He said the commission has not discussed the terms of a line of credit with the Bank of North Dakota. He said he does not believe the commission will need the line of credit.

Chairman Schmidt commented the Legislative Assembly did not want to set aside money for projects it does not think will be completed so it authorized the line of credit instead of setting aside those funds.

Representative Streyle commented he does not think all the money for projects will be needed before the end of the biennium. He said the committee needs a revenue projection to figure out the allocation and budget.

In response to a question from Representative Streyle, Mr. Laschkewitsch said money that is not committed to projects will not carry over to the next biennium.

In response to a question from Senator Lee, Mr. Laschkewitsch said the "bucket" concept is new and restricts the commission's ability to shift money from one project to another. Mr. Laschkewitsch said the commission can submit a request to the Budget Section to move money between "buckets" although it has not done so. He said it would be more convenient not to use the "bucket" concept.

Representative Streyle said the "buckets" are completely flexible and money can be moved around to different projects within a "bucket." He said if one project's costs exceed the initial budget but is completed, the project should be fully funded.

In response to a question from Representative J. Nelson, Mr. Laschkewitsch said the commission must follow the language in its appropriation. Mr. Laschkewitsch said there is little language governing the \$69 million for Fargo flood control that has not been used but 2013 House Bill No. 1020 in the prior session did set out criteria that must be met before those funds can be used. He said the funds are available only for levee and dike control until there are federal appropriations for the flood control project. He said the federal government has authorized the project and appropriated a block grant to the Army Corps of Engineers for all their water projects. He said the Army Corps of Engineers will allocate \$5 million to the Fargo project and, in his opinion, that satisfies the requirement that federal money be appropriated for the project.

Chairman Schmidt said he believes the appropriations requirement has not been met because no federal agency has been told to write a check.

### **SOURIS RIVER BASIN FLOOD CONTROL ISSUES**

Chairman Schmidt called on Representative Streyle for an overview of Minot flood control issues. Representative Streyle said the most important parts of the Minot flood control project are the first four phases, which will cost approximately \$250 million. He said about one-half of that money is allocated and the project is short about \$100 million. He said completion of the first four phases will take about 60 percent of the houses currently in the flood plain out of the flood plain. He said state and local funding combined with a possible bond issue should cover the costs of these phases. He said completion of the first four phases will provide millions of dollars of flood insurance premium relief for citizens throughout the Souris River Basin, not just in Minot.

Chairman Schmidt called on Mr. Dan Jonasson, Public Works Director, Minot, for a presentation ([Appendix N](#)) on the Minot flood control project.

In response to questions from Chairman Schmidt, Mr. Jonasson said the environmental impact study is for the area from Burlington through the east side of Minot. Mr. Jonasson said some of the environmental impact study also takes downstream impacts, including the concerns raised by individuals during the meeting, into consideration. He said permitting will be done in phases as they progress rather than for the entire project at once.

In response to a question from Senator Robinson, Mr. Jonasson said trees clogging the river are not holding up work at this point in the project, but the city is working to address that issue.

In response to a question from Representative Anderson, Mr. Jonasson said the city is looking at ways to implement greenway features for residents to use when there is not a flood.

In response to a question from Representative Streyle, Mr. Jonasson said the city is \$38 million short for the first three phases of the project if a 75/25 cost-share is used.

Chairman Schmidt called on Mr. Ryan Ackerman, Administrator, Souris River Joint Water Resource Board, to continue the presentation on the Minot flood control project.

In response to a question from Senator Luick, Mr. Ackerman said Lake Darling was created primarily for recreation rather than flood control.

In response to questions from Representative Anderson, Mr. Ackerman said climate change issues are not slowing down the process of amending the 1989 agreement with Canada. Mr. Ackerman said the amendment process is simply lengthy. He also said there are a suite of options for flood control depending on the amount of funding available. He said state funds plus a Minot city sales tax have funded about one-half of the costs of the planned flood control project. He said planners are meeting with individual landowners and will begin implementation of the program this summer.

In response to a question from Senator Robinson, Mr. Ackerman said the project will have to be scaled back from three phases to one or two phases if sufficient state funds are not appropriated and that would absolutely impact the bidding process negatively.

In response to a question from Representative Hofstad, Mr. Ackerman said the project is being designed in accordance with Army Corps of Engineers' standards. Mr. Ackerman said the additional administrative work required by working with federal agencies increases the cost of the project.

Representative Streyle commented that planners need the state's cost-share right away for cashflow so they can initiate the project's first three phases. He said not all the money for Phase 4 is needed immediately. He said if the project sits idle due to a lack of funds, there will be huge costs for the City of Minot and its residents in terms of flood insurance premiums. He said he did not think the cost commitment is too much for the state.

Chairman Schmidt called on Ms. Cindy Hemphill, Finance Director, Minot, for a presentation ([Appendix O](#)) on the local share of flood protection costs, the United States Department of Housing and Urban Development (HUD) resiliency grant, and buyouts of flood-damaged properties.

In response to a question from Representative J. Nelson, Ms. Hemphill said buyouts are a different issue from so-called "zombie" homes.

In response to a question from Senator Luick, Ms. Hemphill said the city has to review a fair market value appraisal before it buys out a home. Ms. Hemphill said, if HUD funds are used, HUD will allow the city to negotiate within 10 percent above or below the fair market value. She said homeowners can appeal the buyout amount to a committee of community members. She said when negotiating buyouts, the city has to consider the cost of using eminent domain procedures if negotiations fail.

In response to questions from Representative J. Nelson, Ms. Hemphill said there are fewer than 100 blighted, or "zombie", homes left. Ms. Hemphill said it is important for the committee to know Minot has walked the walk in past projects and followed through on its commitments to provide local cost-shares.

In response to questions from Senator Robinson, Ms. Hemphill said the city estimates it will have \$11.5 million from a local sales tax in its flood control fund. Mr. Jonasson added that about 2,850 homes will be in the new flood plain, but the flood control project will take about 60 percent of them out of the flood zone.

In response to a question from Senator Casper, Ms. Hemphill said Minot is requesting a 75/25 cost-share and expects the total cost of the project to be \$1 billion.

Representative Streyle commented the first four phases of the project are most important and will not cost \$1 billion. He said the other phases can wait.

In response to questions from Senator Casper, Ms. Hemphill said a 75 percent cost-share of the first four phases is about \$187 million, but there is already about \$60 million appropriated. Ms. Hemphill said there is no federal participation at this point except for community block grant dollars available for buyouts. She said federal agencies may decide to participate after the feasibility study is complete.

Chairman Schmidt asked whether there is a requirement for Minot to have easements for overland inundation of agriculture lands before funding the project. Mr. John Paczkowski, Director, Regulatory Division, State Water Commission, responded that Minot must have property rights for any lands impacted by the project. Mr. Paczkowski said the State Water Commission requires an analysis of property impacts before it will issue permits for the project. He said the impacts analysis should help preclude a piecemeal approach to property rights that could delay the project.

Representative Streyle commented that there will be impacts downstream but they will consist of small amounts of water for short periods of time.

Mr. Ackerman commented that modeling shows there will be less than one-tenth of a foot of inundation and, under the law, there is no need to obtain property rights for that level of water.

In response to Senator Luick, Mr. Ackerman said there will be upstream impacts that will need to be mitigated but only for levels greater than 1-in-100-year floods.

### **ASSINIBOINE BASIN COMMISSION**

Chairman Schmidt called on Ms. Wanda McFadyen, Executive Director, Assiniboine Basin Commission, for a presentation ([Appendix P](#)) on the commission's history and activities.

### **WATER WELL TESTING**

Chairman Schmidt called on Mr. David Glatt, Chief, Environmental Health Section, State Department of Health, for a presentation ([Appendix Q](#)) on water well testing and dissemination of results to the public.

In response to a question from Representative Anderson, Mr. Glatt said some observation wells are not in irrigated areas and the initial purpose of observational wells was to monitor water supply. Mr. Glatt said water quality testing came later.

### **FARGO INTERIOR FLOOD CONTROL PROJECT AND RED RIVER BASIN DIVERSION PROJECT ISSUES**

Chairman Schmidt called on Mr. Mike Williams, City Commissioner, Fargo, for a presentation ([Appendix R](#)) on the status of the Fargo interior flood control project and Red River Valley diversion project.

In response to a question from Chairman Schmidt, Mr. Williams said the City of Fargo will match \$60 million in state funds with a sales tax that passed in 2009 and a one cent infrastructure tax.

In response to a question from Senator Lee, Mr. Williams said the oxbow area will still need work after the Second Street and Fourth Street projects are completed. Mr. Williams said they will need to protect the water treatment plant and the far south section of Fargo.

In response to a question from Senator Sorvaag, Mr. Williams said the flood wall will rise 45 feet and the earthen dikes will be wide enough on top to add height if necessary. Mr. Williams said there will be protection for 100-year flood events but not for 500-year flood events. He said these measures will not alleviate flood insurance for 19,000 homes. He said it will take 5 years to finish the in-town projects, which are about 60 percent complete now. He said they need to buy only about 20 more homes. He said they will need to put clay on top of roads to protect the far south part of Fargo as a temporary measure.

In response to a question from Representative J. Nelson, Mr. Williams said the federal government has invested about \$40 million in design of the project. Mr. Williams said the other trigger for state funds will be met when the project partnership agreement is signed in mid-July. He said the Army Corps of Engineers has \$23 million available

for allocation because some projects on the approved list have no local share available. He said Fargo has risen to the top of the list of projects for the corps because of the plan for the state share and the local sales tax.

Chairman Schmidt called on Ms. Mary Scherling, Cass County Commissioner, for a presentation ([Appendix S](#)) on Fargo flood control projects.

In response to a question from Senator Luick, Ms. Scherling said Fargo has received in-kind funds from the federal government in terms of planning and research. Ms. Scherling said they will receive the \$5 million that triggers the state funds in July.

Chairman Schmidt commented that the funds committed by the federal government are appropriated. He said there is a difference between committing funds and appropriating them and 2015 Senate Bill No. 2020 requires federal funds to be appropriated before state funds are provided for the project.

In response to questions from Chairman Schmidt, Ms. Scherling said Fargo has no commitment or money for the project from Minnesota. Ms. Scherling said Fargo will be able to cover the funding gap by extending its sales tax or possibly creating a special assessment district if Minnesota does not provide any funds.

Chairman Schmidt expressed concern the project was going forward in a piecemeal fashion and no easements had been obtained in the more than 3 years since the project was begun. He said he was concerned that quick take eminent domain is being used because the process to obtain easements was delayed for so long.

Senator Luick commented that, despite assurances to the contrary, engineers have told him not all alternative options for the project were explored.

Representative Streyle said buyouts of homes at 200 to 400 percent of their fair market values seems excessive compared to buyouts in Minot that are within 10 percent of fair market value. In response to this question, Ms. Scherling said the Fargo project is complying with the Army Corps of Engineers regulations for buyouts now.

In response to a question from Senator Luick, Ms. Scherling said some assessed home values were artificially lowered because of the floods.

Chairman Schmidt called on Mr. Fredericks to address quick take eminent domain and the environmental impact statement for the Fargo diversion project. Chairman Schmidt also asked Mr. Fredericks to comment on the May 5, 2016, letter ([Appendix T](#)) from Jennifer Verleger, Assistant Attorney General, to Erik Johnson, Fargo City Attorney, regarding land acquisition for the Fargo diversion project from unwilling owners in Richland County.

Mr. Fredericks said the Cass County Joint Water Resource Board has broad authority to acquire property and exercise eminent domain under North Dakota Century Code Title 32 and Chapter 61-16.1. He said the district has authority to use eminent domain within or outside of the district, including Richland County. He said the land at issue in Richland County is the staging area for diversion project and the district is not looking to put components on that land.

In response to a question from Chairman Schmidt, Mr. Fredericks said the district has not acquired rights to any property yet due to a federal court case that is pending in Minnesota. Mr. Fredericks said the judge in that case made it clear the district board should not acquire property while the environmental impact statement was in process. He said it would have been better had they been able to enter negotiations with landowners years ago but they were hamstrung by the court case.

In response to a question from Senator Luick, Mr. Fredericks said he represents both the Cass County Joint Water Resource Board and Richland County Water Resource Board but advised the Richland County entity of the conflict and said he could not represent them in the matter of the diversion project.

Senator Casper commented that the committee should be told if the group that initiated the federal lawsuit in Minnesota opposed the use of quick take for the project in North Dakota. He also requested a timeline of the project.

In response to a question from Senator Sinner, Mr. Fredericks said construction on the project needs to begin this year or else "new start" federal funds will be lost. Mr. Fredericks said the water resource district cannot obtain the necessary properties for the project in time to begin construction this year unless it uses quick take.

In response to a question from Senator Sorvaag, Mr. Fredericks said if a water resource district's use of quick take is challenged in court, the district must demonstrate the necessity of obtaining the property right at issue.

The Legislative Council staff asked whether the district's immediate access to the land under quick take destroys the landowner's ability to object to the use of quick take. Mr. Fredericks responded that the landowner still has the legal right to object. Mr. Fredericks also said some landowners may try to block vehicles or equipment from entering land that was taken by quick take, in which case the district would need to call a sheriff to enforce the taking.

In response to a question from Senator Schaible, Mr. Fredericks said landowners have an advantage when regular eminent domain is used because water resource districts are usually under tight timelines. Mr. Fredericks said quick take tips the scales in favor of the districts and gets landowners to the negotiating table. He said opponents of water projects cannot kill projects by holding out when quick take is available.

### **PUBLIC COMMENT**

Ms. R. Kelsch testified in opposition to the use of quick take. She presented an April 29, 2016, letter ([Appendix U](#)) from the Richland County Water Resource District to the State Engineer regarding that district's concerns about quick take and eminent domain. She testified one problem with quick take is its use after very little negotiation with landowners when property is wanted for industrial purposes. She said quick take authority needs to be narrowed.

Senator Lee commented that he cosponsored the bill authorizing quick take for water resource boards but using quick take for expedience or convenience is not appropriate. He said the committee should consider limiting quick take authority.

Chairman Schmidt said he would consider bills limiting quick take authority. Other committee members indicated their interest in working on such a bill. Chairman Schmidt said the committee will need to meet again in August and September.

The next committee meeting was tentatively scheduled for August 24-25, 2016, at 10:00 a.m. in Watford City.

No further business appearing, Chairman Schmidt adjourned the meeting at 3:15 p.m.

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Claire Ness  
Counsel

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John Walstad  
Legal Division Director

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