

2009 SENATE POLITICAL SUBDIVISIONS

SB 2256

# 2009 SENATE STANDING COMMITTEE MINUTES

Bill/Resolution No. SB 2256

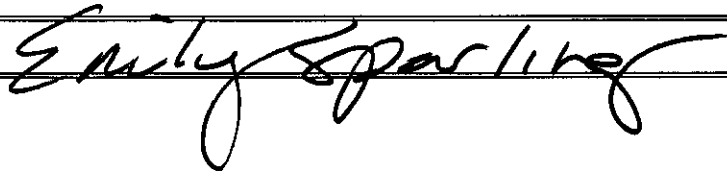
Senate Political Subdivisions Committee

Check here for Conference Committee

Hearing Date: 01/29/2009

Recorder Job Number: 8187

Committee Clerk Signature



Minutes:

**Chairman Andrist** Opened the hearing on SB 2256.

**Senator Fischer** District #46. Introduced SB 2256. See attachment #1. Northern Area Water Systems (NAWS).

**Sean M. Fredricks** Ohnstad Twichel, P.C. Spoke in support of 2256. See attachment #2.

**Chairman Andrist** If a local water resource district is involved in litigation and does not have the resources, would the liability move to another local political subdivision? Or, would the complainant have any place to go?

**Fredricks** The insurance reserve fund currently insures water resource districts but in situations like this where we are accepting liability for something we do not have insurance for, the complainant is would not be able to turn to some other district if the water resource district cannot pay.

**Senator Dotzenrod** What was the condition of the law before 2007?

**Fredricks** We have gone through several stages with this bill. Discussed the iterations of the bill over the past few years.

**Senator Dotzenrod** This change did not occur due to something that the legislature did in

2007?

**Fredricks** No

**Senator Lee** Was there changing staff in the water commission office that led to a different personal approach to this?

**Fredricks** There may have been in the attorney general's office. My understanding is that the AG must sign off on a cost sharing agreement before they will give their blessing.

**Senator Dotzenrod** If the state accepts this indemnity; will this lead to "deep pocket" lawsuits?

**Fredricks** The state would not be accepting indemnity, they would simply be responsible for their own negligence. The state has argued that this will lead to deep pockets but I think that everyone will put the state on the lawsuit anyway. The state is concerned about the Devil's Lake lawsuit. There are provisions to protect larger institutions from frivolous suits.

**Steve Spilde** Chief Executive Officer of the ND Insurance Reserve Fund. Spoke in support of 2256. See attachment #3.

**Chairman Andrist** Passage of this bill would not preclude a contractual agreement between say the School of the Deaf and the Devil's Lake School District?

**Spilde** I do not know it would depend on the School of the Deaf's interpretation.

**Chairman Andrist** But in a situation like this you would still cover the Devil's Lake water districts?

**Spilde** Yes. Our coverage would remain in place. The water districts negligence would be covered by us.

**Chairman Andrist** Would the division of risk management permit it?

**Spilde** I believe that would be the question, what operational mode are they going to use for their facilities.

**Gary Thompson** President of the ND Water Resource Districts Association. Back in 2008 we passed a resolution in support of this bill.

**Aaron Birst** I am with the Association of Counties. We also support this bill very strongly for all the reasons stated.

**Senator Fischer** In November I asked for the Attorney General's opinion on this legislation and as of noon they said they are working on it. I would guess that it is a lot of work for them as they have to search the code for any other clauses.

**Chairman Andrist** Clearly this bill has been drafted with the water districts in mind but to your knowledge, does it have unintended consequences for others?

**Senator Fischer** I think it does have unintended consequences. Gave example of the Dam in Cass County.

**Senator Lee** I think that might be an intended consequence, not an unintended one. When Senator Andrist was asking the question, I think he meant adverse reactions to the bill.

**Connie Sprynczynatyk** ND League of Cities and also on the NDIRF board. Spoke in support of 2256. There were other areas that we were seeing problems. State agencies were trying to shift liabilities onto partnerships; we thought we had fixed the problem. Gave example of the DOT. This is our way of saying the State takes care of their own and we take care of our own.

**Tag Anderson** Director of Risk Management, Office of Management and Budget. Spoke in opposition to 2256 as it is currently written and suggested some amendments. See attachment #4.

**Chairman Andrist** Do you intend every water project to be approved by the OMB?

**Anderson** That is correct.

**Chairman Andrist** And you would be prepared to oversee every large project?

**Anderson** Yes.

**Senator Olafson** As I look at your testimony, in my eyes the relationship between a vendor and a contractor is very different than the relationship between the state and a local political subdivision, where is the analogy?

**Anderson** I would agree that in many relationships it is uniquely different but that is not always the case. The example of Devil's Lake is a unique case. As far as the state is concerned, we have no charge or mission that says we have to provide access for swimmers other than at the students at the School for the Deaf. Briefly discussed how risk is evaluated and assigned. The default is that everyone is responsible for their own liability.

Committee discussed the issues related to risk and vicarious liability as well as informal and formal indemnity agreements.

**Sean Fredericks** I was not around in 1997 when the statute was negotiated but I think this amendment is very similar to the good faith language that we are trying to delete in this current bill. We are a little nervous that we are going to be in the same situation again in two years where OMB is making decisions. The message we were hearing was the language was just not black and white enough, so if we go to the legislature and make a change, everything with be clearer. This amendment suggests to me that there is going to be more confusion. Gave a brief example involving the dam at Cass County

**Senator Olafson** Is the state protected by each institution assuming their own liability?

**Fredericks** If we continue down the same path, that would not mean the state is not going to be named in a lawsuit. That might happen but the state is going to be able to defend itself, as it did in the Devil's Lake lawsuit. I am proposing that each party is taking responsibility for their own liability. We strongly urge passage of the bill as presented.

Brief discussion about road situation on 94 near Fargo.

Briefly discussed the language of the amendment and the intent of the bill as currently written.

**Dale Frank** ND State Engineer with the Water Commission. Gave neutral testimony. One of the reasons we neither support nor oppose this bill is that I am an engineer and I am not sure I understand the legal language. As state water commissioners we are actually two agencies, office of state engineers which is regulatory and gives permits. Clarified the dam in Cass County issue. We do not require indemnifications for permits. On the state water side, we give out money and that is where indemnification comes in. If all we do is give a project money, the question is, how much liability should we assume for that? Devil's Lake case precipitated some of their concerns.

**Chairman Andrist** When you grant money you do not oversee the specifications of the project?

**Frank** We do not.

**Senator Olafson** How much liability do you have after giving money if that is your only action in the contractual agreement?

**Frank** Our agreements are developed by the Attorney General. They review all the projects but after Devil's Lake they don't just sign them anymore.

**Senator Olafson** I don't understand the high level of concern about indemnification if all you have done is provide money for the project, you don't control it or have any specifications. Where is your liability?

**Frank** In the Devil's Lake case it didn't make any difference.

**Chairman Andrist** What you are saying is that it is the Attorney General's issue?

**Frank** Not necessarily, the state water commission is clearly in the business to help projects along. There is probably some liability associated with doing that. The problem with Devil's

Lake was not with us but it cost us 2mil. to defend.

Discussion about Devil's Lake case.

**Senator Fischer** The liability should be with the permitting because the plans and proposals are then reviewed by that agency. Spoke about the dam case in relationship to liability.

**Chairman Andrist** closed the hearing on SB 2256

# 2009 SENATE STANDING COMMITTEE MINUTES

Bill/Resolution No. SB 2256

Senate Political Subdivisions Committee

Check here for Conference Committee

Hearing Date: 01/30/2009

Recorder Job Number: 8233

Committee Clerk Signature



Minutes:

**Chairman Andrist** Reopened the discussion on SB 2256.

**Senator Lee Moved Do Pass**

**Senator Olafson** Second.

Brief discussion on what precipitated the bill, Devil's Lake example.

The Clerk called the role on the motion to **Do Pass. Yes: 6, No: 0, Absent: 0.**

**Senator Lee will carry the bill.**



Date: 1/30/09  
Roll Call Vote #: 1

2009 SENATE STANDING COMMITTEE ROLL CALL VOTES  
BILL/RESOLUTION NO. 2256

Senate Political Subdivisions Committee

Check here for Conference Committee

Legislative Council Amendment Number \_\_\_\_\_

Action Taken  Do pass  Do not pass  Amend

Motion Made By J. Lee Seconded By Senator Olafson

Senators	Yes	No	Senators	Yes	No
Chairman John M. Andrist	/		Senator Arden C. Anderson	/	
Vice Chairman Curtis Olafson	/		Senator JoNell A. Bakke	/	
Senator Judy Lee	/		Senator Jim Dotzenrod	/	

Total (Yes) 6 No 0

Absent 0

Floor Assignment Senator Lee

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

**REPORT OF STANDING COMMITTEE**

**SB 2256: Political Subdivisions Committee (Sen. Andrist, Chairman) recommends DO PASS (6 YEAS, 0 NAYS, 0 ABSENT AND NOT VOTING). SB 2256 was placed on the Eleventh order on the calendar.**

2009 HOUSE POLITICAL SUBDIVISIONS

SB 2256

# 2009 HOUSE STANDING COMMITTEE MINUTES

## Bill No. SB 2256

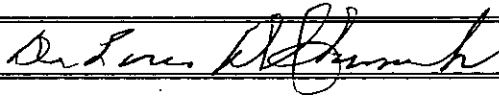
### House Political Subdivisions Committee

Check here for Conference Committee

Hearing Date: March 6, 2009

Recorder Job Number: 10344

Committee Clerk Signature



Minutes:

**Vice Chairman Headland** opened the hearing on SB 2256.

**Senator Fischer:** (see testimony #1). There are some amendments that are going to be proposed. I oppose the amendments. It is just a way to water it down and slow down progress again. Frankly the Water Commission because of the suit at Devils Lake has decided that they don't want to fund any more projects unless they are completely indemnified. By political subdivisions do have a say on how those projects are designed and built.

The State Engineer will tell you that the state is separate from the water commissions so what we need to do then is separate the engineer from the water commission process and have an engineer that does the permitting and one that works with the water commission. The one solution that I see is going to happen the quickest; there is no point in funding without the impossible indemnity.

**Rep. Kretschmar:** do they put provisions in the contracts now?

**Senator Fischer:** Yes. We had a temporary agreement and now they decided to go back to the indemnity and so our feeling is that they have become the combatant on the two pieces that they require the sentence be deleted in the bill so in good faith we came to the legislature and made the change in legislation and now they are saying that is not good enough. We

need this amendment. This will do us no good at all because it puts it under the labored bureaucracy and unnecessary and statewide issue. This is not an east and west issue; it is a statewide issue.

**Rep. Zaiser:** Do you know why they are going back again on their obligation.

**Senator Fischer:** I believe it is because of the law suit in Devils Lake. There was a possibility that the state could be liable for \$80 million or more. I think the state engineer decided they don't want to take the chance of doing that again. So a lot of our drainage reconstruction doesn't have one percent of that kind liability built into that yet they want to apply it to that.

**Rep. Zaiser:** What will this do with any future water projects?

**Senator Fischer:** I don't know if I would say it would eliminate future projects, but there are some changes that are going to have to be made for projects to be done through the state.

Right now we are in a situation where we can't comply with what they are asking. We thought we had this worked out through this legislation, but we were going to have risk management or the state examiner wanting to do both. The amendment is still in the bill if they kill the bill and we are in the same position we were before the legislature.

**Rep. Zaiser:** It really is putting a strangle hold on water projects?

**Senator Fischer:** I don't think we could solve it.

**Sean Fredricks, Counsel for Red River Jt. Water Resource District and Cass County Jt.**

**Water Resource District:** (see testimony #2).

**Rep. Koppelman:** Are these uninsurable risks?

**Sean Fredricks:** Yes

**Rep. Koppelman:** I would assume they are also uninsurable risks for the local entities to enter into these projects as well because they are insuring the same risk, but on behalf of someone else.

**Sean Fredricks:** That is true.

**Rep. Koppelman:** Is this because of the unpredictable nature of the risk or does it have something to do with the Supreme Court rejecting the doctrine of sovereign many years ago?

**Sean Fredricks:** This place this is written out of Chapter 32-4.1 provides immunity and as a result ever since the state advocated the concept of sovereign immunity there have been several places where the state is immune from specific actions. If you look at this chapter you will see that states are immune from many actions such as punitive, legislative, judicial decisions that have to be made. In answer to your question that is correct.

**Rep. Koppelman:** In your legal judgment is there a way for us as policy maker on the state level to enact legislation which would protect the state from an uninsurable risk and yet not seek to pass the risk on to someone else without violating that sovereign immunity band?

**Sean Fredricks:** Basically specific legislation to cover basically uninsurable risks but I can't say in terms of contractual language I do think we should have framework that we can all lead to and go by and that is essentially what we are trying to do.

**Steve Spilde, CEO, ND Insurance Reserve Fund:** (see testimony #3).

**Rep. Klemin:** How is the passage of this bill effect the sovereign immunity?

**Steve Spilde:** I don't know if it will. The hope would be over time it would.

**Rep. Kretschmar:** Has the insurance reserve fund insure any of the insurable issues?

**Steve Spilde:** No it's not.

**Rep. Kretschmar:** Do they have the authority to do that if that could be done. Good practices?

**Steve Spilde:** Up until 1997 we actually had the department of human services headquarters with us and provided medical malpractice coverage in the state of ND. The state, as a matter of policy, decided to pull the state reserve fund so since 1997 we have not provided this to

state agencies. With what happened in regard to state agencies and internally opened our laws to provide those services.

**Michael Dwyer: ND Water Resource District Association:** I am here to support this legislation.

**Aaron Birst: Association of Counties:** We also support this and I can verify that we have seen this in more than the water district contracts.

**Connie Sprynczynaty: ND League of Cities:** I am also a voting member of the Insurance Reserve Fund. I do remember the discussions in the late 1990's about this shift. We are not, as political subdivisions, unwilling to pay a premium to insure our home, but we are unable to pay from the state treasury. This bill reminded me of the saying, "we will take our own risk; you take your risk" and we really mean it.

**Mike Buringrud: Chairman of North Cass Water Resource District Cass County Jt. Water Resource District:** (see testimony #4).

**Joel Halvorson: Traill County Water Resource District:** (see testimony #5). We urge a do pass on SB 2256.

**Gary Peterson: Red River Jt. Water Board:** ( handed out Gary Thompson, President of the ND Water Resource District's Assn. testimony #6). We urge a do pass.

**Senator Fischer:** If I may I would like propose a slight amendment and that is to add an emergency clause to the bill that was overlooked earlier if you pass the bill.

**Opposition:**

**Tag Anderson, Director OMB Risk Management Division:** (see testimony #7). (Proposed amendment #8). Went over his testimony and proposed amendment. Now I heard Sean Fredicks and he indicated that essentially they didn't have a problem with the idea of the indemnification for each parties own negligence and the language that we offer in those

proposed amendment, at least as far as the vicarious liability says nothing more. It simply states that fact. Should the negligent act of the political subdivision and the liability that is imposed upon the state is vicarious in its nature and if by contract and the defendant would hold this from the outset. Those amendments we offer also recognize the vicarious liability is imposed and each person would have to assume their own liability and if so the coverage for that liability was available.

**Rep. Koppelman:** You did present these amendments in the senate and they did not adopt them?

**Tag Anderson:** We offered proposed amendments on the other side. They would not do them. The current draft of our proposed amendment was essentially my attempt to address the legitimate concerns that Senator Fischer and others have raised as it relates to water projects. To preserve the narrow ability to acquire program indemnification in certain circumstances and address the concerns by essentially saying before an agency can do it; all parties involved have to address the concerns that they have and can't recover.

**Rep. Koppelman:** So do these amendments address any concerns that were raised by the proponents of the legislation in the Senate about your proposed amendments there that did not succeed or are they essentially the same?

**Tag Anderson:** The proposed amendments on the Senate side as I recall simply said that vicarious liability could be shifted and full identification would only be allowed if approved by the Director of OMB. So what is in here is it is required to be in writing; not just the Director of OMB, but it also requires the Attorney General and they have to explain why it is needed and most importantly address their side and why they have that they obtain coverage.

**Rep. Koppelman:** What I am hearing is the big problem here seems to be the uninsurability of this risk, be it by a political subdivision or by the state or by a water board or whatever it



might be. If that is the case we are kind of chasing the issue around the bush a little bit here. Is there some way for the state to absent immunity, which the court has struck down, for the states to say that when we run into risks that are uninsurable we have some immunity and therefore make this kind of checking of that equally uninsurable liability to someone else who can't deal with it.

**Tag Anderson:** Two points I would make in response. First, the proposed amendment we are offering, I think actually focuses everyone's attention on that very issue which is if we are dealing with the risk that we are worried about and it uninsurable; perhaps instead of simply passing through dollars to a political subdivision that comes upon the state agency therefore step up and actually be more actively involvement in that project. Seconded point is that potential liability that often is involved here is not just coordinated liability; actually it is a combination of cases dealing with water projects, without amending the constitution, you cannot discuss, correlate, and immunize the state for potentially doing something that takes on this contract.

**Rep. Conrad:** can you give me an example of what that looks like.

**Tag Anderson:** I cannot give you an example directly as it relates to the state and political subdivisions because it is actually there is not a lot of case law currently on that issue. The passage of vicarious liability situation would be an employer and its agent employer even though the employer, if you own a business for example and you did everything reasonable to make sure an accident didn't happen which your employee acted negligently anyway, you can be sued for the act of your agent. If the fear of liability goes on the state of ND is vicarious; in other words we didn't really do anything wrong, it was the political subdivision who did something wrong, but there is a relationship there that the court system seems to indicate that vicarious should fall. We would be happy to step up and not wait for judgment to enter.

**Rep. Conrad:** If there is a state approved water projects, right, they approve the designs and they give out the money when they do the cost sharing do they look at the design?

**Tag Anderson:** I am not a water person? I do know however, that there are differences in opening water projects and for example a simply clean drain is a completely different scenario than for example a dam.

**Rep. Conrad:** If the state is involved in any way with the township are we saying in this that you would remove the liability if a local entity is doing the work?

**Tag Anderson:** Only if the Attorney General and Director of OMB approves. If the state is independently negligent, because they didn't themselves get involved in a water project the vicarious language would not apply. That shifting of liability can only be done with approval; that is what the proposed amendment says.

**Rep. Conrad:** So does this say the county would not be liable if the state decided not to go along?

**Tag Anderson:** Our proposed amendment does not say that. These municipalities are exclusive under the control of the political subdivisions and the state has no authority to make sure that bad things don't happen.

**Rep. Klemin:** It might be helpful to get some kind of example here about your amendment. For example let's say a farmer's crop gets flooded and reduces his crop because it alleges that it is because of negligent design of drainage so the farmer then sues the water resource district and the state of ND and anyone else that is involved? I might be something like and inadequate culvert and water backs up. So that person sues the State of ND and the local water resource district for negligence in the design and maintenance. Now without your amendment the state could make a cross condense against the water resource district saying that it was your fault and if we are liable to the farmer then you are liable for us for that?

**Tag Anderson:** Under existing principals of law that can be done without the kind of amendment that you are proposing. Whereas, if there is some separate liability individual liability of the state where either the judge would decide where the percentage of fault to allocate to state and what percentage of fault to allocate to the water resource district and each prepare its own separate percentage of liability in terms of that verdict. That happens in the absence of any kind of a contract shifting liability. If we have a contract that shifts liability then the state would say we are liable for it anyway and we would have to pay. What this bill does, as I understand it says the state would have to be responsible for its own liability. Is that correct?

**Tag Anderson:** Our proposed amendment simply said look, if area liability is found they should have to step up to the plate right from the offset. Now to the extent that the state of ND has some independence for fault the state would be responsible for that and there could be a final judgment under the proposed amendment. Absence a contract completely shifting that liability to the political subdivision in very narrow circumstances and that can only be done where the approval of the Director of OMB identifying the risk and the need and identifying the concern about the viability of obtaining coverage for it. Because our position is that there are narrow circumstances where it is appropriate to shift full liability to the political subdivision where they control the entire municipality that can cause harm and they have the viability essentially to prevent those things from happening. In otherwise they are 99% fault with 1% fault.

**Rep. Klemin:** The reason we have this bill before us is because the state has given us provisions in this bill and what is to say that same kind of scenario couldn't happen if we amended the bill. If I representing the plaintive for instance I would never give satisfaction against the state to start with.

**Tag Anderson:** I think you have identified the very reason why we want this type of a contract. We don't want the plaintive attorneys dictating how we would work up a contract. That is why we would work it up between the Attorney General and the Attorney for the political subdivision and based on their assessment as to whether there is any independent basis for liability against the state of ND.

**Rep. Zaiser:** Would you give me an example of that very narrow liability protection. Who do you need to protect?

**Tag Anderson:** The state has custody of the cars and maintain safe highways and the state highway often runs through town and those local political subdivisions are in the cities and county and they go down that road. In those situations the state is essentially cutting over complete highway systems to local political subdivisions and in those situations it seems to me it is only fair for the political subdivision to be responsible for any loses that are brought regardless of how great a host articulates.

**Rep. Zaiser:** That could be the same thing where the state might be 99% liable and the political subdivision were 1% at fault where yet you want them to shift the liability to them to cover you. Is the equally fair?

**Tag Anderson:** I think you have to trust the judgment of the Attorney General and Director of OMB and understand that should a scenario where we are going to use the 99% out that would be a scenario where we actually control these counties for someone and that would not be an appropriate situation to be shifting it to a political subdivision entity.

**Rep. Zaiser:** You are trying to prevent them from being free and clear of liability if it was 99% your fault; where when you said the DOT example they were running through this town that the local political subdivision should maintain 99% fault. Is this a contradiction?

**Tag Anderson:** What we are saying is that a political subdivision has virtually exclusive control over the municipalities that naturally cause harm to someone. Those are circumstances where it would be appropriate to say essentially to the political subdivision by contract you need to step up to the plate and defend a law suit that is brought against you and us because ours always is so maniacal that it is unlikely be found at fault except for the vicarious liability or at most where 100% at fault.

**Rep. Zaiser:** I think you missed my point; could it operate in reverse or inverse?

**Tag Anderson:** I suppose it could in theory. The Attorney General addresses OMB would not approve that if you decide to do that.

**Rep. Kretschmar:** What you are trying to say under your proposed amendment that the advantage is shifted back to the state rather than having equality of that political subdivision.

**Tag Anderson:** I am not sure I understand the question?

**Rep. Kretschmar:** Under the current bill there is a 50-50 proposition; the state has it liability and the political subdivision has theirs. Under the amendment the advantage is shifting more to the state and less to the political subdivision.

**Tag Anderson:** I would venture to guess how many departments do it that way. I believe we would not.

**Rep. Conrad:** If I understand your amendment you just asked to decide upfront what the liability are, right? The Attorney General or OMB will approve that statement if he thinks they should?

**Tag Anderson:** Under current law the state can demand ramification from a political subdivision completely for vicarious liability. Under current law it has to be done in good faith and has to be a separate thing. The proposal is to say no, there can be no indemnification whatsoever. Our proposed amendment is saying wait a minute there are circumstances where

it is appropriate to have indemnification for example. One is where we are not the ones at fault and we don't want to be held responsible for the negligent person or entities actions on vicarious liability. We are simply saying that is the theory and the truly variable one and truly be viable and is incumbent on the political subdivisions to step up and defend it from the offset and not have cross money thrown at them. Secondly we also believe that although we would recognize that there probably have been cases where agencies have demanded indemnification provision of agreements where it was not so I think the state would have to concede that it happens; occasionally sort of blind reliance of agency folks on their standard manuals. The ability to have a full indemnification provision remains, but not just allow the agencies to finance it but to have them request it from the OMB and Attorney General and they have to explain what it is that we are talking about. Why is there a need for a full indemnification provision? It also addresses the political subdivisions ability to answer for it.

**Rep. Klemin:** If we did adopt this amendments would we still be looking at whether a cause.

**Tag Anderson:** I imagine so.

**Chairman Wrangham:** With your amendment it seems to me it would almost have to be predetermined who was the cause in order to write the agreement and I guess I view that as the job of the Clerk's of the Justice System to determine is at cause.

**Tag Anderson:** You are correct. The liability that is going to be imposed upon the political subdivision and or the state and particularly the area that is going to be relied upon will not be known until the process has worked itself through. What our proposed amendment allowed us to do is have a contract essentially between the state and the political subdivision that says in vicarious liability situations you need to defend us. Regardless, how do I distract it;

representatives from the political subdivision and their insurance carrier can determine at the outset how best to do pending action that would benefit both parties. At the outset there is no

viable claim against the state of ND; the state of ND is only going to be responsible for the political subdivisions actions on vicarious liability carries. We think it appropriate to have the political subdivisions to set up to the plate and handle it.

**Dale Frank, Secretary of the State Water Commission:** I actually was not going to testify today but my ears are ringing. There are a couple of points I want to make. Rep. Koppelman mentioned there was sovereign immunity to the state and that is clearly one of the main things. Second was the land owner's law suit. I think if you add up all the costs for the state water commission, the Attorney General, Risk Management, the cities and counties I think the cost is probably in the \$3 million range. It is very expensive and it is still ongoing. Because of that the Attorney General recommended we make some changes the way we did business. We have required indemnity clauses on our contracts for years. But they recommended that we add in a significant requirement that we get an insurance endorsement and that is where we ran into a significant problem and the ND Insurance Reserve Fund was not able to provide these insurance endorsements. We probably could have gone to the local authorities and lobbied or something like that but we didn't want to do that so about 10 months ago or a year ago we made a temporary agreement. The contract would include indemnity bonds, but that we would only require an insurance endorsement through the end of the year. So we are signing contracts written out regarding the amount of money and the State Water Commission is prepared to continue that process for as long as we can. I believe the other side views this as temporary, but it wouldn't necessarily be temporary on our side. Another point that was mentioned that risk management covers agencies and therefore covers the state political subdivisions. There is one form of liability that is not covered by either and that is inverse confirmation. Since that is not covered it falls first of all to the agency that has second to the falls to the State Legislature and I think that in the case of the Devils Lake Landowners law suit

we had to part where the plaintiff's thought they were getting into a little bit of trouble so we offered to settle for \$40 million and if we would have had this a loss on that type of thing, we would have ended up coming back to you for help. Then it gets down to how the project with the local subdivisions runs their and certainly they can do that without the state cost share. We are talking about projects that they own; they design; they build and they maintain. Of course if they don't come to us for money are they in themselves accepting liability for that? That is just the way it is. The issue is if the only thing the state of ND does is give them a \$1 million for a project; do also accept the liability for that trust. I think maybe a good part of this bill is that, if the state legislature delays that the state should incur liability for a project that we don't own, design, build or maintain; if you think there is a liability that should be associated with just getting the money you have that right. We deal with money; I am signing the state up for some liability. If you tell me that is fine that is fine with me.

**Rep. Conrad:** When you give them the money do approve their plans?

**Dale Franks:** We may give them a permit.

**Rep. Conrad:** But the permit is separate from the money?

**Dale Franks:** We give that from the office of the State Engineer, that permit. The Attorney General is telling me we have more protection giving out permits than we do contracts. I am not sure exactly why, but more than one attorney has told me that. We also on these permits I will state in there that there is liability on the permit; but that is a one way street. I sign it and that is it. What we are talking about on 2256 is a contract where the state has signed or the political subdivision has signed so now you have a contract so that is different. Maybe there is liability associated with giving out that permit.

**Rep. Conrad:** When you do the cost share money do you look at the plans?



**Dale Franks:** We do look at the plans and review it. In case of a rural water project we don't have to give them a permit for that. They hire their own facility engineer for a water project. We have heard of them doing this. The issue is probably more on the political facilities like a dam where we do it on the permit side and looking at the plate.

**Rep. Hatlestad:** Do you think a political subdivision would have a problem signing such indemnity if you only gave them money; that was all you did?

**Dale Franks:** I believe that is what they are objecting to right now. I think that is the purpose of this bill. These are not projects; we have limited control over them. These are their projects and we give them money. That is what this is about. The state on the other hand; there isn't any question we are the deep pockets so everyone wants involvement in the state. I was subpoenaed on that Devils Lake law suit. I sat in the back row. I am not convinced that the state would be presiding over a law suit if they couldn't have brought in the state for their dollars. They weren't looking for Nelson and Benson County to provide; they were looking for the deep pockets and we were the deep pockets.

**Rep. Conrad:** In the contract all you are say is you can move water from this spot to that spot. You don't say how they are going to move it?

**Dale Franks:** We do not get into that. It just states between we will move water and that is it. On the permit side we get into the details on that.

**Rep. Zaiser:** Are you telling me that when you get permits you don't look at that project in the terms of really knowing specifically what it is. Just in the permit project?

**Dale Franks:** I think what I just said are we do get into the details of those permits.

**Rep. Zaiser:** So in other words you are involved in the project from the permit side.

**Dale Franks:** there is a difference. There is an Office of State Engineer and there is also a State Water Commission. From the office of Stat Engineer we give most permits out. There is

a separation of those two. We even have our own stationery and everything else. There is a separation of the regulatory functions and the maybe they shouldn't be split and in some states they are split, but in North Dakota they actually function as two separate agencies.

**Rep. Zaiser:** are you involved in the permit?

**Dale Franks:** We look, but we do not redesign that project. Drainage projects we look at more because we have to protect the water. Like I said it is your decision and when we get in trouble we are coming back.

**Chairman Wrangham:** Yes, it will be our decision. It is a tough one to make, but as I listen to this I keep thinking of the victims here. Hopefully ever we don't have any problems. If we do have a problem that injured person is a citizen of ND. If the grievance is settled unfairly the victim is the taxpayers of ND who have to ultimately pay it. Whichever direction it comes from so I hope whatever we in the future we find the most efficient for the taxpayers of ND.

**Dreux Kautzmann, ND Dept. of Transportation, Special Assistant Attorney General:** (see testimony #9). If this bill would pass the state would have to initially defend some third party legal things although it may not have anything to do with the activity that they derived from their plan. It could essentially cause the state some legal expenses that did not occur on their watch.

**Rep. Klemin:** What about an alternative to this amendment that has been proposed? A provision that would allow the state to cover its attorney fees but if it is determined if the state is not at fault. Seems like the cost of the attorney fees should be theirs?

**Dreux Kautzmann:** I think that is good.

Neutral: None

Hearing closed.

# 2009 HOUSE STANDING COMMITTEE MINUTES

## Bill No. SB 2256

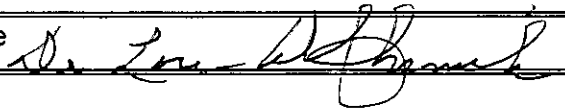
### House Political Subdivisions Committee

Check here for Conference Committee

Hearing Date: March 19, 2009

Recorder Job Number: 11246

Committee Clerk Signature



Minutes:

Chairman Wrangham reopened the hearing on SB 2256.

**Rep. Koppelman: I would move that we add the emergency clause.**

**Motion Made By Rep. Koppelman to add the emergency clause; Seconded By Rep.**

**Corey Mock**

**Discussion:**

**Rep. Koppelman:** It was requested during the hearing. The reason is so it takes effect immediately because there are contracts that are being negotiated right now.

**Voice Vote Carried.**

**Do Pass As Amended Motion Made By Rep. Koppelman: Seconded By Rep. Corey**

**Mock:**

**Rep. Klemin:** I was going to propose an amendment.

**Motion was withdrawn.**

**Rep. Klemin:** From the testimony from the DOT that we were concerned about contracts with political subdivisions and really what they were concerned about is contracts with political

subdivisions using the streets for parades and a variety of other things like that. What they are concerned about is the cause to attend something you really aren't in but have gone in

because of the state being a new contract. What they are mainly concerned about is the cost of defense of attorney fees. In order to have it in their contract for a political subdivision, but because of this bill they won't be able to do that anymore. What we are looking at is a situation where the state is brought in as defendant in a law suit that is primarily against the political subdivision with some liability relating to the use of that street. What the amendment would do is if we state would have to be liable and report the subdivision also liable then the state would be able to recover its strength from the political subdivision. Kind of a trade off.

**Rep. Koppelman:** Would it work in reverse then so if the state was found liable and the political subdivision was not; then the political subdivision could recover its cost from the state?

**Rep. Klemin:** Yes it would have to be fair. If the state was found partially liable or the political subdivision was also liable; they are both liable for some degree, then that would apply.

**Rep. Koppelman:** do you have an amendment prepared?

**Rep. Klemin:** No.

**Rep. Koppelman:** I think that would handle the concern of the DOT.

**Rep. Conrad:** With the amendment what is the risk management you would have?

**Rep. Klemin:** I did not think a whole lot about that. The problem with the contract the state has; where can the state agencies acquire the other portion of the contract to assume the responsibility for the state for their negligence. Example given: From Minot where someone sued the state due to a piece of paper being dropped and they slipped on it in the state fair grand stand and got hurt. The state was sued and they have to defend it. So what the state is trying to do in this agreement here is saying we won't have the liability here anymore than we fell is necessary.

**Rep. Conrad:** We are concerned about the fact they have two properties in the Water Commission. One is the permitting and the other one is the grant provision. In the grant area

they don't look at the design; they don't look at anything; they just gift them the money. Can they just make a statement on who is liable on that and divide that out in the grant? Is that the way that would work?

**Rep. Klemin:** As I understand it they would have this agreement and under further provisions.

**Rep. Conrad:** And this bill would take care of that? That is my fear?

**Rep. Koppelman:** I don't have a major objection to what Rep. Klemin has proposed as long as it is fair and receptacle but I think the bill on its own kind of handles it from the standpoint that it talks about eliminating this cost shifting. I would assume if there is a situation where one party or the other is found to not have liability then that party could be dismissed from the case and they would potentially have some legal costs in terms of preparation up to that point, but it certainly wouldn't be the same as going through an entire proceeding and so on.

**Rep. Klemin:** It wouldn't get dismissed until it is all over because technically that is how it is done. So the liability would not happen until it is done.

**Chairman Wrangham:** do we want to consider that amendment just by hearing the explanation or do you want to see it in writing before you act on it.

**Rep. Koppelman:** I would like to see it.

**Chairman Wrangham:** We are going to look at another amendment. The committee is in general agreement with the bill?

Hearing closed.

2009 HOUSE STANDING COMMITTEE MINUTES

Bill No. SB 2256

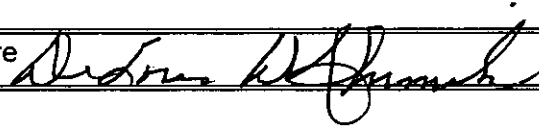
House Political Subdivisions Committee

Check here for Conference Committee

Hearing Date: March 20, 2009

Recorder Job Number: 11317

Committee Clerk Signature



Minutes:

**Chairman Wrangham** reopened the hearing on SB 2256.

**Rep. Klemin:** I have decided it is not appropriate to amend it.

**Do Not Pass Motion Made by Rep. Koppelman: Seconded by Rep. Conrad**

**Chairman Wrangham:** Yes it is amended with the emergency clause.

**Discussion:**

**Rep. Conrad:** Inaudable

**Vote:** 11 Yes 0 No 2 Absent Carrier: Rep. Koppelman

Hearing closed.

March 20, 2009

VR  
3/20/09

PROPOSED AMENDMENTS TO SENATE BILL NO. 2256

Page 1, line 2, after "subdivision" insert "; and to declare an emergency"

Page 1, after line 11, insert:

**"SECTION 2. EMERGENCY.** This Act is declared to be an emergency measure."

Renumber accordingly

Date: 3/19  
Roll Call Vote #: 1

2009 HOUSE STANDING COMMITTEE ROLL CALL VOTES  
BILL/RESOLUTION NO. 2256

**HOUSE POLITICAL SUBS COMMITTEE**

Check here for Conference Committee

Legislative Council Amendment Number \_\_\_\_\_

Action Taken  DP  DNP  DP AS AMEND  DNP AS AMEND

Motion Made By Rep Koppelman Seconded By Rep Mock

Representatives	Yes	No	Representatives	Yes	No
Ch. Wrangham			Rep. Conrad		
Vice Chair Rep. Headland			Rep. Kelsh		
Rep. Hatlestad			Rep. Kilichowski		
Rep. N. Johnson			Rep. Mock		
Rep. Klemin			Rep. Zaiser		
Rep. Koppelman					
Rep. Kretschmar					
Rep. Pietsch					

Total (Yes) \_\_\_\_\_ No \_\_\_\_\_

Absent \_\_\_\_\_

Floor Carrier: \_\_\_\_\_

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

*EM Clause Added*



Date: 3/20/09  
Roll Call Vote #: 1

2009 HOUSE STANDING COMMITTEE ROLL CALL VOTES  
BILL/RESOLUTION NO. 2256

HOUSE POLITICAL SUBS COMMITTEE

Check here for Conference Committee

Legislative Council Amendment Number \_\_\_\_\_

Action Taken  DP  DNP  DP AS AMEND  DNP AS AMEND

Motion Made By Rep Koppelman Seconded By Rep. Conrad

Representatives	Yes	No	Representatives	Yes	No
Ch. Wrangham	✓		Rep. Conrad	✓	
Vice Chair Rep. Headland	○		Rep. Kelsh	✓	
Rep. Hatlestad	✓		Rep. Kilichowski	✓	
Rep. N. Johnson	✓		Rep. Mock	✓	
Rep. Klemin	✓		Rep. Zaiser	○	
Rep. Koppelman	✓				
Rep. Kretschmar	✓				
Rep. Pietsch	✓				

Total (Yes) 11 No 0

Absent 2

Floor Carrier: Rep Koppelman

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

**REPORT OF STANDING COMMITTEE**

**SB 2256: Political Subdivisions Committee (Rep. Wrangham, Chairman)** recommends **AMENDMENTS AS FOLLOWS** and when so amended, recommends **DO PASS** (11 YEAS, 0 NAYS, 2 ABSENT AND NOT VOTING). SB 2256 was placed on the Sixth order on the calendar.

Page 1, line 2, after "subdivision" insert "; and to declare an emergency"

Page 1, after line 11, insert:

**"SECTION 2. EMERGENCY.** This Act is declared to be an emergency measure."

Renumber accordingly

2009 TESTIMONY

SB 2256

*Same given to House.*

**SB 2256**

**Mr. Chairman, members of the Political Subdivision Committee  
For the record, I am Senator Tom Fischer, District 46, Fargo**

**SB 2256 is one of the most important pieces of legislation of this session as far as the infrastructure of North Dakota is concerned.**

**Since November of 2007 the State Water Commission has asked Water Resource Districts for indemnity that is impossible to supply. They want this indemnity before they will cost share with any proposed water project.**

**My feeling is that if the state does not want to accept any responsibility for their decisions there is no point in funding the State Water Commission because they will not be spending any money.**

**However, the State Water Commission does fund three projects that they say are state projects any therefore are exempt. The Southwest Pipeline, NAWS and the Devils Lake outlet. In my humble opinion these projects expose the Commission to more risk because they are 100% state responsibility.**

**I would like to introduce Mr. Sean Fredricks who can explain the problem much better than I and hopefully the solution to this problem. Thank you Mr. Chairman, I will stand for questions.**

**Testimony by Sean M. Fredricks  
Ohnstad Twichell, P.C.  
Counsel for Red River Joint Water Resource District and Cass County Joint Water  
Resource District**

**Before the Senate Political Subdivisions Committee  
In Support of SB 2256**

**North Dakota Legislature  
Bismarck, North Dakota  
January 29, 2009**

Chairman Andrist, members of the Committee, I appreciate the opportunity to testify in support of SB 2256. My name is Sean Fredricks, and I am an attorney with the Ohnstad Twichell Law Firm in West Fargo. I represent the Red River Joint Water Resource District, the Cass County Joint Water Resource District, and several individual water resource districts, including the Southeast Cass Water Resource District, the Maple River Water Resource District, the North Cass Water Resource District, the Rush River Water Resource District, the Sargent County Water Resource District, the Richland County Water Resource District, and the Dickey County Water Resource District.

SB 2256 is a bill that will impact all political subdivisions around the State. The experiences of water resource districts over the last year will clearly illustrate why water resource districts and several other political subdivisions support SB 2256. This indemnity issue very nearly prevented water resource districts from constructing several important water projects in 2008.

Without SB 2256, various State agencies, including the State Water Commission, will continue to insist that political subdivisions accept the State's liability for the State's own negligence. SB 2256 will prohibit this inequitable, and I think illegal, practice. From our perspective, each party should simply be responsible for its own liability and its own negligence. That is the simple objective of SB 2256.



As you know, the legislature appropriates a certain amount of dollars for the North Dakota State Water Commission each biennium for purposes of funding various water resource and water supply projects. The State Water Commission then considers requests from individual entities, including water resource districts, for State cost share dollars. The State Water Commission approves cost share dollars for eligible items in accordance with the Commission's policies. Once approved, State Water Commission staff prepares "Cost Participation Agreements" water resource districts must sign before State Water Commission staff will issue approved cost share dollars. Those agreements contain indemnity provisions that require water resource districts to indemnify the State Water Commission, the State of North Dakota, and all other agencies of the State for all claims arising out of a project in perpetuity, including claims arising out of the State's sole negligence or even the State's own intentional misconduct.

In other words, the State Water Commission requires water resource districts to accept any and all of the State's own liability arising out of a given project, even if the water resource district was not negligent in any way, and even if the State was solely negligent. In even simpler terms, the State wants water resource districts to accept responsibility, and costs, for any of the State's mistakes. Unfortunately, water resource districts have no alternative; they must sign the Cost Participation Agreements, including the indemnity provisions, if they want the cost share dollars approved by the State Water Commission (and appropriated by the legislature).

On several occasions, I objected to these indemnity provisions on behalf of my clients. In some instances, I was able to negotiate a revised indemnity provision that simply required each party to accept their own liability. That is a fair arrangement, and that is all SB 2256 attempts to accomplish.

Unfortunately, in recent years the State Water Commission has rejected any attempts to renegotiate the indemnity language. Instead, water resource districts are forced to accept these

indemnity provisions, and to accept the State's liability. If they refuse to accept the indemnity terms, the State Water Commission will not accept cost share dollars, cost share the legislature intends to provide. Beyond the basic fairness issues this arrangement creates, water resource districts lack legal authority to accept the State's liability, in my opinion.

The North Dakota Insurance Reserve Fund has indicated it will not provide endorsements for water resource districts to indemnify the State Water Commission and all State agencies for the State's own negligence or intentional misconduct *in perpetuity*. As a result, water resource districts have no choice but to sign these indemnity provisions to accept the State's liability for anything and everything, forever. At the same time, water resource districts do not have the requisite insurance to cover that indemnification. This contractual arrangement could potentially bankrupt any given water resource district if a board actually had to indemnify the State for the State's own negligence.

In our negotiations and discussions with the State over the course of the past year, the State frequently contended the liability shift was necessary to protect State coffers. However, Chapter 32-12.2 already limits the State's liability, and specifically excludes liability for several of the State's specific activities. For example, the State Water Commission and the State Engineer's Office frequently argued the approval of permits for projects would subject the State to liability. However, Section 32-12.2-02(3)(d) already specifically provides the State is not liable for granting or refusing to grant permits. That is just one example of many instances in Chapter 32-12.2 that already provides the State with immunity. If the State is already immune under Chapter 32-12.2, there is no reason for the State to shift its liability to water resource districts.

On the other hand, under Chapter 32-12.1 of the North Dakota Century Code (the Chapter that provides political subdivision liability protection) does not permit water resource districts to accept another party's liability. So we have situations where the State is shifting liability in instances where the State would already have immunity and liability limits under Chapter 32-12.2 to water

resource districts that cannot accept the State's liability under Chapter 32-12.1. That approach defies common sense, basic fairness, and the law.

Water resource districts, and the individual water managers that serve on water resource district boards, are knowingly forced to accept liability they may not have legal authority to accept. These indemnity provisions in the State Water Commission Cost Participation Agreements not only create inequitable situations, they create situations that violate North Dakota law, and they put water resource districts and their individual water managers at great risk.

Water managers are committed public servants who receive little compensation or thanks for their efforts. Water managers work tirelessly to create and construct important water projects for the benefit of their communities, and unfortunately these indemnity provisions leave them with two difficult alternatives: (1) to accept the State's liability, liability for which they cannot obtain insurance, and which they may not have legal authority to accept; or (2) to refuse to accept the State's liability, and to attempt to construct projects without any State cost share dollars. As you can probably guess, most water resource districts lack the financial wherewithal to construct projects without State cost share dollars, cost share the legislature clearly intends to provide for these projects each biennium. In addition, landowners who are members of a proposed assessment district who must vote to support a project are not likely to cast affirmative ballots without cost participation from the State to offset their local landowner costs. As you can see, this is a very difficult dilemma for water managers.

Regrettably, many water resource districts are unaware of what exactly the State is requiring in these indemnity provisions. Most water resource districts have such small general funds, they lack resources to retain attorneys to review the State Water Commission's Cost Participation Agreements, or to object to these indemnity terms. In those instances, water resource districts are accepting all of the State's liability without even knowing it.



N.D. Cent. Code § 32-12.2-13, as written now, does not support the State Water Commission's current practice; the statute does not permit the State's current indemnity provisions. Yet, State Water Commission staff requires water resource districts' concurrence with the indemnity provisions before they will release approved cost share dollars. Water resource districts have no option but to accept the State Water Commission's potentially illegal indemnity provisions to access approved cost share dollars. SB 2256 will eliminate any ambiguities or questions regarding whether or not Section 32-12.2-13 permits these types of indemnity provisions. If the legislature passes SB 2256, State agencies and political subdivisions will simply be responsible for their own liability; the State Water Commission will have no choice but to revise their indemnity provisions so the State Water Commission is responsible for its own liability, and water resource districts are responsible for their own liability; water resource districts will be able to obtain the requisite insurance for their projects; and State Water Commission staff will release cost share dollars approved by the State Water Commission (and the legislature) so water resource districts can construct important water projects around the State.

My clients and I urge the passage of SB 2256 to create equitable, and legal, contractual relationships between State agencies and political subdivisions around the State.

Thank you for your consideration.

TESTIMONY OF STEVEN L. SPILDE  
CEO, NORTH DAKOTA INSURANCE RESERVE FUND  
to the  
N.D. SENATE POLITICAL SUBDIVISIONS COMMITTEE  
IN SUPPORT OF SENATE BILL NO. 2256

January 29, 2009

Chairman Andrist and members of the Senate Political Subdivisions Committee, my name is Steve Spilde - I am the Chief Executive Officer of the North Dakota Insurance Reserve Fund (NDIRF) and appear today in support of Senate Bill No. 2256.

**Brief History of Section 32-12.2-13 NDCC**

In 1994, the State of North Dakota lost sovereign immunity by decision of the ND Supreme Court. The 1995 ND State Legislature subsequently enacted a "Tort Claims Act" (Chapter 32-12.2 NDCC) to describe certain retained immunities and identify the circumstances under which suit might be brought against the state. One of the first actions subsequently taken by state agencies to reduce liability risk exposure in contractual relationships was to seek to transfer that risk, including to political subdivisions. This activity became so widespread and indiscriminate that political subdivisions sought relief from the State Legislature in 1997, the result being section 32-12.2-13 NDCC.

I was involved in the drafting of section 32-12.2-13 NDCC and recall clearly that its letter and intent was to prohibit contractual risk transfer between the state and political subdivisions in nearly all cases. The language "...unless the agreement is entered into in good faith and is set forth in a separate writing signed by both parties and supported by adequate consideration which must be stated in the agreement" (emphasis added) was intended to provide a "safety valve" for those few instances where the state and a political subdivision, in a true arms-length transaction, wished to transfer risk in order to

accomplish an objective that was not otherwise within the realm of normal operations of either party—  
not to provide carte blanche for the state to transfer liability risk in any and every type of agreement .

#### **Contractual Risk Transfer Following Enactment of Section 32-12.2-13**

Initial improvement was noted by the NDIRF following enactment of section 32-12.2-13 NDCC in 1997. We saw far fewer contracts proffered by state agencies to political subdivisions in which the political subdivision was required to accept the state's liability risk. The state's risk management manual acknowledged the 1997 legislative action in this regard and noted that contractual risk transfer to political subdivisions should not be required in "routine" contracts (Exhibit "A", attached). We would argue that this understated the legislative intent of section 32-12.2-13 but it was a good start.

Unfortunately, over time, more and more state agency contracts are requiring indemnity and additional insured status to be provided to the state by political subdivisions – even where the state agency is merely passing through appropriated or grant funds. The risk transfer language contained in some agreements the NDIRF has seen are more extensive than the rest of the contract (Exhibit "B", attached) and contain significant pitfalls for the unwary – or even the wary. Many political subdivisions are not staffed or funded to adequately analyze the agreements (which also vary in language from agency to agency and time to time).

#### **Coverage Issues**

The NDIRF seeks to facilitate the risk coverage needs of its political subdivision members. Therefore, while another party's liability assumed by an NDIRF member under the terms of a contract is not automatically covered and assumption of another party's liability is rarely sound risk management, the NDIRF will, if requested by a member, in many cases issue an endorsement adding a party to the NDIRF member's coverage if the risk is deemed manageable upon our review of the contract and an appropriate charge can be determined. The NDIRF cannot, however, agree to provide coverage by

endorsement in perpetuity, as is now being required in many state agency contracts – we have no way of determining or adequately funding this exposure. This leaves NDIRF members in the position of either foregoing the perceived benefits of a state agency contract or accepting the state’s liability without having risk financing in place to cover it – not a reasonable situation for either the NDIRF or our members.

#### Summary

- **Section 32-12.2-13 NDCC is not being observed as intended.**
- **Frictional costs for legal analysis and coverage endorsement charges are being incurred, and potentially uncovered liability is being assumed in some cases by political subdivisions.**
- **State agencies and political subdivisions both have risk financing mechanisms in place to cover their liability exposures (the State Risk Management Fund and the NDIRF, respectively).**
- **A prohibition of risk transfer is needed to halt the arbitrary shifting of liability risk from the largest and best equipped governmental entity in North Dakota (the State of North Dakota) to those with typically the least infrastructure (political subdivisions).**
- **SB 2256 will remove any doubt as to the appropriate contractual risk management relationship between state agencies and political subdivisions – each party assumes and finances its own risk.**

For these reasons, the NDIRF urges the Senate Political Subdivisions Committee to give a “DO PASS” recommendation to SB 2256.

I would be pleased to respond to any questions Committee members may have, at any time.

Thank You.

The 1997 Legislature revised the State Tort Claims Act to require that a contract between the state and a political subdivision may not contain a provision that requires one party to assume the liability of the other or the liability of a third party or to bear the costs of defense of actions against the other or against a third party, unless the agreement is entered into in good faith and is set forth in a separate writing signed by both parties and supported by adequate consideration which must be stated in the agreement.

The legislative intent represented in this revision of the Act is that the State and political subdivisions should not attempt to transfer liability or associated defense costs to each other as a routine matter in contracts between them. Such transfers are not prohibited, but they are not intended to be used indiscriminately.

In accord with this legislative intent, we recommend contracts between State agencies and political subdivisions use the *limited* indemnification form in most instances and the *inter-governmental* form only in "unique" cases. The majority of fund pass-through agreements between a State agency and a political subdivision would be defined as routine contracts where the *limited* indemnification form would be used. It should be noted, however, that if the political subdivision hires a subcontractor to perform the requirements of such a routine agreement, the subcontractor should be required to indemnify both the political subdivision and the State.

Examples of "unique" cases in which using the *inter-governmental* form would be appropriate are when the State agency determines:

- 1) the benefit to the contracting political subdivision is much greater than that to the State;
- 2) it would be an inappropriate use of State taxpayers' funds to pay costs associated with claims arising from the agreement; or
- 3) the State has no control over the activities of the political subdivision or its agents related to the agreement.

If a contract between a state agency and a political subdivision contains any indemnification language other than the *limited* indemnification form, that indemnification clause must be entered into in good faith, set forth in a "separate writing signed by both parties," and "supported by adequate consideration" which must also be stated in the agreement.

The following are several examples of appropriate indemnification clauses. (Note: When an agency chooses to use those clauses marked with an asterisk, the clauses and an explanation of the consideration for the use of

Same  
handouts  
given to  
House.

**Agreement for Cost Participation**

1. **PARTIES.** This agreement is between the State of North Dakota (State), by and through the State Water Commission (Commission), and the Maple-Steele Joint Water Resource District (District). *Add + 25*

2. **INTENT.** Commission will provide District with an amount, not to exceed \$112,500, used by District to pay for 50% of the eligible costs incurred in the 2008 Upper Maple River Dam Project Development and Preliminary Engineering Project (Project).

3. **DISTRICT RESPONSIBILITIES.** District will maintain a Project file containing documents relevant to Project for the lifetime of Project. State shall not be responsible for maintaining a Project file.

4. **PROJECT DESCRIPTION AND LOCATION.** Project entails completion of the development and preliminary engineering phase for the 2010 construction of the Upper Maple River Dam consistent with District's proposal for Project, as approved by Commission on September 30, 2008. This phase includes detailed principal and emergency spillway design, embankment design, backwater mapping, landowner meeting and permitting for the Upper Maple River Dam to be constructed in Section 35 of Carpenter Township, Steele County on the Maple River mainstem about 3.4 river miles downstream of Sussex Dam. The scope of work for Project includes site survey and mapping, regulatory issues, hydrology/hydraulics, preliminary site design, design report, project meetings, photogrammetry, soils investigation, environmental assessment, and legal and administrative work.

5. **COST.** The estimated total cost of Project is \$275,000, of which \$225,000 is considered eligible for State cost-share participation. Commission will pay District 50% of the actual eligible costs incurred in Project, not to exceed \$112,500 contingent upon availability of Commission funds and any other conditions in this agreement. Commission shall have sole discretion to determine eligible costs and availability of Commission funds. Ineligible costs include, but are not limited to, costs for technical assistance and in-kind services, and costs that are defrayed by other non-local entities that reduce the cost of Project to District; administrative, legal, and bonding costs; and District employee salaries.

6. **PAYMENT.** Commission will make a single payment upon receipt of and approval of District's written request. District will provide Commission verification of actual costs. District shall provide Commission a copy of the final Project report upon completion.

7. **INDEMNIFICATION.** See Attachment A.

8. INSURANCE.

- a. District shall secure and keep in force during the term of this agreement and District shall require all contractors/subcontractors, prior to commencement of an agreement between District and the contractor/subcontractor, to secure and keep in force during the term of this agreement, from insurance companies, government self-insurance pools, or government self-retention funds, authorized to do business in North Dakota, the following insurance coverages:
- (1) Commercial general liability, including premises or operations, contractual, and products or completed operations coverages (if applicable), with minimum liability limits of \$250,000 per person and \$1,000,000 per occurrence.
  - (2) Automobile liability, including Owned (if any), Hired, and Non-Owned automobiles, with minimum liability limits of \$250,000 per person and \$1,000,000 per occurrence.
  - (3) Workers compensation coverage meeting all statutory requirements. The policy shall provide coverage for all states of operation that apply to the performance of this agreement.
- b. The insurance coverages listed above must meet the following additional requirements:
- (1) Any deductible or self-insured retention amount or other similar obligation under the policies shall be the sole responsibility of District. The amount of any deductible or self-retention is subject to approval by State.
  - (2) This insurance may be in policy or policies of insurance, primary and excess, including the so-called umbrella or catastrophe form and must be placed with insurers rated "A-" or better by A.M. Best Company, Inc., provided any excess policy follows form for coverage. Less than an "A-" rating must be approved by State. The policies shall be in form and terms approved by State.
  - (3) The duty to defend, indemnify, and hold harmless State and Commission under this agreement shall not be limited by the insurance required in this agreement.
  - (4) State shall be endorsed on the commercial general liability policy, including any excess policies (to the extent applicable), as additional insured. State shall have all the benefits, rights and coverages of an additional insured under these policies.
  - (5) The insurance required in this agreement, through a policy or endorsement, shall include:
    - (a) A "Waiver of Subrogation" waiving any right to recovery the insurance company may have against State.

- (b) A provision that the policy and endorsements may not be canceled or modified without 30 days prior written notice to Commission.
  - (c) A provision that any attorney who represents State under this policy must first qualify as and be appointed by the North Dakota Attorney General as a Special Assistant Attorney General as required under N.D.C.C. §54-12-08.
  - (d) A provision that District's insurance coverage shall be primary (i.e., pay first) as respects any insurance, self-insurance or self-retention maintained by State and that any insurance, self-insurance or self-retention maintained by State shall be in excess of District's insurance and shall not contribute with it.
  - (e) Cross liability/severability of interest for all policies and endorsements.
  - (f) The legal defense provided to State under the policy and any endorsements must be free of any conflicts of interest, even if retention of separate legal counsel for State is necessary.
  - (g) The insolvency or bankruptcy of the insured District shall not release the insurer from payment under the policy, even when such insolvency or bankruptcy prevents the insured District from meeting the retention limit under the policy.
- (6) District shall furnish a certificate of insurance and all endorsements to Commission before commencement of this agreement.
  - (7) Failure to obtain and maintain insurance as required throughout the term of this agreement is a material breach of contract entitling State to terminate this agreement immediately.

9. **BREACH.** Violation of any provision of this agreement by District constitutes breach of this agreement. At the discretion of Commission, a breach obligates District to reimburse Commission for all funds paid to District for Project. At the discretion of Commission, breach of this agreement relieves Commission of all obligations under this agreement.

10. **AGREEMENT BECOMES VOID.** This agreement is void if not signed and returned by District within 60 days of Commission's signature.



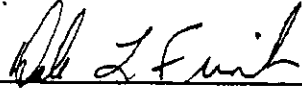
11. TERMINATION.

- a. The parties may terminate this contract by mutual consent or any party may terminate this contract upon 30 days written notice delivered to the other party by certified mail or in person.
- b. Commission may terminate this contract effective upon delivery of written notice to District, or a later date as may be stated in the notice, under any of the following conditions:
  - (1) If, as determined by Commission, an emergency exists.
  - (2) If funding from federal, state, or other sources is not obtained and continued at levels sufficient to provide the funds agreed upon for the services or supplies in the indicated quantities or term. The parties may modify the contract to accommodate a reduction in funds.
  - (3) If federal or state laws or rules are modified or interpreted in a way that the services are no longer allowable or appropriate for purchase under this agreement or are no longer eligible for the funding proposed for payments authorized by this contract.
  - (4) If any license, permit, or certificate required by law, rule, or this agreement is denied, revoked, suspended, or not renewed.
- c. Any termination of this contract shall be without prejudice to any obligations or liabilities of either party already accrued prior to termination.
- d. Commission by written notice of default (including breach of contract) to District may terminate the whole or any part of this contract:
  - (1) If District fails to provide services called for by this contract within the time specified or any extension agreed to by Commission; or
  - (2) If District fails to perform any of the other provisions of this contract, or so fails to pursue the work as to endanger performance of this contract and after receipt of written notice from Commission, fails to correct failures within 10 days or a longer period as Commission authorizes.
- e. The rights and remedies of any party provided in this contract are not exclusive.

12. **MERGER.** This contract constitutes the entire agreement between the parties. There are no understandings, agreements, or representations, oral or written, not specified within this contract. This contract may not be modified, supplemented or amended, in any manner, except by written agreement signed by both parties.

**NORTH DAKOTA STATE WATER  
COMMISSION**

By:



\_\_\_\_\_  
DALE L. FRINK  
Secretary

DATE: 10-29-2008

**MAPLE-STEELE JOINT  
WATER RESOURCE DISTRICT**

By:



\_\_\_\_\_  
RODGER OLSON  
Chairman

DATE: 12-10-08

ATTACHMENT A

**Indemnification**

District agrees to defend, indemnify, and hold harmless the State of North Dakota, its agencies, officers and employees, including the State Water Commission (State), from claims resulting from the 2008 Upper Maple River Dam Project Development and Preliminary Engineering Project (Project), including all costs, expenses and attorneys' fees, which may in any manner result from or arise out of Project, except that where court proceedings, including any and all appeals, result in a final determination that State is liable, State shall be responsible for its share only of the total liability. The legal defense provided by District to State under this provision must be free of any conflicts of interest, even if retention of separate legal counsel is necessary. District also agrees to defend, indemnify, and hold State harmless for all costs, expenses and attorneys' fees incurred in establishing and litigating the indemnification coverage provided herein. This obligation shall include an endorsement naming the State of North Dakota as a covered party during period of Project. District agrees that adequate consideration exists for this Indemnification.

READ BEFORE SIGNING

**MAPLE-STEELE JOINT WATER RESOURCE DISTRICT**

Name: Paula O. Lee

Signature: \_\_\_\_\_

Date: 12-10-08

Witness: \_\_\_\_\_

Date: \_\_\_\_\_

**NORTH DAKOTA STATE WATER COMMISSION**

By: Dale L. Frink, Secretary

Signature: Dale L. Frink

Date: 10-29-08

ATTACHMENT A

*Acknowledgement and Assumption of Risk*

The Bismarck Public School District is aware of the dangers and the risks to person and property involved in the comprehensive water festival and celebration in Grand Forks, North Dakota.

*Indemnification*

In consideration of the State Water Commission's payment of funds for eligible costs incurred in the comprehensive water festival and celebration in Bismarck, North Dakota, the Bismarck Public School District agrees to defend, indemnify, and hold harmless the State of North Dakota, its agencies, officers and employees, and the State Water Commission, from claims resulting from the comprehensive water festival and celebration in Bismarck, North Dakota provided by Bismarck Public School District, including all costs, expenses and attorneys' fees, which may in any manner result from or arise out of this agreement. The legal defense provided by the Bismarck Public School District to the State of North Dakota and the State Water Commission under this provision must be free of any conflicts of interest, even if retention of separate legal counsel is necessary. The Bismarck Public School District also agrees to defend, indemnify, and hold the State of North Dakota and the State Water Commission harmless for all costs, expenses and attorneys' fees incurred in establishing and litigating the indemnification coverage provided herein. This obligation shall continue after the termination of this agreement.

READ BEFORE SIGNING

BISMARCK PUBLIC SCHOOL DISTRICT

Name: \_\_\_\_\_

Signature: \_\_\_\_\_

Date: \_\_\_\_\_

Witness: \_\_\_\_\_

Date: \_\_\_\_\_

NORTH DAKOTA STATE WATER COMMISSION

By: Dale L. Frink, Secretary

Signature: Dale L. Frink

Date: 9-11-2007

#4

Testimony on SB 2256  
Tag Anderson, Director  
**OMB Risk Management Division**  
January 29, 2009

Mr. Chairman, and members of the Senate Political Subdivisions Committee, my name is Tag Anderson. I am the Director of the Risk Management Division of OMB. I appear today to provide testimony in opposition to Senate Bill 2256 as currently drafted and to offer proposed amendments.

It is a common and prudent practice for organizations to contractually assign risks associated with a business relationship. The State is no different. Under NDCC 32-12.2-17, the State may require, with the approval of the Director of OMB, a vendor or contractor doing business with the State to indemnify and hold harmless the State for all claims that arise from that relationship. This type of provision is appropriate in those cases where the risk of harm is significant but the State has little or no control over the instrumentalities that give rise to the risk of harm. This type of contractual assignment of risk, however, is not common, and in fact under NDCC 32-12.2-17, the default arrangement, without approval from the Director of OMB, is that the contract will simply provide for indemnification for claims based upon vicarious liability.

Vicarious liability refers to the legal doctrine that assigns liability for an injury to a person who was not at fault in causing the injury but who has a particular legal relationship to the person who did act negligently. For example, vicarious liability is often seen in the employer/employee context wherein an employer is held responsible for its employee's negligent acts even though the employer acted with reasonable care.

Like under NDCC 32-12.2-17, the proposed amendments we offer recognize that where vicarious liability is imposed, a principle generally has a right to seek indemnification from the agent that actually was negligent and caused the injury. This right of indemnification is independent and separate from any contract entered into under this section. The proposed amendments will allow the contract between the State and political subdivision to recognize this obligation and require the negligent party to step up and fully defend the action and hold the non negligent party harmless for the negligent party's actions. Where both parties are alleged to have been negligent, each

party would have to assume its own liability unless a more stringent indemnification requirement was first approved by the Director of OMB.

That concludes my testimony and would be happy to answer any questions you may have.

PROPOSED AMENDMENTS TO SENATE BILL NO. 2256

Page 1, line 9, remove the overstrike over "~~unless the agreement is entered into in~~"

Page 1, remove the overstrike over lines 10 and 11 and immediately after the period insert "A contract under this section may only contain a provision requiring one party to indemnify and hold harmless the other party for vicarious liability claims unless the director of the office of management and budget determines a more stringent indemnification provision is appropriate."

Renumber accordingly

# 2

**Testimony by Sean M. Fredricks  
Ohnstad Twichell, P.C.  
Counsel for Red River Joint Water Resource District  
and Cass County Joint Water Resource District**

**Before the House Political Subdivisions Committee  
In Support of SB 2256**

**North Dakota Legislature  
Bismarck, North Dakota  
March 6, 2009**

Chairman Wrangham, members of the Committee, I appreciate the opportunity to testify in support of SB 2256. My name is Sean Fredricks, and I am an attorney with the Ohnstad Twichell Law Firm in West Fargo. I represent the Red River Joint Water Resource District, the Cass County Joint Water Resource District, and several individual water resource districts, including the Southeast Cass Water Resource District, the Maple River Water Resource District, the North Cass Water Resource District, the Rush River Water Resource District, the Sargent County Water Resource District, the Richland County Water Resource District, and the Dickey County Water Resource District.

**Overview of Liability-Shifting**

SB 2256 is a bill that will impact all political subdivisions around the State. In short, it will prohibit an unfair State agency practice of "liability-shifting" to local governing bodies. Currently, as a condition to participating in State cost share programs for local government projects, many State agencies insist that local government entities sign indemnity agreements that shift State agency liability to the local governments. In other words, if a local government wants to take advantage of a State agency's cost share program, that local government must first agree to accept the State agency's liability for the agency's own negligence. From our perspective, State agencies should be responsible for their own liability, and local governments should be responsible for their own





liability; that is a fair arrangement, and that is the simple objective of SB 2256. Liability-shifting should not be a condition to obtaining State cost share dollars.

### **Examples of State Agency Liability-Shifting**

The experiences of water resource districts over the last year clearly illustrate why water resource districts and several other political subdivisions support SB 2256. This practice of liability-shifting very nearly prevented many water resource districts from constructing several important water projects in 2008.

As you know, the legislature appropriates a certain amount of dollars for the North Dakota State Water Commission each biennium for purposes of funding various water projects. The State Water Commission then considers requests from individual entities, including water resource districts, for State cost share dollars. The State Water Commission approves cost share dollars for eligible projects and items in accordance with the Commission's policies. Then, State Water Commission staff prepares "Cost Participation Agreements" water resource districts must sign before they can access the approved cost share dollars. Those agreements contain indemnity provisions that require water resource districts to indemnify the State Water Commission, the State of North Dakota, and all other agencies of the State for *all* claims arising out of a project *in perpetuity*, including claims arising out of the State's sole negligence, or even the State's own intentional misconduct.

In other words, the State Water Commission shifts its liability to the water resource districts. Water resource districts must accept any and all of the State's own liability arising out of a given project, even if the water resource district was not negligent in any way, and even if the State was solely negligent. In even simpler terms, the State Water Commission wants water resource districts to accept all responsibility, and costs, for any of the State's mistakes. Unfortunately, water resource districts have no alternative; they must sign the Cost Participation Agreements, including the

indemnity provisions, if they want the cost share dollars approved by the State Water Commission (and appropriated by the legislature).

On several occasions, I objected to these indemnity provisions on behalf of my clients. In some instances, I was able to negotiate revised indemnity provisions that simply required each party to accept their own liability. Again, that is a fair arrangement, and that is all SB 2256 attempts to accomplish.

Unfortunately, similar recent efforts to negotiate reasonable indemnity language with the State Water Commission have not been as successful. Instead, water resource districts have been forced to accept the liability-shift to participate in the State Water Commission's cost share program. At a State Water Commission meeting in April of 2008, a meeting where we attempted to resolve this problem, the State Water Commission actually voiced support for a legislative solution to this problem. For the most part, the parties agreed Section 32-12.2-13 of the North Dakota Century Code (the statute SB 2256 seeks to amend) is the root of the problem. We agreed in principle, at the time, to seek a solution during the session.

#### **Accepting Liability-Shifting Without Insurance**

The North Dakota Insurance Reserve Fund has indicated it will not provide endorsements for water resource districts to indemnify the State Water Commission and all State agencies for the State's own negligence or intentional misconduct *in perpetuity*. As a result, water resource districts have to accept the liability-shifting in these indemnity provisions, yet they lack the requisite insurance to cover that indemnification. So, water resource districts, and the water managers that serve on water resource district boards, are knowingly forced to accept State agency liability when they lack the insurance, or the financial resources, to cover that liability. In addition to the financial risk to water resource districts created by this arrangement, individual water managers could be at great risk if a board actually had to indemnify the State for the State's own negligence.

In our negotiations and discussions with the State over the course of the past year, the State frequently contended the liability-shift was necessary to protect State funds. That concern, however, does mean a liability-shift to the detriment of local governments is fair. Further, local governments can certainly understand the need to protect funds, but the State's argument only highlights the heightened risk to local governments: if the State is concerned about its funds, consider the burden a liability-shift creates for local governments, whose funds are obviously limited to a much greater extent.

### **Legal Reasons to Prohibit Liability-Shifting**

Chapter 32-12.2 of the North Dakota Century Code already limits the dollar amount for any State liability, and specifically excludes liability for several of the State's actions and negligence. For example, the State Water Commission and the State Engineer's Office have expressed concern over liability for decisions to grant or deny various permits. However, Section 32-12.2-02(3)(d) already specifically excludes State liability for decisions to grant or deny permits. That is just one example of many instances in Chapter 32-12.2 that already provides the State with immunity. If the State is already immune under Chapter 32-12.2, there is absolutely no reason for the State to shift its liability to water resource districts, especially when water resource districts cannot obtain insurance to cover the State's liability, and especially when water resource districts lack the funds to answer for the State's negligence.

The Attorney General's Office recently issued an Opinion that concludes water resource districts lack legal authority to accept liability-shifting indemnity provisions in contracts, with the sole exception of contracts with State agencies. The authority for that exception cited by the Attorney General's Office is Section 32-12.2-13, the statute SB 2256 seeks to amend. The result of the Opinion is very clear: if SB 2256 does not pass, the State Water Commission will continue to insist on these inequitable liability-shifting arrangements, to the detriment of water resource districts.

Similarly, other agencies will continue their liability-shifting practices as well, to the detriment of all other local governments around the State.

### **Inherent Disadvantages of Local Governments**

Water managers work tirelessly to create and construct important water projects for the benefit of their communities. Unfortunately, these liability-shifting practices leave water managers with two difficult alternatives: (1) they can accept the State's liability, liability for which they cannot obtain insurance, and for which their boards simply lack funds to cover; or (2) they can refuse the State's unfair indemnity provisions (which will result in the loss of any State cost share), and they can attempt to construct projects without any State cost share. As you can probably guess, most water resource districts lack the financial resources to construct projects without State cost share dollars. In addition, local landowners are not likely to support water projects, no matter how important, without cost participation from the State to offset their own assessments. As you can see, this is a very difficult dilemma for water managers.

Regrettably, many water resource districts are unaware of what exactly the State is requiring in these indemnity provisions. Most water resource districts have such small general funds, they lack resources to retain attorneys to review the State Water Commission's Cost Participation Agreements, or to object to these indemnity terms. In those instances, water resource districts typically sign the agreements, and accept all of the State's liability, without even knowing it. I suspect other local governments around the State are doing the same.

SB 2256 will eliminate any ambiguities or questions regarding whether or not Section 32-12.2-13 permits these types of indemnity provisions. If the legislature passes SB 2256, State agencies and local governments will simply be responsible for their own liability. For water resource districts, passage of SB 2256 will mean the State Water Commission will be responsible for its own liability, and water resource districts will be responsible for their own liability;

water resource districts will be able to obtain insurance for their projects; and State Water Commission staff will release cost share dollars approved by the State Water Commission (and the legislature) so water resource districts can construct important water projects around the State.

My clients and I respectfully request a Do Pass recommendation on SB 2256, to eliminate the unfair State agency practice of liability-shifting.

Thank you for your consideration.



#3

**TESTIMONY OF STEVE SPILDE  
CEO, NORTH DAKOTA INSURANCE RESERVE FUND  
to the  
N.D. HOUSE POLITICAL SUBDIVISIONS COMMITTEE  
IN SUPPORT OF SENATE BILL NO. 2256**

**March 6, 2009**

Chairman Wrangham and members of the House Political Subdivisions Committee, my name is Steve Spilde - I am the Chief Executive Officer of the North Dakota Insurance Reserve Fund (NDIRF) and appear today **in support of Senate Bill No. 2256.**

**Brief History of Section 32-12.2-13 NDCC**

In 1994, the State of North Dakota lost sovereign immunity by decision of the ND Supreme Court. The 1995 ND State Legislature subsequently enacted a "Tort Claims Act" (Chapter 32-12.2 NDCC) to describe certain retained immunities and identify the circumstances under which suit might be brought against the state. One of the first actions subsequently taken by state agencies to reduce liability risk exposure in contractual relationships was to seek to transfer that risk, including to political subdivisions. This activity became so widespread and

indiscriminate that political subdivisions sought relief from the State Legislature in 1997, the result being section 32-12.2-13 NDCC.

I was involved in the drafting of section 32-12.2-13 NDCC and recall clearly that its letter and intent was to prohibit contractual risk transfer between the state and political subdivisions in nearly all cases. The language “...unless the agreement is entered into in good faith and is set forth in a separate writing signed by both parties and supported by adequate consideration which must be stated in the agreement” (emphasis added) was intended to provide a “safety valve” for those few instances where the state and a political subdivision, in a true arms-length transaction, wished to transfer risk in order to accomplish an objective that was not otherwise within the realm of normal operations of either party– not to provide carte blanche for the state to transfer liability risk in any and every type of agreement .

### **Contractual Risk Transfer Following Enactment of Section 32-12.2-13**

Initial improvement was noted by the NDIRF following enactment of section 32-12.2-13 NDCC in 1997. We saw fewer contracts proffered by state agencies to political subdivisions in which the political subdivision was required to accept the state’s liability risk. The state’s risk management manual acknowledged the 1997

legislative action in this regard and noted that contractual risk transfer to political subdivisions should not be required in “routine” contracts (Exhibit “A”, attached). We would argue that this understated the legislative intent of section 32-12.2-13 but it was a good start.

Unfortunately, over time, more and more state agency contracts are requiring indemnity and additional insured status to be provided to the state by political subdivisions – even where the state agency is merely passing through appropriated or grant funds. The risk transfer language contained in some agreements the NDIRF has seen are more extensive than the rest of the contract (Exhibit “B”, attached) and contain significant pitfalls for the unwary – or even the wary. Many political subdivisions are not staffed or funded to adequately analyze the agreements (which also vary in language from agency to agency and time to time).

### **Coverage Issues**

The NDIRF seeks to facilitate the risk coverage needs of its political subdivision members. Therefore, while another party’s liability assumed by an NDIRF member under the terms of a contract is not automatically covered and assumption of another party’s liability is rarely sound risk management, the



NDIRF will, if requested by a member, in many cases issue an endorsement adding a party to the NDIRF member's coverage if the risk is deemed manageable upon our review of the contract and an appropriate charge can be determined. The NDIRF cannot, however, agree to provide coverage by endorsement in perpetuity, as is now being required in many state agency contracts – we have no way of determining or adequately funding this exposure. This leaves NDIRF members in the position of either foregoing the perceived benefits of a state agency contract or accepting the state's liability without having risk financing in place to cover it – not a reasonable situation for either the NDIRF or our members.

#### **Summary**

- **Section 32-12.2-13 NDCC is not being observed as intended.**
- **Frictional costs for legal analysis and coverage endorsement charges are being incurred, and potentially uncovered liability is being assumed in some cases by political subdivisions.**
- **State agencies and political subdivisions both have risk financing mechanisms in place to cover their liability exposures (the State Risk Management Fund and the NDIRF, respectively).**

- **A prohibition of risk transfer is needed to halt the arbitrary shifting of liability risk from the largest and best equipped governmental entity in North Dakota (the State of North Dakota) to those with typically the least infrastructure (political subdivisions).**
- **SB 2256 will remove any doubt as to the appropriate contractual risk management relationship between state agencies and political subdivisions – each party assumes and finances its own risk.**

For these reasons, the NDIRF urges the House Political Subdivisions Committee to give a “DO PASS” recommendation to SB 2256.

I would be pleased to respond to any questions Committee members may have, at any time.

Thank You.

#4

**Testimony of Michael Buringrud  
North Cass Water Resource District  
Cass County Joint Water Resource District**

**Before the House Political Subdivisions Committee  
In Support of SB 2256**

Thank you, Chairman Wrangham and members of the Committee. My name is Mike Buringrud. I am the Chairman of the North Cass Water Resource District, and a member of the Cass County Joint Water Resource District. Both the North Cass and Cass County Joint Boards support SB 2256.

This indemnity issue has been very frustrating for water resource districts. In fact, the issue very nearly derailed a project the North Cass Board planned to construct in 2008. North Cass owns and operates Cass County Drain #32. In 2008, as a result of landowner feedback, the North Cass Board decided to reconstruct Drain 32. We applied to the State Water Commission for cost share, the Commission approved it, and we signed a cost share agreement. There were always issues with these indemnity clauses, but we knew we had to sign them if we wanted the cost share.

About a month before the construction season, the Commission notified us we did not have the proper insurance, and that we could not have any of the cost share for Drain 32 until we provided evidence of insurance for the indemnity. We argued over the issue for awhile, and the State Water Commission finally held a special meeting to discuss indemnity.

The way I understand the deal we struck, we still agreed to accept the State's liability forever, but we only had to provide insurance coverage for the State until the end of construction. The North Cass Board knew we had no choice: we could either agree, or we could forget about the Drain 32 reconstruction. So, we signed it, and we finished our project. But we are obviously concerned about having to cover the State for its mistakes. That is not fair to the Boards, and it is not fair to the taxpayers in our counties.

The North Cass Water Resource District, the Cass County Joint Water Resource District, and I respectfully request a Do Pass on SB 2256.

#5

**Testimony of Joel Halvorson  
Traill County Water Resource District**

**Before the House Political Subdivisions Committee  
In Support of SB 2256**

Chairman Wrangham, members of the Committee, my name is Joel Halvorson, and I am a Water Manager on the Traill County Water Resource District. The Traill County Board opposes the State Water Commission's indemnity requirements, and we support SB 2256. These cost share contracts from the State unfairly put water resource districts in difficult situations. The State Water Commission should be responsible for its own liability, and water resource districts should be responsible for their own liability. The idea behind SB 2256 is simple: if the State is negligent, we should not have to pay for it.

The Traill County Board requests a Do Pass on SB 2256. Thank you for your consideration.

SENATE BILL No. 2256

#1

Testimony by Gary Thompson

President of the North Dakota Water Resource Districts Assn.

Mr. Chairman, Committee Members, my name is Gary Thompson and I would like to thank you for allowing me to testify here today on behalf of the North Dakota Water Resource Districts Assn.

Senate bill 2256 deals with the liability of certain entities that are involved in the construction of water projects within the State of North Dakota. Before a project can get started certain Insurances need to be in place. The Water Boards need to make sure they are covered for any liability that they may have in the project, the contractor needs to make sure that their liabilities are taken care of as well. The same holds true for any other entity that has an interest in the same project whether it be the Water board that oversees the project to the State that has a responsibility to give us directives on how to proceed. The purpose of this bill is to make sure that all entities are responsible for their own liabilities.

The change we are asking for comes in the North Dakota Century Code **32-12.2-13. Contract between the state and a political subdivision.** A contract between the state and a political subdivision may not contain a provision that requires one party to assume the liability of the other or the liability of a third party or to bear the costs of defense of actions against the other or against a third party. We are asking to leave out the rest of the statute that reads and I quote **“unless the agreement is entered into in good faith and is set forth in a separate writing signed by both parties and supported by adequate consideration which must be stated in the agreement,** end of quote. We believe that this change will

● give each entity their own and deserved liability in each project that goes through the proper procedures administered by law.

Mr. Chairman and Committee Members, the North Dakota Water Resource Districts Assn. at its annual meeting in December passed a resolution for this legislation and would ask for a **do pass** on bill 2256



# 7

Testimony on SB 2256  
Tag Anderson, Director  
**OMB Risk Management Division**  
~~January 29, 2009~~  
3/6

Mr. Chairman, and members of the Senate Political Subdivisions Committee, my name is Tag Anderson. I am the Director of the Risk Management Division of OMB. I appear today to provide testimony in opposition to Senate Bill 2256 as currently drafted and to offer proposed amendments.

It is a common and prudent practice for organizations to contractually assign risks associated with a business relationship. The State is no different. Under NDCC 32-12.2-17, the State may require, with the approval of the Director of OMB, a vendor or contractor doing business with the State to indemnify and hold harmless the State for all claims that arise from that relationship. This type of provision is appropriate in those cases where the risk of harm is significant but the State has little or no control over the instrumentalities that give rise to the risk of harm. This type of contractual assignment of risk, however, is not common, and in fact under NDCC 32-12.2-17, the default arrangement, without approval from the Director of OMB, is that the contract will simply provide for indemnification for claims based upon vicarious liability.

Vicarious liability refers to the legal doctrine that assigns liability for an injury to a person who was not at fault in causing the injury but who has a particular legal relationship to the person who did act negligently. For example, vicarious liability is often seen in the employer/employee context wherein an employer is held responsible for its employee's negligent acts even though the employer acted with reasonable care.

Like under NDCC 32-12.2-17, the proposed amendments we offer recognize that where vicarious liability is imposed, a principle generally has a right to seek indemnification from the agent that actually was negligent and caused the injury. This right of indemnification is independent and separate from any contract entered into under this section. The proposed amendments will allow the contract between the State and political subdivision to recognize this obligation and require the negligent party to step up and fully defend the action and hold the non negligent party harmless for the negligent party's actions. Where both parties are alleged to have been negligent, each

party would have to assume its own liability unless a more stringent indemnification requirement was first approved by the Director of OMB and the Attorney General. Full indemnification would in our estimation be rare, and the amendments we offer would require the reasons for requiring more stringent indemnification to be explained as well as addressing whether the political subdivision would need additional coverage to assume the liability and if so whether coverage for that liability was available.

That concludes my testimony and would be happy to answer any questions you may have.



# 8

PROPOSED AMENDMENTS TO SENATE BILL NO. 2256

Page 1, line 9, remove the overstrike over "~~unless the agreement is entered into in~~"

Page 1, remove the overstrike over lines 10 and 11 and immediately after the period insert "A contract under this section may only contain a provision requiring one party to indemnify and hold harmless the other party for vicarious liability claims unless the director of the office of management and budget and the attorney general determine a more stringent indemnification provision is necessary. Approval from the director of the office of management and budget and the attorney general must be in writing and must address the rationale for requiring more stringent indemnification together with the political subdivision's need and ability to obtain coverage for the assumed liability through insurance, government self-retention pools, or other financial arrangements."

Renumber accordingly

#9

**HOUSE POLITICAL SUBDIVISIONS COMMITTEE**

**March 6, 2009**

**9 a.m. – Prairie Room**

**North Dakota Department of Transportation  
Dreux Kautzmann, Special Assistant Attorney General**

**SB 2256**

---

Good morning Mr. Chairman and members of the committee. I'm Dreux Kautzmann, Special Assistant Attorney General with the North Dakota Department of Transportation (NDDOT). I am here today to provide testimony in support of Risk Management's proposed amendments to SB 2256.

Some background: Every year the department typically allows some political subdivisions to close down some of our roads so that they can utilize them for a parade or fair. These usually take place during the summer months. We enter into a short written agreement with the political subdivision detailing the time and date of closure, the road affected, and what they need to do as far as providing a detour. The agreement also requires the political subdivision to return the road to the condition it was in prior to the fair or parade.

We would like to be able to continue to enter into the same types of agreements with political subdivisions as we have in the past. We believe these events are both beneficial to the local communities involved and serve a valid purpose. We believe Risk Management's amendment is consistent with the department's current policy regarding these types of activities.

The agreements we enter into with political subdivisions require them to defend the NDDOT/State and cover claims for damages where the NDDOT/State is not at fault. Currently, these are the only agreements where we require this level of protection from a political subdivision.

I would like to note that the department is unaware of any concerns on the part of the political subdivisions concerning the level of protection we require from them in our parade and fair agreements. To our knowledge, we've always been able to resolve any issues that they may have had regarding these types of agreements.

The department believes, based on advice from State Risk Management, that it is appropriate to ask for the level of protection it does in these instances for the following reasons:

- The benefit to the political subdivision in having the fair or parade is solely in their favor.
- NDDOT has no control over the fair or parade activities of the political subdivision.
- It would be an inappropriate use of state taxpayer dollars to pay costs associated with legal claims arising from the fair or parade activities.

Please keep in mind that these events may involve the consumption of alcohol, athletic activities, or other activities which do not fall under our mission. We don't believe that it is appropriate to pay state dollars to defend legal claims arising from these types of activities.

If this bill were to pass, the NDDOT/State would now have to, at least initially, potentially defend some third party legal claims even though it may have had nothing to do with the activity (fair or parade) that gave rise to the claim. This could potentially cause the NDDOT/State to incur legal expenses that it would not have to under current law.

Mr. Chairman, I would be happy to answer any questions that you or the committee may have. Thank you.