

NORTH DAKOTA LEGISLATIVE MANAGEMENT

Minutes of the

NATURAL RESOURCES COMMITTEE

Wednesday, February 22, 2012
Roughrider Room, State Capitol
Bismarck, North Dakota

Representative Chuck Damschen, Chairman, called the meeting to order at 10:00 a.m.

Members present: Representatives Chuck Damschen, Dick Anderson, Michael D. Brandenburg, Lyle Hanson, Curt Hofstad, Bob Hunsakor, Mike Nathe; Senators Bill Bowman, Randy Burckhard, Robert Erbele, Oley Larsen, Philip M. Murphy, Connie Triplett

Members absent: Representatives Duane DeKrey, David Drovdal, Scot Kelsh, David S. Rust, Vicky Steiner; Senator Layton Freborg

Others present: Representative Jerry Kelsh and Senator Larry Robinson, members of the Legislative Management, were also in attendance.

See [Appendix A](#) for additional persons present.

It was moved by Senator Erbele, seconded by Representative Brandenburg, and carried on a voice vote that the minutes of the previous meeting be approved as distributed.

FEDERAL DESIGNATIONS STUDY

Chairman Damschen gave a summary on wetland easements obtained by the United States Fish and Wildlife Service. He said these easements have created hard feelings between landowners and federal agencies because agencies have taken control of land through legal action. He said emotions run high in the issue of property rights and the federal government.

Mr. Tracy Potter, Executive Director, Fort Abraham Lincoln Foundation, provided testimony on the Northern Plains Heritage Foundation. He said the foundation provides grants and does not have any impact on private landowners. He said the foundation has no regulatory impact and does not own property nor tell anyone what to do with property. He said there are 49 national heritage areas and each has a theme. In this state, he said, a feasibility study was conducted by Ms. Amy Mosset from the Three Affiliated Tribes. He said letters of support were received from the counties involved as part of the feasibility study. He said there was no opposition at that time. He said the Northern Plains National Heritage Area was approved by Congress in 2009. He said the feasibility study developed the themes of the home of the Mandan and Hidatsa Indians--a focus on Lewis and Clark and Sakakawea and a focus on George Custer and Sitting Bull. He said there is a misconception that the program relates to national parks. He said the foundation is developing a management plan to send to the Secretary of the

Interior by the end of March 2012. He said as part of the management plan there will be meetings in each of the five counties involved in the area. He said there was a pilot grant program, and 13 organizations sent in applications and 9 were recommended for funding. He said the funding available was \$150,000. He said there was a perception of a conflict of interest because members of the grant committee were part of the organizations that received grants. He said the grants were stopped by the National Park Service. He said there was no financial interest by the volunteer board members. He said the National Park Service was asked to cancel only those grants with the appearance of a conflict of interest. He said the National Park Service required the grant process to start over, and it is being chaired by Ms. Susan Wefald. He said the public may comment on the management plan at a hearing on March 7 at the Bismarck Veterans Memorial Public Library.

In response to a question from Representative Nathe, Mr. Potter said it is not his understanding that 2011 Senate Bill No. 2204 prohibited the use of Fort Abraham Lincoln Foundation money to match Northern Plains Heritage Foundation money for exhibits for the earth lodges at Fort Lincoln. He said he did not think the law completely restricts projects on state property. He said if the state funds the activity or provides property, then there needs to be legislative approval.

In response to a question from Representative Nathe, Mr. Potter said if the law is intended to overrule federal law, it is unconstitutional. He said the Attorney General issued a letter opinion expressing concern with the constitutionality of bills like Senate Bill No. 2204.

In response to a question from Representative Brandenburg, Mr. Potter said volunteer labor of the board of directors can be used as part of the match. He said \$440,000 has been appropriated for grants and \$47,000 has been expended on management. He said the next grant round will be for around \$300,000 and there is more than enough match available. Mr. Potter said heritage areas are designed to be operated by a local nonprofit for a period of 15 years and after that time to be self-sustainable. He said other states with heritage areas have gone back after the 15 years for additional funds; however, he said, the foundation in this state wants to be done in 15 years.

In response to a question from Senator Triplett, Mr. Potter said the grant request from Fort Lincoln will be for 10 or 12 interpretive panels at the archaeology lodge. He said one lodge is empty and the goal is to have the panels tell how archaeology is used to understand the earth lodges. He said there is a request for interpretative signage at Chief Looking Village. He said the Dakota Zoo wants money for flood recovery. He said the zoo is tied to the heritage area because of the animals seen by Lewis and Clark.

In response to a question from Senator Triplett, Mr. Potter said at one time there was a hope to move a depot to the State Railroad Museum in Mandan. He said the railroad is not the main story, but Custer was here because of the railroad.

In response to a question from Representative Nathe, Mr. Potter said Senate Bill No. 2204 prohibits the use of state funds as matching funds in heritage area grants.

Ms. Sandy Clark, North Dakota Farm Bureau, provided testimony and a handout ([Appendix B](#)) of Senate Bill No. 2204. She said the federal law allowed for landowners to opt-in and the state law provides for the state to opt-in as well. She said the Farm Bureau opposes the Northern Plains National Heritage Area because of concerns with future regulation of viewshed and with a concern on fiscal responsibility of spending money on these types of grants. She said the program should have boundaries. She said the statute prohibits state matching funds unless there is legislative approval. She said there is concern that the Division of Tourism gives grants to private entities and these funds are commingled with other funds and then used for match. She said the concern is that the money ends up being used as a match. She said the management plan does not acknowledge Senate Bill No. 2204, but refers to a failed bill.

In response to a question from Representative Brandenburg, Ms. Clark said the grant money comes from the Department of the Interior and is the same agency that contains the United States Fish and Wildlife Service.

In response to a question from Senator Triplett, Ms. Clark said the North Dakota Farm Bureau does not oppose historic preservation but does oppose the Northern Plains National Heritage Area, partly due to fiscal responsibility.

In response to a question from Senator Triplett, Ms. Clark said the North Dakota Farm Bureau has not opposed the Division of Tourism budget which in part supports historic preservation.

POTASH STUDY

Mr. Ryan Rauschenberger, Deputy Commissioner, Tax Department, presented written testimony ([Appendix C](#)) on potash taxation. Under the current law, he said, if a one million-ton potash processing facility were operated today at full capacity and selling the product for \$400 per ton, at a 2 percent tax rate, the facility would generate \$8 million in taxes annually.

He said this does not take into account any taxes generated from the sale of byproducts. He said the average consolidated Burke County mill rate is approximately 210 mills. If this were applied to potash production commercial property assessed at a market value of \$100 million, it would produce an annual tax revenue stream of approximately \$1,050,000 for the county and other political subdivisions.

In response to a question from Senator Bowman, Mr. Rauschenberger said there needs to be an analysis of whether the revenue stream will be big enough to handle the impact.

In response to a question from Representative Nathe, Mr. Rauschenberger said the state's money would be placed in the general fund. He said the method is more important than the rate. He said other states have potash on public land and their tax rates combined with royalty rates equal 4 percent to 5 percent.

Mr. Doug Graupe, President of the North Dakota County Commissioners Association and Divide County Commissioner, presented written testimony ([Appendix D](#)) on potash mining and taxation. He listed six concerns with potash mining and taxation. The concerns are:

1. Production and processing facility sites must be required to post a reclamation bond.
2. It is unclear as to whether zoning and siting for production and processing facilities is preempted by the Industrial Commission or remains with political subdivisions.
3. Spacing units on wells is of concern.
4. The taxation model should mirror the gas plant model.
5. The use of the point-of-sale method of taxation versus the use of production taxation provides a more immediate taxation that benefits state and local governments.
6. The desire is to have the allocation of 100 percent of the first \$1 million of tax revenue to the county and a step-down to an allocation of no less than 30 percent local and 70 percent state, instead of the ability to tax property.

In response to a question from Representative Damschen, Mr. Graupe said local zoning is preferred because people affected by the industry have a voice in the process.

Ms. Janet Cron, Director of Tax Equalization and Planning and Zoning Board member, Burke County, presented written testimony ([Appendix E](#)) on issues with potash mining. The issues included:

1. The use and availability of water.
2. Salt disposal and storage.
3. Well field piping containing saltwater.
4. The distribution of tax proceeds in a manner consistent with the Municipal Tax Sharing Act in Saskatchewan which distributes taxes on potash mines with eligible rural and urban municipalities within a 20-mile radius of a potash mine shaft and headframe.

5. Jobs as a positive impact.
6. Infrastructure for the 1,500 jobs for construction and probable labor force of 79 salaried and 193 hourly paid personnel.

In response to a question from Representative Anderson, Ms. Cron said there is no nearby rural water system, but the water authority may be able to provide water.

In response to a question from Senator Bowman, Ms. Cron said the potash companies have not provided enough communication. She said the local governments do not have enough expertise.

In response to a question from Senator Burckhard, Ms. Cron said there needs to be more communication from the Industrial Commission as well.

In response to a question from Representative Hunskor, Ms. Cron said a large concern is with the salt and the transportation of saltwater from the well head to the plant. She said a break in the pipeline could be disastrous.

In response to a question from Senator Triplett, Ms. Cron said that although the companies have said they will not have piles of salt, she does not trust the companies.

Mr. Don Dickie, Dakota Salts, answered questions for the committee. In response to a question from Representative Hofstad, Mr. Dickie said state data was used for siting the exploratory well. He said the information gained from the exploratory well was published within the company in January. He said the results showed different mineralization than expected. He said the seams were thinner and not as rich as in comparison to the project that has begun in England. He said the timeline from engineering and permits to completion of a potash mine is three years.

In response to a question from Representative Nathe, Mr. Dickie said Dakota Salts is focusing efforts in England.

In response to a question from Senator Triplett, Mr. Dickie said it is regrettable if the test well site has not been cleaned up, but it will be returned to its previous condition.

In response to a question from Representative Damschen, Mr. Dickie said the company will use every effort to address the concerns presented at this meeting.

In response to a question from Representative Damschen, Mr. Dickie said there are three main minerals that would come from potash mining in this state--potash, magnesium, and sodium chloride.

Mr. Dickie said sodium chloride is returned two- or three-to-one as to the potash and is an issue that needs to be addressed.

Mr. Ted Hawbaker, landowner, Burke County, presented testimony on potash mining. He said there was no zoning for the test well. He said the Attorney General said it was within the jurisdiction of the Industrial Commission. He said the main byproduct is sodium chloride which is used for road salt, cattle salt, and table salt. He said in Canada these uses make up one-half of 1 percent of the salt. He said Dakota

Salts does not know how it will handle the salt. He said if a plant is started without a plan for the salt, it will be too late. He said the test well has plastic and junk on it a year and a half after being drilled. He said pipelines will connect each well. He said there is a concern that the pipelines will break. He said the taxation of oil is at 11 percent and oil is needed by the United States, but potash is taxed at a much lower rate and 80 percent to 90 percent is exported to foreign countries.

In response to a question from Representative Hunskor, Mr. Hawbaker said the two lines per well will most likely serve more than one well, but will be under high pressure to be able to push the liquid that distance.

Representative Hunskor told of a rupture of a saltwater pipeline for the oil industry that contaminated over 40 acres.

Representative Anderson said all saltwater mines could have a meter going in and out and shut down automatically if there is a problem.

In response to a question from Representative Damschen, Mr. Hawbaker said farmers in this country use almost no potash. He said some potash is used for corn. He said rice farming uses the most potash, and the soil in China and Russia need more potash. He said the soil content in the United States does not need as much potash.

In response to a question from Senator Bowman, Mr. Hawbaker said in Canada it has been found not to be feasible to return salt back to the cavern from which the salt came.

Mr. Dickie said Dakota Salts received a grant from the Industrial Commission for studying the viability of using compressed air energy storage. He said the report has been completed and filed with the state.

ENVIRONMENTAL PROTECTION AGENCY STUDY

Mr. Tom Trenbeath, Attorney General's office, presented testimony based on a handout ([Appendix F](#)) on actions involving the Environmental Protection Agency (EPA) and this state. He said North Dakota is a party to three separate lawsuits challenging the EPA's greenhouse gas regulatory scheme. He said the state is party to a lawsuit challenging the method of implementing sulfur dioxide standards. He said the state recently won a lawsuit against EPA regarding Minnkota's best available control technology for nitrous oxide emissions and the judgment has not been appealed. He said the state is suing the EPA regarding regional haze and the state implementation plan. He said the state is involved with litigation with Minnesota regarding the Next Generation Energy Act and the externality values assigned to coal energy generated in North Dakota.

Mr. Trenbeath said the state has filed amicus briefs in a number of cases or has joined amicus briefs. He said the federal government can impose regulations on this state or let this state regulate an area. He said

most of the arguments with the EPA result when Congress has left an issue to the state and the EPA does something contrary to the congressional dictate.

In response to a question from Senator Bowman, Mr. Trenbeath said this state hired a Minnesota law firm to conduct the lawsuit against Minnesota because of past performance and the action had to be filed in Minnesota.

In response to a question from Representative Brandenburg, Mr. Trenbeath said transmission is not an issue with the lawsuit against Minnesota.

In response to a question from Representative Hofstad, Mr. Trenbeath said the only direct appropriation to the Attorney General's office for lawsuits is for the Minnesota lawsuit. He said the funds used to sue the EPA mainly come from the State Department of Health.

In response to a question from Representative Damschen, Mr. Trenbeath said the EPA is suable by the state and sometimes the EPA is absolutely wrong.

In response to a question from Representative Brandenburg, Mr. Trenbeath said in matters of environmental regulation, the federal government is supreme, and they can control industry. He said the problem is when the EPA is not acting under law or inconsistent with the law.

Mr. Dave Glatt, Chief, Environmental Health Section, State Department of Health, provided written testimony ([Appendix G](#)) on EPA programs and application in North Dakota.

In response to a question from Representative Hofstad, Mr. Glatt said as newer employees are hired by the EPA, there is a lack of local knowledge and trust. He said the EPA has flexibility in some areas and needs to allow that flexibility when required by the location. He said most of the contact with the EPA is through telephone calls, and it is difficult to get officials to travel to North Dakota.

In response to a question from Senator Triplett, Mr. Glatt said the EPA wants every state to do the same thing. He said the end outcome should be the same; however, different paths should be allowed to reach that outcome. He said there needs to be a level playing field within the state but not nationwide. He said industry should be allowed the opportunity to reach the end point using the process that works best.

In response to a question from Representative Brandenburg, Mr. Glatt said the EPA signs consent agreements after being sued which require states to take specific actions. He said the states do not have a voice in drafting the consent agreements.

In response to a question from Representative Brandenburg, Mr. Glatt said there should be national

legislation that the EPA cannot sign a consent agreement without state approval or approval of involved parties.

In response to a question from Representative Damschen, Mr. Glatt said this state uses science and the law to make decisions. For regional haze, he said, the state followed the law and used the best science. He said the EPA disagreed. He said lawsuits waste money that could be used for environmental protection.

In response to a question from Senator Triplett, Mr. Glatt said funds for legal fees from the Legislative Assembly have been helpful and future funding for technical staff is needed.

Mr. Dane Braun, Program and Policy Analyst, Department of Agriculture, presented written testimony ([Appendix H](#)) on the spill prevention, control, and countermeasure rule; agricultural dust; and pesticide drift.

In response to a question from Representative Kelsh, Mr. Braun said the spill prevention, control, and countermeasure rule requires farmers with more than 1,320 gallons of on-farm oil and fuel storage and a reasonable expectation of oil discharge into a waterway to create a plan. He said the EPA has not provided consistent advice as to what is reasonable.

In response to a question from Representative Hofstad, Mr. Braun said the federal spill prevention, control, and countermeasure rule is enforced by the federal government and the state is not allowed to enforce the rule. He said the state is providing education for farmers.

In response to a question from Senator Triplett, Mr. Braun said the Agriculture Commissioner hosted Mr. Jim Martin, Administrator for Region 8, Environmental Protection Agency, and that was worthwhile. He said it was especially worthwhile for the staff who accompanied Mr. Martin.

In response to a question from Representative Kelsh, Mr. Braun said the Department of Agriculture has staff members in working groups with the EPA so that relationships are developed. He said the department is trying to have other EPA officials travel to North Dakota, but it is difficult to accomplish.

No further business appearing, Chairman Damschen adjourned the meeting at 2:20 p.m.

Timothy J. Dawson
Committee Counsel

ATTACH:8