

***Presentation To
North Dakota Legislative Council
Interim Natural Resources Committee
Bismarck, North Dakota***

***By
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Mr. Chairman and members of the interim Natural Resources Committee. I am Dale Frink, State Engineer, and Chief Engineer-Secretary to the State Water Commission.

On April 23, 2008, the State Water Commission approved an interim, possibly long-term, solution to the liability and indemnification issues regarding state cost share contracts with local political subdivisions for water projects. This agreement was developed after considerable debate and discussions between the State Water Commission, the Office of Attorney General, Risk Management, the North Dakota Insurance Reserve Fund (NDIRF), and representatives from the local political subdivisions. The term "interim" is used because the issue will continue to be reviewed for possible changes.

The issue stems at least, in part, from the Devils Lake landowners lawsuit in which landowners around Devils Lake sued the state and county water resource districts claiming inverse condemnation of their property due to flooding they alleged was caused, in part, by water projects built in the Devils Lake basin. The state was named as a defendant in the lawsuit because of its partial financial assistance for construction of many projects and post-construction regulation of many projects. Although the state loosely participated with many of the projects, at no point did the state assume ownership beyond its regulatory authority. Although the state and local water boards won at the District Court, the case has been appealed to the North Dakota Supreme Court. The State Water Commission, Office of Attorney General, and NDIRF spent over \$1 million dollars defending this lawsuit. The plaintiffs have suggested it would take up to \$25 million to settle the case. Whether we win or lose the case, it exposed liability issues for any water projects in which the state has even a minimal relationship or role.

As a result, it is prudent to re-evaluate our future liability risks and look for ways to reduce these risks. One recommendation from the Office of Attorney General was to strengthen our indemnification clause by requiring project sponsors to indemnify the state with an insurance endorsement from NDIRF or a private insurance company. This was recommended because a commitment to indemnify isn't worth much unless there is money to back it up. And since political subdivisions, particularly water resource districts, don't have much in the way of assets, an insurance policy provides the money

that makes the indemnification worth something. The State Water Commission has had an indemnification clause in its contracts for years. The local political subdivision simply signed the agreement without an insurance endorsement. A key part of the Office of Attorney General's recommendation was that the insurance endorsement should be for the life of the project. This recommendation, again, related back to the Devils Lake case where all of the projects named in the lawsuit were not only completed decades ago but most had functioned for 25-50 years. However, NDIRF declined to offer the political subdivisions an endorsement for the life of the project.

The Office of Attorney General reviews all of the State Water Commission's agreements and provides recommendations on them. The Commission has always tried to follow their recommendations or, in some cases, explored other options with the Office of Attorney General. In this case, their recommendation was to require an endorsement from NDIRF. With NDIRF declining to provide the endorsement, the State Water Commission was in a difficult situation.

There were two key meetings involved at reaching this interim agreement. The first meeting occurred between the various agencies and entities involved - the Governor's office, Office of Attorney General, State Water Commission, NDIRF, Risk Management, and a representative from the county water resource districts. The second meeting was by the State Water Commission.

After lengthy discussion, we agreed that our agreements would only require an endorsement for the construction period of the project. NDIRF agreed to provide this endorsement. We will continue to require full indemnification from the project owners but without an insurance endorsement beyond the construction period.

The Office of Attorney General continues to recommend full indemnification with an endorsement, but they also understand the dilemma. In the end, Tom Trenbeath, Deputy Attorney General, indicated that they believed the negotiated indemnification language was the best we could obtain at this time and that, ultimately, the decision comes down to a policy decision.

At this time, we are again entering agreements with the political subdivisions. The State Water Commission intends to use the new indemnification clauses at least through the upcoming legislative session. I am aware that Senator Tom Fischer and others have been exploring various legislative bills that may affect this issue.