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# **SUMMARY**

## **BRIEFLY – THIS REPORT SAYS**

### **ADMINISTRATIVE RULES COMMITTEE**

The Council reviewed all state administrative agency rulemaking actions from December 1984 through October 1986. For the first time the Council filed a formal objection to a rule passed by an agency. The rule provided that bed and breakfast facilities could not use food in hermetically sealed containers not prepared in a food processing establishment.

The Council studied the statutes governing rulemaking procedures and grants of rights of appeal from decisions of administrative agencies. The Council recommends a bill to make the Wheat Commission and the Department of Human Services with respect to its rules under the family subsidy program subject to Chapter 28-32. The Council recommends a concurrent resolution to direct the Council to conduct a comprehensive study of the Administrative Agencies Practice Act, North Dakota Century Code Chapter 28-32.

### **AGRICULTURE COMMITTEE**

The Council studied several issues relating to North Dakota's wetlands, including the economic and other impacts of the state's drainage permit laws. The Council recommends a bill to provide financial assistance through the agribond program to landowners in developing water projects; a bill to establish a wetlands mediation advisory board to resolve disputes relating to wetlands; a bill to require the affirmative recommendation of the board of county commissioners before the federal government can acquire wetlands; and a bill to declare the wetlands policy of the state.

The Council studied the duties, qualifications, and authority of the State Forester, the location of the office of the State Forester, and the placement of the State Forest Service under the jurisdiction of the Board of Higher Education. The Council recommends a bill to make the State Department of Forestry a division of the State Soil Conservation Committee, to require the Soil Conservation Committee to appoint the State Forester, to require the State Forester to have a Bachelor of Science degree in forestry, and to require the office of the State Forester to be located in Bismarck.

The Council studied insolvencies of grain warehousemen and grain buying or commission firms, and the feasibility of providing surety bond coverage, insurance coverage, or other insolvency protection for grain producers entering into credit-sale contracts. The Council makes no recommendation for legislative action.

The Council studied the problems associated with, and compiled information on, the planting and maintaining of new shelterbelts and the protection and rejuvenation of existing shelterbelts. The Council makes no recommendation for legislative action.

The Council received annual reports from the Land Reclamation Research Center on the status of all reclamation and research projects, conclusions reached, and future goals and objectives of the Land Reclamation Research Center.

### **BUDGET SECTION**

The Council received a report regarding the federal Gramm-Rudman-Hollings law, which requires a balanced federal budget by federal fiscal year 1991 and requires across-the-board reductions in federal appropriations if the annual budget deficit ceiling required for each year is not met. The Council received a report on the federal Tax Reform Act of 1986 that could result in a decrease in North Dakota income taxpayers' average federal tax liability of up to 10 percent, and the decrease in state individual income tax revenues, due to the lower federal tax liability, could approach \$7 million per year. The Council approved the nonresident tuition rates set by the State Board of Higher Education and the expenditure of \$391,186 in gift funds for the construction of a research and extension service staff facility at the Carrington Experiment Station.

The Council received revised revenue estimates presented by the Office of Management and Budget in May 1986. The 1985-87 biennium revised revenue estimate is for \$115.8 million less than the 1985 Legislative Assembly revenue

estimate. The Council received reports on the enhanced audit program, the farm credit counseling program, the Workmen's Compensation Bureau's accounting and data processing systems modernization, and oil overcharge funds anticipated to be received by the state.

The Council denied the Workmen's Compensation Bureau's request to relocate. The Council received recommendations from the Director of Institutions regarding future plans for the old state office building. The Council approved transfers from the 1983-85 biennium state contingency fund to the extent that requests for the transfers from the fund exceeded \$500,000 during the 1983-85 biennium. The Council received a report on alternatives for financing the construction of capital improvements.

Four groups, consisting of members of the Budget Committees on Higher Education and Human Services, visited major state agencies and institutions, evaluated requests for major improvements and structures, and heard difficulties encountered by the institutions.

### **BUDGET COMMITTEE ON GOVERNMENT FINANCE**

The Council studied state agency and institution pay practices including a comprehensive review of state employee fringe benefits, including their cost and adequacy, and the feasibility of a cafeteria-style benefits program. The Council recommends that the Office of Management and Budget encourage all state agencies in the state classified system to complete its American Management Association's program for performance appraisal.

The Council studied the investment powers and performance of the State Investment Board to determine whether the best return is being received on the state's investments and to monitor the implementation of changes directed by the 1985 Legislative Assembly. The Council recommends a bill to provide for a "prudent investor rule" for the State Investment Board investments, to require the State Investment Board to meet eight times each year, and to delete the requirement that the president of the Bank of North Dakota serve as secretary of the State Investment Board.

The Council monitored the status of major state agency and institution appropriations. The review focused on expenditures of institutions of higher education and the charitable and penal institutions, the appropriations for the foundation aid program, and the appropriations to the Department of Human Services for aid to families with dependent children and medical assistance.

The Council received actuarial valuation reports of the Public Employees Retirement System, Teachers' Fund for Retirement, and Highway Patrol retirement system.

### **BUDGET COMMITTEE ON HIGHER EDUCATION**

The Council studied the governance and organization of higher education, admissions and tuition policies, tuition reciprocity, and student financial aid. The Council recommends two concurrent resolutions for constitutional amendments. The first resolution amends the constitution to change the members of the screening committee, which submits nominations for Board of Higher Education members to the Governor, from the president of the North Dakota Education Association, the Chief Justice of the Supreme Court, and the Superintendent of the Department of Public Instruction to the Superintendent of Public Instruction, Commissioner of Agriculture, chairman of the board of the Greater North Dakota Association, Speaker of the House, and an appointee of the Governor. The second resolution amends the constitution to increase the size of the Board of Higher Education from seven to nine members, reduce the length of board member terms from seven to five years, limit board members to two terms, and remove the requirement that no more than one graduate of any one of the institutions may be on the Board of Higher Education at any one time.

The Council recommends that increases in resident student tuition be limited to the projected increase in the consumer price index. The Council recommends the tuition reciprocity agreement with Minnesota continue to require Minnesota students attending North Dakota institutions to pay the tuition rate charged Minnesota residents either in the Minnesota state university or community college system, as appropriate. The Council recommends that the 1987 Legislative Assembly increase state-funded student financial aid, if fiscally

feasible, to provide that the ratio of state-funded student financial aid to tuition rates be the same as it was in 1981.

The Council recommends a bill extending the authority of the Industrial Commission to act as the State Building Authority through June 30, 1989, with the specific projects funded by bond issues to be authorized by the Legislative Assembly.

### **BUDGET COMMITTEE ON HUMAN SERVICES**

The Council studied the human service delivery system. The Council recommends a concurrent resolution urging the Department of Human Services to implement 21 recommendations to improve the human service delivery system. The Council recommends a bill to establish a human services board with the authority to establish administrative policy of the Department of Human Services and to administer the department through the executive director. The Council recommends as an option for legislative consideration a bill relating to the structure of the Department of Human Services which deletes the statutory reference to all offices and divisions within the Department of Human Services except for the State Hospital, the Governor's Council on Human Resources, the regional human service centers, and the vocational rehabilitation unit.

The Council recommends a bill to require the Department of Human Services to develop an integrated, multidisciplinary continuum of services for chronically mentally ill individuals. The Council recommends a bill to provide that the State Hospital's administrator, who must be a qualified and experienced hospital administrator with a master's degree, shall have the previous responsibilities of the superintendent of the State Hospital. The Council also recommends the 1987 Legislative Assembly support establishment of an approved internship psychologist program in North Dakota at the State Hospital, human service centers, and the University of North Dakota; that funding be included in the Department of Human Services 1987-89 appropriation for the internship program; and that priority be given to North Dakota residents for admission to the graduate program in psychology at the University of North Dakota.

The Council monitored the deinstitutionalization of developmentally disabled persons and makes no specific recommendations; however, it believes the Legislative Assembly will need to address a number of problems relating to the process and has arranged for and developed information to assist the Legislative Assembly as it considers legislation relating to deinstitutionalization.

The Council studied in-home and community-based services for the elderly and disabled. The Council recommends a bill to require mandatory preadmission screening of each person prior to admission to a long-term care facility and requires the facility to inform individuals of available in-home and community-based services. The Council also recommends a bill to provide to people based on a functional assessment a continuum of community-based services adequate to appropriately sustain individuals in their homes and communities to delay or prevent institutional care.

The Council received the report of the Governor's Commission on Children and Adolescents at Risk. The Council recommends a bill to establish a Children's Coordinating Cabinet, to develop and implement a plan for coordinating delivery of services to children and adolescents at risk.

### **COURT SERVICES COMMITTEE**

The Council studied the present and projected caseload of the North Dakota Supreme Court and the need for an intermediate court of appeals or other methods of alleviating the workload of the Supreme Court. The Council recommends a bill, effective July 1, 1989, to require the establishment of a court of appeals consisting of a panel of three judges appointed by the Governor on a temporary basis if the Supreme Court has disposed of 250 cases by opinion in the one-year period prior to September 1 of any year.

The Council studied the present structure of municipal court services. The Council recommends a bill to extend the jurisdiction of county courts to criminal misdemeanor, infraction, and noncriminal traffic cases involving violations of city ordinances and to allow the transfer of certain municipal court cases to the county court. The bill also grants a city with a population of 5,000 or less the option of appointing either a law-trained or nonlaw-trained municipal judge. The Council recommends a bill to allow counties to authorize one part-time

county judge. The Council recommends a concurrent resolution directing the Legislative Council to study methods for providing and maintaining model municipal ordinances for the protection of small North Dakota cities.

The Council monitored court decisions and proposals for federal legislation concerning pornography for the purpose of determining whether changes should be made to state laws. The Council makes no recommendation for legislative action.

#### **EDUCATION COMMITTEE**

The Council studied whether the state compulsory school attendance law should be revised to accommodate alternative methods of student instruction, including home schooling. The Council makes no recommendation for legislative action.

The Council studied the feasibility and desirability of placing the delivery of vocational education services and programs under the supervision of the Superintendent of Public Instruction, reviewed the administrative structures for the delivery of vocational education services and programs in other states, and reviewed federal requirements regarding the delivery of vocational education services and programs at the state level. The Council makes no recommendation for legislative action.

#### **EDUCATION FINANCE COMMITTEE**

The Council studied all facets of the state's finance formulas used in making payments to public elementary and secondary schools for instructional and transportation services to determine whether those formulas should be changed. The Council recommends a bill to make the state financially responsible for the entire tuition and excess costs incurred by handicapped children placed outside their school districts of residence if the placements are made by a county or state social service agency, if the placement is made from a state-operated institution, or if the placement is made by a court or juvenile supervisor; a bill to allow school districts to create and add to building funds by making transfers from general fund appropriations regardless of whether a building fund tax levy has been authorized; and a bill to require all school districts that do not operate either an approved elementary school or a high school to reorganize with or annex their territory to a school district that operates either an approved elementary or high school. The Council also recommends continued monitoring of revenues to the common schools trust fund.

The Council studied whether school districts should receive foundation aid reimbursement for summer physical education programs. The Council recommends a bill to permit proportionate foundation aid payments for eligible summer courses, including physical education courses, and to require the Superintendent of Public Instruction to adopt rules regarding the eligibility of all summer school programs to receive proportionate foundation aid payments.

#### **GARRISON DIVERSION OVERVIEW COMMITTEE**

The Council received several briefings on the progress of litigation surrounding the Garrison Diversion Project, the Garrison Diversion Unit Reformulation Act of 1986, the status of construction activity, and possible direction of the project in the future.

#### **GOVERNMENT ADMINISTRATION COMMITTEE**

The Council contracted with Booz Allen and Hamilton, Inc., for an in-depth review of the state's data processing. The Council recommends a bill to expand the definitions relating to the crime of computer fraud, to expand the crime of computer fraud, and to add a new offense of "computer crime." The Council also supports several recommendations originating from the Booz Allen and Hamilton study.

The Council studied the feasibility of establishing a statewide enhanced nine-one-one (911) emergency telecommunications system. The Council recommends a bill to establish a nine-member, Governor-appointed emergency services communication system advisory committee to establish standards and guidelines for a statewide 911 emergency telephone system. The standards must require

that systems installed after July 1, 1987, identify the emergency caller's location. Also, the bill provides that the proceeds of the excise tax imposed on telephone access lines under North Dakota Century Code Section 57-40.6-01 may be used only for the purpose of establishing or operating an emergency services communication system in accordance with the standards and guidelines established by the advisory committee.

The Council heard the progress reports of the Commissioner of Labor, Job Service North Dakota, and the Workmen's Compensation Bureau on their efforts in coordinating labor and employment services, especially in the areas of joint reporting and combined audits. The Council encourages the Commissioner of Labor, Job Service North Dakota, and the Workmen's Compensation Bureau to continue to work together through increased coordination whenever possible. The agencies are also encouraged to introduce legislation that would provide for joint employer wage reports and combined audits.

### **INDIAN JURISDICTION COMMITTEE**

The Council studied issues of concern to the state and persons living within the boundaries of the Fort Berthold Reservation. The Council recommends a bill to establish a statutory Legislative Council state and tribal relations committee; a bill to include the Attorney General on the membership of the Indian Affairs Commission; a bill to require the Attorney General to make investigations on Indian reservations; a bill providing for the reciprocal recognition of judgments, decrees, and orders of the state and the tribal court of the Three Affiliated Tribes in certain cases; a bill requiring any public agency to provide public notice and hold a public hearing prior to the approval of an agreement entered into with an Indian tribe and to require a biennial review of the agreement; and a bill to require all executive and administrative officers and departments that submit biennial reports to the Governor and the Office of Management and Budget to include in their reports a detailed statement of all sources and expenditures of public funds for state services that benefit Indians residing on Indian reservations in the state. The Council also recommends a concurrent resolution urging the President of the United States to establish a commission to study the impact of federal Indian policies on non-Indians living or working on or near Indian reservations and a concurrent resolution urging the Congress of the United States to make payments in lieu of taxes on all land withdrawn or purchased for federal purposes or held in trust for Indians and Indian tribes.

The Council also studied the issue of state courts' jurisdiction over civil cases arising within the exterior boundaries of Indian reservations. Although some of the recommendations resulting from the Fort Berthold Reservation study relate to Indian civil jurisdiction issues, the committee makes no additional recommendations as a result of the Indian civil jurisdiction study.

### **INDUSTRY AND BUSINESS COMMITTEE**

The Council studied the feasibility and desirability of consolidating the statutory authority and administration of financial institutions organized under state laws in light of federal changes regarding regulation of financial institutions. The Council recommends a bill to provide an order of priority for paying expenses of and claims against an insolvent bank and a bill to raise the capital stock and surplus requirements of a banking association.

The Council studied the regulation of property and casualty insurance plans created by local groups or associations. The Council makes no recommendation for legislative action.

The Council studied the cancellation, nonrenewal, and declination of property and casualty insurance policies and automobile insurance policies to determine the desirability of enacting similar requirements for commercial policies. The Council makes no recommendation for legislative action.

### **JOBS DEVELOPMENT COMMISSION**

The Council studied methods and the coordination of efforts to initiate and sustain new economic development and to spur the creation of new employment opportunities for the citizens of the state. The Council recommends a bill to establish a public venture capital corporation for the purpose of organizing and managing an investment fund capitalized through the sale of shares to the Bank of North Dakota and other public and private investors to provide a source of

investment capital for the establishment, expansion, and rehabilitation of business and industry in the state. The Council recommends a bill to provide for the application of the prudent investor rule to the administration of funds under the management of the State Investment Board. The Council recommends a bill to require the State Investment Board and the Public Employees Retirement Board to invest not less than two percent of the total moneys of the Teachers' Fund for Retirement, the workmen's compensation fund, and retirement funds under the administration of the Public Employees Retirement Board in North Dakota-related investments whenever consistent with the boards' fiduciary responsibilities. The Council also recommends a concurrent resolution to direct the Legislative Council to establish a similar Jobs Development Commission for the next interim.

#### **JUDICIAL PROCESS COMMITTEE**

The Council studied the impacts and problems associated with numerous specific kinds and types of statutory liens and various types of property that are exempt from attachment or mesne process and levy or sale upon execution and other final process issued from any court and the various priorities and rights they create. The Council recommends a bill to establish a statutory agricultural lien for any person who processes any crop or agricultural product and a separate statutory agricultural lien for any person who furnishes supplies or services used in the production of crops or agricultural products; a bill to exempt public retirement benefits, assistance for dependent children, and crime victims reparations awards from all liabilities for debts of the person; and a bill to exempt private pensions and life insurance policies from execution of judgment.

The Council studied the comparative negligence laws and their interaction with the products liability, strict liability, and workmen's compensation laws in light of recent North Dakota Supreme Court decisions. The Council recommends a bill to establish comparative fault in negligence, strict liability in tort, and dram shop actions. The Council makes no recommendation concerning that portion of the comparative negligence study dealing with workmen's compensation issues.

#### **JUDICIARY COMMITTEE**

The Council studied the extent liability insurance coverage is provided for state and political subdivision employees and the governmental immunity of political subdivisions. The Council recommends a bill to provide for civil action indemnification and legal expense for any Supreme Court justice, Supreme Court surrogate justice, district court judge, district court surrogate judge, county court judge, judicial referee, and juvenile supervisor; a bill to reduce from six to three years the general statute of limitations for bringing an action against the state; a bill to provide that a political subdivision is liable for only that part of any uncollectible party's share of an award in proportion to the percentage of the negligence attributable to the political subdivision; a bill to extend the immunity granted persons rendering emergency care and services to cover not only actions taken at the scene of the accident but actions taken when going to and coming from the scene of the accident; a bill to provide that a party may only seek punitive damages after making a motion to amend the pleadings to claim the damages and the court, after a hearing, finds prima facie evidence in support of the motion; a bill to clarify the word "employee" to include board members and volunteers of a political subdivision in the chapter that grants immunity to political subdivision employees; a bill to require an annual filing of statistical data by property and casualty insurance companies; a bill to authorize the Commissioner of Insurance to establish joint underwriting associations; a bill to authorize the Commissioner of Insurance to adopt rules regulating self-insurance plans; and a concurrent resolution to direct the Council to study the insurance industry.

The Council studied the present marital property law in this and other states and the desirability of adopting the Uniform Marital Property Act. The Council recommends a bill to enact the Uniform Marital Property Act with minor changes concerning insurance and with a three-year delayed effective date.

The Council reviewed and made recommendations concerning uniform acts recommended by the North Dakota Commission on Uniform State Laws. The Council recommends adoption of the Uniform Antitrust Act, the Uniform Arbitration Act, and the Uniform Statutory Will Act.

The Council makes several recommendations as a result of its statutory revision responsibility. The Council recommends a bill to amend all pertinent North Dakota Century Code sections to make reference to Section 39-21-45.1 as a criminal traffic offense; a bill to clarify that the procedures in North Dakota Century Code Sections 20.1-01-28 and 20.1-01-29 are applicable to pertinent noncriminal violations of the Game and Fish Commissioner's rules and the Governor's proclamations and that the bond required to secure appearance is equal to the amount set forth in the rule, order, or proclamation; and a bill to make technical corrections to the Century Code.

#### **LAW ENFORCEMENT COMMITTEE**

The Council studied the feasibility and desirability of establishing a central filing office for criminal judgments. The Council recommends a bill to require reporting criminal history information concerning certain misdemeanors to the Bureau of Criminal Investigation, with the Attorney General being empowered to adopt rules specifying the misdemeanors for which records are to be kept.

The Council studied the structure of the state law enforcement system and the coordination of training and standards of law enforcement personnel. The Council recommends a bill to provide for peace officer standards, training, and licensing and a bill to provide for a temporary increase in the motor vehicle operator's license fee to fund expansion of the Law Enforcement Training Center in Bismarck.

The Council studied the county coroner system and whether there is a need for a statewide medical examiner system using a forensic pathologist. The Council recommends a bill to establish a state medical examiner system headed by a forensic pathologist affiliated with the University of North Dakota Medical School and a bill to provide funding for the medical examiner system through a per capita payment by counties, a fee on the first copy of a death certificate, an increase in certain insurance taxes, and a fee charged to certain commercial recipients of a medical examiner's report.

The Council studied the status and impact of charitable gambling in the state, particularly the issues of the future of charitable gambling, establishment of an independent charitable gambling commission, and the level of the charitable gambling tax. The Council recommends a bill to establish an independent charitable gambling commission that would have general supervisory authority over charitable gambling; a bill to make the basic charitable gambling tax one percent of gross proceeds instead of the present basic five percent of adjusted gross proceeds, with the tax being allocated to a dedicated fund for gambling enforcement; a bill to establish a rent limitation of \$150 per month for conducting pull tab or jar games; a bill to limit pull tab and jar game prizes; a bill to limit bingo prizes; and a bill to require licensing of manufacturers of charitable gaming tickets and to require the Attorney General to adopt quality standards for the manufacture of charitable gaming tickets.

#### **LEGISLATIVE AUDIT AND FISCAL REVIEW COMMITTEE**

The Council reviewed 69 audit reports presented by the State Auditor's office and independent accounting firms.

The Council studied the Bank of North Dakota's loan programs, including loan policies, status of current loans, and loans written off since January 1, 1983. The Council recommends the Bank of North Dakota implement recommendations resulting from the Touche Ross and Company's operational review of the Bank of North Dakota.

The Council monitored and studied the implementation by the Office of Management and Budget of changes to the state accounting system.

The Council studied the accounting procedures for accounts receivables at the State Hospital and Grafton State School to reduce the large amounts of uncollectible accounts receivable. The Council recommends a bill to require the State Hospital and Grafton State School to establish a procedure recognizing the patient's ability to pay when determining the billing levels for the cost of patient care and treatment, to allow the Grafton State School to write off uncollectible accounts, and to provide that Grafton State School nonresident patients and responsible relatives must pay the full cost of care and treatment.

## **LEGISLATIVE PROCEDURE AND ARRANGEMENTS COMMITTEE**

The Council studied the impact of the new Article IV of the Constitution of North Dakota and recommends a bill to make the changes generally determined to be necessary in light of the new Article IV and a bill relating to the filing of bills approved by the Legislative Assembly. The Council also recommends rules changes necessary in light of the new Article IV.

The Council reviewed legislative rules and makes a number of recommendations intended to clarify existing rules and expedite the legislative process.

The Council reviewed the impact of the federal Fair Labor Standards Act on the legislative branch and participated in the Block Boundary Suggestion Project of the 1990 census redistricting data program.

The Council reviewed the gift acceptance authority of state entities and recommends a bill to provide the Capitol Grounds Planning Commission with exclusive authority to accept gifts for exterior placement on the Capitol grounds and a bill to limit the authority of state entities to accept gifts and to require the recordation of gifts with the State Historical Board.

The Council supervised the continuing renovation of the legislative wing of the State Capitol and recommends a bill to appropriate funds to make improvements during the 1987-89 biennium.

The Council also reviewed legislative expense reimbursements and adopts a policy applicable to the legislative session.

The Council studied the feasibility and desirability of expanding the jurisdiction of the Committee on Public Employees Retirement Programs to include all fringe benefits for state employees. The Council makes no recommendation for legislative action.

## **OIL AND GAS COMMITTEE**

The Council studied the state's oil and gas laws, with emphasis on those laws relating to royalty owners and surface owner protection. The Council recommends a bill to allow royalty owners to inspect and copy the oil and gas production and royalty payment records of the person obligated to pay royalties under the lease; a bill to define the function and operation of oil and gas division orders; a bill to define the term "surface owner" for purposes of the Oil and Gas Production Damage Compensation Act as any person having a present possessory or future possessory interest in the surface of the land; a bill to include completion operations within the definition of drilling operations for the purposes of the Oil and Gas Production Damage Compensation Act; a bill to allow a surface owner to recover for damage to water wells, springs, and other surface and groundwater sources caused by oil and gas exploration and development; a bill requiring a mineral developer to include a statement in the notice of drilling operations informing the surface owner of the right to request the State Department of Health to inspect and monitor well sites for the presence of hydrogen sulfide and to require the State Department of Health, upon request by a surface owner, to conduct this inspection; a bill to establish a civil penalty applicable to persons convicted of violating any state law or county zoning ordinance relating to geophysical exploration; and a bill allowing any person adversely affected by an Industrial Commission order to appeal the order to the district court for the county in which the oil or gas well or the affected property is located.

## **RETIREMENT COMMITTEE**

The Council solicited and reviewed various proposals affecting public employee retirement programs. The Council obtained actuarial or fiscal information on each proposal and reported this information to each proponent. The Council gave favorable recommendations to six of the retirement proposals. The Council deferred consideration on several other retirement proposals.

Because of budgetary restraints, the Council was unable to conduct nonstatutory assignments relating to public employees retirement.

## **TAX ADMINISTRATION COMMITTEE**

The Council studied confidentiality statutes governing state tax records. The Council recommends alternative bills relating to income tax return filings—one bill to prohibit disclosure of whether or not a return has been filed; and one bill to allow disclosure of whether or not a return has been filed. Under

the bill allowing disclosure, no disclosure is allowed if the taxpayer has filed for an extension of time to file a return or if the taxpayer is exempt from filing requirements.

The Council studied personal property tax replacement and state revenue sharing programs. The Council makes no recommendation for legislative action.

The Council studied political subdivisions tax levy limitations. The Council recommends a bill to allow political subdivisions to increase tax levies by three percent over the highest amount levied in dollars in the three most recent taxable years.

#### **TAXATION COMMITTEE**

The Council gathered information on sales and use tax exemptions and determined their impact on state revenues. The Council recommends a bill to eliminate sales tax exemptions for receipts from educational, religious, or charitable activities when those activities involve regular retail sales that are in direct competition with retailers. The bill also eliminates the sales tax exemption for hospitals, nursing homes, and similar facilities for purchases which are not made for the benefit of a patient or occupant of the facility.

The Council studied North Dakota's imposition of worldwide unitary corporate income tax apportionment. The Council recommends a bill to recede to water's edge unitary apportionment for corporate income tax purposes and exclude from apportionment 85 percent of the income from foreign dividends and 80/20 corporations.

The Council studied taxes imposed on the mining or conversion of energy sources. The Council recommends a bill to provide a two-year exemption from the oil extraction tax for new wells; a bill to gradually reduce the oil extraction rate to 3.5 percent over a period of four years, remove the royalty owner exemption from the oil extraction tax, and provide a one-year exemption from the oil extraction tax for new wells; and a bill to reduce the coal severance tax rate from \$1.04 to 60 cents per ton and adjust the distribution formula for severance tax revenues.

#### **TRANSPORTATION COMMITTEE**

The Council studied the present transportation system of the state and the ability of that system to provide for the efficient transportation of people, services, and goods. The Council recommends a bill to allow local jurisdictions to designate minimum maintenance roads and to be subject to less liability for those roads; a bill to allow counties to change their county farm-to-market road program by conducting a public hearing; and a bill to require that notice be given to the Highway Department of certain construction projects that will have a significant impact on the highway system.

The Council studied the impact of proposed cutbacks in federal funding for transportation assistance programs benefiting the elderly and disabled. The Council makes no recommendation for legislative action.

The Council studied the effects of existing state and federal laws on the motor carrier industry of the state. The Council makes no recommendation for legislative action.

**REPORT**  
*of the*  
**NORTH DAKOTA LEGISLATIVE COUNCIL**

Pursuant to Chapter 54-35 of the North Dakota Century Code



**FIFTIETH LEGISLATIVE ASSEMBLY**  
**1987**

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# North Dakota Legislative Council

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Legislative Budget  
Analyst & Auditor

**KATHERINE M. CHESTER**  
Code Revisor

January 6, 1987

Honorable George A. Sinner  
Governor of North Dakota

Members, 50th Legislative Assembly of North Dakota

I have the honor to transmit the Legislative Council's report and recommendations to the 50th Legislative Assembly.

Major recommendations include establishment of a human services board; creation of a court of appeals; establishment of statutory agricultural processor's and supplier's liens; establishment of comparative fault; adoption of the Uniform Marital Property Act; a requirement for peace officer licensing; establishment of a state medical examiner system; adoption of water's edge unitary taxation; reductions in the coal severance tax and the oil extraction tax; declaration of a state wetlands policy; the provision of a continuum of services for the chronically mentally ill and for the elderly and disabled; creation of a children's coordinating cabinet; reorganization of nonoperating school districts; reciprocal recognition of certain state and tribal court decisions; creation of a public venture capital corporation; political subdivision employee immunity and other tort law reforms; creation of a charitable gambling commission; and a proposal to change the constitutional membership of the State Board of Higher Education.

The report also discusses committee findings and numerous other pieces of recommended legislation. In addition, the report contains brief summaries of each committee report and of each recommended bill and resolution.

Respectfully submitted,

Representative Roy Hausauer  
Chairman, North Dakota  
Legislative Council

RH/jfl  
Enc.

# HISTORY AND FUNCTIONS OF THE NORTH DAKOTA LEGISLATIVE COUNCIL

## I. HISTORY OF THE LEGISLATIVE COUNCIL

The North Dakota Legislative Council was created in 1945 as the Legislative Research Committee (LRC). The LRC had a slow beginning during the first interim of its existence because, as reported in the first biennial report, the prevailing war conditions prevented the employment of a research director until April 1946.

After the hiring of a research director, the first LRC held monthly meetings prior to the 1947 Legislative Session and recommended a number of bills to that session. Even though the legislation creating the LRC permitted the appointment of subcommittees, all of the interim work was performed by the 11 statutory members until the 1953-54 interim, when other legislators participated in studies. Although "research" was its middle name, in its early years the LRC served primarily as a screening agency for proposed legislation submitted by state departments and organizations. This screening role is evidenced by the fact that as early as 1949, the LRC presented 100 proposals prepared or sponsored by the committee, which the biennial report indicated were not all necessarily endorsed by the committee and included were several alternative or conflicting proposals.

The name of the LRC was changed to the Legislative Council in 1969 to reflect more accurately the scope of its duties. Although research is still an integral part of the functioning of the Legislative Council, it has become a comprehensive legislative service agency with various duties in addition to research.

## II. THE NEED FOR A LEGISLATIVE SERVICE AGENCY

The Legislative Council movement began in Kansas in 1933. At present, nearly all states have such a council or its equivalent, although a few states use varying numbers of special committees.

Legislative service agencies provide legislators with the tools and resources that are essential if they are to fulfill the demands placed upon them. In contrast to other branches of government, the Legislative Assembly in the past had to approach its deliberations without its own information sources, studies, or investigations. Some of the information relied upon was inadequate or slanted because of special interests of the sources.

To meet these demands, the Legislative Assembly established the North Dakota Legislative Council. The existence of the Council has made it possible for the Legislative Assembly to meet the demands of the last half of the 20th century while remaining a part-time citizen legislature which meets for a limited number of days every other year.

## III. COMPOSITION OF THE COUNCIL

The Legislative Council by statute consists of 15 legislators, including the majority and minority

leaders of both houses and the Speaker of the House. The speaker appoints five other representatives, two from the majority and three from the minority from a list of nine members recommended by each party. The Lieutenant Governor, as President of the Senate, appoints three senators from the majority and two from the minority from a list of seven members recommended by each party.

The Legislative Council is thus composed of eight majority party members and seven minority party members (depending upon which political party has a majority in the Senate), and is served by a staff of attorneys, accountants, researchers, and auxiliary personnel who are hired and who serve on a strictly nonpartisan basis.

## IV. FUNCTIONS AND METHODS OF OPERATION OF THE COUNCIL

Although the Legislative Council has the authority to initiate studies or other action deemed necessary between legislative sessions, much of the Council's work results from study resolutions passed by both houses. The usual procedure is for the Council to designate committees to carry out the studies, although a few Council committees, including the Budget Section, the Administrative Rules Committee, the Retirement Committee, the Garrison Diversion Overview Committee, and the Legislative Audit and Fiscal Review Committee, are statutory committees with duties imposed by state law.

Regardless of the source of authority of interim committees, the Council appoints the members with the exception of a few ex officio members named by statute. Nearly all committees consist entirely of legislators, although a few citizen members are sometimes selected to serve when it is determined they can provide special expertise or insight for a study.

The Council committees hold meetings throughout the interim at which members hear testimony, review information and materials provided by staff, other state agencies, and interested persons and organizations, and consider alternatives. Occasionally it is necessary for the Council to contract with universities, consulting firms, or outside professionals on specialized studies and projects. However, the vast majority of studies are handled entirely by the Council staff.

Committees make their reports to the full Legislative Council, usually in November preceding a regular legislative session. The Council may accept, amend, or reject a committee's report. The Legislative Council then presents the recommendations it has accepted, together with bills and resolutions necessary to implement them, to the Legislative Assembly.

In addition to conducting studies, the Council and its staff provide a wide range of services to legislators, other state agencies, and the public. Attorneys on the staff provide legal advice and counsel on legislative matters to legislators and legislative committees. The

Council supervises the publication of the Session Laws, the North Dakota Century Code, and the North Dakota Administrative Code. The Council has on its staff the Legislative Budget Analyst and Auditor and assistants who provide technical assistance to Council committees and legislators and who review audit reports for the Legislative Audit and Fiscal Review Committee. A data processing division provides computer services to the legislative branch, including research and bill drafting capabilities. The Legislative Council library contains a wide variety of materials and reference documents, many of which are not available from other sources.

## **V. MAJOR PAST PROJECTS OF THE COUNCIL**

Nearly every facet of state government and statutes has been touched by one or more Council studies since 1945. Statutory revisions, including the rewriting of criminal laws, election laws, game and fish laws, insurance laws, motor vehicle laws, school laws, and weapons laws have been among the major accomplishments of interim committees. Another project was the republication of the North Dakota Revised Code of 1943, the resulting product being the North Dakota Century Code.

Government reorganization has also occupied a considerable amount of attention. Included have been studies of the delivery of human services, agriculturally related functions of state government, centralized state government computer and microfilm services, and organization of the state's charitable and penal institutions, as well as studies of the feasibility of consolidating functions in state government to create a Department of Motor Vehicles and a Department of Administration.

The review of uniform and model acts, such as the

Uniform Probate Code, have also been included in past Council agendas. Constitutional revision has been studied several interims, as well as studies to implement constitutional measures which have been approved by the voters, such as the new Legislative Article.

Pioneering in new and untried areas is one major function of interim committees. The regulation and taxation of natural resources, including oil and gas in the 1950's and coal in the 1970's, have been the highlights of several interim studies. The closing of the constitutional institution of higher education at Ellendale also fell upon an interim committee after a fire destroyed one of the major buildings on that campus. The expansion of the University of North Dakota Medical School is another area that has been the subject of several interim studies.

Among the innovations of interim committees was the creation of the Regional Environmental Assessment Program (REAP) in 1975. This was a resource and information program designed to provide environmental, socioeconomic, and sociological data acquisition and monitoring. REAP was terminated with a gubernatorial veto in 1979, after four years as a joint legislative-executive program under the tutelage of the Legislative Council.

Perhaps of most value to citizen legislators are committees which permit members to keep up with rapidly changing developments in complex fields. Among these are the Budget Section, which receives the executive budget prior to each legislative session. The Administrative Rules Committee allows legislators to monitor executive branch department rules and regulations. Other subjects which have been regularly studied include school finance, property tax levies, and legislative rules.

# ADMINISTRATIVE RULES COMMITTEE

The Administrative Rules Committee is a statutory committee deriving its authority from North Dakota Century Code (NDCC) Sections 54-35-02.5, 54-35-02.6, and 28-32-03.3. The committee is statutorily required to review administrative agency rules to determine:

1. Whether administrative agencies are properly implementing legislative purpose and intent.
2. Whether there are court or agency expressions of dissatisfaction with state statutes or with rules of administrative agencies promulgated thereto.
3. Whether court opinions or rules indicate unclear or ambiguous statutes.

The committee may make rule change recommendations to the adopting agency and may make recommendations to the Legislative Council for amendment or repeal of enabling legislation serving as authority for rules.

In addition, the Legislative Council delegated to the committee the Council's authority to review and approve or disapprove state purchasing rules pursuant to NDCC Section 54-44.4-04.

The Administrative Rules Committee was assigned one study. House Concurrent Resolution No. 3001 directed a study of the statutes governing rulemaking procedures and grants of rights of appeal from decisions of administrative agencies.

Committee members were Representatives Serenus Hoffner (Chairman), Connie L. Cleveland, Arthur Melby, Jack Murphy, Kelly Shockman, Dan Ulmer, and Janet Wentz; and Senators Jim Kusler, Jerry Meyer, Curtis N. Peterson, and Jens J. Tennesos.

The report of the committee was submitted to the Legislative Council at the biennial meeting of the Council in November 1986. The report was adopted for submission to the 50th Legislative Assembly.

## ADMINISTRATIVE AGENCY RULES REVIEW

The committee is statutorily required to review administrative agency rules. Administrative agencies are those state agencies authorized to adopt rules in accordance with the requirements of the Administrative Agencies Practice Act (NDCC Chapter 28-32). By statute, a rule is an agency statement that implements, interprets, or prescribes law or policy. Properly adopted rules have the force and effect of law.

The committee's review authority is statutorily limited to rules assigned to the committee. At the committee's request, the Legislative Council chairman assigned to the committee all rules published in the North Dakota Administrative Code (NDAC) effective after November 1984. This allowed continuation of the rules review process initiated on July 1, 1979.

As rules were scheduled for review, each adopting agency was requested to provide information on:

1. Whether the rules resulted from statutory changes made by the 1979, 1981, 1983, or 1985 Legislative Assemblies.
2. Whether the rules resulted from federal programs or whether the rules were related in subject matter to any federal statute or regulation.

3. The rulemaking procedure followed in adopting the rules.
4. Whether any person had filed any complaint concerning the rules.
5. The approximate cost of giving public notice and holding any hearing on the rules, and the approximate cost of staff time used in developing the rules.
6. The subject matter of the rules and the reasons for adopting the rules.

## Review of Current Rulemaking

The committee reviewed 1,280 rule changes from December 1984 through October 1986. Table A tabulates the rule changes published in the Administrative Code and reviewed by the committee. The tabulation depicts the number of rules amended, created, superseded, repealed, or redesignated. The most important qualification of the tabulation is that each rule is viewed as one unit, although rules differ in length and complexity. Tables, appendices, and most organizational rules were not included in the tabulation. Thirty-four agencies amended their organizational rules during the review period.

Approximately 176 rule changes resulted from 1985 legislative action, 92 changes resulted from 1983 legislative action, 104 changes resulted from 1981 legislative action, and 23 changes resulted from 1979 legislative action. Approximately 217 rule changes were related to federal programs, statutes, or regulations.

## Committee Objection

NDCC Section 28-32-03.3 provides:

1. If the Committee on Administrative Rules objects to all or any portion of a rule because the committee deems it to be unreasonable, arbitrary, capricious, or beyond the authority delegated to the adopting agency, the committee may file that objection in certified form in the office of the Legislative Council. The filed objection must contain a concise statement of the committee's reasons for its action.
2. The office of the Legislative Council must attach to each objection a certification of the time and date of its filing and as soon as possible must transmit a copy of the objection and the certification to the agency adopting the rule in question. The office of the Legislative Council must also maintain a permanent register of all committee objections.
3. The office of the Legislative Council must publish an objection filed pursuant to this section in the next issue of the code supplement.
4. Within 14 days after the filing of a committee objection to a rule, the adopting agency must respond in writing to the committee. After receipt of the response, the committee may withdraw or modify its objection.
5. After the filing of a committee objection, the burden of persuasion is upon the agency in any action for judicial review or for enforcement of the rule to establish that the whole or portion

thereof objected to is within the procedural and substantive authority delegated to the agency. If the agency fails to meet its burden of persuasion, the court must declare the whole or portion of the rule objected to invalid and judgment must be rendered against the agency for court costs. These court costs include a reasonable attorney's fee and are payable from the appropriation of the agency which adopted the rule in question.

This section was passed in 1981 and prior to this interim the Administrative Rules Committee had never made any formal objection pursuant to it. The 1985 Legislative Assembly passed Senate Bill No. 2463 requiring the State Laboratories Department, prior to January 1, 1986, to establish by rule the procedures for licensing, qualifying, classifying, inspecting, and regulating persons providing bed and breakfast facilities in private homes, including rules affecting the health and safety of the facilities and the persons using the facilities. "Bed and breakfast facility" was defined as a private home which is used to provide accommodations for a charge to the public, with at most two lodging units for up to eight persons per night and in which no more than two family style meals per day are provided.

The State Laboratories Department adopted NDAC Section 47-04-05-04, effective December 1, 1985. The section reads:

**Food supplies.** Food must be in sound condition, free from spoilage, filth, or other contamination and must be safe for human consumption. Food shall be obtained from or be equal to food from sources that comply with all laws relating to food and food labeling. Before serving any food to the public, the bed and breakfast facility shall comply with all applicable inspections of food required by law. The use of food in hermetically sealed containers that was not prepared in a food processing establishment is prohibited. Fluid milk and fluid milk products used or served shall be pasteurized and shall meet the grade A quality standards established by law.

At its December 10, 1985, meeting, the committee by motion objected to a portion of the rule and the following objection was filed in the Legislative Council office on December 30, 1985:

THE LEGISLATIVE COUNCIL'S  
COMMITTEE ON ADMINISTRATIVE RULES  
OBJECTS TO THAT PORTION OF NORTH  
DAKOTA ADMINISTRATIVE CODE SECTION  
47-04-05-04 RELATING TO PROHIBITING IN  
BED AND BREAKFAST FACILITIES THE  
USE OF FOOD IN HERMETICALLY SEALED  
CONTAINERS THAT WAS NOT PREPARED  
IN A FOOD PROCESSING ESTABLISHMENT.

The committee objects to this rule as being unreasonable because:

1. The prohibition on the use of food in hermetically sealed containers that was not prepared in a food processing establishment prevents the serving of home canned food by a bed and breakfast facility.

2. The prohibition was intended to prevent food poisoning caused by home canned food.
3. One of the principal attractions to staying in a bed and breakfast facility located in a rural area is eating locally grown and prepared, including home canned, foods.
4. Food poisoning may be caused by leaving commercially prepared foods in the can after opening.
5. Many of the reported cases of food poisoning have been in large restaurants, which do not serve home canned foods.

A letter containing a copy of the objection was sent to the agency on December 31, 1985. On January 13, 1986, the committee received the following response to the committee's objection:

**1. Objection:**

The prohibition on the use of food in hermetically sealed containers that was not prepared in a food processing establishment prevents the serving of home canned food by a bed and breakfast facility.

**Response:**

Objection No. 1 is true. It was the intent of the rules to prohibit bed and breakfast facilities from serving food in hermetically sealed containers that was not prepared in a food processing establishment.

**2. Objection:**

The prohibition was intended to prevent food poisoning caused by home canned food.

**Response:**

Objection No. 2 is true. The prohibition was intended to prevent food poisoning caused by home canned food. Food poisoning may be attributable to chemical poisoning, Staphylococcus food poisoning, botulism, and other infectious or toxic agents. Our intent when drafting the rules was to prevent specifically the potentially fatal food poisoning, botulism, caused by improperly processed foods.

**3. Objection:**

One of the principal attractions to staying in a bed and breakfast facility located in a rural area is eating locally grown and prepared, including home canned, foods.

**Response:**

We know of no data to support the conclusion in Objection No. 3.

**4. Objection:**

Food poisoning may be caused by leaving commercially prepared foods in the can after opening.

**Response:**

Objection No. 4 is correct. Our objective in prohibiting the use of home canned foods was not to prevent this type of food poisoning, but to try

to eliminate the introduction of botulism organisms into food during the home canning process.

**5. Objection:**

Many of the reported cases of food poisoning have been in large restaurants, which do not serve home canned foods.

**Response:**

Most of the reported cases of food poisoning in restaurants are caused, not by the botulism organism, but by chemical agents, Staphylococcus and other pathogenic bacteria, viruses, and parasites which have been introduced through mishandling of the food. Examples of mishandling include improper holding temperature, inadequate cooking, poor personal hygiene, and contaminated equipment. Botulism results when Clostridium botulinum survives the effect of time-temperature exposure during the canning process. Commercial canning establishments, in contrast to home kitchens, must strictly adhere to a processing regime proven to be effective. In our rules and regulations we prohibited the use of home canned food because of the history of such food in causing the potentially fatal illness, botulism. According to statistics from the Center for Disease Control, from 1899 through 1977, 72 percent of botulism outbreaks were traced to home-processed foods; whereas, only nine percent was caused by commercially processed foods. Despite the fact that botulism does not account for a large number of illnesses, it does produce a large percentage of deaths. This is illustrated by the following statistics from 1982, the most recent available from CDC, in which there were 30 confirmed cases of Clostridium botulinum accounting for 0.3 percent of all food-borne illness and 20.9 percent of all deaths associated with foodborne illness. All 30 cases occurred in the home, one in North Dakota from a container of home-processed green beans. These statistics may very well be conservative because cases of food poisoning in the home may be unreported; whereas, cases involving public establishments receive more publicity, are investigated, and consequently reported to CDC.

The North Dakota State Laboratories Department promulgated the bed and breakfast rules to protect patrons of bed and breakfast facilities and also to protect the proprietors. We live in a litigious society. By providing defined standards for proprietors to follow we feel that their liability in case of a foodborne disease outbreak will be reduced.

The committee decided at its April 17, 1986, meeting not to withdraw its objection and the objection is published following the rule in the North Dakota Administrative Code.

## ADMINISTRATIVE AGENCY RULEMAKING AND APPEAL RIGHTS STUDY

House Concurrent Resolution No. 3001 directed a study of the statutes governing rulemaking authority and procedures of state agencies and statutes containing rights of appeal from decisions of state agencies, with emphasis on standardizing the rulemaking and appeals procedures by deleting such provisions in recognition of the provisions of the Administrative Agencies Practice Act.

### History of Existing State Law

North Dakota Century Code Chapter 28-32 contains the Administrative Agencies Practice Act. The chapter provides for administrative agency rulemaking, hearing, and appeal procedures.

Prior to 1981, Section 28-32-01(1) defined administrative agency as including:

[A]ny officer, board, commission, bureau, department, or tribunal other than a court, having statewide jurisdiction and authority to make any order, finding, determination, award, or assessment which has the force and effect of law and which by statute is subject to review in the courts of this state.

Therefore, a four-prong test was used to determine whether an agency was an "administrative agency" and thus was subject to Chapter 28-32:

1. The agency had to have statewide jurisdiction.
2. The agency had to have authority to make a determination.
3. The determination had to have the effect of law.
4. The determination by statute was subject to review in the courts of this state.

The North Dakota Supreme Court, in decisions prior to 1981, held that the definition included such agencies as the State Banking Board, the Board of Barber Examiners, the Board of Pharmacy, the Public Service Commission, and the Tax Commissioner, but also held that the definition did not include the county superintendent of schools, the board of directors of an irrigation district, the State Board of Public School Education (while administering the state school construction fund), and the State Toxicologist.

In Dakota National Insurance Co. v. Commissioner of Insurance, 54 N.W.2d 745 (N.D. 1952), the North Dakota Supreme Court held that the purpose of Chapter 28-32 is "not to grant a right of appeal but merely to regulate the procedure in cases where a right of review was granted expressly by other statutes." Thus, where statutes outside of Chapter 28-32 granted a right of appeal, (and if the other requirements were met) the procedure for the appeal was governed by Chapter 28-32. However, if no right of appeal was granted by a statute outside of Chapter 28-32, Chapter 28-32 did not apply.

During the 1979-80 interim the Administrative Rules Committee studied the Administrative Agencies Practice Act and found that it was difficult to determine whether an agency is an "administrative agency" without an Attorney General's opinion or a Supreme Court decision. As recommended by that committee, and approved by the 1981 legislative session, "administrative agency" was redefined to mean:

[E]ach board, bureau, commission, department, or other administrative unit of the executive branch of state government, including one or more officers, or employees, or other persons directly or indirectly purporting to act on behalf or under authority of the agency. An administrative unit located within or subordinate to an administrative agency shall be treated as part of that agency to the extent it purports to exercise authority subject to this chapter.

The definition also lists the agencies that are not included within the definition.

By changing the definition of administrative agency to remove the four-prong test, the question left unanswered by the committee was whether Chapter 28-32 which, under the four-prong test, was merely a procedural Act, became a substantive Act governing administrative activities of state agencies. Implicit within the rationale for changing the definition of administrative agency was the understanding that all agencies fitting within the new definition would be subject to Chapter 28-32 and their decisions would be subject to an appeals process. What was required, however, without an express statutory statement to that effect, was a court decision affirming the committee's intent and objective in revising the definition.

The North Dakota Supreme Court in Hammond v. North Dakota State Personnel Board, 332 N.W.2d 244 (N.D. 1983), construed Section 28-32-15 as granting a right of appeal from final decisionmaking of administrative agencies, without the necessity that a right of appeal be provided by other statutes.

### Committee Consideration

To standardize the rulemaking and appeal procedures by removing such references outside of Chapter 28-32 the committee first had to find and evaluate the references.

Preliminary research produced 264 NDCC sections outside of Chapter 28-32 that make reference to rulemaking and appeal procedures for administrative agencies.

The committee reviewed the sections and found the majority of the sections simply make reference to Chapter 28-32 procedures. However, a number of the sections also contain procedures in addition to or in conflict with the procedures found in Chapter 28-32.

In looking at the need for uniformity of rulemaking and appeal procedures for all administrative agencies, the committee also questioned why 24 agencies continue to be excepted from Chapter 28-32 requirements. Research revealed that many of the agencies were granted exception because of Attorney General's opinions or Supreme Court decisions. The Attorney General's opinions and Supreme Court decisions were based upon the definition of administrative agency in effect prior to 1981. Concerned that the exceptions were no longer valid, the committee

requested all agencies excepted from Chapter 28-32 to justify the agency's exception if the agency desired that the exception continue. All agencies responding requested continued exception except the Wheat Commission and the Department of Human Services with respect to its rules under the family subsidy program. Both agencies indicated no need for the exception because they voluntarily follow Chapter 28-32 requirements and publish their rules in the North Dakota Administrative Code.

After hearing the testimony of the agencies and examination of the statutes, the committee concluded that the provisions of Chapter 28-32 are inadequate in that, among other things:

1. Social changes since the adoption of Chapter 28-32 have greatly altered the functions of administrative agencies, including the regulation of the environment, welfare programs, and public safety, and procedural requirements in the chapter have not changed accordingly.
2. Present provisions do not clearly define the parties to the proceedings or provide for alternative types of hearings depending on the circumstances.
3. Present provisions do not detail procedures to be used in prehearing conferences or in the hearing itself.
4. It is unclear whether emergency rules become effective upon approval by the Attorney General or receipt of the rules by the Legislative Council for publication in the Administrative Code.
5. The chapter does not specify the agency responsible for filing the rules with the Legislative Council for publication in the Administrative Code.

The committee concluded no changes should be made to standardize the rulemaking and appeal procedures by deleting such provisions throughout the Century Code or to require all agencies to meet Chapter 28-32 requirements until improvements have been made to Chapter 28-32.

### RECOMMENDATIONS

The committee recommends House Concurrent Resolution No. 3001 directing the Legislative Council to conduct a study of the Administrative Agencies Practice Act, North Dakota Century Code Chapter 28-32, to include considerations of the agencies subject to the Act, the agencies not subject to the Act, the various rulemaking procedures under current law, any public hearing requirements, the procedures and practices prior to and after such hearings, the appeals available, the feasibility and desirability of standardizing administrative rulemaking authority, and the extent administrative rules should be published in the North Dakota Administrative Code.

The committee also recommends House Bill No. 1029 that would make the Wheat Commission and the Department of Human Services with respect to its rules under the family subsidy program subject to Chapter 28-32.

**TABLE A  
STATISTICAL SUMMARY OF RULEMAKING**

Agency	Amend	Create	Supersede	Repeal	Special
Accountancy, Board of Public .....	2				
Agriculture, Commissioner of .....	1	109		25	
Attorney General .....	5	50		2	
Audiology and Speech-Language Pathology, .....	1				
Board of Examiners in					
Banking and Financial Institutions, .....	3	5		1	
Department of					
Credit Review Board .....		5			
Embalmers, Board of .....	5				
Game and Fish Department .....	36	9		1	
Health, Department of .....	131	53		2	10*
Highway Department .....	2				
Highway Patrol .....		3			
Historical Board .....	6	16			
Human Services, Department of .....	43	47		5	
Industrial Commission .....	13	7		5	
Insurance, Commissioner of .....	3	33			
Job Service North Dakota .....		1		1	
Laboratories Commission .....	2	18			1**
Livestock Sanitary Board .....	2	1		2	
Medical Examiners, Board of .....	3	11		5	
Nursing, Board of .....	11	51		57	
Office of Management and Budget .....				24	
State Personnel Board .....		26			
Pesticide Control Board .....	2	1			
Pharmacy, Board of .....	1	4			
Plumbing Board .....	44	13	3	1	
Psychologist Examiners, Board of .....	5	3			
Public Service Commission .....	22	22		77	
Real Estate Commission .....	8				
Retirement Board .....		31			
Seed Commission .....	45	7		12	
Tax Commissioner .....	30	50	24	10	
Treasurer, State .....	2				
Veterinary Medical Examiners, Board of .....	1				
Workmen's Compensation Bureau .....		7			
<b>Total</b>	<u>429</u>	<u>583</u>	<u>27</u>	<u>230</u>	<u>11</u>

Grand total all sections = 1,280

\*Redesignated sections

\*\*Objection to 47-04-05-04

# AGRICULTURE COMMITTEE

The Agriculture Committee was assigned four studies. House Concurrent Resolution No. 3065 directed a study of all of the issues related to North Dakota's wetlands, including the economic and other impacts of the state's drainage permit laws. House Concurrent Resolution No. 3086 directed a study of the duties, qualifications, and authority of the State Forester, the location of the office of the State Forester, and the placement of the State Forest Service under the jurisdiction of the Board of Higher Education. House Concurrent Resolution No. 3089 directed a study of insolvencies of grain warehouses and grain buying or commission firms. Senate Concurrent Resolution No. 4036 directed a study of the problems associated with the protection and rejuvenation of shelterbelts. In addition, the Legislative Council delegated to the committee the responsibility under North Dakota Century Code (NDCC) Section 38-14.1-04.2 to receive annual reports prepared by the Reclamation Research Advisory Committee on the status of all reclamation research projects, conclusions reached, and future goals and objectives.

Committee members were Representatives Allen Richard (Chairman), Charles C. Anderson, Gordon Berg, Arthur Melby, Eugene J. Nicholas, Richard C. Pederson, Emil J. Riehl, Don Shide, Kelly Shockman, and Wilbur Vander Vorst; and Senators Bruce Bakewell, E. Gene Hilken, Earl M. Kelly, Adam Krauter, Dean Meyer, Walter A. Meyer, and F. Kent Vosper.

The report of the committee was submitted to the Legislative Council at the biennial meeting of the Council in November 1986. The report was adopted for submission to the 50th Legislative Assembly.

## WETLANDS STUDY

### State Drainage Law

Water resource districts have authority under NDCC Chapters 61-16.1 and 61-21 to issue drainage permits. Chapter 61-16.1 deals with the operation of water resource districts. Certain powers are granted to water resource district boards, including the authority to construct and control all water conservation and management devices in the district. Any person planning to drain a slough, pond, or lake that drains an area consisting of 80 acres or more, must first secure a permit for the drain. The permit application must be submitted to the State Engineer who refers the application to the affected water resource district. Investigations must be held to determine if the draining will flood or adversely affect downstream lands. If the investigation shows that the proposed drainage will flood or adversely affect downstream lands, the water resource board may not issue a drainage permit until flowage easements are obtained. An exception is provided for construction or maintenance of any existing or prospective drain constructed under the supervision of a state or federal agency, as determined by the State Engineer. Any person violating the permit requirement is liable for all damages and is guilty of an infraction (i.e., \$500 fine maximum penalty).

Chapter 61-21 pertains to drainage projects. A written petition for the construction of a drain may be submitted to the water resource district board. The petition must be signed by at least six property owners or a majority of the landowners within the proposed district whose property will be drained by the proposed drain. If the petition for the proposed drain is presented to the water resource district board, the board must establish the line of the proposed drain and designate a surveyor or engineer if further consideration is warranted. After the production of a detailed map or plan of the drain, a hearing on the plan will be held, after which the affected landowners may vote for or against the drain. The board must deny the drain petition for insufficient cause to make the petition, if costs are more than benefits to be derived, or if 50 percent or more of the affected landowners are opposed to the drain.

Although water resource districts may establish and maintain drains either under Chapter 61-16.1 or Chapter 61-21, these chapters must be exercised exclusively of each other. Therefore, a drain must be maintained pursuant to the statutory authority under which it is established.

### State Wetlands Preservation Law

Several state statutes recognize the importance of wetlands by encouraging the preservation of wetlands in North Dakota. Section 57-02-08.4 provides a conditional property tax exemption for owners of wetlands. Owners of wetlands may qualify for tax exemption by filing an agreement not to drain, fill, pump, concentrate water in a small or deeper excavation in the wetland basin, or alter the physical nature of the wetland in any manner that reduces the wetland's ability to function as a natural system during the year for which the exemption is claimed. The amount of the wetland exemption is reflected upon the property tax statement of the individual taxpayer. When wetlands are drained, the exemption is forfeited and the land is subject to additional taxes which would have been assessed if the property had not qualified for the exemption. The taxes which would have been due on the land without the exemption for the 10 years preceding the year in which the exemption was terminated must be computed, and the property owner is liable for the difference between the amount of taxes which would have been owed without the exemption and the taxes which were actually paid on the property in addition to taxes currently due.

Section 57-02-08.5 requires the State Treasurer to pay the county treasurer the sum of property taxes lost due to wetlands qualifying for the property tax exemption. The county treasurer is required to apportion and distribute the money to the county and local taxing districts.

Section 57-02-08.6 authorizes the State Treasurer to receive funds for the tax exemption program from legislative appropriation, or by gift, grants, devise, or bequest from any source. These funds are to be used to make payments to counties in lieu of revenues lost. No money has been appropriated for this program;

however, certain state officials are authorized to work with federal and private groups or citizens to develop a source of funding to implement the Act. The tax exemption program is effective for the year beginning after December 31, 1986.

Chapter 61-31 provides the waterbank program in North Dakota. Under the program, as administered by the Commissioner of Agriculture, the state may contract with landowners for the conservation of wetlands. Landowners must agree not to drain, burn, fill, or otherwise destroy wetlands, and not to use the wetlands for agricultural purposes other than as authorized by the commissioner. In return, the landowner will receive benefits, including an annual payment at a rate set by the commissioner. The State Engineer and the water resource districts are required to notify the commissioner of drainage permit applications that have been denied. The commissioner is then required to attempt to enter into a waterbank agreement with the landowner.

Section 61-31-10 requires the Commissioner of Agriculture to work with the Governor, the Game and Fish Commissioner, the United States Fish and Wildlife Service, and organizations and citizens to develop a source of funding to implement the waterbank program. The waterbank program was created in 1981 but has never received any funding. According to the office of the commissioner, funds to finance the waterbank program are being solicited.

#### **Federal Wetlands Preservation Law**

Several federal laws affect wetlands. The 1929 Migratory Bird Conservation Act initiated a program for the acquisition of land for migratory bird refuges. Under the program, the state must consent by law to the acquisitions. The 1934 Migratory Bird Hunting Stamp Act provided a revenue source to the federal government for the refuge acquisition program. Under the Act, "duck stamps" were sold and the proceeds were placed in the migratory bird conservation fund. In 1958 the Migratory Bird Hunting Stamp Act was amended to allow the Secretary of the Interior to acquire land or interests in land for waterfowl production areas. The 1958 amendment provided that the secretary could acquire waterfowl production areas without the state legislative consent required by the 1929 Act for migratory bird refuges. In 1961 Congress authorized a \$105 million interest-free loan to the migratory bird conservation fund for a crash program for acquisition of waterfowl production areas and migratory bird refuges. The 1961 Act, however, also provided that no land could be acquired using the migratory bird conservation fund unless the acquisition was consented to by the Governor or an appropriate state agency. Because of the 1929 Act and the 1961 Acts, both legislative consent and gubernatorial consent are necessary for federal acquisitions of migratory bird refuges, but state legislative consent is not necessary for the acquisition of waterfowl production areas. Between 1961 and 1977 Governor Guy and Governor Link approved the acquisition of approximately 1.2 million acres of waterfowl production area easements by the federal government through the United States Fish and Wildlife Service.

In 1964 Congress enacted the Revenue Refuge Sharing Act. This Act provided that the net receipts of the federal government under the national wildlife refuge system are to be used to make payments in lieu of taxes to counties in which refuges are located.

The Wetlands Trust of the Garrison Unit Reformulation Act, enacted in May of 1986, attempted to resolve wetland acquisition and management issues. The Act created a trust fund for developing wetlands which will primarily be used to pay farmers to maintain existing wetlands to further wildlife production. Total federal contributions to the program cannot exceed \$12 million. The fund will contain \$4 million in federal funds by 1992 and the remaining \$8 million in federal funds must be matched 10 percent by state, local, or private interests. The trust fund will be operated as a nonprofit corporation by a board of trustees with three members appointed by the Governor and three members appointed by the wetlands and wildlife organizations. The Governor's approval is required to acquire a wetland. Under this Act, there is no eminent domain authority. The trust is intended to complement existing state and federal wetlands programs by developing innovative approaches to the preservation, enhancement, restoration, and management of wetlands in private, as well as public, ownership.

#### **Wetlands in the United States and North Dakota**

It has been estimated that the original wetland acres of the 48 conterminous states have decreased at a rate of between 450,000 and 550,000 acres per year for the years from 1950 to 1970. More recently the loss-per-year figure has been set at approximately 300,000 acres. Approximately one-half of the original wetland acres of the lower 48 states have been lost. Ninety-five percent of the losses are attributable to human activities, with agriculture causing 80 percent of the loss. North Dakota comprises about 10 percent of the prairie pothole region and plays an essential role in maintaining North America's waterfowl population. Approximately 175 species of resident and migratory birds rely on North Dakota's potholes. The wetlands in North Dakota form the largest and most productive waterfowl breeding habitat in the lower 48 states. In an average year, over three million ducks will be present during the spring breeding season. This amounts to as much as 50 percent of the breeding ducks in the conterminous 48 states. A square mile of the pothole region can allow the production of breeding ducks in densities of up to 185 pairs. The United States Fish and Wildlife Service reported that by 1984, 350 nest islands and 1,625 nest structures were in place in North Dakota. Ducks banded in North Dakota have been recovered in 46 states, 10 Canadian provinces, and 22 other countries. The United States Fish and Wildlife Service reported that the long-term trend indicates duck numbers are gradually declining.

In North Dakota from 2 to 2.6 million acres (of an original 4.9 million acres) of wetlands remain. Wetlands in North Dakota are being drained at an estimated 20,000 to 30,000 acres annually. The United States Fish and Wildlife Service has stated

that it manages 423,122 acres of fee title lands in North Dakota, and has purchased easements, prior to 1976, on an estimated 758,645 acres of wetlands. Because the easements were taken on quarter-sections or larger tracts of land, the total land subject to pre-1976 easements is approximately 4.8 million acres. The terms of the pre-1976 easements prohibit the draining, filling, leveling, or burning of all wetlands located on the 4.8 million acres. The estimated number of 758,654 wetland acres protected by the pre-1976 easements represents the number of wetland acres identified by the United States Fish and Wildlife Service when payment was made to landowners for wetland easements and when county-by-county gubernatorial consents were computed. Because wetland acres in pre-1976 easements are not delineated, the actual number of wetland acres protected by the pre-1976 easements is an unresolved issue between the state of North Dakota and the United States Fish and Wildlife Service.

In the early 1950s, the states, the United States Fish and Wildlife Service, and the International Association of Fish and Wildlife Agencies jointly determined that approximately 12.5 million acres of waterfowl habitat, including wetland and upland, in the United States were needed under state and federal control to stop declines in waterfowl populations. North Dakota's share of the 12.5 million objective was 1,577,976 acres. The responsibility for acquiring this habitat was split—the federal share being eight million acres and the states' share being 4.5 million acres. According to the United States Fish and Wildlife Service, 62 percent of the 1,577,976-acre North Dakota waterfowl production area objective was accomplished between 1961 and 1983.

The United States Fish and Wildlife Service's goal is to acquire an additional 110,802 acres in fee and 491,122 acres of wetland easements in North Dakota. According to the United States Fish and Wildlife Service, if this goal is met, 500,000 wetland acres in North Dakota will not be subject to United States Fish and Wildlife Service regulation or control.

The committee received testimony regarding the North Dakota migratory bird habitat acquisition plan between the state of North Dakota and the United States Fish and Wildlife Service. This plan is a result of NDCC Section 20.1-02-18.3, requiring the United States Fish and Wildlife Service to establish a migratory waterfowl habitat plan prior to acquiring land in North Dakota. The Governor has approved the habitat acquisition plan with the following conditions:

1. The acquisition plan will be in effect unless revoked by the 1987 North Dakota Legislative Assembly.
2. The Governor has to approve every fee tract approved by the United States Fish and Wildlife Service.
3. Controversial issues between this state and the United States Fish and Wildlife Service must be resolved by an agreed upon date or the agreement is void.

The plan is required to address the extent and general locations of all proposed acquisitions with money from the migratory bird conservation fund, the

management of all such lands whether already acquired or to be acquired, and the relationship of such acquisition to mitigation acquisitions for federally financed or permitted projects. Some of the controversial issues being addressed in the plan include the length of easements; payments in lieu of taxes; migratory bird, blackbird, and waterfowl depredation to farmers' crops; weed control; emergency haying of lands; water level management on river refuges; delineation of acres under easement acquired prior to 1976; payments to landowners for maintaining wetlands; and state authority over wetland acres required by the United States Fish and Wildlife Service. The Governor and the Department of the Interior must review the acquisition plan at least once every 10 years.

#### **Costs and Benefits of Draining**

A professor at North Dakota State University presented the results of seven studies of drainage costs in parts of North Dakota and Minnesota. The studies reported large variations in drainage costs depending on the depth and length of ditch, size and type of wetland drained, presence or absence of a natural outlet, and ownership of equipment. Generally, surface drainage was reported as much less expensive than tile drainage. Of the areas studied, the lowest costs reported were from the Devils Lake area. Those costs, based on a 1979 study, ranged from \$11.24 to \$18.56 per acre for surface drainage. According to the 1979 study, costs in west central Minnesota ranged from \$21 to \$400 per acre for surface drainage and from \$250 to \$371 per acre for tile drainage. A 1981 study reflected changes in the costs of drainage in west central Minnesota ranging from \$165 to \$383 for surface drainage and \$516 to \$1,046 for the tile drainage. Based on the 1981 studies, costs in southern Minnesota ranged from \$350 to \$440 per acre for tile drainage, costs in western Minnesota ranged from \$35 to \$200 per acre for surface drainage, and costs in south central Minnesota ranged from \$425 to \$529 per acre for tile drainage. The benefit/cost ratio for surface ditch draining in 1980 was very favorable; i.e., a return of \$3.72 in northeast central North Dakota and a return of \$3.63 in southeast central North Dakota for each dollar spent to drain wetlands. Due to decreases in profitability and a slight increase in drainage costs, the benefit/cost ratios have declined in 1985 to a return of \$2.34 in northeast central North Dakota and a return of \$2.12 in southeast central North Dakota for every dollar spent on drainage.

No monetary value was placed on the benefits lost when land is drained, such as flood control; ground water recharge; erosion control; water filtration; the value to wildlife and wildlife production; recreational areas for hunting, fishing, and photography; and aesthetic and educational values.

#### **Issues Considered**

The committee reviewed three bill drafts establishing a program to provide financial assistance to landowners for the development of water projects. Two of the bill drafts, one providing for administration of the program by the Water Commission and the other providing for administration by the

Commissioner of Agriculture, would have provided matching grants to landowners whose applications for water projects had been approved by the administering agencies. Under the third bill draft, both the Water Commission and the Commissioner of Agriculture would administer the program. Landowners whose applications for water projects had been approved would be entitled to borrow money under North Dakota Century Code Chapter 4-36, which is the agribond program. Under the agribond program, the landowner would borrow money from a local lender, who would be responsible for servicing and collecting the loan. The local lender would apply to the Industrial Commission and request participation in the agribond program in the amount of the borrower's request. The Industrial Commission would issue agribonds for the total amount of the request. Proceeds from the bond sale would be deposited in local banks in the form of certificates of deposit. The landowner would repay the amount borrowed to construct the water project plus interest to the local lender, the local lender would repay the Industrial Commission, and the Industrial Commission would redeem the bonds.

Representatives from the Water Commission and the office of the Commissioner of Agriculture were generally in favor of the third proposal because it utilized the expertise of the employees of the Water Commission (in approving applications for feasible and meritorious water projects) and also provided an innovative financing mechanism through use of the agribond program, administered by the Commissioner of Agriculture. Under this proposal, individuals would have access to a source of funds for water management and conservation practices. The proposal would provide a mechanism for the state to become involved in water management projects, including the construction of stock ponds, drains, and dikes, at the local level with landowners and lessees.

The committee was advised that the swampbuster provision of the Food Security Act of 1985 may have a significant impact on development of some water projects under this proposal. The swampbuster provisions were intended to stop the destruction of the nation's wetlands. Under the swampbuster provisions of the 1985 Act, a landowner who constructs a water project which constitutes the draining of wetlands will be ineligible for any federal farm benefits.

The committee reviewed two bill drafts to establish a wetlands mediation review board to mediate disputes caused by decisions of the United States Fish and Wildlife Service pertaining to wetlands. One proposal would have established a wetlands mediation board consisting of members appointed by the Governor and the United States Fish and Wildlife Service. The other proposal established a wetlands mediation board consisting of the following ex officio members: the Governor, the Commissioner of Agriculture, the State Game and Fish Commissioner, the State Engineer of the Water Commission, the regional director of the United States Fish and Wildlife Service, and representatives of the North Dakota Farmers Union, North Dakota Farm Bureau, North Dakota National Farmers Organization, the Association of Counties, and the State Association of

Soil Conservation Districts, or their designees. Compensation of board members would be the responsibility of the entity represented. The second proposal would establish a mechanism for the entities to become informed about various conflicts and issues arising in the state regarding wetlands. Both proposals were intended to establish a mechanism to resolve problems between landowners and the United States Fish and Wildlife Service in lieu of litigating the dispute in court.

The committee reviewed a bill draft to require a federal agency to obtain approval from the county commissioners and the Governor prior to acquiring a lease, easement, or servitude of wetlands or the title to wetlands in North Dakota. From 1977 to 1985 an affirmative recommendation by the board of county commissioners was required before the Governor could grant final approval to proposed acquisitions by the federal government. Prior to 1977 successive Governors of North Dakota consented to the acquisition of easements covering approximately 1.5 million acres of wetlands. By 1977 the United States had obtained easements covering about one-half of this acreage. The United States challenged the statutes that required county commissioner approval on the grounds that they were hostile to federal law, and that any easements acquired in violation of the statutes would still be valid. The United States Supreme Court held that North Dakota's legislation could not restrict the United States' ability to acquire easements pursuant to consent previously given. The bill draft would require county commissioner approval only to future consent of acquisitions and thus would avoid possible conflict with the United States Supreme Court decision. Under this proposal, acquisition of wetlands by the United States would be approved at the local level which is the level most affected by the acquisition.

#### **Wetlands Advisory Committee**

The committee established a Wetlands Advisory Committee to present proposals on wetland issues to the committee. The advisory committee consisted of representatives from the Garrison Diversion Conservancy District, League of Women Voters, National Audubon Society, National Wildlife Federation, Pheasants Forever, North Dakota Association of Counties, North Dakota Farm Bureau, North Dakota Farmers Union, North Dakota Game and Fish Department, North Dakota Parks and Recreation Department, North Dakota State Water Commission, North Dakota Water Resource Districts Association, North Dakota Water Users Association, North Dakota Wildlife Society, United States Fish and Wildlife Service, and Wildlife Management Institute. The advisory committee served as a forum for negotiation among the representatives of the broad spectrum of groups involved in an attempt to arrive at a proposal that would accommodate the separate objectives of each organization. The advisory committee focused its study on whether preservation of additional wetlands was necessary and, if so, the manner in which the acreage should be preserved.

The Wetlands Advisory Committee recommended legislative adoption of a policy statement with respect

to wetlands. The policy statement is intended to increase cooperation between the state and the federal government; accommodate agriculture, water, and wildlife interests; and provide a framework for long-term cooperative efforts and relations with the federal government in the wetlands area. The committee reviewed two bill drafts based on the recommendations of the Wetlands Advisory Committee. One bill draft declared the wetlands policy of the state. As a policy statement, the proposal would not impose any duty on any state agency or other person but would be an advisory declaration of the state's wetlands policy. The policy statement recognizes that water is one of North Dakota's most important natural resources, and that the protection, development, and management of North Dakota's water resources is essential for long-term public health, safety, and general welfare and economic security of North Dakota. It also recognizes that agriculture is the most important industry in North Dakota and that agricultural concerns must be accommodated when wetlands are protected. The policy statement is based on the premise that water development and wetland preservation activities must be balanced to protect North Dakota's agriculture, water, and wildlife resources.

The other bill draft would have made the policy statement substantive law by imposing duties on agencies and authorizing the agencies to implement the recommendations of the Wetlands Advisory Committee.

A representative of the North Dakota water resource districts and the North Dakota Water Users Association and committee members supported adopting the policy statement bill draft as the first step in providing the framework for long-term cooperation between the federal government and the state of North Dakota. The policy statement is intended to address concerns in three areas of wetland issues. Those areas are the attempt by the Governor and the United States Fish and Wildlife Service to resolve the conflicts and improve the working relationship between the state and the United States Fish and Wildlife Service through the migratory bird habitat acquisition plan; wetland issues arising over the Garrison Diversion Unit; and wetland issues pertaining to water resource districts, which are faced with the swampbuster provisions of the Food Security Act of 1985.

### **Recommendations**

The committee recommends Senate Bill No. 2032 to provide financial assistance, through the agribond program, to landowners in developing water projects administered by the Water Commission and the Commissioner of Agriculture. The bill provides appropriations to the Water Commission and the Commissioner of Agriculture to cover expenses. The program is intended to use the expertise of the engineers at the Water Commission and use an innovative financing mechanism for the development of water projects.

The committee recommends Senate Bill No. 2033 to establish a wetlands mediation advisory board consisting of ex officio members, representing

designated entities. The bill establishes an alternative dispute resolution mechanism intended to resolve conflicts between landowners and the United States Fish and Wildlife Service pertaining to wetlands.

The committee recommends Senate Bill No. 2034 to require affirmative recommendations by the board of county commissioners before the Governor could approve proposed acquisitions of wetlands by the federal government. The bill requires approval at the county level, which is the level most affected by the acquisition.

The committee recommends Senate Bill No. 2035 to declare the wetlands policy of the state. The policy is intended to provide a framework for long-term cooperation with the federal government in the wetlands area. The policy attempts to accommodate agriculture, water, and wildlife interests.

## **STATE FORESTER STUDY**

### **History of the Office**

The office of the State Forester was created in 1913. It was the duty of the president of the School of Forestry to be the State Forester and to promote forestry in the state. The State Forester was required to establish a state nursery for the propagation of seeds and seedlings, to be distributed to citizens of the state. In 1955 the State Forester was vested with authority in all matters pertaining to the prevention, detection, and suppression of forest fires in forest protection areas. In 1971 the qualification for the office of State Forester was changed from being the president of the School of Forestry to being a member of the staff of the school. In 1980 the office of the State Forester was moved from Bottineau to Fargo.

### **Qualifications, Duties, and Powers of the State Forester**

North Dakota Century Code Chapter 4-19 provides the general qualifications and powers of the State Forester. A member of the staff of the State School of Forestry, designated by the Board of Higher Education, is the State Forester. The State Forester is given the following powers and duties:

1. Supervising the raising and distribution of seeds and forestry stock.
2. Promoting practical forestry.
3. Compiling and disseminating information relative to practical forestry.
4. Publishing, issuing, and distributing bulletins.
5. Lecturing before farmers' institutes and other organizations interested in forestry.

The State Forester is required to maintain a state nursery in conjunction with the State School of Forestry. The State Forester may distribute seeds and planting stock from the state nursery to citizens and landowners of the state, must supply suitable directions for planting seeds or forestry stock, and must furnish skilled assistance to supervise the planting if requested. The State Forester may accept gifts, donations, or contributions of land suitable for forestry purposes and may enter an agreement for acquiring, by lease, purchase, or otherwise, lands that are desirable for state forest purposes. The State Forester may sell, exchange, or lease lands under the

forester's jurisdiction, subject to any contracts entered into by the state. Section 4-19-10 authorizes any board or officer having the control or management of any real estate belonging to or controlled by the state or any of its political subdivisions to enter into agreements with the federal government for the planting of shelterbelts or other necessary protective structures and works.

The Board of University and School Lands, under NDCC Section 15-06-38, is authorized to place original grant lands that are more readily suitable for forestry than for agricultural purposes under the management of the State Forester. The State Forester is to apply good forestry practices in the care, reforestation, fire control, and management of the land. The State Forester must provide detailed annual reports to the Board of University and School Lands regarding the lands placed under the State Forester.

The State Forester, under NDCC Section 18-02-08, may, if the state is in need of special protection from forest fires, establish forest protection districts. Counties within fire protection districts may cooperate with the State Forester for fire prevention. The State Forester is granted jurisdiction in all matters relating to the prevention, detection, and suppression of forest fires outside the limits of incorporated cities in the forest protection districts. The State Forester is authorized to cooperate and contract with state or federal departments, agencies, or political subdivisions in forest surveys, research and forestry, and forest protection. The State Forester has the authority to apply for, receive, and expend federal moneys for fire protection services; to purchase, lease, or sell fire protection equipment; and to aid rural fire departments.

Pursuant to NDCC Chapter 57-57, the State Forester is given administrative authority over the woodland tax program. The owner of a woodland that qualifies under the program is entitled to pay a tax on the woodland in lieu of all ad valorem taxes by the state and local taxing authorities. The woodland tax rate is computed by the board of county commissioners and the State Forester.

Additionally, under NDCC Section 38-14.1-21, the State Forester may assist the Public Service Commission in approving or modifying a permit to conduct surface coal mining or reclamation operations. The State Forester, who is required to take care that the interests of the state are protected, is an ex officio member of the State Historical Board and a member of the State Outdoor Recreation Interagency Council. Members of the council must deal with the distribution of state general fund appropriations which are to be matched with federal outdoor recreation grants-in-aid; to periodically keep records of meetings; cooperate with the federal government, particularly in connection with distribution in the use of federal funds; and encourage cooperation among public, voluntary, and commercial agencies and organizations.

#### **Fiscal Impact of Moving State Forester to Bismarck**

House Bill No. 1520 (1985) would have removed the

State Forester from the jurisdiction of the Board of Higher Education and moved the office of the State Forester and the State Forest Service to Bismarck. The fiscal note for 1985 House Bill No. 1520 provided a cost estimate in excess of \$130,000, not including additional costs that would be incurred by the new department if NDSU-Bottineau and the State Forest Service were split. The fiscal note was prepared by the director of business affairs at NDSU-Bottineau and the State Forest Service. The \$130,000 would be the result of additional appropriations that would be necessary to compensate for NDSU-Bottineau's loss in sharing of resources and personnel with the Forest Service. Approximately 26 percent of the 1985-86 budget of the business office at NDSU-Bottineau is for the State Forest Service.

The Office of Management and Budget prepared a report for the committee on the budgetary implications of a merger of the North Dakota Forest Service with the Soil Conservation Committee and the North Dakota Parks and Recreation Department. The report indicated that there would be an annual savings of approximately \$4,900 if the Forest Service were consolidated with the Soil Conservation Committee. The report also indicated that if the Forest Service were combined with the Parks and Recreation Department there would be an annual savings of approximately \$24,600. With either plan, a one-time expenditure of \$13,500 was estimated as necessary for remodeling the district office in Bottineau and for moving the State Forester's office to Bismarck.

#### **Testimony and Considerations**

The noninstructional forestry staff at the North Dakota Forest Service, and representatives of the North Dakota Society of American Foresters, North Dakota Wildlife Society, North Dakota Recreation and Parks Association, and North Dakota Urban and Community Forestry Association were in favor of requiring the State Forester to have a degree in forestry and of moving the office of the State Forester and the Forest Service to Bismarck. Representatives of all of these organizations, except the noninstructional Forest Service staff, were in favor of removing the State Forest Service from the jurisdiction of the Board of Higher Education. They expressed a preference for establishing the Forest Service as an independent agency and as an alternative consolidating the Forest Service with another agency. They testified that implementation of these recommendations would increase the effectiveness and productivity of the State Forest Service and make the State Forester more responsive to the needs of the state by allowing greater interaction with other state agencies, federal agencies, and the Legislative Assembly; and increase the visibility and accessibility of the State Forester to private citizens. It was also suggested that expenses and travel costs may be reduced if the office of the State Forester were located in Bismarck. Proponents of these changes argued that the State Forester should be trained in forestry in order to apply forestry principles and practices to achieve sound resource management and conservation of North Dakota's

forestry resources. The reason expressed for removing the State Forester from the jurisdiction of the Board of Higher Education was that the North Dakota Forest Service is a service-oriented agency, no longer involved in the education of forestry students. Additionally, locating the Forest Service in Bismarck would place the Forest Service in a setting where policy decisions are made.

The committee considered two bill drafts and a proposal to remove the State Forest Service from the jurisdiction of the Board of Higher Education, move the office of the State Forest Service and the State Forester to Bismarck, and require the State Forester to have a baccalaureate degree in forestry. Under one bill draft the State Forester would have been appointed by the Governor and the State Forestry Department would have been established as an independent agency.

Under the second bill draft the State Department of Forestry would become a division of the State Soil Conservation Committee. The State Forester would be appointed by the Soil Conservation Committee and would serve as director of the State Department of Forestry. The executive director of the Soil Conservation Committee testified that soil conservation interests and forestry interests both recognize the importance of a total tree production, planting, care, maintenance, renovation, and utilization program. Upon consolidation with the Soil Conservation Committee, forestry assistance would be delivered through the existing network of the 62 soil conservation districts to both rural and urban interests. Consolidation would be beneficial from the viewpoint that both organizations are concerned about the maintenance and renovation of trees.

A proposal was made that would have consolidated the State Forest Service with the North Dakota Parks and Recreation Department to form the Department of Parks, Recreation, and Forestry. The director of the Department of Parks and Recreation indicated that the benefits that would result from this consolidation included reducing administrative costs; providing better service; improving coordination and cooperation with other state and federal agencies including the Water Commission, the State Game and Fish Department, the State Land Department, the Bureau of Land Management, the Corps of Engineers, and the United States Fish and Wildlife Service; providing easier access to the legislative, judicial, and executive branches of government; and upgrading the visibility of both the Parks and Recreation Department and the State Forest Service.

The noninstructional staff of the Forest Service opposed removing the Forest Service from the jurisdiction of the Board of Higher Education; however, they were in favor of locating the office of the State Forester in Bismarck and requiring the State Forester to have a degree in forestry. Representatives of NDSU-Bottineau and the Board of Higher Education opposed changes in the existing structure of the Forest Service. They argued that a closer reaffiliation between the Forest Service and NDSU-Bottineau would increase the efficiency of the Forest Service. They testified that several of the

problems that prompted House Concurrent Resolution No. 3086 had been taken care of administratively; i.e., the acting State Forester has a bachelor's degree in forestry; the Forest Service had increased public visibility by increasing educational and promotional activity through newspapers, television, radio, and journals; the acting State Forester had met with the Governor and solicited input on forestry programs from other state agencies in an attempt to increase coordination with those agencies; and the Forest Service had become more responsive to landowner needs in shelterbelt renovation, tree planting, and in providing urban forestry assistance to communities through workshops. Problems with consolidation include securing a comparable level of business office support at an equivalent cost (NDSU-Bottineau and the Forest Service currently share resources and the cost of purchases); retaining staff participation in North Dakota higher education retirement plans; continuing the "rent-free" use of publicly owned office space currently received at NDSU-Bottineau and Dickinson State College; maintaining close working relationships with the extension and research branches of North Dakota State University; disrupting employee and program performance; and retaining direct control over forestry programs, personnel, resources, facilities, and budgets.

#### **Recommendation**

The committee recommends House Bill No. 1030 to make the State Department of Forestry a division of the State Soil Conservation Committee. The bill requires the Soil Conservation Committee to appoint a State Forester to serve as the director of the State Department of Forestry, requires the State Forester to be a graduate of an accredited school of forestry with a minimum education of a Bachelor of Science degree in forestry, and requires the office of the State Forester and the State Department of Forestry to be located in Bismarck.

#### **GRAIN WAREHOUSE INSOLVENCIES STUDY Warehouse Insolvencies in North Dakota**

Sales of commodities by credit-sale contracts are commonly used to shift income from one year to another. As of January 1, 1985, 392 of the 582 licensed warehousemen in North Dakota reported in excess of \$190 million in credit-sale contracts outstanding. This amount will vary depending from year to year upon the farm economy and the need to defer income.

Since 1975 there have been 11 insolvencies, and there are three pending insolvencies, of grain warehouses or grain elevators in North Dakota. All but two of the insolvencies and pending insolvencies have occurred since January 1, 1982. In an insolvency proceeding, cash claims against the grain warehouse are normally satisfied out of both grain proceeds and bond proceeds. Credit claims or those claims arising out of a credit-sale contract, however, are normally satisfied only out of the grain proceeds or other assets of the grain warehouse. Bond coverage is not mandated for credit-sale contracts entered into by a grain warehouseman. In three of the insolvencies,

individuals holding executory credit-sale contracts suffered losses in excess of \$340,000. The largest loss resulted from the insolvency of Central States Grain of Anslem, where over \$200,000 was lost. During the same 10-year period, unpaid cash claims against insolvent North Dakota grain warehousemen totaled over \$250,000, stemming mainly from the 1984 insolvency of National Sun Industries of Enderlin.

### **Warehousemen Insolvency and Credit-Sale Contracts Law**

Provisions relating to grain warehousemen and roving grain or hay buyers are found in NDCC Chapters 60-02, 60-03, and 60-04. Sections 60-02-01 and 60-04-01 define a credit-sale contract as a written contract, or that portion of the contract, for the sale of grain which is to be paid or may be paid more than 30 days after delivery or release of the grain being sold.

Section 60-02-09 requires certain bonding requirements to be met before the Public Service Commission will issue a license. The bond must be for the specific purpose of protecting holders of outstanding receipts, and covering the costs incurred by the Public Service Commission in the event of a licensee's insolvency; however, the bond may not accrue to the benefit of any person entering into a credit-sale contract with a public warehouseman.

Section 60-02-19.1 provides that warehousemen may only purchase by credit-sale contracts if certain requirements are met, including providing notice of the lack of bond coverage for credit-sale contracts, unless bond coverage has been obtained. If the public warehouseman's license is revoked, terminated, or canceled, a person selling by a credit-sale contract may advance the date of the contract to not later than 30 days from the effective date of the revocation, termination, or cancellation.

Several additional provisions in Chapter 60-02 pertain to public warehouse insolvencies. In the event of an insolvency, all grain in the warehouse must first be applied to the satisfaction of receipts which have been issued by the warehouseman. "Receipts" does not include credit-sale contracts. A farmer who sells grain on a credit-sale contract becomes an unsecured creditor. Receiptholders have a first priority lien on all grain contained in the warehouse. This lien has priority over any lien or security interest in favor of a creditor of the warehouseman, regardless of the time when the creditor's lien or security interest attached to the grain. The lien is discharged upon the sale of grain in the ordinary course of business. When a public warehouseman ceases business, the warehouseman must redeem all outstanding unconverted sales tickets or warehouse receipts at the price prevailing on the date of closing.

Chapter 60-03 applies to roving grain or hay buyers. Section 60-03-01 defines a credit-sale contract as a contract, or that portion of a contract, for the sale of grain pursuant to which the sale price is to be paid or may be paid after the delivery or release of the grain for sale. Roving grain or hay buyers are prohibited from purchasing or marketing grain or hay by credit-sale contracts unless they file a \$50,000 minimum bond with the Public Service Commission

for the benefit of all persons selling grain or hay to or through the buyer by credit-sale contract. The amount of the bond may be raised at the discretion of the Public Service Commission.

North Dakota Administrative Code Section 69-07-02-02 provides a schedule for bond amounts required of public warehousemen. Based upon the capacity of the warehouse, the amount of bond required will range from \$50,000 for a warehouse with a capacity up to 50,000 bushels to \$500,000 for a warehouse with a capacity between 475,001 and 500,000 bushels. For a warehouse with a capacity of greater than 500,000 bushels, the bond amount is \$500,000 plus \$5,000 for each additional 25,000 bushels or fraction thereof. The commission may require additional bonds if necessary.

In addition to state law pertaining to the insolvency of grain warehousemen, federal bankruptcy law may apply if the warehouseman has sought the protection of federal bankruptcy or has been forced into federal bankruptcy.

In 1971, House Bill No. 1241 amended Section 60-02-09 to exempt credit-sale contracts from bond coverage. The exemption for bond coverage for credit-sale contracts eliminated the need for increasing the bond amount for warehousemen, according to the minutes of the Senate Agriculture Committee.

### **Action in Other States**

Bond coverage for credit-sale contracts varies in surrounding states. In Minnesota bond coverage is not mandated for credit-sale contracts; however, a warehouse must maintain 90 percent of the value of its credit-sale contracts in assets pursuant to Minnesota Statutes Annotated Section 223.177(4). South Dakota has statutorily affirmed the past practice of not mandating bond coverage for credit-sale contracts. Montana has retained mandatory bond coverage for credit-sale contracts. According to the Montana Department of Agriculture, this coverage has been subject to review and may be eliminated in the future. In addition to traditional surety bond coverage, some states have added additional insolvency protection through state-controlled indemnity funds. These funds may provide coverage supplementing that of existing surety bonds.

### **Testimony**

House Concurrent Resolution No. 3089 reflected the concern that producers of grain sold on credit-sale contracts should have priority over general creditors in the distribution of assets of elevators that file for bankruptcy. This concern is based on the premise that producers of agricultural commodities should retain ownership of the product until payment in full has been received and honored.

Representatives of the North Dakota Grain Dealers Association, North Dakota Farmers Union, North Dakota Farm Bureau, and North Dakota Wheat Producers generally opposed requiring warehouseman's bonds to cover grain sold on credit-sale contracts. Testimony received indicated that the losses on credit-sale contracts are disproportionately small compared to the total volume of credit-sale contracts issued in this state and most of the losses

have been from specialty crops.

The bond rates of Transamerica Insurance Company, which is the state's largest underwriter, will increase for 1986-87 from between 150 to 400 percent depending on the size of the warehouse. It was estimated that a bond, for a 250,000-bushel capacity warehouse, that cost \$488 in 1985-86 will cost \$1,250 in 1986-87 and \$2,500 in 1987-88; for a 400,000-bushel capacity warehouse, a bond that cost \$638 in 1985-86 will cost \$2,000 in 1986-87 and \$4,000 in 1987-88; a bond for a 750,000-bushel capacity warehouse that cost \$788 in 1985-86 will cost \$2,750 in 1986-87 and \$5,500 in 1987-88; and a bond for a 1,200,000-bushel capacity warehouse that cost \$878 in 1985-86 will cost \$3,200 in 1986-87 and \$6,400 in 1987-88. The increase in bond costs is due to premium rates that were not changed for several years, losses in recent years that have cost bonding companies \$1.5 million, and court decisions holding that bonding companies must cover obligations that the bonding companies argued were not covered by the bond. Credit-sale contracts were not taken into account under any of these estimates. Such coverage was described as much more expensive.

Insurance coverage for producers of grain sold on credit-sale contracts is generally not available, or if available, is at a rate unacceptable to producers. Insurance coverage for grain sold on credit-sale contracts was offered in Iowa and Illinois but was not successful. The underwriting results were unfavorable because of the risk selection. Farmers who sold to financially stable elevators would not purchase protection at any price and as a result it was difficult to develop reasonable premium charges for those willing to purchase. Testimony indicated that insurance coverage was available to elevators for grain sold on credit-sale contracts at approximately \$2.50 per \$100 of insurance.

Opposition was expressed to creating an indemnity fund that would indemnify one commodity at the expense of another. Testimony generally indicated that any plan to provide insolvency protection for people selling by credit-sale contracts should be paid for by the persons who receive the protection.

### **Conclusion**

The committee makes no recommendation with respect to the feasibility of providing surety bond coverage, insurance coverage, or other insolvency protection for grain producers entering into credit-sale contracts.

### **SHELTERBELT STUDY**

#### **Shelterbelts in North Dakota**

Shelterbelts and other wind erosion prevention means have been widely practiced in North Dakota following the substantial soil erosion of the 1930s. Of the 1.5 million acres of woodlands in North Dakota, windbreaks and shelterbelts compose over 384,000 acres. In addition to these acres, North Dakota's woodlands are composed of approximately 343,000 acres of potential commercial forest and 120,000 acres of urban or community woodlands. Total woodlands within the state have increased, purportedly due to the planting of trees for erosion control. The number of trees planted for soil erosion control within the

state yearly has been declining recently. Most windbreak planting began after 1939. The yearly average windbreak plantings in miles has decreased from 2,703.4 miles in 1960-64 to 2,482.2 miles in 1965-69; 1,885.2 miles in 1970-74; 1,108.4 miles in 1975-79; and 690.6 miles in 1980-84. It appears that over 65 percent of North Dakota's planted field windbreaks are 15 years old or older. Nearly 20 percent are 25 years old or older.

At the state level, the State Forester provides assistance for shelterbelt planting and maintenance to private woodland owners. The State Forester is authorized to supervise the raising and distribution of seeds and forest tree planting stock and to promote practical forestry. Seeds and planting stock are distributed by the State Forester to citizens and landowners in the state at cost, except that planting stock distributed for live snow fences or highway beautification projects may be distributed free of charge. The State Forester provides information regarding the planting and when requested the forester must furnish skilled assistance to supervise the planting of seeds and planting stock, with the cost assessed to the applicant. The State Forester also assists the soil conservation districts. Pursuant to NDCC Section 61-16.1-09 a water resource district may order or initiate appropriate legal action to compel the cessation of the destruction of native woodland bordering within 200 feet of a riverbank subject to overflow flooding that will cause extensive property damage or it may order owners of such property to plant a shelterbelt for flood protection.

In addition to state programs, the federal government is active in the planting and promotion of shelterbelts. The Soil Conservation Service of the United States Department of Agriculture provides the major thrust in shelterbelt planting through technical assistance to North Dakota landowners and soil conservation districts on planting and renovation of windbreaks and shelterbelts. This assistance comes mainly in the form of windbreak standards and specifications which provide the necessary dimensions and composition of various windbreaks. These standards also provide information regarding care and maintenance of shelterbelts by providing information on replanting, controlling grasses and weeds, pruning, thinning, and supplemental watering of windbreaks. Standards vary depending on desired use or purpose of the shelterbelt. Additionally, federal cost-sharing programs help pay a percentage of the expenses for shelterbelt plantings.

Shelterbelts and windbreaks are the best wind erosion prevention practice available in North Dakota, and there are many more miles of shelterbelts in North Dakota than in any other state. The growing tendency to rent or lease land has cut down on the number of tree plantings, owing to the reluctance of renters to plant and tend shelterbelts. Shelterbelts also cut down on the crop production area available to the farmer and require substantial upkeep and weed control.

Cost-sharing programs are available under the agriculture conservation program of the United States Department of Agriculture's Agricultural Stabilization and Conservation Service and the Great

Plains conservation program of the United States Department of Agriculture's Soil Conservation Service. Farmers are eligible for payments from the Agricultural Stabilization and Conservation Service and the Soil Conservation Service up to 75 percent of allowable costs. Those costs range up to \$15 per acre for land preparation, up to \$9 per 100 feet for tree planting, up to \$5.63 per 100 feet for restoration-thinning, and up to \$22.50 per 100 feet for restoration-removal. For fiscal year 1984, cost-shares paid to North Dakota landowners by the federal government under the agricultural conservation program of the Agricultural Stabilization and Conservation Service totaled \$602,118, and under the Great Plains conservation program of the Soil Conservation Service totaled \$33,926.

### **Considerations**

The committee toured the North Dakota Soil Conservation District's Lincoln-Oakes Nurseries where deciduous stocks are grown. The committee received information on the forestry program between the state of South Dakota and the Corps of Engineers. The South Dakota Division of Forestry and the Corps of Engineers have entered into a contract to establish food plots, nesting cover for birds, and tree plantings around Lake Sharp and Lake Oahe in South Dakota. The committee compiled information used by the United States Department of Agriculture's Soil Conservation Service to plan and design windbreaks when assisting North Dakota landowners, including the standards and specifications for renovating old windbreaks as well as those used for new farmstead and field windbreaks.

It was indicated that additional research is necessary to be able to provide landowners and soil conservation district supervisors with information to prevent the decline of existing shelterbelts, including information on tree renovation or rejuvenation, on the removal and replacement of shelterbelts, and on tree pruning and thinning to improve the effectiveness of existing shelterbelts. It is also necessary to develop genetically superior trees; to place greater emphasis on the selection of species more tolerant to insects, diseases, and agricultural chemicals; to increase research on regrowth control; and to research the effects shelterbelts have on crop yields, snow distribution, and soil erosion.

The committee received information from the United States Department of Agriculture's Agricultural Stabilization and Conservation Service regarding a research project involving the genetic improvement of trees used for conservation of soil and water in the northern Great Plains. The problems identified in the project were lack of reliable seed sources for nursery stock production; poor performance—high mortality of single row Siberian elm field breaks; lack of hardiness — high mortality in more populous species; need for additional tree and shrub species adapted to the northern Great Plains;

and the need for genetically improved cultivars of major tree and shrub species. Research objectives were identified as improving tree and shrub cultivars genetically for traits such as hardiness, pest and herbicide tolerance, faster growth rate, better crown form, and reduced crop competition; and improving techniques for propagating, establishing, and managing genetically improved trees and shrubs in seed orchards and clonal stool beds.

The executive director of the State Soil Conservation Committee indicated the Soil Conservation Committee did not intend to request funds for shelterbelts from the 1987 Legislative Assembly because federal programs were adequate at this time and that federal cost-sharing programs supply the incentives for farmers to plant shelterbelts.

### **Conclusion**

The committee compiled information on the planting and maintenance of shelterbelts but makes no recommendation with respect to the protection and rejuvenation of existing shelterbelts.

### **LAND RECLAMATION RESEARCH CENTER REPORTS**

North Dakota Century Code Section 38-14.1-04.1 establishes a three-member Reclamation Research Advisory Committee appointed by the Governor. The committee's responsibilities include establishing and inventorying all reclamation research projects in the state, reviewing proposed reclamation research projects administered by the Public Service Commission, and determining whether Public Service Commission reclamation research projects should be funded. The committee also recommends to the Public Service Commission future reclamation research budgets to be administered by the commission. The Reclamation Research Advisory Committee is required under Section 38-14.1-04.2(5) to prepare yearly reports to the Legislative Council on the status of all reclamation research projects, conclusions reached, and future goals and objectives. The Legislative Council has directed that these reports be received by the interim Agriculture Committee during the 1985-86 interim.

1985 Senate Bill No. 2009 appropriated \$1,318,788 to the Land Reclamation Research Center. An amount of \$726,365 of the funds appropriated is to be used for research projects regarding prime farmland soil productivity, development of productivity indices for reclaimed land, soil respreading and depth of soil replacement, and runoff and erosion on reclaimed land.

Senate Bill No. 2009 requires the Land Reclamation Research Center to file annual reports with the Legislative Council on August 1. These reports are prepared by the Reclamation Research Advisory Committee. The reports are on file in the Legislative Council office. The committee accepted the reports and took no further action with regard to them.

# BUDGET SECTION

North Dakota Century Code (NDCC) Section 54-44.1-07 requires the budget director to present the Governor's budget and revenue proposal to the Budget Section. In addition, the Budget Section is assigned other duties by law which are discussed in this report.

Budget Section members were Senators Evan E. Lips (Chairman), William S. Heigaard, Jim Kusler, Corliss Mushik, Pete Naaden, Gary J. Nelson, David E. Nething, R. V. Shea, Bryce Streibel, Floyd Stromme, Harvey D. Tallackson, Jens J. Tennesos, Russell T. Thane, Malcolm S. Tweten, Jerome L. Walsh, and Frank A. Wenstrom; Representatives Gordon Berg, Gereld F. Gerntholz, Jayson Graba, Ronald E. Gunsch, Orlin Hanson, Roy Hausauer, Tish Kelly, Harley R. Kingsbury, Tom Kuchera, Bruce Laughlin, Thomas Lautenschlager, Charles Mertens, Robert Nowatzki, Olaf Opedahl, Jim Peterson, Verdine D. Rice, Beth Smette, Oscar Solberg, Scott B. Stofferahn, Earl Strinden, Kenneth N. Thompson, Michael Unhjem, Francis J. Wald, Brent Winkelman, and Thomas C. Wold; and Lt. Governor Ruth Meiers. Representative Pete Lipsiea was a member of the committee until his death in June 1985.

The report of the committee was submitted to the Legislative Council at the biennial meeting of the Council in November 1986. The report was adopted for submission to the 50th Legislative Assembly.

At its organizational meeting, members were informed of the following Budget Section duties and responsibilities:

1. 1985 House Concurrent Resolution No. 3059 authorizes the Budget Section to hold the required legislative hearings for federal block grants under the Omnibus Budget Reconciliation Act of 1981. The Budget Section authority is in effect through September 30, 1987.
2. 1985 Senate Concurrent Resolution No. 4039 directs the Budget Section to monitor federal tax and budget changes affecting the state of North Dakota during the 1985-87 biennium.
3. 1985 House Bill No. 1001, which created North Dakota Century Code Section 57-01-11.1, requires the Tax Commissioner to submit quarterly reports to the Budget Section on the progress made in collecting additional tax revenues under the enhanced audit program and on settlements of tax assessments.
4. 1985 House Bill No. 1001 requires the Agriculture Commissioner to submit quarterly reports to the Budget Section regarding the progress and administration of the farm credit counseling program. 1985 Senate Bill No. 2349 provided a \$460,000 appropriation for the farm credit counseling program.
5. NDCC Section 50-06-05.1(18) provides that the Department of Human Services, with the approval of the Budget Section, may terminate the food stamp program should the rate of federal financial participation and administrative costs provided under Public Law 93-347 be decreased or limited, or should the state or counties become financially responsible for all or a portion of the coupon bonus payments under the Food Stamp Act.

6. NDCC Section 50-06-05.1(20) provides that the Department of Human Services, with the approval of the Budget Section, may terminate the energy assistance program should the rate of federal financial participation and administrative costs be decreased or limited to less than 50 percent of the total administrative costs, or should the state or counties become financially responsible for all or a portion of the cost of energy assistance program benefits.
7. The 1973 Legislative Assembly assigned the duties of the auditing board to the Executive Budget Office. NDCC Section 54-14-03.1 requires the Executive Budget Office to submit a written report to the Budget Section documenting irregularities discovered during the preaudit of claims, and areas where more uniform and improved fiscal practices are desirable. 1985 House Bill No. 1003 expands the definition of irregularities to include payments of bonuses, cash incentive awards, and temporary salary adjustments to state employees.
8. NDCC Section 54-14-01.1 requires the Budget Section to periodically review the actions of the Office of the Budget (a division of the Office of Management and Budget) regarding the following budget office statutory duties: (1) requiring itemized statements prior to payment of claims against the state; (2) regulations regarding departmental payroll procedures; (3) use of electronic funds transfer systems for payment of departmental payrolls; (4) regulations regarding standardized voucher forms and disapproval of claims; and (5) withholding from state employee compensation.
9. 1985 House Bill No. 1006 requires the Director of Institutions to present to the Budget Section during the 1985-86 interim a detailed proposal regarding the future plans for the old state office building.
10. 1985 House Bill No. 1009 requires the Department of Human Services to report to the Budget Section any deficiency appropriation to be introduced in the 50th Legislative Assembly as a result of changes in federal financial participation rates in entitlement programs.
11. 1985 Senate Bill No. 2009 provides for an appropriation of up to \$1 million in gifts, to be expended upon Budget Section approval, for the construction of a research and extension service staff facility at the Main Experiment Station or a branch station.
12. 1985 Senate Bill No. 2032 requires the Workmen's Compensation Bureau to make periodic reports during the 1985-86 interim to the Budget Section regarding the bureau's progress in the modernization of its data processing and accounting systems. The project requires Budget Section approval before expenditures can be made pursuant to the \$561,487 appropriation provided for the project. If the Workmen's Compensation Bureau desires to move, the relocation requires the approval of the Budget Section, Director of Institutions, and

Emergency Commission. Approval by the Budget Section, Director of Institutions, and Emergency Commission is required before the contingency line item containing funds for rent expense can be utilized.

13. NDCC Section 54-27.1-10 required the Federal Aid Coordinator (Intergovernmental Assistance) to report to the Budget Section areas where the consolidation of receipt of federal funds by state agencies would result in improved program efficiency in the expenditure of federal funds. This law was repealed by the 1985 Legislative Assembly effective June 30, 1985.
14. NDCC Section 21-11-05 provides for the Economic Development Commission to file applications for natural resources development bond issues with the Legislative Council. The Legislative Council is to prepare and submit any necessary legislation for authorization of issuance of bonds or appropriation of funds. The loans from a bond issue can be made to any qualifying enterprise to plan, acquire, or improve facilities for the conversion of North Dakota natural resources into low cost power and the generation and transmission of such power. The program was established by the 1983 Legislative Assembly.
15. NDCC Section 15-65-03 provides that before a public broadcasting facility can accept a gift of a tax-producing property, it must receive Budget Section approval.
16. NDCC Section 54-16-01 allows Emergency Commission transfers from the state contingency fund in excess of \$500,000 only to the extent the requests for transfers are approved by the Budget Section.
17. NDCC Section 15-10-18 requires institutions of higher education to charge nonresident students tuition in amounts to be determined by the State Board of Higher Education with the approval of the Budget Section.
18. NDCC Section 15-10-12.1 requires the Budget Section to review and act upon State Board of Higher Education requests for authority to construct buildings or campus improvements on land under the board's control when the construction is financed by donations, gifts, grants, and bequests; and to act upon requests from the board for authority to sell any property or buildings which an institution of higher education has received by gift or bequest.
19. NDCC Section 54-27-22 requires Budget Section approval of state agency and institution requests for moneys from the capital improvements preliminary planning revolving fund.
20. 1985 House Bill No. 1021 appropriates \$905,000 for the Souris River flood control project. If the full amount is not needed to complete the project, or if the full amount will not be spent during the 1985-87 biennium, the State Water Commission upon Budget Section approval may utilize unused amounts for other contract purposes.
21. NDCC Section 54-44.1-07 requires the Budget Section to review, prior to the 1987 legislative

session, the executive budget for the 1987-89 biennium.

The Budget Section was not required to hold public block grant hearings since the state did not receive, in addition to the moneys appropriated by the Legislative Assembly for the 1985-87 biennium, federal block grant moneys under the Omnibus Budget Reconciliation Act of 1981.

The Budget Section did not receive requests or reports:

1. From the Department of Human Services to terminate the energy assistance or food stamp programs as a result of a decrease in the rate of federal financial participation.
2. From the Federal Aid Coordinator (Intergovernmental Assistance) regarding areas where the consolidation of receipt of federal funds by state agencies would result in improved program efficiency in the expenditure of federal funds. This statutory requirements expired June 30, 1985.
3. To receive applications for natural resources development bond issues.
4. From a public broadcasting facility to accept a gift of a tax-producing property.
5. From state agencies or institutions for moneys from the capital improvements preliminary planning revolving fund.
6. From the State Water Commission to carry over unexpended amounts appropriated for the Souris River flood control project or to use unexpended amounts for other contract purposes.

#### FEDERAL TAX AND BUDGET CHANGES

1985 Senate Concurrent Resolution No. 4039 directs the Budget Section to monitor federal tax and budget changes affecting the state of North Dakota during the 1985-87 biennium. Of the \$2.4 billion in total state appropriations approved by the Legislative Assembly for the 1985-87 biennium, approximately \$700 million is from federal funds.

#### Federal Budget Changes

The Congressional Balanced Budget and Emergency Deficit Control Act of 1985 enacted in December 1985 included a process for reducing the federal budget deficit, known as the Gramm-Rudman-Hollings law. This law requires a balanced federal budget by federal fiscal year (FFY) 1992 and establishes the following budget deficit ceilings:

FFY 1986	\$171.9 billion
FFY 1987	144.0 billion
FFY 1988	108.0 billion
FFY 1989	72.0 billion
FFY 1990	36.0 billion
FFY 1991	0

If the annual budget deficit ceiling is exceeded, a "sequestration" or an across-the-board reduction in federal appropriations is mandated except for exempt programs. The major exempt programs are Medicaid, Social Security, child nutrition, Aid to Families With Dependent Children, and food stamps.

The Legislative Council staff presented information on the impact of the Gramm-Rudman-Hollings law on federal funds appropriated for the 1985-87 biennium. The estimated impact of the 4.3 percent reduction on federal funds budgeted by state agencies and institutions for fiscal year 1986 was approximately \$10.3 million. The United States Congress was not required to effect the Gramm-Rudman-Hollings law across-the-board budget reductions for federal fiscal year 1987 due to favorable federal revenue and expenditure estimates.

### Federal Tax Changes

The Tax Reform Act of 1986, enacted in October 1986, resulted in major tax modifications generally effective January 1, 1987, for corporate and individual income tax payers. Due to the major reform nature of the Act, a number of modifications regarding tax rates, deductibility, tax credits, and taxable income will affect revenues generated from federal and state income taxes.

Representatives of the Tax Department testified that for North Dakota income tax payers the average federal tax liability decrease could approach 10 percent. Approximately 87 percent of state tax returns filed utilize the short form. The 10.5 percent income tax rate on the short form is based on federal tax liability. Although information for a precise estimate is not available, the decrease in state individual income tax revenue amounts, due to the lower federal tax liability, could approach \$7 million per year. In addition, the federal tax changes will affect long-form tax filers.

The 1987-89 biennium revenues and expenditures will be affected by the federal Gramm-Rudman-Hollings budget reductions and the federal tax law modifications. Unless adjustments are made for corporate and individual income taxes, less revenue will be generated by income taxes in the 1987-89 biennium.

### STATUS OF STATE GENERAL FUND

At each Budget Section meeting, a representative of the Office of Management and Budget reviewed the status of the state general fund and revenue collections.

### Revenue Revision

In February 1986 the market price per barrel of oil began to precipitously decrease from the \$25 per barrel estimated price to \$17.50. By April 1986, the actual price per barrel was \$11.50 compared to the \$25.13 estimated price. The significant oil price decrease, with a subsequent decrease in state oil production, led to the revision of 1985-87 estimated revenues in May 1986. The following schedule compares the original 1985-87 biennium revenue estimates adopted by the 1985 Legislative Assembly with the May 1986 revised estimates:

Revenue Type	Original Estimate	Revised Estimate	Variance
Sales and use taxes	\$ 391,871,000	\$357,774,000	\$ (34,097,000)
Individual income tax	167,074,000	144,167,000	(22,907,000)
Corporate income tax	76,614,000	96,182,000	19,568,000
Cigarette and tobacco tax	19,807,000	19,547,000	(260,000)
Oil and gas production tax	86,266,000	55,664,000	(30,602,000)
Oil extraction tax	122,409,000	80,875,000	(41,534,000)
Coal severance tax	16,465,000	15,736,000	(729,000)
Coal conversion tax	25,463,000	16,908,000	(8,555,000)
Insurance premium tax	20,040,000	25,166,000	5,126,000
Interest income	27,394,395	24,240,000	(3,154,395)
Other	72,421,912	73,724,000	1,302,088
Total revenue	\$1,025,825,307	\$909,983,000	\$(115,842,307)

The 1985 Legislative Assembly revenue estimate, the May 1986 revised revenue estimate, actual general fund revenues, and the variance of actual revenues from the revised revenue estimate for the period from July 1, 1985, through September 30, 1986, are as follows:

Revenue Type	1985 Legislative Assembly Revenue Estimate Through September 1986	May 1986 Revised Revenue Estimate Through September 1986	Actual Revenues Through September 1986	Comparison of Actual Revenues to the Revised Revenue Estimate
Sales and use taxes	\$234,894,000	\$219,230,997	\$220,120,256	\$ 889,259
Individual income tax	92,960,000	81,687,001	83,381,060	1,694,060
Corporate income tax	49,511,000	64,299,000	64,641,045	342,045
Cigarette and tobacco tax	12,635,000	12,482,000	12,332,827	(149,173)
Oil and gas production tax	51,390,000	40,187,001	40,613,991	426,990
Oil extraction tax	73,446,000	57,748,000	58,048,320	300,320
Coal severance tax	9,393,000	9,311,032	9,398,776	87,744
Coal conversion tax	14,556,000	10,047,432	10,057,821	10,389
Insurance premium tax	12,795,000	15,065,602	15,274,784	209,182
Interest income	20,029,000	19,568,833	19,876,734	307,901
Other	37,760,000	42,314,534	43,549,003	1,234,468
Total revenue	\$609,369,000	\$571,941,432	\$577,294,617	\$5,353,185

In March 1986 the Governor mandated a four percent across-the-board general fund budget reduction allotment due to the significant decrease in estimated revenues. The four percent allotment decreased general fund expenditures by approximately \$45 million.

### General Fund Balance

Due to the significant revenue decrease the following changes to revenues, expenditures, and the ending state general fund balance are anticipated to occur:

July 1, 1985, general fund balance		\$ 150,400,000
Original revenue estimate	\$1,025,800,000	
Less: May 1986 revenue revisions	<u>115,800,000</u>	
1985-87 revised revenue estimate		<u>910,000,000</u>
Total available moneys		\$1,060,400,000
1985-87 legislative appropriations	\$1,133,100,000	
Less: Four percent allotment-March 1986	<u>45,000,000</u>	
1985-87 revised expenditures		<u>1,088,100,000</u>
June 30, 1987, estimated balance		<u>\$ (27,700,000)</u>

Based on cash flow projections, representatives from the Office of Management and Budget anticipate that funds will need to be borrowed beginning in January 1987. Pursuant to NDCC Section 54-27-23, during the biennium general fund cash flow borrowing is authorized from special funds.

### ENHANCED AUDIT PROGRAM

Pursuant to 1985 House Bill No. 1001, the State Tax Commissioner reported on the enhanced audit program collections and major assessments. In addition, the State Tax Commissioner reported on settlements of tax assessments.

For the period from July 1, 1985, through September 30, 1986, enhanced audit program collections were approximately 135 percent of the \$6.6 million goal to date or \$2.3 million more than estimated. The 1985-87 biennium enhanced audit program goal is \$10 million.

Total major assessments of approximately \$20 million and total major collections of \$5.5 million were reported for the period from April 1, 1986, through September 30, 1986.

### FARM CREDIT COUNSELING PROGRAM

Pursuant to 1985 House Bill No. 1001, the Budget Section received reports from representatives of the Department of Agriculture on the progress of the farm credit counseling program. 1985 Senate Bill No. 2349 provided a \$460,000 appropriation to establish a farm credit counseling program under the supervision of the Agriculture Commissioner.

Since the program's \$460,000 appropriation was spent by the end of August 1986, the farm credit counseling program was combined with the Farm Credit Review Board, and beginning in August 1986, the board began paying all employee and operation costs of the program. The demand for the farm credit counseling services exceeded that anticipated when the program was authorized. The Farm Credit Review Board was established by 1985 House Bill No. 1494 to establish a farm foreclosure negotiation board and to provide a home-quarter purchase fund. The bill appropriated \$50,000 from the general fund for administrative expenses and \$2 million from the Bank of North Dakota profits for the home-quarter purchase fund.

The farm credit counseling program assisted 1,220 farmers for the period from July 1985 through October 1986.

Representatives from the Department of Agriculture recommended that the program be continued during the 1987-89 biennium and be reviewed biennially. The department's 1987-89 budget request includes a \$759,000 request for the program. The temporary financing agreement with the Farm Credit Review Board would be discontinued if this request is approved.

### STATE BOARD OF HIGHER EDUCATION

#### Tuition Rates

In accordance with NDCC Section 15-10-18, the Budget Section approved the nonresident tuition rates as proposed by the State Board of Higher Education.

University and college undergraduate tuition rate increases for 1985 and 1986 academic years ranged from 10 percent to 15 percent per year. University and college undergraduate tuition rate decreases for the 1986 academic year for South Dakota, Montana, Saskatchewan, and Manitoba students ranged from nine to 13 percent. Graduate tuition rate increases for each year for other nonresidents and Minnesota students were at least equal to undergraduate increases. University and college graduate tuition rate decreases for academic year 1986 for South Dakota, Montana, Saskatchewan, and Manitoba students ranged from nine to 12 percent. The approved tuition rates are as follows:

### NONRESIDENT SCHOOL TERM TUITION RATES

	Undergraduate			Graduate		
	1984-85	1985-86	1986-87	1984-85	1985-86	1986-87
<b>Universities</b>						
South Dakota, Montana, Saskatchewan, and Manitoba students	\$1,812	\$1,986	\$1,812	\$2,100	\$2,310	\$2,034
Minnesota students	1,098	1,200	1,458	1,050	1,155	1,470
Other nonresident students	1,812	1,986	2,286	2,100	2,310	2,658
<b>Colleges</b>						
South Dakota, Montana, Saskatchewan, and Manitoba students	1,488	1,776	1,544	1,638	2,043	1,854
Minnesota students	881	984	1,104	1,050	1,155	1,470
Other nonresident students	1,448	1,776	2,046	1,638	2,043	2,352

### **Carrington Experiment Station Research and Extension Service Facility**

Pursuant to 1985 Senate Bill No. 2009, the Budget Section is required to review and approve the expenditure of up to \$1 million in gifts for the construction of a research and extension service staff facility at the Carrington Experiment Station. The Budget Section approved the expenditure of \$391,186 for the construction of the facility.

### **WORKMEN'S COMPENSATION BUREAU Bureau Relocation**

Pursuant to 1985 Senate Bill No. 2032, the Workmen's Compensation Bureau requested the approval of the Budget Section to relocate the bureau's offices and to authorize the expenditure of funds contained in the contingency line item for rental expense. Representatives from the Workmen's Compensation Bureau requested to move from the Russel Building to the Manhattan Life Insurance Building. The contingency line item contains \$45,000 for additional rental expense in the event the bureau would relocate.

For the 1985-87 biennium the bureau's monthly rental payments at the Russel Building are \$10,900 for 14,133 square feet and the Manhattan Life Insurance Building monthly rental payments would be \$11,000 for 17,500 square feet, with one month's free rental. The Manhattan Life Insurance Building rental contract contained no further assurance beyond the biennium for continuing the proposed rental level.

The Budget Section denied the Workmen's Compensation Bureau request to relocate to the Manhattan Life Insurance Building. Since some committee members believed the potential value of the rental space appeared to be much greater than the two-year lease agreement, and since the bureau had no further assurances of the rate of future rental costs, the Budget Section denied the relocation request.

### **Accounting and Data Processing Systems Modernization**

Pursuant to 1985 Senate Bill No. 2032 the Workmen's Compensation Bureau presented reports at each Budget Section meeting regarding the bureau's progress in the modernization of its data processing and accounting systems. The Budget Section approved the expenditure of the \$561,487 appropriation made for the project. The chairman of the Workmen's Compensation Bureau reported that the project is anticipated to be completed by March 31, 1987, and computerization of some portions of the project will begin in December 1986.

### **OLD STATE OFFICE BUILDING**

Pursuant to 1985 House Bill No. 1006, representatives of the Director of Institutions presented several proposals to the Budget Section regarding the future plans for the old state office building. The old state office building is located on the Capitol grounds and houses the State Water Commission and the Industrial Commission's Oil and Gas Division.

Representatives of the Director of Institutions recommended that a new offsite office building be

constructed. The proposed new building is estimated to cost \$3.7 million, would contain 53,000 square feet, an increase of 20,000 square feet over the old state office building and would utilize open office furniture workstations. The old state office building would be razed upon completion of the proposed new building. A \$3.7 million request for the new building is included in the Director of Institutions 1987-89 biennium budget request.

The chairman of the Workmen's Compensation Bureau proposed constructing a new state office building utilizing the workmen's compensation fund moneys, with repayment to be provided by rental payments made by departments and agencies occupying space in the building. The various proposed alternatives included renovating, renovating and adding to the present state office building, and constructing a new building, including construction options of 60,000, 80,000, and 100,000 square feet. The estimated cost for remodeling options ranged from \$3.1 million to \$5.5 million and options for construction of a new building ranged from \$3.6 million to \$6 million.

### **TRANSFERS FROM THE STATE CONTINGENCY FUND**

Pursuant to NDCC Section 54-16-01, which states in part that the aggregate total of transfers from the state contingency fund, within the limits of legislative appropriations, can exceed \$500,000 for the biennium only to the extent that requests for transfers from the state contingency fund are approved by the Budget Section, six requests were received at the June 1985 meeting which exceeded the \$500,000 limit for the 1983-85 biennium. The 1983-85 biennium state contingency fund appropriation was \$1 million. The Budget Section approved the following transfers:

1. Approved a Department of Agriculture request of \$200,000 for existing county grasshopper control roadside spraying programs.
2. Approved, subject to any provisions of law restricting such expenditures, the Department of Agriculture request for \$200,000 for the department's grasshopper control program and that the availability of such funds continue into the 1985-87 biennium.
3. Approved a Governor's office request of \$10,000 for costs arising from the removal hearings of the Griggs County sheriff.
4. Approved a Governor's office request of \$8,000 for operating expenses for the arrest and return of fugitives.
5. Approved an Attorney General's office request of \$23,000 to defray additional litigation expenses expected during the 1983-85 biennium.
6. Approved a State Laboratories Department request of \$4,000 for operating fees.

### **ALTERNATIVE FINANCING METHODS FOR STATE CAPITAL IMPROVEMENTS**

The Legislative Council staff reported that North Dakota has utilized various financing methods for major capital improvements. The following schedule contains the financing methods used for major capital improvement projects approved by the Legislative Assembly for the 1967-69 through 1985-87 bienniums:

Financing Method	Total All Ap- ropriations 1967 Through 1987									
	1967-69 Biennium	1969-71 Biennium	1971-73 Biennium	1973-75 Biennium	1975-77 Biennium	1977-79 Biennium	1979-81 Biennium	1981-83 Biennium	1983-85 Biennium	1985-87 Biennium
General fund appropriations	\$11,004,153	\$233,700	\$7,393,551	\$8,951,900	\$16,956,000	\$27,810,343	\$15,593,450	\$38,870,567	\$3,992,140	\$500,000
Revenue bonds	0	12,720,000	3,100,000	2,830,000	1,200,000	4,350,000	9,100,000	7,600,000	12,250,000	38,450,000
Special fund appropriations	6,936,076	10,617,195	2,269,695	2,050,000	2,225,000	6,362,100	6,443,300	22,947,509	16,322,662	23,213,490
Loan from the Bank of North Dakota	0	0	0	0	0	455,000	0	0	708,000	0
Common schools trust fund loan	0	0	0	0	0	8,000,000	0	0	4,265,000	0
<b>Total</b>	<b>\$17,940,229</b>	<b>\$23,570,895</b>	<b>\$12,763,246</b>	<b>\$13,831,900</b>	<b>\$20,381,000</b>	<b>\$46,977,443</b>	<b>\$31,136,750</b>	<b>\$69,418,076</b>	<b>\$37,537,802</b>	<b>\$62,163,490</b>

NOTE: In some instances these amounts may reflect moneys that were reauthorized or reappropriated. A project could be reauthorized because it was not completed during the biennium or due to a revenue shortfall.

### Summary of Alternatives for Financing Construction of State Buildings

For all financing alternatives, excluding those under point No. 4, involving debt incurred for the construction of buildings, the lease/rental payments to pay the principal and interest on the debt would be subject to the approval of the payments on a biennial basis by the Legislative Assembly.

A summary of alternatives available for the financing of construction of state buildings is as follows:

1. Finance the construction of state buildings through general and special fund appropriations.
2. Authorize and/or direct the Board of University and School Lands to use moneys from the permanent fund of the common schools to build facilities at institutions of higher education and other state institutions. Lease-rental payments would need to be made to the permanent fund of the common schools.
3. Provide for the issuance of revenue bonds similar to those issued by the State Board of Higher Education under NDCC Chapter 15-55. These bonds may be used only for financing the construction of revenue-producing buildings.
4. Provide by resolution for a constitutional amendment to modify or provide for a specific exemption to the debt limitation contained in Section 13 of Article X of the Constitution of North Dakota. See Schedule 1 for the requirements regarding bond issues contained in Section 13 of Article X of the Constitution of North Dakota.
5. Authorize the Industrial Commission acting as the North Dakota State Building Authority to issue evidences of indebtedness for projects approved by the Legislative Assembly.
6. Establish a quasi-public state building authority, separate and distinct from other state agencies and institutions, to issue evidences of indebtedness for projects approved by the Legislative Assembly.
7. Enter into lease-rental agreements with private developers to construct or modify needed buildings according to state specifications and then lease the buildings to the state on a term basis.
8. Enter into lease-purchase agreements with private developers to construct or modify needed buildings according to state specifications and lease the buildings to the state with an option to purchase the buildings upon expiration of a specified lease term or upon payment of a specified amount.

### TOUR GROUPS

The Budget Committees on Higher Education and Human Services tours were also the 1985-87 biennium budget tours. Traditionally, the budget tours have been conducted in the fall before the Legislative Assembly meets; the 1985-87 biennium budget tours were conducted throughout the 1985-86 interim.

The tour group minutes are available in the

Legislative Council office and will be submitted in indexed form to the Appropriations Committees during the 1987 legislative session. The Budget Committee on Higher Education, Senator Bryce Streibel, Chairman, constituted the budget tour group for the following higher education institutions:

Bismarck Junior College  
Dickinson State College  
Forest Service  
Lake Region Community College  
Mayville State College  
Minot State College  
North Dakota State University  
NDSU-Bottineau  
State School of Science  
UND-Williston  
University of North Dakota  
Valley City State College

The Budget Committee on Human Services constituted the budget tour group for the following charitable and penal institutions and human service centers:

Badlands Human Service Center—Dickinson  
Grafton State School  
Lake Region Human Service Center—Devils Lake  
North Central Human Service Center—Minot  
Northeast Human Service Center—Grand Forks  
Northwest Human Service Center—Williston  
San Haven  
School for the Blind  
School for the Deaf  
South Central Human Service Center—Jamestown  
Southeast Human Service Center—Fargo  
State Industrial School  
Tri-City Care, Inc.—Stanley  
West Central Human Service Center—Bismarck

Budget Section and Budget Committee on Government Finance members toured the State Penitentiary, Roughrider Industries, and the State Farm.

#### **OTHER ACTION**

The Budget Section received reports on the

collocation of the Health Department and State Laboratories Department, the status of the resources trust fund and the lands and minerals trust fund, and Missouri River litigation. In addition, the Budget Section received information on changes in the federal appropriations for vocational education programs and on the status of the state unemployment trust fund.

Representatives from the Office of Intergovernmental Assistance presented information to the Budget Section regarding the anticipated Exxon, Stripper Well, and Diamond Shamrock refund allocations. The \$16.2 million anticipated to be received from the refund allocations is proposed to be allocated as follows:

1. Low income home energy assistance program—\$4.38 million.
2. Native American programs—\$1.41 million.
3. Local government programs, including the institutional conservation program—\$6.4 million.
4. State buildings conservation program—\$2.76 million.
5. General programs (including state energy conservation and extension service energy programs)—\$1.25 million.

In order to spend the funds, the Office of Intergovernmental Assistance will either need to request Emergency Commission or legislative approval.

As a result of the United States Supreme Court ruling in *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985), all full-time non-professional state employees were placed under the Fair Labor Standards Act as of October 13, 1985. The Act, enacted in 1938, established the rate of overtime pay and compensation for private employers. The state is required to pay overtime wages or provide compensatory time for overtime hours worked by nonprofessional employees. It is believed that most state agencies have appropriate overtime pay policies in place.

This report presents Budget Section activities during the interim. Since one of the major responsibilities of the Budget Section is to review the executive budget, which by law is not presented to the Budget Section until after December 1, a supplement to this report will be submitted for distribution at a later date.

**AN ANALYSIS OF LONG-TERM DEBT LIMITATIONS PROVIDED IN SECTION 13 OF ARTICLE X  
OF THE NORTH DAKOTA CONSTITUTION**

Requirements for Bond Issues Under Article X, Section 13 <sup>v</sup>	State Bonded Indebtedness Not Exceeding \$2 Million Aggregate Outstanding	State Bonded Indebtedness In Excess of \$2 Million, But Not Exceeding \$10 Million Aggregate Outstanding	State Bonded Indebted- ness Exceeding \$10 Million Aggregate Outstanding, or Issues Exceeding \$2 Million Aggregate Outstan- ding If Not Secured by State-Owned Utility, Enter- prise, or Industry Real and Personal Property
1. Secured by a first mortgage on real estate, not to exceed 65 percent of its value or upon real and personal property of state-owned utilities, enterprises, or industries in amounts not exceeding its value		X	
2. Secured by a first mortgage upon real estate, not to exceed 65 percent of its value			X
3. Authorized by law for a clearly defined purpose	X	X	X
4. Provide for an irrevocable annual tax levy or other source of repayment sufficient to retire the debt	X	X	X
5. Provide for a continuing appropriation of the repayment source in an amount sufficient to retire the debt	X	X	X
6. Provide for the payment of principal within 30 years and for the payment of interest semiannually	X	X	X

<sup>v</sup> Debt incurred for the purpose of repelling invasion, suppressing insurrection, defending the state in wartime, or to provide for the public defense in case of threatened hostilities can exceed the limits included in this schedule.

# BUDGET COMMITTEE ON GOVERNMENT FINANCE

The Budget Committee on Government Finance was assigned two study resolutions. House Concurrent Resolution No. 3076 directed a study of state agency and institution pay practices. The Legislative Council directed the study to include a comprehensive review of state employee fringe benefits, including their cost and adequacy, and the feasibility of a "cafeteria-style" benefits program. Senate Concurrent Resolution No. 4001 directed a study of the investment powers and performance of the State Investment Board and funds of the Public Employees Retirement System. The committee was also assigned the responsibility to monitor the status of state agency and institution appropriations and to receive the state retirement fund's actuarial valuation reports.

Committee members were Senators Clayton A. Lodoen (Chairman), Ray David, Thomas Matchie, Corliss Mushik, Bryce Streibel, Harvey D. Tallackson, and Russell T. Thane; and Representatives Jack Dalrymple, Jayson Graba, Ronald E. Gunsch, Lyle Hanson, Douglas G. Payne, Mary Kay Sauter, Wade Williams, Brent Winkelman, and Thomas C. Wold.

The report of the committee was submitted to the Legislative Council at the biennial meeting of the Council in November 1986. The report was adopted for submission to the 50th Legislative Assembly.

## STATE AGENCY AND INSTITUTION PAY PRACTICES

House Concurrent Resolution No. 3076 directed a study of the state agency and institution pay practices including a comprehensive study of the following:

1. Central Personnel Division's market survey techniques, including the determination of equivalent job values in setting pay ranges.
2. The need for major equity adjustments in salaries to place state employees in the proper steps in their pay grades based on years of service and job performance.
3. Lack of agencywide evaluation systems based on uniform standards of objective criteria to be used by the supervisors in evaluating employees for pay increases and promotions.
4. Staffing needs of the Central Personnel Division to perform adequately its functions, including technical assistance to offices and agencies.

The Central Personnel Division administers and establishes the state agency and institution pay policies for agencies in the state classified service. The Central Personnel Division is within the Office of Management and Budget and its goal is to establish a unified system of personnel administration for the classified service of the state based upon merit principles and scientific methods governing the position classification, pay administration, and transfer of its employees. The state classified service includes all state employees except:

1. Elective officials.
2. Members of boards and commissions required by law.

3. Administrative heads of departments required by law.
4. Officers and employees of the legislative branch of government.
5. Members of the judicial branch of government of the state of North Dakota and their employees and jurors.
6. Persons temporarily employed in a professional or scientific capacity as consultants or to conduct a temporary and special inquiry or investigation.
7. Officers and members of the teaching staff of universities and institutions of higher education.
8. Positions deemed to be inappropriate to the classified service due to the special nature of the position.
9. Members and employees of occupational and professional boards.
10. Officers and employees of the North Dakota Mill and Elevator Association.

The duties of the director of the Central Personnel Division are:

1. Establish policies, rules, and regulations, subject to the approval of the Central Personnel Board.
2. Establish and maintain a roster of all employees in the state classified service.
3. Encourage and assist in the development of personnel administration within the various departments and agencies of the state.
4. Assist state agencies to develop personnel administration and employee training programs.
5. Assist state agencies to develop and implement agency grievance procedures in statewide review mechanisms.

## Committee Review

### Market Survey Techniques and State Salary Pay Grades

The Central Personnel Division reported on its salary survey techniques and survey results, implementation of a statewide employee performance appraisal program, and implementation of recommendations made by prior studies. The Central Personnel Division reported that its market salary survey techniques are used to compare the pay of classified state employees with that of other employment market salaries. The basic steps in conducting a salary survey are:

1. Determine the employment market.
2. Select survey classes.
3. Collect the salary data.
4. Analyze the data.

The 1985 survey included 612 North Dakota employers representing all North Dakota employers with more than 50 employees and 71 service-oriented firms with between 20 and 50 employees. In addition to the in-state survey, the Central Personnel Division participated in the Central States Salary Conference.

The Central Personnel Division believes its salary surveys show that salary ranges for state employees are competitive. The surveys indicate that major equity adjustments in salaries to place state

employees in the proper pay grade based on years of service and job performance are not necessary.

### **Central Personnel Division Staffing**

The Central Personnel Division has 12 full-time positions—seven professional staff and five clerical staff. The Office of Management and Budget reported that the Central Personnel Division would need additional staff to review adequately the classification system every two years. The Office of Management and Budget added that due to the state fiscal constraints the additional staff will not be requested for the 1987-89 biennium.

### **Employee Performance Appraisal System**

The committee received a summary of agency responses to its questionnaire on state agencies and institutions pay practices. Seventy-six agencies and institutions were sent the questionnaire relating to employee job descriptions and employee performance evaluations. Of the agencies responding six do not have written job descriptions or are not developing them and four do not have written employee performance evaluations or are not developing them. The Central Personnel Division has adopted a personnel policy which establishes a statewide employee performance review system. The Central Personnel Division also purchased the American Management Association's training program for performance management. The Central Personnel Division reported that since the Office of Management and Budget purchased the American Management Association's program for performance appraisal in June 1985, four agencies have not participated in the program and indicated they do not plan to participate in the program by December 31, 1986. In addition, 10 agencies indicated to the Central Personnel Division that although they have not participated in the program they are still contemplating future participation.

The Board of Higher Education and institutions under the board's control, Tax Department, Highway Department, Highway Patrol, and Job Service North Dakota do not plan to participate in the American Management Association's program. These agencies and institutions utilize formal performance appraisal systems similar to the American Management Association's program.

The committee recommends that the Office of Management and Budget encourage all state agencies in the state classified system to complete the American Management Association's program for performance appraisal.

### **Review of the Central Personnel Division**

During the 1981-83 biennium, the Legislative Council contracted with the Council of State Governments for a team to study the operations of the Central Personnel Division. Through the Council of State Governments' interstate consulting service the review of the Central Personnel Division was made and a report was prepared. During the 1985-86 biennium, the Budget Committee on Government Finance reviewed the Council of State Governments' final report. The Council of State Governments' report

includes the following 10 major recommendations:

1. Restructure the State Personnel Board to consist of lay citizens.
2. Transfer the policymaking responsibilities of the State Personnel Board to the administrative structure of state government.
3. Clarify and perhaps expand the Central Personnel Division's roles in strengthening and improving the classifications program in nonmerit agencies.
4. The Central Personnel Division should conduct studies regularly to provide comparative data on benefit packages provided by private companies who compete with state government for employees.
5. Establish a job listing, recruitment, and referral service.
6. Provide the Central Personnel Division sufficient positions to hire a qualified selection psychologist or test specialist to update tests based on valid legal criteria.
7. Revise the North Dakota Century Code to vest the Central Personnel Division with the authority to require each agency to submit a step-by-step grievance plan.
8. Authorize the Central Personnel Division to establish a set of universal guidelines upon which performance measures are to be based.
9. Continue the development of an automated personnel information system.
10. The Central Personnel Division should be given the staff to develop and coordinate training programs for state employees.

The Central Personnel Division reported that all but two of the recommendations have been implemented through administrative action. Because the Central Personnel Division believes the Personnel Board should not consist entirely of lay citizens and that a selection psychologist need not be hired, those recommendations have not been implemented.

## **FRINGE BENEFITS**

### **Background**

The Legislative Council directed the committee to perform a comprehensive review of the state employee fringe benefits including their cost and adequacy. The 1985 Legislative Assembly authorized for the 1985-87 biennium 12,040.59 full-time equivalent positions and appropriated \$666,356,653 for salaries and wages. The percentage of the amount appropriated for salaries and wages that is fringe benefits is approximately 19 percent or \$127 million. This percentage does not include fringe benefits such as sick leave, annual leave, funeral leave, and holidays.

Fringe benefits for state employees include:

1. Annual leave.
2. Sick leave.
3. Funeral leave.
4. Military leave.
5. Jury and witness leave.
6. State holidays.
7. Hospital benefits coverage.
8. Medical benefits coverage.
9. Life insurance benefits coverage.
10. Retirement plan.

11. Deferred compensation and annuity programs.
12. Workmen's compensation.
13. Unemployment compensation.
14. Social Security.
15. OASIS.

#### **Committee Review**

The Central Personnel Division reported that its January 1985 annual salary survey shows state employee fringe benefits are 43 percent of gross salaries. The fringe benefits comprising the 43 percent includes annual leave, sick leave, state holidays, retirement, workmen's compensation, unemployment compensation, and Social Security. The survey indicates that, in comparison, employees of businesses in North Dakota receive approximately 38 percent fringe benefits to gross salary. The survey shows that in the nine-state region the average of fringe benefits to gross salaries is 46 percent.

#### **CAFETERIA-STYLE BENEFITS PLANS Background**

The Legislative Council directed the committee to study the feasibility of a cafeteria-style benefits program. Cafeteria plans allow employees choices and options as to the fringe benefits they receive. Cafeteria-style benefits plans are authorized in Section 125 of the Internal Revenue Code. This section, created in 1978, defines a cafeteria plan as a written plan under which all participants must be employees and the participants may choose among two or more benefits. The goal of the cafeteria plan is to provide employees the opportunity to best meet individual benefits needs. Medical benefits are the key components of any flexible benefits plan.

#### **Committee Review**

The committee reviewed options for a cafeteria-style benefits program and examples of cafeteria-style benefits plans implemented in governmental entities and private companies. Examples included Minnesota's Hennepin County, Northern States Power Company, and First Bank System.

The committee received testimony from the Public Employees Retirement System, North Dakota Public Employees Association, and the Teachers' Fund for Retirement regarding which benefits state employees would prefer to be included in a cafeteria benefits plan. The employee associations testified that state employees are generally satisfied with the present benefits they receive, but some employees would like dental coverage and vision coverage.

The Public Employees Retirement System reported that a cafeteria-style benefits plan could be expensive to implement and operate. Although the Public Employees Retirement System would not estimate the cost to implement a program, it reported the consulting firm said similar programs cost approximately \$1 million to implement.

The committee considered a bill draft to provide a flexible benefits program to provide for state employee dental coverage and vision coverage. The coverage would be provided through funds created by employees depositing pretax earnings to flexible spending accounts. The bill draft provided that the

plan would be administered by the Public Employees Retirement System. Based on the review of the plan's costs and on the apparent lack of state employee interest in the plan, the committee does not recommend a bill to implement a flexible spending accounts plan.

#### **INVESTMENT POWERS OF THE STATE INVESTMENT BOARD AND PUBLIC EMPLOYEES RETIREMENT SYSTEM Background**

Senate Concurrent Resolution No. 4001 directed a study of the investment powers and performance of the State Investment Board and funds of the Public Employees Retirement System. The committee received background information on funds under the control of the State Investment Board and the Public Employees Retirement System. The funds under the control of the State Investment Board are:

- State bonding fund.
- Teachers' Fund for Retirement.
- State fire and tornado fund.
- Workmen's compensation fund.
- Veterans Home improvement fund.
- National Guard tuition trust fund.
- National Guard training area and facility development trust fund.

Funds under the control of the Public Employees Retirement System include its fund and the Highway Patrolmen's retirement fund.

Members of the State Investment Board are the Governor, State Treasurer, Commissioner of University and School Lands, chairman of the Workmen's Compensation Bureau, Insurance Commissioner, executive secretary of the Teachers' Fund for Retirement, and two members who are not state employees.

The resolution directed that the committee monitor the implementation of the legislation passed by the 1985 Legislative Assembly. Senate Bill No. 2050 passed by the 1985 Legislative Assembly requires that funds under the control of the State Investment Board establish policies on investment goals and objectives and that the funds have annual investment performance reports prepared. Senate Bill No. 2049 added as members of the State Investment Board the executive secretary of the Teachers' Fund for Retirement and two members who are not state employees.

#### **Committee Review Implementation of Investment Goals and Objectives**

The committee received reports on the implementation of 1985 Senate Bill No. 2050, which required the funds under the control of the State Investment Board to establish policies on investment goals and objectives (North Dakota Century Code Section 21-10-02.1). Representatives of funds under the State Investment Board reported that they have established policies on investment goals and objectives. The policies provide:

1. The definition and assignment of duties and responsibilities to advisory services and persons employed by the board.

2. Acceptable rates of return, liquidity, and levels of risk.
3. Long-range asset allocation goals.
4. Guidelines for the selection and redemption of investments.
5. Investment diversification, investment quality, qualification of advisory services, and amounts to be invested by advisory services.
6. The type of reports and procedures to be used in evaluating performance.

### Implementation of Reporting Procedures

Senate Bill No. 2050 also required that annual reports be prepared on the investment performance of each fund under the control of the State Investment Board and the Public Employees Retirement System. The State Investment Board and the Public Employees Retirement System employ Callan Associates to perform investment measurement service. During the interim the committee received Callan Associates investment measurement service

reports. The reports are uniform and include the following information for each of the funds under the control of the State Investment Board and the Public Employees Retirement System:

1. A list of the advisory services managing investments for the boards.
2. A list of investments including the cost and market value, compared to previous reporting periods, of each fund managed by each advisory service.
3. Earnings, percentage earned, and change in market value of each fund's investments.
4. Comparison of the performance of each fund managed by each advisory service to other funds under the boards' control and to market indicators.

The following is a schedule of the June 30, 1986, balances of the funds under the control of the State Investment Board and the Public Employees Retirement System and the annualized rate of return on each of the fund's composite amounts:

	Teachers' Fund for Retirement	Workmen's Compensation Fund	State Bonding Fund	State Fire and Tornado Fund	National Guard Tuition Trust Fund	Public Employees Retirement System Fund <sup>1/</sup>	Total All Investments
(In Millions of Dollars)							
Investment balance — June 30, 1986	\$286.9	\$200.6	\$9.2	\$22.8	\$6.8	\$235	\$761.3
Investment rate of return for fiscal year 1986	20.3%	17.48%	20.08%	19.16%	9.18%	25.05%	20.89%

<sup>1/</sup>The Public Employees Retirement System invests the Highway Patrol retirement fund. The amount shown includes the amount of both the Public Employees Retirement System and Highway Patrol retirement funds.

### Prudent Investor Rule

The committee received testimony from the State Investment Board that by implementing a prudent investor rule the board's opportunity for investment growth would be enhanced. The prudent investor rule means that investments are made by exercising the judgment and care that an institutional investor of ordinary prudence, discretion, and intelligence exercises in the management of large investments entrusted to it. Presently the board may invest in investments described in North Dakota Century Code Section 21-10-07. Those investments are securities that are a direct obligation of the United States or any state, or qualifying corporate bonds, notes, or debentures. A representative of the board testified that to perform all of their duties the board must meet at least eight times each year. North Dakota Century Code Section 21-10-04 requires the board to meet at least four times each year. The board informed the committee that there is a potential conflict of interest because the president of the Bank of North Dakota serves as the State Investment Board secretary. A conflict of interest may arise when, although it may be profitable for the Bank of North Dakota, transactions or investments with other organizations may be more beneficial to the State Investment Board.

The State Investment Board plans to employ a state investment director. The board believes that by employing a state investment director the board's investment decisions can be improved.

### Recommendation

The committee recommended House Bill No. 1031 authorizing the State Investment Board to make investments under the prudent investor rule rather than the specific investments authorized by law. The bill requires the State Investment Board to meet eight times each year rather than four times. The bill also repeals North Dakota Century Code Section 21-10-03, which provides that the president of the Bank of North Dakota serves as secretary of the State Investment Board.

Repealing Section 21-10-03 requires the board to hire staff to handle its transactions. The estimated 1987-89 biennium cost for the State Investment Board to employ an investment director, accountant, and secretary plus operating costs is \$350,000.

### STATE RETIREMENT FUNDS' ACTUARIAL VALUATION REPORTS

North Dakota Century Code Section 54-52-06 requires that the Public Employees Retirement System Board must submit to each session of the Legislative Assembly, or such committee as may be designated by the Legislative Council, a report of the contributions necessary, as determined by the actuarial study, to maintain the fund's actuarial soundness. The committee was also assigned the responsibility to receive the Public Employees Retirement System actuarial valuation report. At the committee's March 26, 1986, meeting the actuarial valuation reports for the Public Employees

Retirement System, the Highway Patrolmen's retirement fund, and the Teachers' Fund for Retirement were presented. The Public Employees Retirement System and Teachers' Fund for Retirement reports were dated July 1, 1985, and the Highway Patrol report was dated July 1, 1984.

The actuarial valuation reports show the percentage of employee compensation necessary to be deposited in the fund to meet the fund's objectives for the fiscal year. For fiscal year 1986, the percentage of employee compensation necessary to meet the Public Employees Retirement System and Teachers' Fund for Retirement objectives and the actual percentage of compensation paid to the Public Employees Retirement System and Teachers' Fund for Retirement funds are:

For Fiscal year 1986	Public Employees Retirement System	Teachers' Fund for Retirement
Total percentage of compensation necessary to fund objectives . . . . .	6.99%	11.76%
Membership assessment (paid by state for state employees) . . . . .	4.00	6.22
Employer contribution requirement . . . . .	2.99%	5.54%
Actual employer contribution . . . . .	5.12%	6.22%

The actuarial valuation report for the Highway Patrolmen's retirement fund shows that to meet the fund's objectives for the fiscal year ended June 30, 1985, the necessary rate of employer contribution is 19 percent of employee compensation. The actual employer contribution for fiscal year 1985 was 12 percent.

The retirement funds' actuarial valuation reports dated July 1, 1986, projecting the actuarial assumptions and costs for fiscal year 1987 were not available to present to the committee at its last meeting.

## MONITORING STATUS OF APPROPRIATIONS

### Background

Since the 1975-76 interim, a Legislative Council interim committee has monitored the status of major state agency and institution appropriations. The Budget Committee on Government Finance was assigned this responsibility for the 1985-86 interim.

The committee's review focused on expenditures of major state agencies including the institutions of higher education and the charitable and penal institutions, the appropriations for the foundation aid program, and the appropriations to the Department of Human Services for Aid to Families With Dependent Children and medical assistance. The committee also heard reports on the status of bond issues authorized by the 1985 Legislative Assembly.

### Status of Appropriations of Major Agencies

To assist the committee in fulfilling its

responsibility of monitoring the status of major appropriations, the Legislative Council staff prepared reports on the following:

1. Overview of total expenditures and revenues at the higher education and charitable and penal institutions.
2. Overview of utility expenditures at the higher education and charitable and penal institutions.
3. Number of residents and personnel at the charitable and penal institutions.
4. Foundation aid program.
5. Aid to Families With Dependent Children and medical assistance payments.

For the 1985-87 biennium, Governor Sinner requested that state agencies reduce their general fund spending amount by four percent. The expenditures and distributions included in the reports are compared to the 1985 Legislative Assembly appropriated amounts except where noted.

At the September 1986 meeting, the staff presented reports on these areas for the period July 1, 1985, through June 30, 1986, or the first year of the 1985-87 biennium. The reports include:

1. Total expenditures at the charitable and penal institutions for the first year of the 1985-87 biennium were \$68.6 million or \$300,000 more than an estimated \$68.3 million. Total revenues for the same period were \$24.4 million or \$4.3 million less than an estimated \$28.7 million. For the period, the possible state general fund fiscal impact was a negative \$4.2 million. The negative fiscal impact was due mainly to a possible deficiency appropriation at the Grafton State School and San Haven.
2. Total expenditures at the institutions of higher education for the first year of the biennium were \$151.9 million or \$5.5 million less than an estimated \$157.4 million. Total revenues for the same period were \$51.6 million or \$1.4 million more than an estimated \$50.2 million. For the period, the possible state general fund fiscal impact was a positive \$7.5 million.
3. Total utility expenditures for all the charitable and penal institutions for the first year of the biennium were \$2.3 million or \$500,000 less than an estimated \$2.8 million. Total utility expenditures at the institutions of higher education for the first year of the biennium were \$8.4 million or \$1.3 million less than an estimated \$9.7 million.
4. Average student, resident, and inmate populations at the charitable and penal institutions totaled 1,823 persons or 87 persons less than an estimated 1,910. The average monthly full-time equivalent positions for the same institutions totaled 2,580 or 10 positions more than the authorized total of 2,570.
5. The 1985 Legislative Assembly appropriated from the general fund \$369.9 million for foundation aid program payments. In response to Governor Sinner's request for a four percent general fund spending reduction, the revised amount of general fund foundation aid program payments is \$355.1 million. The 1985 Legislative Assembly also appropriated \$47.9 million for distribution from

the state tuition fund for the 1985-87 biennium. For the first year of the 1985-87 biennium foundation aid payments were \$178.5 million or \$3.4 million less than an estimated \$181.9 million. The appropriation balance of foundation aid for fiscal year 1987 is \$176.8 million compared to original estimates of \$188.2 million. For the first year of the biennium distributions from the state tuition fund were \$25.4 million or \$1.4 million more than an estimated \$24 million. The estimates made during the 1985 Legislative Assembly for per-pupil payments and tuition fund payments for each year of the biennium, the actual amounts for fiscal year 1986, and the revised estimated amounts for fiscal year 1987 are:

	Original Estimates For 1985-86	Actual 1985-86 Payments	Original Estimates For 1986-87	Revised Estimates For 1986-87
Per-pupil payments	\$1,425	\$1,425	\$1,455	\$1,370
Tuition fund payments	195	209	195	195
<b>Total payments</b>	<b>\$1,620</b>	<b>\$1,634</b>	<b>\$1,650</b>	<b>\$1,565</b>

Actual weighted units for 1985-86 were 126,743 compared to 127,584 weighted units estimated during the 1985 Legislative Assembly.

6. Aid to Families With Dependent Children payments for the first year of the 1985-87 biennium totaled \$19.3 million or \$400,000 less than an estimate of \$19.7 million. Actual medical assistance expenditures for the first year of the biennium totaled \$116.6 million or \$16.4 million less than the original appropriation of \$133 million and \$5.4 million less than the revised estimate of \$122 million. The amount of general fund expenditures for the first year of the biennium totaled \$58 million or \$5.9 million less than the original appropriation of \$63.9 million and \$200,000 less than the revised estimate of \$58.2 million. Total Aid to Families With Dependent Children expenditures for the biennium are estimated to be \$40.4 million. Total medical assistance payments for the biennium are now estimated to be \$278.6 million compared to an original estimate of \$297 million.

### Status of the General Fund

The Budget Committee on Government Finance and the Budget Section heard reports by the Office of Management and Budget regarding the status of the state general fund. Refer to the Budget Section report for a summary of the Office of Management and Budget's report.

### Status of Bond Issues Authorized by the 1985 Legislative Assembly

House Bill No. 1662 passed by the 1985 Legislative Assembly established the Industrial Commission as the North Dakota Building Authority and authorized the Industrial Commission to issue evidences of indebtedness, including bonds, in the amount of \$14.8 million. The \$14.8 million consisted of three different projects which included:

1. State Penitentiary Phase II construction and renovation project amounting to \$7.5 million.
2. Grafton State School renovation of Sunset Hall, Collette Auditorium, tunnel replacement, and life safety improvements in the shop warehouse and food service center amounting to \$3.9 million.
3. State Hospital project amounting to \$3.4 million. The project includes razing and replacing the central store building and installing air conditioning in four buildings.

The Industrial Commission authorized the sale of the 1986 Series A North Dakota Building Authority revenue bonds in the amount of \$17,235,000. The \$2,435,000 difference in the bond issue amount and the authorized amount for construction costs is for capitalized interest, administration, and loan issuance. The bonds are dated May 15, 1986, and bear interest at the rates of 5.4 percent to 7.125 percent. Final maturity date for the bonds is June 1, 2016. The bonds may be redeemed prior to maturity beginning June 1, 1993. Prior to the issue, temporary financing used to begin the projects was obtained from the Bank of North Dakota.

# BUDGET COMMITTEE ON HIGHER EDUCATION

The Budget Committee on Higher Education was assigned two study resolutions and a Legislative Council study directive. House Concurrent Resolution No. 3094 directed a study of the feasibility of the various means and methods of developing an alternative structure for higher education in North Dakota. In addition, the resolution directed a study of the admissions and tuition policies for foreign and nonresident students. House Concurrent Resolution No. 3096 directed a study of the positive and adverse impacts of tuition reciprocity agreements on postsecondary educational institutions, the communities where such institutions are located, students, and state government. The Legislative Council also directed a study of the financial aid available for students seeking postsecondary education in North Dakota.

Committee members were Senators Bryce Streibel (Chairman), Ray David, William S. Heigaard, Herschel Lashkowitz, Thomas Matchie, John M. Olson, Rolland W. Redlin, Jens J. Tennesfos, Malcolm S. Tweten, Jerry Waldera, and Frank A. Wenstrom; and Representatives Jack Dalrymple, Gereld F. Gerntholz, Mike Hamerlik, Orlin Hanson, Brynhild Haugland, Tom Kuchera, Bruce Laughlin, Bob Martinson, Charles Mertens, Donna Nalewaja, Robert Nowatzki, David O'Connell, Jim Peterson, Oscar Solberg, and Clark Williams.

The report of the committee was submitted to the Legislative Council at the biennial meeting of the Council in November 1986. The report was adopted for submission to the 50th Legislative Assembly.

## HIGHER EDUCATION SYSTEM STUDY

### Background

House Concurrent Resolution No. 3094 states that the increase in costs of higher education in North Dakota may make it impractical to continue the system as presently operated and that several other states have alternative systems which may be more cost-effective and efficient than the system that now exists in North Dakota. In addition, the resolution states there is a need to review the number of foreign students, Minnesota-North Dakota reciprocity students, and other nonresident students who make up an important part of the educational, cultural, and financial makeup of several institutions.

Several proposals were introduced in the 1985 Legislative Assembly for restructuring the system of higher education including a resolution to amend the Constitution of North Dakota to create a three-tiered system of higher education consisting of the University of North Dakota at Grand Forks with satellite institutions at Mayville, Minot, Valley City, and Dickinson; junior colleges at Bismarck, Bottineau, Devils Lake, Wahpeton, and Williston; and North Dakota State University at Fargo. Also proposed was a two-university and state junior college system with the University of North Dakota in Grand Forks, Mayville, and Minot, with a two-year center at Williston; North Dakota State University at Fargo, Dickinson, and Valley City, with a two-year center at Bottineau; and a junior college system with

institutions at Bismarck, Devils Lake, and Wahpeton.

In addition, a two-tiered system of higher education was proposed consisting of universities at Grand Forks, Fargo, and Minot; and state community colleges at Bismarck, Bottineau, Devils Lake, Dickinson, Mayville, Valley City, Wahpeton, and Williston. In addition, a bill was introduced to establish a University of North Dakota at Bismarck, and a resolution was introduced for a constitutional amendment to designate where the state institutions of higher education must be located and to require a constitutional amendment to close or eliminate any of the public institutions. All of these bills and resolutions failed to pass the 1985 Legislative Assembly.

### Previous Higher Education Studies

During the 1981-82 interim, the Higher Education Study Commission reviewed the structure of the higher education system in North Dakota and recommended the three community colleges be under the governance of the state and developed statewide goals for postsecondary education which were approved by the 1983 Legislative Assembly.

The Legislative Council's Budget "A" Committee, during the 1983-84 interim, conducted a study of the financing of higher education in North Dakota by accepting the Board of Higher Education's offer to organize task forces to study higher education funding. The task forces studied the following areas:

1. Access to postsecondary education.
2. Faculty compensation.
3. Program staffing.
4. Instruction and academic support costs.
5. Equipment.
6. Computers.
7. Facilities maintenance.
8. Research.
9. Student services and institutional support.
10. Facilities adequacy.

The task force recommendations were used by the Board of Higher Education, the Executive Budget Office, and the 1985 Legislative Assembly as a basis for developing appropriations for the 1985-87 biennium.

### Dr. Kent Alm's Review of Higher Education

The committee contracted with Dr. Kent Alm for a review of higher education and an update of his report to the 1981-82 Higher Education Study Commission. The Alm report addressed the eight major study areas considered by the committee. The committee considered the individual study areas at the location and on the dates as follows:

Study Area	Location	Date
Student financial assistance, student tuition, and tuition reciprocity	Valley City State College	September 1985
	North Dakota State University State School of Science	

Study Area	Location	Date
Educational programs	Mayville State College	October 1985
	University of North Dakota Lake Region Community College	
Educational opportunity - access	Bismarck Junior College	January 1986
Governance	NDSU-Bottineau Minot State College	May 1986
	UND-Williston Dickinson State College	
System organization	Bismarck	August 1986
		October 1986
Role and scope	Bismarck	August 1986

The committee conducted budget tours of the institutions of higher education to hear institutional needs for capital improvements and any problems institutions encountered during the biennium. The tour group minutes are available in the Legislative Council office and will be provided to the Appropriations Committees during the 1987 legislative session.

The committee received testimony from faculty, students, and administrative staff of the colleges and universities, the Board of Higher Education and its staff, staff of the Board for Vocational Education, and the Office of Management and Budget in developing its recommendations in each area.

The Alm report included information, observations, and recommendations on each of the major subject areas considered by the committee. The following is a summary of the Alm report recommendations and committee conclusions and recommendations for each of the major subject areas:

### 1. Student Financial Assistance

North Dakota has two major state-funded student assistance programs—a North Dakota student financial assistance program which provides students in need a grant of up to \$500 per year for the first two years of postsecondary education, with a general fund appropriation of \$1,085,000 for the 1985-87

biennium; and a tuition assistance program which provides students in need grants of up to \$1,500 per year to attend private colleges in North Dakota, with a general fund appropriation of \$500,000 for the 1985-87 biennium.

The Alm report states major changes are not needed in state appropriations for student financial aid in the next biennium, if tuition increases are minimal, as federal student financial assistance is expected to remain steady. The report states a state-funded summer job program for students would be a constructive response to the financial needs of many college students but the economic conditions in North Dakota preclude the funding of such a program. The report states continued increases in tuition and fees with no increases in student financial aid will potentially deny access to postsecondary education to many of North Dakota's academically able youth.

The committee learned that resident tuition has increased from \$630 per year at the universities and \$570 per year at state colleges in 1981 to \$1,092 and \$978, respectively for 1986, an increase of approximately 70 percent; while appropriations for state-funded financial aid increased only \$175,000, or 12 percent, from \$1,410,000 for the 1981-83 biennium to \$1,585,000 for the 1985-87 biennium.

### Student Financial Assistance—Recommendation

The committee recommends the 1987 Legislative Assembly increase state-funded student financial aid, if fiscally feasible, to provide that the ratio of state-funded student financial aid to tuition rates be the same as it was in 1981. The effect of this recommendation is to potentially increase private college tuition assistance funding from \$500,000 for the 1985-87 biennium to \$740,000 for the 1987-89 biennium and increase state student financial assistance funding from \$1,085,000 to \$1,870,000, respectively, based on projected 1987-89 tuition rates, which reflect the five percent annual increases approved by the Board of Higher Education and in the institutions' budget requests to the Governor.

### 2. Student Tuition

The following schedule details tuition rates at North Dakota universities and colleges:

## TUITION RATES AT NORTH DAKOTA UNIVERSITIES AND COLLEGES FOR THE YEARS 1985-86 AND 1986-87

	1985-86				1986-87*			
	Resident	Nonresident	Manitoba Saskatchewan	Other Foreign	Resident	Nonresident	Manitoba Saskatchewan	Other Foreign
Enrolled in:								
Graduate and professional at the universities . . . . .	\$ 1,155	\$ 2,310	\$ 2,310	\$ 2,310	\$ 1,272	\$ 2,658	\$ 2,034	\$ 2,658
Undergraduate University . . . . .	\$ 993	\$ 1,986	\$ 1,986	\$ 1,986	\$ 1,092	\$ 2,286	\$ 1,812	\$ 2,286
State, junior, and community colleges . . . . .	\$ 888	\$ 1,776	\$ 1,776	\$ 1,776	\$ 978	\$ 2,046	\$ 1,544	\$ 2,046

\*Beginning in 1986-87, contiguous states and provinces (South Dakota, Montana, Manitoba, and Saskatchewan) will receive a reduced rate. Prior to that year, the rates for all foreign residents were equal to the nonresident rate.

The Alm report provided the committee information on historic tuition charges at North Dakota institutions of higher education and information on tuition as a percent of the institutional operating budgets. The report states since 1960, tuition in North Dakota has increased in excess of 800 percent, nonresident students paid twice the resident tuition rate, and North Dakota is no longer considered a low tuition state. The committee learned that the percentage of institutional operating budgets funded by tuition ranges from 16 to 25 percent. The report states the tuition charged at the institutions in North Dakota varies slightly with the two universities charging tuition slightly higher than all nine other institutions. A normal expectation would be that the universities would be higher than the state colleges which, in turn, would be higher than the two-year institutions. The Alm report recommended the state develop a policy which will limit increases in resident tuition to the rate of inflation.

**Student Tuition—Recommendation**

The committee recommends increases in resident student tuition be limited to the projected increase in the consumer price index. Chase Econometrics projects the consumer price index for North Dakota to increase 3.8 percent in calendar year 1987 and 4.4 percent in calendar year 1988.

**3. Tuition Reciprocity**

North Dakota currently has a tuition reciprocity agreement with Minnesota, which is discussed in detail in the tuition reciprocity study section of this report. The committee learned for the 1985-86 school year 5,250 Minnesota students were enrolled in North Dakota institutions, and 3,160 North Dakota students attended Minnesota institutions of higher education.

The Alm report states approximately 70 percent of the out-of-state students at North Dakota public colleges and universities are from Minnesota and those students paid approximately \$200 per year less in tuition to attend North Dakota institutions than they would have paid at Minnesota institutions for the 1985-86 school year, while North Dakota students paid approximately \$200 more in tuition at Minnesota institutions than they would have paid at North Dakota institutions. The tuition rates for reciprocity students were established by computing the average resident tuition rate charged at comparable Minnesota and North Dakota institutions. The report states the Minnesota tuition reciprocity agreement in effect for the 1985-86 academic year, which required students to pay a tuition rate based on an average of tuition rates at similar institutions in the two states, benefits the state of Minnesota as more Minnesota students attend North Dakota institutions than North Dakota students attend Minnesota institutions.

The Alm report estimates if the tuition reciprocity agreement is eliminated, North Dakota would save approximately \$2,528,000 annually, detailed as follows:

	Estimated Annual Savings (Costs)
1. Additional income from remaining Minnesota students paying a nonresident tuition rate	\$3,400,000
2. Additional income from North Dakota students returning from Minnesota institutions	684,000
3. Cost savings resulting from fewer faculty	144,000
4. Loss of income from Minnesota students who do not return to North Dakota institutions	(1,700,000)
Net annual savings	\$2,528,000*

\*Additional savings of \$1.24 million may be realized as the estimates assumed all faculty related to lower enrollments would not be eliminated as the institutions are not currently provided funds for the entire number of faculty the formula generates. Although the consultant was unable to estimate the impact on other costs and felt the costs would not be reduced significantly, there could be a potential reduction in related instructional support and other costs as a result of fewer students.

The Alm report recommended Minnesota students attending North Dakota institutions of higher education be charged tuition equal to the Minnesota resident tuition rate charged either in the Minnesota state university or community college system, as appropriate.

**Tuition Reciprocity—Recommendation**

The committee agrees with the Alm report and recommends the tuition reciprocity agreement with Minnesota be changed to require Minnesota students attending North Dakota institutions to pay the tuition rate charged Minnesota residents either in the Minnesota state university or community college system, as appropriate. The Board of Higher Education has amended the tuition reciprocity agreement with the state of Minnesota to do this for the 1986-87 school year. The Board of Higher Education estimates this will result in \$750,000 of additional institutional income annually.

**4. Educational Programs**

The Alm report provided information on the degree-granting programs available at the institutions, the Board of Higher Education's program review process, and the approval process for new programs at the institutions. The report states the state needs continuous long-range planning, a state planning office to develop and address the needs of the state, and comprehensive institutional role statements to guide program development by the Board of Higher Education. The Alm report states in times of limited state resources the Legislative Assembly should not provide additional general fund appropriations for new academic programs but should allow the programs to be added within available institution

resources. The report also states the total appropriation for "higher education" should not include the appropriations for the experiment stations, extension divisions, Rehabilitation Hospital, or the State Forest Service as they are not "higher education" appropriations.

### **Educational Programs—Conclusion**

The committee makes no recommendation regarding educational programs at the institutions of higher education or the need to establish a state planning office.

### **5. Educational Opportunity—Access**

North Dakota's current policy on access to higher education is to allow high school graduates to attend the public institutions of their choice with enrollments limited in selected program areas. The Alm report states this policy is consistent with the Constitution of North Dakota. It was reported many states have higher entrance standards for their universities than their colleges and higher entrance standards for their colleges than their junior colleges. The Alm report included information on institutional student enrollments by county of residence which indicates North Dakota colleges and junior colleges enroll a majority of their students from a contiguous geographic region while the two universities and the State School of Science enroll students from all areas of the state.

The report states, for the 1984-85 school year, North Dakota institutions of higher education provided a total of 344 extension programs in outlying communities. These extension programs are currently self-supporting from student fees, which differ from courses on campus which are state supported. Also students enrolled in extended degree programs, programs offered by the institutions in other cities to obtain a specific degree, are required to pay the same tuition as students enrolled at the institution plus a charge for faculty travel costs. The report states requiring students in extension and extended degree programs to pay more than students on campus limits access to educational programs.

In addition the report states the availability of specific programs at an institution and the ability of individuals to pay tuition are additional factors affecting educational opportunity. The report states that programs which are duplicated at several institutions that have a satisfactory number of students enrolled are not wasteful and although a small savings might be realized by eliminating those programs it would be done by limiting educational opportunity. The report states that limiting tuition increases to the projected increase in the consumer price index, which the committee recommends, is an appropriate step to continue to make higher education available to North Dakota students.

The Alm report recommends, to address the needs of many North Dakota citizens who reside long distances from colleges and universities, the Board of Higher Education develop a phased-in plan for the state to assume some of the costs of extension and external degree programs.

### **Educational Opportunity—Conclusion**

The committee makes no recommendation regarding the state assuming a part of the cost of extension and external degree programs.

### **6. Governance**

Governance of higher education in North Dakota is constitutionally provided to the Board of Higher Education whose seven members are chosen by the Governor, each for a seven-year term, subject to Senate approval. The Governor chooses from a list of three nominees made for each vacancy by a screening committee consisting of the Chief Justice of the Supreme Court, the Superintendent of Public Instruction, and the president of the North Dakota Education Association.

The Alm report recommends the membership of the screening committee be increased from three members to five, the approval of four members be required to submit a nominee to the Governor, and the membership be changed to consist of the:

1. Commissioner of Agriculture.
2. Superintendent of Public Instruction.
3. Chairman of the board of the Greater North Dakota Association.
4. President of the Board of Higher Education.
5. An appointee of the Governor.

The Alm report also recommends the size of the Board of Higher Education be increased from seven to nine members, the length of board member terms shortened from seven to five years, and the board prepare descriptions of areas of expertise needed on the board to be used by the screening committee in making its nominations.

### **Governance—Recommendation**

The committee recommends two concurrent resolutions for constitutional amendments to be voted on at the November 1988 general election and effective on December 1, 1988. Senate Concurrent Resolution No. 4002 is to amend the constitution to change the membership of the screening committee, which submits names to the Governor, from the president of the North Dakota Education Association, the Chief Justice of the Supreme Court, and the Superintendent of Public Instruction to the:

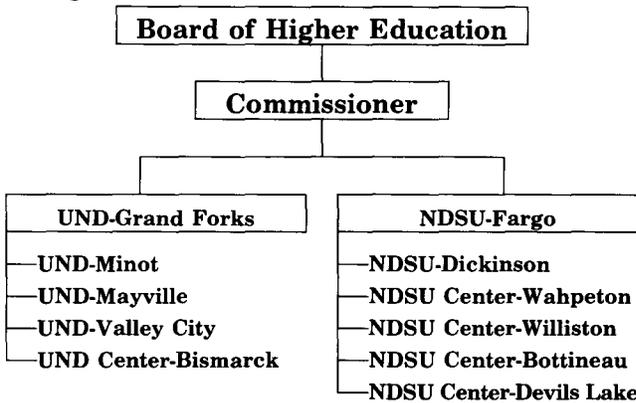
1. Superintendent of Public Instruction.
2. Commissioner of Agriculture.
3. Chairman of the board of the Greater North Dakota Association.
4. Speaker of the House.
5. An appointee of the Governor.

Senate Concurrent Resolution No. 4001 would amend the constitution to increase the size of the board from seven to nine members, reduce the length of board member terms from seven to five years, limit board members to two terms, and remove the requirement that no more than one graduate of any one of the institutions may be on the Board of Higher Education at any one time.

### **7. System Organization**

The Alm report states the major problem facing North Dakota higher education is not the number of institutions but rather the maintenance and

improvement of educational quality. It states, as appropriations cannot be expected to increase substantially in the near future and tuition cannot be increased significantly without limiting access to higher education for many students, the state needs to better utilize the resources provided higher education to impact positively educational quality by sharing those resources among the institutions. The Alm report states it is not reasonable to expect this sharing of resources to take place in the current higher education organization structure and an organizational structure needs to be established to achieve the desired results and a commitment must be made by higher education leadership for a new system to be effective. The Alm report recommends a two-university system be established which would be organized as follows:



The proposed two-university system would be organized based upon compatibility of roles as the University of North Dakota, Minot State College, Mayville State College, Valley City State College, and Bismarck Junior College have roles directly related to professional preparation within the liberal arts tradition and North Dakota State University, Dickinson State College, State School of Science, UND-Williston, NDSU-Bottineau, and Lake Region Community College have roles which emphasize agriculture, science, and technology.

Under the proposed system, the chief administrators of the two-university system would be chancellors and would be located on the campuses of the two universities and the presidents and deans of the other nine institutions would report and submit budgets to the appropriate chancellor who would report directly to the Board of Higher Education. Appropriations would continue to be made to each institution with chancellors authorized to transfer temporarily institutional resources between institutions. A permanent transfer of institutional resources would require the approval of the Board of Higher Education.

The Alm report states the advantages of a two-university system are to:

1. Allow a greater sharing of institutional resources.
2. Provide all graduates of North Dakota institutions with a university degree or certificate.
3. Assist the universities in meeting their statewide graduate roles.
4. Assist the transferability of credits between institutions.

5. Control program duplication.
6. Enhance faculty development.
7. Provide better institutional planning, decisionmaking, and enhance the prestige of smaller institutions and assist them in recruiting students and faculty.

The disadvantages of a two-university system, the Alm report states, are that the two universities may not fulfill their additional responsibilities, local communities may resist the change as they may see it as a loss of an institutional identification within the communities, and smaller institutions may resist being controlled by a larger institution.

The committee received a report on the constitutional and statutory changes required to implement a two-university system. North Dakota constitutional amendments required include amending Section 6 of Article VIII, which provides for a Board of Higher Education and establishes state educational institutions and locations, and Sections 12 and 13 of Article IX, which designate permanent locations for public institutions having trust lands. In addition, amendments to related North Dakota Century Code Chapter 15-11 would be required.

### System Organization—Conclusion

The committee considered three drafts of resolutions for constitutional amendments to establish alternate systems of higher education organization in North Dakota:

1. To create a university system and remove reference in the constitution to the types of institutions of higher education which must be located in the named cities.
2. To create a system of colleges and universities with campuses located geographically throughout the state without specific reference to locations.
3. To create a system of colleges and universities with campuses at the specific locations of Grand Forks, Fargo, Wahpeton, Valley City, Mayville, Minot, Dickinson, Williston, Bismarck, Bottineau, and Devils Lake.

The committee makes no recommendation regarding system organization of higher education in North Dakota.

### 8. Role and Scope

The Alm report states the role of the University of North Dakota as prescribed in the constitution is to provide educational programs in all major areas of learning; the role of North Dakota State University is to provide educational programs consistent with the land grant tradition; and the role of the State School of Science at Wahpeton is to provide educational programs which emphasize vocational-technical needs. The role of the state normal schools and teacher colleges at Valley City, Mayville, Minot, and Dickinson, as detailed in the constitution, are to prepare personnel for the public schools. The Alm report states the roles of these institutions have been expanded, changing the schools from teacher colleges to regional institutions. The constitution provides that the School of Forestry at Bottineau, which has been expanded to include a college transfer program, is to provide educational programs emphasizing

forestry and horticulture. The Alm report states the Constitution of North Dakota makes no specific reference to the remaining junior colleges.

The Alm report states the institutions of higher education either meet their constitutional roles or have been changed consistent with changes at similar institutions nationwide. The scope of programs and courses vary significantly between institutions, with larger institutions generally having a broader scope of programs and courses.

The Alm report states a need exists to expand the role of the institutions to meet the needs of the underserved population, especially adults. It was stated there are more than 29 million adults in the nation that are functionally illiterate, an additional 49 million who are borderline illiterate, and that by 1990 three out of four jobs will require education or technical training in addition to high school. The report states North Dakota needs to make additional opportunities for education available throughout the state as residents of western North Dakota are particularly disadvantaged because of distance from a college or university. Also, the report states North Dakota needs to engage in research and development to enhance its economic climate and as substantial professional resources are available at the institutions of higher education their roles should be expanded to assist in economic development.

#### **Role and Scope—Conclusion**

The committee makes no recommendation regarding the role and scope of colleges and universities in North Dakota.

#### **Partners for Quality Report**

The North Dakota State Board of Higher Education commissioned an advisory panel to address the future of higher education in North Dakota. The panel's report entitled "Partners for Quality" was explained at the last committee meeting. The panel made recommendations to the Board of Higher Education regarding governance, access, institution closure, institutional missions and roles, academic programs, and the funding of higher education. The recommendations were compatible with those of Dr. Alm in the following areas:

1. Develop a true system of higher education organization.
2. Establish clearer institutional roles.
3. Limit increases in tuition to projected increases in the consumer price index.
4. Provide comparable general educational opportunities throughout the state.

#### **TUITION RECIPROCITY STUDY**

House Concurrent Resolution No. 3096 directed a Legislative Council study of the positive and adverse impacts of tuition reciprocity agreements on postsecondary education institutions, the communities where such institutions are located, postsecondary students, and state government. The resolution states, due to the large number of

nonresident and foreign students enrolled in North Dakota institutions of higher education, the large number of North Dakota students enrolled out of state, and the increasing costs of providing postsecondary education, adjustments to tuition reciprocity agreements may be necessary. The resolution states that it is necessary to determine the impact on communities, institutions, students, and state government before extending, withdrawing from, or making substantial adjustments to these agreements.

#### **History of Tuition Reciprocity Agreements**

North Dakota Century Code Chapter 15-10.1 authorizes the Board of Higher Education to enter into reciprocal agreements with South Dakota, Montana, and Minnesota for the purpose of utilization of state institutions of higher education and to provide a means to enable students to obtain their desired courses in the most expedient manner at the lowest possible cost.

The Board of Higher Education originally entered into a tuition reciprocity agreement with Minnesota beginning with the 1975-76 school year. Under that agreement students from both states participating in the program paid the resident graduate or undergraduate tuition of the institution they attended. Each state's liability for tuition reciprocity was determined based on the total number of credit hours earned by that state's students at the other state's institutions multiplied by a weighted tuition differential factor computed by averaging the difference between resident and nonresident tuition rates. The state with the greater liability based on this calculation then made a payment to the other state. As Minnesota students attending North Dakota schools exceeded the numbers of North Dakota students attending Minnesota schools for each year through the 1982-83 school year, the state of Minnesota made payments to North Dakota for those years totaling \$6.7 million.

Beginning with the 1983-84 school year the two states renegotiated their tuition reciprocity agreement to provide for the establishment of a common tuition rate, by category of institution, computed by averaging the established tuition rates for similar types of institutions of both states within each category. The fiscal impact to the state of North Dakota as a result of the change in the tuition reciprocity agreement was to eliminate the payments Minnesota made to the state, while tuition revenue for North Dakota institutions enrolling Minnesota students was increased. This tuition reciprocity agreement was in effect through the 1985-86 school year.

#### **Number of Reciprocity Students, Tuition Rates, and Institutional Enrollments**

The following schedule shows the full-time equivalent students who have participated in the tuition reciprocity program and the reimbursement North Dakota received from Minnesota since the program began:

Full-Time Equivalent				
School Year	Minnesota Students Attending North Dakota Schools	North Dakota Students Attending Minnesota Schools	Difference Between Minnesota and North Dakota Students	Reimbursement From Minnesota
1975-76	1,953	841	1,112	\$ 692,223
1976-77	2,704	1,457	1,247	775,571
1977-78	3,138	1,854	1,284	798,710
1978-79	3,514	2,403	1,111	742,501
1979-80	3,538	2,433	1,105	750,952
1980-81	4,481	2,660	1,821	887,115
1981-82	4,904	2,795	2,109	1,039,187
1982-83	5,244	3,029	2,215	1,054,323
1983-84	5,231	3,060	2,171	0
1984-85	5,250	3,074	2,176	0
1985-86	5,250	3,160	2,090	0
<b>Total reimbursement</b>				<b>\$6,740,582</b>

The following schedule compares North Dakota resident, Minnesota students on reciprocity, and

nonresident student college and university undergraduate tuition rates for the years 1983-84 through 1986-87:

Year	Category	Minnesota Students on Reciprocity		
		North Dakota Resident	North Dakota Reciprocity	Non-resident Student
1983-84	College undergraduate	\$ 726	\$ 834	\$1,371
	University undergraduate	846	984	1,692
1984-85	College undergraduate	771	881	1,488
	University undergraduate	906	1,098	1,812
1985-86	College undergraduate	883	984	1,776
	University undergraduate	993	1,200	1,986
1986-87	College undergraduate	978	1,100	1,956
	University undergraduate	1,092	1,456	2,184

The following schedule shows nonresident and resident headcount enrollments, including foreign students, at North Dakota institutions of higher education for the 1985 school year:

### NORTH DAKOTA 1985 COLLEGE AND UNIVERSITY FALL HEADCOUNT ENROLLMENTS

Institution	Undergraduate			Graduate			Total Foreign Students	Other Non-residents	Total Non-residents	Total North Dakota Residents	Total Students
	Canada	Other	Total	Canada	Other	Total					
University of North Dakota	145	130	275	29	35	64	339	3,661	4,000	6,919	10,919
North Dakota State University	10	170	180	2	177	179	359	2,988	3,347	6,066	9,413
Dickinson State College	5	1	6				6	113	119	1,158	1,277
Valley City State College	5	3	8				8	95	103	985	1,088
Mayville State College	13	7	20				20	135	155	575	730
Minot State College	65	13	78	27		27	105	151	256	2,807	3,063
Bismarck Junior College	5	6	11				11	71	82	2,326	2,408
NDSU-Bottineau	19		19				19	56	75	392	467
Lake Region Community College	2	4	6				6	12	18	561	579
UND-Williston								54	54	618	672
State School of Science	2	42	44				44	770	814	2,023	2,837
<b>Total</b>	<b>271</b>	<b>376</b>	<b>647</b>	<b>58</b>	<b>212</b>	<b>270</b>	<b>917</b>	<b>8,106</b>	<b>9,023</b>	<b>24,430</b>	<b>33,453</b>

### Evaluation of Economic Aspects of Tuition Reciprocity in North Dakota

The committee contracted with Dr. Thor Hertsgaard and Dr. Alan Henderson, North Dakota State University, to determine the economic aspects of tuition reciprocity in North Dakota. Their report states the total impact of reciprocity students' spending in North Dakota communities is approximately \$350 million per year, which generates additional state tax revenues of \$817,000. The report estimated the impact of the elimination of the tuition reciprocity agreement with Minnesota and the corresponding decrease in the number of Minnesota students enrolled in North Dakota institutions of higher education. It was assumed the elimination of

tuition reciprocity would result in a certain percentage of Minnesota students at North Dakota institutions returning to institutions in Minnesota and a like percentage of North Dakota students at Minnesota institutions returning to North Dakota institutions.

The impact of eliminating tuition reciprocity was computed based on two scenarios, a decline in the number of Minnesota students at North Dakota institutions of 1,750 (one-third) and 2,625 (one-half) with a corresponding return of North Dakota students of 843 and 1,266. By eliminating tuition reciprocity and thereby increasing tuition for the Minnesota students remaining in North Dakota, the state would realize annual savings of \$2,270,000 and \$1,830,000 summarized as follows:

	Savings (Costs) of Losing One- Third of the Minnesota Students	Savings (Costs) of Losing One- Half of the Minnesota Students
1. Additional tuition income from Minnesota students paying the nonresident tuition rate and North Dakota students attending Minnesota institutions returning to North Dakota institutions, reduced by the loss of income from Minnesota students not returning to North Dakota institutions	\$1,516,000	\$ 211,000
2. Costs savings from fewer faculty	895,000*	1,830,000*
3. Loss of state tax revenues	(141,000)	(211,000)
Net annual savings	\$2,270,000	\$1,830,000

\* Additional savings of \$1.24 million may be realized as the estimates assumed all faculty related to lower enrollments would not be eliminated as the institutions are not currently provided funds for the entire number of faculty the formula generates. Although the consultants were unable to estimate the impact on other related costs and felt the costs would not be reduced significantly, there could be a potential reduction in related instructional support and other costs as a result of fewer students.

### Alm Review of Tuition Reciprocity

As discussed previously in this report, the Alm report reviewed the tuition reciprocity agreement with Minnesota and recommended amending the agreement to provide that tuition charged Minnesota students at North Dakota institutions of higher education be the same as the Minnesota resident tuition rate charged either in the Minnesota state university or community college system, as appropriate. The report estimated this would result in an increase in tuition of approximately \$200 per year per Minnesota student and would increase revenue by approximately \$1.2 million per year based on the current number of Minnesota students enrolled at North Dakota institutions of higher education.

### Board of Higher Education Consideration

The Board of Higher Education staff testified the board was considering possible changes to the reciprocity agreement with Minnesota. At the November 1985 Board of Higher Education meeting, the board directed its staff to determine the fiscal feasibility of (1) charging Minnesota undergraduate students the Minnesota resident tuition rate beginning in the 1986-87 academic year; and (2) reducing the scheduled 15 percent North Dakota resident tuition increase for the 1986-87 academic year. The board staff recommended that resident tuition rate increases for the 1986-87 school year be reduced from the scheduled 15 percent to 10 percent and tuition for Minnesota students enrolled in North Dakota institutions be increased to the Minnesota resident tuition rate. The board staff reported the increase in Minnesota tuition rates would generate

approximately \$750,000 of additional institutional revenues for the 1986-87 school year while limiting the resident student increase to 10 percent would reduce institutional revenues by approximately \$1,050,000.

The Board of Higher Education approved the changes and the reciprocity agreement with Minnesota was amended for the 1986-87 school year to charge Minnesota students attending North Dakota institutions the tuition charged at comparable Minnesota institutions.

### Recommendation

The committee recommends Minnesota students attending North Dakota institutions of higher education be required to pay the comparable Minnesota resident tuition rate. This recommendation has been implemented by the Board of Higher Education by amending the Minnesota reciprocity agreement for the 1986-87 school year. Minnesota student tuition was increased from \$984 for 1985-86 to \$1,100 for 1986-87 at the colleges and from \$1,200 to \$1,456 for universities. The Board of Higher Education office estimated additional institutional income from the 1986-87 school year of \$750,000 as a result of increased Minnesota student tuition.

### STUDENT FINANCIAL ASSISTANCE STUDY

The committee was assigned the study of the availability of student financial assistance by the Legislative Council as a result of numerous student financial assistance bills and resolutions considered during the 1985 Legislative Assembly. Bills were introduced for an education student revolving loan fund for postsecondary students in elementary or secondary math, science, or special education programs, tuition waivers for American Indians, a state college work-study program, and a merit scholarship program. All of these bills failed to pass.

### North Dakota Student Financial Assistance Programs

The following is a summary of state student financial assistance programs:

#### 1. Student Financial Assistance Program

The student financial assistance program, implemented in 1974, resulted from the federal-state student incentive grant program (SSIG). The student incentive grant program provides federal matching funds on a dollar-for-dollar basis up to the state's share of the total appropriation. The North Dakota student financial assistance program, administered by the Board of Higher Education, provides a grant of up to \$500 per year per student for the first two years of postsecondary education. The student financial assistance program is offered to students demonstrating substantial financial need who are ineligible for other types of grants.

#### 2. Tuition Assistance Grant Program

The tuition assistance grant program, administered by the Board of Higher Education, was developed in 1979 to assist students exhibiting financial need to attend private, four-

year, North Dakota higher education institutions. The program is totally state supported and provides grants of up to \$1,500 per year. The initial intent of the program was to equalize tuition between the public and private institutions based on student need.

3. North Dakota Nursing Scholarships/Loans

The North Dakota nursing scholarship/loan program began in 1955 to encourage students to enter nursing and to practice their profession in North Dakota. The program provides for cancellation of the loan upon completion of one year of employment for practical nurses and two years of employment for registered and graduate registered nurses. In the event the student does not complete the employment requirement, the funds must be repaid to the nursing scholarship loan fund. The awards are up to an aggregate of \$300 for a practical nurse, \$1,000 for a registered nurse, and \$1,800 for a graduate registered nurse.

4. North Dakota Indian Scholarships

The North Dakota Indian scholarship program was authorized by the 1963 Legislative Assembly. The purpose of the program is to encourage American Indians to attend and graduate from institutions of higher education or postsecondary vocational education. Grants of up to \$2,000 per year can be awarded to eligible students.

5. North Dakota Highway Department Scholarships/Loans

The North Dakota Highway Department scholarship/loan program, authorized by the 1967 Legislative Assembly, is available to eligible students entering their sophomore, junior, or senior years of postsecondary education in the fields of civil engineering, civil engineering technology, industrial drafting design technology, construction engineering and construction management, when Highway Department employment in these fields is available. Grants of up to \$800 per year can be awarded to eligible students. The student must be employed by the Highway Department for at least the amount of time for which scholarship funds were received. If the student fails to graduate or does not accept employment, the scholarship must be repaid with interest.

6. National Guard Tuition Waivers

The National Guard tuition waivers program was authorized during the 1977 Legislative Assembly. The program provides for 75 percent of tuition fees to be waived for National Guard members enrolled in state-controlled higher education, vocational education, or technical education institutions. The Adjutant General reimburses each school for two-thirds of all tuition fees waived.

7. National Guard Tuition Grant Program

The National Guard tuition grant program was established by the 1979 Legislative Assembly. The program provides for a National Guard member to enroll in a private nonprofit postsecondary institution and receive a grant of

50 percent of the tuition fees charged by the school, with the grant amount limited to the tuition charged for similar courses and credit hours at the University of North Dakota. Any participating private institution must waive 25 percent of the tuition charged for similar courses and credit hours at the University of North Dakota.

8. Aid for Dependents of Deceased or Totally Disabled North Dakota Resident Veterans

The 1973 Legislative Assembly provided a program offering free tuition at state-supported North Dakota higher education, technical education, or vocational education institutions for dependents of deceased or totally disabled North Dakota resident veterans. The only fees the dependent must pay are those charged to retire outstanding bonds or aviation-related charges. The assistance is available to achieve a baccalaureate degree over a 36-month or eight-semester period.

9. UND Medical Center Loan Program

The UND Medical Center administers a loan program for dental or medical students, as authorized by the 1957 Legislative Assembly. Loans of up to \$4,000 per year can be made to eligible students. Repayment, except in special circumstances, is required to begin one year from the date of completing the first year of residency, for medical students, or one year from the date of graduation, for dental students.

10. UND Medical Center Scholarships/Loans

The UND Medical Center scholarship program resulted from the 1957 legislative session. Under the direction of the Board of Higher Education, the UND Medical Center is authorized to provide scholarships or stipends as necessary to staff state agencies and institutions with psychiatrists or other psychiatric personnel. The scholarships are paid from proceeds of a one-mill statewide levy. The students must work at state institutions for a term prescribed by the Board of Higher Education. In the event the employment contract is not fulfilled, the scholarship must be repaid with interest.

**Bank of North Dakota Student Loan Programs**

In addition to the current offered federally subsidized guaranteed student loan program, the Bank of North Dakota began offering an unsubsidized guaranteed student loan program on July 1, 1986. The federal government insures the principal amount of the loan, but does not otherwise subsidize the loans. The interest, currently eight percent, is paid quarterly by the family or student. This program was established to provide student financial assistance to families with adjusted gross incomes in excess of \$30,000. For the period from July 1, 1986, through September 24, 1986, the Bank had processed 388 applications for a total of \$812,500 in unsubsidized guaranteed student loans.

The Bank of North Dakota has included in its 1987-89 budget request a contingency line item including \$51,000 to continue the unsubsidized

guaranteed student loan program and \$312,000 to provide loans under the parental loans for undergraduate students program (PLUS) if need for the program is demonstrated. The parental loans for undergraduate students are insured by the federal government.

### **Congressional Action Regarding Federal Financial Assistance Programs**

The committee received reports regarding the status of federal student financial assistance. During the committee's study of student financial assistance the United States Congress passed the Higher Education Amendments of 1986, which encompasses the federal student financial assistance programs. Several provisions regarding student financial assistance were also included in the 1985 Consolidated Omnibus Budget Reconciliation Act (COBRA) enacted in April 1986.

One provision contained in the Higher Education Amendments of 1986 requires the guaranteed student loan program to demonstrate need based on the "uniform methodology," which determines the amount a family can be expected to contribute based on available income and a portion of net assets after certain deductions. Eligibility for guaranteed student loans was previously based on income only. The inclusion of a portion of parental net assets in an agricultural state that is land and equipment intensive as North Dakota is would have a severe impact on the availability of federal student financial assistance. The committee encouraged the North Dakota Congressional Delegation to take action to delete or modify the provisions while the bill was in the conference committee, but the provision remained in the final Act.

The Higher Education Amendments of 1986 require a study of the financial aid formulas for students attending postsecondary institutions, giving special attention to devising a more equitable formula for farm assets.

The independent student definition is significantly changed by the Higher Education Amendments of 1986 making it more difficult for students to qualify as independent students, which affects loan and grant eligibility. Unless a student meets the independent student definition, his or her parents' income and assets must be considered in determining the amount of financial aid. The definition now requires students to be 24 years of age if unmarried or demonstrate financial independence from parents for the previous two years and earn an annual income of \$4,000 or more.

Need analysis, based on available income and a portion of equity in assets, is used for the Pell grant, supplemental educational opportunity grant, college work-study, and national direct student loan programs. The Higher Education Amendments of 1986 increased the portion of assets determined to be available to contribute to the cost of education, making it more difficult to qualify for a grant or loan under the supplemental educational opportunity grant, college work-study, national direct student loan, and guaranteed student loan programs. As previously mentioned, need analysis for guaranteed

student loans, the largest student assistance program, was formerly based solely on income.

### **Federal Student Financial Assistance Programs**

The following is a summary of available federal student financial assistance programs including provisions from the Higher Education Amendments of 1986:

#### **1. Pell Grants**

The Pell grant program provides nonrepayable grants to eligible low income students. Maximum award levels are established annually through the federal appropriations process. The Higher Education Amendments of 1986 included the following modifications:

1. The current maximum award is increased from \$2,100 to \$2,300.
2. Need analysis will now be determined separately from other student financial assistance programs and is simplified from the current uniform methodology utilized.

#### **2. Supplemental Educational Opportunity Grants**

The supplemental educational opportunity grant (SEOG) program was developed to provide financial assistance to eligible students attending postsecondary education institutions. The supplemental educational opportunity grant program differs from the Pell grant in that each participating school will receive enough money to pay Pell grants to all qualified students; for supplemental educational opportunity grants, each state receives a predetermined amount. The Higher Education Amendments of 1986 included the following modifications:

1. An institutional match, not previously required, of five percent for federal fiscal year (FFY) 1989, 10 percent for FFY 1990, and 15 percent for FFY 1991 and forward is mandated.
2. The current amount for nonrepayable grants of up to \$2,000 per year is increased to \$4,000 per year.
3. This program is affected by the need analysis provision which includes available parental income and increases the amount of net assets determined to be available to contribute to education costs.

#### **3. Carl D. Perkins National Direct Student Loans**

The Carl D. Perkins national direct student loan program was the first student financial aid program developed that provided low interest loans to undergraduate and graduate students. Postsecondary institutions receive new capital contributions each year, consisting of 90 percent federal funds and 10 percent state funds, which are deposited in a local revolving loan fund.

The Higher Education Amendments of 1986 included the following modifications:

1. Current loan amounts of \$6,000 for total undergraduate instruction and \$12,000 for total undergraduate and graduate instruction are increased to \$9,000 and \$18,000, respectively.
2. Institutions are required to make loans to

students demonstrating exceptional need, a provision not previously required.

3. This program is affected by the need analysis provision which includes available parental income and increases the amount of net assets determined to be available to contribute to education costs.

#### 4. College Work-Study

The college work-study program provides employment to students attending postsecondary education institutions. Students enter the program upon establishing substantial financial aid need subject to the institution's available funding and other aid the student is receiving. The funds are used on a matching basis with 80 percent of the student payroll provided by the federal college work-study program and 20 percent provided by the individual institutions. The Higher Education Amendments of 1986 included the following modifications:

1. The current institutional match of 20 percent is increased to 25 percent in FFY 1989 and to 30 percent in FFY 1990.
2. This program is affected by the need analysis provision which includes available parental income and increases the amount of net assets determined to be available to contribute to education costs.

#### 5. Guaranteed Student Loans

Guaranteed student loans, offered by the Bank of North Dakota and other North Dakota financial institutions, are subsidized low interest, federally insured loans made by a lending institution, utilizing its funds, to students seeking postsecondary education. The federal government subsidizes a substantial portion of the interest cost for eligible students. All students must demonstrate need to obtain the federally subsidized loans. Students must first seek a Pell grant before applying for these loans.

According to Bank of North Dakota representatives, the Bank originates approximately 75 percent of all guaranteed student loans made in North Dakota.

The Higher Education Amendments of 1986 included the following modifications:

1. Current loan amounts of up to \$2,500 for each undergraduate year and \$5,000 for each graduate year are increased to \$2,625 per year for eligible freshmen and sophomores; \$4,000 per year after two years for undergraduates; and \$7,500 per year for graduates.
2. Multiple disbursements of loan proceeds to students are required with the proceeds to be disbursed through the postsecondary institution (included in 1985 COBRA). Previously, the student received directly the full amount of the loan proceeds.
3. For new borrowers, the current interest rate of eight percent over the life of the loan will be eight percent through the fourth year of repayment, 10 percent thereafter, effective July 1, 1988.
4. Guaranteed student loan need analysis, currently based solely on parental and student income, is changed to include a portion of equity in assets.

#### 6. Parent Loans for Undergraduate Students and Supplemental Loans for Students

The parent loans for undergraduate students and supplemental loans for students programs provide loans for postsecondary education to students either not eligible for or in addition to other types of financial aid. The current loan amount of up to \$3,000 per year is increased to \$4,000 per year by the Higher Education Amendments of 1986 and can be made to eligible undergraduate students, graduate students, and parents. The parent loans for undergraduate students program utilizes credit rating information to determine the eligibility of the applicant. The lending institutions utilize their own funds, and the loans are federally guaranteed.

#### Federal and State Student Financial Assistance

The following is a summary of federal and state student financial assistance provided to North Dakota students for the years 1981 through 1986:

	1981-83 <sup>1</sup>	1983-85 <sup>2</sup>	1985-86 <sup>2</sup>
Pell grants	\$19,233,498	\$28,021,902	\$18,974,144
Supplemental educational opportunity grants	3,900,904	3,999,674	2,105,467
College work-study	5,328,440	5,988,752	2,851,380
Bank of North Dakota guaranteed student loans	43,875,000 <sup>1/</sup>	49,403,000 <sup>1/</sup>	23,615,989
National direct student loans	7,665,044	8,598,913	4,356,244
North Dakota student financial assistance	1,010,000	985,000	551,996
North Dakota nurses scholarships/loans	109,460	105,475	18,700
North Dakota National Guard tuition grants and waivers	485,988	670,000	438,067
Tuition assistance grants	400,000	400,000	236,480
North Dakota Indian scholarships <sup>1/</sup>	156,430	183,240	96,442
UND Medical Center loans	155,845	178,655	122,780
Highway Department scholarships/loans	9,110	7,467	2,800
Total	\$82,329,719	\$98,542,078	\$53,370,489*

\*This is a one-year total. To compare it to the first two columns, it would be an estimated \$106 million.

<sup>1/</sup>In some cases, these amounts reflect scholarships that were reawarded due to withdrawals, deaths, or unacceptable grades.

<sup>2/</sup>The basis for the fiscal year amounts reflected in these columns for Bank of North Dakota guaranteed student loans are calendar year amounts.

#### Testimony

As discussed previously in this report the Alm report recommended that major increases in state-funded student financial assistance were not necessary.

The committee received testimony regarding the insufficiency of student financial assistance. Representatives from institutions of higher education testified that student access becomes limited as student financial assistance funds decrease. The increased need for student financial assistance was a result of significant increases in tuition rates. It was recommended that the state student financial

assistance grant program be expanded to provide funds for all four undergraduate years. It was also recommended that a state-sponsored loan program be established.

#### **Recommendation**

A committee member presented a bill draft at the committee's last meeting that would have provided for the creation of a North Dakota merit scholarship program, with eligibility based on grade point average, class rank, and American College Testing scores. The committee does not recommend the bill draft to the Legislative Council.

As discussed previously, in addition to the letter to the North Dakota Congressional Delegation regarding including parental assets in determining guaranteed student loan eligibility, the committee recommends that the 1987 Legislative Assembly increase state-funded student financial assistance, if fiscally feasible, to the levels proportionate with 1981 tuition rates. This recommendation would increase the tuition assistance grant program from \$500,000 to \$740,000 and increase the state student financial assistance program from \$1,085,000 to \$1,870,000, based on projected 1987-89 tuition rates, increased five percent per year, approved by the Board of Higher Education for budgetary purposes.

#### **OTHER COMMITTEE ACTION**

The committee received a Legislative Council staff report on the status of bond issues authorized by the 1985 Legislative Assembly in House Bill No. 1662, which established the Industrial Commission as the North Dakota Building Authority. The report states the three projects authorized by the 1985 Legislative Assembly to be funded from bond issues were the State Penitentiary Phase II construction renovation project of \$7.5 million, the Grafton State School renovation project of \$3.9 million, and the State Hospital project of \$3.4 million.

The committee was informed the authority of the Industrial Commission to issue evidences of indebtedness under North Dakota Century Code Chapter 54-17.2 expires on June 30, 1987, subject to continued authority to exercise powers granted under the chapter and to comply with any covenants entered into before that date.

#### **Recommendation**

The committee recommends House Bill No. 1032 extending the authority of the Industrial Commission to act as the state building authority through June 30, 1989, with the specific projects funded by bond issues to be authorized by the Legislative Assembly.

# BUDGET COMMITTEE ON HUMAN SERVICES

The Budget Committee on Human Services was assigned five studies. House Concurrent Resolution No. 3028 directed a study of the consolidation of services provided by the Department of Human Services and the relationship between the department, the county social service boards, and mental health services. House Concurrent Resolution No. 3077 directed a study of the on-going implementation of the federal district court order concerning deinstitutionalization of developmentally disabled persons. House Concurrent Resolution No. 3062 directed a study of the need for comprehensive in-home and community support services to maintain, enhance, or prolong the independence and self-support of the partially dependent elderly population.

House Concurrent Resolution No. 3052 requested the Governor direct the Governor's Commission on Children and Adolescents at Risk, created to study services provided by the juvenile justice and human service delivery systems to children, to report its findings and any recommendations to an interim committee of the Legislative Council for its review and recommendations. The Budget Committee on Human Services was assigned that function.

Senate Concurrent Resolution No. 4002 urged the Department of Human Services to revise its long-term care facility Medicaid reimbursement system and report to an interim Legislative Council committee on its progress in designing and developing a revised prospective Medicaid reimbursement system. The Budget Committee on Human Services was assigned this function by the Legislative Council.

Committee members were Senators John M. Olson (Chairman), Evan E. Lips, Corliss Mushik, and Russell T. Thane; and Representatives Jim Brokaw, Judy L. DeMers, Brynhild Haugland, Arvid E. Hedstrom, Tish Kelly, Rod Larson, Rosemarie Myrdal, Bill Oban, Dagne B. Olsen, Olaf Opedahl, Verdine D. Rice, Beth Smette, Earl Strinden, and Michael Unhjem. Representative Peter Lipsiea was a member of the committee until his death in June 1985.

The report of the committee was submitted to the Legislative Council at the biennial meeting of the Council in November 1986. The report was adopted for submission to the 50th Legislative Assembly.

## HUMAN SERVICE DELIVERY SYSTEM STUDY

House Concurrent Resolution No. 3028 states that the consolidation of human services by the 1981 Legislative Assembly was done to make the delivery of all human services more efficient, to minimize the administrative costs of providing those services, and to eliminate the duplication of services. The resolution states that a review of the effectiveness of that consolidation should be conducted to ensure that intended services are being efficiently provided.

### Background

The 1981 Legislative Assembly passed House Bill No. 1418, which created the Department of Human Services with the functions, powers, and duties of the

previous Social Service Board, Governor's Council on Human Resources, the Mental Health and Retardation Division of the Department of Health, the Division of Alcoholism and Drug Abuse of the Department of Health, and the State Council on Developmental Disabilities.

That legislation also established the following organization within the Department of Human Services:

1. State Hospital.
2. Office of Human Services containing:
  - a. Developmental Disabilities Division.
  - b. Mental Health Division.
  - c. Social Services.
  - d. Vocational Rehabilitation.
  - e. Alcohol and Drug Abuse Division.
3. Office of Economic Assistance and County Administration.
4. Administrative and fiscal support services.

In addition, the legislation mandated that regional human service centers provide the services formerly provided by mental health and retardation service units and area social service centers.

## Dawes Review of Human Service Delivery System

At the committee's first meeting it decided to visit each of the state's eight regional human service centers during its study and to select a consultant to assist the committee in its review of the human service delivery system.

Dr. Kenneth Dawes, University of North Dakota, was selected to provide the committee with background information on human service terms and programs; to conduct a survey of county, regional, and state human service personnel, referral agencies, and clients to assess the efficiency and effectiveness of the human service delivery system; to summarize survey results and findings; and to make recommendations to the committee to enhance the efficiency of the human service delivery system.

The Dawes report was completed early in the interim and presented to the committee at its December 1985 meeting to enable the committee to receive testimony on the findings and recommendations of the report as the committee visited the regional human service centers.

The recommendations included in the Dawes report were a result of information gathered by surveying approximately 1,000 people including county, regional, and state human service personnel, clients, and referral agencies. The report states the opinion of the people surveyed lacked a general consensus regarding the effectiveness of the human service delivery system but did identify a tremendous amount of unmet human service delivery needs.

The report summarized the strengths and weaknesses of the current human service delivery system in North Dakota as follows:

Strengths	Weaknesses
Organizational structure	Lack of coordination
Physical facilities	Administrative structure
Working conditions	Ineffective leadership

### Strengths

Comprehensive services  
Lack of duplication  
Dedicated staff  
Competent staff  
Quality services  
Supportive community  
Service philosophy

### Weaknesses

Political climate/control  
Lack of goals and priorities  
Closed decisionmaking  
Limited planning  
Poor needs assessments  
Lack of training  
Lack of evaluation of programs  
Underutilized programs  
High caseloads  
Lack of outreach services  
Lack of public awareness

The Dawes report included the following recommendations which the committee adopted, and it recommends a resolution urging the Department of Human Services to address, except for recommendations No. 7 and 10 which provide for eliminating the director of the Office of Human Services and establishing a human services advisory board:

1. Place priority on improving coordination and communication.
2. Develop departmentwide manuals, glossaries, and training.
3. Conduct an in-depth study of communication channels.
4. Develop memoranda of understanding between counties and regional human service centers.
5. Improve regional coordination with community agencies and resources.
6. Develop regional public information brochures.
7. Consider eliminating the position of director of the Office of Human Services.
8. Define the roles and responsibilities of administrators.
9. Provide management training for administrators.
10. Establish a state advisory board for the Department of Human Services.
11. Develop a systemwide statement of purpose, goals, and objectives.
12. Obtain input from service staff in developing policies and procedures.
13. Institute systemwide comprehensive planning and establish priorities for the delivery of specific services by region and county.
14. Institute a formal, comprehensive, and objective needs assessment process.
15. Regularly review all programs for recommending continuance, deletion, transfer, or modification.
16. Conduct caseload studies and equalize caseloads across regions and programs.
17. Develop regional plans for promoting outreach.
18. Provide increased information for general public dissemination.
19. Conduct a thorough review of vocational rehabilitation staff concerns.
20. Develop a user-oriented comprehensive evaluation information system.
21. Conduct comprehensive regular evaluations of all staff including administrators.
22. Encourage career development plans for all staff including administrators.
23. Conduct a comparative salary study to determine adequacy of pay scales.

### Review of Regional Human Service Centers

The committee held meetings in each city with a

human service center to receive testimony from regional human service center staff, regional human service center advisory council members, county commissioners, county social service board members and executive directors, referral agencies, judges, ministers, and other concerned citizens on the effectiveness and efficiency of the human service delivery system in the region.

The following is a summary of concerns expressed in testimony to the committee during its regional meetings:

1. Additional services are needed in the communities for the chronically mentally ill, including long-term residential facilities.
2. Regions are having difficulties recruiting professional staff, including psychiatrists, which is placing an additional workload on other employees.
3. Some regions have waiting lists for clients to see counselors for nonemergency needs.
4. Staff in some regional human service centers and county social service agencies are not sufficient to meet the demands for services.
5. Vocational rehabilitation staff feel consolidation with other human service functions has limited funds available for vocational rehabilitation, required vocational rehabilitation to serve clients with more mental disabilities, reduced office space, and resulted in duplicative computer reporting requirements.
6. County commissioners believe they lack control over social service programs.
7. Additional outreach services are needed in most regions of the state.
8. County social service program costs and utilization are increased without an increase in county resources.
9. Rules and regulations of the Department of Human Services are too stringent and do not provide county social services with sufficient flexibility.
10. Counties are required to provide state-mandated social service programs without receiving additional state funding for related staff needs.
11. The state needs to prioritize services as funding may not be available to provide the social services demanded.
12. The roles and responsibilities of the regional human service centers and the state office of the Department of Human Services should be clarified.
13. Counties are experiencing a rapid growth in reported child abuse and neglect cases, related investigations, and staff needs.
14. Guidelines for eligibility for low income energy assistance programs are too lenient.
15. Additional services for alcohol and drug dependency, especially youth services, are needed.
16. Adequate education in family planning and alcohol and drug abuse in the public schools is needed.
17. The "driving under the influence" law has increased the number of court-ordered alcohol dependency evaluations by the human service centers resulting in a waiting period.
18. County social services and the regional human

service centers have problems recruiting and retaining staff.

### **Vocational Rehabilitation Concerns**

The committee, as a result of concerns expressed by regional vocational rehabilitation staff, reviewed the federal requirements for state vocational rehabilitation programs. States are required to maintain a defined administrative structure with one state agency, a full-time director, and staff responsible for administering and supervising vocational rehabilitation services which in North Dakota is done by the Vocational Rehabilitation Division of the Department of Human Services. If the vocational rehabilitation needs of all handicapped persons in the state cannot be met, the state must assure that those services are provided to the most severely handicapped persons who have a reasonable expectation of rehabilitation for future employment.

Regional human service center vocational rehabilitation staff members expressed their concerns and suggestions for improvements in vocational rehabilitation operations and organization. The staff members said they do not have sufficient information on the state's vocational rehabilitation budget and object to the use of \$1.5 million of vocational rehabilitation funds for developmentally disabled clients in the 1985-87 biennium. They said the role of the state vocational rehabilitation office needs to be clarified and it is difficult for the vocational rehabilitation regional supervisors to report directly to both the human service center director and the state vocational rehabilitation director. They recommended the responsibility for the administration of the vocational rehabilitation program be in one administrative structure; vocational rehabilitation funds remain in the vocational rehabilitation budget and the relationship of the developmental disabilities program and vocational rehabilitation be defined; the vocational rehabilitation director have responsibility for the vocational rehabilitation budget; and the computer systems for vocational rehabilitation and other human service functions be compatible.

### **Organization of the Department of Human Services**

The committee reviewed the current administrative structure of the Department of Human Services, which includes an executive office with personnel, legal services, and management services; an Office of Human Services including an Alcohol and Drug Abuse, Developmental Disabilities, Mental Health, Crippled Children Services, Aging Services, and Children and Family Services Divisions; an Office of Economic Assistance and County Administration including an Economic Division and a Medical Services Division; a Vocational Rehabilitation Division; the regional human service centers; and the State Hospital. The department has established the positions of assistant director of administration and assistant director of programs.

The Dawes report recommended a state human services advisory board be established consisting of the chairpersons of the eight regional advisory boards

and representatives of the county social service boards. The proposed board would recommend names to the Governor for the appointment of the executive director of the department and advise the executive director on the regional and county human service needs and concerns.

### **Review of Mental Health Services**

As a result of touring state institutions and human service centers, the Dawes study recommendations, and testimony presented to the committee regarding the need for the state to develop additional community services for the chronically mentally ill, the committee reviewed current programs and expenditures for the chronically mentally ill, the 1987-89 Department of Human Services budget request for mental health services, and mental health system organization in other states; received reports on the preliminary recommendations of the Governor's Commission on Mental Health Services; and received testimony on the difficulty in recruiting and retaining psychologists at the human service centers and the State Hospital.

The committee learned there is a need for additional community residential services for the chronically mentally ill, especially long-term housing, and other community support services including partial care, aftercare, social clubs, and transitional employment training, which are currently available but on a limited basis and not in all regions of the state.

The committee heard a report from the Department of Human Services regarding the department's request for mental health service appropriations for the 1987-89 biennium. The department is requesting \$14.7 million, of which \$14.2 million is from the general fund for community mental health services and related department central office costs, which is an increase from 1985-87 appropriations of \$7.7 million in total and \$9.5 million from the general fund. The State Hospital's 1987-89 budget request totals \$50.6 million of which \$37.2 million is from the general fund which represents an increase from the 1985-87 biennium of \$3.3 million in total and \$6.7 million from the general fund.

The Governor's Commission on Mental Health Services reported it was considering recommendations that included developing a community-based mental health delivery system with the human service center as the single portal of entry to the system; changing the role of state government from delivering mental health services to assuring the services are provided with the use of private providers; and developing a strong partnership between the University of North Dakota Medical School and the Department of Human Services to recruit, train, and retain psychiatric personnel.

The committee was informed of difficulties in recruiting and retaining psychological services at the human service centers, the State Hospital, and for the community developmental disabilities facilities. A representative of the State Hospital discussed problems in recruiting and retaining psychologists at the human service centers and the State Hospital. It was suggested the agencies be allowed to hire psychologists at the middle of the salary classification

range and upgrade other staff accordingly; staff be allowed to engage in outside employment and be provided state-funded professional development; the state be requested to pay for interviewing and relocating costs; North Dakota students receive priority for admission to the University of North Dakota's graduate program in psychology; an internship psychologists program with the State Hospital, human service centers, and the University of North Dakota be developed; and clerkships be provided for graduate students at the human service centers and the State Hospital.

### **Recommendations**

The committee recommends Senate Concurrent Resolution No. 4003 urging the Department of Human Services to implement changes to the human service delivery system in North Dakota as recommended in the Dawes report, excluding the recommendations for a human services advisory board and for the elimination of the position of director of the Office of Human Services. The specific changes recommended are discussed in detail earlier in the report.

Also, the committee recommends House Bill No. 1033 to establish a human services board, consisting of nine members appointed by the Governor, one from each of the eight human service regions and one member appointed at large, with the authority to establish administrative policy of the Department of Human Services, and to administer the department through the executive director. Under the bill, the Governor will continue to appoint the executive director of the Department of Human Services.

In addition, the committee recommends House Bill No. 1034 relating to the structure of the Department of Human Services which deletes the statutory reference to all offices and divisions within the Department of Human Services except for the State Hospital, the Governor's Council on Human Resources, the regional human service centers, and the vocational rehabilitation unit. This bill draft allows the department to deliver required services through the administrative structure it believes the most appropriate. The committee recommends this bill as an option to be considered by the 1987 Legislative Assembly in its consideration of the administrative structure of the Department of Human Services.

The committee recommends Senate Bill No. 2036 to require the Department of Human Services to develop an integrated, multidisciplinary continuum of services for chronically mentally ill individuals. The continuum must consist of an array of service provided by private mental health professionals, private agencies, county social service agencies, human service centers, community-based residential care and treatment facilities, and private and public inpatient psychiatric hospitals. To the extent feasible, access to the continuum must be through human service centers. The bill provides, within the limits of legislative appropriations, the continuum should include socialization and basic living skill programs; appropriate residential facilities; appropriate training, placement, and support to enhance potential for employment; appropriate delivery and control of

medication; appropriate economic assistance; and an inpatient facility with appropriate programs.

In addition, the committee recommends House Bill No. 1035 to provide that the State Hospital's administrator, who must be a qualified and experienced hospital administrator with a master's degree, shall have the previous responsibilities of the superintendent of the State Hospital. In addition, the bill provides that the administrator, with the approval of the executive director of the Department of Human Services, in regard to the medical director, shall appoint and employ the necessary professional staff including a medical director who is a board-eligible or board-certified psychiatrist. Current law requires the superintendent to be a certified psychiatrist.

Also, the committee recommends the 1987 Legislative Assembly support the establishment of an approved internship psychologist program in North Dakota at the State Hospital, human service centers, and the University of North Dakota; that funding be included in the Department of Human Services 1987-89 appropriation for the internship program; and that priority be given to North Dakota residents for admission to the graduate program in psychology at the University of North Dakota.

## **DEINSTITUTIONALIZATION OF THE DEVELOPMENTALLY DISABLED STUDY**

### **Background**

House Concurrent Resolution No. 3077 directed the Legislative Council to study the ongoing implementation of the federal district court order concerning deinstitutionalization of developmentally disabled persons.

The resolution cites the United States District Court order issued in the case of Association for Retarded Citizens (ARC) of North Dakota v. Olson which requires the state to seek placement of the developmentally disabled in existing licensed and accredited facilities, or to create community-based residential services sufficient to reduce the population of the Grafton State School and the need for the Legislative Assembly to be apprised, as the development of deinstitutionalization plans have far-reaching ramifications and involve the appropriation of large amounts of tax dollars.

### **ARC Lawsuit**

The United States District Court as a result of the lawsuit filed in September 1980 originally ordered, in August 1982, the state to seek placement of the developmentally disabled in existing facilities or create community residential services to reduce the population of the Grafton State School to 450 by July 1, 1987, and to 250 by July 1, 1989, and to comply with Title XIX regulations by July 1, 1985, and ACMR/DD standards by July 1, 1987, at any facility where any class member is residing. In November 1984 the court also ordered the state to reduce the institutional population to 552 persons by July 1, 1985.

The committee received information on additional changes to the court order. Representatives of the Attorney General's office informed the committee that to avoid contempt of court charges and related

costs resulting from the state being unable to meet the institutional population level of 552 by July 1, 1985, the state agreed to meet a population level of 450 residents by July 1, 1986, rather than July 1, 1987; and to further reduce the population level to 350 on January 1, 1988. In addition, representatives of the Attorney General's office reported at a committee meeting late in the interim the state is seeking the plaintiffs' agreement on additional modifications to the court order which are summarized as follows:

1. Eliminate all time lines for reducing institutional populations and meeting ACMR/DD accreditation.
2. Provide a definition of "class," in the court order, to determine which persons are entitled to services.
3. Limit the types of facilities that must meet ACMR/DD accreditation standards.
4. Assign monitoring of the implementation of the court order from the court-appointed monitor to the North Dakota Protection and Advocacy Project.
5. Establish an arbitration and dispute mechanism to settle disagreements between the Association for Retarded Citizens and the state of North Dakota.
6. Allow the state to emphasize individual client needs rather than the institution population levels and emphasize state control over developmental disability services.

#### **Status of Deinstitutionalization**

During the interim the committee heard reports from the Department of Human Services regarding the placement of residents from the Grafton State School and San Haven into community facilities and the status of the deinstitutionalization budget. It was reported that during the 1985-87 biennium as of October 1986, 268 persons were placed from the institutions reducing the institutional population to 430 residents.

The following schedule compares the total number of residents and employees at the two institutions since 1970:

#### **Comparison of Resident and Employee Levels at the Grafton State School and San Haven**

	Residents	Employees
Fall 1970	1,487	729
Fall 1972	1,396	753
Fall 1974	1,227	790
Fall 1976	1,149	893
Fall 1978	1,114	860
March 1980	1,049	863
October 1982	978	1,096
June 1983	905	1,192
June 1985	650	1,368
June 1987 (projected)	437	1,407
Less placements (projected)	(87)	
January 1988	350*	1,149**
Less placements (projected)	(100)	
June 1989 (projected)	250*	1,087

\* This is the court-ordered population level.

\*\* Reflects the reduction of employees at San Haven and is based on an average of 61.53 full-time equivalent employees for the biennium at San Haven to be phased out by the end of the biennium.

The department reported as of August 31, 1986, \$21.5 million, \$15.9 million from the general fund, has been expended for the developmental disability community-based care program for the 1985-87 biennium compared to estimates of \$25.6 million, \$16.8 million from the general fund. Actual expenditures were less than estimated due to fewer services being provided than estimated.

#### **1987-89 Developmental Disabilities Budget Request**

The Department of Human Services presented information on its 1987-89 budget request for developmental disability community programs which totals \$115.6 million, of which \$59.3 million is from the general fund, which represents a total increase of \$24.2 million from the 1985-87 appropriation, of which \$5.8 million is from the general fund. The budget request includes 15 additional positions, 14 in the human service centers and one in the central office.

It was reported that reducing the combined institutional population to 350 by January 1, 1988, will result in the closure of San Haven as the Grafton State School has sufficient facilities for that population level.

#### **Family Foster Care for the Developmentally Disabled**

The Department of Human Services reported on the family foster care program for the developmentally disabled. It was reported as of August 1986 approximately 20 developmentally disabled adults were placed in foster care homes from minimally supervised living arrangements and transitional living facilities with an additional 20 planned to be placed by the end of the 1985-87 biennium. The department said they are reviewing programs in Nebraska and Michigan to possibly serve as a model for the placement of the severely retarded in foster care homes.

#### **Long-Term Care Survey**

The Department of Human Services reported it had surveyed long-term care facilities in North Dakota and identified 329 residents who were either mentally retarded or had resided at the Grafton State School and were therefore a member of the "class" in the ARC lawsuit. The department determined that 197 of the residents are appropriately placed in long-term care facilities, 81 are appropriately placed if their specific needs are met, and the remaining 51 residents would be more appropriately served in other facilities with most in an intermediate care facility for the mentally retarded.

#### **Dual Diagnosis Clients**

The Department of Human Services has identified

251 clients who have a dual diagnosis, both mental retardation and a mental illness, 61 residents at the State Hospital, 55 at the Grafton State School, and 135 receiving community developmental disability services. The committee was informed the department was reviewing these clients to determine their most appropriate placement.

### **Other Reports on the Impact of Deinstitutionalization**

The committee heard reports from the Grafton State School, the Protection and Advocacy Project, the Director of Institutions' office, the court monitor, community providers, special education units of the public schools, and concerned citizens regarding the status of deinstitutionalization and its impact on the state.

The committee visited the Grafton State School and San Haven in October 1985 and learned the school's role has changed from a facility housing the mentally retarded to a training facility providing active treatment. It was learned the school's facilities are adequate to meet projected population levels through 1990 and current staff levels will need to be continued even as the population of the institutions decreases as more intensive active treatment is provided the more severely retarded and handicapped residents remaining. The Emergency Commission during the 1985-87 biennium authorized the two institutions to employ 31 new positions to meet Title XIX requirements.

The federal district court monitor reported to the committee on the status of deinstitutionalization and recommended the state accept responsibility for providing services to all developmentally disabled persons, including the chronically mentally ill; require all developmental disability service programs and facilities to be ACMR/DD accredited; clarify the mission of the Developmental Disabilities Division and the Grafton State School; and adequately fund the Protection and Advocacy Project.

The Protection and Advocacy Project staff reported its responsibilities are to investigate suspected abuse and neglect of the developmentally disabled, monitor developmental disability facilities, and represent the developmentally disabled in legal proceedings. The Protection and Advocacy Project staff recommended the state provide higher salaries for professionals providing developmental disability services, review the high staff turnover in community developmental disability facilities, and ensure that adequate services are available prior to reducing the Grafton State School population to 350 residents.

The Director of Institutions' office reported on the future roles of the School for the Blind and the School for the Deaf. It was reported the majority of the School for the Deaf's students have only a deaf handicap and 75 percent of the school's population is in the lower elementary classes which indicates the school's population will grow in the future. The Director of Institutions' office has no plans for closing the School for the Blind although in the future there may not be a need for residential facilities for the school's 35 students as many of them will be placed in community facilities.

As the committee visited the regional human service centers, it also toured residential and work activity/day activity facilities for the developmentally disabled. Representatives of the state's developmental disabilities providers indicated a need for additional funds for staff salaries to recruit and retain competent staff. The committee received testimony from the special education units of the public school systems in the eight human service regions. Representatives of the public school systems believe they do not have sufficiently trained staff to meet the medical needs of the severely retarded and multihandicapped students placed in schools. They reported on the high cost to educate these students and the inadequacy of state special education funding.

### **Devils Lake Meeting on Developmental Disabilities**

The committee, as a result of problems encountered by the Lake Region Developmental Disability Corporation in providing services, conducted a meeting in Devils Lake in August 1986 to receive testimony from current and former staff members of the corporation, the corporation board members, and other interested persons regarding the situation in an attempt to avoid similar problems in the future in that and other areas of the state. The corporation had been cited by the Department of Human Services for excessive incidents of physical aggression which resulted in the corporation's board of directors terminating the employment of their executive director of the corporation.

### **Conclusion**

The committee makes no specific recommendation regarding the status of deinstitutionalization; however, it believes the Legislative Assembly will need to address a number of problems related to this process. The committee arranged for and developed information, to assist the Legislative Assembly as it considers legislation relating to deinstitutionalization, on the status of the court case; on committee tours of centers and facilities; on nonprofit board member liability; on services provided; and on expenditures made during the 1985-87 biennium and planned for the 1987-89 biennium.

### **STUDY OF IN-HOME AND COMMUNITY SERVICES FOR THE ELDERLY AND DISABLED**

House Concurrent Resolution No. 3062 directed a study of the need for comprehensive in-home and community support services to maintain, enhance, or prolong the independence and self-support of the partially dependent elderly population. The resolution states the possibility of making additional county funds available for such services by eliminating the county contributions to the medical assistance program.

The resolution cites the increase in the elderly population in North Dakota, the difficulty of many elderly persons in maintaining independent living because of a lack of in-home and community support services, and the forced institutionalization of partially dependent elderly persons resulting in the

deterioration of the elderly persons' conditions and increasing the level of care required and the cost to the state as well as the individuals.

### Current Program

The 1983 Legislative Assembly passed legislation to provide for state funding of in-home and community-based services to prevent or reduce institutional care for the elderly. North Dakota Century Code Chapter 50-06.2, entitled "Comprehensive Human Service Programs," was established to reimburse counties for providing homemaker, chore, respite care, home health aide, and other related services. North Dakota Century Code Chapter 50-24.2, entitled "Family Home Care," was established to reimburse counties and eligible persons for family home care and adult foster care. The reimbursement for services in these programs are at rates not to exceed the nonfederal share of the state average of Medicaid payments for intermediate nursing care.

The Department of Human Services reimburses counties under these programs for only individuals determined in need of intermediate or skilled nursing care. In addition, the state has received a waiver from the United States Department of Health and Human Services to use Medicaid (Title XIX) funds for programs provided eligible persons in their homes as an alternative to nursing home care.

The Department of Human Services reported as of September 1986, 44 counties have been reimbursed \$779,000 during the 1985-87 biennium in the state-funded, in-home and community-based services program. The following schedule details the services provided, number of counties receiving reimbursement, and amount reimbursed:

Services	Counties Participating	Amount Reimbursed
Respite care	23	\$104,652
Homemaker	38	176,674
Home health aide	37	149,250
Chore	4	302
Case management	38	60,262
Family home care	28	288,097

### Testimony

The committee received testimony from the Department of Human Services, county social services personnel, and concerned citizens regarding the current in-home and community-based service program and the need for the services. Representatives of the county social service boards testified on the excessive amount of documentation required to receive reimbursement under the state-funded and Medicaid waiver programs. The Department of Human Services reported the majority of the documentation is necessary to ensure the funds are spent properly and that these are federal Medicaid requirements.

Several persons testified on the need for the state to continue and expand these programs to reduce the need for institutional care and to allow persons to remain in their homes. Several persons testified on

the need to include personal attendant care services in the state-funded program. The committee was asked to change the current program to reduce documentation, broaden eligibility, and charge persons receiving the services only the direct service costs including related salaries and travel.

### County Share of Medical Assistance Program

The resolution states that counties find it increasingly difficult to provide in-home and community-based services while funding a portion of their Medicaid costs, counties have little control over Medicaid expenditures, and if counties were not required to pay a portion of their Medicaid costs additional county funds would be available for in-home and community-based services.

The committee received a Legislative Council report on the major human service grant programs for the 1985-87 biennium by funding source. The report shows the major grant programs total \$423.5 million for the biennium, of which \$252.7 million is federal funds, \$150.6 million is from the state general fund, and \$20.2 million is county funds. The medical assistance program budget for the biennium, excluding developmentally disabled grants, is \$212.8 million, consisting of \$123.1 million of federal funds, \$77.6 million from the state general fund, and \$12.1 million of county funds. Counties currently pay 15 percent of the nonfederal share of the medical assistance program.

### Proposed Continuum of Services

The committee asked the Department of Human Services to develop a proposed continuum of home and community-based services for the elderly and disabled with reduced documentation requirements, changes in eligibility requirements, and a simplified delivery system.

The Department of Human Services proposal included mandatory preadmission screening of all persons seeking admission to intermediate and skilled nursing care facilities to determine their need for nursing home care and required all persons determined in need of nursing home care to be informed that they have the option of home and community-based services if those services can meet their needs. Persons not in need of nursing home care as determined by the screening would be referred to the case management system for an assessment to determine if in-home and community services are needed. The assessment would be based on functional impairment and would review the person's ability to live independently and determine the assistance needed for a person to perform the basic self-care activities of daily living (ADLs). The proposal would require counties to provide the services to the extent funding is provided. The Department of Human Services staff stated the proposal would reduce paperwork requirements and make it easier to determine eligibility and to receive the services.

The proposal provided the funding of the services would be determined by the level of impairment and an individual's financial resources, with clients able to pay for the service to do so on a sliding fee scale based on family size and income. The following schedule details the program's proposed funding:

Number of Client ADLs	Source of Funding
3 or less ADLs	Social service block grant, Older Americans Act, or local funding programs
3 to 6 ADLs	State general fund
5 to 6 ADLs	Medicaid funds if client meets Medicaid eligibility criteria

The Department of Human Services estimated the fiscal impact of the mandatory screening to be \$36,000 per biennium and estimated 200 additional clients would be served under the proposal, 50 resulting from a change to a functional assessment and 150 resulting from requiring counties to provide the services, at a cost of \$1.1 million from the general fund for the biennium.

### Recommendations

The committee recommends two bills to provide a continuum of in-home and community-based services including mandatory preadmission screening. Senate Bill No. 2037 requires mandatory preadmission screening of each person prior to admission to a skilled nursing, intermediate care, or hospital swing-bed facility and requires the facility to inform individuals of available in-home and community-based services and of the individual's opportunity to choose, in consultation with an attending physician and family member, among the appropriate alternatives.

The committee also recommends Senate Bill No. 2038 to provide a continuum of community-based services adequate to appropriately sustain individuals in their homes and communities and to delay or prevent institutional care. The bill provides the Department of Human Services will reimburse counties within the limits of legislative appropriations for the following services, to be provided to persons who, on the basis of functional assessment, are eligible:

1. Homemaker services.
2. Chore services.
3. Respite care.
4. Home health aide services.
5. Case management.
6. Family home care.
7. Personal attendant care.
8. Adult family foster care.

The bill also provides that the counties shall make the services available, to the extent funding is provided, to any individual requesting the service and determined eligible, by the county in accordance with rules established by the Department of Human Services, on the basis of functional assessment. Individuals will be required to pay for the services in accordance with a fee scale based on family size and income, and the Department of Human Services shall pay the full cost of indirect services with state, county, and federal funds.

## COMMISSION ON CHILDREN AND ADOLESCENTS AT RISK

### Background

House Concurrent Resolution No. 3052 requests the Governor to direct the Commission on Children and Adolescents at Risk to report its findings and any recommendations which may require legislative action to an interim committee of the Legislative Council for its review and recommendations. The Budget Committee on Human Services was assigned that function.

### Reports of the Commission on Children and Adolescents at Risk

Lt. Governor Ruth Meiers, Chairman of the Governor's Commission on Children and Adolescents at Risk, made progress reports during the interim to the committee. At the committee's September 1986 meeting the committee received the final report of the commission.

The Commission on Children and Adolescents at Risk identified eight objectives the state must have to meet the needs of children and adolescents at risk:

1. Achieve a more effective organizational structure that will facilitate better coordination, planning, and integration of services.
2. Establish a better coordinated youth correction system with a uniform philosophy and mission.
3. Make a commitment to work toward filling the gaps that currently exist in related services.
4. Strengthen the quality of services that are currently provided.
5. Provide an increased child advocacy effort to assure that children's rights are guarded.
6. Promote and encourage the role of the private provider in the provision of services.
7. Provide an increased emphasis on prevention programs and services.
8. Establish public policies that strengthen and support the family.

Pursuant to those eight objectives the Commission on Children and Adolescents at Risk developed numerous recommendations including their top priority — the creation of a Children's Coordinating Cabinet to promote coordination, policy development, and program development at the state level to result in improving the quality of services to children and adolescents at risk with the resources available.

The commission submitted a bill draft to the committee for the establishment of a Children's Coordinating Cabinet. The bill draft establishes a Children's Coordinating Cabinet to develop and implement a plan for coordinated delivery of services to children and adolescents at risk with such cabinet to consist of the Governor or his designee; Attorney General or his designee; executive director of the Department of Human Services; Superintendent of Public Instruction; State Health Officer; director of Job Service North Dakota; Director of Institutions; director of Vocational Education; and state juvenile services coordinator. The bill draft provides that the departments and agencies with membership on the coordinating cabinet shall provide at the request of the Governor any support services required for the cabinet and the cabinet may, within the limits of

available funding, hire or arrange for any staff necessary. The bill draft requires the cabinet to develop, implement, and monitor a plan establishing a coordinated interagency system for the delivery of a continuum of services to children and adolescents at risk.

The bill draft provides the Children's Coordinating Cabinet shall annually prepare and present to the Legislative Assembly and the Governor a report setting forth recommendations and a detailed analysis of the progress made toward fulfilling the plan. The cabinet is given authority to apply for and accept any funds, grants, gifts, or services made available for the purpose of serving children and adolescents at risk with such funds received to be deposited in a special fund to be known as the Children's Coordinating Cabinet fund. The bill draft appropriates \$300,000 out of that fund to the Children's Coordinating Cabinet for the 1987-89 biennium.

#### **Recommendation**

The committee recommends Senate Bill No. 2039 to establish the Children's Coordinating Cabinet as discussed previously to develop and implement a plan for coordinating delivery of services to children and adolescents at risk.

#### **MEDICAID REIMBURSEMENT SYSTEM IMPLEMENTATION STUDY**

Senate Concurrent Resolution No. 4002 urges the Department of Human Services to revise its long-term care facility Medicaid reimbursement system. This resolution was the result of the Legislative Council's Budget "C" Committee 1983-84 interim study of the state's Medicaid reimbursement system for long-term care facilities. That committee determined the state's present Medicaid system may shift some of the long-term care costs applicable to Medicaid patients to patients paying for their own care. They determined that incentives should be included in the Medicaid reimbursement system to encourage improved levels of care, accomplish efficient management, contain costs, and reduce the differential between Medicaid and private pay patient rates.

Senate Concurrent Resolution No. 4002 urges the department to implement a uniform financial reporting system by January 1, 1985, to ensure that accurate comparisons among long-term care facilities can be made. It also urges the department to design and develop before July 1, 1987, a revised prospective long-term care Medicaid reimbursement system which includes rates based on budgets calculated by using historical costs trends with appropriate adjustments for the type of long-term care facility, level of care delivered, and projected economic and other changes. The resolution urges the department to have the revised prospective Medicaid reimbursement system operational on January 1, 1988. The department was to report during the 1985-86 interim on the progress made in designing and developing the revised prospective Medicaid reimbursement system for long-term care facilities.

#### **Department of Human Services Report**

The department reported the uniform financial reporting system has been developed and implemented and as of January 1, 1986, all providers are submitting their cost reports in a uniform manner.

The department reported they have not begun development of a revised prospective system because the limited resources of the department have been allocated to other department needs. It was reported due to limited funds appropriated for long-term care for the 1985-87 biennium a change in the current reimbursement methodology was established. Facilities are placed in groups based on facility level of care, facility size, type of administration, and the percentage of skilled Medicaid recipients occupying skilled beds. Costs for facilities within the peer groups are averaged and a ceiling placed on certain cost categories for reimbursement purposes at 110 percent of the average. The department reported they have focused their resources on the development of institutional reimbursement changes with the first priority being the development of a prospective system (DRGs) for inpatient hospital reimbursement which should be operational by early 1987 and will reimburse hospitals based on a preset amount for each discharge, similar to the Medicare program. This system provides incentives for hospitals to control costs and to operate in an efficient and effective manner. It was reported as a result of this and other demands on the department the design and development of a prospective Medicaid reimbursement system for long-term care facilities will need to be delayed.

#### **Equalization of Private and Public Nursing Care Rates**

At the committee's last meeting, the Department of Human Services reported they plan to introduce a bill to equalize private pay and public pay patient rates in long-term care facilities. It was reported the implementation of this equalization, if passed by the 1987 Legislative Assembly, will begin for the rate year beginning on January 1, 1990, and will take precedence over establishment of a prospective Medicaid reimbursement system for long-term care facilities.

#### **Conclusion**

The Department of Human Services plans to delay the establishment of a prospective Medicaid reimbursement system for long-term care facilities beyond January 1, 1988, and plans, that if the bill to equalize rates is passed by the 1987 Legislative Assembly, to discontinue any development on this system.

#### **TOUR GROUPS**

During the interim the Budget Committee on Human Services functioned as a budget tour group and visited the eight regional human service centers, local developmental disability provider facilities, State Hospital, School for the Deaf, School for the Blind, Grafton State School, and San Haven to hear institutional needs for major improvements and any

problems institutions or the other facilities may be encountering during the interim.

The tour group minutes are available in the Legislative Council office and will be submitted in indexed form to the Appropriations Committees during the 1987 legislative session.

#### **OTHER COMMITTEE CONSIDERATION**

The committee heard reports from representatives of the VesslAmor facility in Jamestown providing special education services for autistic and autistic-like children. The representatives of the facility discussed problems encountered by them in obtaining licensure and certification to provide education and boarding services for these children. The committee asked

representatives of the Department of Public Instruction, Attorney General's office, and the Department of Human Services to review the situation and make recommendations to the committee. The agencies reported to the committee that a separate statutory provision for services for autistic children is not necessary and that current licensing and regulatory provisions are sufficient. Although the problems of the facility in Jamestown have been resolved, several committee members believed the Department of Human Services and the Department of Public Instruction should provide more information to assist individuals in the development of similar programs.

# COURT SERVICES COMMITTEE

The Court Services Committee was assigned two studies. House Concurrent Resolution No. 3037 directed a study of the present and projected caseload of the North Dakota Supreme Court and the need for an intermediate court of appeals or other methods of alleviating the workload of the Supreme Court. House Concurrent Resolution No. 3104 directed a study of the present structure of municipal court services. Following the May 1985 meeting of the Legislative Council, the chairman of the Council assigned to the committee the responsibility of monitoring court decisions and proposals for federal legislation concerning pornography for the purpose of determining whether changes should be made to state laws.

Committee members were Representatives John T. Schneider (Chairman), Tony Eckroth, Mike Hamerlik, Joe Keller, Harley R. Kingsbury, William E. Kretschmar, Thomas Lautenschlager, Dagne B. Olsen, Vince Olson, R. L. Solberg, and William Starke; and Senators Jack Ingstad, Wayne Stenehjem, and Frank A. Wenstrom. Representative Pat Conmy was a member of the committee until resigning his House seat in December 1985.

The report of the committee was submitted to the Legislative Council at the biennial meeting of the Council in November 1986. The report was adopted for submission to the 50th Legislative Assembly.

## APPELLATE COURT SERVICES STUDY Background

The Constitution of North Dakota includes several provisions relevant to the study directed by House Concurrent Resolution No. 3037. The constitution vests the judicial power of the state in a unified judicial system consisting of a Supreme Court, a district court, and such other courts as may be provided by law. The North Dakota Supreme Court is the highest court of the state and consists of five justices. The constitutional powers of the Supreme Court include appellate jurisdiction and the authority to promulgate rules of procedure to be followed by all courts of the state. The Chief Justice is the administrative head of the unified judicial system. The Chief Justice may assign judges, including retired judges, for temporary duty in any court or district under rules and regulations promulgated by the Supreme Court. A majority of the Supreme Court is necessary to constitute a quorum or to pronounce a decision; however, the Supreme Court may not declare a legislative enactment unconstitutional unless at least four of the members of the court so decide. Whenever the Supreme Court reverses, modifies, or confirms a judgment or order of a lower court, the reasons must be concisely stated in writing. Any justice dissenting may give the reason for the dissent in writing. Appeals are allowed from decisions of lower courts to the Supreme Court as may be provided by law.

The 1983 Legislative Assembly approved Senate Concurrent Resolution No. 4005 directing the Legislative Council to conduct a study of the present and projected caseload of the North Dakota Supreme

Court and methods for the appropriate structure and administration of appellate court services. In May 1983 the Legislative Council declined to give priority to the study requested in Senate Concurrent Resolution No. 4005 and suggested the study be referred to the North Dakota judicial system. At the request of the North Dakota Supreme Court, the Court Services Administration Committee of the North Dakota judicial system initiated the study called for in Senate Concurrent Resolution No. 4005. In December 1983 the Court Services Administration Committee appointed a subcommittee, known as the Future Appellate Court Services Study Subcommittee, to study the workload of the North Dakota Supreme Court. The subcommittee was chaired by Representative William E. Kretschmar, and consisted of Attorneys Orlin W. Backes and Paul G. Kloster, Senator William S. Heigaard, Representative Pat Conmy, Judge William F. Hodny, and Justice Gerald W. VandeWalle. The subcommittee concluded an intermediate court of appeals, if properly structured and administered, is the best available solution to the workload crisis of the North Dakota Supreme Court. A similar study was undertaken by a committee created by the Board of Governors of the State Bar Association of North Dakota. That committee consisted of Attorneys Duane R. Breitling (Chairman), Patrick Durick, George Dynes, Robert Heinley, Dwight Kautzmann, LeRoy Loder, Robert McConn, Earle R. Myers, Jr., and Fred Whisenand. The committee of the State Bar Association concluded the creation of an intermediate court of appeals is "a drastic and costly step which should be implemented only after other methods of workload reduction have been utilized to their fullest." The Court Services Committee reviewed reports and recommendations from both the Future Appellate Court Services Study Subcommittee and the committee of the State Bar Association of North Dakota.

## Future Appellate Court Services Study Subcommittee

The Future Appellate Court Services Study Subcommittee studied the present and projected caseload of the North Dakota Supreme Court, appropriate constitutional and legislative revisions, and appropriate administrative and structural changes in appellate court services in North Dakota. In its report and recommendations dated January 7, 1985, the subcommittee made the following findings regarding the workload of the Supreme Court:

1. There is a present workload crisis in appellate court services in North Dakota.
2. The present crisis in appellate court services in North Dakota is being managed, but at significant sacrifice by the justices which could lead to a decreased quality of opinions.
3. The management of this chronic Supreme Court caseload crisis is threatened by any emergency or any unforeseen event impairing the work capacity of any single justice.

4. The North Dakota Supreme Court has reached the limit of its caseload capacity.

5. The caseload of the North Dakota Supreme Court will continue to increase.

According to the subcommittee's report, the justices of the Supreme Court wrote 225 full opinions in 1983, or 45 full opinions per justice. The subcommittee cited what it described as the only authoritative literature regarding the number of appellate cases a court can competently handle, which states that no appellate judge, however competent, can write more than 35, or conceivably 40, full-scale publishable opinions in a year. The subcommittee suggested that present time limitations imposed on justices of the Supreme Court "encourage the creation of five single judge Supreme Courts in which each justice must increasingly rely on the justice authoring an opinion for the statements of law and facts in the case since sufficient time is increasingly unavailable for independent assessment." The subcommittee recommended maximum annual caseload standards concerning the number of new case filings in the Supreme Court and the number of full opinions authored by justices of the Supreme Court. The subcommittee suggested that the maximum annual number of new filings in the Supreme Court should not exceed 310. The subcommittee suggested that the high limit to the optimum caseload of the Supreme Court is 200 full opinions per year, or 40 full opinions per justice, and the maximum caseload of the court is 225 full opinions per year, or 45 full opinions per justice. The subcommittee also recommended standards regarding the disposition time for appellate cases. The subcommittee suggested that the caseload of the Supreme Court should not be so high as to result in the disposition of criminal and civil cases more than 100 days from the date the case is ready for calendaring, hearing, and decision to the date the case is actually decided by issuance of the mandate. The subcommittee indicated that the disposition time in 1983 for civil cases decided by the Supreme Court was 100 days, and for criminal cases 95 days. In concluding the workload of the Supreme Court will continue to increase, the subcommittee projected that in the year 1995 the Supreme Court's workload may range from 60 to 73 full opinions per justice.

The subcommittee reviewed various proposals for internal administrative changes for aiding appellate court services in North Dakota, but concluded that those proposed changes would not significantly affect the workload of the Supreme Court in the near future or on a long-term basis. The subcommittee reviewed three suggestions for structural changes in appellate court services; i.e., provide for discretionary appellate jurisdiction of the Supreme Court, expand the Supreme Court from five to seven justices, or establish an intermediate court of appeals. The subcommittee concluded that an intermediate court of appeals is the best solution to the workload crisis of the Supreme Court. Statutory revisions giving the Supreme Court discretionary authority over its caseload would provide a tool for the Supreme Court to protect its docket but only at the expense of important public expectations of the right to an appeal in all cases. The subcommittee determined that expanding the

Supreme Court from five to seven justices would create additional and substantial complexities in the relationships among the justices of the Supreme Court, would only marginally impact the workload of the court, and would require a constitutional amendment that "would be difficult, problematic, and insufficiently speedy to address the present caseload crisis of the North Dakota Supreme Court." The subcommittee projected an annual cost of approximately \$270,000 for the addition of two justices to the Supreme Court, and \$395,000 for a three-judge intermediate court of appeals.

The subcommittee identified arguments in favor of establishing an intermediate court of appeals, including arguments the establishment of the court would provide a substantial reduction in the workload of the Supreme Court, permit the Supreme Court to control its docket, require no amendment to the state constitution, avoid the problem of randomness in Supreme Court panels and review proceedings before the full court, provide the Supreme Court with flexibility in dealing with projected future increases in the state's appellate caseload, and preserve the right to appeal in all cases. Arguments identified by the subcommittee in opposition to the establishment of an intermediate court of appeals include the court, if poorly administered, would only shift the workload of the Supreme Court from case review to review of decisions of the intermediate court of appeals; the cost of an intermediate court of appeals would be higher than the cost of other alternatives; and an intermediate court of appeals would increase the complexity of the appellate review process and increase costs to some litigants. The subcommittee reviewed these arguments and determined that by establishing an intermediate court of appeals the actual workload of the Supreme Court would be substantially reduced, foreseeable increases in caseload could be accommodated in an orderly manner, important customs and public expectations would be preserved, and legislative implementation would be accomplished in a speedy manner.

The subcommittee recommended that the 1987 Legislative Assembly consider establishing an intermediate court of appeals, or at least an interim, temporary mechanism to permit the assignment of trial court judges and attorneys to intermediate appellate court panels pursuant to rules adopted by the Supreme Court.

#### **Committee of the State Bar Association of North Dakota**

In its report dated June 4, 1986, the State Bar Association Committee made the following findings concerning Supreme Court workload problems and solutions:

1. The workload of the Supreme Court has increased to a level that may require that affirmative action be taken.
2. Several changes could be made to lower the workload of the Supreme Court, including the use of prehearing settlement conferences, prehearing screening of cases, discretionary review for certain types of cases, stricter adherence to Rule 52(a) of the Rules of Civil Procedure, and

summary disposition.

3. Several structural changes within the court could be made to reduce the workload of each individual justice, including the addition of justices to the Supreme Court and the decision of cases by panels of the Supreme Court.
4. These changes should be implemented and tested for effectiveness before an intermediate court of appeals is created in North Dakota.

The State Bar Association committee gathered statistics concerning the workload and personnel of the North Dakota Supreme Court for the years 1975-85, and concluded that the caseload of the Supreme Court has risen dramatically in the past 10 years and that the Supreme Court "appears to be losing the battle to keep its docket current." The appendix to this report compiles caseload statistics of the Supreme Court as contained in the 1979-85 annual reports of the North Dakota judicial system.

The State Bar Association committee indicated that the number of support personnel available to aid the Supreme Court with its increasing workload has risen since 1975, but not in proportion to the increase in the Supreme Court's workload. The committee compiled statistics from other states such as Montana, South Dakota, and Wyoming and determined from those statistics that the growth rate of appellate caseloads in the region appears to be slowing. The number of new case filings in North Dakota decreased by 11 percent from 1984 to 1985. The committee suggested that the flattening out of the case filing growth rates is a trend that indicates that "less drastic alternatives designed to accomplish workload reduction may be best suited to North Dakota."

The State Bar Association committee's report reviews methods of reducing the Supreme Court's workload, either through a decrease in the Supreme Court's caseload or through more efficient management of the present caseload. A common method of handling the workload of an appellate court is to add justices to that court. The committee identified major arguments against adding justices to the Supreme Court, including the cost of additional justices and necessary support personnel, the necessity of a constitutional amendment, and uncertainty of whether the addition of justices to an appellate court actually reduces long-term workload problems.

Another method identified by the State Bar Association committee to reduce the workload of the Supreme Court is to allow the Supreme Court to hear some cases in panels of judges. The primary advantage of this approach is expediency because more cases could be handled by the same number of justices. The main disadvantage of the panel approach is a loss of collegiality between justices and the possibility of inconsistent decisionmaking reached by different panels of judges hearing similar cases.

The State Bar Association committee described the advantages of using prehearing screening and settlement conferences to reduce the workload of the Supreme Court. A prehearing settlement conference is designed to aid in the settlement of cases or to delineate and limit the issues to be presented on appeal. The committee determined that through

settlement conferences a "court hears less cases, due to settlement, and also the cases which it hears are easier, because issue delineation has made them less complex."

The Supreme Court adopted a summary disposition rule effective March 1, 1986, which allows the court to affirm the decision of a lower court by an opinion that merely cites the rule and its criteria, and any previous controlling appellate decision. The State Bar Association committee suggested that a screening procedure be established by the Supreme Court to quickly determine those cases which should be handled by the summary disposition rule. The committee suggested that the rule be modified by the Supreme Court to provide the possibility of eliminating or substantially reducing oral argument. The committee identified the summary disposition rule as a method of allowing the Supreme Court to manage an increasing workload by reducing the time spent on easily decided cases. Several states have adopted some form of summary disposition rule, including South Dakota where the use of the rule has steadily increased since its implementation in 1981.

Another method identified by the State Bar Association committee to reduce the workload of the Supreme Court is for the Supreme Court to utilize a more narrow scope of review in deciding certain appeals, particularly appeals from decisions of administrative agencies.

The State Bar Association committee discussed the creation of an intermediate court of appeals as a method of reducing the workload of the Supreme Court. Other states, including Minnesota and Idaho, have created intermediate appellate courts; however, the caseloads of the Supreme Courts of those states varied greatly prior to their creation. For example, in South Carolina each justice of the Supreme Court was writing an average of 88 opinions per year prior to the creation of an intermediate court of appeals, while in Hawaii the justices of the Supreme Court were writing only 21 opinions per year.

The State Bar Association committee determined that the creation of an intermediate court of appeals would be the most expensive method of reducing or managing the Supreme Court's workload, would be "expensive to litigants who have another level of judicial bureaucracy to forge through," would prolong litigation because of "delay caused by the additional level of judicial machinery," and would not necessarily reduce the long-term workload of the Supreme Court. The committee cited statistics indicating an intermediate court of appeals provides only a temporary decrease in the workload of a Supreme Court, and a study revealing that the caseload of a Supreme Court, while decreasing on a short-term basis as the result of the creation of an intermediate court of appeals, will thereafter increase as if no intermediate court of appeals had been created. The committee concluded that the possibility exists that the establishment of an intermediate court of appeals would create an even greater workload for the Supreme Court.

#### **Testimony and Committee Consideration**

The Court Services Committee received testimony

that focused on arguments for and against the creation of an intermediate court of appeals. Proponents of an intermediate court of appeals suggested that there is little reason to believe the workload of the Supreme Court will decline in the future, but rather an increase in that workload is more likely to occur. The Supreme Court has recently adopted a summary disposition rule, a rule requiring a reduction in the length of Supreme Court briefs from a maximum of 50 pages to 40 pages, and a policy to hear only 30 cases per month. Proponents argued that these and other alternatives to an intermediate court of appeals, however, do not reduce substantially the workload of the Supreme Court. Proponents argued that the public would be better served by the creation of an intermediate court of appeals, which would provide a long-term solution to the workload problem of the Supreme Court. Representatives of the State Bar Association of North Dakota and the North Dakota Trial Lawyers Association generally opposed the creation of an intermediate court of appeals on grounds that less drastic and less expensive alternatives are available which should be tried prior to the creation of an intermediate court of appeals. Opponents argued that recent decreases in the number of case filings in North Dakota and the surrounding region may indicate a trend that case filings are leveling off, if not in fact decreasing.

The committee considered a bill draft to implement the recommendations set forth in the report of the Future Appellate Court Services Study Subcommittee. The bill draft established a court of appeals consisting of a panel of three judges to exercise appellate and original jurisdiction delegated to it by the Supreme Court. The bill draft required the Governor to appoint the initial judges of the court of appeals who would then have taken office on January 1, 1988, and served staggered terms. Subsequent to the initial appointment of judges, the judgeships of the court of appeals would have been filled by statewide election and vacancies would have been filled in the same manner as vacancies in the office of justice of the Supreme Court. The bill draft allowed the Supreme Court to assign active or retired district court judges, retired justices of the Supreme Court, lawyers and retired judges of the court of appeals to serve on additional temporary three-judge panels of the court of appeals for a time certain or for one or more cases on the docket of the court of appeals. The bill draft allowed any party aggrieved by a judgment or order of the court of appeals to petition the Supreme Court for review of the decision pursuant to rules of the Supreme Court. The Supreme Court would have had discretion to grant or deny the petition.

Initially, the committee amended the bill draft to allow the Chief Justice discretionary authority to appoint judges to the court of appeals on a permanent or temporary basis beginning January 1, 1990. After first approving the bill draft as amended, the committee reconsidered its action in light of Section 10 of Article VI of the Constitution of North Dakota which prohibits the imposition of nonjudicial duties upon the Supreme Court or any of its justices and the exercise of any power of appointment by any of the

justices "except as herein provided." The committee was advised that the bill draft arguably delegated to the Chief Justice discretionary authority to either adopt or reject a court of appeals and therefore to determine a question of public policy involved in the exercise of pure legislative duties or powers in contravention of the separation of powers doctrine. Furthermore, although the Constitution of North Dakota permits the Chief Justice to appoint a court administrator for the unified judicial system and to assign judges or retired judges for temporary duty in any court, the Chief Justice is not authorized by the constitution to appoint judges to any court on a permanent basis.

### **Recommendation**

Because of uncertainty concerning the future caseload of the Supreme Court, the committee concluded a statutory mechanism should be available to address a Supreme Court caseload crisis should one develop.

The committee recommends House Bill No. 1036 to require the establishment of a court of appeals consisting of a panel of three judges appointed by the Governor on a temporary basis if the Supreme Court has disposed of 250 cases by opinion in the one-year period prior to September 1 of any year. The judges of the court of appeals would be appointed for a limited period of time, not to exceed one year, as necessary to assist the Supreme Court with the disposition of its caseload. The effective date of the bill would be July 1, 1989.

## **MUNICIPAL COURT SERVICES STUDY**

### **Background**

According to the 1985 annual report of the North Dakota judicial system, 161 cities in North Dakota have municipal courts that are served by 148 municipal judges. North Dakota Century Code (NDCC) Section 40-18-01 provides that municipal judges have exclusive jurisdiction of all offenses against municipal ordinances. Section 40-49-17 vests in the municipal judge of a city the exclusive jurisdiction of all violations of rules or ordinances enacted by a board of park commissioners. Section 29-01-15 allows a municipal judge to act as a committing magistrate if the municipal judge is an attorney licensed to practice law in the state; to hear, try, and determine misdemeanors and infractions within the jurisdiction of the municipal judge; to adjudge and impose the punishment prescribed by law, upon conviction, in all cases within the jurisdiction of the municipal judge; and to grant certain temporary protection orders in adult abuse cases. In cities with a population of 3,000 or more, the municipal judge is required to be an attorney licensed to practice law in the state unless a licensed attorney is not available. In cities with a population of fewer than 3,000, the municipal judge need not be an attorney licensed to practice law in the state and is not required to be a resident of the city in which the judge is to serve. According to the 1985 annual report of the North Dakota judicial system, there are presently 19 legally trained and 129 lay municipal judges in the state.

As the result of a decision of the United States Supreme Court in Pulliam v. Allen, 466 U.S. 522 (1984), municipal judges in North Dakota are subject to prospective injunctive relief pursuant to the federal Civil Rights Act (42 U.S.C. 1983) and liability for attorney's fees under the federal Civil Rights Attorney's Fees Awards Act of 1976 (42 U.S.C. 1988). That decision involved an action brought against a state magistrate by two individuals who claimed that the magistrate's practice of imposing bail on persons arrested for nonjailable offenses under state law and of incarcerating those persons if they could not meet bail was unconstitutional. The Supreme Court determined that the Civil Rights Act was not intended by Congress to expand the common law doctrine of judicial immunity to insulate state judges completely from federal review, and that Congress clearly intended that attorney's fees be available in any action to enforce the Civil Rights Act.

### **Municipal Court Study Subcommittee**

The Judicial Planning Committee of the North Dakota judicial system appointed a subcommittee known as the Municipal Court Study Subcommittee to study municipal court services in North Dakota. In its report and recommendations dated September 25, 1984, the subcommittee identified the following structural problems in the municipal court system of North Dakota:

1. Criminal traffic jurisdiction is beyond the present training and experience of many lay municipal judges. As a result, substantial unfairness can result to those persons coming before such courts.
2. The physical condition of many municipal courtrooms and the resources available to most lay municipal judges are inadequate.
3. The trial de novo appeal from municipal court decisions is unnecessary and wasteful and undermines the credibility of municipal judge decisions.
4. The city ordinances of many municipalities under which defendants are tried are antiquated or nonexistent and often are unavailable to judges, litigants, or the public.

The subcommittee emphasized that criminal traffic proceedings involve complex substantive and procedural laws that are beyond the training and experience of many lay municipal judges. The subcommittee indicated that some municipal judges are not furnished with copies of the municipal ordinances they are expected to interpret and apply and are often without, or in some cases expressly denied, the assistance of city prosecutorial services. In some cases ordinances under which defendants are charged and tried do not exist and in some cases are obsolete or were not validly authorized. The subcommittee noted that the Pulliam v. Allen decision raises serious liability issues for municipal judges as well as for the cities they serve.

### **Testimony and Committee Considerations**

The Court Services Committee reviewed the report and recommendations of the Municipal Court Study Subcommittee concerning municipal court services in the state. In 1985, House Bill No. 1398 would have

implemented recommendations made by the Municipal Court Study Subcommittee in its 1984 report, including a recommendation that all municipal judges be licensed to practice law in the state. The bill failed to pass the House of Representatives. The chairman of the subcommittee informed the Court Services Committee the subcommittee no longer is recommending that all municipal court judges be licensed to practice law.

The subcommittee recommended to the Court Services Committee a bill draft to give cities the option to retain their lay municipal judges, have law-trained municipal judges, or transfer their municipal court cases to county courts.

The subcommittee also recommended a bill draft to allow the board of county commissioners of any county to authorize by resolution one part-time county judge to handle any increased activity resulting from the transfer of municipal court cases to county court. The subcommittee later withdrew its recommendation for the bill draft because of a philosophy against the use of part-time judges and because there probably would not be a significant number of cases transferred from municipal courts to county courts.

The subcommittee also recommended that the Legislative Council study methods for providing and maintaining model municipal ordinances for the protection of small North Dakota cities. Testimony indicated that the exposure to liability for cities and municipal judges is increased in part because the process of adopting city ordinances is often haphazard. Furthermore, the process for adopting and maintaining city ordinances for smaller cities is expensive and difficult. The subcommittee concluded that a cooperative effort with respect to model ordinances would be cost-efficient and would encourage uniformity of city ordinances.

### **Recommendations**

Based upon the report and recommendations of the Municipal Court Study Subcommittee, the committee recommends Senate Bill No. 2040 to extend the jurisdiction of the county courts to criminal misdemeanor, infraction, and noncriminal traffic cases involving violations of city ordinances; to allow the governing body of a city to transfer some or all of the cases of the municipal court to the county court of the county in which the city is located; and to transfer to the county court for trial any municipal court cases in which the defendant is entitled to a jury trial and has not waived that right.

The bill allows a city with a population of fewer than 5,000 the option of appointing a municipal judge not licensed to practice law in the state but also allows such a city to require that municipal judges be licensed to practice law. The bill allows the governing body of a city to appoint a municipal court clerk for municipal ordinance violations with authority as assigned by the municipal judge. The Supreme Court could adopt rules for the qualifications of municipal court clerks, the extent and assignment of authority by municipal court judges, and the conduct of the office. The bill expands the contempt authority of municipal court judges and raises the penalty for

contempt from \$100 and one-day imprisonment to \$500 and 30 days' imprisonment.

The committee recommends Senate Bill No. 2041 to allow the board of county commissioners of any county to authorize by resolution one part-time county judge. Although the Municipal Court Study Subcommittee indicated the bill is not necessary at this time, the committee determined the bill is permissive in nature and would provide county governments the option of providing for a part-time county judge.

The committee recommends House Concurrent Resolution No. 3002 to direct the Legislative Council to study methods for providing and maintaining model municipal ordinances for the protection of small North Dakota cities.

## **PORNOGRAPHY REVIEW**

### **Background**

North Dakota Century Code Chapter 12.1-27.1 relates to obscenity control and includes provisions prohibiting the dissemination of obscene material, obscene performances for pecuniary gain, the promotion of obscenity to minors, the display of objectionable materials to minors, and the exhibition of X-rated motion pictures in unscreened outdoor theaters. Sections 11-11-62 and 40-05-17 allow counties and cities to restrict the location of adult establishments, and Section 53-03-03 regulates indecent carnival performances.

### **Testimony and Committee Considerations**

Testimony was received from representatives of the Attorney General's office, the Council of Abused Women's Services, and citizen groups regarding the regulation of pornography. Citizen groups informed the committee that state laws regarding the regulation of pornography are adequate; however, the major problem is enforcing those laws against defendants who are represented in many instances by out-of-state experts. It was suggested to the committee that the Attorney General's office be staffed with at least one legal expert in the field of obscenity control to prosecute cases at the local level. Other problems cited by citizen groups include the availability of pornographic materials to minors and a possible casual link between pornography and domestic violence.

The committee was informed a Morton County judge determined NDCC Section 12.1-27.1-03.1, which prohibits the display of objectionable materials to minors, is unconstitutionally broad insofar as it prohibits the display of materials granted First Amendment protection.

The committee reviewed several decisions and proposed federal legislation relating to pornography and obscenity control. In 1985 the United States Court of Appeals for the Eighth Circuit in Upper Midwest Booksellers Association v. City of Minneapolis, 780 F.2d 1389 (8th Cir. 1985), upheld

a Minneapolis ordinance that makes it unlawful for any person knowingly to display for commercial purposes any material that is "harmful to minors" unless that material is in a sealed wrapper. The ordinance further requires an opaque cover on any materials whose "cover, covers, or packaging, standing alone, is harmful to minors." The Court of Appeals rejected arguments that the ordinance violates the First Amendment overbreadth doctrine and concluded the ordinance constitutes a permissible time, place, or manner restriction of speech.

In 1982 the United States Supreme Court in New York v. Ferber, 458 U.S. 747, upheld a New York statute prohibiting persons from promoting child pornography by distributing materials that depicted such activity. In reaching this conclusion the court recognized an overriding interest in protecting children from appearing in sexually explicit pictorial material and therefore denied First Amendment protection to child pornography. The committee reviewed federal decisions concerning an ordinance of the Indianapolis City Council which defined "pornography" as a practice that discriminates against women; prohibited people from trafficking in pornography, coercing others into performing in pornographic works, or forcing pornography on anyone; and provided that anyone injured by someone who had seen or read pornography has a right of action against the maker or seller of pornography. The city of Indianapolis argued the ordinance protected women from sex-based discrimination and was analogous to the interest recognized by the United States Supreme Court in protecting children from child pornography. A federal district court found the ordinance to be unconstitutional, reasoning in part that adult women generally have the capacity to protect themselves from participating in and being personally victimized by pornography, which makes the state's interest in safeguarding the physical and psychological well-being of women not so compelling as to sacrifice the guarantees of the First Amendment. The United States Court of Appeals in American Booksellers Association, Inc. v. Hudnut, 771 F.2d 323 (7th Cir. 1985), affirmed the decision of the lower court on grounds the definition of "pornography" contained in the ordinance violated the First Amendment.

### **Conclusion**

The committee received no suggestions for legislation concerning pornography or obscenity control and concluded the state's laws appear adequate. The committee concluded any recommendations concerning NDCC Section 12.1-27.1-03.1 would be premature until the North Dakota Supreme Court determines the constitutionality of that statute.

The committee makes no recommendation for legislation concerning pornography.

**APPENDIX**  
**CASELOAD SYNOPSIS OF THE SUPREME COURT FOR CALENDAR YEARS 1979-85**

	<b>1979</b>	<b>1980</b>	<b>1981</b>	<b>1982</b>	<b>1983</b>	<b>1984</b>	<b>1985</b>
New filings .....	208	294	309	308	310	370	338
Filings carried over from previous calendar year .....	121	88	125	154	152	158	197
Total cases docketed .....	329	382	434	462	462	528	535
Dispositions by opinion .....	*	*	*	*	241	247	243
Dispositions by order .....	*	*	*	*	63	84	92
Total dispositions .....	241	257	280	310	304	331	335
Cases pending as of December 31 .	88	125	154	152	158	197	200

\*1979-82 annual reports of the North Dakota judicial system do not provide a breakdown of dispositions by opinion and order.

# EDUCATION COMMITTEE

The Education Committee was assigned two studies. Senate Concurrent Resolution No. 4052 directed a study to determine whether the state compulsory school attendance law should be revised to accommodate alternative methods of student instruction. House Concurrent Resolution No. 3067 directed a study of the feasibility and desirability of placing vocational education under the supervision and authority of the Superintendent of Public Instruction and also directed a review of the administrative structure for the delivery of vocational education services and programs and a review of federal requirements regarding the delivery of vocational education services and programs at the state level. In addition, the committee was given the responsibility under North Dakota Century Code Section 15-59-05.2 to receive reports on interagency agreements for education services to handicapped students.

Committee members were Representatives Tish Kelly (Chairman), Tony Eckroth, Kenneth O. Frey, Ronald E. Gunsch, Gerald A. Halmrast, Kenneth Knudson, Arthur Melby, David O'Connell, Elmer Retzer, Orville Schindler, A. R. Shaw, Beth Smette, and Francis J. Wald; and Senators Phillip Berube, Bonnie Heinrich, Jerome Kelsh, and Curtis N. Peterson. Representative Les Gullickson was a member of the committee until his death in October 1985.

The report of the committee was submitted to the Legislative Council at the biennial meeting of the Council in November 1986. The report was adopted for submission to the 50th Legislative Assembly.

## COMPULSORY SCHOOL ATTENDANCE STUDY North Dakota Law

The compulsory school attendance law, found in North Dakota Century Code Chapter 15-34.1, requires that all school age children, with limited exceptions, attend a state-approved school. There are four basic requirements for a school to be approved in North Dakota. First, the school must require its students to be in attendance for at least 175 school days. Second, the school must meet fire and safety regulations. Third, the school curriculum must meet state requirements. Finally, the teachers employed by the school must be certificated. The committee primarily focused its attention on the requirement regarding teacher certification.

The North Dakota compulsory school attendance law requires local school district personnel to inquire into possible violations of the law and requires local state's attorneys to prosecute any person who violates the law. It is an infraction for any person to fail to comply with the requirements of the state compulsory school attendance law. The law makes it incumbent upon the parent, guardian, or other persons having control over a school age child to send that child to a state-approved school. No special provision is made regarding teacher certification requirements for home schools or church-affiliated schools.

## Other States' Laws

Thirty-five states expressly permit by statute the use of home school instruction under varying circumstances. Fifteen states have no statutory provision allowing for home school instruction. Some of those states, however, are operating under state education department rules, court decisions, or Attorney General opinions that permit home instruction if the home qualifies as a school under state law. Four of the 35 states that expressly allow home school instruction require that home school teachers be certificated.

Other states use various approaches, other than teacher certification, to regulate alternative schools. Those approaches include providing for state control over curriculum content (e.g., Colorado), providing local school boards with the discretion to approve home school programs (e.g., Massachusetts and Ohio), providing a state board with the discretion to approve home school programs, regulating the number of days and hours of instruction provided by home schools (e.g., Montana and Wisconsin), providing exemptions to school approval for all religious affiliated schools (e.g., Iowa, Kansas, Nebraska, and Virginia), providing no state regulation over private schools (e.g., Illinois and Oklahoma), and testing of home school students and using those results in the approval of home schools (e.g., Arizona, Arkansas, Georgia, and New Mexico).

## Court Decisions

The committee reviewed various court decisions regarding constitutional challenges to state compulsory school attendance laws. The leading authority in this area is Wisconsin v. Yoder, 406 U.S. 205 (1972). In this case the United States Supreme Court held that the First Amendment prevented the state of Wisconsin from compelling Amish parents to send their children to attend formal high school to age 16.

The committee reviewed North Dakota Supreme Court cases involving challenges to this state's compulsory school attendance laws. Those cases are State v. Shaver, 294 N.W.2d 883 (N.D. 1980), State v. Rivinius, 328 N.W.2d 220 (N.D. 1982), and State v. Patzer, Larsen, Reimche, and Lund, 382 N.W.2d 631 (N.D. 1986). In all of these cases the North Dakota Supreme Court upheld the state's compulsory school attendance law against constitutional challenges. The Patzer, Larsen, Reimche, and Lund case, however, is apparently the first case in which the court dealt with defendants, convicted of violating the compulsory school attendance law, who were providing instruction to their children in their homes. An appeal from this decision was filed with the United States Supreme Court and in October 1986 the court denied certiorari (and thus did not accept the case for hearing).

The committee also reviewed the North Dakota Supreme Court case In the Interest of C. S. and A.S., 382 N.W.2d 381 (N.D. 1986). This case involved an appeal by two children from a juvenile court determination that they were "unruly children"

under North Dakota law. That determination was made as a result of the children's truancy from school after their parents removed them from the public school system in order to educate them at home. The North Dakota Supreme Court held that a child who is truant from school may be determined to be an unruly child only if the child is habitually absent from school in defiance of parental authority.

Finally, the committee reviewed the Minnesota Supreme Court case *State v. Newstrom*, 371 N.W.2d 525 (Minn. 1985). That case involved a home school mother who was convicted for failing to send her children to a state-approved school. Minnesota's compulsory school attendance law, codified as Minnesota Statutes Sections 120.10 through 120.12, requires that children attend a school taught by teachers whose qualifications are "essentially equivalent" to the minimum standards for public school teachers of the same grades or subjects. Mrs. Newstrom unsuccessfully contended that even though she lacked formal education her background was "essentially equivalent" to that of a public school teacher. The Minnesota Supreme Court reversed her conviction. The court determined that the phrase "essentially equivalent" was unconstitutionally vague for the purpose of imposing criminal sanctions for the failure to comply with it. The state of Minnesota is in the process of reviewing options to amend its compulsory school attendance law.

#### **1985 Legislative Activity**

The committee reviewed 1985 Senate Bill No. 2263, which would have provided an exception to the state's compulsory school attendance law for home school instruction. That exception would have allowed children to enroll in home schools that complied with applicable health, fire, and safety laws; provided an organized course of study in the subjects otherwise required by law; maintained certain student records; provided at least 175 days of student instruction per year; notified the county superintendent of schools of information regarding each student in attendance; and required each home school child to take a standardized test selected by the county superintendent of schools. The bill also provided for additional testing or remedial instruction if a child's standardized test scores fell more than one grade level or year level below the national mean for that child's age group. The bill failed to pass in the Senate and 1985 House Bill No. 1626, a similar bill, was withdrawn from further consideration in the House of Representatives.

#### **Testimony**

The committee received extensive testimony from persons proposing amendments to the compulsory school attendance statutes. This testimony was primarily given by two distinct groups. The first group seeking revisions to the state's compulsory school attendance law were parents who desired to educate their children in home schools. The major objection those parents had with the law related to the teacher certification requirements for state approval of a home school. Home school proponents testified that teacher certification does not guarantee quality education and that there is not a cause and

effect relationship between student test results and the academic preparation of teachers. As an alternative, the parents suggested state-supervised testing of home school students to ensure that academic progress was taking place. They also indicated a willingness to allow state-certificated teachers to visit home schools.

The second group seeking revision to the compulsory school attendance law was headed by the leaders of various church-affiliated schools. In general, opposition was expressed to any form of state approval over the curricula of church-affiliated schools. The testimony was that First Amendment religious liberties prohibit the state from interfering with what is a parent's constitutional right to educate that parent's children in a church-affiliated school. The church school leaders indicated that it would be wrong for the church to submit its educational ministeries for approval from the state. A suggestion was made to amend the compulsory school attendance law to permit children to receive their education in any safe and healthful surrounding if that education was approved by a state-certificated teacher or if the child passed any recognized national standard examination.

The committee received information indicating that there are over 5,000 church-affiliated schools in the United States with approximately 500,000 children using alternative school curriculum materials; that there are eight nonapproved church-affiliated schools and at least four nonapproved home schools operating in North Dakota; that 413 students in North Dakota attend 10 approved church-affiliated schools and 13 students attend eight approved home schools; and that between 500 to 2,000 children in North Dakota might be home educated if the compulsory school attendance law were modified.

Representatives from the North Dakota Education Association and other public school administrators generally supported the compulsory school attendance law. They indicated that 73 percent of the public is generally not in favor of the proliferation of home schools, 90 percent of the public would require private and church-related schools to meet the same standards for teacher certification as the public schools must meet, and 82 percent of the public favor the same requirement for home schools.

The North Dakota Education Association's policy statement, adopted at its annual convention, indicates that if home school programs are permitted to exist, they should be required to meet certain guidelines including instruction by certificated teachers or teachers with at least a baccalaureate degree, annual state or local approval, and state- or local-mandated testing program. The policy statement also indicates that home school students should have the option of attending public school for part-time instruction with public schools receiving full foundation aid payments for all children enrolled in home schools.

The committee received testimony regarding enforcement of the compulsory school attendance law and the effects of decriminalizing the law. Such a change would primarily affect the constitutional due process rights of persons charged with violating the law. The right to a jury trial and the right of indigent

persons to the appointment of counsel at public expense would be eliminated if the statutes were enforced through civil proceedings. The burden of proving violations of the law would be lessened from a "beyond a reasonable doubt" standard to a "preponderance of the evidence" standard. The following reasons were given in favor of decriminalizing the compulsory school attendance law:

1. Parents who are convicted of violating the law generally receive small fines and thus are not deterred from providing alternative instruction.
2. The law is not being uniformly enforced throughout the state.
3. State's attorneys should not be prosecuting otherwise law abiding citizens who, because of their beliefs, do not want to send their children to school.

Suggestions were made that a civil monetary penalty should be imposed in an amount that would discourage schools or parents from not complying with the compulsory school attendance law and that the Attorney General or the Superintendent of Public Instruction should have the authority to seek an injunction to close schools that do not comply with the law. Members of the Home School Association opposed decriminalization of the compulsory school attendance law because certain procedural and substantive rights would be lost.

### **Home and Christian Schools Task Force Proposal**

The Superintendent of Public Instruction formed a home and Christian schools task force to study and recommend possible amendments to the compulsory school attendance statutes. The task force consisted of representatives from the North Dakota Education Association, the North Dakota Council of School Administrators, and the Department of Public Instruction. Although representatives of the task force generally opposed amending the current law, the task force proposed a series of changes affecting compulsory attendance. The committee reviewed a bill draft based on the changes recommended by the task force. The bill draft would have provided an exception to the compulsory school attendance law for children being taught in a home where the parent was the teacher. The home school would have been permitted to operate at the elementary level. This was based on the premise that junior high and secondary education requires considerably more resources and teacher training than would be possible in a home school environment. The task force's most significant compromise in its recommended changes would have permitted an individual to teach in a home school without certification but with at least a baccalaureate degree. This change was proposed with the understanding that the local school board would provide a certificated teacher to supervise the home school to ensure, among other things, that the home school was providing the required academic instruction in the same number of days and hours per day required by public schools and that the student was making satisfactory academic progress. Under the proposal, home schools would have been required

to obtain annual approval from local school boards and state aid payments would have been made to school districts for each student enrolled in a home school approved by the school board. The state aid would have been used to alleviate the costs of supervision and other services provided to the home school. Finally, the penalty for violating the compulsory school attendance law would have been changed from a criminal infraction to a civil administrative penalty of \$50 per day.

Representatives from the educational associations supported, with reservations, the task force bill draft as an alternative to the proposal made by the Home School Association. Representatives of the task force viewed the task force proposal as a compromise of their positions that teachers should be certificated and that home schools should meet the same standards as public schools.

Representatives from the Home School Association opposed the task force bill draft for several reasons. They expressed the views that the proposal would have placed several limitations upon the exercise of the freedoms of parents to educate their children at home; arbitrarily cut off the right to teach a child at home after the child reached the age of 13; unconstitutionally violated the principle of "conflict of interest" because it would have allowed the local school board to approve or disapprove home education when there was a financial stake in the decision (public schools have a financial stake because they receive state aid and other money for each student that attends a public school); arbitrarily and capriciously required parents to have baccalaureate degrees; unconstitutionally delegated legislative authority to the Superintendent of Public Instruction to place additional burdens on home schools with its rulemaking power; unconstitutionally denied equal protection of the law to those who could not afford to pay the civil fine of \$50 a day to keep their children at home or in an alternative school; and violated the establishment clause by allowing teachers from public schools to supervise private religious schools.

### **North Dakota Home School Association Proposal**

The committee considered a bill draft incorporating the recommendations of the North Dakota Home School Association. The bill draft would have provided an exception to the compulsory school attendance law for children attending "alternative schools," which included home schools. Instruction would have been provided by or at the request of the child's parent or guardian. The bill draft would have eliminated teacher certification requirements for parents, guardians, or other persons having custody over a child being taught in an alternative school: if the parent, guardian, or other person having custody of the child, or the person actually providing the instruction to the child, had a baccalaureate degree or had passed a standardized written teacher proficiency examination; if the child had performed at or above the grade level normally achieved by that child's age group on a nationally standardized test; or if the alternative school's curriculum had been approved by the local school board, the county

superintendent of schools, or the Superintendent of Public Instruction. The bill draft would have allowed home school children to participate in any course of instruction or other activity offered in the public schools. Finally, the bill draft would have prohibited any person from bringing legal action for damages caused by the provision of education in a home school.

Representatives from the Home School Association suggested several technical amendments to their bill draft and requested that a new section in the North Dakota Century Code be created to define clearly alternative schools as an act of recognition that alternative schools have the same status under law as public schools and other private schools.

Representatives of the educational associations and the task force objected to:

1. The provision providing immunity from suit. They indicated that the state should be held responsible for the education it approves, even if the education is provided by alternative schools.
2. The broad definition of "alternative schools." They recommended that the proposal be limited to home schools.
3. The broad interpretation of how alternative school instruction could be deemed equivalent to instruction provided in public schools. Under the Home School Association's proposal if the alternative school's curriculum was approved, neither student performance nor teacher preparation would have to be addressed; or, if the instructor passed a standardized teacher proficiency examination, the school would be deemed equivalent regardless of its curriculum or its students' achievement.
4. The proposal's lack of state supervision and control over alternative schools. They believe a certain amount of supervision and control is necessary to ensure quality education.

Although support was expressed for the provision allowing home school students to attend public schools part time, concern was also expressed that the return of home school students to the public school system might cause problems.

### **Conclusion**

The committee makes no recommendation with respect to the state compulsory school attendance law due to the difficulties with and opposition to each proposal considered.

## **VOCATIONAL EDUCATION STUDY**

### **State Law**

The current state administrative structure for supervision over vocational education programs is outlined in North Dakota Century Code Chapter 15-20.1. Those statutes provide that the State Board of Public School Education also is the State Board of Vocational Education. The State Board of Vocational Education administers vocational education programs and is empowered to shape all state policy for those programs in public elementary and secondary schools in North Dakota. The board also has authority over vocational education programs conducted in postsecondary institutions if those programs use funds administered by the State Board of Vocational

Education. Although the Superintendent of Public Instruction is a member of the State Board of Vocational Education, that board is separate from the Department of Public Instruction and is virtually autonomous in its authority to carry out its duties relating to the administration of vocational education programs.

### **Federal Law**

The committee reviewed the Carl D. Perkins Vocational Education Act of 1984, which provides federal requirements for state eligibility to receive federal vocational education funds. Among other things, the federal Act describes the administrative structure that must be implemented by states receiving federal funds under it. The Act requires any state desiring to participate in the vocational education program to designate or establish, consistent with state law, a "state board of vocational education which shall be the sole state agency responsible for the administration or the supervision of the state vocational education program." The federal Act also requires the state to establish a State Council on Vocational Education with its members appointed by the Governor. The state council's duties are largely advisory in nature. Federal law requires the state board, in consultation with the state council, to develop a state plan for the proposed use of federal vocational education funds. The federal Act does not specify what state agency must be responsible to supervise federally funded vocational education programs; however, the Act does require the state to designate or establish a sole state agency responsible for the administration of such programs. The committee was advised that the federal Act does not prohibit placing the delivery of vocational education services and programs under the supervision of the Superintendent of Public Instruction.

### **1983 Legislative Activity**

The committee reviewed 1983 Senate Bill No. 2074, which would have restructured the administration of state vocational education in North Dakota by repealing the statutory authority of the State Board of Vocational Education. The bill would have created a new constitutional board to replace the State Board of Higher Education and the State Board of Vocational Education.

### **Administration in Other States**

The most common state entities responsible for supervising vocational education are state boards of education. In the 38 states that use this administrative structure, the State Director of Vocational Education is generally under the authority of the State Superintendent or Commissioner of Education. Eight states have separate vocational education boards to supervise their vocational education programs. North Dakota is one of four states that designate the State Board of Education as the State Board of Vocational Education with the State Vocational Education Director reporting directly to the board. Two states recently removed the supervision of vocational education from the Department of Education, and

Wyoming is currently conducting a study to determine the advisability of moving its vocational education programs from under the supervision of its Department of Education to a separate vocational education board.

### **Testimony**

Representatives of the Superintendent of Public Instruction and the State Board of Vocational Education expressed strong support for maintaining the current structure of the vocational education program. The committee was advised that the Department of Public Instruction and State Board of Vocational Education are currently cooperating very well and that there is little duplication of staff between the two agencies. It was also indicated there was not an overlap of vocational education programs being provided by the department and the board. The committee was advised, therefore, that there would probably not be any savings to the state by placing the delivery of vocational education services and programs under the supervision of the Superintendent of Public Instruction.

The committee heard testimony that the Superintendent of Public Instruction would be in a difficult situation if vocational education were placed under the superintendent's authority. The superintendent would be required to make recommendations on the administration of vocational education to the State Board of Vocational Education, and as a member of the board, the superintendent would be required to vote on those recommendations. The committee also received testimony and reviewed

information regarding the interrelationships between the various state entities responsible for supervising vocational education programs. Those state entities are the State Council on Vocational Education, the Governor's Employment and Training Forum, and the State Board of Vocational Education. In addition, a special needs interagency agreement was developed in 1980 between the State Board of Vocational Education, the Department of Public Instruction, the Division of Vocational Rehabilitation, and the Division of Developmental Disabilities for the purpose of ensuring mutual reinforcement and coordination between the agencies.

### **Conclusion**

The committee concluded that the Superintendent of Public Instruction and the State Board of Vocational Education cooperate well together with little duplication of staff or overlap of programs between the two agencies. The committee makes no recommendation to restructure the administration of state vocational education by placing the delivery of services and programs under the supervision of the Superintendent of Public Instruction.

### **SPECIAL EDUCATION INTERAGENCY AGREEMENTS**

The committee received a report regarding various interagency agreements for the provision of services to handicapped persons. Those agreements are on file in the Legislative Council office. The committee accepted those agreements and took no further action with regard to them.

# EDUCATION FINANCE COMMITTEE

The Education Finance Committee was assigned two studies. House Concurrent Resolution No. 3058 directed a study of all facets of the state's finance formulas used in making payments to public elementary and secondary schools for instructional and transportation services and whether those formulas should be changed. The Legislative Council directed the committee to study whether school districts should receive foundation aid reimbursement for summer physical education programs.

Committee members were Senators Curtis N. Peterson (Chairman), Phillip Berube, Layton W. Freborg, Clayton A. Lodoen, Don Moore, Pete Naaden, and Dan Wogsland; and Representatives Wesley R. Belter, Kenneth O. Frey, Moine R. Gates, Gerald A. Halmrast, Julie A. Hill, Serenus Hoffner, Larry A. Klundt, Kenneth Knudson, Ray Meyer, Richard C. Pederson, Cathy Rydell, Orville Schindler, and Clark Williams.

The report of the committee was submitted to the Legislative Council at the biennial meeting of the Council in November 1986. The report was adopted for submission to the 50th Legislative Assembly.

## SCHOOL FINANCE STUDY

There are four significant sources for the payment of state financial aid to public school districts in North Dakota. Those four sources are the state foundation aid program, transportation program, tuition apportionment payments, and special education reimbursements.

### Foundation Aid Program

The foundation aid formula utilizes three major components to derive the amount of state payments made to school districts. The first component is the per-pupil based state payment. In addition to the per-pupil based state payment, schools receive a per-pupil payment from the state tuition trust fund. Total per-pupil payments made to schools have increased from the 1975-76 school year through the 1986-87 school year as follows:

	Foundation Payment	Tuition Apportionment	Total State Payment
1975-76	\$ 640	\$ 38	\$ 678
1976-77	690	47	737
1977-78	775	47	822
1978-79	850	53	903
1979-80	903	80	983
1980-81	970	106	1,076
1981-82	1,425	98	1,523
1982-83	1,353*	158	1,511
1983-84	1,400	176	1,576
1984-85	1,350	202	1,552
1985-86	1,425	209	1,634
1986-87	1,370***	209**	1,579

\*The 1981 Legislative Assembly provided for a \$1,591 per-pupil foundation aid payment. The appropriation necessary to fund this payment was made in anticipation of certain oil extraction tax revenues which were not received by the state.

\*\*Estimated payment.

\*\*\*This figure represents the amount expected to be paid after budget cuts by the executive branch. Original appropriation was for \$1,455.

The second major component of the foundation aid formula is the use of weighting factors that generally favor schools with lower enrollment and higher per-pupil costs. The weighting factors were included in the original foundation aid program formula to account for the fiscal burden suffered by school districts with low enrollments and proportionately high per-pupil costs. The weighting factors are also higher for students attending high schools. The number of students in the district multiplied by the appropriate weighting factor (determined by each school district's enrollment in its high schools and elementary schools), multiplied by the foundation aid base payment equals the gross entitlement of the school district from the state foundation aid program. A summary of the current weighting factors and actual cost of education ratios dating back to the 1974-75 school year is shown at the end of this report.

After a school district's gross entitlement of foundation aid is established, the third major component of the foundation aid formula, that of property equalization, is applied. A 20-mill "equalization factor" is multiplied times the net assessed and equalized valuation of real property in each school district. The intent of this equalization factor is to make state educational funds available for redistribution to school districts that have relatively low property valuations. The underlying assumption justifying application of this equalization factor is that a school district with high property valuation is in a better position to raise locally a portion of its total cost of education than is a district with a low assessed property valuation. As this hypothetical 20-mill levy causes the amount of state aid paid to a school district to be decreased, the premise is that the high valuation district will and should pay a greater portion of its overall cost of education. The gross entitlement, less the amount determined by use of the 20-mill equalization factor, equals the net state foundation aid payment.

Up until 1981 all counties were also required to actually levy 21 mills to raise revenue in support of education at the local level. The revenue raised by the 21-mill county levy was paid to school districts and that amount was subtracted from the school district's foundation aid reimbursement. The amount of revenue raised by the county levies varied depending on the property wealth of each county. The theory and rationale of this mandatory levy was that since counties with relatively high property valuations raised more revenue locally and received a proportionately smaller share of state aid payments, more money was available through the state foundation aid program to be distributed to school districts located in counties with relatively low property valuations. Equalization of educational opportunity was therefore enhanced, and the state constitutional guarantee of a free and uniform system of public school education was also addressed.

The passage in November 1980 of Initiated Measure No. 6 brought with it expectations for dramatically increased revenues for, among other things, state educational finance. Initiated Measure No. 6 imposed a 6.5 percent oil extraction tax and provided that 45 percent of the funds derived from the tax be used to make possible state funding of elementary and secondary education at a 70 percent level. With the electorate having approved of the concept of public education being funded at a 70 percent level by the state, the 1981 Legislative Assembly provided that 60 percent of the oil extraction tax revenue be allocated to the state school foundation aid program. The mandatory 21-mill county levy was eliminated by the 1981 Legislative Assembly. Foundation aid payments were also increased by more than 40 percent for the 1981-82 and 1982-83 school years. North Dakota Century Code (NDCC) Section 57-51.1-08 retains the statutory goal of financing 70 percent of the costs of public school education by the state.

Approximately one-half of all North Dakota school districts have fewer than 74 students in high school and are therefore given a 1.70 weighting factor for the purpose of distributing state school foundation aid payments. Elementary school students have a significantly lower weighting factor than high school students. The statutory weighting factor ratios do not match the actual education cost data in the various-sized schools. For example, the .90 weighting factor for elementary schools with between 100 and 999 students in average daily membership was said to be inadequate, while the 1.70 weighting factor for high schools with 1 to 74 students in average daily membership was said to result in overpayments based on actual education cost data. The committee was generally advised that the weighting factors for elementary schools are more closely tied to actual education cost data than the weighting factors used for high school payments.

The committee received information that the state is not meeting its goal of financing 70 percent of the costs of elementary and secondary school education. Total state appropriations for education paid for approximately 62.3 percent of the average cost of elementary and secondary school education for the 1983-84 school year. The federal government provided approximately 6.5 percent of the average cost of education for all school districts in the state.

Representatives of the Superintendent of Public Instruction advised the committee that the department's proposed budget for the 1987-89 biennium requests \$416,060,376 for foundation aid payments to school districts which amounts to an increase of \$86 million over the estimated actual payments that will be made during the 1985-87 biennium.

### **Transportation Program**

State transportation aid is paid to school districts according to the number of miles traveled and the size of schoolbuses being operated. Transportation payments for the 1985-87 biennium are 38 cents per mile for schoolbuses with a capacity to carry nine or fewer students and 76 cents per mile for schoolbuses

having the capacity to carry 10 or more students. In addition, school districts receive 19 cents per student per day for each student transported in a bus with a capacity to carry 10 or more students. Finally, school districts that arrange for transportation within the incorporated limits of a city within which a school is located may receive 9.5 cents per student per one-way trip for a maximum reimbursement of 19 cents per student per day.

State transportation aid has, over the years, steadily increased as a percentage of all transportation costs incurred by school districts. For the 1974-75 school year, total transportation costs amounted to \$10,594,437 and state transportation aid amounted to \$5,592,617 or 52.8 percent. During the 1981-82 school year, total transportation costs amounted to \$23,112,963 and state transportation aid equaled \$17,523,956 or 75.8 percent. State transportation aid payments for the 1985-86 school year amounted to \$20,189,000 or 88.6 percent of all school district transportation expenditures.

There is a wide disparity in the percentage of transportation costs reimbursed to school districts. In general, rural school districts with fewer students and long routes receive the highest ratio of state aid to actual costs. Many such districts receive state aid in excess of 100 percent of their actual costs. The largest school districts with large student populations and relatively short bus routes receive the lowest ratio of state aid to actual transportation costs. These districts typically receive state aid in amounts varying between 40 percent and 75 percent of their transportation costs.

The committee reviewed 1985 House Bill No. 1049 which, as recommended, would have replaced the current transportation payment formula with a block grant program to reimburse school districts for 85 percent of their transportation costs. Opponents of the block grant approach for reimbursing transportation costs were successful in amending the bill to reflect the current transportation reimbursement formula. The estimated cost of the bill was \$37.2 million for the 1985-87 biennium. That figure is approximately \$2 million less than the amount that is spent under the current formula. A representative of the Superintendent of Public Instruction advised the committee that the percentage of state reimbursement for transportation costs exceeds 100 percent for many of the smaller school districts in the state. This occurs because those districts' costs are generally quite low except in those years when they replace schoolbuses. Due to a statutory increase in mileage payments, the average state reimbursement for school districts for transportation costs was 88.6 percent for the 1985-86 school year compared to 78.6 percent during the 1983-84 school year. Those school districts that run few buses and keep them for long periods of time are the districts that could lose the most in state funds under an 85 percent of cost reimbursement formula for transportation. The committee was advised that if all school districts were reimbursed for 100 percent of their transportation costs based on a five-year cost average, it would require an additional \$4 million per biennium over what is currently appropriated.

A school administrator reported the results of a survey of 25 school districts, located geographically across the state. The survey was conducted in an attempt to compile data relating to actual transportation costs for the period beginning in January 1986 and ending in May 1986. Seventeen of the 25 school districts responded to the survey. Information was requested regarding operation costs, drivers' salaries, depreciation, and administration. The study indicated there is a relationship between cost per mile and density, i.e., the more sparse the population the lower the cost per mile and the more dense the population the higher the cost per mile. Several variables affect the cost of transportation from district to district, including types of roads, replacement schedules for buses, salaries of bus drivers, and maintenance and repairs of buses. The range in cost per mile was great, with the low being 62 cents per mile and the high being \$1.64 per mile. The average cost per mile was \$1.19, and the majority of schools fell within the range of 85 cents to \$1.15 per mile. A representative of the Superintendent of Public Instruction indicated that the state average transportation cost per mile for 1984-85 was 93.2 cents. The state reimbursed districts for 1985-86 at the rate of 72 cents per mile. State reimbursements for transportation amount to between \$40 to \$41 million per biennium. Total expenditures per biennium are \$44 to \$45 million. The administrator reported that, although not conclusive, the formulas currently being used for transportation reimbursements to school districts are probably fairly reasonable, even though there may be disparities at both ends of the scale.

A different issue that surfaced during the 1985 legislative session concerned certain school districts that charge for the transportation of rural schoolchildren. Current law does not require school districts, other than those that have been reorganized, to provide transportation to schools. Therefore, in school districts that have not been reorganized, certain costs of school transportation are charged to the parents of children who are bused to school. This practice was challenged by a Bismarck School District patron in Bismarck Public Schools v. David Walker, 370 N.W.2d 565 (N.D. 1986). The North Dakota Supreme Court in that case refused to determine whether there is a state constitutional right to free transportation to schools because it found the Bismarck School District patrons had signed a contract agreeing to pay transportation costs and thereby waived any rights to receive that transportation free of charge. A very similar case, however, against the Dickinson Public School District, which did not have contracts for transportation charges, has been appealed to the North Dakota Supreme Court.

#### **Tuition Apportionment Payments**

An increasingly important source of revenue for school districts is the state tuition trust fund. This fund consists of the net proceeds from all fines for violation of state laws and the interest and income from the state common schools permanent trust fund. State law requires the Office of Management and

Budget to certify to the Superintendent of Public Instruction the amount in the state tuition trust fund on the third Monday in February, April, August, October, and December in each year. The superintendent is then required to apportion the money in the fund among all school districts in the state in proportion to the number of children of school age residing in each school district. The per-pupil amount of tuition apportionment payments made to school districts for the past several years is shown in the preceding chart.

The tuition apportionment payments consist of the net proceeds from all fines for violations of state laws and the interest and income from the state common schools permanent trust fund. Section 2 of Article IX of the Constitution of North Dakota requires the net proceeds of fines imposed for the violation of state laws to be deposited in the common schools trust fund for the maintenance of the state's common schools. North Dakota Century Code Section 15-44-02 requires each county treasurer to report the collection of certain funds, including the net proceeds of fines collected for the violation of state law, to the Office of Management and Budget. Those moneys are then sent to the State Treasurer's office for deposit in the common schools trust fund.

The committee began monitoring the disposition of fine revenues to the common schools trust fund in November 1985 when it became aware that some counties were remitting little or no fine revenue to the state. Letters regarding the obligations of various county officials were sent to those officials by the Legislative Council, Office of Management and Budget, the Chief Justice of the North Dakota Supreme Court, and the Attorney General. The committee received information that some county officials simply were not aware of their obligation to transfer such funds to the state common schools trust fund. It was also indicated that certain county officials may be intentionally ignoring the requirement that such funds be forwarded to the state. Seventeen counties were identified as sending little or no revenue from court fines to the common schools trust fund. The committee was advised that certain county courts might be imposing excessive court costs in lieu of fines because the former can be retained by the county. The committee was advised regarding state laws specifying the type of court costs that can be charged by county courts. The average monthly fine receipts to the trust fund for the 12-month period preceding November 1985 amounted to \$70,413.14. The monthly average fine receipts to the fund from November 1985 through August 1986 amounted to \$81,081.52, an increase of \$10,668.38 per month.

#### **Special Education Reimbursements**

North Dakota Century Code Section 15-59-04 requires all school districts to provide special education programs for handicapped children. School districts are not legally required to provide special education programs for gifted children. School districts that make expenditures for the special education of children are entitled, under Section 15-59-06, to receive state reimbursements for their cost of education and related services. State payments

are made to school districts providing programs for gifted or handicapped children, or both. The state reimbursement may not exceed three times the state average per-pupil cost of education for each exceptional child per year and four times the state average per-pupil cost of education for each exceptional child per year for the cost of related services. An exceptional child may be either a gifted or handicapped child. The state average cost of education during the 1984-85 school year was \$2,736.12. Therefore, the maximum reimbursement for special education instructional costs permitted by law would amount to approximately \$8,000 per year. The method used to reimburse school districts, however, is not based on the average per-pupil cost of education or related services, but rather on the number and qualifications of full-time special education instructors employed by a school district. School districts are reimbursed on an annual flat grant basis for the cost of specific education personnel employed to deliver education services to exceptional children. A representative of the Superintendent of Public Instruction reported that the state provided school districts with approximately 45 percent of their special education funding in 1983-84.

Transportation aid is paid to school districts for the transportation of exceptional students to and from school in other districts and to and from schools within the school districts for special education programs approved by the Superintendent of Public Instruction. The amount of transportation reimbursed by the state is the same amount that school districts are entitled to otherwise receive for transporting students, except that such reimbursements must be made for all miles traveled regardless of whether the students live within the incorporated limits of cities in which the schools they are enrolled in are located.

When a child is placed outside his or her school district of residence, the school district of residence remains financially responsible for all tuition costs relating to that child's education. This financial commitment, which often is not budgeted for by a school board, constitutes a budgetary problem related to special education and educational finance in general. Over the past several years, representatives of the Superintendent of Public Instruction and school administrators have recommended that the state become financially responsible for 100 percent of the costs of elementary and secondary school students placed outside their school districts of residence by social service agencies and courts.

The committee reviewed 1985 Senate Bill No. 2063, 1985 House Bill No. 1048, and 1985 Senate Bill No. 2064 relating to special education finance. Senate Bill No. 2063, which was defeated in the House, would have required the state to pay the entire tuition and excess costs for handicapped children placed outside their school districts of residence if the placement was made by a county or state social service agency, if the placement was made from a state-operated institution, or if the placement was made by a court or juvenile supervisor. The bill would have made the state responsible for the costs of deinstitutionalizing students from the Grafton State School.

Social service agencies and courts have the

authority to place children outside their school districts of residence if they are in need of either special education services or services supplementary to those generally provided to other public school students. Under current law, the school district of residence remains financially responsible to pay the bill for these children up to 2.5 times the statewide average per pupil, either elementary or secondary costs. The 2.5 times cost amounts to \$7,403 for grades 1 through 8 and \$9,680 for grades 9 through 12.

Under current law a child's legal school district of residence is where that child's parents or guardians reside. One issue reported by a representative of the Superintendent of Public Instruction is whether a school district, wherein a limited corporate guardian is located, should be responsible for the cost of special education of a handicapped emancipated person under the age of 21 who has never been physically present in the school district. The representative testified that 1985 Senate Bill No. 2063 would have addressed this problem by assigning to the state all special education costs for deinstitutionalized children.

A representative of the Superintendent of Public Instruction indicated there are approximately 60 severely and multiply handicapped students out of the entire state special education population of approximately 11,300 children. There are 85 special education children enrolled in Grafton State School. Approximately 42 of those children are 16 years of age or older, and at least 20 of those children will be 21 years of age or older within the next three years and will no longer be entitled to special education. Representatives of the Superintendent of Public Instruction, therefore, indicated that the deinstitutionalization of the children from Grafton State School should not drastically impact school district special education expenditures. The representative estimated it would cost approximately \$15,000 a year for the state to reimburse school districts for the cost of educating each student deinstitutionalized from the Grafton State School, not including the costs of noneducation-related expenses such as boarding care. A representative of the Bismarck School District, however, indicated that it costs the Bismarck School District almost \$30,000 per year, not including noneducation-related expenses, to educate each of four students who are severely and multiply handicapped and who were deinstitutionalized from the Grafton State School. The only federal funds that follow students from Grafton State School when they are deinstitutionalized amount to approximately \$515.50 per student per year. The fiscal impact of a bill similar to Senate Bill No. 2063 would be approximately \$1.1 million and would affect approximately 80 students, including students who were deinstitutionalized from Grafton State School. Under a bill similar to Senate Bill No. 2063, the state would be picking up the "2.5 times amount" currently paid by districts of residence.

Opposition was expressed to having the state become financially responsible for all costs of educating handicapped children because it would remove all incentive for school districts to provide local special education programs. In addition, if a student remains in the school district of residence

there is no statutory limit on that school district's financial responsibility. It was argued that this practice penalizes school districts that take the initiative to provide special education services.

House Bill No. 1048, as recommended by the 1983-84 interim Education "A" Committee, would have, among other things, amended the current special education reimbursement formula to provide reimbursement to school districts in an amount equal to 60 percent of the salary and fringe benefit costs paid the previous year by the school district for personnel employed to deliver special education instructional services and an amount not to exceed four times the state average per-pupil cost of education for each child per year for the cost of related special education services. The estimated appropriation necessary to fund this recommendation was \$50 million for the 1985-87 biennium compared to the 1983-85 special education appropriation of approximately \$21.2 million. Although House Bill No. 1048 was approved by the Legislative Assembly, the provisions for amending the special education reimbursement formula were amended out of the bill prior to passage. The purpose of this bill was to offset the local contribution toward special education programs which was steadily increasing because the legal rights of handicapped children to receive special education were being expanded. It was reported that although the cost of special education programs continued to rise, the percentage of state and federal reimbursement for those costs had not kept pace with the increase.

Representatives of the Superintendent of Public Instruction testified that state statutes do not inhibit the proliferation of new special education units. The committee was advised that as the number of special education units grow, the size of those units gradually becomes smaller and thereby inhibits the range of services that each unit is able to provide. Because state laws limit the financial responsibility of school districts that send their children to other school districts for special education to 2.5 times the statewide average cost of instruction, and because there is no upper financial limit for the liability of a school district that develops its own programs to educate handicapped children within the district, the incentive is for school districts to send children outside their school districts of residence for special education. The state director of special education advised the committee that the liability cap often serves as a disincentive for the establishment of good local special education programs. However, the committee questioned whether it would be cost efficient to develop sophisticated local special education programs for all low incidence handicapped children in every school district where such children exist.

The committee reviewed 1985 Senate Bill No. 2064, which was defeated in the Senate, relating to delivery of special education services. The bill would have established a special education area coordinator pilot program. The bill was designed to make a coordinator responsible for facilitating the provision of special education services through existing cooperative special education units to all school age children

residing in the pilot program area who have severe and profound handicaps. The bill provided a general fund appropriation of \$200,000 for the 1985-87 biennium and appropriated \$100,000 in anticipated federal special education funds that would have been provided to the Department of Public Instruction. The bill also provided that an additional amount of money not to exceed \$100,000 could be raised through a tax imposed by the school districts located in the special education pilot program area.

The committee also heard concerns regarding private schools that are able to receive higher tuition payments than public schools for educating handicapped children. Public schools are currently limited to receiving \$299 per student in capital construction costs, regardless of actual costs, as part of their tuition; however, private schools are not subject to that limitation. The tuition payment formula provides that the school districts that send their children out of district must pay tuition in an amount equal to the "average cost of education" per student in the county. The "average cost of education" includes double the statewide student average cost for capital outlay. The purpose of this law is to make it possible for a school district that does not offer high school or elementary school to pay the necessary cost of tuition for sending children to a school in another district. Testimony indicated that capital construction costs may be much higher when special education facilities are constructed.

The committee reviewed a bill draft that would have allowed a school district to charge as part of its tuition for nonresident handicapped children the greater of either that district's actual per-student average cost of capital outlay or double the statewide per-student average cost of capital outlay. A school district's liability for paying tuition for handicapped children would still be limited to an amount equal to 2.5 times the state average cost of education. A representative of the Superintendent of Public Instruction testified that capital outlay figures fluctuate in direct proportion to the building programs and bond issues that are passed in the state. This bill draft would have addressed the fact that there may be additional costs for capital outlay when special education facilities are built for special needs children.

Opposition was expressed to this bill draft because it singled out handicapped students and implied that all costs of building are due to the handicapped. Under this bill draft, it would have been necessary to determine what portion of the cost of a building was used for special education facilities and what portion of the cost was general. A suggestion was made that actual capital outlay costs should be recovered for any student.

#### **School District Building Funds**

The committee reviewed the use of school districts' general fund revenues for capital construction projects. State law provides that a building fund may be established by a school district upon a 60 percent approval of the district electors. State law also permits a school district to create a building fund by appropriating up to 20 percent of the current annual

general fund appropriations to establish the building fund. State law, however, does not indicate whether such transfers may be made from the general fund if a building fund mill levy has been approved by the voters. Representatives of the Superintendent of Public Instruction indicated that most school districts have at some time transferred general fund money to their building funds to make capital improvements. The committee reviewed the South Central Judicial District case Linderkamp v. Bismarck School District No. 1 where the district court held that school districts may not, under current law, transfer money from their general funds to a building fund if they have voter-approved building fund tax levies.

Prior to the district court opinion in Linderkamp, members of school boards had generally interpreted the law to allow transfers from the general fund to the building fund. Thirty-five school districts transferred \$2,736,284 from the general fund to their capital project fund in 1984-85. Many schools financed building projects by transferring money from the general fund to the building fund instead of issuing bonds and obligating the taxpayer's property for a period of years.

The committee reviewed a bill draft that would have clarified state statutes by amending the law to conform with the district court's interpretation. Under the bill draft, a school district that had not levied taxes for a building fund would have been permitted to transfer funds from general fund appropriations to a building fund. The bill draft would have allowed school districts with unlimited taxing authority to make such transfers regardless of whether a building fund tax had been levied. An alternative bill draft considered by the committee would have amended state statutes to allow all school districts to create and add to building funds by making transfers from general fund appropriations regardless of whether a building fund tax levy had been authorized. Some concern was expressed that under the alternative bill draft, taxpayers would lose their right to vote on capital improvements.

#### **Dissolution of Nonoperating School Districts**

Pursuant to NDCC Section 15-27.4-01, a nonoperating school district may continue to exist provided that 50 percent of the pupils from the school district attend schools in another state. A representative of the Superintendent of Public Instruction indicated that most nonoperating school districts are protected from mandatory dissolution because they send their students to schools located out of state. The tax base in most of these school districts was described as insufficient to pay the cost of education, especially if they have severely multiply handicapped children.

The committee reviewed a bill draft relating to the reorganization, annexation, or dissolution of nonoperating school districts. The bill draft would require all school districts that did not operate either an approved elementary school or high school to reorganize with or annex their territory to school districts that operate either an elementary or high school by July 1, 1989. Under the bill draft, a school district which did not operate a school and which

failed to reorganize with or annex to an operating school district would be dissolved by the county committee. Under Section 15-40.2-09, if a student were residing in a school district that was annexed to or reorganized with another district, and if that district had been sending students to a school district in a bordering state because of proximity or terrain, that student could attend for the first time, or continue to attend, a school in the bordering state. A representative of the Superintendent of Public Instruction indicated that this bill draft would equalize tax efforts among school districts. Currently, some of the nonoperating school districts have levied their maximum number of mills while others make no local tax effort.

#### **National Conference of State Legislatures' Education Grant**

The Legislative Council received an education study grant from the National Conference of State Legislatures in the amount of \$6,000. The Council retained a consultant from the Education Commission of the States to provide assistance in conducting this study. The study focused on North Dakota's reimbursement for elementary and secondary school transportation and special education programs.

Forty-eight states were surveyed to collect information on state approaches to financing transportation costs. Special emphasis was placed on states that operate under circumstances similar to North Dakota's. Data available about the costs of providing transportation and the various types of school districts in the state was reviewed to see if this data would provide insights into how the current formula could be made more sensitive to the experiences of North Dakota school districts. Using the information from the previous two tasks, alternative approaches to financing transportation in North Dakota were simulated. Special emphasis was placed on seeing how changes to the parameters of the current system might improve the distribution of transportation aid across the state.

The survey revealed a variety of state transportation aid distribution programs. The distribution formulas were categorized into five general groups: a density formula, a percentage of allowable costs formula, a mileage payment formula, a per-pupil payment formula, and a combination of methods such as a mileage and percentage of cost procedure. All of the states that use density formulas for the distribution of state transportation aid generally use the average daily number of pupils transported divided by either the number of square miles in the school district or the number of daily route miles to arrive at a pupil density factor.

The formulas used by Idaho and Colorado for transportation reimbursements were simulated using North Dakota data. Idaho reimburses school districts for schoolbus transportation at 85 percent of the allowable costs of the district for the next preceding year. Under this formula, the 1985-86 payment for regular schoolbus routes would have been \$19,152,444 compared with the actual payment of \$18,278,637 (excluding reimbursements for vocational education, special education, and family

transportation).

Colorado reimburses districts for schoolbus transportation on the basis of 25 percent of the difference between the current operating expenses and the amount determined by multiplying 40 cents times each mile traveled. The Colorado formula was simulated using North Dakota data with the following modifications. Reimbursements were made on the basis of 50 percent of the difference between the total costs of transportation and the amount determined by multiplying 50 cents times each mile traveled. The average percent of reimbursement was approximately 75 percent of costs compared with an average reimbursement rate of 81 percent of costs under the current system (excluding reimbursements for vocational education, special education, and family transportation). The number of school districts receiving payments in excess of 100 percent of cost, under this simulation, would be reduced from 84 to five. In addition, most of the districts would be reimbursed between 70 and 90 percent of current operating costs including an allowance for depreciation.

The approaches to financing special education used in other states were reviewed to see if other states have developed approaches that provide incentives for collaborative service delivery systems. Peer states were surveyed to learn how questions of access to full service have been addressed at the state level. States included in this survey were Colorado, Iowa, Nebraska, New Mexico, South Dakota, Utah, and Wyoming. Series of discussions and interviews with administrators and teachers in special education units in North Dakota were initiated. Attention was focused on special education units where collaborative efforts appear to have been particularly successful.

Based on this data, the consultant concluded that cooperative units can work provided three basic characteristics are in place:

1. The unit is large enough to offer the full complement of services and staff necessary to accommodate the special education children in the unit.
2. The unit has the flexibility to make local decisions about how to organize and deliver services.
3. The unit has the capacity to negotiate a fair mechanism for allocating costs back to constituent districts.

### **Recommendations**

The committee recommends Senate Bill No. 2042 to make the state financially responsible to pay the entire tuition and excess costs for handicapped children placed outside their school districts of residence if the placement was made by a county or state social service agency, if the placement was made from a state-operated institution, or if the placement was made by a court or juvenile supervisor. The bill makes the state responsible for the costs of deinstitutionalizing students from Grafton State School.

The committee recommends Senate Bill No. 2043 to allow all school districts to create and add to building funds by making transfers from general fund

appropriations regardless of whether a building fund tax levy has been authorized. Current law does not indicate whether such transfers may be made from the general fund if a building fund mill levy has been approved by the voters.

The committee recommends Senate Bill No. 2044 to require all school districts that do not operate either an elementary school or a high school to reorganize with or annex their territory to a school district that operates either an approved elementary or high school. The bill is intended to equalize tax efforts among school districts.

The committee recommends that the Legislative Council assign to the Legislative Audit and Fiscal Review Committee the responsibility to monitor fine revenues to the common schools trust fund.

### **SUMMER PHYSICAL EDUCATION PROGRAMS**

The Legislative Council directed the committee to study whether summer school physical education courses should be eligible for proportionate foundation aid payments. Prior to amendments made by the 1985 Legislative Assembly, school districts were given the authority under NDCC Section 15-40.1-07 to provide summer school courses and receive proportionate state foundation aid payments for students enrolled in those courses. The only stipulation for payment was that the offered course be eligible to satisfy graduation requirements and that it consist of at least as many clock hours as other courses offered during the regular school term.

During the 1985 legislative session, concern was expressed that the state should not reimburse school districts for summer programs used to prepare high school athletic teams for their fall athletic schedules. Consequently, Section 15-40.1-07 was amended to prohibit proportionate foundation aid payments to school districts for all summer physical education programs. Opponents of this amendment questioned whether all summer physical education programs should be penalized and very likely cut by school districts as a result of the perceived abuse brought on by the summer "athletic camps."

The Superintendent of Public Instruction advised the committee that the Department of Public Instruction was monitoring summer school education programs to assure appropriate education is being carried out in those programs. Representatives of the superintendent expressed a primary concern and need for a clearer definition of the summer programs and courses that should be eligible to receive proportionate foundation aid payments. A wide variety of courses are taught during the summer. Representatives of the superintendent questioned whether some of those programs should be reimbursed by the state. For example, it was suggested that it might not be appropriate to reimburse foreign language courses when the students travel to a foreign country. It was the general consensus of committee members and representatives of the Superintendent of Public Instruction that physical education programs should concentrate on lifetime exercise skills and that other summer school programs should be approved under

rules adopted by the Superintendent of Public Instruction.

Physical education is a required course for graduation. It was therefore suggested that it should be reimbursed like other required courses. It was also suggested that school district summer programs should be more closely monitored to assure that "athletic camps" are not reimbursed. The committee was advised that a total of 73 school districts with an enrollment of 6,094 students received reimbursements for summer school programs during 1985. The total foundation aid payments made to these programs amounted to \$1,318,680. In 1984, \$130,267 in state foundation aid payments was made to school districts for summer physical education programs. There were 12 high schools with such programs with a total of 735 students enrolled. According to representatives of the Superintendent of Public Instruction, only seven

school districts have recently offered summer physical education programs, and they are the largest school districts in the state.

The committee reviewed a bill draft authorizing the Superintendent of Public Instruction to adopt rules regarding the eligibility of school districts to receive proportionate payments for all summer courses including physical education courses.

#### Recommendation

The committee recommends House Bill No. 1037 to permit proportionate foundation aid payments for eligible summer physical education courses and requires the Superintendent of Public Instruction to adopt rules regarding the eligibility of all summer school programs to receive proportionate foundation aid payments.

### COST OF EDUCATION RATIOS

Kind of District	1974-75	1975-76	1976-77	1977-78	1978-79	1979-80	1980-81	1981-82	1982-83	1983-84	1984-85	Current Weighting Factor
Kindergarten	.55	.53	.52	.55	.53	.52	.54	.55	.52	.54	.49	.50
Rural (1-8)	1.23	1.19	1.38	1.11	1.13	1.16	1.68*	1.09	1.33	1.15	1.47	1.30
Elementary (1-6) 99	1.07	1.03	1.05	1.11	1.12	1.15	1.13	1.17	1.17	1.17	1.17	1.00
Elementary (1-6) 100-999	.93	.95	.96	.95	.94	.94	.92	.92	.93	.90	.91	.90
Elementary (1-6) 1,000	.96	.96	.95	.95	.94	.94	.93	.93	.94	.93	.94	.95
Grades 7 and 8	.95	.97	.99	1.04	1.03	1.03	1.04	1.06	1.01	.98	1.01	1.00
High school (9-12)												
550 or more pupils	1.10	1.13	1.10	1.08	1.10	1.08	1.09	1.11	1.11	1.08	1.09	1.20
150-549	1.03	1.02	1.02	1.01	1.00	1.00	1.00	1.08	1.11	1.17	1.20	1.32
75-149	1.07	1.05	1.06	1.04	1.04	1.05	1.07	1.10	1.14	1.16	1.20	1.40
74 or less	1.28	1.28	1.25	1.26	1.23	1.27	1.30	1.31	1.38	1.43	1.43	1.70
Average cost per pupil	\$938	\$1,097	\$1,212	\$1,376	\$1,544	\$1,741	\$1,957	\$2,392	\$2,476.82	\$2,682.50	\$2,736.12	XXX

#### \*Error in data reporting

Cost of education ratios are calculated by dividing the statewide average cost per pupil for each of the enrollment categories by the statewide average cost per pupil for all pupils. The ratios reflect only the amount that was spent and does not reflect the need for new programs or enhancements to existing programs. The ratios reflect cost economics that were instituted by schools to the extent that the ratios did not increase as dramatically as most cost indices. Per-pupil cost of education figures do not include the cost of student activities, transportation, food services, or building expenditures.

# GARRISON DIVERSION OVERVIEW COMMITTEE

The Garrison Diversion Overview Committee originally was a special committee created in 1977 by House Concurrent Resolution No. 3032 and recreated in 1979 by Senate Concurrent Resolution No. 4005. In 1981 the 47th Legislative Assembly enacted North Dakota Century Code Section 54-35-02.7, which statutorily creates the Garrison Diversion Overview Committee. The committee is responsible for legislative overview of the Garrison Diversion Project and related matters and for any necessary discussions with adjacent states on water-related topics.

Section 54-35-02.7 directs that the committee consist of the majority and minority leaders and their assistants from the House and Senate, the Speaker of the House, the President Pro Tempore from the Senate selected at the end of the immediately preceding legislative session, and the chairmen of the House and Senate standing Committees on Natural Resources.

Committee members were Representatives Earl Strinden (Chairman), Roy Hausauer, Serenus Hoffner, William E. Kretschmar, Charles Mertens, and Alice Olson; and Senators William S. Heigaard, Clayton A. Lodoen, Rick Maixner, Don Moore, Gary J. Nelson, and David E. Nething.

The report of the committee was submitted to the Legislative Council at the biennial meeting of the Council in November 1986. The report was adopted for submission to the 50th Legislative Assembly.

## History of the Project

The Garrison Diversion Unit is one of the principal developments of the Pick-Sloan Missouri River Basin program, a multipurpose program authorized by the Flood Control Act of 1944 (Pub. L. 78-534; 57 Stat. 887). The Pick-Sloan plan provided for construction of a series of dams on the Missouri River to control flooding, provide power generation, and to maintain a dependable water supply for irrigation, municipalities, industry, recreation, wildlife habitat, and navigation. Approximately 550,000 acres of land in North Dakota were inundated by reservoirs on the Missouri River under the Pick-Sloan plan.

One feature of the Pick-Sloan plan was the Missouri-Souris Unit, which was the forerunner of the Garrison Diversion Unit. Under the plan for the Missouri-Souris Unit, water was to be diverted below the Fort Peck Dam in Montana and transported by canal for irrigating 1,275,000 acres, supplying municipalities in North Dakota and South Dakota and Minnesota, restoring Devils Lake, conserving wildlife, and for augmenting the Red River.

After considerable study and review of the Missouri-Souris Unit, Congress reauthorized the project as the initial stage, Garrison Diversion Unit, in August 1965 (Pub. L. 89-108; 83 Stat. 852). The building of Garrison Dam changed the diversion point of the Missouri-Souris Unit from Fort Peck Dam to Garrison Reservoir (Lake Sakakawea). With the change in the diversion point and the selection of some different areas to be irrigated, the plan was renamed the Garrison Diversion Unit.

The first detailed investigations of the Garrison

Diversion Unit were completed in 1957 and involved a proposed development of 1,007,000 acres. The initial stage of the Garrison Diversion Unit, authorized in 1965, provided for irrigation service to 250,000 acres in North Dakota. This plan involved the construction of major supply works to transfer water from the Missouri River to the Souris River, James River, Sheyenne River, and Devils Lake Basin. The plan also anticipated water service to 14 cities, provided for several recreation areas, and provided for a 146,530-acre wildlife plan to mitigate wildlife habitat losses resulting from project construction and enhancement of other wetland and waterfowl production areas.

Under the 1965 authorization the Snake Creek Pumping Plant would lift Missouri River water from Lake Sakakawea behind Garrison Dam into Lake Audubon, an impoundment adjacent to Lake Sakakawea. From Lake Audubon the water would flow by gravity through the 73.6-mile McClusky Canal into Lonetree Reservoir, situated on the headwaters of the Sheyenne River. The Lonetree Reservoir would be created by construction of Lonetree Dam on the upper Sheyenne River, Wintering Dam on the headwaters of the Wintering River, and the James River dikes on the headwaters of the James River. Lonetree Reservoir is situated so that water can be diverted by gravity into the Souris, Red, and James River Basins and the Devils Lake Basin.

The Velva Canal would convey project water from the Lonetree Reservoir to irrigate two areas totaling approximately 116,000 acres. The New Rockford Canal would convey project water for irrigation of approximately 21,000 acres near New Rockford and to deliver water into the James River feeder canal for use in the Oakes-LaMoure area. The Warwick Canal, an extension of the New Rockford Canal, would provide water for irrigation in the Warwick-McVile area and provide water for the restoration of the Devils Lake chain.

The United States Bureau of Reclamation has overall responsibility for operation and maintenance of the Garrison Diversion Unit and will operate and maintain all project works during the initial period following completion of construction.

A number of concerns have halted construction on the project in recent years, including:

1. Legal suits brought by groups, such as the National Audubon Society, seeking to halt construction of the Garrison Diversion Unit claiming that the project violates the National Environmental Policy Act and to enforce a stipulation between the United States and Audubon to suspend construction until Congress reauthorizes the Garrison Diversion Unit.
2. Numerous problems concerning wildlife mitigation and enhancement lands.
3. Canadian concerns that the Garrison Diversion Project would allow transfer of foreign species of fish and other biota to the detriment of Canadian waters in violation of the Boundary Waters Treaty of 1909.

### **Canadian Concerns**

Canadian interest in the Garrison Diversion Unit has centered on concerns that because the Garrison Diversion Unit involves a transfer of water from the Missouri River to the drainage basins of the Souris and Red Rivers, the return flows entering Canada through the Souris and Red Rivers would cause problems with regard to water quality and quantity.

In 1973 the Canadian government requested a moratorium on all further construction of the Garrison Diversion Unit until a mutually acceptable solution for the protection of the Canadian interests, under the Boundary Waters Treaty of 1909, was achieved. The United States government responded by formally stating its recognition of its obligation under the Boundary Waters Treaty and adopting a policy that no construction affecting Canada would be undertaken until it was clear that this obligation would be met.

During 1974 several bi-national meetings of officials were held to discuss and clarify the Canadian concerns over potential degradation of water quality. An agreement was reached in 1975 between the governments of Canada and the United States to refer to the International Joint Commission the matter of potential pollution of boundary waters by the Garrison Diversion Unit.

The International Joint Commission created the International Garrison Diversion Study Board. The board concluded that the Garrison Diversion Unit would have adverse impacts on water uses in Canada including adverse effects on flooding and water quality. The board specifically recommended that any direct transfer by the Garrison Diversion Unit of fish, fish eggs, fish larvae, and fish parasites be eliminated by adopting a closed system concept and the installation and use of a fish screen structure.

In August 1984 a press line, approved by representatives of Canada and the United States, was issued announcing a general agreement between the two governments that Phase I of the initial stage of the Garrison Diversion Unit could be constructed. Canada, however, remained firmly opposed to the construction of any features that could affect waters flowing into Canada.

### **Garrison Diversion Unit Commission**

For the fiscal year 1985 the water and energy appropriations bill, signed by the President on July 16, 1984, contained an agreement negotiated by Senator Andrews and representatives of the National Audubon Society to establish a commission to review the Garrison Diversion Unit.

The Garrison Diversion Unit Commission was a 12-member panel appointed by the Secretary of the Interior to reexamine plans for the Garrison Diversion Unit in North Dakota. The commission was directed to examine, review, evaluate, and make recommendations regarding the existing water needs of North Dakota and to propose modifications to the Garrison Diversion Unit before December 31, 1984. Construction on the project was suspended from October 1 through December 31, 1984.

The commission worked under the restriction that any recommendation of the commission must be

approved by at least eight of the 12 members and that should the commission fail to make recommendations as required by law, the Secretary of the Interior was authorized to proceed with construction of the Garrison Diversion Unit as currently designed.

Congress directed the commission to consider 11 specific areas:

1. The costs and benefits to North Dakota as a result of the Pick-Sloan Missouri Basin program.
2. The possibility for North Dakota to use Missouri River water.
3. The need to construct additional facilities to use Missouri River water.
4. Municipal and industrial water needs and the possibility for development, including quality of water and related problems.
5. The possibility of recharging ground water systems for cities and industries, as well as for irrigation.
6. The current North Dakota water plan to see if parts of the plan should be recommended for federal funding.
7. Whether the Garrison Diversion Unit can be redesigned and reformulated.
8. The institutional and tax equity issues as they relate to the authorized project and alternative proposals.
9. The financial and economic impacts of the Garrison Diversion Unit, when compared with alternative proposals for irrigation and municipal and industrial water supply.
10. The environmental impacts of water development alternatives, compared with those of the Garrison Diversion Unit.
11. The international impacts of the water development alternatives, compared with those of the Garrison Diversion Unit.

The commission released its final report and recommendations on December 20, 1984. The commission affirmed the existence of a federal obligation to the state of North Dakota for its contribution to the Pick-Sloan Missouri Basin program but recommended that an alternative plan be implemented in place of the 250,000-acre initial stage of the Garrison Diversion Unit as authorized in 1965 and the original project authorization in 1944. The commission recommended that Lonetree Dam not be completed at this time and that the Sykeston Canal be constructed as the functional replacement. The commission specifically said, while the Lonetree Dam and Reservoir should remain an authorized feature of the plan, the construction should be deferred pending a determination by the Secretary of the Interior consisting of a demonstration of satisfactory conclusion of consultations with Canada and after appropriation of funds by Congress. The commission recommended that the Garrison Diversion Unit be configured to provide irrigation service to 130,940 acres in the Missouri River and James River Basins instead of the first stage 250,000-acre project. The commission also recommended that the first phase of the Glover Reservoir be included as a feature of the plan in lieu of Taayer Reservoir for regulation of flows in the James River.

The commission further recommended the

establishment of a municipal, rural, and industrial system for treatment and delivery of quality water to approximately 130 communities in North Dakota. A municipal and industrial water treatment plant with a capacity of 130 cubic feet per second was recommended to provide filtration and disinfection of water releases to the Sheyenne River for use in the Fargo and Grand Forks areas.

An alternate state plan for municipal water development was submitted to the Garrison Diversion Unit Commission by Governor Allen I. Olson and Governor-elect George Sinner, proposing that the state would design and construct the water systems and pay 25 percent of their costs. In return, the federal government would provide up to \$200 million for municipal water development projects, but the funds would be nonreimbursable. The federal government under the alternate state plan would pay 75 percent of the construction costs of the systems with only the operation and maintenance costs borne by the benefiting cities.

### Authorization Legislation

Following the issuance of the commission's report, work began on the language for a reformulation bill for the Garrison Diversion Unit. A bill was introduced by Representative Dorgan in early spring of 1985. After months of negotiations the hearings on the bill were postponed by Representative Dorgan, upon advice of Governor Sinner and the Conservancy District, because the National Audubon Society objected to language contained in the reauthorization bill. A \$41.3 million 1986 Garrison appropriation passed the House. The bill, however, contained a deadline of March 3, 1986, for passage of an authorization bill or no additional 1986 funds could be issued.

On September 3, 1985, the Garrison Diversion Overview Committee was apprised of the stalemate in negotiations by the Conservancy District, the Governor, and the Congressional Delegation. Senator Burdick suggested the following as the basic language for a simple reformulation bill for the project:

Garrison Diversion Unit, North Dakota: The committee has provided \$41,300,000 as requested by the President and directs the bureau to continue the design, construction, and operation of those features of the Garrison Diversion Unit that are common both to the existing authorization and the commission recommendations. This action is in accord with the direction of Congress as stated in Section 207, Public Law 98-360.

The overview committee recommended that the state continue negotiations for a period of 30 days with the wildlife groups to develop language for a Garrison Diversion Unit reformulation bill and, if no agreement was reached between the parties after that time period, a bill should be introduced in the United States Senate reformulating the Garrison Diversion Unit according to the language suggested by Senator Burdick.

On October 22, 1985, the overview committee met jointly with the executive committee and board members of the Garrison Diversion Conservancy District. Again the committee was advised that

negotiations with the Audubon Society on reformulation language remained stalemated. By letter Senators Andrews and Burdick provided the committee with the language of a bill they intended to introduce as follows:

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, that the Secretary of the Interior is authorized to implement the recommendations of the Garrison Diversion Unit Commission (established pursuant to Section 207, Public Law 98-360) in its final report dated December, 1984, provided, however, that the capital repayment assistance from power revenues shall be limited to the irrigation features of the project.

Subsequent to the meeting, Senators Burdick and Andrews introduced the bill, S.R. 1785, authorizing the commission plan. The hearing on this bill was later delayed.

Senator Burdick began working on proposed compromise legislation with House Water and Power Subcommittee Chairman George Miller in order to devise a bill that could pass the House of Representatives. The proposed legislation was initially opposed by the Governor, other state officials, and Conservancy District officials. At a January meeting of the overview committee, however, the Senate delegation told the committee members and state officials they felt failure to adopt compromise legislation would result in the end of the Garrison Diversion Project. In March 1986 the Garrison Diversion Conservancy District and in April the Garrison Diversion Conservancy District board of directors approved the proposed Burdick-Miller bill with amendments formulated by Representatives Dorgan and Miller. In April the bill passed the United States House of Representatives by a 254 to 154 margin and the Senate by unanimous consent.

On May 12, 1986, President Ronald Reagan signed the Garrison Diversion Unit Reformulation Act of 1986, H.R. 1116, into law. The final legislation was approved by representatives of the state of North Dakota, the Conservancy District, the National Audubon Society, and the National Wildlife Federation.

The legislation addresses the James River by dictating a comprehensive study of effects over the next two years during which time construction of certain features could not be undertaken. These features are the James River Feeder Canal, the Sykeston Canal, and any James River improvements. Of the 32,000-acre New Rockford Extension, included in the Garrison Diversion Unit Commission final report, 4,000 acres were transferred to the West Oakes area and 28,000 acres are authorized for development within the Missouri River Basin.

The legislation also contains provisions for:

1. 130,940 acres of irrigation.
2. Deauthorization of the 1944 Flood Control Act and the 1965 Garrison Authorization.
3. Preservation of North Dakota's water rights claims to the Missouri River.
4. Nonreimbursement of features constructed prior to enactment which will no longer be employed to full capacity, to the extent of the unused

capacity.

5. Acre-for-acre mitigation based on ecological equivalency rather than the 1982 mitigation plan.
6. Deauthorization of the Taayer Reservoir and purchase of the Kraft Slough for waterfowl habitat.
7. Continued authorization, but no constructing of the Lonetree Reservoir. Sykeston Canal is mandated for construction following required engineering, operational, biological, and economic studies.
8. Irrigation acreage other than on the Indian reservations or the 5,000-acre Oakes Test Area cannot be constructed until after September 30, 1990.
9. A \$200 million grant for construction of municipal and industrial water delivery systems. A \$40.5 million nonreimbursable water treatment facility to deliver 100 cubic feet per second to Fargo and Grand Forks is authorized. All water entering the Hudson Bay drainage must be treated and must comply with Boundary Waters Treaty of 1909.
10. Municipal and industrial systems for the Fort Berthold, Fort Totten, and Standing Rock Reservations.
11. Substitution of the Sykeston Canal for Lonetree but Lonetree could be built if:
  - a. The Secretary of the Interior determines a need for the dam and reservoir.
  - b. Consultations with Canada are satisfactorily completed.
  - c. The Secretaries of State and the Interior certify determinations to Congress and 90 days have elapsed.
12. Irrigation soil surveys that must include investigations for toxic or hazardous elements.
13. Federal participation in a Wetlands Trust to preserve, enhance, restore, and manage wetland habitat in North Dakota.

### Project Update

On November 12, 1986, the overview committee received updates about the project from representatives for the Conservancy District, the Bureau of Reclamation, and North Dakota Water Users Association. Conservancy District representatives informed the committee they thought they had all the authority needed under present law to handle the \$200 million grant from the federal government for construction of municipal and industrial water delivery systems. Minor changes to the statutes might be needed once construction actually begins. A joint powers agreement had been developed between the Conservancy District and the State Water Commission to divide the authority for dealing with the state's water needs. Proposals were being considered for expending federal appropriations in the next two years for the Southwest Pipeline Project and then later using the moneys in the resources trust fund to help fund the state's portion for the municipal and industrial water delivery systems. The Conservancy District supports the grant money being used to provide wholesale not retail

distribution of water. A major long-term biota study was recently undertaken.

The representative for the bureau told the committee construction continues on the New Rockford Canal and the Oakes Test Area. The bureau was presently expending much time and attention on completing the James River study. A final supplemental environmental statement based on the reformulation bill should be complete in 1987. Under the new plan an additional 38,000 mitigation acres would be needed.

### Legal Issues

Legal counsel for the Garrison Diversion Conservancy District informed the committee throughout the interim on the progress of the litigation surrounding the project. Following is a discussion provided by that counsel of the lawsuits and their status through November 12, 1986.

1. 101 Ranch v. United States, No. A2-81-89, U.S. District Court for the District of North Dakota (Judge Benson and U.S. Magistrate Klein).

#### a. **Purpose of Garrison Diversion Conservancy District involvement in this litigation:**

This is a quiet title action concerning about 11,000 acres of lakebed in West Bay of Devils Lake. The land was conveyed by the Garrison Diversion Conservancy District to the United States in 1971 as a nonfederal cost-sharing payment for the Garrison Diversion Unit. The plaintiffs (101 Ranch and others) also claim the land. The state and the Garrison Diversion Conservancy District have intervened as defendants to assert claims of state ownership over the lakebed and to protect the monetary credits received as a result of the conveyance.

#### b. **Status of this case:**

- (1) The court has declared that Devils Lake was navigable at statehood and that the state owns the lakebed.
- (2) The court has ruled that the meander line was the ordinary high watermark at statehood.
- (3) The court has denied a motion by the Devils Lake Sioux Tribe to intervene in the case (the court's order is dated September 30, 1985).
- (4) The U.S. Magistrate has been designated as a special master to hold evidentiary hearings on factual issues, make findings of factual conclusions of law, and file a report with the court.
- (5) After reviewing the pleadings, briefs, and orders of the federal court, Attorney General Spaeth decided that the state and the Garrison Diversion Conservancy District should continue to assert title to the lakebed unless (a) a person or governmental entity has acquired an interest in the lakebed as a result of quiet title action against, or conveyances from, the state of North Dakota; (b) a person or governmental entity has constructed substantial improvements on lakebed land; and (c) a state agency or a political

subdivision is currently using a tract for a public purpose. Attorney General Spaeth consulted with the board in January 1986 and the board concurred with the Attorney General.

- (6) The state and the Garrison Diversion Conservancy District filed an amended complaint (the amendment recognized the claims to West Bay lakebed acquired through quiet title actions involving the state of North Dakota).
  - (7) The board considered a settlement offer on October 3. The proposal generally involved the conveyance of West Bay lakebed to the Garrison Diversion Conservancy District in exchange for \$660,000. The board did not accept the offer.
  - (8) The court has denied a state and the Garrison Diversion Conservancy District motion requesting consolidation of the 101 Ranch and Devils Lake Sioux Tribe cases.
  - (9) The Attorney General has not approved a request by the board to settle with landowners in West Bay and Creel Bay who are claiming by adverse possession.
  - (10) The parties attended a pretrial conference on October 30, 1986. The court will begin the trial on February 2, 1987.
2. In the Matter of the Ownership of the Bed of Devils Lake, Civil No. 12121, N.D. District Court (Ramsey County).
- a. **Purpose of the Garrison Diversion Conservancy District involvement in this litigation:**  
This quiet title case is a class action concerning ownership of the bed of Devils Lake below the meander line. The state and the Garrison Diversion Conservancy District have intervened to assert claims of state ownership over the lakebed and to protect the monetary credits received in 1971 when a portion of the lakebed was conveyed to the United States.
- b. **Status of this case:**
- (1) A quiet title action was initiated in 1978 concerning a tract of land on the east shore of Creel Bay, Devils Lake. The trial court decision was appealed to the North Dakota Supreme Court in October 1982. The Supreme Court (in Park District of the City of Devils Lake v. Garcia, 334 N.W.2d 824 (N.D. 1983)) later remanded the entire case to the North Dakota District Court for further proceedings.
  - (2) A second quiet title action was initiated in July 1982 concerning a tract of land on the west shore of Creel Bay, Devils Lake. The case was captioned Cox v. Kurtz, Civil No. 11844.
  - (3) Both quiet title actions involved land between the meander line around Devils Lake and the water's edge.
  - (4) The state of North Dakota and the board of directors, Garrison Diversion Conservancy District, intervened in both quiet title actions. The state claimed that it acquired ownership of the lakebed below the meander line at statehood and that it continues to own the lakebed. The Garrison Diversion Conservancy District claimed that it had a statutory responsibility to manage the state-owned lakebed.
  - (5) The state of North Dakota and the Garrison Diversion Conservancy District also initiated a quiet title action against Burlington Northern, Inc., on July 12, 1983, to determine the ownership of abandoned railroad right-of-way below the meander line around Devils Lake. The case was captioned State of North Dakota v. Burlington Northern, Inc., Civil No. 11995.
  - (6) A fourth quiet title action was initiated in June 1981 against the United States concerning the Benson County portion of the lakebed; i.e., about 11,000 acres of lakebed between Minnewaukan and Ziebach Pass. The state of North Dakota and the Garrison Diversion Conservancy District also intervened in this action. The caption of this case, filed in United States District Court, is 101 Ranch v. United States, Civil No. A2-81-89.
  - (7) The Park Board of the City of Devils Lake v. Garcia and the Cox v. Kurtz cases were consolidated into a single case in June 1983.
  - (8) The court notified all parties in the consolidated case in December 1983 that the court might join "all persons whose interests in real property lying between the meander line and shoreline of Devils Lake may be effected" by a motion then pending before the court. After a pretrial conference on the subject, the court filed an order (dated April 11, 1984) certifying the consolidated case as a class action.
  - (9) The court ordered the following persons to be members of the class established for the litigation to determine the ownership of the bed of Devils Lake: all landowners above, but adjacent to, the meander line around Devils Lake and all landowners who claim an interest in the lakebed below the meander line constitute the members of the class, except for the following: (a) the United States of America; (b) the Devils Lake Sioux Tribe; (c) the plaintiffs in 101 Ranch v. United States, Civil No. A2-81-89 (D.N.D.); (d) the state of North Dakota; and (e) the Garrison Diversion Conservancy District.
  - (10) The class action should (except for any claims of the United States, the Devils Lake Sioux Tribe, and the plaintiffs in 101 Ranch v. United States) quiet title to the lakebed of Devils Lake below the continuous meander line around the lake.
  - (11) The consolidated class action has been

named In the Matter of the Ownership of the Bed of Devils Lake.

- (12) The trial court has ruled that the state of North Dakota acquired the bed of Devils Lake as an incident of statehood. However, the trial court declined to rule, in the summary judgment proceedings, that the meander line is the ordinary high watermark. That issue, along with other issues, will be the subject of a trial.
- (13) The trial court has denied a motion by the Devils Lake Sioux Tribe to dismiss the case.
- (14) The state and the Garrison Diversion Conservancy District have retained several expert witnesses, all from North Dakota, to address the key issues: geology, hydrology, archeology, soils, vegetation, and history (e.g., navigation of the lake). The reports which have been prepared by the expert witnesses have been served on the other parties.
- (15) In February 1986, a settlement proposal was sent to the attorneys for all adverse parties. The proposed settlement stated that the state and the Garrison Diversion Conservancy District would recognize the final judgment in certain quiet title actions if the adverse party would not claim any interest, including riparian rights, in lakebed below the meander line (other than the specific tract involved in

the quiet title action). Adverse parties claiming lakebed with final quiet title judgments have settled under those terms.

- (16) The scheduled trial dates are November 17-21, 1986, in Devils Lake.

3. Devils Lake Sioux Tribe v. State of North Dakota, No. A2-86-87, U.S. District Court for the District of North Dakota.

a. **Purpose of the Garrison Diversion Conservancy District involvement in this litigation:**

The Devils Lake Sioux Tribe has sued the state of North Dakota because of the claims of ownership and management by the state and the Garrison Diversion Conservancy District. The tribe now claims that the United States owns the lakebed in trust for the tribe.

b. **Status of this case:**

- (1) The state and the Garrison Diversion Conservancy District were served with a complaint on June 23, 1986; an answer has been filed.
- (2) The United States filed a motion to dismiss on October 15, 1986. The United States contends that the tribe should have filed its lawsuit within 12 years after the July 7, 1971, quit claim deed from the Garrison Diversion Conservancy District to the United States. The court has not acted on the motion.

# GOVERNMENT ADMINISTRATION COMMITTEE

The Government Administration Committee was assigned two studies. House Concurrent Resolution No. 3085 directed a study of the office of Central Data Processing and other state computer systems, to determine the feasibility of maximizing usage and accessibility of state-owned computers for all state agencies and institutions. House Concurrent Resolution No. 3064 directed a study of the feasibility of establishing a statewide enhanced nine-one-one (911) emergency telecommunications system. The Legislative Council also designated the committee as the entity to receive reports from the Department of Labor, Workmen's Compensation Bureau, and Job Service North Dakota on the progress in implementing recommendations made by 1985 Senate Concurrent Resolution No. 4006.

Committee members were Senators Pete Naaden (Chairman) and Floyd Stromme; and Representatives Wesley R. Belter, June Y. Enget, Moine R. Gates, Jayson Graba, Arvid E. Hedstrom, Harley R. Kingsbury, Rod Larson, Bill Oban, Oscar Solberg, Kenneth N. Thompson, and Michael Unhjem.

The report of the committee was submitted to the Legislative Council at the biennial meeting of the Council in November 1986. The report was adopted for submission to the 50th Legislative Assembly.

## STATE COMPUTER SYSTEMS STUDY

### Background

The office of Central Data Processing was established in 1969 in the Office of Management and Budget. The staff of the office of Central Data Processing consists of 122 employees headed by a director who is in charge of the supervision and regulation of electronic data processing activities of the executive branch state agencies, institutions, departments, and boards. The office of Central Data Processing also provides data processing services to the legislative and judicial branches of state government. Over 55 state agencies and departments use the office's IBM 3090-200 or 4381-3 mainframe computers. The office's 1985-87 appropriation was \$23,439,211.

Prior to beginning the study, committee members attended an informal program presented by the International Business Machine Corporation on computer concepts, personal computers, and information systems in state government.

### Booz Allen and Hamilton Study

The committee contracted with Booz Allen and Hamilton of Bethesda, Maryland, to conduct a study of North Dakota's data processing services and to update the firm's 1980 data processing study. Except for Job Service North Dakota, the Adjutant General, and the institutions under the control of the State Board of Higher Education, all state agencies and institutions were included in the study. Booz Allen and Hamilton began its study in September 1985.

### Study Focus

The Booz Allen and Hamilton study focused on ways to maximize the economical and efficient use and accessibility of state-owned computers for all state agencies and institutions. The study also updated Booz Allen and Hamilton's March 17, 1980, study of North Dakota state data processing services to determine which of the 1980 recommendations had been implemented, and if not implemented, which recommendations are still relevant.

To obtain the required information, the study team surveyed 71 agencies; conducted 17 followup interviews in agencies that use the services of the office of Central Data Processing; and observed the facilities of the office of Central Data Processing.

### Study Findings

The Booz Allen and Hamilton study revealed that of those state agencies surveyed:

1. One-half use services of the office of Central Data Processing.
2. Over three-fourths have their own personal computers, word processors, terminals, or printers.
3. Over 300 different software packages have been procured by the agencies from 40 vendors.
4. Over 250 personal computers have been provided to those agencies by 13 vendors.
5. Over 1,000 word processing systems, cathode ray tube display units, and printers have been provided to the agencies by more than 36 vendors.

The study further revealed that:

1. Approximately 1,000 state employees are currently involved in data and word processing.
2. Twenty-six of the agencies surveyed are planning significant changes to their current data processing systems.
3. Eighteen agencies are planning new systems.
4. Many state agencies lack the technical knowledge and skill to use their personal computers effectively.
5. A significant compatibility issue will arise if state agencies continue to acquire such a wide array of personal computers and associated software.
6. The absence of a Central Data Processing disaster recovery plan exposes the state to major risks especially as dependency on computer-based systems grows.

### Study Recommendations

Booz Allen and Hamilton made six recommendations that were supported by the committee. Following each recommendation is an explanation of action taken by the agencies involved in light of the recommendation.

1. Establish a more realistic threshold for central purchasing of software which recognizes both direct and indirect costs.

Agency Action: The Purchasing Division of the Office of Management and Budget adopted a

policy that all state agencies must submit a requisition to the Purchasing Division prior to purchasing computer software, regardless of cost. The office of Central Data Processing has provided the Purchasing Division with a list of supported software products. Requests for products not on the list are forwarded to the office of Central Data Processing for review of application needs, cost, compatibility, and training requirements.

2. Increase the technical assistance by the office of Central Data Processing to agencies on personal computers and require reasonable knowledge before permitting hardware and software to be procured.

Agency Action: The office of Central Data Processing expanded training for state agencies in an effort to help them obtain reasonable knowledge prior to procuring computer hardware and software. The office of Central Data Processing also offers analyst design services to provide guidance to state agencies and to help them to develop personal computer expertise.

3. Consolidate statewide planning for computers and communications.

Agency Action: In April 1986, by executive order, the Telecommunications Office of the Director of Institutions' office was administratively transferred to the Office of Management and Budget.

4. Encourage the State Auditor's office to accelerate plans to audit use of personal computers by state agencies.

Agency Action: Prior to the recommendation, the State Auditor had no plans to audit the use of personal computers by state agencies. The State Auditor, however, is beginning to apply data processing application auditing procedures where an agency's financial records are computer generated.

5. Prepare a disaster recovery plan.

Agency Action: In February 1986 the position of contingency planner in the office of Central Data Processing was filled. The office of Central Data Processing has developed an implementation schedule and expects to have a complete disaster recovery plan by February 1988.

6. For broad and objective expertise the Legislative Council should continue to use consultant services whenever major data processing procurements or changes are planned.

Booz Allen and Hamilton also suggested that as technology continues to evolve, state-owned combined laser/computer output microfilm printers may provide a more cost-effective way for the state to print the forms required by the state agencies.

Booz Allen and Hamilton made two recommendations not supported by the committee. One recommendation was to enact data privacy legislation. An interpretation could be made that North Dakota statutes do not address the issue of personal rights regarding computer data maintained by state agencies and political subdivisions. "Personal

rights" are the rights an individual has over the collection, maintenance, and dissemination of information that identifies or has the potential of identifying the individual. The second recommendation was to reestablish the advisory committee to the office of Central Data Processing to address relevant policy issues, review major new state agency systems development plans, and review major hardware and software procurements by the office of Central Data Processing.

The committee did not support the recommendation for the enactment of data privacy legislation because the office of Central Data Processing authorizes state agencies to exchange computer information if the directors of the agencies agree to the exchange in writing and if the exchange is not in conflict with any of the over 45 North Dakota Century Code provisions restricting record data. The committee also was cognizant of the state's open records law and the fact that 1981 Senate Bill No. 2050, a data privacy bill recommended by the Legislative Council, failed to pass the Senate.

The committee did not support the recommendation for reestablishment of an advisory committee to the office of Central Data Processing because the benefits over the current practice of personnel of the office of Central Data Processing working directly with agencies were not evident. In its 1980 study Booz Allen and Hamilton first recommended the establishment of an advisory committee. The advisory committee was established for a brief period after the 1980 study; however, the committee was discontinued due to a lack of attendance by agency supervisors.

#### **Library Automation for North Dakota**

A representative of the North Dakota State Library gave a presentation on the Library Automation for North Dakota study. The Library Automation for North Dakota study seeks to establish an automated library exchange for libraries throughout the state. The Library Automation for North Dakota study had originally planned to present this project to the Legislative Assembly during the 1987 session; however, the target date has been delayed until the 1989 session because of budget considerations.

#### **Data Processing Service Requests**

The committee requested the Legislative Council staff to prepare an analysis of requests for data processing services for presentation to the Committees on Appropriations during the legislative session.

#### **Computer Fraud**

The committee reviewed North Dakota's computer fraud law, contained in North Dakota Century Code Sections 12.1-06.1-01 and 12.1-06.1-08. The definitions in Section 12.1-06.1-01 were found to be inadequate because of advances in technology and changes in use of computer systems. In addition, the crime of computer fraud, contained in Section 12.1-06.1-08, does not prohibit attempted computer fraud or activities by "hackers."

## Recommendations

The committee recommends House Bill No. 1038 to expand the definitions relating to the crime of computer fraud, to expand the crime of computer fraud, and to add a new offense of "computer crime." The bill redefines "computer" to include the functions of work, storage, and communication; redefines "computer network" to include terminal interconnection through the use of microwave, fiber optics, light beams, or other electronic or optic data communication; redefines "financial instrument" to include credit cards, debit cards, electronic fund transfer cards, or other means of accessing an account for the purpose of initiating electronic fund transfers; redefines "property" to include stored data, supporting documentation, and any other tangible or intangible items of value; and redefines "services" to include any use of a computer, computer system, or computer network to perform useful work. The bill also expands the crime of computer fraud to include those individuals attempting to gain access, as well as modifying, copying, disclosing, taking possession of, or preventing the authorized use of a computer, computer system, or a computer network. The bill also creates an offense of computer crime, which is substantively the same as computer fraud except that there need be no intent to defraud or deceive. It is intended that this provision would subject computer hackers to a criminal penalty.

Although not making a recommendation on the transfer of state telecommunications from the Director of Institutions to the Office of Management and Budget, the committee, by motion, indicated that it supports legislation to accomplish this transfer.

## EMERGENCY TELECOMMUNICATION SYSTEM STUDY

### Background

The 1985 Legislative Assembly enacted North Dakota Century Code Chapter 57-40.6, which authorizes counties or cities to impose an excise tax on telephone access lines for funding emergency services communications systems; however, the electors of the county or city must approve the tax, and the tax cannot exceed 50 cents per month per telephone access line. Cities in North Dakota that provide basic 911 service are Minot, Grand Forks, and Mandan; also, in November 1984 voters in the city of Fargo approved a special 1985 real estate tax levy to pay for installing an enhanced 911 system. The major difference between a basic 911 system and an enhanced 911 system is that an enhanced 911 system allows for automatic number and location identification.

The only statewide system in North Dakota is a toll-free telephone number established in 1967 for persons to call for law enforcement, fire, medical, highway, and domestic emergency assistance. This number is 1-800-472-2121 and is answered by trained personnel at North Dakota State Radio Communications. The personnel at State Radio Communications determine the nature of the call and dispatch the appropriate emergency services. North Dakota is reportedly the only state that has one agency (State Radio Communications) from which every public safety resource in the state can be dispatched.

## Statewide 911 System

There are an estimated 700 to 800 telephone exchanges in North Dakota. As an aid in determining the feasibility of developing a statewide enhanced 911 system, the committee heard testimony from representatives of rural and commercial telephone companies, State Radio Communications, the Division of Emergency Management, and from the Director of Institutions' office.

The advantages of developing a statewide enhanced 911 system are:

1. The three-digit "911" telephone number has been designated for nationwide public use in reporting an emergency and requesting emergency assistance.
2. Developments in telecommunication have made it possible to quicken response time to emergency calls for law enforcement, fire, medical, rescue, and other emergency services.
3. The enhanced 911 system provides selective routing of calls, which makes it possible for calls to be routed directly to local emergency dispatchers. Therefore, multiple county jurisdiction should not be a problem. At least 78 of the exchanges in the state are in multiple county jurisdictions.
4. The enhanced 911 system has automatic number and location identification features, which provide the emergency dispatcher with the number of the telephone being used to make the call and its location. Automatic number and location identification eliminates the need for a call to be held and traced, which is necessary in cases when a caller is unable to speak for some reason.
5. An enhanced 911 system in rural areas gives the dispatcher the exact location of the emergency.
6. A statewide system would eliminate the problems caused by local areas of 911 use so that a person traveling from one area in the state to another will not be in a situation of trying to use the 911 number in an area not having a 911 system.
7. A statewide system would result in a uniform location coding system.

The disadvantages of developing a statewide enhanced 911 system are:

1. Each exchange with mechanical step-by-step switches would need to be upgraded to provide enhanced 911 service at a cost of \$20,000-\$100,000 each.
2. Some rural exchanges have as few as 80 people on an exchange, which would mean an enhanced 911 system could be very expensive if upgrading is necessary.
3. Many people are not convinced of the value of an enhanced 911 system in the rural areas because the fire department, police, or ambulance may still have to travel a long distance to reach that rural area.

## Recommendation

The committee recommends Senate Bill No. 2045 to establish a nine-member emergency services communication system advisory committee for 911 telephone systems. The advisory committee would be

appointed by the Governor. The members would represent rural telephone companies, commercial telephone companies, the North Dakota League of Cities, the Association of Counties, Director of Institutions, the North Dakota Peace Officers Association, the Fire Chiefs Association, the Department of Human Services, and the State Radio Communications' office. The state communication system office would provide staff services and travel expense reimbursement for committee members. The advisory committee, with the assistance of the state communication system office, is to establish standards and guidelines for the development and operation of emergency 911 telephone system to provide uniformity and compatibility of emergency 911 systems in the state. However, the standards must require that systems installed after July 1, 1987, identify the emergency caller's location. The advisory committee is to submit a biennial report to the Governor and the Legislative Assembly. The bill makes the collection of the excise tax on telephone access lines as imposed by Section 57-40.6-02 contingent upon compliance with the standards and guidelines established by the advisory committee. The county or city may not use the proceeds of the tax imposed under that section for any purpose other than establishing or operating the emergency services communication system in accordance with the standards and guidelines established by the emergency service communication advisory committee. The provisions of the bill would expire as of July 1, 1991.

## **PROGRESS REPORTS ON COORDINATED LABOR AND EMPLOYMENT SERVICES**

### **Background**

Senate Concurrent Resolution No. 4006 directed the Commissioner of Labor, the North Dakota Workmen's Compensation Bureau, and Job Service North Dakota to coordinate their efforts in providing labor and employment services.

The agencies were to make a coordinated and cost-efficient effort to combine their efforts in providing labor and employment services, with special emphasis given to combining reporting forms and resolving variations in statutory reporting requirements; combining payroll auditing functions; sharing office space; and combining administrative and data processing services.

### **Progress Reports**

The progress reports required by Senate Concurrent Resolution No. 4006 were received by the committee. The reports revealed the following areas of cooperation:

1. The Workmen's Compensation Bureau and Job Service North Dakota are sharing information on new employers moving into the state in an effort to make sure every new employer is reached.
2. The Commissioner of Labor now notifies the Workmen's Compensation Bureau whenever a new company begins operating in the state.
3. The Commissioner of Labor is now using the district offices of Job Service North Dakota to conduct field hearings, whenever possible.

4. Job Service North Dakota and the Workmen's Compensation Bureau began a pilot operation on July 1, 1986, in which a representative of the Workmen's Compensation Bureau is housed at the Fargo Job Service office.

Other potential areas of coordination that the agencies' considered are:

1. The automated data processing systems used by the Workmen's Compensation Bureau and Job Service North Dakota are incompatible, and therefore it is not economically feasible for the two agencies to use the same computer system.
2. The agencies believe combined audits are not currently viable because the audits would not result in a savings of man-hours due to the fact that the laws governing the agencies impose differing requirements and each agency conducts audits for different purposes and uses different audit criteria.
3. The agencies believe a joint employer report would be confusing and cumbersome for the employers to complete due to the fact that the laws governing the agencies impose differing requirements.

The laws governing the agencies differ in the following aspects:

1. Under the unemployment compensation law a child under age 18 in the employ of the mother or father is exempt, while under the workmen's compensation law all unmarried family members living at home are exempt.
2. Under the unemployment compensation law wages of corporate officers performing services are taxable and sole proprietors and partners are exempt, while under the workmen's compensation law coverage is optional for corporate officers and self-employed persons.
3. Under the unemployment compensation law agricultural coverage is mandatory if 10 or more workers are employed in 20 different weeks or if there is a quarterly payroll of \$20,000 and others can elect coverage, while under the workmen's compensation law agricultural coverage is optional.
4. Under the unemployment compensation law employers report wages quarterly, while under the workmen's compensation law employees have variable reporting years.
5. Under the unemployment compensation law the wage base is 70 percent of the average annual wage (\$10,800 for 1986), while under the workmen's compensation law the wage base is \$3,600.
6. Under the unemployment compensation law domestic wages are covered if wages of \$1,000 or more are paid in any calendar quarter, while under the workmen's compensation law domestic wages are exempt but coverage may be elected.
7. Under the unemployment compensation law volunteer workers are exempt, while under the workmen's compensation law volunteer workers can elect to have coverage.
8. Under the unemployment compensation law employers of multistate workers may request all states to agree to permit wages to be reported to

only one state, while under the workmen's compensation law there is an opportunity for voluntary coverage, which may cover employees working out of state for North Dakota employers.

Although the agency representatives had not prepared legislation at the time of the committee's final meeting, they stated that they will continue to meet to attempt to develop legislation for introduction during the next legislative session regarding joint employer wage reports and combined audits. They also indicated that they will continue to cooperate through increased communication.

### **Conclusion**

The committee makes no recommendation as the result of receiving the progress reports. However, the Commissioner of Labor, the Workmen's Compensation Bureau, and Job Service North Dakota are encouraged to continue to work together through increased coordination whenever possible. The agencies are also encouraged to introduce legislation that would provide for joint employer wage reports and combined audits.

# INDIAN JURISDICTION COMMITTEE

The Indian Jurisdiction Committee was assigned two studies. Senate Concurrent Resolution No. 4051 directed a study of issues of concern to the state and persons living within the boundaries of the Fort Berthold Reservation including the feasibility of state legislation under the authority of federal law to resolve jurisdictional issues regarding tribal and state governments, state and tribal law and practice regarding the recognition of state and tribal court judgments, the operation and administration of state tax laws on the Fort Berthold Reservation, and the impact on taxing districts of the presence of tax-exempt lands owned by the tribal government and members within the Fort Berthold Reservation and methods to replace funds lost to political subdivisions by the exemption of those lands. Senate Concurrent Resolution No. 4075 directed a study of the issue of state courts' jurisdiction over civil cases arising within the exterior boundaries of Indian reservations.

Committee members were Senators Stanley Wright (Chairman), Phillip Berube, Rick Maixner, and Art Todd; Representatives Charles C. Anderson, June Y. Enget, Julie A. Hill, Tom Kuchera, Donna Nalewaja, Elmer Retzer, Cathy Rydell, Mary Kay Sauter, and Wade Williams; and Citizen Members Diane Johnson, Cheryl Kulas, Claryca Mandan, Dale Peterson, Art Raymond, and Gene Sloan. Representative Pat Conny was a member of the committee until resigning his House seat in December 1985.

The report of the committee was submitted to the Legislative Council at the biennial meeting of the Council in November 1986. The report was adopted for submission to the 50th Legislative Assembly.

## FORT BERTHOLD RESERVATION STUDY

### Background

The tribal-state relationship has historically included many areas of cooperation and holds the potential for increased cooperation and coordination. However, in spite of progress in these areas, recent developments including court decisions, fiscal constraints on state and tribal governments, and an increased need for governmental services have led to a renewed focus on the state and tribal relationship and problems of Indian jurisdiction. The allocation of jurisdiction (the power or authority of a government to govern) among state, tribal, and federal governments forms the basis for conflict as each government seeks to exercise its sovereign powers.

### Federal Indian Policies

A historical perspective of policies established by the Congress of the United States toward Indians is of central importance to understanding the relationship between the federal, tribal, and state governments. Federal Indian policy is marked by idealistic periods such as the first years of the Republic, when Congress pledged that "the utmost good faith shall always be observed toward the Indian," and the 1930s, when a commitment was made to revive tribal governments. Other eras were less altruistic—the period of removal, when hundreds of tribes were evicted from their ancestral lands; the

allotment era, which resulted in the loss of millions of acres of tribal land; and the termination period, when many tribes were divested of the federal-tribal relationship.

The United States recognized Indian tribes as political entities and made treaties with them, both during the period of the Articles of Confederation and under the Constitution of the United States. Under the Articles of Confederation, Indian affairs were left to individual states. The framers of the constitution judged this to be unworkable; Section 8 of Article I of the Constitution of the United States changed this responsibility by providing that "Congress shall regulate commerce . . . with the Indian tribes." The federal government also could rely on other enumerated powers in its relationship with Indian tribes—the treaty power; the war power; and the power to create new territories and to admit new states to the Union. Taken altogether, these constitutional provisions grant Congress plenary legislative power on the subject of Indian affairs, a power which preempts that of the states.

An early federal policy of geographically separating Indians from non-Indians did not last as non-Indians moved west across the continent and encroached on Indian lands. In scores of treaties negotiated during the mid-19th century, government policy separated Indians within the overall non-Indian society by setting aside reservations for the Indians. Under these treaties Indian tribes gave up much of their land in exchange for smaller areas that were to be held in trust by the federal government for the sole benefit and use of the tribes. In exchange, the federal government promised to help tribal members overcome the problems that accompanied the loss of land, lifestyle, and culture resulting from placement on reservations. It was during this period that the concept began to develop that the tribes were wards of the federal government. The substantial change in character of the Indian nations up until this time led Congress to abolish the treaty-making process in 1871, replacing it with legislative agreements.

During the latter half of the 19th century federal policy changed and the United States embarked on an effort to assimilate Indians into non-Indian society, and to open remaining Indian lands for non-Indian settlement. The policy culminated in the General Allotment Act of 1887. As a result of the allotment policy, much of the tribal land was allotted in severalty to individual members; the land not allotted to individual Indians was declared surplus to tribal needs and opened for homesteading by non-Indians. As a result of this and later sales of allotments by the Indian owners, many reservations developed checkerboard land ownership patterns.

The Indian Reorganization Act of 1934 marked a change in federal Indian policy from direct assimilation by allotment to voluntary assimilation through the encouragement of tribal self-government and tribal economic development. However, by 1948 the pendulum had swung again in the direction of weakening tribal authority. The Indian self-government policies of the 1930s were swept away in

the drive to terminate the federal recognition of and relationships with Indian tribes, supposedly to leave them and their problems solely in the hands of the states in which they were located. It was recommended that the states be made responsible for Indian social services, that tribal property be transferred to Indian-owned corporations, and that the tax-exempt status of Indian lands be ended. In 1953 Congress passed a policy statement expressing intent to terminate all special relationships between the tribes and the federal government. Also during that year, the Civil and Criminal Jurisdiction on Reservations Act, commonly known as Public Law 280, was enacted. This law delegated to California, Minnesota, Nebraska, Oregon, Wisconsin, and later Alaska jurisdiction over most crimes and many civil matters throughout most of the Indian reservations within their borders. The Act also offered other states the option of accepting the same jurisdiction without obtaining tribal consent.

The modern era of tribal self-determination, which began around 1960, is premised on the notion that Indian tribes are the basic governmental units of Indian policy. Among significant developments of the era include the Indian Civil Rights Act of 1968, which extended many of the guarantees of the Bill of Rights and other constitutional rights to Indians under tribal governments. It also repealed the section of Public Law 280 that permitted states to assume legal jurisdiction over Indian land without tribal consent and provided for rights of withdrawal of such jurisdiction for tribes. After 1968 states were permitted to extend jurisdiction over Indian lands only with the consent of affected tribes. Throughout the 1960s and 1970s the federal government greatly increased the participation of tribal governments in efforts to solve reservation problems and increasingly used them as the local delivery system for federally supported services.

### **Fort Berthold Reservation**

The Fort Berthold Reservation, home of the Three Affiliated Tribes (Mandan, Arikara, and Hidatsa) is located near the center of the western half of North Dakota. The reservation is divided into five separate segments by Lake Sakakawea and lies in five different counties—Mountrail, McKenzie, Dunn, Mercer, and McLean. Cities on the reservation include New Town and Parshall.

The boundaries of the Fort Berthold Reservation were established by the Act of March 3, 1891, 26 Stat. 1032. Toward the end of the 19th century, however, Congress increasingly adhered to the view that the Indian tribes should abandon their nomadic lives on the reservations and settle into an agrarian economy on privately owned parcels of land. This shift was fueled in part by the belief that individualized farming would speed the Indians' assimilation into American society and in part by the continuing demand for new land for the many homesteaders moving west. As a result of these pressures Congress passed a series of surplus lands Acts at the turn of the century to place Indians onto individual allotments carved out of reservations and to open up unallotted lands for non-Indian settlement. One such

Act, the Act of June 1, 1910, 36 Stat. 455, opened certain lands of the Fort Berthold Reservation for homesteading. The Act authorized and directed the Secretary of the Interior to survey all of the unsurveyed part of the reservation and "to sell and dispose of, as hereinafter provided, all the surplus unallotted and unreserved lands within that portion of said reservation lying and being east and north of the Missouri River."

The interpretation of surplus lands Acts has been a source of jurisdictional disputes between state and federal officials as to which sovereign has authority over lands that were opened by the Acts and have since passed out of Indian ownership. Decisions of the United States Supreme Court and other courts conclude, however, that once a block of land is set aside for an Indian reservation, then no matter what happens to the title of the individual plats within the area, the entire block, including lands held in fee by non-Indians, retains its reservation status until Congress explicitly indicates otherwise. Such is the conclusion reached by the United States Supreme Court in *Solem v. Bartlett*, 465 U.S. 463 (1984), and other decisions that construed surplus lands Acts for determining whether such Acts either diminished reservations or simply offered non-Indians the opportunity to purchase land within established reservation boundaries.

In 1972 the United States Court of Appeals for the Eighth Circuit held in *The City of New Town, North Dakota v. United States*, 454 F.2d 121 (1972), that the boundaries of the Fort Berthold Reservation are those boundaries specified in the Act of March 3, 1891, and that the surplus lands Act of 1910 and subsequent Acts did not alter those boundaries. Most of the land that was settled by non-Indian homesteaders as a result of the surplus lands Act of 1910 had not been treated as belonging on the reservation prior to the Court of Appeals' decision. That portion of the Fort Berthold Reservation settled by non-Indian homesteaders is commonly referred to as the "northeast quadrant."

In March 1985 the qualified electors of the Three Affiliated Tribes voted to amend their tribal constitution as approved by the Secretary of the Interior to include language to extend the jurisdiction of the Three Affiliated Tribes "to all persons and all lands, including lands held in fee, within the exterior boundaries of the Fort Berthold Reservation as defined by the Act of March 3, 1891 . . . ."

### **Jurisdictional Issues on the Fort Berthold Reservation**

The committee spent many hours listening to testimony of Indian and non-Indian residents of the Fort Berthold Reservation, and federal, state, and tribal representatives. On February 11, 1986, the committee held a meeting in New Town to allow testimony of local residents concerning the committee's study. The meeting was well attended and provided a proportionate balance of Indian and non-Indian views on a wide array of mutual concerns relating to tribal and state governmental authority on the reservation. Many non-Indians expressed

concern over uncertainty that exists on the reservation regarding the tribal government's jurisdictional authority in matters such as taxation, environmental protection, law enforcement, licensing, hunting, fishing, and zoning over non-Indians residing on reservation land not owned by an Indian or the Three Affiliated Tribes. Testimony also expressed concern regarding the absence of allowed participation by non-Indians in tribal government affairs. Testimony indicated a perception of unfairness exists among non-Indians because they are not permitted to serve on tribal court juries or vote in tribal elections. Tribal officials indicated that they are faced with reductions in funding for federally assisted programs and high unemployment, and expressed to the committee their need to provide effective economic development, a comprehensive social services delivery system, and natural resource management and development to complete the process toward tribal self-sufficiency.

Game and fish matters and law enforcement are areas that exemplify the concept of "dual jurisdiction" on the reservation. The director of the Game and Fish Division of the Three Affiliated Tribes indicated that the only reasonable way to preserve the tribe's game and fish resources is to allow the tribe to regulate Indian and non-Indian hunting and fishing on all lands within the reservation. The State Game and Fish Commissioner indicated that non-Indians on the reservation do not need a tribal license to hunt on non-Indian lands, and, although a tribal fishing permit is required of non-Indians to fish on Indian waters, the only tribal permit required for fishing on Lake Sakakawea is an access permit for crossing tribal lands. The tribal director indicated a fishing license is issued as part of the tribal access permit for crossing tribal lands. The permit must be signed by the individual purchasing it and contains a provision whereby the signatory expressly submits to the jurisdiction of the tribal court. Tribal and state game and fish wardens on the reservation are cross-deputized. Cross-deputization normally involves an agreement by which law enforcement officers from one government are commissioned by another government, enabling both to enforce both state and tribal laws. Cross-deputization is also utilized on the reservation by the Bureau of Indian Affairs, local police, and county sheriffs. Testimony indicated that although cross-deputization seems to be working, conflicts have arisen in the past which result in less stability and uniformity in law enforcement on the reservation.

The New Town city attorney suggested that a federal solution to problems of dual jurisdiction may include the imposition of a unified jurisdiction scheme acceptable to the Three Affiliated Tribes and the state. The city attorney also suggested that tribal and state laws could be coordinated for joint administration by state and tribal law enforcement agencies. A New Town city councilman suggested that the committee include the Attorney General as a member of the Indian Affairs Commission to monitor and evaluate the effect of actions taken or contemplated by Indian tribes on the state and its political subdivisions. The committee considered a bill

draft that included the Attorney General on the membership of the Indian Affairs Commission. Committee discussion indicated that the bill draft would facilitate meaningful discussion and decisionmaking by the Indian Affairs Commission on legal issues affecting the state and the tribes.

The city councilman also recommended that the committee urge Congress to enact legislation giving the state and its political subdivisions jurisdiction over the northeast quadrant. The committee reviewed a letter from the Attorney General expressing his personal views to the mayor of Parshall regarding the tribe's constitutional amendment extending tribal jurisdiction to all persons and all lands within the boundaries of the reservation. The Attorney General concluded that tribal jurisdiction over non-Indians and non-Indian lands is narrow or nonexistent. The Attorney General suggested that the city of Parshall and non-Indians residing on the reservation have three alternatives for resolving their concerns; i.e., to negotiate with the tribe to reach an agreement on jurisdictional issues and then to seek congressional implementation of that agreement; to litigate issues as they arise; or to request Congress to disestablish the northeast quadrant of the reservation. A representative of the Attorney General's office indicated that the Attorney General is willing to participate in negotiations for state and tribal agreements and may participate in major litigation that arises on the reservation.

The committee heard testimony from a representative of the Commission on State-Tribal Relations, which was formed in 1977 by the National Conference of State Legislatures, the National Congress of American Indians, and the National Tribal Chairmen's Association. The commission was formed to analyze the legal and political potential for state and tribal leaders to negotiate their own solutions to reservation problems through agreements or compacts. The representative indicated that Congress and the courts will continue to fail to devise a jurisdictional formula easily applicable to every state and tribe across the country. The key is to focus and rely, not on jurisdiction and solutions from the federal government, but rather on how the state or local governments and tribal governments can find workable solutions to day-to-day governing problems that can be decided on the state-tribal level.

The committee considered a bill draft that established a statutory Legislative Council state and tribal relations committee with authority to study problems that exist between state or local governments and tribes and to act as a negotiating body if appropriate to facilitate agreements. The committee was informed that Idaho and Montana have utilized legislative interim committees on Indian affairs on a continuing basis during the past several years. In 1976 the Wisconsin Legislature created a statutory Legislative Council committee to study problems and develop specific recommendations and legislative proposals relating to Indians and the various Indian tribes in Wisconsin. The Wisconsin committee is composed of 14 members—six members appointed by the Legislative Council from names submitted by Indian tribes in the state and eight

legislator members. Testimony by a representative of the Three Affiliated Tribes indicated that the tribe would support the establishment of a statutory Legislative Council committee on state and tribal relations. The executive director of the Indian Affairs Commission supported the bill draft but indicated that such a committee may duplicate many functions of the Indian Affairs Commission. Proponents of the bill draft indicated that a statutory Legislative Council state and tribal relations committee would provide the continuity needed to address the jurisdictional concerns expressed by residents of the Fort Berthold Reservation.

The committee considered a bill draft that would have amended North Dakota Century Code Section 54-36-01 to remove from the membership of the Indian Affairs Commission all governmental members except the executive director of the Department of Human Services and would have replaced those governmental members with members of the House of Representatives and the Senate. The bill draft would have removed the tribal chairmen and the Governor from the commission. Committee discussion in favor of the bill draft indicated a larger representative share of legislators on the Indian Affairs Commission would allow it to address not only the administration of Indian programs but also the jurisdictional concerns of Indian and non-Indian citizens residing on Indian reservations in the state. The Indian Affairs Commission by formal resolution opposed the bill draft. Testimony in opposition to the bill draft stressed the importance of providing a forum to allow Indian leaders the opportunity to talk to the Governor. The committee considered a bill draft that required the Attorney General to make investigations of complaints alleging the violation of any constitutional, civil, or legal right of an individual residing on an Indian reservation. Testimony indicated that proposal would provide a "pressure relief mechanism" that is needed on Indian reservations in the state. Testimony in opposition to the bill draft indicated that the Attorney General would have no authority pursuant to federal law to investigate complaints on Indian reservations. Committee discussion indicated that the bill draft would be self-limiting because under federal law the investigative powers of the Attorney General on Indian reservations may extend only to non-tribal members; however, the Attorney General could nevertheless make a record of complaints and any lack of cooperation on the part of the tribal government.

### **Recognition of State and Tribal Court Judgments**

State courts in the United States take one of three approaches to the question of whether to grant tribal decisions the same force and validity in their jurisdictions as they give to decisions of their sister states. Some state courts have no clearly defined relationship with the tribal courts or definite attitude toward their decisions, either ignoring tribal court decisions or giving them only evidentiary value. State courts in North Dakota generally fall within this category. Some state courts recognize tribal decisions

based on principles of comity, while others accord such decisions full faith and credit as they would other state decisions.

The full faith and credit clause of the Constitution of the United States compels states to accord full faith and credit to the laws and proceedings of sister states. It requires recognition of proper judgments of other states, and in some cases mandates application of their substantive laws. The full faith and credit clause applies only between the states, but Congress has extended its application by statute, 28 U.S.C. 1738, to require "the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken." Whether the term "territory" includes Indian tribes has resulted in conflicting state court decisions. Congress has explicitly made the full faith and credit clause applicable to tribal court decisions in some contexts, and probably possesses the power under the constitution to extend the clause to all tribal court decisions. For example, the Indian Child Welfare Act, 25 U.S.C. 1911, requires the United States, the states, territories, possessions, and other tribes to give full faith and credit to tribal laws and proceedings applicable to child custody proceedings.

Some state courts treat tribal court decisions with the same deference shown decisions of foreign nations as a matter of comity. Through comity a sovereign recognizes the acts, decrees, laws, or judgments of another sovereign, primarily as a matter of courtesy rather than of right. Comity is a rule of practice and convenience only and is fully in the discretion of the court.

The committee heard considerable testimony concerning the structure of the tribal court of the Three Affiliated Tribes. The tribal court consists of a chief judge, an associate judge, and magistrates. The associate judge presides over all contested matters properly brought before the court and must be learned in the law with at least three years' trial experience. The associate judge is appointed by the Tribal Business Council for a term and under conditions determined by the Council. The chief judge supervises the activities of the magistrates and, if the chief judge is law trained, has the power and duty to preside over all matters properly brought before the court. The chief judge is elected in the manner that members of the Tribal Business Council are elected. To qualify for the position of a chief judge a candidate must be at least 25 years of age, an enrolled member of the Three Affiliated Tribes, and a graduate from an approved law school or learned in the law by reason of actual courtroom experience of three or more years duration; however, if no person possesses such qualifications a candidate for the position of chief judge must be at least 30 years of age, a high school graduate, an enrolled member of the Three Affiliated Tribes, and must not have been convicted of a felony. The present associate judge of the tribal court is Judge Tom M. Beyer, who also serves as county judge for the counties of Billings, Golden Valley, and Dunn and as municipal judge for the city of New Town.

The tribal court of the Three Affiliated Tribes is staffed with a court administrator responsible for

general administrative duties including budget formulation and contract preparation, a clerk of court responsible for handling and processing all civil complaints and maintaining the overall court calendar, a deputy clerk of court responsible for handling and processing all criminal cases, a juvenile officer who oversees child custody cases and juvenile petitions, a juvenile clerk responsible for all clerical responsibilities associated with juvenile court cases, a juvenile judge who presides over noncontested juvenile cases, a magistrate who presides at arraignments in the absence of the chief judge and sets bail, a prosecutor who represents the tribe in all contested matters, and an assistant prosecutor who is responsible for writing and screening all complaints and commitments.

Testimony indicated that the tribal court of the Three Affiliated Tribes is open to Indians and non-Indians. Tribal statistics indicated that 98 percent of all civil cases filed in tribal court in 1985 were commenced by non-Indian plaintiffs against Indian defendants primarily for the purpose of debt collection. Rules of procedure in civil actions govern the repossession of personal property. There is no monetary limit on the amount in controversy in any civil case in the tribal court. A party to an action may apply to the tribal court for the issuance of a writ of execution upon presentation of a tribal court judgment. Law enforcement officers of the Bureau of Indian Affairs are responsible for executing tribal court judgments. The tribal court of the Three Affiliated Tribes is a member of an intertribal court of appeals consisting of several tribes which provides a means to appeal a decision of the tribal court to another forum.

The tribal code of the Three Affiliated Tribes provides a procedure for the removal of judges whereby the judge is provided an advisory hearing after which a recommendation is made to the full Tribal Business Council, which ultimately decides whether to remove the judge. The Chief Justice of the North Dakota Supreme Court indicated on the basis of his personal views that the tribal procedure regarding the removal of judges is contrary to the separation of powers doctrine and does not allow for judicial independence. The Chief Justice indicated that confidence in tribal court decisions could be facilitated by improvements made in tribal court systems which would only then set the stage for asserting a basis for state recognition of tribal court decisions.

A legal representative of the Three Affiliated Tribes requested that the committee consider a bill draft that provided, on a temporary basis, for the reciprocal recognition of certain judgments, decrees, and orders issued by the tribal court of the Three Affiliated Tribes and state courts in the following categories of subject matter jurisdiction: (1) divorce decrees and property distributions pursuant to divorce; (2) child custody orders; (3) adoption decrees; (4) adjudications of the dependency and neglect of Indian children within the jurisdiction of the tribal court; and (5) adjudications of the juvenile delinquency of Indian children within the jurisdiction of the tribal court. The court recognizing the decision of a forum court

would make no inquiry into the facts of the case or the governing law, except to the extent necessary to determine whether the forum court had the requisite subject matter jurisdiction to hear the case. Testimony indicated that existing practice in state courts and the tribal court of the Three Affiliated Tribes does not provide for mutual recognition of state and tribal court decisions which in many instances results in enforcement problems for both the tribe and the state. Testimony in favor of the bill draft indicated that the reciprocal recognition of state and tribal court decisions would stabilize the rights of both Indian and non-Indian litigants.

The committee also considered a bill draft that would have allowed state courts to recognize as a matter of comity the judgments, decrees, or orders of any tribal court in the state in cases involving primarily child custody or domestic relations matters. The bill draft was based on South Dakota law and would have required the party seeking recognition to establish by clear and convincing evidence that the tribal court had jurisdiction over both the subject matter of the judgment, decree, or order and of the parties and that the judgment, decree, or order: was not fraudulently obtained; was obtained by a process that assures the requisites of an impartial administration of justice, including notice and a hearing; complied with the laws, ordinances, and regulations of the tribal government from which it was obtained; and would not contravene the public policy of the state. Opponents to the bill draft indicated that it would have placed an unrealistic burden on the party seeking recognition of a tribal court decision, and would have involved judicial discretion that would not stabilize the rights of individual state and tribal citizens. Proponents indicated that the bill draft would have required state courts to at least address the question whether a tribal court decision should be recognized which would constitute a step beyond existing practice.

The committee also considered a bill draft that would have allowed state courts to give full faith and credit to a judgment, decree, or order of the tribal court of the Three Affiliated Tribes of the Fort Berthold Reservation, the Devils Lake Sioux Tribe of the Fort Totten Indian Reservation, the Standing Rock Sioux Tribe of the Standing Rock Indian Reservation, or the Turtle Mountain Band of Chippewa of the Turtle Mountain Indian Reservation in all cases if the judgment, decree, or order would not contravene the public policy of the state of North Dakota and if the Indian tribe complied with certain standards and requirements. The bill draft would have required the Attorney General, upon the written request of the tribal council of an Indian tribe, to determine whether by ordinance the Indian tribe had implemented procedures for the selection, term and tenure, discipline, and removal of tribal court judges which would ensure the independence of the tribal judiciary; implemented an independent appellate process which provides for the review of final judgments, decrees, and orders of the tribal court by a neutral forum; required that the tribal court be a court of record; implemented a jury selection process that would guarantee the right to a fair and impartial

jury; implemented rules of procedure to be followed by the tribal court which ensure due process of law; and recognized and enforced the constitutional rights enumerated under the Indian Civil Rights Act of 1968. The bill draft would have required the Attorney General, if it was determined that the Indian tribe had complied with the requisite standards and requirements, to issue a certificate of compliance to the Indian tribe which would have been effective for a period of two years from the date of certification and would have provided the means by which tribal court decisions could be recognized in state courts.

Proponents of the bill draft indicated that the requirements and standards for recognition of tribal court decisions would have treated all tribal governments on an equal basis. Opponents of the bill draft indicated that the Supreme Court, and not the Attorney General, would be the appropriate body for determining whether Indian tribes comply with the requirements and standards enumerated in the bill draft. Opponents further argued that each tribal government should be approached separately for its views and input prior to the approval of any state legislation that may affect those governments.

#### **Administration of State Tax Laws on the Fort Berthold Reservation**

Generally, income, certain activities and personal property of reservation Indians, earned or located within an Indian reservation, are not subject to state taxation. In White Eagle v. Dorgan, 209 N.W.2d 621 (N.D. 1973), the North Dakota Supreme Court held that North Dakota could not impose an individual income tax upon income earned on an Indian reservation by an Indian residing on that reservation in the absence of an agreement allowing the state to impose such taxes. The court held that state business privilege and sales taxes were barred from imposition upon Indians because Congress had undertaken to completely regulate trading on the reservations.

Indian tribes retain the authority to impose taxes on Indians under their general governmental jurisdiction except to the extent that Congress has expressly imposed limits. Decisions of the United States Supreme Court, including Merrion v. Jicarilla Apache Tribe, 455 U.S. 130 (1982), reveal that tribal authority to tax non-Indians who conduct business on the reservation is an inherent power necessary to tribal self-government and territorial management, and is derived from the tribe's general authority to control economic activity within its jurisdiction, and to defray the cost of providing governmental services by requiring contributions from persons or enterprises engaged in economic activities within the jurisdiction of the tribe that benefit from those governmental services. Tribal taxing authority over non-Indians on non-Indian lands within reservations may be more limited. The United States Supreme Court determined in Montana v. United States, 450 U.S. 544 (1981), that the Crow Tribe of Montana, although it could prohibit or regulate hunting or fishing by nonmembers on land belonging to the tribe or held by the United States in trust for the tribe, had no power to regulate non-Indian fishing and hunting on reservation land owned in fee by nonmembers of the

tribe. The court noted that Indian tribes retain inherent sovereign power to exercise some forms of civil jurisdiction over non-Indians on the reservations, even on non-Indian fee lands. A tribe may regulate through taxation, licensing, or other means the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements. A tribe may also retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe.

In the past, states and tribes relied almost exclusively on the courts to answer questions concerning the exercise of their taxing authority. In the 1970s, however, South Dakota and the Oglala Sioux Tribe of the Pine Ridge Reservation pioneered a process for coordinating their separate tax policies, which later became a model for other agreements. Very simply, the tribe adopted a sales tax scheme compatible with the state's. The state collected all taxes on the reservation and shared a predetermined percentage of the revenue with the tribe. In that way the state was able to collect taxes from Indians on the reservation; the tribe raised its own revenue without creating a costly system to administer the tax; and the system for collecting taxes from Indians and non-Indians living on the reservation was easily administered. Similar arrangements have since been initiated in Oregon, Minnesota, and Michigan.

A representative of the State Tax Commissioner described the administration of state tax laws on the Fort Berthold Reservation as follows:

1. State income tax—Indians working and living on the reservation are not subject to the state income tax. Indian income obtained through work off the reservation is subject to the tax. Businesses must be fractionalized to determine ownership and subsequent taxability.
2. Sales and use taxes—Sales by Indian and non-Indian traders to Indians on the reservation are not subject to sales and use taxes. Sales by non-Indians to non-Indians are subject to the taxes. Purchases by Indians off the reservation are subject to the taxes unless the merchant delivers the goods onto the reservation or delivery to the reservation is made by a common carrier.
3. Telephone and natural gas taxes—Tribal members are not subject to telephone and natural gas taxes. Non-tribal members are subject to these taxes.
4. Motor vehicle excise tax—All vehicles on or off the reservation are subject to the motor vehicle excise tax if the vehicles are used on the streets and highways of the state.
5. Cigarette and tobacco taxes—Tax stamps are not required for tobacco products purchased out of state by Indian traders for sale on the reservation. Non-Indian traders must purchase and apply the stamps.
6. Oil and gas production taxes, oil extraction taxes, and coal severance taxes—The coal severance tax is imposed on coal severed on the reservation; the

oil and gas production taxes and extraction taxes are imposed on non-Indian royalty owners but not Indian royalty owners.

7. Motor fuel tax—Under a federal statute the motor fuel tax can be imposed on sales to Indians or non-Indians on the reservation. Heating fuel sold to Indians residing on the reservation is not subject to the motor fuel tax but nontribal members purchasing heating fuel are subject to this tax.
8. Mobile home tax—A mobile home located within the boundaries of a reservation and owned by an Indian who resides within the reservation is not subject to the mobile home tax. A mobile home located within the boundaries of a reservation and owned by an Indian who resides outside the reservation is subject to the tax. A mobile home located outside the boundaries of a reservation, regardless of whether it is owned by an Indian or non-Indian, is subject to the tax.
9. Real property tax—Trust lands on the reservation are exempt from real property taxation. Non-Indians who lease trust lands are taxed on their leasehold interests. Real property owned in fee patent by an Indian tribe and located within the boundaries of the tribe's reservation is not subject to county real property taxation.

The Three Affiliated Tribes have enacted tribal employment rights ordinances that are enforced by a Tribal Employment Rights Office to impose employment, training, subcontract, and contract preference requirements on a "covered employer." "Covered employer" means any employer who employs two or more employees within the exterior boundaries of the Fort Berthold Reservation for an aggregate of 60 or more working days within any period of 12 months. An "employer" means any person or entity who engages in commerce through compensated agents or servants, or who is hired pursuant to contracts for services, within the exterior boundaries of the Fort Berthold Reservation including any independent contractors and subcontractors of the United States, of any wholly owned government corporation, or of any state or of any political subdivision thereof. The ordinances also impose an employment rights fee on each covered employer, irrespective of whether the employer's principal place of business is located on or off the Fort Berthold Reservation, who engages in business, in the capacity of a prime contractor or subcontractor, in the area of mineral exploration, mineral development, or construction, in the amount of one percent of the total gross contract price for each contract entered into on the reservation. Testimony indicated the purpose of the tribal employment rights ordinances is to create employment and training opportunities for tribal members and for other Indians, and to eliminate employment discrimination against Indian people. Information provided by the Three Affiliated Tribes indicated that fees collected through the 10th month of the tribe's 1986 fiscal year amounted to \$46,785.18.

The Three Affiliated Tribes recommended that the committee consider a tribal proposal for a general revenue sharing agreement between the tribe and the state which would generate, according to a tribal expert, \$300,000 in annual revenue for the tribe.

Testimony indicated that the Three Affiliated Tribes' position is that tribal members on the reservation are not subject to the state motor vehicle excise tax, cigarette and alcohol excise taxes, and the motor fuels tax that are presently being collected from tribal members on the reservation. The tribe's proposed revenue sharing agreement would have allowed the state to continue to collect the excise taxes and the state sales tax on the reservation and would have required the state to share those collections with the tribe pursuant to a formula based on taxes collected on the reservation.

A representative of the State Tax Commissioner indicated that the tribe's proposed revenue sharing agreement would not constitute a permissible agreement between a public agency and Indian government pursuant to existing law. Agreements entered into between other states and tribal governments require the tribe to impose a tax identical in all respects to a tax already imposed by the state on non-Indians, thereby requiring merchants to collect only one tax from all persons on the reservation. The tax collected is then divided between the state and the tribe by some predetermined formula. Testimony indicated that the Tax Department is willing to negotiate with representatives of the Three Affiliated Tribes to work out a tax agreement permissible under state law. A tribal representative said if the Three Affiliated Tribes is unable to reach a revenue sharing agreement the tribe will probably impose its own excise taxes on persons residing on the reservation to counter reductions in federal funding for social services.

#### **Impact of Tax-Exempt Lands on Local Governments**

Representatives of the State Tax Commissioner informed the committee that an Attorney General's opinion concluded that real property owned in fee patent by an Indian tribe and located within the boundaries of the tribe's reservation is not subject to county real property taxation. The city auditor of Parshall indicated that all Indian properties placed in trust with the United States government and federal low income housing are exempt from real property taxation. Testimony indicated that cities do not receive reimbursement from the federal government in lieu of real property taxes on Indian trust property and that under present law an Indian could purchase taxable property and place this property into tax-exempt status. The city auditor indicated the city of Parshall is supplying public services to all residents of Parshall with only 65 percent of the potential tax revenue it could realize if all tax-exempt properties were subject to real property taxation.

The committee considered a concurrent resolution draft that urged Congress to make full payments in lieu of real property taxes to local governments on all land withdrawn or purchased for federal purposes or held in trust for Indians and Indian tribes. Committee discussion indicated that it is not unusual for the federal government to make payments in lieu of taxes on land withdrawn or purchased for federal purposes.

### **Other Topics Considered**

The committee also considered additional topics relating to its study of issues of concern to the state and persons residing within the boundaries of the Fort Berthold Reservation.

#### **State-Tribal Agreements**

The potential exists for the state and tribal leaders to negotiate their own solutions to many problems through agreements. The 1983 Legislative Assembly enacted NDCC Chapter 54-40.2, which authorizes any public agency to enter into an agreement with any one or more tribal governments to perform any administrative service, activity, or undertaking that either is authorized to perform by law and to resolve any disputes. Chapter 54-40.2 does not authorize an agreement that enlarges or diminishes the jurisdiction over civil or criminal matters which may be exercised by either the state or tribal governments located in the state. However, the scope of Chapter 54-40.2 does encompass many areas of potential agreement including law enforcement, natural resources, social services, and taxation, and provides an alternative to litigation or the federal political process that would be beyond the control of the government leaders involved.

Any agreement made under Chapter 54-40.2 must have the approval of the Governor. In deciding whether to approve an agreement, the Governor must consider whether the purpose of the agreement furthers the goals of the agency, whether the agreement is in the best interest of the state as a whole, and whether the public agency or agencies have authority to fulfill the agreement. An agreement made pursuant to Chapter 54-40.2 is subject to revocation by any party upon six months' notice to the other unless a different notice period is provided for in the agreement.

The committee received copies of various agreements between the Three Affiliated Tribes and the state or its political subdivisions concerning the control of noxious weeds on the reservation, pesticide enforcement, the operation and maintenance of Good Bear Bay and Pouch Point Bay within the reservation, child support enforcement, highway construction, conservation of oil and gas resources on the reservation, foster care, and other matters. The committee heard testimony from several persons indicating their discontent with an agreement entered into between the Three Affiliated Tribes and the State Commissioner of Agriculture regarding pesticide control on the reservation. Although the committee did not discuss the merits of that testimony, a bill draft was considered that provided a mechanism for public notice and input regarding any agreement between a public agency and Indian government prior to its submission to the Governor for approval. The bill draft also required that any agreement approved by the Governor be reviewed periodically to determine the utility and effectiveness of the agreement and whether the parties are in compliance with all provisions of the agreement.

#### **State Agency Services to Indians**

The committee received and reviewed information

compiling estimates of state funds expended by various state agencies for the benefit of Indians during the 1985-87 biennium. Although Indians are generally entitled to the same rights and benefits as other American citizens and residents, the committee was able to utilize the information to facilitate discussion with tribal representatives. The North Dakota Indian Affairs Commission has in the past conducted a similar survey on a periodic basis because of many requests from individuals for such information and because the information may be helpful to Indian tribes in the state for their development of plans for the future.

The committee considered a bill draft that required all executive and administrative officers and departments required by NDCC Section 54-06-04 to submit to the Governor and the Office of Management and Budget reports covering their operations for the two preceding fiscal years to include in their reports a detailed statement of all sources and expenditures of public funds for state services that benefit Indians residing on Indian reservations in the state including a presentation of sources and expenditures associated with each service provided by the state. Committee discussion indicated that it would also be important to include in the reports a delineation of sources of funds as many Indian services are funded by federal funds that are distributed through state agencies.

#### **Recommendations**

The committee recommends House Bill No. 1039 to establish a statutory Legislative Council state and tribal relations committee. The committee would be appointed in the same manner as, and would operate according to the statutes and procedures governing the operation of, other Legislative Council interim committees. The membership of the committee would include one representative of the Three Affiliated Tribes of the Fort Berthold Reservation, one representative of the Devils Lake Sioux Tribe of the Fort Totten Indian Reservation, one representative of the Standing Rock Sioux Tribe of the Standing Rock Indian Reservation, and one representative of the Turtle Mountain Band of Chippewa of the Turtle Mountain Indian Reservation. The bill would allow the state and tribal relations committee to study problems that exist between state or local governments and Indian tribes, and to hold hearings and act as a negotiating body to facilitate agreements, improved communications, and greater understanding between state or local governments and Indian tribes. The bill would also authorize the Indian Affairs Commission to advise the state and tribal relations committee on proposals pending before the committee and to recommend appropriate subjects for consideration or investigation by the committee.

The committee recommends Senate Bill No. 2046 to include the Attorney General on the membership of the Indian Affairs Commission.

The committee recommends Senate Bill No. 2047 to require the Attorney General to make a full and complete investigation of any complaint alleging the deprivation of any constitutional, civil, or legal right of an individual residing on an Indian reservation

upon the written request of the state's attorney of the county of the residence of the aggrieved individual. The bill requires the Attorney General to conduct and take full charge of any criminal prosecution that results from the investigation. Necessary expenses incurred in making the investigation must be allowed and paid by the county in which the investigation was requested.

The committee recommends House Concurrent Resolution No. 3004 to urge the President of the United States to establish a presidential commission to study further the impact of federal Indian policies on non-Indians living or working on or near Indian reservations in the United States.

The committee recommends Senate Bill No. 2048 to incorporate the Three Affiliated Tribes' proposal for reciprocal recognition of state and tribal court judgments, decrees, and orders in cases involving the dissolution of marriage, the distribution of property upon divorce, child custody, adoption, or adjudication of the delinquency, dependency, or neglect of Indian children. The bill pertains only to the tribal court of the Three Affiliated Tribes and not other Indian tribes or bands located in the state. The bill allows a recognizing court to inquire as to the facts of a case or governing law only to the extent necessary to determine whether the forum court had jurisdiction over the subject matter of the judgment, decree, or order. The bill would be effective through June 30, 1989.

The committee concluded that the issue of mutual recognition of state and tribal court decisions should be studied further. The committee recommends that the Legislative Council study the issue either through the recommended statutory Legislative Council state and tribal relations committee or by other means and to include in that study input from other Indian tribes located in the state.

The committee recommends House Concurrent Resolution No. 3003 to urge the Congress of the United States to make payments in lieu of taxes on all land withdrawn or purchased for federal purposes or held in trust for Indian and Indian tribes to replace real property tax revenue foregone by local governments.

The committee recommends Senate Bill No. 2049 to require any public agency entering into an agreement with an Indian tribe pursuant to NDCC Chapter 54-40.2 to provide public notice and hold a public hearing prior to the submission of the agreement to the Governor for approval. The bill would require a public agency to review and determine biennially the utility and effectiveness of any agreement approved by the Governor with an Indian tribe and to determine whether the parties are in substantial compliance with all provisions of the agreement.

The committee recommends House Bill No. 1040 to require all executive and administrative officers and departments required by NDCC Section 54-06-04 to submit biennial reports to include in their reports a detailed statement of all sources and expenditures of public funds for state services that benefit Indians residing on Indian reservations in the state including a presentation of sources and expenditures associated with each category of service provided. The

statements would be compiled by the Director of the Office of Management and Budget in the report required of the director.

## INDIAN CIVIL JURISDICTION STUDY

### Background

Historically, Indian territories were generally deemed beyond the legislative and judicial jurisdiction of state governments. This restriction was reflected in the federal statute that required North Dakota to disclaim all right and title to the unappropriated public lands lying within the state owned or held by any Indian or Indian tribes as a condition for admission to the Union.

Federal restrictions on state jurisdiction over Indian country were largely eliminated, however, in 1953 with the enactment of Public Law 280. Public Law 280 gave federal consent to the assumption of state civil and criminal jurisdiction over Indian country and provided the procedures by which such an assumption could be made. It authorized states like North Dakota, whose constitutions and statutes contain federally imposed jurisdictional restraints, to amend their laws to unilaterally assume jurisdiction.

In 1957 the North Dakota Supreme Court in Vermillion v. Spotted Elk, 85 N.W.2d 432 (N.D. 1957), held that the existing jurisdictional restraints foreclosed state civil jurisdiction over Indian country only in cases involving interests in Indian lands themselves. The court further held that Public Law 280 had no application to a state such as North Dakota, which had exercised such jurisdiction under its constitution and laws prior to the enactment of Public Law 280. That case involved a personal injury action brought as a result of an automobile accident between enrolled Indians residing within the boundaries of an Indian reservation in which the accident occurred. The North Dakota Supreme Court held that the district court had jurisdiction to try the action.

In 1958 the Constitution of North Dakota was amended to authorize the Legislative Assembly to provide for the acceptance of jurisdiction over Indian country. In 1961 the Legislative Assembly directed the Legislative Research Committee to study the field of Indian affairs including law enforcement, education, health, and welfare problems and services. Among the recommendations of the interim Subcommittee on Indian Affairs was a proposal for the assumption by the state of full civil, but not criminal, jurisdiction over Indian country as authorized by Public Law 280. The subcommittee had concluded there was "something approaching a void in civil law or civil rules by which people must live or by which state and local governments function in reservation areas." The subcommittee did not recommend that the state assume criminal jurisdiction over Indian reservations "because of the objection by substantial numbers of Indian citizens and because of the costs involved." Subsequently, the 1963 Legislative Assembly enacted NDCC Chapter 27-19, which authorizes the extension of state court jurisdiction over all civil claims for relief which arise on an Indian reservation upon acceptance of such jurisdiction by Indian tribes or individuals. Chapter 27-19 places certain limitations upon the scope of state civil

jurisdiction and provides procedures for withdrawal from state civil jurisdiction by Indian tribes. No Indian tribe has accepted state civil jurisdiction under Chapter 27-19.

Later in 1963 the North Dakota Supreme Court decided the case of In re Whiteshield, 124 N.W.2d 694 (N.D. 1963), which involved the issue of whether the state district court had jurisdiction over Indian parents and their children residing on the Fort Totten Indian Reservation in a proceeding to terminate parental rights. Notwithstanding its earlier decision in Vermillion v. Spotted Elk, the North Dakota Supreme Court held that the amendment of the Constitution of North Dakota in 1958, and the passage of Chapter 27-19 in 1963, amounted "to a complete disclaimer of jurisdiction over civil causes of action which arise on an Indian reservation, except upon acceptance by the Indian citizens of the reservation in the manner provided by the legislative enactment." Subsequent cases of the North Dakota Supreme Court consistently construed Chapter 27-19 to disclaim the jurisdiction the court had recognized in Vermillion v. Spotted Elk.

In 1974 the Three Affiliated Tribes of the Fort Berthold Reservation employed Wold Engineering, a North Dakota corporation, to design and build the Four Bears Water System Project, a water supply system located wholly within the Fort Berthold Indian Reservation. The project was completed in 1977 but it did not perform to the satisfaction of the Three Affiliated Tribes. In 1980 the Three Affiliated Tribes sued Wold Engineering in North Dakota district court for negligence and breach of contract. At the time the suit was filed, the tribal court of the Fort Berthold Reservation did not have jurisdiction over a claim by an Indian against a non-Indian in the absence of an agreement by the parties. After counterclaiming for the Three Affiliated Tribes' alleged failure to complete its payments on the water supply system, Wold Engineering moved to dismiss the complaint on the ground the state court had no jurisdiction over the matter because the Three Affiliated Tribes had never consented to state court jurisdiction under Chapter 27-19. The district court dismissed the suit for lack of jurisdiction. In affirming the dismissal on appeal the North Dakota Supreme Court in Three Affiliated Tribes of the Fort Berthold Reservation v. Wold Engineering, P.C., 321 N.W.2d 510 (1982), concluded it had no jurisdiction over civil causes of action arising within the exterior boundaries of an Indian reservation, unless the Indian citizens of the reservation vote to accept jurisdiction.

In 1983 the United States Supreme Court granted certiorari in the case, and thereafter held that federal law did not preclude the state district court from asserting jurisdiction over the Three Affiliated Tribes' claim (467 U.S. 138 (1984)). Specifically, the United States Supreme Court ruled that Public Law 280 neither required nor authorized North Dakota state courts to forego the jurisdiction recognized by the North Dakota Supreme Court in Vermillion v. Spotted Elk. The court recognized that to the extent that Vermillion v. Spotted Elk permitted North

Dakota courts to exercise jurisdiction by non-Indians against Indians or over claims between Indians, it intruded impermissibly on tribal self-governance. However, the court noted that it had repeatedly approved the exercise of jurisdiction by state courts over claims by Indians against non-Indians, even when those claims arose in Indian country, because the exercise of such jurisdiction does not interfere with the right of tribal Indians to govern themselves under their own laws. Because the North Dakota Supreme Court's interpretation of Chapter 27-19 and its accompanying constitutional analysis appeared to rest on a possible misconception of federal law, the United States Supreme Court vacated the judgment and remanded the case to allow the North Dakota court to reconsider the jurisdictional questions.

On remand, the North Dakota Supreme Court (364 N.W.2d 98 (1985)), upon reviewing the legislative history of Chapter 27-19 concluded that the 1963 Legislative Assembly's enactment of that chapter terminated as a matter of state law any "residuary" jurisdiction that may have existed under Vermillion v. Spotted Elk over claims arising in Indian country brought by tribal Indians against non-Indians in state court. In its decision the North Dakota Supreme Court made comments that provided the impetus to Senate Concurrent Resolution No. 4075:

In so holding, we suspect that neither side of this controversy will be completely satisfied. This causes us to assert that, aside from the very narrow issue of residuary jurisdiction involved in this case, the Indian people will not receive justice on a par with other citizens of this state until they realize that their rights are best preserved in the state courts and that they vote to accept state jurisdiction in all civil cases; or until the Congress of the United States so realizes and as a consequence requires acceptance of state jurisdiction by the Indian tribes and the Indian people; or until the Congress of the United States creates a federal court with jurisdiction to decide civil cases arising within the exterior boundaries of Indian reservations. Indians are now full citizens of this state, they have the franchise and they could receive the fruits of justice in our state courts if they would but accept jurisdiction for all civil purposes, submit their problems to those courts, and have faith in the judicial system which all other citizens, irrespective of their ancestry, must and do rely upon.

In view of the realization that over 20 years have elapsed since the Legislature conducted its study into Indian problems, the unfulfilled great hope of the Legislature in the improvement of Indian and non-Indian relations which would result from the ultimate assumption by the state or acceptance by the Indian people of civil jurisdiction, and the existence of a multitude of problems arising from the lack of uniform jurisdiction, we believe it to be appropriate and timely for the Legislature to again create an interim Indian jurisdiction study committee, which would include representatives of the Indian people, which study hopefully might be

conducted contemporaneously with a national study by Congress with the object of finding a solution to these complex and emotional problems. It is quite obvious that a court such as ours cannot resolve the problems in a piecemeal case-by-case basis. Ultimately, most issues in this area are brought to this Court with very disappointing results because we are required to say in most cases that our state courts do not have jurisdiction to decide the issues that cry out for an answer. (emphasis in original)

### **Testimony and Committee Considerations**

At the suggestion of the Chief Justice of the North Dakota Supreme Court, the committee reviewed the federal Maine Indian Claims Settlement Act and its legislative history to ascertain if any of its provisions would provide workable solutions for North Dakota. The Maine Indian Claims Settlement Act arose as a result of claims by the Passamaquoddy Tribe and the Penobscot Nation that 12.5 million acres of land contained within the state of Maine had been acquired by the state without federal approval in violation of federal law. The Act provided congressional implementation and ratification of the terms of a settlement negotiated over several years among the Passamaquoddy Tribe, the Penobscot Nation, the Houlton Band of Maliseet Indians, the state of Maine, private landowners, and the United States government. The Act provided for the extinguishment of the Indian land claims upon federal appropriation of \$81.5 million to implement provisions of the Act which established settlement funds for the benefit of the three Maine tribes. The Act ratified Maine legislation that essentially accorded to the Passamaquoddy Tribe and Penobscot Nation the status of municipalities under state law. The Act reserved to the tribes the power to enact ordinances and collect taxes subject to the duties and limitations of a municipality and the power to govern internal tribal matters such as membership, tribal government organization, and tribal elections; and granted the tribes exclusive jurisdiction over violations by their members of tribal ordinances. The state was granted exclusive jurisdiction over non-tribal members. The Act provided the tribes exclusive jurisdiction over criminal offenses committed on the reservation by a tribal member against another tribal member or property of a tribal member where the potential maximum penalty would not exceed six months' imprisonment or a fine of \$500, and reserved to the tribes civil jurisdiction over small claims and jurisdiction over certain juvenile crimes, Indian child custody proceedings, and domestic relations matters between tribal members if both parties reside on the reservation.

The committee also reviewed a federal Act that confirmed the boundaries of the Southern Ute Indian Reservation in Colorado and defined jurisdiction within that reservation, and its legislative history. Tribal, state, local, and federal governmental officials all participated in the formulation of the Act as a solution to jurisdictional uncertainty that existed within the Southern Ute Indian Reservation as a result of the reservation's checkerboard nature of land ownership. The stated intent of the Act, in part, was

to establish that all lands within the reservation constitute Indian country for purposes of federal, state, or tribal jurisdiction, civil or criminal, over Indian members of federally recognized Indian tribes. The Act limited the jurisdiction of the Southern Ute Tribe over non-Indians or their property to Indian trust lands within the reservation, and limited federal criminal jurisdiction as to non-Indian offenses against the person or property of an Indian within the reservation to those offenses actually committed on trust lands.

A representative of the legal department of the Three Affiliated Tribes and several committee members indicated that the federal Acts involving Maine and Colorado would not provide an appropriate starting point for committee discussion leading to a workable solution to jurisdictional problems in North Dakota. The legal representative of the Three Affiliated Tribes indicated that the Three Affiliated Tribes would not participate in the formulation of an agreement between the tribe and the state for ratification by Congress that would require the tribe to waive any of its jurisdictional authority or accept the status of a municipality.

During the interim, the United States Supreme Court granted certiorari in the case of Three Affiliated Tribes of the Fort Berthold Reservation v. Wold Engineering, P.C., to examine the Three Affiliated Tribes' assertion that the North Dakota Supreme Court's earlier construction of Chapter 27-19 to disclaim any preexisting state civil jurisdiction violated the federal constitution and was preempted by federal Indian law. The United States Supreme Court decided on June 16, 1986, that Chapter 27-19 is preempted by federal law insofar as it was applied by the North Dakota Supreme Court to disclaim the preexisting jurisdiction earlier recognized by the court in Vermillion v. Spotted Elk over civil suits by tribal Indians against non-Indians for which there is no other forum, absent a tribe's waiver of its sovereign immunity and its consent to suit in all civil causes of action (476 U.S.\_\_\_\_\_, 90 L.Ed.2d 881).

The United States Supreme Court examined the purpose of Public Law 280, as implemented by Chapter 27-19, which was to promote the gradual assimilation of Indians into the dominant American culture and to ease the fiscal and administrative burden borne by the federal government by virtue of its control over Indian affairs. The Supreme Court concluded, because Public Law 280 was designed to extend the jurisdiction of the states over Indian country and to encourage state assumption of such jurisdiction and because Congress had not provided for disclaimers of preexisting jurisdiction, that the interpretation by the North Dakota Supreme Court of Chapter 27-19 to disclaim preexisting jurisdiction could not be reconciled with the congressional plan embodied in Public Law 280 and was therefore preempted by it.

The United States Supreme Court reinforced its conclusion that the operation of the North Dakota jurisdictional scheme was inconsistent with federal law through an analysis of the state, federal, and tribal interests at stake. Although the Supreme Court recognized that North Dakota's interest in requiring that all its citizens bear equally the burdens and the

benefits of access to the courts was readily understandable, it nevertheless determined that federal and tribal interests in Indian self-government and autonomy, as well as the federal interest in ensuring access to the courts, outweighed the state's interest. In analyzing the interests at stake, the Supreme Court noted that the North Dakota statutory scheme conditioned the tribe's access to state courts on the tribe's agreement to the application of state civil law in all state court civil actions to which it would be a party regardless of whether the tribe had any other effective means of securing relief for civil wrongs. The state had conceded that even if the tribe had access to tribal court to resolve civil controversies with non-Indians it would be unable to enforce those judgments in state court. The Supreme Court concluded that the North Dakota statutory conditions could be met only at an unacceptably high price to tribal sovereignty and effectively barred the tribe from the courts. The Supreme Court determined the North Dakota statutory scheme would require tribes to accept a potentially severe intrusion upon their ability to govern themselves according to their own laws in order to regain their access to the state courts.

The Supreme Court also noted that the requirement of Chapter 27-19 that the tribe consent to suit in all civil causes of action before it could gain access to state court would serve to defeat the tribe's federally conferred immunity from suit. The Supreme Court described the tribe's immunity as not congruent with that which the federal government, or the states, enjoy, and that the tribe's immunity is subject to plenary federal control and definition; however, in the absence of federal authorization, tribal immunity is privileged from diminution by the states. Finally, the Supreme Court indicated that Public Law 280 does not constitute a waiver of tribal sovereign immunity, or represent an abandonment of the federal interest regarding Indian self-governance.

The Supreme Court concluded its examination of the state, tribal, and federal interests implicated in the case by noting that the perceived inequity of permitting the tribe to recover from a non-Indian for civil wrongs in instances where a non-Indian allegedly could not recover against the tribe "simply must be accepted in view of the overriding federal and tribal interests in these circumstances, much in the same way that the perceived inequity of permitting the United States or North Dakota to sue in cases where they could not be sued as defendants because of their sovereign immunity also must be accepted."

Issues that may arise in the future concerning the decision by the United States Supreme Court were identified by the attorney who represented Wold Engineering before the Supreme Court. First, it is unclear whether the decision would apply to allow suits to be brought by individual Indians, rather than Indian tribes, against non-Indians in state court. Second, the scope of procedure and discovery available in the state court to the Indian and non-Indian parties is left unresolved by the decision. The Three Affiliated Tribes conceded during oral argument before the United States Supreme Court that the tribe should be subject to discovery proceedings and pro-

ceedings that would ensure a fair trial to non-Indian defendants. Testimony indicated that the state should seek a compromise solution with the tribes identifying those processes of the state judicial system which ought to apply when an Indian tribe brings an action against a non-Indian in state court. Third, the Three Affiliated Tribes conceded during oral argument before the United States Supreme Court that a non-Indian defendant could assert a counterclaim arising out of the same transaction or occurrence that is the subject of the tribe's principal suit as a setoff or recoupment; however, the extent to which a non-Indian defendant's counterclaim could be used to defeat or reduce a tribal plaintiff's recovery or to fix the tribe's affirmative liability in state court was specifically left unresolved by the high court.

The present version of Public Law 280 gives federal consent to states not having jurisdiction over civil causes of action between Indians or in which Indians are parties arising in Indian country to assume with the consent of the tribe occupying that Indian country "such measure of jurisdiction over any or all such civil causes of action arising within such Indian country" as may be determined by the state to the same extent the state has jurisdiction over other civil causes of action. Presently, Chapter 27-19 provides for the extension of state jurisdiction over all civil causes of action that arise on an Indian reservation upon acceptance of such jurisdiction by Indian citizens as provided by law. Testimony suggested that Chapter 27-19 be amended to allow Indian tribes the opportunity to accept state civil jurisdiction only in specific subject matters of civil law rather than in the context of an all-encompassing acceptance. Although the committee received no indication an Indian tribe in the state would accept state civil jurisdiction in limited subject areas, testimony indicated that such an amendment to Chapter 27-19 would provide an opportunity for Indian tribes to consider a more limited acceptance of state civil jurisdiction should they desire.

The Chief Justice indicated on the basis of his personal views that the decision of the United States Supreme Court resolved only the question concerning the right of Indian tribes and possibly individual Indians to sue non-Indians in civil cases arising within the boundaries of an Indian reservation. The decision did not address the issue of state court jurisdiction in civil cases arising within the boundaries of an Indian reservation when both parties are Indians, or when a non-Indian plaintiff and an Indian defendant are involved. A legal representative of the Three Affiliated Tribes expressed the opinion that the decision clarified the appropriate relationship between tribal and state governments and illustrated that tribal sovereignty is controlled by the federal government and not the state.

### Conclusion

Although some of the recommendations resulting from the Fort Berthold Reservation study relate to Indian civil jurisdiction issues, the committee makes no additional recommendations as a result of this study.

# INDUSTRY AND BUSINESS COMMITTEE

The Industry and Business Committee was assigned three studies. House Concurrent Resolution No. 3034 directed a study of the feasibility and desirability of consolidating the statutory authority and administration of financial institutions organized under state laws in light of federal changes regarding regulation of financial institutions. House Concurrent Resolution No. 3078 directed a study of the regulation of property and casualty insurance plans created by local groups or associations. House Concurrent Resolution No. 3082 directed a study of the cancellation, nonrenewal, and declination procedures and requirements for property and casualty insurance and automobile insurance policies.

Committee members were Representatives Richard Kloubec (Chairman), John Dorso, Ralph C. Dotzenrod, David J. Koland, Theodore A. Lang, Bob O'Shea, Douglas G. Payne, Jack Riley, Scott B. Stofferahn, Ben Tollefson, Francis J. Wald, and Joseph R. Whalen; and Senators Byron Langley, Walter A. Meyer, Chester Reiten, R. V. Shea, and Art Todd.

The report of the committee was submitted to the Legislative Council at the biennial meeting of the Council in November 1986. The report was adopted for submission to the 50th Legislative Assembly

## BANKING LAWS CONSOLIDATION STUDY

House Concurrent Resolution No. 3034 directed a study of the feasibility and desirability of consolidating state statutory and regulatory authority of banks, credit unions, and savings and loan associations in light of changes in the federal law governing financial institutions which eliminate many of the differences between the classifications of financial entities in this state. The statutes regulating banks, credit unions, and savings and loan associations are found in North Dakota Century Code (NDCC) Chapters 6-01, 6-02, 6-03, 6-06, 6-06.1, 6-07, and 6-08, and Title 7.

### Historical Distinctions

The historical distinctions among banks, savings and loan associations, and credit unions were based on the economic origins of the various entities. Banks are financial institutions engaged in all facets of what the public generally perceives as the banking industry. These activities include holding deposits, providing checking accounts, making commercial loans, making personal loans, making residential real estate loans, operating trust departments, and various other activities.

Historically, a savings and loan association was intended to serve a relatively small market of depositors and to lend money primarily for the purpose of purchasing residential real estate. As originally established, savings and loan associations were not permitted to have checking accounts nor generally to make loans other than home loans. In North Dakota savings and loan associations are formally known as building and loan associations. A savings and loan association is described in NDCC Section 7-01-01 as a corporation "mutually operated for the purpose of encouraging home building and

thrift among its shareholders and loaning substantially all of its funds to them on real estate mortgage security . . ." The emphasis was on lending money to the association's depositors rather than to others. There are no state-chartered savings and loan associations in North Dakota. The last state-chartered savings and loan association acquired federal charter status in 1982.

Historically, a credit union was established to serve a relatively small community of interest among its depositors, with most lending being made primarily for the purchase of personal property. As in the case of savings and loan associations, checking accounts were not generally offered by credit unions. The community of interest distinction is still included in the definition of a credit union found in Section 6-06-07. That section provides that credit union membership is "limited to groups having a common bond of occupation or association or to groups within a well-defined rural or urban district."

### Remaining Distinctions

The differences in services provided by the various kinds of financial institutions have become increasingly blurred in recent years. It is now possible to open a checking account, obtain a commercial loan, or obtain a personal property loan at a savings and loan association. Likewise many credit unions offer similar services. Thus, observed from the service side of the analysis, credit unions and savings and loan associations are becoming more and more like banks. There are, however, remaining distinctions. A commonly cited example of such a distinction is the power to operate branches. The establishment of branch banks, even for federally chartered banks, is left to state law. In North Dakota banks are limited in the number of branches they may establish. No similar statutory restriction is imposed on credit unions or savings and loan associations. Further, under federal charters, savings and loan associations may make more equity investments in real estate than federally chartered banks may make.

Organizational and other "behind the scenes" requirements of the various kinds of financial institutions still vary significantly. For example, under state law, banks and savings and loan associations must have capital contributions of \$50,000 to start businesses, while no minimum requirement is imposed on credit unions. Reserve requirements for the various kinds of institutions also vary. For banks, the State Banking Board by rule has adopted the requirements of the Federal Reserve System. The reserve requirements for credit unions are determined by the rules of the National Credit Union Administration. The reserve requirements for savings and loan associations are established by the board of directors of the savings and loan association. The board is required to set aside in a reserve fund at least five percent of the annual net earnings of the association until the fund reaches at least five percent of the association's assets.

At the federal level another important difference

among the kinds of institutions is the regulatory scheme employed. Accounting standards (for issues such as computing capital assets) are more stringent for banks.

### **Federal Regulation and Preemption of State Regulation**

Under authority of the Commerce Clause of the Constitution of the United States, Congress enacted the National Banking Act, 12 U.S.C. 21 et seq., granting the federal government exclusive authority over federally chartered depository institutions, except insofar as Congress permits state control. Under the doctrine of federal preemption of state laws, derived from the Supremacy Clause of the Constitution of the United States, when federal and state laws regulate the same subject matter (such as with banking) the courts must look to whether the state law conflicts with the specific federal law or statutory scheme. If so, the law may be declared unconstitutional. Thus, national banks are not subject to a state law that expressly conflicts with a federal law, frustrates the purpose for which national banks were created, or impairs the efficiency of national banks to discharge duties imposed upon them by federal law.

### **Federal Deregulation**

State regulation of banking was substantially altered by the passage of the federal Depository Institutions Deregulation and Monetary Control Act of 1980. The Act is a broad-ranging law containing a number of provisions that alter the regulation of banking. These provisions are aimed at improving monetary control by the federal reserve, the nation's central bank; helping depository institutions including banks, savings and loan associations, and credit unions adapt to their increasingly competitive environment; and improving services to customers at these institutions.

The Act has nine titles, five of which are themselves known as Acts:

1. The Monetary Control Act of 1980.
2. The Depository Institutions Deregulation Act of 1980.
3. The Consumer Checking Account Equity Act of 1980.
4. The Truth in Lending Simplification and Reform Act of 1980.
5. The Financial Regulation Simplification Act of 1980.

Other provisions deal with state usury laws, amendments to the national banking laws, powers of thrift institutions, and foreign control of United States financial institutions.

Specific provisions include extending federal reserve deposit reserve requirements to all depository institutions, removing interest rate ceilings, extending to all depository institutions authority for interest-bearing transaction accounts, increasing federal insurance requirements from \$40,000 to \$100,000, increasing other powers of depository institutions, and providing federal override of state usury laws for many types of loans.

The committee reviewed an arrangement, according to subject matter, of North Dakota's laws relating to

banks, credit unions, and savings and loan associations. The structural organization of the compilation of laws was (1) the Department of Banking and Financial Institutions; (2) organization and qualification of financial institutions; (3) powers, management, and operation; (4) dissolution, insolvency, suspension, and liquidation; and (5) general provisions.

### **Testimony**

The high interest rates and inflation of the 1970s created a new national marketplace for financial services including services provided by large corporations like Sears and American Express. These institutions provide increasing competition for traditional depository institutions.

The federal Depository Institutions Deregulation and Monetary Control Act of 1980 and the federal Garn-St. Germain Depository Institutions Act of 1982 were enacted to enable depository institutions to adapt to this increasingly competitive environment.

Testimony was generally in favor of amending state laws to allow state-chartered banks to compete with deregulated federally chartered banks as a means of retaining capital in North Dakota. Representatives of the North Dakota Credit Union League, the North Dakota Savings and Loan Association, and the Independent Community Bankers of North Dakota, however, opposed consolidating the laws regulating financial institutions. Those representatives testified that the organizational and structural distinctions among banks, savings and loan associations, and credit unions would create obstacles to consolidated regulation. Some of the differences among banks and other depository institutions are fostered by differing regulation under the institutions' insurers (i.e., the Federal Depository Insurance Corporation, the Federal Savings and Loan Insurance Corporation, and the National Credit Union Administration). Many distinctions among financial institutions are the result of federal laws that allow states to regulate some areas of federally chartered bank activities but not federally chartered savings and loan association activities. For example, states may regulate branch banking for federally chartered banks, but not for federally chartered savings and loan associations.

It was suggested that authorizing a regional interstate banking compact (allowing banks from other western states in a specified region to operate reciprocally) would enable state-chartered banks to compete for and keep capital in North Dakota. A representative of the Department of Banking and Financial Institutions testified that partial deregulation and increased competition have increased the risks of bank insolvencies.

The committee considered several proposals relating to the risks of insolvency caused by deregulation and increased competition among financial institutions. The committee favored a proposal providing for the order of paying expenses of and claims against an insolvent bank and a proposal to raise the capital stock and surplus requirements of a banking association.

The committee considered three bill drafts relating to the authority of the Commissioner of Banking and

Financial Institutions and the State Banking Board or the State Credit Union Board in cases of insolvencies. The first bill draft would have authorized the Commissioner of Banking and Financial Institutions to hold an administrative hearing to determine whether a financial institution was insolvent. The State Banking Board and the State Credit Union Board would have acted in an advisory capacity to the commissioner. One problem with this proposal was that the administrative process was thought to be too cumbersome and time consuming a procedure to be used in an emergency insolvency situation. Committee members also expressed reluctance to grant the commissioner, without action on the part of the State Banking Board or the State Credit Union Board, the broad authority to determine whether an institution is insolvent.

The second bill draft would have authorized the State Banking Board to commence an action in district court prior to taking possession of an insolvent bank. The bill draft would have required the court to hear the case in a closed proceeding (to promote confidentiality) and as quickly as the circumstances required. Allowing the State Banking Board to bring an action in district court prior to the bank being closed was intended to remove the uncertainty from the board's decision to close the bank which was caused by the right to appeal within 10 days after the order. This uncertainty was said to hamper purchase and assumption transactions by the Federal Deposit Insurance Corporation. One problem with this proposal was that the court docket could not be protected, thus there would be no confidentiality. In addition, the bank would have had the right to appeal the district court decision. The Commissioner of Banking and Financial Institutions also reported that the Federal Deposit Insurance Corporation had advised the commissioner that the insolvency determination is rarely appealed and does not generally interfere with purchase and assumption transactions.

The third bill draft would have authorized emergency takeovers of insolvent financial institutions. One of the problems with this proposal was that it did not authorize a bank that merged to operate as a branch bank, thus discouraging banks from merging with failing banks in other towns. Opposition was also expressed to allowing out-of-state banks to take over failing banks in North Dakota.

### **Recommendations**

North Dakota currently has no statutes for determining creditor priority in a financial institution insolvency. The committee recommends House Bill No. 1041 to provide the following order for paying expenses of and claims against an insolvent bank:

1. Administrative expenses.
2. Unsecured claims for wages, salaries, or commissions up to \$5,000 per individual.
3. Claims of depositors.
4. Other unsecured and secured claims.
5. Claims for subordinated debts.
6. Equity capital of shareholders.

The bill is intended to facilitate full purchase and assumption transactions by the Federal Deposit Insurance Corporation because it gives depositors

priority over general creditors. The Federal Deposit Insurance Corporation assumes liability for all depositors in a purchase and assumption transaction and would have to assume liability for general creditors if they were given the same status as a depositor. The bill is intended to protect depositors up to \$100,000 and protects the Federal Deposit Insurance Corporation from contingent claims of general creditors.

The committee recommends House Bill No. 1042 to raise the capital stock requirements of a banking association from \$50,000 to \$100,000 and to raise the surplus requirements from \$25,000 to \$50,000. Although the initial capitalization of a bank exceeds the amounts required in this bill, the bill grants the State Banking Board the flexibility to require additional capital and surpluses.

### **GROUP PROPERTY AND CASUALTY INSURANCE STUDY**

House Concurrent Resolution No. 3078 directed a study of the desirability of enacting legislation to regulate specifically plans providing property and casualty insurance by groups and associations, the premium rates charged under the plans, and the cancellation provisions of the plans.

#### **Property and Casualty Plans in North Dakota**

Groups or associations may solicit insurance from insurance companies to provide coverage for their members. If the insurer finds these policies to be unprofitable, the insurer may cancel the policies.

North Dakota Century Code Chapter 26.1-25 regulates premium rates for fire, property, and casualty insurance to prevent excessive, inadequate, or unfairly discriminatory rates. Section 26.1-25-03 requires consideration of certain data when establishing rates for property and casualty insurance. Under this provision, due consideration must be given to past and perspective loss experiences, catastrophe hazards, reasonable margins for underwriting profit and contingencies, and other events. Section 26.1-25-04 requires rate filings to be made with the Commissioner of Insurance. The commissioner is required to review the filings as soon as possible to determine whether they meet the requirements of Chapter 26.1-25. The commissioner is authorized under Section 26.1-25-05 to disapprove filings that do not meet the requirements of Chapter 26.1-25.

Section 26.1-30-19 requires all insurance policies, contracts, agreements, and rate schedules to be filed with and approved by the Commissioner of Insurance before issuance or delivery in this state. Section 26.1-30-19(4) provides that no casualty or fire and property insurance policy, certificate, contract, or agreement may be issued for delivery or delivered to any person in the state until it has been filed and approved by the commissioner to the extent the rates are filed and approved pursuant to Chapter 26.1-25. Sections 26.1-30-20 et seq. provide a procedure for approving or disapproving insurance policies, certificates, contracts, agreements, or rate schedules.

#### **Testimony**

Many trade associations and other groups have been soliciting insurance policies for their members

from insurance companies whose insurance plans are issued at rates that are inadequate to cover the cost of underwriting. Additionally, many political subdivision property and casualty insurance policies have been cancelled due to nationwide underwriting losses. Some of the cancellation problems arise when inexperienced companies do not fully evaluate the risks involved. The committee was advised that all insurance policies and rate schedules must be filed with the Commissioner of Insurance before the policies are issued. The Commissioner of Insurance has the authority to disapprove all rate schedules either because of excess or insufficient premiums. Representatives of the Commissioner of Insurance testified that it is difficult to determine adequately whether rates are sufficient for property and casualty insurance without the assistance of an actuary.

The committee reviewed a bill draft that would have defined direct response or mass market advertising as an unauthorized insurance transaction. The purpose of the bill draft was to prohibit solicitation by trade associations and other groups, that were not licensed in North Dakota, through direct response or mass market advertising. Committee members determined that the problem appears to be with companies licensed to do business in the state whose policy rates were not being adequately scrutinized by the Insurance Department.

### **Conclusion**

The committee makes no recommendation with respect to regulating specifically plans providing property and casualty insurance by groups and associations, the premium rates charged under the plans, and the cancellation provisions of the plans.

### **CANCELLATION, NONRENEWAL, AND DECLINATION OF COMMERCIAL PROPERTY AND CASUALTY AND AUTOMOBILE INSURANCE STUDY**

House Concurrent Resolution No. 3082 directed the study of the provisions regulating cancellation, nonrenewal, and declination of property and casualty insurance policies and automobile insurance policies to determine the desirability of enacting similar requirements for the cancellation, nonrenewal, and declination of commercial property and casualty insurance policies.

### **Cancellation, Nonrenewal, and Declination**

State law regulates the declination, cancellation, or nonrenewal of automobile insurance policies and property and casualty insurance policies to the extent that these policies cover noncommercial vehicles and property. These provisions were taken from model acts developed by the National Association of Insurance Commissioners. The provisions relating to declination, cancellation, or nonrenewal of automobile insurance policies and property and casualty insurance policies are aimed at requiring notification of the declination or termination of noncommercial policies. Additionally, cancellation of insurance policies during the term of the policy has been limited.

North Dakota Century Code Section 26.1-24-07

prohibits the forfeiture, suspension, or impairment of an insurance policy for nonpayment of any note or obligation taken in payment of a premium, unless the insurer provides notice not less than 30 days prior to the maturity of the premium, note, or obligation.

The declination, cancellation, and nonrenewal provisions relating to noncommercial property and casualty insurance policies are codified in Sections 26.1-39-10 through 26.1-39-21. The scope of these sections is limited to policies or risks located or resident in this state issued or renewed after July 1, 1983, which insure any of the following:

1. Loss of or damage to real property which consists of not more than four residential units, one of which is the principal place of residence of the insured.
2. Loss of or damage to personal property owned by the insured or used for personal, family, or household purposes within a residential dwelling.
3. Legal liability of the insured arising out of bodily injury or death or damage to property, except that arising out of business pursuit other than professional legal or medical services.

Additionally, the scope of these sections does not apply to certain specified policies, including workmen's compensation policies, automobile policies, and policies primarily insuring risks arising from the conduct of a commercial or industrial enterprise.

The declination, cancellation, and nonrenewal provisions applicable to automobile insurance policies are codified in Sections 26.1-40-01 through 26.1-40-12. The application of these provisions is limited to certain specified automobile policies, including automobile liability coverage, no fault benefits coverage, uninsured motorist coverage, and others. The scope of the provisions is further limited to policies covering the following motor vehicles:

1. Private passenger vehicles or station wagons, not used as public or livery conveyances, nor rented to others.
2. Four-wheel motor vehicles with load capacities of 1,500 pounds or less, which are not used in an occupation, profession, or business of the insured, nor used for a public or livery conveyance, nor rented to others.

The following policies are specifically excluded from the scope of the declination, cancellation, and nonrenewal provisions relating to automobile insurance:

1. Policies in effect less than 60 days from the time notice of cancellation is mailed unless it is a renewal policy.
2. Any policy issued under the North Dakota assigned risk plan.
3. Any policy insuring more than six motor vehicles.
4. Any policy covering the operation of a garage, automobile sales agency, repair shop, service station, or a public parking place.
5. Any policy providing insurance only on excess basis.
6. Any other contract providing insurance which incidentally provides insurance for motor vehicles.

The provisions relating to declination, cancellation, and nonrenewal of property and casualty insurance

parallel to a large degree the provisions relating to the declination, cancellation, and nonrenewal of automobile policies. Declination is defined in Sections 26.1-39-11(1) and 26.1-40-01(1) as the refusal of an insurer to issue a policy upon the receipt of a written nonbinding application or written request for coverage from the insurance agent or an applicant. According to Sections 26.1-39-11(4) and 26.1-40-01(5), termination refers to the act of canceling insurance coverage during the term of the policy or nonrenewing a policy beyond its original term.

Insurers generally have broader authority to decline or refuse to renew an insurance policy as compared to canceling the policy if specific procedures are followed. An exception to this rule exists for terminating an insurance policy based upon race, religion, and other prohibited reasons listed in Sections 26.1-39-17 and 26.1-40-11. An insurer's authority to cancel a policy during its term is limited to certain specified reasons, including the nonpayment of premium, discovery of fraud or material misrepresentation, and other reasons specified in Sections 26.1-39-13 and 26.1-40-02.

### **Testimony**

In previous years, the market for commercial property and casualty insurance and automobile insurance has been competitive and widely available. Recently, however, the companies offering commercial property and casualty insurance and automobile insurance have become less numerous.

Representatives of the Commissioner of Insurance testified that cancellation during the term of a commercial property and casualty insurance policy has been a serious problem in North Dakota. Several factors have contributed to this problem. When interest rates are low, insurance companies no longer compete to obtain premium dollars to invest. The lower interest rates cause increased premium rates, capped premium amounts per agent, and the elimination of some insurance coverage. The nationwide risk concept, under which insurance companies judge risk based upon nationwide statistics, has caused insurance premium rate increases in North Dakota. Frivolous claims, broad judicial interpretations of insurance coverage under insurance policies, and increases in the size and number of personal injury recoveries are additional factors that have led to termination and nonrenewal of commercial insurance policies.

Although North Dakota considers midterm cancellation of commercial insurance as an unfair trade practice, some companies use the lack of a commercial property and casualty insurance policy cancellation provision to break insurance contracts and renegotiate policies for higher premiums. Twenty-seven states currently handle midterm cancellation of commercial insurance as an unfair insurance practice and nine states cover midterm cancellation within the guidelines of commercial cancellation, declination, and renewal provisions.

The committee reviewed a bill draft that would have extended the regulation of cancellation, declination, and renewal and nonrenewal of individual lines of property and casualty, and automobile insurance to commercial lines of property

and casualty and automobile insurance by removing the language in those statutes that limited the law to individual coverage.

Testimony and committee discussion reviewed the distinction between personal lines and commercial lines of insurance. Commercial lines of insurance, as opposed to personal automobile and homeowners insurance, require extensive underwriting, claims, and rating expertise. In addition, various reasons for cancellation of the different types of policies may require different advance notice requirements. One of the differences between commercial and personal lines of insurance that requires the cancellation, declination, or nonrenewal of a commercial policy to be regulated separately from individual or personal lines policies is dislocation in the reinsurance marketplace. A primary insurance carrier that loses its reinsurance may be financially jeopardized if it is required to stay on the risk, thus impairing the insurance company's ability to serve other customers not affected by the loss of reinsurance. It was suggested that loss of reinsurance should be an allowable reason for cancellation of commercial policies. In addition, it was suggested that a policy of commercial line insurance should be subject to cancellation if the policyholder failed to comply with loss control recommendations made in the interests of providing a safe workplace for workers and a safe environment for neighbors.

Opposition was expressed to applying the declination standard used for personal lines of coverage to commercial insurance. The definition of declination includes "the offering of insurance coverage with a company within an insurance group which is different from the company requested on the nonbinding application or written request for coverage or the offering of insurance upon different terms than requested in the nonbinding application or written request for coverage . . ." The committee was advised that in commercial insurance many difficult lines of liability insurance are offered by insurance corporations operating many different insurance companies. Some operate only in a few states, some operate to provide only certain types of coverages, and others to serve certain classes of businesses. Many complex insurance risks today are handled by different companies within a group. Under the declination definition, transferring the application or limiting the available coverages would be a difficult standard for commercial insurance companies to meet.

Opposition was also expressed to making commercial lines insurance cancellation, declination, and nonrenewal subject to Section 26.1-39-18(4), which allows an aggrieved insurance consumer to sue to recover additional damages stemming from violations of the law. The view was expressed that sanctioning additional litigation would perpetuate the liability crisis.

### **Conclusion**

The committee makes no recommendation with respect to extending the cancellation, nonrenewal, and declination provisions of personal line property and casualty insurance policies and automobile insurance policies to commercial policies.

# JOBS DEVELOPMENT COMMISSION

The Jobs Development Commission was assigned one study. Senate Concurrent Resolution No. 4047 directed the Legislative Council to establish a Jobs Development Commission composed of legislators, officials from the executive branch of government, officials from higher education, and representatives of private industry to study methods and to coordinate efforts to initiate and sustain new economic development and to spur the creation of new employment opportunities for the citizens of North Dakota.

Commission members were Senators Gary J. Nelson (Chairman), William C. Parker, Chester Reiten, R. V. Shea, and Art Todd; Representatives Rick Berg, Jay Lindgren, Don Lloyd, and Dan Ulmer; and Citizen Members Clair T. Blikre, Robert Heskin, Don Mathsen, Richard Rayl, Robert J. Whitney, and John R. Wilson.

The report of the commission was submitted to the Legislative Council at the biennial meeting of the Council in November 1986. The report was adopted for submission to the 50th Legislative Assembly

## Background

Senate Concurrent Resolution No. 4047 reflects the Legislative Assembly's recognition of the need to strengthen and diversify the economic base of North Dakota through a concerted effort by the public and private sectors to develop and implement state economic development policies that retain, strengthen, and expand existing business and industry and encourage the startup and growth of new business and industry in the state.

State and local government officials have long been aware that an aggressive economic development plan is essential to foster economic diversification through the development of new industry and business, and the expansion of existing industry and business in the state.

Legislative initiatives presently encourage economic development through a variety of measures including tax incentives, tax increment financing, business and industrial financing, public contract preference laws, and promotional activities. The Economic Development Commission is directed by North Dakota Century Code (NDCC) Section 54-34-01 "to carry out a program of promotion and economic development to enhance the general welfare of the state through the establishment of new business and industry, the expansion of existing business and industry, the development of new markets for agricultural, and other products, the encouragement of international trade, the development of tourism, and the attraction of new residents, business, and industry."

## Activities in the States

In an effort to formulate ideas and strategies that stimulate job creation, the commission monitored economic development initiatives in other states. A recent wave of state economic initiatives was stimulated by several forces, including the recessions of the early 1980s, a diminishing federal presence in

economic development, a new spirit of entrepreneurship and local business development, and foreign competition. A representative of the National Conference of State Legislatures informed the commission that newer economic strategies include entrepreneurial development, in which states take a neutral role in fostering business startups and expansion, and industrial competitiveness, in which states play a more active role by giving assistance to specific industries. Other economic development initiatives used by states over the last decade include recruiting industries from other states, investing public funds in education, job training and placement, improving infrastructure, securing foreign investment, and promoting exports. Some significant themes have emerged in state economic development. "Partnership" between the public and private sectors describes the working relationship on economic development matters that has emerged in many states among state and local governments, business, universities, and labor. For states dependent upon one or two major industries that are subject to economic highs and lows or to the threat of foreign competition, diversification of the economic base has become a major objective. States have also sought to build on their strengths. There has been an increasing acceptance by states of a "home-grown" economic development strategy rather than "smokestack chasing" in light of studies such as the one performed by Dr. David Birch of the Massachusetts Institute of Technology which recognized that small businesses create 50 to 80 percent of new jobs.

The state of Kansas recently embarked on an economic development initiative that may become a model for other states. In response to a growing awareness of other states' efforts to foster new industry and a concern that the state was losing its competitive edge in attracting economic development, the 1985 Kansas Legislature appropriated funding for a research study of Kansas business conditions and climate and for the development of a state strategy for economic development. Matching funds were provided by major Kansas organizations and the University of Kansas provided an equivalent contribution in resources. The study was undertaken by the Institute for Public Policy and Business Research at the University of Kansas, in close consultation with various private consultants. The main elements of the study were (1) an identification of key factors affecting state economic development as perceived by Kansas business, state, and community leaders, and by non-Kansans; (2) an identification of key factors affecting decisions to locate or not to locate in the state; (3) a delineation of state economic trends, strengths, and weaknesses; (4) an analysis of other states' incentives and strategies; (5) a target industry analysis of the types of industries best suited to the state and its regions; and (6) recommendations for consideration.

A Kansas legislative committee on economic development adopted the basic strategy recommended by the study and prepared legislation based on the study which was passed by the 1986 Kansas

Legislature. The nine-bill package reorganized the state economic development department into a state commerce department; created special economic development committees in the legislature; established a public-private venture capital program called Kansas Venture Capital, Inc.; granted tax credits for venture capital companies; and created Kansas, Inc., a private-sector group to coordinate and advise the Governor, the Department of Commerce, and legislative committees. The package also provided a tax credit for research and development; created the Kansas Technology Enterprise Corporation to speed research and development from universities and colleges to the private sector; approved a proposed constitutional amendment that would allow the state to participate in projects that benefit economic development; approved a proposed constitutional amendment for a state-run lottery to fund economic development programs; and approved a proposed constitutional amendment to allow city and county officials to lower or eliminate local property taxes for up to 10 years for expanding industrial plants.

The Kansas initiative represents a concerted effort by the public and private sectors, on a bipartisan basis, to first study a state's economy and then enact a legislative package. A similar effort was undertaken by Indiana in 1981-83 involving 53 bills relating to job training, business assistance and promotion, research, infrastructure improvement, investment capital, and tax incentives.

### **North Dakota's Rankings**

The commission reviewed studies that purport to measure and rank state business climates and economic activity. In June 1985 the Alexander Grant general manufacturing climate study of the 48 contiguous states ranked North Dakota second among the states in general attractiveness to manufacturing firms. Factors considered in the study were state and local government fiscal policies, state-regulated employment costs, labor costs, availability and productivity of the labor force, and other manufacturing-related issues. In June 1986 the Grant Thornton (formerly Alexander Grant) manufacturing climate study ranked North Dakota fifth among the states. Testimony by a representative of the Economic Development Commission indicated that the state's drop in ranking from second to fifth was due in large part to a less favorable analysis of the ability of state and local authorities to match general expenditures with general revenues. Finally, in its October 1986 issue, Inc. Magazine ranked North Dakota 49th among the states on the basis of actual state performance in stimulating entrepreneurial activity and economic expansion. The magazine article indicated that a state's ranking signifies its economy's relative success, over a four-year period, in three areas—job creation, new business creation, and young company growth.

### **Testimony**

During the interim the commission toured vocational educational facilities at the State School of Science and the Northern Crops Institute and

various industrial plants in Wahpeton and Fargo, including 3M Company; Wahpeton Canvas Company, Inc.; GPK Products, Inc.; Great Plains Software; Alloway Manufacturing; and Steiger Tractor, Inc. The commission sought ideas and suggestions from management representatives of those firms regarding the state's business climate. Those representatives' suggestions included that the Legislative Assembly limit the state's corporate income tax to a level that would encourage businesses to locate in the state, review the state's Sunday closing law, encourage the growth of high technology industries, review the state's system of higher education for possible consolidation or elimination of certain institutions, provide solutions to the rising costs of liability insurance, and stimulate competition in the health insurance industry. A 3M Company representative indicated that companies generally consider the following factors in locating their plants:

1. Proximity to suppliers and customers.
2. Availability of skilled labor.
3. Government attitude toward taxes on business and industry and the taxes their employees pay.
4. Cost and availability of utilities.
5. Productivity and quality of workers.
6. Government receptivity to business and industry.
7. Progressiveness of the community and quality of life for employees.
8. Efficient transportation facilities.
9. Proximity to other company facilities.

The commission heard testimony from representatives of the Greater North Dakota Association, the Industrial Development Association of North Dakota, the North Dakota League of Cities, local officials, various trade and labor organizations, public and private development agencies, and state departments, agencies, and institutions, regarding the state's economic climate, existing economic development programs, and suggestions for initiatives to stimulate the state's economy. A representative of the Industrial Development Association indicated that the state's inherent disadvantages include its distance from major markets and suppliers, a comparatively small labor force, and the state's poor image. Economic activities for which North Dakota has a locational advantage include agricultural processing and derived effects from energy development. A professor of Agricultural Economics at North Dakota State University, Dr. Thor Hertsgaard, indicated that the North Dakota economy is primarily an export-based economy driven by income generated by primary economic sectors that earn income from sources outside the state. This income is multiplied due to the spending of some of those dollars within the state for inputs that must be provided by the trade and service sectors in the state's economy. The primary economic sectors are agriculture, mining, manufacturing, tourism, and federal government outlays for wages and salaries of federal employees and for contract construction in the state. The trade and service sectors are the supporting sectors that provide the primary sectors with the inputs needed for production. The trade and service sectors consist of wholesale and retail trade; transportation; contract construction; communi-

cations and utilities; nonmetallic mining; finance, insurance, and real estate; business and personal services; professional and social services; and local government.

The Greater North Dakota Association advocates an aggressive state economic development effort aimed at expanding the primary income and job creation sectors of the state's economy. A representative of the Industrial Development Association of North Dakota indicated that the state's economy can be stimulated by assisting existing industry and bringing in new industry related to the state's primary economic sectors. The association also recommended that the Legislative Assembly consider the Kansas economic development study as a guide to future efforts in North Dakota. The commission reviewed an economic development work plan for North Dakota prepared by the Economic Development Commission. The plan suggests that although the Economic Development Commission should work to recruit new businesses from in-state and out-of-state sources, recruitment of new businesses should not be the central focus of the Economic Development Commission's activities in light of studies indicating that nearly 75 percent of all new jobs come from existing sources of employment.

On the basis of testimony received and information gathered, the commission considered primarily two subject matters—state-supported venture capital and public pension fund investments.

#### **State-Supported Venture Capital**

Testimony indicated repeatedly that a main obstacle to the development of business and employment opportunities in the state is a lack of investment capital for new or expanding businesses. The commission reviewed state-supported venture capital programs, adopted in varying forms by more than 30 states since the mid-1970s, which directly or indirectly increase the amount of equity or risk capital available to private firms and help create an entrepreneurial climate. According to a recent publication of the National Conference of State Legislatures, states have used three basic approaches designed to increase the amount of venture capital available to private businesses:

- Creating state-chartered quasi-public and private venture capital funds.
- Allowing public pension funds to make venture capital investments.
- Providing tax incentives to encourage private investment in venture capital funds or to encourage private venture capital investment directly in specified types of companies.

The state presently provides tax incentives to encourage private investment in venture capital corporations. North Dakota Century Code Chapter 10-30.1 grants a tax credit to a qualified taxpayer who makes an investment in a venture capital corporation organized pursuant to that chapter. The credit applies against any state income tax liability imposed on the taxpayer in a maximum amount equal to 25 percent of the taxpayer's investment up to a total tax credit of \$250,000. A venture capital corporation organized

pursuant to Chapter 10-30.1 must provide financing to small business concerns doing business in North Dakota for the sole purpose of enhancing the production capacity of the business or its ability to do business in the state. Testimony indicated a venture capital corporation, recently organized in the state pursuant to Chapter 10-30.1, is attempting to raise \$4 million for capital investment in qualified small businesses in the state.

At the request of representatives of the Economic Development Commission, the commission considered a bill draft which provided for the establishment of a public venture capital corporation to be organized for the purpose of taking equity ownership positions in new or expanding North Dakota businesses. The bill draft required the Bank of North Dakota, and allowed other public and private investors, to purchase stock in the corporation, and provided for additional capitalization through a transfer of funds presently deposited pursuant to Chapter 6-09.2 in the industrial development revenue bond fund. The bill draft designated the Economic Development Commission as the board of directors of the corporation. The corporation would be required to contract with a professional investor that is experienced in making successful venture capital investments for the management of the investment fund.

The bill draft provided additional capitalization for the corporation by transferring to the Bank of North Dakota funds presently deposited in the industrial development revenue bond fund for the purpose of purchasing additional shares of stock in the corporation. The industrial development revenue bond guarantee program, NDCC Chapter 6-09.2, was created by the 1981 Legislative Assembly to encourage the purchase of Municipal Industrial Development Act bonds for the purpose of furthering industrial expansion and development in the state. The Economic Development Commission administers the program and is authorized to guarantee debt service payments required by evidence of indebtedness on any industrial development project upon application of a municipality.

Representatives of the Economic Development Commission indicated that no bonds have been guaranteed by the Economic Development Commission since the program was enacted in 1981. Chapter 6-09.2 allows the Economic Development Commission to guarantee bonds on industrial development projects in an amount up to 20 times the unencumbered balance in the bond guarantee fund. This amount of leverage was cited by Economic Development Commission representatives as a possible reason the program is not attractive. The Economic Development Commission passed a resolution establishing the amount of bonds that can be guaranteed by the commission at 10 times the unencumbered balance in the bond guarantee fund. Testimony indicated the balance of the industrial development revenue bond fund on August 29, 1986, was \$1,400,649.60. The bill draft allowed the venture capital corporation's board of directors to continue to guarantee bonds under the industrial development revenue bond guarantee program by utilizing

available funds in the corporation's investment fund.

Testimony and committee discussion indicated general agreement on the need for venture capital in the state; however, suggestions relating to the degree of state involvement in a venture capital program varied widely. Suggestions included the establishment of a private venture capital corporation capitalized in part by state funds, a venture capital corporation operated as a Small Business Investment Company capitalized through the purchase of common stock by private investors and a matching purchase of nonvoting preferred stock by the state similar to Kansas Venture Capital, Inc., and the establishment of a state fund for the purpose of coinvesting in the state with private venture capital firms that would be responsible for providing management assistance. Commission members did agree, however, that the funds set aside for the industrial development revenue bond guarantee program should be utilized for economic development purposes.

Commission discussion concerning the bill draft focused primarily on what role the professional investor should play in the management of companies receiving capital investments made by the corporation, the composition and need to depoliticize the corporation's board of directors, and alternative sources of capitalization for the corporation. Representatives of the Bank of North Dakota supported the concept of making venture capital available in the state and indicated that any state venture capital program must provide for competent management, a mix of public influence and private expertise on the board of directors, a provision for out-of-state investments to provide balance and stability to the investment fund, and a specific exception to the state's open records and meetings laws. Those representatives also indicated that the Bank of North Dakota should not be required to invest in the venture capital corporation.

### **Public Pension Fund Investments**

In recent years many states have enacted legislation to direct public retirement funds toward in-state investments as a means of fostering the state economy. The commission reviewed the legislation of several of these states. For example, in 1985 the Arkansas Legislature substituted a prudent investor rule for the state's "legal list" as the only statutory restriction to investments made by the state's public employee retirement systems. Legal lists generally specify the maximum amount of assets that can be invested in different types and qualities of investments. The Arkansas statute requires fiduciaries administering funds held by the Arkansas public employee retirement systems to manage those funds when appropriate investment alternatives are available so as to "favorably impact the economic condition of, and maximize capital investment in" the state. The statute states the Arkansas Legislature's intention that as assets become available for investment the systems must seek to invest, in accordance with the prudent investor rule, not less than five percent nor more than 10 percent of their portfolios in state-related investments.

The commission also reviewed information describing other states' initiatives in allowing public pension fund investments in venture capital projects. For example, in 1982 the Michigan Legislature authorized the State Department of Treasury, custodian of five separate retirement systems, to invest up to five percent of the systems' assets in qualified small businesses or venture capital firms. The department seeks to invest in businesses with above average potential for growth, particularly technology-based firms and companies with unique products. As of February 1986, the department had invested more than \$126 million, and its portfolio included 25 high growth firms and 12 venture capital funds.

Many states, including North Dakota, have adopted constitutional provisions prohibiting the state and its political subdivisions from subscribing to or becoming the owner of capital stock in corporations or associations. Section 18 of Article X of the Constitution of North Dakota was adopted for the primary purpose of prohibiting the state from indulging in the practice of making donations, or giving or loaning the state's credit, to companies promising to construct railways or other internal improvements. The North Dakota Supreme Court has interpreted this constitutional provision on a number of occasions in light of legislative attempts toward promoting industrial development in the state. The commission was advised North Dakota case law recognizes that the state or any county or city, when engaged in making internal improvements or engaged in a state industry, enterprise, or business, may loan, give it credit, make donations, or subscribe to or become the owner of capital stock in any association or corporation. A 1967 Attorney General's opinion determined that "the State Employees Retirement Fund may be invested in capital stock" because "the state is engaged in the investing business for its employees which is a lawful business or enterprise."

The governing authority of the Public Employees Retirement System is the Retirement Board, which is empowered by statute to select a funding agent or agents to invest the moneys of the system. There are no statutory restrictions on the types of investments that may be made for the Public Employees Retirement System. The board sets the policies for the funding agents to follow and has established a prudent person standard as part of its investment policy.

The State Investment Board is charged with the investment of the state bonding fund, Teachers' Fund for Retirement, state fire and tornado fund, workmen's compensation fund, Veterans Home improvement fund, National Guard training area and facility development trust fund, and the National Guard tuition trust fund, and may appoint an investment director or advisory service that is experienced in the field of investments. The investment director has the power to make purchases, sales, exchanges, investments, and reinvestments of the funds under the supervision of the board subject to limitations contained in the law or the policymaking regulations or resolutions promulgated

by the board. North Dakota Century Code Section 21-10-07 lists the types of securities and investments that are legal investments for the funds under the supervision of the State Investment Board which includes common or preferred stock of any corporation organized under the laws of any state, so long as no more than 20 percent of the assets of the fund are invested in common and preferred stocks.

Testimony indicated that the combined assets of the funds administered by the State Investment Board and the Retirement Board total approximately \$800 million. Testimony indicated that \$1 million of the public employees retirement fund is invested directly in Montana-Dakota Utilities debentures and that North Dakota may be benefiting indirectly from Government National Mortgage Association investments and other similar fund investments. The chairman of the Workmen's Compensation Bureau indicated that approximately \$500,000 of the workmen's compensation fund is presently invested in North Dakota farm loans. Testimony indicated that both the State Investment Board and the Retirement Board have examined proposals from out-of-state venture capital firms for the formulation of a venture capital pool that could provide investment capital for North Dakota businesses that meet certain investment criteria.

The commission considered a bill draft which would have required the Retirement Board through its funding agents and the State Investment Board to invest not less than two percent of the retirement funds administered by the Public Employees Retirement Board and not less than two percent of the total moneys of the Teachers' Fund for Retirement in North Dakota-related investments calculated to establish, rehabilitate, or expand business and industry, or otherwise maximize capital investment in the state. The bill draft was opposed by the State Investment Board, Public Employees Retirement System, Association of Former Public Employees, North Dakota Retired Teachers Association, and the North Dakota Public Employees Association. Testimony indicated that the bill draft would have compromised the fiduciary integrity of investment trustees who, pursuant to their fiduciary responsibilities, must discharge their duties for the exclusive purpose of providing benefits to fund participants and their beneficiaries.

No objection was raised to commission proposals for encouraging rather than mandating the State Investment Board and Public Employees Retirement Board to invest funds in the state. Representatives of the State Investment Board indicated that legislation allowing the board to invest the funds under its supervision pursuant to a prudent investor rule, rather than a legal list, would encourage the board to invest funds directly in state-related investments.

### **Securities Laws**

The commission considered the impact of the state's securities laws on capital formation in the state. Testimony indicated that the state's securities laws may be overly restrictive, impose excessive costs on persons who comply with the laws, and in some

instances inhibit capital formation. The North Dakota Securities Commissioner indicated that it is only a perception that the state's securities laws or enforcement procedures are overly restrictive. A representative of the Industrial Development Association indicated that capital formation is inhibited regardless of whether the problem with the state's securities laws is real or perceived. The commission concluded the difference in opinion regarding the nature of the state's securities laws may be a philosophical difference between individuals within the Office of the Securities Commissioner and those outside that office which would be difficult to address with legislation.

### **Federal Support of Research and Development**

The commission considered trends in federal support of applied research and development at North Dakota universities and colleges. Testimony indicated that the federal government funds larger consortium research and development programs by providing seed capital and then allowing private industry in the states to assume a primary role in the research and development activity. The philosophy behind the federal government's approach to research and development programs is to enhance the pace at which research and development technology becomes commercialized, to offer more industrial involvement in the design of research and development programs, and to allow states a greater role in the ongoing development and operation of research and development programs. Testimony indicated that the state has focused its support in the past for agricultural research and development programs, and as a result, research and development initiatives in technologies related to energy, mining, and mineral development have not been provided a mechanism for securing state funds to compete for federal research and development programs. Testimony suggested that the commission review options for the development of a mechanism to enable the state's universities and colleges to compete successfully with matching state support in the federal research and development marketplace. The options suggested included appropriating undesignated research funds in the institutional budgets of universities and colleges, creating a pool of funds for research through the Economic Development Commission, and establishing strong state tax or regulatory incentives to encourage corporate investment in university-based research programs within the state.

### **Williston Basin Development**

The commission received testimony regarding a proposal for an investigation of natural resource development in North Dakota's Williston Basin. This region of northwestern North Dakota, composed of the counties of Burke, Divide, Dunn, McKenzie, Mountrail, and Williams, contains considerable reserves of lignite, oil and natural gas, inorganic salts, various clays, sulphur compounds, and water which provide the potential for production of numerous chemicals and other materials. These resources, combined with abundant local electric generation and metal ores from neighboring states and Canadian

provinces, provide input for a potential complex of processing and manufacturing facilities. Testimony indicated that a development plan would be necessary to identify those products and byproducts that could be formulated from the natural resources of the region and produced on an economically competitive basis. The proposal outlined a three-phase study to yield the marketing tools necessary for communities in the region to attract or establish industries which would utilize local resources. The first phase would involve an updated assessment of the natural resources and economic conditions in the region of the study. The second phase would involve an industry targeting project to examine the potential of siting several mutually supporting chemical processing plants in the region. The third and final phase would involve a marketing development study to understand more fully the industries that appear economically viable in the region. Testimony indicated a cooperative effort would be needed to implement the proposal.

### **Recommendations**

The commission recommends Senate Bill No. 2050 to establish a public venture capital corporation for the purpose of organizing and managing an investment fund capitalized through the sale of shares of stock to the Bank of North Dakota and other public and private investors to provide a source of investment capital for the establishment, expansion, and rehabilitation of business and industry in the state. The bill requires the Bank of North Dakota to purchase shares of the corporation in an amount not less than \$1.2 million annually, and transfers to the Bank of North Dakota the funds deposited in the industrial development revenue bond fund for use in purchasing additional shares of the corporation. The bill authorizes the corporation to administer an industrial development revenue bond guarantee program and provides a tax credit for private investments in the corporation. The bill designates the Economic Development Commission as the board of directors of the corporation and requires that board to contract with a professional investor for the purpose of managing the corporation's investment fund. Commission members, not left with sufficient time in the interim to fully examine and receive expert testimony concerning a state venture capital program, agreed the bill draft would require refinement to further depoliticize the board of directors, define more fully the role of that board, and provide means to further stimulate private investment in a public venture capital corporation.

The commission recommends House Bill No. 1043 to provide for the application of the prudent investor rule to the administration of funds under the

management of the State Investment Board. The bill defines the prudent investor rule to mean that "in making investments the fiduciaries shall exercise the judgment and care, under the circumstances then prevailing, that an institutional investor of ordinary prudence, discretion, and intelligence exercises in the management of large investments entrusted to it, not in regard to speculation but in regard to the permanent disposition of funds, considering probable safety of capital as well as probable income." The bill would repeal NDCC Section 27-10-07, which sets forth a legal list of investments authorized to be made by the board.

The commission recommends Senate Bill No. 2051 to require the State Investment Board, whenever consistent with its fiduciary responsibilities, to invest not less than two percent of the total moneys of the Teachers' Fund for Retirement and the workmen's compensation fund in North Dakota-related investments calculated to establish, rehabilitate, or expand business and industry, or otherwise maximize capital investment in the state. The bill imposes the same requirement on the Public Employees Retirement Board with respect to retirement funds under its administration. The bill allows the boards to make alternative investments if they determine during any fiscal year that compliance with the bill would result in lower overall earnings for the funds than obtainable from alternative investment opportunities that would provide equal or superior security. The bill provides that if such alternative investments are made, the boards must submit findings and determinations relating to their decision, together with a description of the types, quantity, and yield of investments substituted, to the Budget Section of the Legislative Council at the close of the fiscal year in which alternative investments are made.

The commission recommends House Concurrent Resolution No. 3005 to direct the Legislative Council to again establish a Jobs Development Commission composed of legislators, officials from the executive branch of government, officials from higher education, and representatives of private industry to study methods and coordinate efforts to initiate and sustain new economic development in the state. Testimony indicated that the commission provided a necessary focal point for individuals and state and private economic development agencies and organizations to develop and execute policies and plans for state economic development. Commission members agreed that the study and coordination of economic development initiatives is an ongoing process that should continue through the 1987-89 biennium.

# JUDICIAL PROCESS COMMITTEE

The Judicial Process Committee was assigned two studies. House Concurrent Resolution No. 3036 directed a study of the impacts and problems associated with numerous specific kinds and types of statutory liens and various types of property that are exempt from attachment or mesne process and levy or sale upon execution and other final process issued from any court and the various priorities and rights they create. Senate Concurrent Resolution No. 4065 directed a study of the comparative negligence laws and their interaction with the products liability, strict liability, and workmen's compensation laws in light of recent North Dakota Supreme Court decisions.

Committee members were Representatives William E. Kretschmar (Chairman), Connie L. Cleveland, Raymond Schmidt, R. L. Solberg, Gene Watne, and Thomas C. Wold; and Senators James A. Dotzenrod, Ray Holmberg, Jerry Meyer, and Wayne Stenehjem. Senator Wayne Stenehjem was appointed to membership on the committee following the resignation of Representative Pat Conmy from the Legislative Assembly in December 1985.

The report of the committee was submitted to the Legislative Council at the biennial meeting of the Council in November 1986. The report was adopted for submission to the 50th Legislative Assembly.

## LIEN LAW AND EXEMPT PROPERTY STUDY

House Concurrent Resolution No. 3036 reflects the Legislative Assembly's concern regarding the proliferation and disparity of statutory liens and various exemption statutes scattered throughout the North Dakota Century Code (NDCC).

### Background

Statutory liens are those liens that arise solely by force of statute upon specified circumstances or conditions, but do not include any liens provided by or dependent upon an agreement to give security. This latter type of lien is a consensual lien and is based upon an agreement between the debtor and creditor that the creditor is to have a lien on certain real or personal property of the debtor.

The statutory liens authorized under North Dakota law were enacted over a period of years by the Legislative Assembly as the perceived need for the specific lien arose. As a result, the priorities given these liens are subject to some confusion. This confusion is especially prevalent when dealing with statutory agricultural liens, where specific priorities may be provided in certain instances but not in others. In addition, many statutory liens contain so-called relation back privileges, which in effect result in hidden or secret liens in that the lien may be filed and third parties become aware of it sometime after the lien actually came into existence.

Provisions identifying property that is exempt from service of process are scattered throughout the code. These exemptions normally are provided for persons facing insolvency or bankruptcy, but may also inure to the general protection of certain classes of individuals or entities, including governmental entities.

## Statutory Agricultural Liens

The committee focused its attention on statutory agricultural liens, as these liens are causing the greatest number of problems. Existing statutory agricultural liens are contained in NDCC Title 35. These liens include threshing or drying liens (Chapter 35-07); crop production liens (Chapter 35-08); motor fuel liens (Section 35-08-04); fertilizer, farm chemicals, and seed liens (Chapter 35-09); and sugar beet production liens (Chapter 35-10). The committee concentrated its effort on developing a workable solution to problems surrounding these liens. Problems described to the committee included priority uncertainties caused by relation back privileges accorded certain statutory agricultural liens, numerous statutory agricultural liens which purport to grant priority over all other liens or encumbrances, and the ever-increasing number of liens in general. Few problems with consensual liens were reported because of their perfection requirements.

After receiving input from various individuals and organizations such as representatives of the Real Property, Probate, and Trust Section of the State Bar Association of North Dakota and the North Dakota Grain Dealers Association, the committee examined the laws concerning crop liens and crop mortgages in other midwestern agricultural states. The committee found that the lien law systems of Montana, Nebraska, and South Dakota are similar to the system in North Dakota. However, the systems enacted in Iowa, Kansas, and Minnesota differ substantially from the North Dakota lien law system. Rather than providing a separate lien with varying requirements for each creditor seeking the lien, these states provide for a comprehensive lien available to persons harvesting or processing agricultural crops or products and a comprehensive lien available to persons furnishing supplies or labor used in the production of agricultural crops or products.

### Lien Proposals

The committee examined several different proposals designed to remedy the problems presented by the disparity and proliferation of statutory agricultural liens. The committee considered a proposal to categorize statutory agricultural liens with consensual security interests under the Uniform Commercial Code and require uniform attachment, perfection, and priority requirements for the statutory agricultural liens already existing. Implementation of this proposal would result in uniformity in the various agricultural liens and abrogation of the relation back privileges accorded these liens under existing law, because priority would be based on when the lien was filed by the creditor. However, some individuals and organizations opposed this proposal based on the rationale that creditors who furnish services or supplies used in the production of agricultural products should be accorded a higher priority than other creditors.

The committee also studied a proposal to consolidate all the liens currently available to persons harvesting

crops into a single lien and all liens currently available to persons furnishing services or supplies used in the production of agricultural crops or products into a single lien. Implementation of this proposal would result in placement of all of the available agricultural liens in one chapter of the code, rather than scattered throughout the code, and the achievement of some degree of uniformity. The proposal was not to appreciably change state law, in that all statutory agricultural liens existing under current law were proposed for incorporation into the proposed lien law system. The proposal also provided for the retention of certain relation back privileges in that the agricultural processor's lien available to persons harvesting crops would be effective if filed within 30 days after the processing is completed and the agricultural supplier's lien available to persons furnishing supplies used in the production of crops or agricultural products would be effective if filed within 90 days of when the supplies are furnished.

### **Exempt Property**

With respect to the exempt property portion of the study, the committee examined the exempt property laws of other states, placing special emphasis on the exemption laws of California. The exemption laws of California have two important features. Each exemption has either a value limit or other limitation which prevents abuse and broad exemptions for certain benefits and payments are provided. This system contrasts with that provided for in North Dakota law, which exempts specific types of property and benefits.

As the result of testimony received concerning the study, the committee considered substituting a single monetary exemption for the existing specific property exemptions. The committee also considered implementation of an exemption for private pensions. Although private pensions are exempt under federal law, they are not exempt under applicable North Dakota law, and in a Chapter 7 bankruptcy liquidation, funds in private pension plans pass to the bankruptcy trustee and become part of the bankruptcy estate.

Testimony and committee discussion also reviewed whether an exemption for private pensions, if created, should be absolute, limited to a specific dollar amount, or based on a needs basis to be determined by the court on a case-by-case basis.

The committee also considered consolidating all public retirement plan exemptions into a single exemption containing a uniform spendthrift provision, which exempts the pensions from liability for debts of the person to or on account of whom the pension is paid, and from seizure upon execution or other process. This proposal stemmed from the lack of uniformity in the current public retirement plan exemptions.

### **Recommendations**

The committee recommends House Bill No. 1044 to establish a statutory agricultural lien for any person who processes any crop or agricultural product and a separate statutory agricultural lien for any person who furnishes supplies or services used in the

production of crops or agricultural products. The agricultural processor's lien is effective from the date the processing is completed and the agricultural supplier's lien is effective from the date the supplies are furnished or the services performed. The agricultural processor's lien is to have priority over all other liens or encumbrances and the agricultural supplier's lien is to have priority over all other liens or encumbrances except agricultural processor's liens.

The committee recommends Senate Bill No. 2052 to exempt public retirement benefits, assistance for dependent children, and crime victims reparations awards from all liabilities for debts of the person. Although these benefits are exempt under current law, this bill would place these exemptions in one place in the code.

The committee recommends Senate Bill No. 2053 to exempt private pensions and life insurance policies from execution of judgment. The bill exempts private pensions, annuity policies or plans, certain life insurance policies, individual retirement accounts, Keogh plans, and simplified employee pension plans, and the proceeds, payments, and withdrawals from such pensions, policies, plans, and accounts up to \$100,000 for each pension, policy, plan, or account. The dollar limit would not apply to the extent reasonably necessary for the support of the resident or that resident's dependents, except that the pension or proceeds are not exempt from enforcement of any order to pay spousal support or child support.

### **COMPARATIVE NEGLIGENCE STUDY**

Senate Concurrent Resolution No. 4065 reflects the Legislative Assembly's concern regarding the comparative negligence laws and their interaction with the products liability, strict liability, and workmen's compensation laws in light of recent North Dakota Supreme Court decisions.

#### **Existing State Law**

The North Dakota comparative negligence statute NDCC Section 9-10-07, provides in part:

Contributory negligence shall not bar recovery in an action by any person or his legal representative to recover damages for negligence resulting in death or an injury to person or property, if such negligence was not as great as the negligence of the person against whom recovery is sought, but any damages allowed shall be diminished in proportion to the amount of negligence attributable to the person recovering.

In Mauch v. Manufacturers Sales & Service, Inc., 345 N.W.2d 338 (N.D. 1984), and Day v. General Motors Corporation, 345 N.W.2d 349 (N.D. 1984), the North Dakota Supreme Court addressed the issue of whether the North Dakota comparative negligence statute was applicable to strict liability in tort actions.

In an action based on negligence principles, the plaintiff must prove that the defendant owed a certain duty to the plaintiff, that the defendant breached that duty, that the breach caused injury to the plaintiff, and that the plaintiff suffered legal damages because of that injury. These elements can be summarized as duty, breach, causation, and damages. However, under strict liability rules, the presence of the first two basic elements needed to establish a cause of

action based on negligence (i.e., duty and breach) is automatically assumed on the proof of certain conditions. Examples of these conditions include unreasonably dangerous products or activities. Once it is shown that a case falls within the concept of strict liability, a plaintiff need only show the last two elements, namely causation and damages, in order to recover.

In Mauch and Day the court held that Section 9-10-07 was silent on the issue of whether a modified or pure comparative negligence rule should apply in strict liability in tort cases. Under the pure comparative negligence rule, the contributory negligence of the plaintiff does not bar recovery, but damages are reduced by the amount of the plaintiff's negligence. Thus, recovery can be had even if the plaintiff is more negligent than the defendant. However, under the modified comparative negligence rule, which is the rule provided by NDCC Section 9-10-07, recovery is barred if the plaintiff's negligence is equal to or greater than the defendant's negligence. The court held as a matter of judicial interpretation that the pure comparative negligence theory should apply.

In both Mauch and Day, the reason that the pure comparative negligence rule was applied was that the purpose of strict liability would be defeated if a defendant could completely escape financial responsibility by proving the plaintiff at least 50 percent responsible for the accident or injuries. Thus, the current state of North Dakota personal injury law finds a modified comparative negligence rule used when comparing the conduct of plaintiff and defendant in a negligence case while, in strict liability in tort actions, a pure comparative negligence rule is used to analyze the liability of the litigants.

In Layman v. Braunschweigische Maschinenbauanstalt, Inc., 343 N.W.2d 334 (N.D. 1983), the North Dakota Supreme Court reviewed a case involving workmen's compensation, subrogation, products liability, and joint and several liability of defendants. The court held a manufacturer who was determined to be 25 percent at fault for an employee's injury to be 100 percent liable for the damages. The court reached this result based on the workmen's compensation statute immunizing an employer from suits by injured employees and on the doctrine of joint and several liability. Under the doctrine of joint and several liability, once negligence is established, each defendant is responsible to the plaintiff for the entire amount awarded to the plaintiff. This amount would not be reduced by the negligence attributable to the employer according to this Supreme Court case.

#### **Committee Considerations and Testimony**

The committee examined the comparative negligence provisions of several other jurisdictions and received testimony from various individuals and organizations concerning this study. Testimony indicated that it is important to develop a system to ensure a uniform and predictable award to an injured plaintiff, under all available theories of recovery and that whatever the approach developed by the committee, it should be uniform and include both strict liability in tort and dram shop actions. The

dram shop statute (NDCC Section 5-01-06) allows a plaintiff injured by an intoxicated person, or as a consequence of intoxication, a claim for relief against any person who caused the intoxication.

#### **Proposals Considered**

The committee studied a proposal to amend the comparative negligence statute (NDCC Section 9-10-07) to make it a comparative fault statute. Negligence can be defined as the omission to do something which a reasonable man, guided by ordinary considerations which regulate human affairs, would do, or the doing of something which a reasonable and prudent man would not do, while for purposes of the proposal "fault" included acts or omissions that are in any measure negligent or reckless toward the person or property of the actor or others, or that subject a person to tort liability or dram shop liability. The term also included strict liability for product defect, breach of warranty, negligence or assumption of risk, misuse of a product for which the defendant otherwise would be liable, and failure to exercise reasonable care to avoid an injury or to mitigate damages. In addition, the proposal extended comparative fault principles to strict liability in tort actions as well as dram shop actions. The proposal retained the "less than" or "49 percent rule" of comparing the fault of the litigants wherein recovery is barred if the plaintiff's fault is determined to be equal to or greater than the defendant's fault. The proposal also retained contribution and joint and several liability among tortfeasors.

The committee also studied a proposal to adopt the Uniform Comparative Fault Act as amended through 1979. Although the version of the Act passed by the National Conference of Commissioners on Uniform State Laws provided for pure comparative fault, the proposal studied by the committee contained an alternative providing that the "less than" or "49 percent rule" be used in comparative fault actions. Another significant provision of this Act, as noted by the committee, was that the plaintiff could recover if the fault attributable to the plaintiff was less than the fault attributable to all other parties to the claim. This provision would have required the finder of fact to measure the fault of the plaintiff against the aggregate fault of all the other parties rather than measuring the plaintiff's fault only against the party against whom recovery is sought.

Concerning the portion of the comparative negligence study relating to workmen's compensation issues, the committee considered a proposal the effect of which would have been to reduce the amount of damages awarded an injured employee or the employee's dependents by the percentage of negligence or other fault attributable to the injured employee, the employer, or fellow employees. In addition, the proposal included a provision reducing the Workmen's Compensation Bureau's subrogation interest (the amount an injured worker would be required to repay the bureau from any damages recovered) if the employer, employee, or co-employee were determined to be partially at fault. This provision provided that if the causal negligence or

other fault attributable to the employer and fellow employees is less than the negligence or other fault attributable to the third person against whom the action is brought, the amount of the bureau's subrogation claim must be reduced in proportion to the percentage of negligence or other fault attributable to the employer and fellow employees and the bureau would have been subrogated to the rights of the injured employee or the employee's dependents to the extent of 50 percent of the damages recovered up to a maximum of its reduced subrogation claim. However, if the causal negligence or other fault attributable to the employer and fellow employees was determined to be equal to or greater than the percentage of negligence or other fault attributable to the third person against whom the action is brought, the bureau would not be subrogated to any of the rights of the injured employee or the employee's dependents.

This proposal was supported as a means of obviating the harsh results obtained in situations similar to that addressed in Layman, where a manufacturer or other entity is held totally liable for an injured employee's damages but is only marginally at fault in causing those damages.

The Workmen's Compensation Bureau opposed this proposal because, in its view, it would adversely impact the people the system was designed to protect; i.e., injured employees and employers who have contributed to the system.

#### **Recommendations**

The committee recommends House Bill No. 1045 to

establish comparative fault in negligence, strict liability in tort, and dram shop actions. The North Dakota comparative negligence statute (NDCC Section 9-10-07) would be amended to establish comparative fault. "Fault" is defined to include acts or omissions that are in any measure negligent or reckless toward the person or property of the actor or others, or that subject a person to tort liability or dram shop liability. The term also includes strict liability for product defect, breach of warranty, negligence or assumption of risk, misuse of a product for which the defendant otherwise would be liable, and failure to exercise reasonable care to avoid injury or to mitigate damages. The modified form of comparative fault is retained wherein recovery is barred if the plaintiff's fault is equal to or greater than the defendant's fault. This bill would, in effect, overrule the North Dakota Supreme Court's decision in Mauch and Day requiring that pure comparative negligence principles be applied in products liability and strict liability in tort actions.

As noted, the comparative fault principles would be extended to include strict liability in tort and dram shop actions as well as actions based on negligence principles.

The committee makes no recommendation concerning that portion of the comparative negligence study dealing with the decision of the North Dakota Supreme Court in Layman v. Braunschweigische Maschinenbauanstalt, Inc., and workmen's compensation issues.

# JUDICIARY COMMITTEE

The Judiciary Committee was assigned two studies. House Concurrent Resolution No. 3071 directed a study of the extent liability insurance coverage is provided for state and political subdivision employees to determine the necessity and desirability of providing that coverage, including which employees need or should have coverage, the kind of coverage and the amount of coverage necessary or appropriate, and whether liability coverage could be obtained at less cost under a blanket policy rather than separate policies; and the governmental immunity of political subdivisions and the desirability of expanding the governmental immunity of political subdivisions. House Concurrent Resolution No. 3098 directed a study of the present marital property law in this and other states, and the desirability of adopting the Uniform Marital Property Act. In addition, the Legislative Council delegated to the committee the responsibility to review uniform and model laws recommended to the Legislative Council by the State Commission on Uniform State Laws under North Dakota Century Code (NDCC) Section 54-35-02. The Legislative Council also assigned to the committee the responsibility for statutory and constitutional revision.

Committee members were Senators Jerry Meyer (Chairman), Bonnie Heinrich, Ray Holmberg, Herschel Lashkowitz, and Wayne Stenehjem; and Representatives Rick Berg, Connie L. Cleveland, Joe Keller, William E. Kretschmar, Jay Lindgren, Clarence Martin, Rosemarie Myrdal, David O'Connell, Jack Riley, W. C. Skjerven, Scott B. Stofferahn, and Janet Wentz. Senator Hal Christensen was a member of the committee until resigning his Senate seat in October 1985.

The report of the committee was submitted to the Legislative Council at the biennial meeting of the Council in November 1986. The report was adopted for submission to the 50th Legislative Assembly.

## LIABILITY INSURANCE STUDY

### Origins of Study

This study came about because of increasing costs of obtaining liability insurance for employees of governmental agencies, both at the state and local levels. Three bills were introduced during the 1985 session which would have addressed this issue in some manner. House Bill No. 1437 and House Bill No. 1659 would have generally restored the doctrine of governmental immunity as to political subdivisions, with the exception of liability arising from operation of certain motor vehicles. Senate Bill No. 2453 would have lowered the liability ceiling for political subdivisions from the present limitation of \$250,000 per person and \$500,000 per occurrence to \$50,000 and \$100,000, respectively. All of these bills were defeated during the session. The study resolution was introduced to provide for examination of the issues addressed by those bills.

### Historical Background

At common law, the doctrine of governmental immunity was based on the English tradition that the

king could do no wrong. Until relatively recent years, the doctrine of governmental immunity generally meant that a person injured by the acts of a governmental agency or employee was unable to recover the cost of repairing the injury or damages. Arguments advanced to support governmental immunity included the theory that the plaintiff was a member of the public and was in essence suing himself. The doctrine of governmental immunity was criticized as unfairly placing the burden of careless government operations on the persons who chance to be the victims of these activities. Consequently, in many jurisdictions the doctrine of governmental immunity was abolished either by statute or judicial decision. In a study conducted by the office of the Corporation Counsel of New York City in 1983, it was reported that, with respect to units of local government, seven states had abolished immunity, four had retained it, and the other 39, including North Dakota, had partially waived immunity.

In North Dakota the doctrine of governmental immunity at the political subdivision level was generally abolished by the case of Kitto v. Minot Park District, 224 N.W.2d 795 (N.D. 1974). In that case the Supreme Court of North Dakota said rigid adherence to judicial precedent would require "following decisions of the courts of William the Conqueror," and held that, despite prior case law to the contrary, political subdivisions could be held liable for injuries caused by the negligence, wrongful acts, or omissions of their agents and employees. The court recognized as appropriate that the cost of injuries caused by the negligence of political subdivisions should be spread over the public at large rather than being borne entirely by the individuals suffering the damage. Although the court abolished governmental immunity for political subdivisions, it retained that immunity for discretionary acts. In the court's view, a political subdivision was liable only for torts committed in execution of activities of the political subdivision, but not for the decision of whether to carry out the activities.

As a result of Kitto, the 1975 Legislative Assembly passed a temporary law (1975 S.L., ch. 295) that provided for liability of political subdivisions. Political subdivision liability under the Act was limited to \$20,000 per person and \$100,000 per occurrence. In 1977 the Legislative Assembly enacted what is now NDCC Chapter 32-12.1. Under Section 32-12.1-03, political subdivisions are liable for money damages for injuries "proximately caused by the negligence or wrongful act or omission of any employee acting within the scope of the employee's employment or office under circumstances where the employee would be personally liable to a claimant . . . [and] under circumstances where the political subdivision, if a private person, would be liable to the claimant." Certain activities are totally excluded from liability; namely, any claim based on the "act or omission of an employee . . . exercising due care, in the execution of a statute or regulation, . . . the exercise or performance, exercising due care, or the failure to exercise or perform a discretionary function or duty

...” (emphasis added). The provision specifically enumerates three exempt activities—legislative and quasi-legislative actions, judicial and quasi-judicial actions, and discretionary actions.

Even for activities subject to liability, Section 32-12.1-03 limits the monetary damages to \$250,000 per person and \$500,000 per occurrence.

In *Kitto* the court alluded to the fact that governmental immunity still applies to the state. This rule of law (sovereign immunity) remains—it is specifically mentioned in Section 32-12.1-03. Thus many cases involving the state hinge on whether a suit against a given public official is in reality a suit against the state, thus preventing the suit. A recent example of this issue is *Kristensen v. Strinden*, 343 N.W.2d 67 (N.D. 1983), in which a suit by a motor vehicle branch office operator against the Registrar of Motor Vehicles was dismissed because it was brought against the registrar in his official capacity. To indemnify state employees against being sued in their official capacities as the registrar had been, Section 32-12.1-15 allows state agencies to obtain liability insurance both for the state and for the protection of state employees. The state’s immunity is waived only to the extent of the coverage purchased.

Under Section 32-12.1-04 political subdivisions are required to indemnify employees against claims made against the employee for acts done by the employee within the scope of the employment.

Section 32-12.1-07 allows political subdivisions to insure against liability under Chapter 32-12.1 by self-insurance or purchase of insurance, or some combination of the two methods.

### **Magnitude of Insurance Availability and Affordability Problem**

The committee first tried to ascertain the extent of the crisis precipitated by the increased cost of governmental liability insurance and whether the increased premiums were justified by a corresponding increase in awards and settlements against the governmental units.

A questionnaire concerning subdivision liability insurance costs, claims, and awards was sent to 53 counties, 278 school districts, and 366 cities in North Dakota. The political subdivisions were asked for the figures for 1983, 1984, 1985, and projected 1986 for the total premium amount; deductible amount; general liability amount and premium; motor vehicle liability amount and premium; director’s and officer’s liability amount and premium; errors and omissions amount and premium; professional liability amount and premium; other liability amount and premium; number, type, and amount of claims made; and number and amount of awards and settlements.

A response was received from 38 counties, 84 school districts, and 158 cities. The quality of the responses varied considerably. Although many responses were detailed and complete, a number were incomplete or illegible. Although the committee concluded the questionnaire did not present a precise statistical summary, it was apparent many political subdivisions faced dramatic increases in their

premiums. The data provided did not show a similar increase in judgments and settlements against the political subdivisions.

Similarly, state agencies reported either the inability to obtain insurance at all or at affordable prices. Of the 230 questionnaires sent to state agencies by the Office of Management and Budget, 57 agencies expressed interest in obtaining insurance to cover their employees. The responses to the questionnaire showed a very low five-year loss history.

In early fall of 1985 the committee concluded that self-insurance for political subdivisions might be the best solution for the affordability problem. The committee recognized, however, because the statutes already allowed self-insurance, action would have to be initiated by the political subdivisions to effectuate that legislation.

### **Self-Insurance Fund**

After attending the committee’s meetings and meetings with the Commissioner of Insurance and representatives of other state agencies, the League of Cities, and the Association of Counties, representatives for Missouri River Underwriters decided to spend the \$22,000 necessary to determine the feasibility of a political subdivision self-insurance fund.

On December 27, 1985, Missouri River Underwriters signed a contract with the North Dakota Insurance Reserve Fund. The North Dakota Insurance Reserve Fund is a joint self-insurance plan owned and operated by the political subdivisions and state agencies of North Dakota. The fund started with 23 participants. As of October 20, 1986, the fund had 432 participants and approximately \$4.2 million in premiums and surplus. The fund provides comprehensive insurance coverage, including general liability, broad form comprehensive general liability, public official’s errors and omissions, law enforcement legal liability, firemen’s professional coverage, ambulance malpractice liability, employers’ liability, independent contractor’s coverage, employee benefit liability, teachers’ liability, professional liability, automobile liability, and personal injury protection.

At the committee’s July 30-31, 1986, meeting, the committee by motion congratulated Missouri River Underwriters for undertaking the development of the North Dakota Insurance Reserve Fund and for having accomplished reduced insurance rates for political subdivisions, and encouraged the state’s political subdivisions to participate in and continue support of the fund.

### **Tort Reform**

Although it appeared the immediate problem of affordable insurance for state agencies and political subdivisions was resolved, the controversy concerning the cause of the crisis raged on. The committee received considerable and conflicting testimony on the need for tort reform from the Commissioner of Insurance; lobbyists for the insurance industry; representatives of the judicial branch, various state agencies, the League of Cities, Association of Counties, North Dakota Trial Lawyers Association,

and North Dakota Medical Association; and various individuals. Representatives of the insurance industry argued that the present crisis was largely due to a tort system out of control and strongly recommended tort reform. Representatives for the State Bar Association of North Dakota argued that the insurance industry was making the crisis appear worse than it was by manipulation of insurance figures and they presented a survey they had undertaken to review all civil jury verdicts in state district courts for the period 1975-85. They testified that the results showed there is no dramatic increase in awards in North Dakota and no need for tort reform. Others testified supporting selected tort reform.

In the course of considering tort reform, the committee considered a number of bill drafts including:

1. A bill draft to provide for civil action indemnification and legal defense for judicial officers.
2. A bill draft to reduce from six to three years the general statute of limitations for bringing an action against the state.
3. A bill draft to eliminate punitive damage awards against political subdivisions.
4. A bill draft to place a cap of \$100,000 on the amount of punitive damages awarded against political subdivisions.
5. A bill draft to provide that all awards of punitive damages would go to the common schools trust fund.
6. A bill draft based on California law to place limits on plaintiffs' attorneys' contingency fees.
7. A bill draft to provide that a political subdivision is liable for only that part of any uncollectible party's share in proportion to the percentage of the negligence attributable to the political subdivision.
8. A bill draft to provide that the payment of noneconomic damages such as pain and suffering be paid in periodic payments consistent with the time period for which the damages were compensated.
9. A bill draft to require every operator of an ambulance service to obtain insurance for employees insuring against loss from liability arising from error in providing emergency medical services. No employee would be liable for damages in excess of the amount for which actually insured except for damages resulting from intoxication, misconduct, or gross negligence.
10. A bill draft to provide for indemnification for state employees.
11. A bill draft to extend the immunity for persons rendering care or services in an emergency to cover not only actions taken at the scene of the accident but also actions taken when going to and coming from the scene of the accident. Coverage would be extended to provide immunity even when there was negligence on the part of the care provider. The immunity granted ambulance personnel would apply only to those working without compensation.

12. A bill draft to require a pretrial hearing before discovery relating to a request for punitive damages could be commenced and before a request for punitive damages could be submitted to the finder of fact.

13. A bill draft to clarify the word "employee" to include board members and volunteers of a political subdivision in the chapter that grants immunity to political subdivision employees.

Although the statistics concerning the number and amount of awards granted in civil actions in North Dakota do not support the idea of a civil justice system out of control, the committee also was aware many cases are settled and are not part of the statistics. The committee was concerned, however, that no representative for the insurance industry could provide any statistics or offer any assurance that major tort reform would result in lower insurance rates in North Dakota. The committee supported suggestions for expanding protection for employees of political subdivisions. Concern was expressed that granting indemnification to all state employees, however, would be detrimental to the North Dakota Insurance Reserve Fund because the state might develop its own fund rather than insuring with the reserve fund.

#### **Insurance Industry Regulation**

The groups that were opposing tort reform advised the committee that the insurance crisis was not caused by a tort system out of control but by imprudent investment and pricing methods of insurance companies in recent years.

The committee considered several bill drafts concerned with regulation of the insurance industry, including:

1. A bill draft to require the annual filing of statistical data by property and casualty companies.
2. A bill draft to authorize the Commissioner of Insurance to establish joint underwriting associations.
3. A bill draft to authorize the Commissioner of Insurance to adopt rules regulating self-insurance plans.
4. A study resolution to direct the Legislative Council to study the insurance industry.

The committee again received considerable testimony from the Commissioner of Insurance and representatives of the insurance industry, the North Dakota Medical Association, the North Dakota Trial Lawyers Association, and the North Dakota Insurance Reserve Fund. Everyone testifying concerning the drafts granting authority to the commissioner to regulate self-insurance plans and directing a Legislative Council study of the insurance industry was supportive. There were suggestions, however, that the bill draft providing for regulation of self-insurance plans be amended to be more specific in its authority. There was testimony concerning requiring the reporting of the statistical data and the establishment of the joint underwriting association. Those in favor of the reporting bill testified that the information was needed to help determine to what extent a crisis existed and to further competition.

Those opposed considered it a hardship on the insurance companies as written or unnecessary because the information was already available and not of value because of a shortage of staff in the Insurance Department. Those in favor of the possible establishment of joint underwriting associations supported the bill draft because it gives the commissioner authority to address the availability problem if the insurance companies do not voluntarily provide the insurance. Those in opposition questioned the constitutionality of the draft or the effect of particular provisions of the draft.

### **Recommendations**

The committee recommends Senate Bill No. 2054 to provide for civil action indemnification and legal defense for any Supreme Court justice, Supreme Court surrogate justice, district court judge, district court surrogate judge, county court judge, judicial referee, and juvenile supervisor. Because all 26 cases against judicial officers brought since liability insurance was obtained in 1983 were dismissed, the state could easily self-insure and save considerable amounts of the money now spent for insurance.

The committee recommends Senate Bill No. 2055 to reduce from six to three years the general statute of limitations for bringing an action against the state. The bill would make the statute of limitations for actions against the state the same as for actions against political subdivisions.

The committee recommends Senate Bill No. 2056 to provide that a political subdivision is liable for only that part of any uncollectible party's share of an award in proportion to the percentage of the negligence attributable to the political subdivision. Concern was expressed about suits brought against political subdivisions where the political subdivision was liable for only a small percentage of the damage but due to joint and several liability paid all the award. This bill is intended to reduce that liability under some circumstances.

The committee recommends Senate Bill No. 2057 to extend the immunity granted persons rendering emergency care or services to cover not only actions taken at the scene of the accident but actions taken when going to and coming from the scene of the accident. Coverage would be extended to provide immunity even where there was negligence on the part of the care provider. The bill would address the concern of ambulance service personnel that they were covered only at the scene of an accident.

The committee recommends Senate Bill No. 2058 to provide that upon commencement of an action the complaint may not seek punitive damages. After filing the suit, a party may make a motion to amend the pleadings to claim punitive damages. The court must find, at a hearing on the motion, prima facie evidence in support of the motion before granting the moving party permission to amend the pleadings to claim punitive damages. The bill is intended to help to assure punitive damages are not alleged without a basis for doing so.

The committee recommends Senate Bill No. 2059 to clarify the word "employee" to include board members and volunteers of a political subdivision in

the chapter that grants immunity to political subdivision employees. The committee wanted to reassure board members for political subdivisions they would not be personally liable as a result of actions within the scope of their duties.

The committee recommends House Bill No. 1046 to require an annual filing of statistical data by property and casualty insurance companies. The bill is intended to potentially allow better analysis of any future insurance crisis and perhaps provide competition in the market by giving companies the data needed to determine whether to enter an insurance market.

The committee recommends House Bill No. 1047 to authorize the Commissioner of Insurance to establish joint underwriting associations. The bill is intended to encourage the insurance companies to provide insurance voluntarily and give the commissioner the authority to require them to provide insurance if they did not do so voluntarily.

The committee recommends House Bill No. 1048 to authorize the Commissioner of Insurance to adopt rules regulating self-insurance plans. The bill is intended to ensure the plans are operated on a fiscally sound basis.

The committee recommends House Concurrent Resolution No. 3006 to direct the Legislative Council to study the insurance industry. This resolution reflects the committee's conclusion that a complete study of the industry and Insurance Department is necessary to attempt to avert or reduce any future insurance availability and affordability crisis.

## **THE UNIFORM MARITAL PROPERTY ACT STUDY**

### **Background**

The National Conference of Commissioners on Uniform State Laws approved the Uniform Marital Property Act in July 1983. The American Bar Association House of Delegates at its midyear meeting voted to defer consideration of the Act until the August 1984 meeting in Chicago where it was finally approved. The state of Wisconsin has adopted the Act, with modifications. The Act establishes a new property system that combines features of the common or separate property law (found in 41 states including North Dakota) and community property law (found in nine states). The Act adopts community property provisions by providing that a husband and wife share equally the property acquired by their joint efforts during marriage. Borrowed from the separate property law is the title based management and control feature.

### **North Dakota Statutes and the Uniform Marital Property Act**

Section 23 of Article XI of the Constitution of North Dakota provides:

The real and personal property of any woman in this state, acquired before marriage, and all property to which she may, after marriage become in any manner rightfully entitled, shall be her separate property, and shall not be liable for the debts of her husband.

Following is a comparison of the provisions of

current North Dakota law and of the Uniform Marital Property Act:

### 1. Property Ownership

**Current Law**—Generally property is owned by the spouse who has title to the property or, for property without title, by the spouse who acquired the property.

**Uniform Act**—Regardless of property title, each spouse has a present undivided one-half interest in marital property, which generally consists of property acquired by spouses during marriage, except property acquired by gift or inheritance. All property owned by spouses is presumed marital property.

Property acquired before marriage and by gift or inheritance is generally individual property of the owning spouse but income attributable to individual property during marriage is marital property. Appreciation of a spouse's individual property during marriage is individual property except to the extent any substantial appreciation is attributable to the uncompensated substantial effort of the nonowner spouse, in which case the appreciation is marital.

At the death of the owning spouse, or at the dissolution of a marriage, that spouse's property acquired during marriage and before the effective date of the Act or before marital domicile is established in the state, whichever is later, that would have been marital property under the Act is treated as if it were marital property.

### 2. Management and Control of Property

**Current Law**—Generally the right to manage and control property is determined by the ownership interest which is usually determined by title. Exceptions: NDCC Section 47-18-05 provides that the homestead of a married person cannot be conveyed or encumbered unless the instrument is executed by both the husband and wife; Section 14-07-03 provides that the husband and wife have a mutual duty to support each other out of their individual property and labor; and Section 14-07-12 provides that a district court may authorize the spouse to control the property of the other spouse when the other spouse abandons the spouse for one year without providing for support or is sentenced to prison for one year or more.

**Uniform Act**—Individual property may be managed and controlled by the owning spouse acting alone. A spouse acting alone also has the right to manage and control: marital property titled in that spouse's name alone or not held in the name of either spouse; marital property held in the names of both spouses in the alternative; a policy of insurance if that spouse is designated as the record owner; the rights of an employee under a deferred employment benefit plan which accrue as a result of that spouse's employment; and a claim for relief vested in that spouse by other law.

Management and control of marital property held in the names of both spouses, other than in the alternative, requires the consent of both spouses.

A spouse may make gifts to a third person of marital property over which the spouse has management and control if the value of the gifts to the person does not

exceed \$500 in a calendar year or a larger amount if, when made, the gift is reasonable given the economic position of the spouses.

Management and control of property transferred to a trust is determined by the terms of the trust.

### 3. Deferred Employment Benefits

**Current Law**—Management and control is determined by terms of the plan and any federal or state regulations. Marital property component is not applicable.

**Uniform Act**—Management and control: The employee spouse acting alone has the right to manage and control the rights under the deferred employment benefit plan.

Marital property component: If the benefits are attributable to employment of a spouse after marriage, the effective date of the Act, or establishment of domicile, whichever is later, the benefits are marital property. If the benefits are attributable to employment of a spouse during marriage and partly before and after the marriage, effective date of the Act, or establishment of state domicile, whichever is later, the marital property portion of the benefits is that portion representing the ratio of the period of employment that occurred after the effective date of the Act or establishment of domicile and during marriage to the total period of employment.

### 4. Life Insurance Benefits

**Current Law**—Management and control is determined by terms of a policy and any applicable state or federal regulation. Marital property component is not applicable.

**Uniform Act**—Management and control: A spouse acting alone has the right to manage and control a policy if that spouse is designated as the owner on the records of the policy's issuer.

Marital property component: If a policy is issued after the date of the marriage, the effective date of the Act, or establishment of state domicile, whichever is later, the ownership interest and proceeds are marital property (unless the spouse of the insured is designated the owner, in which case it is individual property). For other situations where at least one premium is paid with marital property, the marital property component is that portion of the ownership interest and proceeds generally representing a ratio of the period during marriage after which a premium is paid from marital property to the entire period the policy is in effect. A spouse may, in writing, relinquish his or her interest in a policy.

### 5. Access to Credit

**Current Law**—Ability of a spouse to encumber property to obtain credit is generally determined by a spouse's ownership interest in property. Exceptions: NDCC Sections 14-07-03 and 14-07-04 provide that a spouse has an interest in the property of the other to the extent necessary for support. Section 14-07-12 provides for the right to manage, control, sell, or encumber property of the absent spouse when a spouse is abandoned or the absent spouse is in prison

for a year or more. Section 47-18-05 provides that the homestead of a married person, without regard to the value thereof, cannot be conveyed or encumbered unless the instrument by which it was conveyed or encumbered is executed and acknowledged by both the husband and wife.

**Uniform Act**—The Act has no specific requirements concerning access to credit. The right to management and control, including the right to encumber, is determined by the spouse who holds title. If there is no title, both spouses have the right to management and control. Management and control is defined as the right to buy, sell, use, transfer, exchange, abandon, lease, consume, expend, assign, create a security interest, mortgage, encumber, dispose of, institute or defend a civil action regarding, or otherwise deal with property as if it were the property of an unmarried person.

## 6. Debt Satisfaction

**Current Law**—Generally creditors may reach only the property of the spouse who incurred the debt to satisfy the debt. Exceptions: NDCC Sections 14-07-08 and 14-07-10 provide that the husband and wife are liable jointly and severally for any debts contracted by either, while living together, for necessities. Generally, however, the separate property of each spouse is not liable for the debts of the other. Section 26.1-33-36 makes rights in life insurance policies exempt from claims of creditors. Section 52-06-30 makes unemployment compensation benefits exempt from collection of all debts except debts incurred for necessities furnished the individual, spouse, or dependents during the time the individual is unemployed and for child support payments.

**Uniform Act**—The type of obligation incurred determines which property may be reached to satisfy the debt: Obligations incurred in interest of marriage (obligations incurred during marriage are presumed so) may be satisfied from marital property and property of the incurring spouse; obligations incurred before or during marriage but arising before marriage may be satisfied from individual property of the incurring spouse and that marital property which, but for marriage, would have been the incurring spouse's property; and any other obligations incurred by a spouse during marriage may be satisfied from individual property of that spouse and that spouse's interest in marital property, in that order.

## 7. Marital Agreements

**Current Law**—NDCC Section 14-07-06 provides that either spouse may enter into any engagement or transaction with the other spouse or with other persons respecting property which either might enter into if unmarried. Sections 14-03.1-01 and 14-03.1-09 allow premarital agreements made in contemplation of marriage, effective upon marriage, which provide for contracts with respect to control and disposition of property.

**Uniform Act**—Spouses are expressly authorized to enter into written agreements, signed by both parties, regarding the economic incidents of marriage, but may not alter the good faith duty, any child support obligation, the "actual knowledge" requirement for

creditors to be bound by agreements, and bona fide purchaser's rights. Modification of spousal support may not result in a spouse having less than necessary and adequate support. Consideration is not required. Enforceability standards are specified by statute. Premarital agreements are also allowed.

## 8. Remedies

**Current Law**—The statutes provide for general actions for support and the usual remedies where the spouses have contracted concerning property.

**Uniform Act**—Specific and general remedies are provided to prevent unfair advantage, to protect a spouse's interest in his or her property, and to compensate a spouse for the other spouse's fraud or waste of marital property.

## 9. Divorce

**Current Law**—NDCC Section 14-05-24 provides that the court must make such equitable distribution of the real and personal property of the parties as may seem just and proper. The Supreme Court has ruled that circumstances of inheritance, gift, or premarital acquisition of property are factors to be considered but all real and personal property of the parties may be divided in any manner to provide equitable distribution.

**Uniform Act**—The distribution of property provided in NDCC Section 14-05-24 would remain unchanged except the court would also have to consider as a factor the half-and-half ownership in marital property.

## 10. Death

**Current Law**—The surviving spouse's share when there is no will is: (a) no children or parent—the entire estate; (b) no children but surviving parent—the first \$50,000 plus one-half balance of estate; (c) children all of present marriage—the first \$50,000 plus one-half residue of estate; and (d) children at least one from prior marriage—one-half the estate.

The surviving spouse's share when there is a will is whatever the will provides and the elective share is one-third of augmented estate (reduced by property received under will). The elective share may be barred by a written agreement.

**Uniform Act**—Under both circumstances, intestacy (no will) and testacy (will), the present statutes would apply. The surviving spouse would already own one-half of all marital and deferred marital property, however. The decedent could only dispose of one-half of marital and deferred marital property and all of individual property.

## Testimony

Testifying in favor of the uniform Act were the legislative director for the National Conference of Commissioners on Uniform State Laws, representatives for the League of Women Voters, and interested individuals. Supporters argued that the Act strengthens the family by making it into a functioning economic unit by recognizing the respective contributions made by both the man and woman during a marriage. They suggested the important decision is whether the concept was

equitable and that details could be worked out over time.

Testifying in opposition were representatives of the banking industry and the State Bar Association of North Dakota. They argued there was no need for this type of change in North Dakota and the Act changes property law so drastically it is impossible to anticipate all the consequences.

A representative for the insurance industry testified concerning some minor changes concerning the Act's effect on insurance companies.

### **Recommendation**

The committee recommends House Bill No. 1049 to enact the Uniform Marital Property Act with minor changes concerning insurance and with a three-year delayed effective date. The committee supports the concept of equality contained in the Act.

## **UNIFORM AND MODEL LAWS REVIEW**

The North Dakota Commission on Uniform State Laws consists of seven members. The primary function of the commission is to represent North Dakota at the National Conference of Commissioners on Uniform State Laws. The national conference consists of representatives of all states, and its sole purpose is to serve state government by improving state law for better interstate relationships.

For the 1985 legislative session the state commission requested the introduction of 24 Acts approved by the national conference and the American Bar Association. Ten of those Acts passed. The Legislative Assembly also approved an individually sponsored model Act recommended by the national conference.

Primarily as a result of the number of Uniform Acts considered, the Legislative Assembly now requires the commission to submit its recommendations for enactment of uniform and model laws to the Legislative Council for its review and recommendation during the interim between legislative sessions.

The state commission recommended four uniform Acts to the Legislative Council for its review and recommendation. The four Acts were the Uniform State Antitrust Act, the Uniform Arbitration Act, the Uniform Statutory Will Act, and the Uniform Succession Without Administration Act.

### **Uniform State Antitrust Act**

The National Conference of Commissioners on Uniform State Laws approved the Uniform State Antitrust Act in 1973 and approved amendments in 1979. The American Bar Association approved the Act in February 1974. The Act has been adopted in Arizona, Iowa, and Michigan. The Act provides civil penalties and injunctive relief for (1) contract, combination, or conspiracy to restrain or monopolize trade; and (2) the establishment, maintenance, or use of a monopoly of trade or commerce or an attempt to establish a monopoly, for the purpose of excluding competition or fixing prices.

#### **1. Summary of Provisions**

Following is a comparison of the provisions of

current North Dakota law and the Uniform State Antitrust Act.

#### **A. Application**

**Current Law**—NDCC Section 51-08-01 makes it illegal to create or be party to any pool, trust, agreement, or contract to fix the price of any property or amount of any property to be manufactured, mined, produced, exchanged, or sold in this state.

**Uniform Act**—Sections 2 and 3 make illegal: (1) a contract, combination, or conspiracy between two or more persons in restraint of, or to monopolize, trade or commerce in a relevant market; and (2) the establishment, maintenance, or use of a monopoly, or an attempt to establish a monopoly, of trade or commerce in a relevant market, for the purpose of excluding competition or fixing prices.

Under Section 4 the Act does not apply to labor nor to any labor, agricultural, or horticultural organization instituted for the purpose of mutual help.

#### **B. Penalties**

**Current Law**—NDCC Section 51-08-03 provides that any person violating any provision of Chapter 51-08 is guilty of a Class A misdemeanor. For a Class A misdemeanor, a maximum penalty of one year's imprisonment, a fine of \$1,000, or both, may be imposed. Section 51-08-11 provides that the court, upon request of the Attorney General, shall issue an injunction enjoining the defendant from disposing of any property of the defendant situated in the state and from removing such property from the jurisdiction of the court. The injunction may be dissolved upon the filing of a bond in an amount determined by the court. Section 51-08-13 provides that in addition to other penalties and costs, the court shall allow a reasonable attorney's fee to go to the Attorney General or state's attorney who conducted the prosecution. The fee must be deposited in the general fund of the state or county.

**Uniform Act**—Section 8 provides that the state, a political subdivision, public agency, or any person threatened with injury or injured in its business or property by a violation of the Act can bring a civil action for injunctive relief, damages and, as determined by the court, taxable costs and reasonable attorney's fees. Damages recovered by an individual may be increased by the trier of fact up to threefold the actual damage if it is found the violation is "flagrant." Section 7 provides that the Attorney General or a state's attorney with the permission or at the request of the Attorney General may bring an action for injunctive relief and damages in the name of the state. The trier of fact may assess a penalty of not more than \$50,000 for each violation.

#### **C. Investigations**

**Current Law**—No specific provisions.

**Uniform Act**—Section 6 provides that if the Attorney General has reasonable cause to believe that a person has information or is in possession, custody, or control of any document or other tangible object relevant to an investigation for violation of the Act, the Attorney General may serve upon the person a

written demand to appear and be examined under oath, to answer written interrogatories under oath, and to produce the document. The testimony and material are confidential until an action is brought unless confidentiality is waived.

#### **D. Contracts and Purchasers**

**Current Law**—NDCC Section 51-08-07 provides that any contract or agreement made in violation of Chapter 51-08 is void. Section 51-08-08 provides that a purchaser of any property from anyone transacting business contrary to Chapter 51-08 is not liable for payment of the price of the property.

**Uniform Act**—No specific provisions.

#### **E. Statute of Limitations**

**Current Law**—NDCC Section 29-04-03 provides that information or a complaint must be filed or an indictment found within two years of the commission of the crime.

**Uniform Act**—Under Section 10: (1) an action brought under Section 7 to recover a civil penalty must be commenced within four years after the claim for relief occurs; and (2) an action under Section 8 to recover damages must be commenced within four years after the claim for relief occurs, or within one year after the conclusion of any timely action brought by the state under Section 7 or 8 based on any matter complained of in the action for damage, whichever is later.

### **2. Testimony**

Testimony in support of the Act indicated that North Dakota's laws are the weakest antitrust laws in the United States, and North Dakota is the only state that has no civil investigation powers. There was no testimony in opposition to the Act.

#### **Uniform Statutory Will Act**

The National Conference of Commissioners on Uniform State Laws approved the Uniform Statutory Will Act in August 1984. The American Bar Association approved the Act in July 1985. The Act has not yet been adopted by any state.

The Act allows a will to be adopted by a simple reference to the Act, which contains will provisions. The Act permits a will to modify the statutory will provisions. A testator may dispose of all or any portion of the testator's estate by the incorporated provisions of the statutory will. The statutory will is an alternative to intestacy disposition (without a will).

### **1. Summary of Provisions**

Following is a comparison of the provisions of North Dakota statutes and of the Uniform Statutory Will Act:

#### **A. Definitions**

**Current Intestacy Law** — "Child" is defined in NDCC Section 30.1-04-09 to provide that, except in cases of adoption, a person is the child of his or her parents regardless of the marital status of the parents, and the parent and child relationship may be established under the Uniform Parentage Act. "Surviving spouse" is defined in Section 30.1-10-02

to include a spouse from whom the testator was then separated under a decree that did not terminate the status of husband and wife, except if the order purported to terminate all marital property rights.

**Uniform Act**—Under Section 1 "child" is defined to provide that a person born out of wedlock is not treated as the child of the father unless the person is openly and notoriously so treated by the father. Under Section 1 "surviving spouse" is defined to exclude a spouse from whom the testator was then separated under a decree of separation, whether or not final, or a written agreement signed by both parties.

#### **B. Action Required**

**Current Intestacy Law**—Under NDCC Section 30.1-04-01 any part of the estate of the decedent not effectively disposed of by the decedent's will passes as prescribed in Chapter 30.1-04.

**Uniform Act**—Section 2 provides that an individual having capacity to make a will under the laws of the state may make a statutory will under the Act. Section 3 provides that a will may incorporate by reference the provisions of the Act in whole or in part and with any modifications and additions the will provides.

#### **C. Share of Spouse**

**Current Intestacy Law**—Under NDCC Section 30.1-04-02 the share of the surviving spouse is: (1) if there is no surviving issue or parent of the decedent, the entire intestate estate; (2) if there is no surviving issue but the decedent is survived by a parent or the parents, the first \$50,000 plus one-half the balance of the intestate estate; (3) if there are surviving issue all of whom are issue of the surviving spouse also, the first \$50,000 plus one-half of the balance of the intestate estate; and (4) if there are surviving issue, one or more of whom are not issue of the surviving spouse, one-half the intestate estate.

**Uniform Act**—Section 5 provides that the share of the surviving spouse is: (1) if there is no surviving issue, the entire statutory will estate; and (2) if there is a surviving issue: (a) subject to any lien, the testator's residence and tangible personal property, except personal investment or business purposes, (b) the greater of \$300,000 or one-half the balance of the statutory will estate, and (c) if economical, the remainder of the estate must be placed in trust. For the life of the spouse, the spouse is to receive the entire net income of the trust and such parts of the principal the trustee deems advisable. If a trust is not economical, the entire estate must be distributed to the spouse. Upon death of the surviving spouse, unless age or disability of a child delays distribution pursuant to provisions of the Act, the principal must be paid to the children in equal shares if all living or to the living issue by representation.

#### **D. Share of Heirs Other Than Surviving Spouse**

**Current Intestacy Law**—Under NDCC Section 30.1-04-03 the part of the intestate estate not passing to the surviving spouse or the entire estate if there is no surviving spouse, passes: (1) to the issue of the decedent. If they are all of the same degree of kinship

to the decedent, they take equally. If of unequal degree, those of more remote degree take by representation; (2) if there is no surviving issue, to the decedent's parent or parents equally; (3) if there is no surviving issue or parent, to the issue of the parents or either of them by representation; and (4) if there is no surviving issue, parent, or issue of a parent, to grandparents or issue of grandparents.

**Uniform Act**—Section 7 provides that if there is no surviving spouse, the statutory will estate passes, subject to the trust provisions: (1) if there is surviving issue, in equal shares to the children of the testator if all survive, otherwise to the surviving issue of the testator by representation; and (2) if there is no surviving issue, to the individuals entitled to receive the estate as if the property were located in North Dakota and the testator had died intestate domiciled in this state in the proportions so determined.

The Act provides for the establishment of a trust for children under an age specified in the will or if the will does not specify an age, at age 23, and for any person having a disability due to mental illness, mental deficiency, physical illness, or disability, chronic use of drugs, chronic intoxication, or other cause. The trust is terminated on the determination of the personal representative or trustee that the trust is uneconomical, on the attainment of the required age, on the removal of the disability, or on the death of the distributee.

## E. Survival

**Current Intestacy Law**—NDCC Section 30.1-04-04 provides that an individual who does not survive the testator by 120 hours is treated as if the individual predeceased the testator.

**Uniform Act**—Section 11 provides that an individual who does not survive the testator by 30 days or more is treated as if the individual predeceased the testator.

## F. Personal Representative

**Current Intestacy Law**—NDCC Chapters 30.1-18 and 30.1-34 establish the powers of personal representatives and trustees, respectively.

**Uniform Act**—Section 13—Alternative A of the Act provides that the powers of the personal representative and trustee are those already granted by state statutes. Section 13 — Alternative B specifically enumerates the powers granted the trustee and personal representative.

## 2. Testimony

Testimony that explained the purposes of the Act indicated that the Act gives a testator one more option—adopting a statutory will through incorporation by reference, and it promotes efficiency and economical drafting of wills. Concern was expressed that the Act did not cover all the important factors particular to each individual case and it would not be more economical in that the length of a will was not a major factor in cost.

## Uniform Arbitration Act

The National Conference of Commissioners on Uniform State Laws approved the Uniform

Arbitration Act in August 1955 and approved an amendment in August 1956. The American Bar Association approved the Act in August 1955 and the amendment in August 1956. The Act validates written agreements to arbitrate disputes, whether the dispute arises subsequent to the agreement or exists at the time the agreement was made. It also provides a procedure when judicial assistance is necessary.

## 1. Summary of Provisions

Following is a comparison of the current North Dakota law and the Uniform Arbitration Act.

### A. Application

**Current Law**—NDCC Section 32-29-01 allows submission of existing controversies to arbitration. Section 15-34.2-10 requires arbitration of disputes concerning compensation for changing schoolbus routes. Section 15-38.1-12 allows school boards and organizations representing a group of teachers to formulate agreements containing provisions for binding arbitration. Section 24-02-26 requires all controversies arising out of any contract for the construction or repair of highways to be submitted to arbitration. Section 26.1-41-17 requires intercompany arbitration when no-fault insurers cannot agree to an equitable allocation of losses.

**Uniform Act**—Section 1 provides that agreements to arbitrate disputes arising subsequent to or existing at the time of the agreement are valid. The Act specifically applies to arbitration agreements between employers and employees or between their representatives.

### B. Appointment of Arbitrator

**Current Law**—There is no specific provision in NDCC Chapter 32-29 covering the appointment of an arbitrator. In Section 24-02-27, concerning only highway contracts, the party demanding arbitration must name the party's arbitrator. The party proceeded against must then name that party's arbitrator within 10 days. If that party fails to name an arbitrator, the moving party may apply to the court for such appointment. All the arbitrators are selected from a pool appointed by the Governor.

**Uniform Act**—Section 3 provides that if the arbitration agreement provides a method of appointment, that method must be followed. If the agreement provides no method or the method fails, the court on application of a party must appoint one or more arbitrators.

### C. Requirements for Action

**Current Law**—NDCC Section 32-29-03 provides that all the arbitrators must meet but a majority may determine any question.

**Uniform Act**—Sections 4 and 5 provide that unless otherwise provided by agreement, the hearing must be conducted by all arbitrators but a majority may determine any question. If, during the course of the hearing, an arbitrator for any reason ceases to act, the remaining arbitrator or arbitrators appointed to act as neutrals may continue with the hearing and determination of the controversy.

## D. Hearings

**Current Law**—NDCC Section 32-29-03 authorizes arbitrators to appoint a time and place for the hearing, adjourn from time to time, and hear allegations and evidence of the parties and make an award thereon.

**Uniform Act**—Section 5 provides that unless otherwise provided by the agreement, arbitrators: (1) shall appoint a time and place for the hearing and cause notification to the parties to be served personally or by registered mail not less than five days before the hearing; (2) may adjourn the hearing from time to time or postpone the hearing to a time not later than the date fixed by the agreement for making the award unless the parties consent to a later date; and (3) may hear and determine the controversy upon the evidence produced notwithstanding the failure of a party to appear. The court on application may order the hearing to be held promptly. The parties are entitled to be heard, to present material evidence, and to cross-examine witnesses.

## E. Representation by Attorney

**Current Law**—No applicable provision.

**Uniform Act**—Section 6 provides that a party has the right to be represented by an attorney at any hearing. A waiver of the right prior to the hearing is ineffective.

## F. Witnesses

**Current Law**—NDCC Section 32-29-03 authorizes the arbitrators to administer oaths to witnesses. Section 32-29-05 provides that witnesses may be compelled to appear before arbitrators by subpoena issued by any county judge.

**Uniform Act**—Section 7 authorizes the arbitrators to issue subpoenas for the attendance of witnesses and for the production of documents, and to administer oaths to witnesses. On application of a party the arbitrators may permit a deposition to be taken of a witness who cannot be subpoenaed or is unable to attend the hearing. Fees for attendance as witnesses are the same as provided by statute for district court witnesses.

## G. Awards

**Current Law**—NDCC Section 32-29-06 provides that the award must be signed and acknowledged by a majority of the arbitrators. If the agreement to arbitrate provides for entry of judgment, the agreement and award must be filed by the arbitrators with the district court specified. If entry of judgment is not required, the arbitrators must deliver a copy of the award to all parties. Sections 32-29-07 through 32-29-10 authorize the appropriate court to affirm, vacate, or modify the award. Sections 32-29-11 through 32-29-21 provide for entry of judgment, appeal to the Supreme Court, and payment of costs.

**Uniform Act**—Section 8 provides that the award must be in writing and signed by the arbitrators joining in the award. The arbitrators must deliver a copy to each party. Section 9 provides for the modification of an award by the arbitrators. Sections 11 through 13 authorize the court to confirm, vacate,

or modify the award. Section 12 authorizes the vacating of an award where there was no arbitration agreement and the party objected during proceedings or hearings. Sections 14 through 19 provide for entry of judgment, appeal to the Supreme Court, and payment of costs.

## 2. Testimony

Testimony in explanation of the Act pointed out that the Act has been adopted in 27 states and every state except Alabama, Georgia, Missouri, Nebraska, North Dakota, Vermont, and West Virginia has adopted a modern arbitration Act. Basically, the Act would expand present law because it would allow parties to agree to submit future questions to arbitration. There was no testimony in opposition to the Act.

## Uniform Succession Without Administration Act

The National Conference of Commissioners on Uniform State Laws approved the Uniform Succession Without Administration Act in July 1983. The Act provides an alternative to the present method of distributing a decedent's estate. The concept of succession without administration is drawn from the civil law and is a variation of the method that is followed largely in Louisiana, in Quebec, and in Europe.

## 1. Summary of Provisions

Following is a comparison of the current North Dakota law and the Uniform Succession Without Administration Act.

### A. Current Law

A personal representative may be appointed in formal (Chapter 30.1-15) or informal (Chapter 30.1-14) proceedings before the court.

In general, the personal representative is responsible for settling and distributing a decedent's estate. Specifically, the personal representative must: (1) give notice of appointment as personal representative to all heirs and devisees—NDCC Section 30.1-18-05; (2) prepare and file or mail an inventory of property owned by the decedent at the time of death, listing it with reasonable detail, and indicating as to each item, its fair market value as of the date of the decedent's death, and the type and amount of any encumbrance that may exist with reference to any item—Section 30.1-18-06; (3) if any property not included in the original inventory comes to the attention of the personal representative, a supplementary inventory must be made—Section 30.1-18-08; (4) take possession or control of the decedent's property, except the property may be left with or surrendered to the person entitled to it until possession of the property is necessary for purposes of administration. The personal representative must pay taxes on and manage, protect, and preserve the estate—Sections 30.1-18-09 and 30.1-18-15; (5) notify creditors of the estate to present their claims within three months after the date of the first publication of the notice or be forever barred. The personal representative must decide whether to allow or disallow each claim and make payment of claims

allowed — Chapter 30.1-19; (6) pay all expenses of administration, and estate, inheritance, and other death taxes—Chapter 30.1-19; (7) distribute the assets of the estate to the persons entitled to them—Chapter 30.1-20; and (8) close the estate by a formal proceeding terminating administration (Section 30.1-21-02) or by sworn statement of the personal representative (Section 30.1-21-03).

North Dakota law provides that title to the decedent's property is in the heirs upon death of the person but such title is subject to administration by the personal representative.

Section 30.1-12-08 provides, with minor exceptions, that probate or appointment proceedings may not be commenced more than three years after the decedent's death.

Sections 30.1-23-01 and 30.1-23-02 facilitate transfer of a small estate without use of a personal representative by providing for collection of personal property by affidavit of the successor. Sections 30.1-23-03 and 30.1-23-04 simplify the duties of a personal representative appointed to handle small estates.

## **B. The Uniform Act**

The Act provides an alternative for administering decedents' estates which makes appointment of a personal representative unnecessary.

The Act provides that the heirs or devisees may become universal successors to the decedent's estate by assuming personal liability for the obligations of the decedent and the estate. The universal successor is obliged to protect the rights of any minors or other incompetent heirs or devisees (Section 201). Minors or other incompetents, through their guardians or conservators, may concur or object as under existing law and are afforded time within the limitations subsequently set out to question acts of the universal successors (Sections 302 and 304). The requirements for the application to become universal successors are spelled out in detail and include the information necessary to coordinate this alternative to administration with any outstanding or pending applications for administration.

The application is to be filed with an administrative officer, such as the clerk or registrar of the appropriate court. The registrar, or the officer designated in the Act, is then to review the application to determine if it is complete and to see if any other proceedings in the estate are outstanding. If the application is complete and timely, and if no other proceedings are pending, the application is to be granted as an administrative, nonjudicial matter. Universal succession may be sought any time after five days have elapsed from the death of the decedent, except that if interests are asserted under a will, the will must have been probated within three years. Consequently, universal succession is available either for the prompt disposition of a decedent's estate or as a simple way of cleaning up an unadministered intestacy. The procedure is designed for simple estates, and if any unprotected creditor or claimant objects, the application will not be granted (Section 203).

Upon granting the application, the registrar issues

a written statement of universal succession. This document states that the applicants are universal successors to the assets of the estate, have assumed liability for the obligations of the decedent, and have the powers and liabilities of universal successors (Section 204). This statement can be used to demonstrate to others the universal successors' rights to deal with the decedent's assets. The universal successors have full power of ownership and third persons are protected when they engage in transactions with them (Section 205). Universal successors are obliged to discharge liabilities and distribute property to others entitled, retaining only that to which the universal successors are beneficially entitled by law. Persons to whom universal successors make distribution are subject to the same liabilities as if they were distributees from a personal representative (Section 206).

By becoming universal successors, the heirs or residuary devisees submit to the jurisdiction of the state court in any proceedings relating to the estate or assumed liabilities. They also waive their right subsequently to seek appointment of a personal representative (Section 207). The universal successors have the obligation of informing heirs and devisees who did not join in the application of the succession without administration. This information may be hand delivered or mailed by ordinary first-class mail. However, it does not affect the validity of the approval of succession without administration. The Act allows for a provision for an optional notice to creditors should the enacting state prefer to shorten the regular statutes of limitations to a four-month nonclaim period (North Dakota has a three-month period) (Section 208). Should a personal representative subsequently be appointed, such as on the petition of an unpaid creditor or claimant, the universal successors are obliged to restore property to which they are not entitled to the estate (Section 209). The liability of the universal successors to creditors or other claimants, except for personal fraud, conversion, or other wrongful conduct, may not exceed the proportion of the claim that the universal successor's share bears to the share of all heirs and residuary legatees (Section 210).

Creditors or other persons entitled to the decedent's property may enforce their claims against the universal successors by any remedy provided by law. For example, a creditor could sue the universal successors in the court to whose jurisdiction they have submitted, or the claimant may demand bond. If the demand for bond precedes the granting of the application, it is an effective objection to succession without administration until the claim is withdrawn or satisfied or bond is posted. If demand for bond occurs after the application for succession without administration has been approved, the claim must be satisfied or bond posted within 10 days or the claimant can petition for administration of the estate (Section 211).

An instrument of distribution of assets in kind or payment from a universal successor is conclusive evidence of the distributee's title to the assets as against all persons interested in the estate, except that a personal representative or universal successor

may recover for an improper distribution (Section 301). This is the same as the prevailing rule for distributees from a personal representative. If an improper distribution has occurred, the distributee is liable to return the property unless protected by adjudication, estoppel, or time limitation. If the distributee no longer has the property, the distributee is liable for its value (Section 302).

Persons who deal with the universal successors, distributees, or their transferees are protected in the same fashion as anyone dealing with the owner of property. Specifically, purchasers or lenders are protected. Those holding assets due the estate are authorized to deliver or pay them to the universal successors, their distributees, or assignees. Transfer agents are also protected in transferring securities or other assets. This protection is in addition to any transactional protection afforded by any other law (Section 303).

The Act includes a statute of limitations providing that, unless earlier barred by other law, any claim against a distributee is barred at the later of three years after the decedent's death or one year after the distribution (Section 304). This section is subject to the overriding provision regarding fraud in Section 104. Because universal successors are also distributees, this section provides the ultimate statute of limitations on actions against them for failure to perform their obligations as universal successors, absent fraud.

## **2. Testimony**

Testimony explaining the Act indicated that the Act is intended to provide a simple procedure for distributing a decedent's estate which makes appointment of a personal representative unnecessary. Concerns expressed about the Act indicated that there was no need for another procedure to settle estates, there could be title questions if courts were not involved in administration, and there could be unforeseen tax liability consequences to universal successors.

### **Recommendations**

The committee recommends adoption of the Uniform Antitrust Act. The Act would strengthen North Dakota's inadequate antitrust laws.

The committee recommends adoption of the Uniform Arbitration Act. The Act would allow for additional use of arbitration by agreement of the parties and would update the current procedures concerning arbitration.

The committee recommends adoption of the Uniform Statutory Will Act. The Act would provide a testator with an additional method for devising his or her property, as an alternative to intestacy.

The committee makes no recommendation with respect to the Uniform Succession Without Administration Act.

## **STATUTORY REVISION**

### **Modification of a Motor Vehicle— Recommendation**

Attorney General Opinion 86-1 opined that a violation of NDCC Section 39-21-45.1, modification

of a motor vehicle, constituted an infraction under Section 12.1-32-01. The Attorney General pointed out that prior to the passage of 1985 House Bill No. 1271 a violation of Section 39-21-45.1 was processed as a moving violation, a noncriminal traffic offense. House Bill No. 1271 amended Section 39-06.1-05 by including a violation of Section 39-21-45.1 within the various criminal traffic offenses exempted from the noncriminal traffic offenses authorized under Sections 39-06.1-02 and 39-06.1-03. There are conflicting references, however, in Sections 39-06.1-09 and 39-06.1-10(3)(a)(9).

The committee recommends Senate Bill No. 2060 to amend all pertinent North Dakota Century Code sections to make reference to Section 39-21-45.1 as a criminal traffic offense.

### **Noncriminal Violations of Game and Fish Rules and Governor's Proclamations— Recommendation**

Attorney General Opinion 86-7 opined that noncriminal procedures in NDCC Sections 20.1-01-28 and 20.1-01-29 are applicable to noncriminal violations of rules adopted by the Game and Fish Commissioner pursuant to Section 20.1-02-05(4) and of an order or proclamation of the Governor pursuant to Section 20.1-08-01. The opinion also indicated that the person charged with such noncriminal violations of rules or proclamations must post a bond to secure appearance equal to the amount set forth in the rule or proclamation. There was confusion on the subject because the maximum bond required to secure appearance for the statutory hearing process for noncriminal game and fish violations was required to be identical to the fees set forth for Class 1 and Class 2 noncriminal offenses, amounts that may be substantially less than the penalties established by the Game and Fish Commissioner by rule or in the Governor's order or proclamation.

The committee recommends Senate Bill No. 2061 to clarify that the procedures in NDCC Sections 20.1-01-28 and 20.1-01-29 are applicable to pertinent noncriminal violations of the Game and Fish Commissioner's rules and of the Governor's proclamations and that the bond required to secure appearance is equal to the amount set forth in the rule, order, or proclamation.

### **Adultery and Cohabitation Statutes**

The committee considered whether a minor technical correction was needed to NDCC Section 12.1-20-09, the adultery statute. The section provides that a married person is guilty of a Class A misdemeanor if he or she engages in a sexual act with another person. Another section excludes conduct with an actor's spouse except for spouses living apart under a decree of judicial separation, a temporary or permanent adult abuse protection order, or an interim order issued in connection with a divorce or separation action. The committee questioned the logic of the exception language. The committee considered a bill draft repealing the statutes making adultery and cohabitation crimes. The committee concluded the bill draft was not within the committee's authority to recommend statutory revision changes.

### Technical Corrections—Recommendation

The committee recommends House Bill No. 1050 to make technical corrections to the Century Code. The bill eliminates inaccurate or obsolete name and statutory references or superfluous language. The following table lists the sections affected and describes the reasons for the changes:

#### North Dakota Century Code

Section	Reason for Change		
6-05-06	Section 6-03-03 was repealed by S.L. 1985, ch. 116, §2. The new language on retention is taken from the former Section 6-03-03.	34-01-09.1	This section as originally enacted in S.L. 1949, ch. 223, contained a comma after chief. The comma was inadvertently deleted in later publications.
10-06-01	Chapter 10-19 was repealed by S.L. 1985, ch. 147, §24, and replaced by Chapter 10-19.1.	34-11.1-04(2)	This is a correction of a typographical error as originally enacted.
10-19.1-92(3)	Chapter 13-02, Fraudulent Conveyances, was repealed by S.L. 1985, ch. 186, §12, when Chapter 13-02.1, the Uniform Fraudulent Transfer Act, was adopted.	34-13-15	References in statutes should be to sections not to rules.
10-19.1-123	Chapter 47-30 was repealed by S.L. 1985, ch. 510, §43, and replaced by Chapter 47-30.1, the Uniform Unclaimed Property Act.	35-08-04	Chapter 35-11, establishing farm laborer's liens, was repealed by S.L. 1981, ch. 360, §1.
10-30.1-04(1)	Chapter 10-19 was repealed by S.L. 1985, ch. 147, §47, and replaced by Chapter 10-19.1.	37-17.1-20	The second "sentence" is redrafted to make a complete sentence.
11-28.3-06	The specific date the section was effective enhances the reader's understanding of the section's application.	39-10-07(2)	The word "rules" should not be used to describe statutory provisions.
21-03-09	Section 21-03-10 allows the proposal of the initial resolution to be by either the governing body or the voters.	39-10-69	"Article" is an incorrect reference to a division of the statutes.
26.1-03-03	Chapter 26-10.1 was repealed by S.L. 1985, ch. 316, §22. Present provisions relating to standard valuation law are found in Chapter 26.1-35.	39-10.1-01	The word "regulation" should not be used to describe a statutory requirement.
26.1-18-28(2)	Sections 26.1-18-15 and 26.1-18-16 were repealed by S.L. 1985, ch. 316, § 22.	39-10.1-08	Section 39-09-01 does not and did not at the time this section was enacted define bicycle. Section 39-01-01 contains definitions used in Title 39.
26.1-21-22	This section was derived from Section 26-23-21 which contained a reference to "general circulation."	39-20-12	The sentence is redrafted to make it clear the person drawing the blood is exempt from liability.
26.1-27-06(3)	Section 26-17.2-08 was repealed by S.L. 1985, ch. 316, §22. Section 26.1-27-10 was derived from Section 26-17.2-08.	40-05-02	Title 62, Weapons, was repealed by S.L. 1985, ch. 683, §8. The new weapons title, Title 62.1, does not contain similar provisions concerning the cities' right to regulate the sale of pistols.
26.1-33-05(7)	Chapter 26-10.1 was repealed by S.L. 1985, ch. 316, §22. Present provisions relating to the standard valuation law are found in Chapter 26.1-35.	41-09-42(6)	Section 9-403(6) of the Uniform Commercial Code refers to subsection 6 of Section 9-402.
28-22-02	Chapter 35-11, establishing a farm laborer's lien, was repealed by S.L. 1981, ch. 360, §1.	43-01-20	A typographical error is corrected.
29-07-01.1	The reference to subsection 7 should have been changed to subsection 8 when S.L. 1983, ch. 352, §1, added a	43-33-07	The specific date of effectiveness of the chapter enhances the reader's understanding of the section's application.
		45-11-01	Chapter 45-10 was repealed by S.L. 1985, ch. 504, §65, and was replaced by Chapter 45-10.1.
		50-06-05.2	Order 49 was superseded by Order 1978-12.
		50-06-05.3(1)	Order 49 was superseded by Order 1978-12.
		54-14-03.1	This change makes the reference to the Budget Section uniform throughout the code.
		54-40-01	The usual reference when defining a term is to the location of the term—in this case "in this section."
		54-54-03	Section 54-54-02, establishing the Council on the Arts, was amended by

	S.L. 1983, ch. 582, §3, to remove the requirement for Senate confirmation of appointments.	57-28-18	S.L. 1985, ch. 604, §13, changed the time period in the sentence preceding the sentence in which the amendment is made. This change would make the time periods successive.
57-02-14	Section 57-02-11 was amended by S.L. 1981, ch. 564, §6, to require that assessments be made annually.		
57-11-03	Section 57-02-08(25) exempts all personal property not required by Section 4 of Article X of the constitution to be assessed by the State Board of Equalization. The reference in Section 57-11-03 to personal property is superfluous.	57-38-30.3	Section 57-38-29.1 was repealed temporarily by S.L. 1983, ch. 632, §5, and permanently by S.L. 1985, ch. 634, §1.
57-23-08	The Tax Appeals Board was declared unconstitutional in <u>Paluck v. Board of County Commissioners</u> , 307 N.W.2d 852 (N.D. 1981). Thus, the reference to the appeals board in Section 57-23-08 is superfluous.	61-21-46	The word "rationing" is a typographical error.
		65-14-01	The change corrects the reference to the name of the Act.
		35-20-10	Section 35-20-10 concerning lien notice for federal taxes is repealed because it conflicts with the more recently adopted Uniform Federal Lien Registration Act, Chapter 35-29.

# LAW ENFORCEMENT COMMITTEE

The Law Enforcement Committee was assigned four studies. House Concurrent Resolution No. 3020 directed a study of the feasibility and desirability of establishing a central filing office for criminal judgments. House Concurrent Resolution No. 3063 directed a study of the structure of the state law enforcement system in North Dakota, particularly the coordination of training and standards of law enforcement personnel. House Concurrent Resolution No. 3097 directed a study of whether there is a need for a statewide medical examiner system, using a forensic pathologist. Finally, Senate Concurrent Resolution No. 4066 directed a study of the status and impact of charitable gambling in this state, particularly of the issues of the direction charitable gambling should take in the future, the feasibility of establishing an independent commission to regulate charitable gambling, enforcement difficulties, intergovernmental relationships, level of the charitable gambling tax, use of charitable gambling proceeds, and whether the constitution should be amended to limit or expand permitted forms of charitable gambling.

Committee members were Senators Thomas Matchie (Chairman), Ray Holmberg, Jack Ingstad, Earl M. Kelly, and F. Kent Vosper; and Representatives Gordon Berg, Judy L. DeMers, Thomas Lautenschlager, Don Lloyd, Vince Olson, Dan Ulmer, Wilbur Vander Vorst, and Adella J. Williams. Senator Hal Christensen was a member of the committee until resigning his Senate seat in October 1985.

The report of the committee was submitted to the Legislative Council at the biennial meeting of the Council in November 1986. The report was adopted for submission to the 50th Legislative Assembly.

## CENTRAL FILING OFFICE STUDY

Under present law primary sources of centralized criminal records in this state include the North Dakota Bureau of Criminal Investigation, the Criminal Justice Training and Statistics Division of the Attorney General's office, the North Dakota Game and Fish Department, and the Motor Vehicle Operators License Division of the State Highway Department. Under North Dakota Century Code (NDCC) Section 12-60-07, the Bureau of Criminal Investigation is required to cooperate with state and federal governments in establishing a complete system of criminal identification, to maintain a record of fingerprints of all people confined in a penitentiary or jail, and to maintain a file for the identification of persons convicted of issuing false and fraudulent checks. The Motor Vehicle Operators License Division of the State Highway Department maintains records of traffic-related offenses, and the Game and Fish Department maintains records of violations of the game and fish laws. The committee concentrated its attention on the records maintained by the sources that are part of the Attorney General's office—the Bureau of Criminal Investigation and the Criminal Justice Training and Statistics Division.

## Background

The issue of the adequacy of criminal records primarily arises in the context of punishment meted out to a defendant after conviction. A frequently seen disposition of cases is to suspend all or some part of a sentence to prison or jail, and some cases are deferred before finding of guilt or innocence on the condition that the defendant commit no further crimes. The problem arises in determining whether a given defendant is entitled to more lenient treatment on the grounds of being a first offender or, if future disposition is contingent upon continued law-abiding conduct, finding whether that promise has been kept by the defendant. It is frequently difficult, especially in misdemeanor cases, for a sentencing judge to obtain accurate information concerning the criminal history of the defendant and decide whether the defendant is entitled to more lenient treatment.

Other issues that are important in this context are determining whether a given defendant before the court has been accurately identified (e.g., whether this John Smith is the same John Smith who stole a car three years ago), the ultimate result of a given criminal prosecution, and who has access to the information contained in the state's criminal history record system.

One method of ensuring control and learning of future conduct of a defendant is to place the defendant, after conviction, under the supervision and management of the Board of Pardons acting through a parole officer. For felony cases, this is required under NDCC Sections 12-53-06 and 12-53-09. For misdemeanor defendants, this supervision is not practical because of the vast numbers of misdemeanor cases and relatively low numbers of parole officers available to keep track of defendants. A primary focus of the committee's deliberations, then, was on methods that could be used to accurately keep track of misdemeanors committed by subjects of the records.

## Testimony

The committee learned that there is an adequate system for comprehensively recording game and fish offenses and traffic offenses, but not for more serious misdemeanors. Normally, the first event linking a given individual to a particular crime is an arrest. The arrest documents generally are the basis of a file linking a person to a crime. However, for some crimes, an arrest is never made before the trial. In some instances, "bad check" cases are handled by the prosecuting attorney sending the check writer a letter requiring the check writer to appear in court. In those circumstances, the initial event that would be recorded in the system would be the court appearance. Other events in the criminal prosecution process are important to a given individual's record. These include questioning concerning a crime, arrest for a crime, disposition of the case by a court before trial, conviction, sentence, and acquittal. Important events following conviction include suspension of sentence, parole, probation, and entry and exit from the prison system. Thus, a critical issue identified to the

committee was exactly what kind of events should be retained in a system.

Another point presented was the nature of offenses for which information should be systematically recorded at all. There are over 600 misdemeanors specified in the North Dakota Century Code. It was predicted that maintaining a systematic record of all violations of those laws would overwhelm the system.

The issue of access to the records was the subject of considerable comment. Present North Dakota law is unclear on the issue of exactly who is entitled to access to the information contained in an individual's criminal history record. Representatives of the Attorney General's office reported that normally this information is freely shared among law enforcement agencies, but that it is not generally given to parties outside the law enforcement system. An exception to this is conviction data, which is generally revealed. The point was made that most of the information in a central record, including that of arrests and other nondispositional actions, could be obtained by sufficient research into other existing public documents. For example, arrests and dispositions of various offenses are routinely reported in some newspapers. Described as a critical distinction of a central system was the obtaining of information by one inquiry directed to a central source rather than by an exhaustive search of sources throughout the state. Further, a distinction was drawn between reporting events to a central system and disseminating information about the events to the general public.

Presently there is no statutory requirement that many of the reportable events with respect to misdemeanors be reported to any central location. A number of incentives to induce this reporting were described. For example, in Minnesota paychecks of local court officials are withheld until reporting requirements are complied with. Because of inconsistent reporting activities around the state, the present North Dakota system was described as dysfunctional. The importance of having the arrest be the initiating event generating a record was emphasized in the context of accurately identifying the subject of a file. Since a person is normally fingerprinted when arrested, the fingerprints have generally served as the basic identifying document of a record.

### **Proposals**

The committee considered a main bill draft, patterned in great part after a similar bill considered during the 1977 session, that specified the interactions with the criminal justice system for which a record would have to be made with the central system. These include issuance of an arrest warrant, creation of an identifiable description of a suspect, notation of an arrest, release without filing of a charge, detention, indictment, information, criminal charges, disposition, sentencing, correctional supervision, escape, pardon, reprieve, sentence commutation, change in sentence, appeal, judgment, and release. The bill draft made the arrest the critical event establishing a record and identifying a particular suspect with the crime. Later a provision

was added to cover situations where there is no arrest before the court proceeding. In these cases the court would be required to order the taking of fingerprints of the defendant who has been convicted.

The bill draft was changed to specify parties responsible for reporting a given event to the bureau. For example, an arrest is generally reported by the arresting agency, filing of a charge is reported by the state's attorney, court dispositions are reported by clerks of court, and entry or exit into or from a correctional institution is reported by corrections officials. The bill draft required the Attorney General to adopt rules dealing with reporting, collecting, maintaining, and disseminating criminal history record information. Under the bill draft the rules must govern issues such as security of the information, limitations on its dissemination, challenging of the information, and auditing and other methods to ensure accuracy of the information. The bill draft also allowed the bureau to charge a fee of up to \$20 for the cost of providing information to parties outside the law enforcement community.

The committee considered a number of alternatives concerning the scope of misdemeanors to be covered by a system. One proposal, originally incorporated in the main bill draft, was to have all misdemeanors included. Another bill draft would have allowed the Attorney General to specify the included offenses by rule. A third bill draft would have required that certain misdemeanors considered more serious be included. These offenses were sex offense misdemeanors, "bad check" violations, and serious driving violations such as driving while "under the influence."

### **Recommendation**

The committee recommends House Bill No. 1051 to generally require reporting of criminal history information to the Bureau of Criminal Investigation. Events relating to all felonies, as well as misdemeanors specified by the Attorney General by rule, are required to be reported. Specification of reportable offenses by the Attorney General is intended to allow changing of the list of such offenses as the capability of administering the system changes.

## **LAW ENFORCEMENT STRUCTURE STUDY**

### **Background**

The chief components of the North Dakota law enforcement structure include various agencies within the office of the Attorney General, as well as a number of agencies outside the Attorney General's office. Agencies not within the Attorney General's office include the Highway Patrol, whose superintendent is appointed by the Governor. Under NDCC Section 39-03-09 the Highway Patrol is responsible for law enforcement related to motor vehicles and highways, and generally at state charitable and penal institutions and at the State Capitol. The Highway Patrol is also responsible for the operation of the Law Enforcement Training Center in Bismarck. Other law enforcement components outside the Attorney General's office include the Game and Fish Department (for enforcing game and fish laws), park rangers, and the State Penitentiary.

Within the Attorney General's office are the Bureau of Criminal Investigation, the Drug Enforcement Unit, the Criminal Justice Training and Statistics Division, the State Fire Marshal, and the Gaming Division. The Bureau of Criminal Investigation was established in 1965 and is responsible for assisting law enforcement agencies in the establishment and maintenance of a complete system of criminal investigation; establishing and maintaining fingerprint records; aiding in and establishing a system for apprehension of criminals and detection of crime; as well as other related duties.

The Criminal Justice Training and Statistics Division was established in 1981 as the successor to the Combined Law Enforcement Council. The division is responsible for certifying the training of peace officers and conducting the training of peace officers, as well as state's attorneys and defense attorneys, regarding the state criminal justice system. Under NDCC Section 12-62-03, the Peace Officers Standards and Training Board is established as part of the division. The seven-member board, also established in 1981, consists of the director of the Law Enforcement Training Center (who, under NDCC Section 39-03-13.1, is appointed by the superintendent of the Highway Patrol), as well as six members appointed by the Attorney General—four peace officers, one county government representative, and one city government representative. The Attorney General appoints one of the members as chairman of the board and the director of the Criminal Justice Training and Statistics Division serves as an ex officio nonvoting member of the board.

In its deliberations with respect to the study, the committee concentrated its attention on the issue of certification of peace officers and on the operation of the Law Enforcement Training Center.

### **Testimony**

#### **Peace Officer Licensing**

Present law does not require a person who is a peace officer to have a special license to perform those duties. However, all officers must receive basic training within one year of their appointment. Problems described to the committee in this context included the existence of a "Catch-22" situation. The conflict is that normally a person is ineligible to receive training at the Law Enforcement Training Center (academy) unless the person is already a peace officer, yet many law enforcement agencies are reluctant to hire candidates without academy training. When the candidate completes the basic training course at the academy, a certificate of completion is issued by the Criminal Justice Training and Statistics Division. The Peace Officer Standards and Training Board is responsible for establishing requirements of the training program at the academy. The seven-week basic training course was described as insufficiently detailed or comprehensive to prepare candidates adequately for service as peace officers. Another problem described to the committee was that faced by smaller communities, which hire a peace officer without academy training and pay the peace officer's salary during training at the academy, only to see the officer, now armed with a certificate of

completion, accept a better paying offer with a law enforcement agency that only accepts trained candidates.

Comparisons were drawn to other occupations and the anomaly cited that peace officers are first hired and then trained. It was pointed out that for most occupations a person desiring to work in that field must first obtain the necessary training and then seek employment. It was also suggested that requiring students to pay for their own training would free the money presently spent by the state on the academy and by employing agencies on salaries of candidates receiving basic training.

The committee also heard testimony concerning some of the perils of employing peace officers with inadequate training or experience. One concern often raised was that untrained peace officers carrying firearms may use the firearms in inappropriate situations, subjecting the employing jurisdiction to serious liability claims. A further cited deficiency of the practice of hiring before training was that a number of peace officers were sent by employing jurisdictions to the academy despite having criminal records inconsistent with serving as a peace officer. By the time these candidates had arrived at the academy, according to witnesses, it was not always possible to refuse training.

It was reported that the training and background of peace officers presently employed varies widely, although a significant portion have at least some college education. As to larger cities and the Highway Patrol, it was reported that many officers have a college degree. For the Highway Patrol, a two-year college degree is now by practice a minimum requirement. Although the nature of the college training varies, many peace officers have college training in criminal justice areas.

The concept of licensing peace officers was studied closely and the opinions of present peace officers were solicited by questionnaires distributed by the North Dakota Peace Officers Association. It was reported that the questionnaire results indicate peace officers are about evenly divided on the issue of licensing, and most do not favor a college education requirement, but most administrators and supervisory level peace officers favor licensing and a college training requirement.

One suggestion, in light of possible peace officer opposition to a licensing proposal, was to establish a three-tiered licensing system, under which different levels of licenses would be issued on the basis of the educational background of the licensee. Suggested gradations were the high school diploma level, the associate degree level, and the bachelor's degree level. One difficulty cited with this proposal was that a supervisor could be directing officers with a higher level license.

Proponents of licensing in general suggested that a licensing system would allow revocation of licenses in contrast to the present reported lack of power of the Peace Officer Standards and Training Board to revoke a certificate issued to an officer completing basic training. Almost all proponents agreed that if peace officer licensing is established, a "grandfather clause" should be included that would grant a license

to peace officers already certified when the proposal takes effect.

### **Law Enforcement Training Center Expansion**

The Law Enforcement Training Center in Bismarck was established following a 1969 appropriation of \$169,000, funded by a one-time 50-cent charge on driver's licenses. Presently the academy has a capacity of 40 beds, with candidates being housed in double-room accommodations.

According to testimony, the academy has been operating at full capacity for most of its existence. Primary use of the academy is for the seven-week basic training courses that all peace officers are required to complete and for the 17-week training program periodically administered by the Highway Patrol for its recruits. When the academy is not being used for the basic training courses, it is available for inservice training to peace officers and a myriad of programs are offered. However, according to testimony, in recent years a number of inservice programs have been deferred because of unavailability of the academy due to its full usage for basic training courses. On weekends, when the academy is not being used for law enforcement training, it has occasionally been used by entities such as the National Guard and the Boy Scouts for various training activities. Under present practice, normally the state pays for the operation of the academy and the employing agency of the officer receiving training pays the officer's salary while the officer is at the academy. It was suggested to the committee that authorization be granted to expand the academy, with funding being provided by a temporary \$1 increase in the driver's license fee.

### **Proposals**

The committee considered a number of variations on the peace officer licensing theme. Proposals discussed included a requirement of a college degree for licensees, a requirement for the establishment of curricula in colleges for training potential peace officers, and a multi-tiered license based on the level of academic achievement of the licensee.

Under the main bill draft considered, peace officers certified before July 1, 1987, are automatically entitled to a license. The bill draft made the Peace Officer Standards and Training Board responsible for establishing licensing standards, including minimum education standards for licensing. The bill draft provided for temporary exemption from the licensing requirement, issuance of a limited license, and adverse license action.

The committee considered a proposal to authorize expansion of the Law Enforcement Training Center in Bismarck. Because of the possible relationship between a license fee and the restriction, under Section 11 of Article X of the Constitution of North Dakota, of use of certain highway funds, the bill draft initially made reference to the necessity of enforcing the 55-mile-per-hour speed limit in order to preserve access to federal highway funds. The bill draft also referred to a special fund for the expansion. The bill draft finally considered by the committee omitted those provisions.

### **Recommendations**

The committee recommends House Bill No. 1052 to provide peace officer standards, training, and licensing. The bill provides for a single license. This choice was made because of the supervision issues raised and as a compromise.

The committee recommends House Bill No. 1053 to provide an appropriation of \$480,000 from the general fund for the expansion of the Law Enforcement Training Center. The bill also provides for a temporary motor vehicle operator's license fee of \$1 imposed on new licenses issued or renewed during the four years beginning July 1, 1987. The committee believes the license fee is not subject to the constitutional restriction on uses of certain motor vehicle taxes. The reference to a special fund was removed in reliance on the representation by the superintendent of the Highway Patrol that funds will not be expended for the expansion until an equivalent amount of revenue has been generated by the operator's license fee.

## **COUNTY CORONER SYSTEM STUDY**

### **Background**

North Dakota has two county coroner systems, governed primarily by NDCC Chapters 11-19 and 11-19.1. Under these chapters, larger counties (those with at least 8,000 population) are required to appoint a physician as a county coroner. Seventeen counties are subject to that requirement. Population trends indicate that another three counties may be by 1990.

In the less populous counties, no formal qualifications are spelled out for the coroner. Under NDCC Section 11-19-19, if there is no coroner, or if the coroner is unavailable, most duties of the office can be performed by the sheriff, the Highway Patrol, or a special agent of the Bureau of Criminal Investigation.

In the more populous counties, the physician coroner's jurisdiction is nominally broader than that of a coroner in the less populous counties. Under NDCC Section 11-19.1-07, there is a duty to report to the coroner or law enforcement officials the occurrence of a death resulting from criminal or violent means, casualty, suicide, or accident; or occurring suddenly while the decedent was in apparent good health, or otherwise in a suspicious or unusual manner. For these counties, special requirements also apply in the case of a death of a child under the age of three years, primarily because of the possibility of sudden infant death syndrome. In practice, many of the reporting requirements nominally applicable to the larger counties are also applied in the smaller counties.

The office of coroner dates from 12th century England where it was established primarily to determine the identity of a decedent because, if the decedent was a felon, the decedent's property belonged to the king. The role of a coroner in determining the cause of death arose from the Norman invasion on England. After the invasion, the Normans required investigations of killings to determine if the victim were a Norman, in which case the village would have to pay a heavy fine called a "murdrum." The office of coroner developed through

medieval times and the concept of rigorous scientific examination into the cause of a death, with the investigation being done by physicians, had its beginnings with the establishment of a medical examiner system in Massachusetts in 1912.

At least two prior efforts have been made in North Dakota to establish a medical examiner system. A 1979 proposal, Senate Bill No. 2149, would have established a board of medical investigation which would have had responsibility for establishing a statewide forensic pathology system. A stated purpose of the proposal, which was defeated in the Senate, was to establish a medical legal system for uniformity of investigations of unexpected death. The 1979 proposal defined a number of kinds of death that would come within the jurisdiction of the medical examiner, primarily focusing on deaths by violent means or those that were unexpected.

In 1985 another proposal was introduced, Senate Bill No. 2441, which had many similarities to the 1979 proposal. In the 1985 proposal, which was defeated in the House of Representatives, a board of forensic investigation would have been established rather than a board of medical investigations. In the 1985 proposal, the Governor appointed the chief medical examiner. The proposal also required that each county appoint a county medical examiner subject to the approval of the chief medical examiner. The 1979 proposal did not require appointment of a county level investigator in each county.

Aside from North Dakota's proposals, other death investigation legislation has been suggested. In 1954 the National Conference of Commissioners on Uniform State Laws published a model Post-Mortem Examinations Act. At least five states have adopted that Act or variations of it.

### **Testimony**

#### **Establishment of the System**

On the topic of whether a medical examiner system should be established, testimony was almost universally in favor. It was reported that the 1985 proposal would have passed but for the cost of adopting the system. The role of the system was described as investigating sudden and unexpected deaths. Proponents pointed out that such an investigation does not necessarily imply that an autopsy would be performed. Many benefits to come from such a system were described to the committee.

Law enforcement officials testified as to the necessity for accurately determining whether a given death is a homicide. It was estimated that as many as five to seven undetected murders are committed each year in North Dakota. One official reported that he knew where he could get away with murder as he had been advised that autopsies were not necessary in that county. Cases were described where autopsies were performed at cemeteries and at a police shooting range. Another case was described in which the victim was buried without an adequate autopsy and evidence leading to proof of the murder was obtained only after exhuming the body and sending it out of state for more intensive examination.

Although detection of unsolved murders is probably the most dramatic demonstration of the need for

adequate death investigation, such occurrences are relatively rare. Reasons cited as having more frequent and general importance include determining whether a given death is accidental or natural for the purpose of determining eligibility for higher indemnity under an accidental death insurance policy. Other valuable information would include accurate determination of whether a death was a suicide. A further value pointed out to the committee was in the generation of useful disease statistics so that public health officials can have an accurate idea of disease trends that may have important public health consequences.

Practical implications of establishing a medical examiner system were discussed. Particular concern was expressed by funeral directors over the possibility of delays in the handling of bodies. Preparation of the body for burial by embalming and other processes significantly hampers a death investigation. Thus the investigation of necessity must be performed with some dispatch before the body is released to the funeral director for preparation for burial. The possibilities of significant delays in this process were raised. Cited as a chief source of potential delay was the time consumed in transporting a body and awaiting the actual investigation.

In some cases, an autopsy can be performed adequately only at a major forensic pathology facility designed for the purpose. These include cases of deaths where the body is not found for some period of time, deaths from highly contagious diseases, and deaths from extraordinary causes. These steps were cited as possible sources of excessive delays and cost consumed in transporting a body. Another problem described to the committee was delay in performance of an autopsy. An example given was the Veterans Administration Hospital in Fargo at which autopsies are reportedly not performed outside normal working hours on Monday through Friday. This meant, according to one witness, that a death occurring on Friday afternoon of a three-day holiday weekend would not be investigated until Tuesday, with the body not being released to the funeral director until Tuesday afternoon. The committee was told this would cause unnecessary stress and turmoil for the family of the decedent.

The issue of initial investigation of a given death to determine if further investigation is necessary also received some commentary. It was generally agreed it would be impossible to have trained physicians available throughout the state to make an initial onsite determination in every case. Consequently, it was suggested that it is important that persons making these initial determinations be given adequate and extensive training in factors to look for in making the critical decision to refer the case to officials with more specialized training. Proponents of the medical examiner system suggested that if the system is established, the first year would be primarily spent in educating local officials in factors to look for that would suggest a need to refer a case to a medical examiner. The importance of this training was emphasized by law enforcement officials, one of whom testified that, although he had received some special training in investigating suspicious deaths, he realized that there were many cases that

might escape his attention and recognition of the need for referral to a medical examiner. It was estimated that about 5,500 deaths occur in North Dakota every year, and of these about 1,000 to 1,200 would be normally within the jurisdiction of the medical examiner system. It was predicted that under a medical examiner system, the decision would frequently be that no further investigation is necessary and about 500 would require autopsies. Many of these autopsies could be performed at regional locations, with only a small number being required to be sent to Grand Forks for completion in the fully equipped autopsy suite.

The committee invited as a special guest the chief medical examiner of New Mexico, who later became the chief medical examiner in Maryland. It was pointed out that many of the geographical issues present in North Dakota are also present in New Mexico. Under the New Mexico system, deputy medical investigators are trained by the state office to make the initial onsite determination. Under the New Mexico system, there is significant cross-benefit of affiliation of the medical examiner with the medical school and that medical students receive exposure to training they might otherwise not receive, and the medical examiner has better access to expert physicians in a variety of fields. The basic goal of a medical examiner system was described as being to provide expertise in death investigation.

### **Funding Sources**

In light of the recognition that a major reason for the failure of the 1985 proposal was the lack of a funding source, considerable discussion was directed toward possible funding methods. The value of the medical examiner system to many of its users was emphasized. Particular emphasis was placed on the value to insurers of accurate determination of the cause of a death in the context of an accidental death double indemnity policy. It was also suggested that counties would experience significant cost savings if a statewide system is established, since counties presently pay the cost of the coroner system. Although reports of county costs for coroner services indicated a wide variation in costs among counties, some of the variation was attributed to the fact that in many of the larger counties the deaths are of out-of-county residents who are taken to a medical center and die there. Consequently, the suggestion was made that counties be required to pay a portion of the cost of the state medical examiner system through a per capita payment.

Other suggested funding methods included an additional tax on life insurance and on accident and health insurance. Proponents of the additional tax suggested there is a sufficiently close relationship between a medical examiner system and the interests inherent in these kinds of insurance to justify the tax. Another funding source suggested was the establishment of a fee for issuance of a death certificate, analogous to the fee of \$2 presently imposed on birth certificates and dedicated to child abuse prevention.

### **Proposals**

#### **Establishment of the System**

The committee considered a basic bill draft to

establish a statewide medical examiner system. Under the bill draft, the state medical examiner would serve both in that office and as head of the Division of Forensic Pathology in the Department of Pathology at the University of North Dakota Medical School. A board of forensic investigation would be established, consisting of the dean of the University of North Dakota Medical School, the State Health Officer, the Attorney General, and a member from each of the State Medical Association, State Peace Officers Association, the North Dakota Pathologists Society, and the State Funeral Directors Association. The board would have general supervisory authority over the medical examiner.

The chief medical examiner is required to be a physician licensed in this state with expertise in the field of anatomical pathology and forensic medicine, certified as such by the American Board of Forensic Pathology. The bill draft provides for the appointment of county medical examiners and county medical examiner investigators. The county medical examiners would be required to be physicians and could serve more than one county. The county medical examiner investigators would not be required to be physicians, but would have to have adequate training in routine investigative procedures relating to forensic pathology.

Under the bill draft, deaths within the jurisdiction of the medical examiner system would be those resulting from violence, suicide, fire, casualty, and poison; those that are sudden to a person in apparent good health, or to a person unattended by a physician; those in a state institution or in public custody; those from a disease or injury resulting from employment; those from an undiagnosed cause which may be related to a disease constituting a threat to public health; those in any other suspicious or unusual manner; and those arising from any cause specified as reportable by rule of the board. The bill draft would also require that persons having knowledge of a reportable death or one that might involve sudden infant death syndrome to report the death to the medical examiner or the law enforcement system.

The bill draft would also amend several sections of present law dealing with other duties of the former county coroner. In most cases, these duties would be performed by the sheriff or county auditor. The bill draft would abolish the present county coroner system, effective in 1989.

### **Funding Sources**

The committee also considered a bill draft that would establish a medical examiner's fund to provide funding for the medical examiner system. Under the bill draft, funding sources would include a 50-cent-per-capita annual payment by counties; the establishment of a fee of not over \$100 to recipients of medical examiner's reports receiving those reports and having a pecuniary interest in the determination of the cause of death; an increase of one-tenth of one percent in the gross premium tax levied on insurance premiums for life insurance (presently two percent) and accident and health insurance policies (presently one-half percent); and a fee of \$25 for the first issuance of a certified copy of a death certificate by the State Department of Health or a local county registrar.

## **Recommendations**

The committee recommends House Bill No. 1054 to establish a state medical examiner system. The bill also provides for an appropriation of \$470,216 for the next biennium to start the system.

The committee recommends companion House Bill No. 1055 to provide the funding sources for the medical examiner's system. The bill establishes a special medical examiner's fund in the state treasury, primarily made up of those funding sources.

## **CHARITABLE GAMBLING STUDY**

### **Background**

Gambling has been a topic of concern since the earliest days of statehood. In the first legislative session after statehood (1889-90), an attempt was made to introduce into this state the ill-fated Louisiana lottery which was seeking a new home in light of the impending revocation of its charter in its state of origin. The scandal and controversy following this attempt led to the adoption of this state's first constitutional amendment outlawing all forms of lotteries and "gift enterprises." That constitutional prohibition was retained until 1976, when it was amended to allow certain forms of charitable gambling, but still prohibited other games of chance, lotteries, and gift enterprises. At the November 1986 general election, the voters disapproved a proposed amendment to this provision repealing the lottery prohibition and requiring the adoption of a state lottery and the establishment of a supervisory commission.

After the passage of the 1976 amendment authorizing charitable gambling, a temporary charitable gambling law was enacted in 1977, another temporary law was enacted in 1979, and a permanent one was enacted in 1981. The permanent provisions are codified as NDCC Chapter 53-06.1. All three laws became effective without the approval of the Governor holding office at the time of passage.

Under Chapter 53-06.1, the Attorney General is responsible for licensing most charitable organizations conducting gambling. Local licensing is permitted for small bingo and raffle events and for small sports pools. However, all charitable gambling organizations are required to file tax returns with the Attorney General. A number of games are authorized under Chapter 53-06.1. Based on money wagered, the most popular game is the one variously known as pull tabs, jars, jar bars, and tip jars. During the interim, the game of bingo moved from third most popular to second most popular game authorized by statute. Falling from second place to third place in the order of popularity was the game of 21 (blackjack). Other games authorized by the statute include raffles, punchboards, and sports pools. By the time of the Legislative Council meeting, according to reports of the Attorney General's Gaming Division, these last three games comprised less than one percent of the total gambling in the state.

Total gambling in the state has increased over the years and by the fiscal year ending June 30, 1986, gross proceeds for charitable gambling had reached nearly \$165.6 million, of which almost all (\$164.6 million) was from the three most popular games. Gross proceeds since the start of gambling in 1977

total \$788.3 million. For all games except blackjack, "gross proceeds" refers to the total amount wagered on the game. For blackjack, the nature of the game makes this figure unavailable and the term refers to the total sale of chips by the house. Typically, total wagering on blackjack exceeds the value of the chips sold as a player may use the same chip a number of times before finally losing it or cashing it in.

The committee considered a number of issues, including the establishment of a supervisory commission, a dedicated tax, a tax based on gross proceeds, rent limitations, prize limits, manufacturer's licensing, expense limits, and possible impacts of a lottery.

### **Testimony**

#### **Charitable Gambling Commission**

The committee heard considerable testimony from representatives of the Attorney General's office as well as many of the regulated charities concerning enforcement efforts of the Attorney General's office. Many charity representatives noted that the Attorney General's Gaming Division has received inadequate appropriations to enforce the charitable gambling law properly. As a result, most enforcement has been responsive and not preventive. The distinction was made that most enforcement efforts are only in response to a specific complaint of a problem and the division has little staff available to provide adequate training to prevent problems from occurring.

The enforcement mechanism in North Dakota was compared to that of the state of Washington, which has gross proceeds of charitable gambling in the vicinity of \$300 million per year. It was reported that the Washington staff has an appropriation of over \$3 million and a staff of 87, while North Dakota's enforcement is performed by a staff of eight with an appropriation of \$740,000 per biennium (\$370,000 per year). The director of the Washington staff, invited to testify before the committee, reported that the Washington staff is able to work closely with the licensees and has implemented a mandatory universal audit program. The discretion to revoke a license was reported as the most effective enforcement tool the staff has. Gambling was described as a cash intensive industry easily subjected to skimming and an incident was reported where a surprise audit was conducted of a bingo game to the cheers of the players.

The point was made that when charitable gambling was first established in North Dakota, it was envisioned that it would be a low key game with small amounts of money involved and designed to discourage participation by professional gamblers. The increased spending on gambling was cited as evidence of excessive professionalism creeping into the North Dakota game. Representatives of some of the larger charities advocated a stronger enforcement mechanism, particularly at the state level. They reported that, with a few exceptions, local enforcement activities were less effective than state activities. Proponents of state-level enforcement said such enforcement would enable greater expertise to be developed, allowing for training of employees of the charities as well as local law enforcement officers.

When the issue of whether state-level enforcement should be in the hands of the Attorney General or an

independent commission was discussed, many proponents suggested that issue may not be as important as whether, regardless of which entity enforces the law, it gets adequate appropriation and personnel.

#### **Dedicated Fund**

One significant problem reported was the failure to dedicate the present charitable gambling tax to enforcement at the state level. Under present law, the local share of the tax (basically two percent) is required to be used for enforcement activities, while the state share (basically three percent) is allocated to the state general fund. There was support for the idea that the present distribution should be changed to remove the payment to the local jurisdiction, with all enforcement responsibilities transferred to the state. The appropriation to the Attorney General's office for gambling enforcement has always been less than the state's share of the gambling tax. Proponents of state-level enforcement argued that adequate enforcement is critical and at a minimum the appropriation for that enforcement should at least equal the amount of tax produced by gambling.

It was contended that using gambling tax proceeds for the general fund goes against the initial concept behind charitable gambling; namely, that it be a low key activity not designed to raise tax revenue for the state, and that any tax revenue raised be used only for policing charitable gambling activities. Accordingly, some proponents suggested that the present statute dealing with allocation of the charitable gambling tax be amended to require that the entire state share be dedicated to the Attorney General's office for enforcement purposes. The impact of the present funding level for the Attorney General's office was emphasized when it was pointed out that present funding and staffing levels would permit a routine audit of each charity only once every 14 years. It was noted that in Washington the funding for enforcement is provided by a dedicated revolving fund from license fees, and not general fund moneys.

#### **Gross Proceeds Tax**

Present law imposes the gambling tax on the basis of adjusted gross proceeds, which is defined by statute as the gross proceeds minus prizes paid to bettors. This method was criticized as not encouraging cost savings on the part of charities. The tax based on adjusted gross proceeds was once described as a license to skim and steal. Another suggestion made was to repeal the present graduated tax structure, under which adjusted gross proceeds in excess of \$600,000 per quarter are taxed at a rate of 20 percent instead of five percent. Witnesses reported that this higher tax has been imposed only once since its inception. Opponents of repealing the graduated tax argued that the graduated tax was designed to prevent any single charity from becoming too big.

#### **Rent Limitations**

Many problems centering around rent payments were described to the committee. It was recalled by proponents of rent limits that, when charitable gambling was first proposed, representatives of the hospitality industry said rent would not be charged

to charities and that host sites would rely for compensation on business generated by the increased traffic attracted by the charitable gambling activities. The lack of rent limitations was cited as the cause of practices described as rent gouging and pirating of host sites. (Pirating refers to a practice of one charity bidding up the rent in competition with a charity already serving a site.)

One method designed to try to alleviate this situation was the establishment, in 1983, of rent limitations for blackjack sites. Rent for blackjack sites was limited to \$150 per month per table. Abuse of this provision was described as occurring in two manners. One manner was that the host site would insist on having an excessive number of blackjack tables, in order to justify a higher monthly rent. When the Gaming Division began disallowing rent payments for tables not regularly used, according to witnesses, some host sites banned blackjack altogether. The reported reason for this practice was that it meant there was no ceiling applicable and host sites were free to charge any rent they could command. It was reported that at one site without blackjack tables, the host site charged rent of \$900 a month.

Representatives of the Attorney General's office testified that the present rent limitations strengthen the ability of the Attorney General's office to negotiate with the host site.

A number of methods of establishing rent limitations were suggested. One method was to base the rent on a percentage of the gross proceeds of the charity at the site. Proponents predicted this would eliminate the incentive of host sites to require excessive blackjack tables or to require their removal altogether, and further that it would prevent rent gouging and site pirating. Opponents contended having rents based on gross proceeds would result in excessive entanglement of the landlord with the activities of the charity and might lead to the landlord requiring the charity to operate gambling over many more hours in order to increase the gross proceeds, on which the rent would be based. Another disadvantage cited was the inability to determine the amount of the rent payable until after the fact.

A compromise proposal suggested was to allow a dollar level rent limitation for pull tabs and jar games, and a separate limitation for blackjack games. It was contended that establishing rent limitations for bingo would be unfair, that no limits are established under present law, and that natural market forces would tend to prevent rent gouging or site pirating for bingo facilities because bingo games typically need larger facilities that are rented on the open market and not affiliated with bars and other entertainment establishments.

#### **Prize Limits**

Whether charitable gambling in North Dakota should remain a low key activity was a common theme of testimony on the subject of prize limits. There are no prize limits on bingo or pull tab games. Instances were reported of prizes and bingo games that had become quite large, including one offered in Fargo for over \$20,000. Proponents of prize limits cited such events as evidence that charitable

gambling is getting out of hand and becoming too professionalized. Opponents predicted market forces would tend to keep bingo prizes down and that it is not feasible, given North Dakota's population base, to consistently operate games at the level of a \$20,000 grand prize.

It was reported that federal law may soon allow conduct of unlimited bingo games on Indian reservations and, if prize limitations were established for North Dakota charities, they would be unable to compete. Some proponents of bingo prize limitations advocated a very low limit, such as a \$1,000 grand prize and a \$2,000 total for all prizes. Other limits suggested were \$2,000 and \$4,000, as well as \$5,000 and \$10,000, respectively.

Another topic discussed was whether prize limits should be established for pull tab games. It was reported that some pull tab games were being offered with top cash prizes as high as \$1,000, and merchandise prizes such as cars worth considerably more. However, it was noted that some charities had stopped offering the \$1,000 top prizes because of the requirement of the Internal Revenue Service that it receive reports of prizes over \$600.

### **Manufacturer's Licensing**

Supporters of the concept of licensing manufacturers of charitable gambling equipment reported problems with quality control of some of the game pieces being used. For example, some charities had problems with pull tab game pieces in which it was possible to "peek" at the piece, without buying it, to determine if it is a winner. A \$1,000 license fee for manufacturers was suggested. Opponents of such a license fee argued that, since many manufacturers only manufacture a small number of pieces for North Dakota markets, many would be reluctant to supply the market if a high fee is imposed. A fee of \$250 was suggested as a compromise.

### **Expense Limits**

The committee heard testimony on a number of subjects on which it did not consider bill drafts. One such subject was the expense limitation. Under present law and depending on the kind of charity involved, charities are allowed to spend as much as 40 or 45 percent of adjusted gross proceeds on the expenses of operating the games. A charity which violates the expense limit is required to "repay" the excess by making allowable donations with funds the charity obtains from nongambling sources. Many violations of the limit were reported. There was one estimate that as much as \$1.5 million had been expended by charities in excess of the limitation, much of which will probably never be repaid. Representatives of the Attorney General's office reported that there is insufficient manpower to police these limits adequately and some charities are chronic offenders. It was reported that two-thirds of the charities are in arrears in repaying expense limitation overspending. An increase in the present expense limitations was suggested; this was opposed on the grounds that an increase would allow more than half of the adjusted gross proceeds to be used for expenses. It was reported that some charities have

had expenses as much as 80 percent of adjusted gross proceeds, and one charity even had expenses of over 100 percent of adjusted gross proceeds. Blackjack was cited as a particularly prevalent source of trouble in the context of expense limitations because it is such a labor intensive game.

### **The Lottery**

Because of the petition drive to place a lottery amendment on the ballot, the committee gave some attention to the possible impact of the establishment of a lottery. Of particular interest was whether the agency charged with administering the lottery should be the same agency charged with enforcing the charitable gambling law. Proponents of merging the two functions argued that the expertise from one function would be valuable in the other function. Opponents of a merger suggested the two interests are inherently incompatible and should be separated. A distinction was made between operation of a lottery, in which the agency is encouraging and promoting gambling activities, and enforcement of charitable gambling law in which the agency is more interested in policing the game than promoting it. It was reported that the two functions are divided in Washington.

Although the committee did not consider proposals to establish the lottery, opponents of a lottery argued that it is inappropriate for the state to be in the business in promoting gambling, that it promotes an attitude of getting something for nothing, and that it has an adverse impact on lower income people. Proponents of a lottery described it as a painless form of taxation, saying its impact would fall only on those voluntarily participating, and that it would provide some valuable revenue to the state. Opponents and proponents of a lottery had differing estimates of the amount of revenue that would come to the state if a lottery is established.

### **Proposals**

The committee considered many bill drafts and proposals concerning charitable gambling.

### **Charitable Gambling Commission**

The committee considered a bill draft that would establish a charitable gambling commission independent of the Attorney General's office and generally responsible for enforcement of charitable gambling law. The commission would consist of five voting members appointed by the Governor and four nonvoting ex officio legislator members. The commission would have general supervisory responsibility over charitable gambling. Local officials would be required to report annually to the commission of their use of the local share of the charitable gambling tax. The commission would provide reports to the Governor for submission to the Legislative Assembly.

### **Dedicated Fund**

The committee also considered a bill draft that would require that the state's share of the charitable gambling tax, whether based on gross proceeds or adjusted gross proceeds, be dedicated to the Attorney

General's office for enforcement purposes only.

### **Gross Proceeds Tax**

The committee considered a bill draft that would change the charitable gambling tax from the present basic rate of five percent of adjusted gross proceeds to one percent of gross proceeds. The present graduated tax system would be retained, with an appropriate increase in the point at which the higher tax rate takes effect.

### **Rent Limitations**

The committee considered a number of bill drafts concerning rent limitations. One bill draft would have based rent limits on gross proceeds and made the limits apply across the board to blackjack and pull tab games. Another bill draft would have established a graduated rent limitation, based on the level of gross proceeds for all games at the site. A third bill draft would make no changes to present limitations on blackjack rent, and limit rent for sites with pull tabs to an additional \$150 per month. All bill drafts had in common that no limit would be placed on bingo rent.

### **Prize Limits**

The committee considered proposals to limit bingo prizes based on the grand prize for a game and total of all prizes for a game. Proposals were considered that would have made limits of \$1,000 and \$2,000; \$2,000 and \$4,000, respectively; and a bill draft was considered with limits of \$5,000 and \$10,000, respectively. The committee also considered a bill draft that would limit the highest denomination winners on pull tab games to \$500.

### **Manufacturer's Licensing**

The committee considered a bill draft that would require licensing of manufacturers of charitable gaming tickets. The committee initially considered a proposed license fee of \$1,000 and later a proposal for a fee of \$250.

### **Recommendations**

The committee recommends Senate Bill No. 2062

to establish a charitable gambling commission, which would have general supervisory authority over charitable gambling. The bill does not address the issues of a dedicated fund or a gross proceeds tax, which are covered by other bills recommended by the committee. The bill provides for an appropriation of \$891,360 for the establishment of the charitable gambling commission. The bill is declared to be an emergency measure.

The committee recommends Senate Bill No. 2063 to base the charitable gambling tax on gross proceeds, at a basic rate of one percent of gross proceeds. The present graduated tax system is retained, with a tax of four percent on gross proceeds per quarter in excess of \$3 million. The bill also creates a special charitable gambling enforcement fund, consisting of the state's share of the charitable gambling tax. An exemption is provided from the general requirement that unexpended appropriations revert to the state general fund.

The committee recommends Senate Bill No. 2064 to establish a rent limitation of \$150 per month for sites where the games of pull tabs or jars are conducted. The \$150 in rent is an addition to rent allowed for blackjack games and for bingo.

The committee recommends Senate Bill No. 2065 to limit pull tab and jar game prizes to a highest denomination winner of \$500.

The committee recommends Senate Bill No. 2066 to limit bingo prizes to a total of all prizes of \$10,000 per bingo session, with a limit on the grand prize of \$5,000. A bingo session is defined as a series of any number of games conducted over a four-hour period. Progressive jackpots averaging not over \$10,000 in prizes per session are permitted.

The committee recommends Senate Bill No. 2067 to require licensing of manufacturers of charitable gaming tickets. A charitable gaming ticket is defined as the game piece used in pull tab games or jar games. The present exemption for resident printers of raffle tickets is continued. The bill establishes a license fee of \$250 for manufacturers and retains the \$1,000 fee for distributors of gaming supplies for which a distributor's license is required. The bill also requires the Attorney General to adopt quality standards for the manufacture of charitable gaming tickets.

# LEGISLATIVE AUDIT AND FISCAL REVIEW COMMITTEE

The Legislative Council by law appoints a Legislative Audit and Fiscal Review Committee as a division of its Budget Section. The committee was created "[f]or the purposes of studying and reviewing the financial transactions of this state; to assure the collection and expenditure of its revenues and moneys in compliance with law and legislative intent and sound financial practices; and to provide the legislative assembly with formal, objective information on revenue collections and expenditures for a basis of legislative action to improve the fiscal structure and transactions of this state." (NDCC Section 54-35-02.1)

In setting forth the committee's specific duties and functions, the legislative Assembly said "[i]t shall be the duty of the legislative audit and fiscal review committee to study and review audit reports as selected by the committee from those submitted by the state auditor, confer with the auditor and deputy auditors in regard to such reports, and when necessary, to confer with representatives of the department, agency, or institution audited in order to obtain full and complete information in regard to any and all fiscal transactions and governmental operations of any department, agency, or institution of the state." (NDCC Section 54-35-02.2)

The Lieutenant Governor by law serves as chairman of the Legislative Audit and Fiscal Review Committee. In addition to Lt. Governor Ruth Meiers, other committee members were Representatives Richard Kloubec, David J. Koland, Theodore A. Lang, Charles Linderman, Olaf Opedahl, Bob O'Shea, and Allen Richard; and Senators Mark Adams, Jerome Kelsh, Harvey D. Tallackson, Jens J. Tennefos, Malcolm S. Tweten, and Stanley Wright.

The report of the committee was submitted to the Legislative Council at the biennial meeting of the Council in November 1986. The report was adopted for submission to the 50th Legislative Assembly.

During the interim the State Auditor and independent accounting firms presented 69 audit reports. An additional 78 audit reports were filed with the committee but were not formally presented. The committee's policy is to hear only audits of major agencies and audit reports containing major recommendations; however, an audit not formally presented could be heard at the request of a committee member or members.

The committee was assigned two studies. Senate Concurrent Resolution No. 4030 directed a study of the Bank of North Dakota's loan programs, including loan policies, status of current loans, and loans written off since January 1, 1983. House Concurrent Resolution No. 3084 directed the Legislative Council to monitor and study the implementation by the Office of Management and Budget of changes to the state accounting system. The committee is also to receive annual reports on the status of accounts receivable at the State Hospital.

## BANK OF NORTH DAKOTA LOAN PROGRAMS Background

Senate Concurrent Resolution No. 4030 directed a study of the Bank of North Dakota's loan programs, including loan policies, status of current loans, and loans written off since January 1, 1983.

The Bank of North Dakota provides funding for commercial loans, participation loans, guaranteed student loans, and for the purchase of farmer-related mortgages and notes and Federal Housing Administration and Veterans Administration home mortgages. In addition, although these are not Bank programs the Bank of North Dakota administers the following:

- Real estate bond fund.
- Beginning farmer loan program.
- Beginning farmer guarantee program.
- Developmentally disabled facility revolving loan funds.
- Fuel production facility guarantee loan program.
- Community water facility revolving loan fund.
- Home-quarter purchase fund.
- North Dakota Rural Rehabilitation Corporation.
- North Dakota Municipal Bond Bank.
- State Land Department farm loan fund.

## Committee Review

Senate Concurrent Resolution No. 4030 directed a study of the Bank of North Dakota's loan programs because a large number of Bank of North Dakota loans are not collectible. Reports were presented regarding the amount of the Bank's outstanding loans and the amount of the Bank's loans that are uncollectible.

Refer to Schedule 1 for the Bank of North Dakota's supervised notes and mortgages.

The total amount of Bank of North Dakota's supervised notes and mortgages balance as of August 31, 1986, is \$513.7 million. Of this total, \$87.4 million was 30 days or more delinquent. This total amount became delinquent because actual payments of \$4.4 million in principal payments were 30 days or over past due.

The amount of loans written off by the Bank of North Dakota for calendar years 1982 through 1985 and the estimated amount of writeoffs for calendar year 1986 are:

1982	— \$3,582,737
1983	— 3,070,462
1984	— 7,099,083
1985	— 8,029,005
1986	— 7,000,000

The amounts shown include only the loans written off that are assets of the Bank of North Dakota.

The State Industrial Commission contracted with Touche Ross and Company to perform an operations review of the Bank of North Dakota. The committee reviewed the Touche Ross final report findings on the Bank's lending function. The report's major findings regarding the Bank's lending function are:

- The documentation included in the Bank’s loan files does not provide a concise analysis of the customer’s background, purpose of loan, collateral repayment plan and rationale for making the loan. Lack of this documentation makes the ongoing analysis of the loan more difficult and time consuming.
- Bank of North Dakota lending officers generally do not visit a potential loan customer’s place of business or farm to make their own assessment of the operation and management integrity and ability.
- The Bank of North Dakota has relied heavily on the lead bank’s reputation as a loan granting criteria.
- Bank of North Dakota commitment letters to lead banks request the lead bank provide up-to-date financial statements. However, this request or obligation is not always included in the loan agreement.
- Loan policies adopted by the Bank of North Dakota are too general. They do not specifically address the types of loans the Bank makes, the documentation required for each type of loan or the criteria for accepting or rejecting a loan request.
- There is no internal credit review function to identify problem or potential problem loans and to evaluate the adequacy of the Bank’s collateral, security interests, and insurance coverage on an ongoing basis.
- There is no ongoing (annual) review of nondelinquent credits.
- There are no periodic (daily or weekly) lending officer meetings to discuss all loans being made, to review problem loans, or to provide a forum for other loan officers to offer advice, suggestions, or related information.
- No procedures or policies are established to develop formal workout plans to mitigate Bank of North Dakota damages from problem loans.

### **Recommendations**

The committee recommends the Bank of North Dakota implement the following Touche Ross recommendations regarding the Bank’s lending process. The Industrial Commission has also recommended the implementation of the following recommendations:

1. The Bank of North Dakota should institute a policy of meeting with the customer and the bank making the loan request to assess the customer’s operations and the originating bank’s abilities.  
**Action:** The Bank will meet annually with the parties it makes loans to for the purchase of bank stocks. The Bank has hired four field representatives for collateral inspection of farm real estate loans. For all new loans exceeding \$100,000 the Bank will conduct collateral inspections before the loans are made.
2. All loans made by the Bank of North Dakota should include a narrative describing the company requesting the loan, the purpose and the amount of the loan, and the collateral and repayment plan.  
**Action:** The Bank now requires that loan applications include information on the history of the company’s finances, the purpose of the amount of the loan, and a completed collateral evaluation form.
3. The Bank of North Dakota should rely on the bank making the originating loan; however, each credit decision should be based on all the facts available at the time. The Bank of North Dakota should not base its decision on prior experience with the lending institution instead of analyzing the individual credit request.  
**Action:** The Bank is making onsite inspections of all loan requests over \$100,000 and is analyzing available facts prior to making a credit decision.
4. The Bank of North Dakota should require the banks that are making the originating loans to provide narrative on the loan request.  
**Action:** The Bank sent a letter to all correspondent banks asking that the banks provide the Bank with the amount of the participation request, the amount that the originating bank intends to lend, the purpose of the loan, the security being offered, and the source of repayment. The Bank is also requesting a copy of the loan applicant’s balance sheets and income statements for the last three years.
5. The Bank of North Dakota lending officers should ensure that all documentation and contingencies are specified by the loan agreement and are obtained.  
**Action:** The Bank is preparing a comprehensive loan participation agreement that ensures all documentation and contingencies are specified in the loan agreement.
6. The Bank of North Dakota should implement policies whereby lending officers would be required to perform economic impact assessments for all loans over \$1 million.  
**Action:** The Bank will conduct economic impact studies of future requests in excess of \$1 million.
7. The Bank of North Dakota should require lending officers to perform annual loan reviews.  
**Action:** The Bank lending officers are beginning to perform annual reviews of existing loans.
8. The Bank of North Dakota should implement a credit standards and review function and a “loan workout” function.  
**Action:** The Bank has implemented a “loan workout” function to assist loan recipients in developing a repayment plan and has filled the position to operate the function. The credit standards and review function has been defined, and a job description is completed for the position to operate the function.
9. The Bank of North Dakota should develop a training program for its lending officers.  
**Action:** The Bank has developed training programs for lending officers, who have weekly credit meetings in which they prepare lending

documents. The Bank has a director of human resources position to develop training programs for all Bank personnel.

- The Bank of North Dakota should establish periodic lending officer meetings to discuss all loans made and to provide a council for lending officers to offer advice, suggestions, or related information.

**Action:** The Bank has established weekly credit meetings whereby all loans are thoroughly reviewed and recommendations for approval or denial are made.

The Bank of North Dakota in implementing the recommendations for the lending process will add approximately 10 full-time positions. The cost of implementing the recommendations for the 1985-87 biennium is approximately \$340,000. Payment for this cost will be made from the Bank's 1985-87 operating expense appropriation. The costs to continue these improvements during the 1987-89 biennium are included in the Bank's 1987-89 biennium budget request.

## CHANGES TO THE STATE ACCOUNTING SYSTEM

### Background

House Concurrent Resolution No. 3084 directed the Legislative Council to monitor and study the implementation by the Office of Management and Budget of changes to the state accounting system.

During the 1979-80 interim, the Legislative Audit and Fiscal Review Committee was directed to conduct a study of the state's accounting and financial reporting system. The committee recommended a bill to the 1981 Legislative Assembly to provide for the revision of the system by assigning the responsibility for such revision to the Director of the Department of Accounts and Purchases (now Office of Management and Budget). The bill also included a \$1 million general fund appropriation to the Office of Management and Budget to revise the system. The total request of \$1 million included:

Revision of accounting system	\$ 465,000
Revision and integration of the payroll/personnel reporting system	400,000
Inflationary cost and contingencies on project estimates	100,000
Clerical support, supplies, and equipment	35,000
<b>Total</b>	<b>\$1,000,000</b>

The new system is to be on an accrual basis system and in compliance with generally accepted accounting principles for state government. The Office of Management and Budget reported to the 1981-83 interim committee that it planned to meet its goal of having the accounting system in place and operational by July 1, 1983. The 1983 Legislative Assembly authorized the carryover of \$201,831 which was not expended from the \$1 million appropriated by the 1981 Legislative Assembly. In addition, the 1983 Legislative Assembly appropriated \$200,000 to the Office of Management and Budget for continued development of the statewide accounting and

management information system (SAMIS). The system was to be implemented during the 1985-87 biennium. The 1985 Legislative Assembly continued implementation of the system but delayed making it operational until July 1, 1987.

### Committee Review

The Office of Management and Budget presented progress reports to the committee regarding the development of the statewide accounting and management information system. It reported the following tasks have been performed:

- Training was provided for state agency personnel regarding the use of the system.
- A system for on-line transmittal from colleges and universities was designed.
- Reports and financial statements to comply with generally accepted accounting principles were designed and programmed.
- Separate files for grant project reporting were created.
- The accounting and reporting system has been tested.

### Statewide Accounting and Management Information System Costs

The following is a schedule of costs incurred to implement the system. The costs shown are for the 1979-81 biennium through the 1985-87 biennium:

Biennium	System Costs
1979-81	\$ 31,865
1981-83	766,304
1983-85	401,831
1985-87	732,578
<b>Total</b>	<b>\$1,932,578</b>

A breakdown of the \$1,932,578 by tasks is as follows:

Salaries and wages and consultant fees for designing the system, administrating and testing the system, and guidance	\$ 892,694
Data processing costs for programming and computer time	948,695
Operating expenses for the ongoing operations of developing the system and for training sessions	70,101
Office equipment	21,088
<b>Total costs</b>	<b>\$1,932,578</b>

In order for the new accounting system to generate state of North Dakota comprehensive financial statements the following enhancements with their related costs which are not included in the Office of Management and Budget's 1987-89 biennium budget request are necessary:

<b>Enhancement</b>	<b>Estimated Cost</b>
Automated fixed assets system	\$150,000
Automated investment system	200,000
Automated inventory system	300,000
An on-line system for the transmittal of financial data from the Bank of North Dakota, Mill and Elevator Association, Job Service North Dakota, and higher education	200,000
<b>Total</b>	<b>\$850,000</b>

Also, additional positions would be necessary to analyze the transactions and prepare the financial statements.

The Office of Management and Budget also reported that the new payroll-personnel system which is being interfaced with the new statewide accounting system is designed, implemented, and tested. The first checks that will be issued by the new system will be made in January 1987. The costs of implementing the payroll-personnel system was approximately \$400,000.

The amount requested by the Office of Management and Budget for the 1987-89 biennium to operate the new accounting system is \$3,208,331. A breakdown of the request is:

Salaries and wages for administration, management, and operation of the system	\$ 889,371
Consultant fees for continued modification of system to meet specific needs	150,000
Operating expenses for operation of the system	146,480
Data processing—costs for computer time to operate system	2,020,980
Equipment	1,500
<b>Total</b>	<b>\$3,208,331</b>

### **STATE AUDITOR**

#### **Audit of the State Auditor's Office**

North Dakota Century Code Section 54-10-04 requires the Legislative Assembly to provide for an audit of the State Auditor's office. The Legislative Council contracted with Eide Helmeke and Company Certified Public Accountants, for such an audit for the two-year period ended June 30, 1985. The firm presented its audit report at the committee's March 1986 meeting. The report stated that by implementing prior audit recommendations, the improvement by the State Auditor's office in the quality of its audit practices is commendable. The report included a recommendation that when the new statewide accounting system is implemented the State Auditor's office issue a comprehensive annual or biennial financial report of the state of North Dakota's fund types and account groups. The report also includes recommendations that the State Auditor's office audit reports include:

- The liability for unpaid annual leave.

- Pertinent lease agreement information.
- All bond payable pertinent details.
- Funds owned by the reporting entity but held by another agency.

#### **Suggested Guidelines for Performing Audits of State Agencies**

In previous bienniums the Legislative Audit and Fiscal Review Committee adopted guidelines for auditors performing audits of state agencies. During the 1985-86 interim, the committee reaffirmed that audits are to be in compliance with these guidelines. The auditor in the audit reports is to make specific statements regarding:

1. Whether expenditures have been made in accordance with legislative appropriations and other state fiscal requirements and restrictions.
2. Whether revenues have been accounted for properly.
3. Whether financial controls and procedures are adequate.
4. Whether the system of internal control is adequate and functioning effectively.
5. Whether financial records and reports reconcile with those of state fiscal offices.
6. Whether there is compliance with statutes, laws, rules, and regulations under which the agency was created and is functioning.
7. Whether there is evidence of fraud or dishonesty.
8. Whether there are indications of lack of efficiency in financial operations and management of the agency.
9. Whether actions have been taken by agency officials with respect to findings and recommendations set forth in the audit report for preceding periods.
10. Whether all activities of the agency were encompassed by appropriations.

It was brought to the committee's attention that auditors were not making comments in their audit reports regarding whether the client's financial operations and management of the agency are efficient. The committee recommends that in the future auditors, during the course of an audit of a state entity, conduct the additional procedures necessary for the auditor to comment on the efficiency of financial operations and make recommendations where necessary. The State Auditor's office said that it is the intention of the State Auditor's office when contracting with private firms to require specific statements in audit reports to comply with the committee's guidelines. The State Auditor's office also stated it will expand its audit procedures to make the specific statements in the postaudit program necessary to comply with committee guidelines.

#### **Accounts Receivable**

The State Hospital audit report for the years ended June 30, 1982, 1983, and 1984, did not include accounts receivable in the financial statements. The accounts receivable were presented in notes to the audit report financial statements.

The committee asked the State Auditor to reflect accounts receivable of the State Hospital and Grafton State School in the financial statements. Accounts

receivable were included in the State Hospital audit report for the years ended June 30, 1984 and 1985.

**OTHER ACTION AND DISCUSSION**

**Agency Responses to Audit Recommendations**

Independent accounting firms auditing state agencies and institutions were not including in audit reports agency institution responses to recommendations. The committee asks that agencies and institutions audited by independent accounting firms prepare written responses to audit recommendations and provide a copy of the responses to the committee.

**Funds Administered by the Bank of North Dakota Which are not Included in the Bank's Financial Statement**

Upon presentation of the Bank of North Dakota audit report for the years ended December 31, 1983 and 1984, the committee found that some of the non-Bank funds administered by the Bank and reported on in supplementary information in the Bank of North Dakota's audit report do not have complete financial statements nor are they necessarily audited. These funds include the real estate bond fund, State Land Department farm loan fund, North Dakota Rural Rehabilitation Corporation, community water facility loan fund, student loan trust, beginning farmer loan program, developmentally disabled loan programs, Board of Higher Education bonds, and the home-quarter purchase fund.

The committee recommends that future Bank of North Dakota audit reports include as supplementary information a balance sheet, income statement, and other appropriate financial information on each of the funds administered by the Bank of North Dakota.

**Open Records Law**

The State Auditor's office brought to the committee's attention that all of its working papers may be subject to public inspection under the open records law. The State Auditor expressed concern about this and asked the committee to recommend legislation exempting his office working papers from being available for inspection under the open records law. The open records law as referred to is established in North Dakota Century Code Section 44-04-18, which states in part that except as otherwise specifically provided by law, all records of public or governmental bodies shall be public records, accessible for inspection during office hours.

The committee asked the Legislative Council staff to prepare a memorandum analyzing the provisions of North Dakota's open records law and to determine if working papers are public records. Concerning working papers, the memorandum noted that in the leading case on this subject (City of Grand Forks v. Grand Forks Herald, 307 N.W.2d 572 (N.D. 1981)), the North Dakota Supreme Court noted that the law of this state contains no specific exception to withhold work products and worksheets, but the court said it was expressing no opinion on whether or not certain implied exceptions exist on the question of what is

or is not a record within the meaning of the open records law.

The committee's position is that preliminary data and working papers prior to completion of a final report are not records available for public inspection pursuant to the provisions of the open records law.

**State Hospital and Grafton State School Accounts Receivable**

North Dakota Century Code Section 50-06.3-08 requires that the State Hospital present a detailed report to the Legislative Audit and Fiscal Review Committee on the status of accounts receivable for each fiscal year. The report must include an aging by recipient classification of accounts remaining unpaid, and the amounts by recipient classification by which accounts were reduced or written off for reasons other than payment during that fiscal year.

Since the State Hospital did not write off any accounts receivable during the 1985-86 interim, a report was not presented to the committee.

The amount of the State Hospital's accounts receivable and the amounts that were written off or are doubtful accounts for the fiscal years 1982 through 1985 are as follows:

Fiscal Year	Amount of Accounts Receivable	Amounts Written Off or Doubtful Accounts
Fiscal year 1982	\$66,108,559	Not reported
Fiscal year 1983	64,485,588	\$12,241,393
Fiscal year 1984	49,331,618	27,099,137
Fiscal year 1985	58,211,245	53,640,347

The committee reviewed the accounting procedures for accounts receivable at the State Hospital and Grafton State School. The State Hospital's billings for care and treatment costs are the actual expenses incurred. Because the billings are not based on ability to pay, the State Hospital has large amounts of uncollectible accounts receivable. The Grafton State School is not authorized to write off accounts receivable. Also, nonresident patients and their responsible parties at the State Hospital, but not at the Grafton State School, are liable for care and treatment expenses.

**Recommendation**

The committee recommends Senate Bill No. 2068 requiring the State Hospital and the Grafton State School to establish a procedure recognizing the patient's ability to pay when determining the billing levels for costs of patient care and treatment. The bill also allows the Grafton State School to write off uncollectible accounts and provides that its nonresident patients and responsible relatives must pay the full cost of care and treatment.

**Data Processing Session**

The committee on September 4-5, 1985, in a joint meeting with the Government Administration Committee, attended an educational training session on data processing technology.

**BANK OF NORTH DAKOTA SUPERVISED NOTES AND MORTGAGES**

Loan Issue	Entity Owning Notes and Mortgages Supervised by the Bank of North Dakota							Total Bank of North Dakota Supervised Note and Mortgage Balances as of August 31, 1986	Amount 30 Days or More Delinquent as of August 31, 1986
	Bank of North Dakota	State Treasurer	Revolving Funds	Board of University and School Lands	North Dakota Rural Rehabilitation Corporation	State Industrial Commission	Other Governmental Entities		
Beginning farmer real estate loans (Bank of North Dakota owned)	\$ 4,765,289							\$ 4,765,289	\$ 698,891
Beginning farmer real estate loans (bond issues)		\$32,412,090						32,412,090	13,107,560
Farm real estate loan policy loans (Bank of North Dakota owned)	921,421							921,421	102,780
Farm real estate loan policy loans (bond issues)		14,159,919						14,159,919	5,840,800
Beginning farmer revolving loan fund			\$ 7,333,499					7,333,499	544,207
Home-quarter purchase fund			0					0	0
North Dakota Rural Rehabilitation Corporation					\$1,725,003			1,725,003	125,897
Family Farm Survival Act of 1985 - agribusiness operating loans	261,067							261,067	83,932
Family Farm Survival Act of 1985 - farm operating loans	8,618,988							8,618,988	94,873
Bank stock loans	7,361,827							7,361,827	752,832
VA or FHA home loans (guaranteed by the federal government)	132,301,032							132,301,032	14,595,886
Beginning businessmen loans	174,105							174,105	49,953
Business and industry loans (90 percent guaranteed by FmHA)	4,153,307							4,153,307	90,732
Bank participation loans	44,893,303							44,893,303	9,906,986
Small Business Administration (SBA) (90 percent guaranteed by the SBA)	4,510,546							4,510,546	1,587,705
Direct student loans (Bank of North Dakota)	9,201,838							9,201,838	0
Direct student loans (Industrial Commission)						\$149,922,793		149,922,793	25,916,326
State Land Department revolving loan fund				\$45,672,160				45,672,160	13,851,621
Developmentally disabled loan fund No. 1			5,533,469					5,533,469	0
Developmentally disabled loan fund No. 2			5,062,067					5,062,067	0
Developmentally disabled loan fund No. 3			1,065,096					1,065,096	0
Municipal bond bank							\$23,916,500	23,916,500	11,449
Community water facility loan fund			9,768,272					9,768,272	0
<b>Total</b>	<b>\$217,162,723</b>	<b>\$46,572,009</b>	<b>\$28,762,403</b>	<b>\$45,672,160</b>	<b>\$1,725,003</b>	<b>\$149,922,793</b>	<b>\$23,916,500</b>	<b>\$513,733,591</b>	<b>\$87,362,430</b>

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# LEGISLATIVE PROCEDURE AND ARRANGEMENTS COMMITTEE

The Legislative Council is authorized by North Dakota Century Code Section 54-35-11 to make all necessary arrangements, except for the hiring of legislative employees, to facilitate the proper convening and operation of the Legislative Assembly. Legislative rules are also reviewed and updated under this authority. North Dakota Century Code (NDCC) Section 54-35-02 grants the Legislative Council the power and duty to control the use of the legislative chambers and permanent displays in Memorial Hall. These statutory responsibilities were delegated to the Legislative Procedure and Arrangements Committee. In addition, the committee was delegated the responsibility for administering 1985 Senate Bill No. 2090, the appropriation for the refinishing of woodwork and improvements to the legislative wing and certain portions of the ground floor and second floor levels of the executive tower of the State Capitol. The committee was also assigned two study resolutions. House Concurrent Resolution No. 3022 directed a study of the need for revision of statutes and legislative rules in light of the 1984 amendments to Article IV of the Constitution of North Dakota. House Concurrent Resolution No. 3006 directed a study of the feasibility and desirability of expanding the jurisdiction of the Committee on Public Employees Retirement Programs to include all fringe benefits for state employees. The committee was also assigned the responsibilities for establishing a policy on legislative expense reimbursement, for determining the impact of the federal Fair Labor Standards Act on the legislative branch, and for participating in the 1990 census redistricting data program. The committee also reviewed the authority of state entities to accept gifts.

Committee members were Representatives Charles Mertens (Chairman), Roy Hausauer, Serenus Hoffner, Tish Kelly, William E. Kretschmar, Jim Peterson, Oscar Solberg, and Earl Strinden; and Senators William S. Heigaard, Clayton A. Lodoen, Rick Maixner, Gary J. Nelson, and David E. Nething.

The report of the committee was submitted to the Legislative Council at the biennial meeting of the Council in November 1986. The report was adopted for submission to the 50th Legislative Assembly.

## LEGISLATIVE ARTICLE STUDY

### Background

The current Article IV of the Constitution of North Dakota was part of the original constitution adopted in 1889. Since adoption, many provisions have been replaced, amended, or declared unconstitutional. All sections of the current Article IV except Sections 14, 15, and 19 were repealed by the constitutional amendments approved at the 1984 primary and general elections, with the repeals effective December 1, 1986.

The new Article IV contains 16 sections. Thirteen were approved at the 1984 primary and general elections and become effective December 1, 1986. Three of the sections are continued from the current

Article IV. While the new legislative article is substantially similar to the old, several of the new provisions require or at least authorize changes to current statutes and legislative rules.

### Composition of the Houses

Section 1 of the new Article IV sets the range of composition of the Senate at 40 to 54 members and the House of Representatives at 80 to 108 members. This section affects NDCC Section 54-03-01.5, which refers to different ranges for the membership of the Senate and the House of Representatives.

Section 2 of the new Article IV authorizes the use of subdistricts of senatorial districts and requires senatorial districts to be of compact and contiguous territory. North Dakota Century Code Section 54-03-01.5 requires subdistricts to be approved by a two-thirds vote of the members-elect of the Senate and the House of Representatives and prohibits the use of subdistricts in multimember Senate districts. Section 54-03-01.5 also refers to the requirement of compact and contiguous territory but makes an exception for where compact and contiguous territory would be impracticable in multimember senatorial districts.

### Terms and Meeting Date

Section 7 of the new Article IV provides that the terms of the members of the Legislative Assembly begin on the first day of December following their election and also provides that the regular session is to convene on the first Tuesday after January 3 or at such other time as may be prescribed by law but not later than January 11.

There is an indirect reference in NDCC Section 54-03.1-02 to terms expiring during a legislative session. Also, Section 54-03-02 provides that the regular session is to convene on the first Tuesday after the first Monday in January unless this is January 2, in which case the Legislative Council is to select a date not earlier than January 2 nor later than January 11.

### Presiding Officers

Section 8 of the new Article IV refers to the election of a presiding officer of the House of Representatives but does not identify the presiding officer as the Speaker. The election of the Speaker of the House is provided in NDCC Section 54-03-08 and House Rule 201 provides that the Speaker presides over the House of Representatives.

Section 7 of the current Article IV requires the Senate to elect a President Pro Tempore who may take the place of the Lieutenant Governor under rules prescribed by law. There is no equivalent to this section in the new Article IV. The election of a President Pro Tempore is provided for in NDCC Section 54-03-08. There was no discussion to indicate any basis for elimination of the office of President Pro Tempore.

### **Election Contests**

Section 12 of the new Article IV provides that each house is the judge of the qualifications of its members, but election contests are subject to judicial review as provided by law. If two or more candidates for the same office tie, the Secretary of State is to choose one of them by the toss of a coin.

Under NDCC Chapter 16.1-16 election contests, other than legislative election contests, are brought as civil actions in district courts. Legislative election contests are brought before and determined by the appropriate house of the Legislative Assembly. Discussion of the handling of legislative election contests indicated that the intent of the new constitutional provision making election contests subject to judicial review was that the Legislative Assembly would not be involved in election recounts, and those contests would be handled in the same manner as other election contests. Under Section 16.1-15-30, tied contests are decided by a coin flip in the county auditor's office.

### **Vote Requirements**

Section 13 of the new Article IV provides that a recorded roll call vote on any question must be taken at the request of one-sixth of the members present. House and Senate Rules 317 require a specific number of members to request a recorded roll call vote.

Section 13 also provides that an emergency measure must be passed by two-thirds of the members-elect of each house. Section 41 of the current Article IV provides that an emergency measure must be approved by two-thirds of the members present and voting. House and Senate Rules 315 refer to the two-thirds vote requirements for emergency measures.

Section 21 of the current Article IV requires disclosure of a personal or private interest before voting on a proposed or pending measure. There is no equivalent to this section in the new Article IV. However, House and Senate Rules 318 provide that any member who has a personal or private interest in any measure or bill shall disclose that fact to the House or Senate and may not vote on the measure without consent of the House or Senate. Discussion by committee members indicated support for the continuance of the conflict of interest provision in the rules.

### **Effective Dates**

Section 13 of the new Article IV provides that a law takes effect on July 1 after its filing with the Secretary of State or 90 days after its filing, whichever comes later. Section 13 also provides that an emergency measure takes effect upon its filing with the Secretary of State or on a date specified in the measure. Section 41 of the current Article IV provides that no Act takes effect until July 1 after the close of the session, except an emergency measure, which takes effect upon its approval by the Governor.

The only requirement as to when the Governor has to file a bill is under Section 9 of Article V of the constitution, relating to the filing of bills vetoed by the Governor after adjournment of the Legislative Assembly.

### **Bill Limitations and Requirements**

Section 13 prohibits any bill from being amended on its passage through either house in a manner which changes its general subject matter. Under the old constitutional provision no bill could be amended on its passage through either house so as to change its original purpose. This provision is reflected in House and Senate Rules 327.

In addition, Section 13 prohibits any bill from being amended, extended, or incorporated in any other bill by reference to its title only, except in the case of definitions and procedural provisions. No such exception is provided under Section 38 of the current Article IV, the provisions of which are reflected in House and Senate Rules 327.

Section 13 also provides that except as otherwise provided in the constitution, no local or special laws may be enacted. The committee reviewed several statutory provisions that could be considered as local or special laws.

Section 34 of the current Article IV requires that every bill have an enacting clause. No provision in the new Article IV imposes an enacting clause requirement. House and Senate Rules 404 require each bill to have an enacting clause and specify the enacting clause to be used. Continuation of the enacting clause requirement in the rules allows for ready distinction between bills, which are required in order to enact a law, and resolutions, which do not enact law.

### **Recommendations**

The committee recommends House Bill No. 1056 to make the statutory changes deemed necessary as the result of the new Article IV. The composition of the House of Representatives and the Senate would be statutorily fixed within the same range required by Section 1 of Article IV; the statutory requirements for a legislative apportionment plan at the minimum would be the same as those provided by Section 2 of Article IV; any ambiguity as to the time for taking office would be eliminated; the time the Legislative Assembly would convene would follow the language of Section 7 of Article IV, but the Legislative Council could still set a different time, as allowed under Section 7; legislative election contests would be subject to judicial review in the same manner as other election contests, as authorized under Section 12 of Article IV; and the method for determining tie votes for the Legislative Assembly would track the language in Section 12 of Article IV. Two statutory provisions, NDCC Sections 23-20.2-09 and 61-16.1-16, are amended to bring to the attention of the Legislative Assembly possible problems with respect to the local or special law prohibition of Section 13 of Article IV.

The committee recommends House Bill No. 1057 to require the Governor to cause to be filed with the Secretary of State every bill not vetoed by the Governor. The time period for filing would coincide with the time allowed the Governor under the constitution to veto a bill. The bill also requires the Secretary of State to record the date each bill is filed.

The committee recommends amendment of House and Senate Rules 315, 317, 318, and 327 to make the

changes deemed necessary as the result of the new Article IV. The specific recommendations are described under the portion of the report entitled "Legislative Rules."

### **LEGISLATIVE RULES**

The committee continued its tradition of reviewing and updating legislative rules. Suggestions for rule changes came from committee members and from employee suggestions presented by the Chief Clerk of the House of Representatives and the Secretary of the Senate after the 1985 session. This portion of the report also contains the rule changes recommended as a result of the committee's study of the impact of the new Article IV of the Constitution of North Dakota.

#### **Floor Privileges**

The committee was concerned over the disruptions caused by allowing guests on the floor. The types of disruption included the noise involved in adding chairs for the guests, the impact guests have on nearby legislators, and the lack of courtesy shown to legislators having the floor. Committee members discussed several alternatives to the current practice, including allowing guests only in the early part of each day's activities or during certain orders of business, issuing a limited number of guest passes to each legislator for use throughout the entire session, and prohibiting floor guests entirely. The committee recommends amendment of House and Senate Rules 205 and creation of Joint Rule 802 to prohibit floor guests except for ceremonial functions designated by the Speaker of the House of Representatives or the President of the Senate, with the prohibition to extend from one-half hour before the session through the daily session.

Concerns were expressed to the committee concerning the difficulty in recognizing representatives of the media for the purpose of floor privileges under House and Senate Rules 205. The presiding officers and the sergeants-at-arms are not always able to identify representatives of the media for floor privileges. However, a major problem is in defining the "legitimate" media. Representatives of the North Dakota Newspaper Association and the North Dakota Broadcasters Association were reluctant to define "legitimate" media and supported an informal meeting at the beginning of the session with the presiding officers and the sergeants-at-arms to establish procedures for identification. The committee adopted a policy that the sergeants-at-arms issue media badges to be worn by members of the press in order to have floor privileges. A badge would be valid throughout the session.

#### **Officers and Employee Positions**

The committee reviewed the employee positions provided for by rule and the employee positions authorized during the 1985 session by Senate Concurrent Resolution No. 4029. The committee recommends amendment of House and Senate Rules 206 to have the rules reflect the employee positions filled during the 1985 session.

### **Votes Required for Questions**

Section 13 of the new Article IV of the Constitution of North Dakota provides that an emergency measure must be passed by a vote of two-thirds of the members-elect of each house.

The committee recommends amendment of House and Senate Rules 315 to recognize the constitutional requirement that an emergency measure requires approval by two-thirds of the members-elect rather than two-thirds of the members present.

#### **Aye and Nay Vote Requirements**

Section 13 of Article IV provides that a recorded roll call vote on any question must be taken at the request of one-sixth of the members present. The committee recommends amendment of House and Senate Rules 317 to replace the specific number required in order to record votes with the provision that votes are to be recorded when requested by one-sixth of the members present.

#### **Voting By Members**

Section 21 of the current Article IV requires disclosure of personal or private interests before voting on a proposed or pending measure. There is no new constitutional provision on conflicts of interest. However, House and Senate Rules 318 provide that any member who has a personal or private interest in any measure or bill shall disclose that fact to the House or Senate and may not vote on the measure without consent of the House or Senate. Discussion by committee members indicated support for the continuance of the conflicts of interest provision in the legislative rules. The committee recommends amendment of House and Senate Rules 318 to delete references to Section 21 of the current Article IV, which will not exist after December 1, 1986.

Concern was expressed to the committee over the various interpretations of House and Senate Rules 318. The House interprets the rule to provide that once the key is closed a person may not vote. The Senate interprets the rule to allow a member to vote as long as the vote total has not been announced, even though the key is closed. The committee recommends amendment of House and Senate Rules 318 to reflect the position of Mason's Manual of Legislative Procedure that a vote may be made until it is announced.

#### **Amending Bills**

Section 13 of the new Article IV provides that no bill may be amended on its passage through either house in a manner which changes its general subject matter. In addition, Section 13 prohibits any bill from being amended, extended, or incorporated in any other bill by reference to its title only, except in the case of definitions and procedural provisions. The committee recommends amendment of House and Senate Rules 327 to have those rules track the language in the new Article IV with respect to amending a bill so as to change its general subject matter and to incorporation by reference.

#### **Elimination of Routine Motions**

Committee members expressed concern that time

is wasted toward the end of the legislative session by routine motions to suspend the rules to permit measures to be deemed properly engrossed and placed on the calendar. During the 1985 session, House and Senate Rules 332.1 were in place for the first time to provide that after the 55th legislative day all bills and resolutions received from the other house for concurrence are immediately placed on the calendar for second reading and final passage. The committee recommends amendment of House and Senate Rules 332.1 to provide that this same procedure apply to bills and resolutions in the house of origin.

#### **Motion for Reconsideration**

Concern was expressed to the committee over the various interpretations given to House and Senate Rules 341. The House interprets the rule to provide that reconsideration may be made once on the day of the vote and once on the following legislative day without a two-thirds vote requirement. The Senate interprets the rule to allow only one attempt at reconsideration without a two-thirds vote requirement.

The committee recommends amendment of House and Senate Rules 341 to provide that after the first motion to reconsider, any subsequent motion would require a two-thirds vote and with respect to this requirement a clincher motion that fails would not be considered a motion to reconsider.

#### **Crossover**

The committee expressed concern that Joint Rule 203, providing for crossover generally to be on the 33rd legislative day, was unrealistic because it had been continually suspended in recent sessions. Recognition was made of the fact that crossover is seen as a target at which to aim in moving workload. The committee discussed other options of reducing the workload near crossover; e.g., increasing the dollar amount at which bills must be rereferred to the Committee on Appropriations and moving the two-day committees to Monday and Tuesday and the three-day committees to Wednesday, Thursday, and Friday.

The committee recommends amendment of Joint Rule 203 to move crossover from the 33rd legislative day to the 34th legislative day. Presidents' Day, an official state holiday, falls on the Monday preceding crossover. If the Legislative Assembly conducts business on Presidents' Day, the 34th legislative day would be the following Friday. This rule change would not affect the four-day weekend after crossover, which is provided by Joint Rule 702.

#### **Consent Calendar**

Committee members discussed the practice in the House of Representatives of placing a resolution on the consent calendar even though the resolution had not received a unanimous vote from the committee of referral. Notice is given of resolutions that will be placed on the consent calendar. If any member objects to a particular resolution that resolution is removed from the consent calendar.

The committee recommends amendment of Joint Rule 206 to allow a resolution that has not received

a unanimous vote from the committee of referral to be placed on the consent calendar if the opportunity is given to members to object to the placement and to have the resolution removed from the consent calendar.

#### **Bill Introduction Privilege**

The committee received an inquiry as to whether bills introduced at the request of an executive agency or the Supreme Court could be "cosponsored" by other entities with this privilege. Cosponsorship of measures is currently limited to legislators. The committee recommends amendment of Joint Rule 208 to allow bills to be introduced at the request of not more than five entities having the privilege to request the introduction of bills under the joint rule.

### **APPLICATION OF THE FAIR LABOR STANDARDS ACT**

#### **Background**

In 1974 Congress amended the federal Fair Labor Standards Act to extend its minimum wage and overtime requirements to virtually all state and local government employees. In 1976 the United States Supreme Court, in National League of Cities v. Usery, 426 U.S. 833 (1976), determined that the Commerce Clause of the United States Constitution did not empower Congress to enforce the minimum wage and overtime requirements of the Act against state and local governments in areas of traditional governmental functions. However, in Garcia v. San Antonio Metropolitan Transit Authority, 469 U.S. 528 (1985), the United States Supreme Court reversed National League of Cities, which resulted in the application of the minimum wage and overtime requirements of the Act to state and local governments.

Of particular concern to the committee was the impact of the overtime provisions of the Act on legislative employees during the session.

#### **Congressional Action**

On November 7, 1985, Congress passed legislation, Public Law 99-150, to limit the application of the federal Fair Labor Standards Act to state and local governments. The legislation was signed by President Reagan on November 13, 1985, and responded to the United States Supreme Court's decision in Garcia. The major impact of the legislation with respect to the legislative branch is that legislative employees are exempted from coverage of the Act, except for those legislative employees covered by civil service laws or working in legislative libraries. The legislative history of the continued application of the Act to legislative library employees indicates that Congress intended that state and local legislative bodies have the same exemption for their employees as does Congress for its employees and because employees of the Library of Congress are not exempt from the Act neither are employees of legislative libraries.

#### **Conclusion**

As a result of congressional action to specifically exempt legislative employees, except for those

legislative employees covered by civil service laws or working in legislative libraries, from coverage of the Fair Labor Standards Act, the time management of session employees may remain the same as that for prior sessions.

## **1990 CENSUS REDISTRICTING DATA PROGRAM**

### **Background**

Under Public Law 94-171, approved December 23, 1975, the Congress of the United States authorized officials responsible for legislative apportionment in each state to submit a plan identifying geographic areas for which specific tabulations of population are desired. The Bureau of the Census was directed to establish criteria for the plans and to provide the tabulations as expeditiously as possible after the census date. The bureau designated this program as the 1990 census redistricting data program. Under Phase 1 of the program, states were given the opportunity to suggest boundaries for census blocks (the smallest geographic areas for which census information will normally be provided).

### **Block Boundary Suggestion Project**

To assist the committee in participating in Phase 1, the block boundary suggestion project, the committee contracted with Mr. Floyd Hickok of the Department of Geography at the University of North Dakota. Mr. Hickok had been involved with the technical aspects of the reapportionment study in 1981 and the reapportionment plan adopted during the 1981 reconvened session.

The Bureau of the Census originally proposed limiting block boundaries to named streets and roads and to rivers over 40 feet wide. As a result of the committee's participation in the project, the bureau reconsidered its proposal. The bureau determined that it would not apply this requirement with respect to unnamed roads that were not dead-end roads. Thus, the plan presented to the bureau focused on the identification of block boundaries other than roads. The committee requested the bureau to provide census information for the two airbases in the state on a block basis.

### **Phase 2**

Phase 2 of the program will commence in late 1987 or early 1988 when the Census Bureau delivers maps with the block boundaries in place. At this time, precinct boundaries may be marked on the maps and the maps returned to the Census Bureau. As a result of the marking of precinct boundaries, census information will be tabulated for those precincts.

### **Conclusion**

In order to complete the state's participation in the 1990 census redistricting data program, the maps received from the Census Bureau in 1987 or 1988 must be marked with the precinct boundaries in the state. Thus, action will need to be taken during the 1987-88 interim to continue participation in the program.

## **GIFT ACCEPTANCE AUTHORITY**

### **Background**

In 1985 the All Veterans Centennial Memorial Association made a proposal to place a memorial on the Capitol grounds. This proposal was presented to the Capitol Grounds Planning Commission, which has authority over the placement and design of items on the Capitol grounds, but does not have authority concerning the acceptance of items. At the time the proposal was considered by the Capitol Grounds Planning Commission, a question arose as to who has authority to accept gifts for the Capitol grounds. This issue was referred to the Legislative Procedure and Arrangements Committee for review.

### **Capitol Grounds Planning Commission Authority**

The Capitol Grounds Planning Commission is established by NDCC Section 48-10-01, which also provides the powers and duties of the commission. The committee was concerned over the lack of clear-cut authority to accept gifts for placement on the Capitol grounds. Interpretations could be made that the Governor, as the chief executive officer of the state, may accept gifts; the director of the Office of Management and Budget, as the chief fiscal officer of the state, may accept gifts; and the Capitol Arts and Historic Preservation Advisory Committee and the State Historical Board may accept gifts.

A review of the existing monuments on the Capitol grounds indicates that no record exists as to how the Sakakawea statue and the Pioneer Family statue were accepted by the state. The statue of John Burke was placed on the Capitol grounds by action of the 1959 and 1961 Legislative Assemblies.

The committee determined that one entity should be responsible for accepting gifts for placement on the Capitol grounds. In addition, the committee determined that the authority of state entities to accept gifts should be limited to gifts that relate to the statutory responsibilities of the entity. During discussions in this area, it was pointed out that no registry is maintained of gifts to the state, and there is no expertise involved in determining the aesthetic value of the gifts.

### **Recommendations**

The committee recommends Senate Bill No. 2069 to provide that the Capitol Grounds Planning Commission has the exclusive authority to accept gifts for exterior placement on the Capitol grounds. The bill provides that this authority could not be used to contravene legislative action directing placement or construction of items on the Capitol grounds.

The committee recommends Senate Bill No. 2070 to limit the statutory authority of state entities to accept gifts to gifts that relate to the statutory responsibilities of the accepting entity. The bill also requires the State Historical Board to maintain a registry of gifts made to the state and provides for review by the State Council on the Arts to determine the aesthetic value of gifts of property offered to the state for placement on the Capitol grounds.

## **RENOVATION OF THE LEGISLATIVE WING**

### **Background**

Recent history of the renovation of the legislative wing of the State Capitol dates back to the 1977 Legislative Assembly, which authorized the construction of the new judicial wing—state office building. The measure authorizing the construction of the new wing provided that additional space be made available either in the Capitol or in the building to be constructed for no fewer than six legislative hearing rooms and one large legislative hearing room. During the 1977-78 interim, the Legislative Procedure and Arrangements Committee contracted with an architect to develop plans for renovating the legislative wing and other portions of the Capitol which were made available for the legislative branch. The "large hearing room" provided for in the 1977 legislation was included in the design for the new wing and is the Pioneer Room. Several new committee rooms were made possible on the ground floor of the Capitol by moving the Legislative Council staff to the offices vacated by the Supreme Court on the second floor.

The 1979 Legislative Assembly appropriated funds for construction of an elevator connecting the ground floor with the top floor of the former Supreme Court Library, and for the renovation of the House and Senate chambers including recarpeting and built-in filing cabinets and removing four desks on each side of the House chamber to provide additional access to members' seats.

The 1981 Legislative Assembly appropriated \$1,875,000 for renovation of the legislative wing, \$1,200,000 of which was appropriated from the Capitol building fund. This fund was created by the Enabling Act, passed by Congress in 1889, which dedicated certain lands, the proceeds of which can only be spent for public buildings for legislative, executive, and judicial purposes. During the 1981-82 interim, major portions of the legislative wing were renovated. A new elevator was constructed from the House chamber to the House balcony. Committee rooms were created on the ground floor by remodeling space previously used for a cafeteria and for offices of the executive branch and the Legislative Council staff. New offices were created for the Speaker and Chief Clerk of the House of Representatives on the balcony level. Other features of the renovation effort included renovated or new spaces provided for legislative study rooms, telephone clerks, committee clerks and stenographers, legislative leaders, and the press. Another major feature of the renovation effort was the purchase of new electronic voting systems, including computer interfacing and high speed printers for both chambers.

During the 1983-84 interim, the balance remaining of funds appropriated in 1981 was used to refinish woodwork on the ground floor and the repair or replacement of hardware items throughout the legislative wing, to recover the five benches on each side of Memorial Hall immediately outside the House and Senate chambers, to replace the sound system and table in the Roughrider Room, and to upgrade the sound system in the Harvest Room.

Some of the projects originally proposed to be

completed during the 1983-84 interim were postponed due to a lack of funds. These funds were provided by 1985 Senate Bill No. 2090, which appropriated \$187,200 from the interest and income fund of the Capitol building fund to finish the legislative space renovation project.

### **Refinishing of Woodwork**

During the 1983-84 interim the committee's contract architect advised that the woodwork in the Prairie Room, the foyer to the Prairie Room, the Legislative Council reception area and elevator lobby on the second floor, the Legislative Council conference room, the former Supreme Court case conference room, and woodbase and doors and frames throughout the legislative wing were in need of work to preserve and protect them. Much of the wood is unique and from the original construction of the State Capitol. During the 1983-84 interim, the refinishing of woodwork on the first and second floors was delayed because of lack of funds. During the current interim, this wood refinishing was completed.

The stripping and refinishing of wood in the legislative wing of the State Capitol was started in 1975. The contractor who worked on all of the wood refinishing projects presented a list of the various projects completed since 1975 and recommended a maintenance schedule so as to avoid major stripping and refinishing projects in the future. The Director of Institutions was informed of the recommended maintenance, which should be the responsibility of the Director of Institutions. The committee strongly supports maintenance of the woodwork as needed so as to avoid major refinishing projects in the future.

### **Legislative Wing Lighting**

During the 1983-84 interim, several problems with lighting systems throughout the legislative wing were pointed out during committee deliberations. Lighting in the Prairie Room was found to be inadequate during the 1983 legislative session. The 1983-84 Legislative Procedure and Arrangements Committee reviewed several other electrical projects, including the installation of new lights in Memorial Hall to accentuate the woodwork, the repair of light fixtures on the balcony in the Dakota Room and in legislative stairwells, and the installation of dimmer switches for the lights in both chambers.

As a result of work contracted for this interim, the major portion of the ceiling in the Prairie Room was removed and a recessed, overall lighting system was installed, accent lighting is being placed in Memorial Hall to accentuate the woodwork, dimmer switches are being placed in the House and Senate chambers, and glass fixtures in the Dakota Room balcony and legislative stairwells are being replaced.

### **Committee Room Tables**

The committee approved the placement of a horseshoe-shaped table in the Prairie Room and authorized the placement of a horseshoe-shaped table in the Harvest Room. Members of the Senate Committee on Appropriations were appointed as a subcommittee to determine the table arrangement in the Harvest Room. In lieu of a new table, the

subcommittee approved a new lectern arrangement in order to provide more space behind the lectern.

#### **Harvest Room Sound System**

Members of the Senate Committee on Appropriations reported problems with the sound system in the Harvest Room. It was noted that some committee members could not hear the discussions of other committee members or general discussions in the room.

The committee approved a new sound system, with table-mounted fixed microphones, for the Harvest Room.

#### **Roughrider Room Bookcases and Chairs**

A recommendation made during the 1983-84 interim was that bookcases be placed in the Roughrider Room to allow members of the House Committee on Appropriations to place materials in the bookcases during the legislative session. Committee members were informed of the problems resulting from the hodgepodge of chairs used by members of the House Committee on Appropriations.

The committee approved the placement of bookcases and new committee chairs in the Roughrider Room.

#### **Committee Room Signage and Bulletin Boards**

A suggestion was made during the 1983-84 interim that new bulletin boards for schedules and agendas be located outside each committee room. The committee approved the installation of signage and bulletin boards for legislative committee rooms.

#### **Information Kiosk Ceiling**

When the information kiosk was constructed, the ceiling of the kiosk was not installed due to lack of funds. The committee approved the installation of a ceiling to the information kiosk.

#### **Committee Room Displays**

During the 1983-84 interim interest was expressed in having the committee rooms contain displays related to the names of the rooms. At the request of the committee, staff of the State Historical Society developed a prototype proposal illustrating the type of displays that could be placed in committee rooms. The proposal, prepared for the Missouri River Room, included a large wall-mounted exhibit panel, and two small, wall-mounted exhibit panels to supplement the large panel. The small exhibit panels are wallcases within which artifacts are displayed. The estimate of the cost for displays was \$1,800 per committee room, which did not include repainting if necessary or staff time in developing the proposals.

The committee considered options on the funding for committee room displays and suggestions included funding through memorials to former legislators, an appropriation from the Capitol building fund, private contributions, or a project of the Centennial Commission. The committee determined that committee room displays should be funded over a period of time; e.g., funding should be provided for four committee rooms next interim, so that in the near future the rooms would be completed.

#### **Recommendation**

The committee determined that completion of the legislative renovation project was a priority for this interim. Because of possible lack of available funds from the appropriation provided by Senate Bill No. 2090, the committee approved the expenditure of Legislative Assembly appropriated funds for the Prairie Room table, the Harvest Room table and audiosystem, the Roughrider Room bookcases and committee chairs, the committee room signage and bulletin boards, and the information kiosk ceiling. The intent, however, was to appropriate funds from the interest and income fund of the Capitol building fund to pay for the projects, which are scheduled for completion just prior to the 1987 legislative session.

Projects under consideration for next interim include refinishing the benches in the House and Senate chambers, replacing the windows in the House chamber to reduce the glare in the chamber, and providing displays for four committee rooms.

The committee recommends House Bill No. 1058 to appropriate \$55,880 from the interest and income fund of the Capitol building fund for payment of the projects authorized by the committee for completion this interim and for projects under consideration for next interim. As it is intended that the payment for projects finished immediately prior to the 1987 Legislative Assembly would be made from this appropriation, the bill contains an emergency clause.

#### **SESSION ARRANGEMENTS**

##### **Legislative Internship Program**

Beginning with the 1969 session the Legislative Assembly has sponsored a legislative internship program in cooperation with the law and graduate schools at the University of North Dakota and the graduate school at North Dakota State University. The legislative internship program has provided the Legislative Assembly with the assistance of graduate school students and law school students for a variety of tasks, and has provided the students with a valuable educational experience. The allocation of interns among the three programs is six from the School of Law, four from the Department of Political Science at the University of North Dakota, and six from the graduate program at North Dakota State University. Of the 16 interns, 10 are assigned to committees, one is assigned to each of the four caucuses, and two are assigned to the Legislative Council office.

The committee reviewed the program and approved its continuation for the 1987 Legislative Assembly. The same schedule followed for selecting legislative interns for the 1985 Legislative Assembly was followed; i.e., the interns were selected by September 15, 1986, and the four leaders from the prior legislative session interviewed those interns who were interested in serving as caucus interns. The interns receive training and orientation by the Legislative Council staff and are given their assignments prior to the session. Although there was some discussion concerning the allocation of students among the programs, no change in the allocation was made for the 1987 Legislative Assembly.

### **Legislative Tour Guide Program**

For the past five legislative sessions there has been a tour guide program to coordinate tours of the Legislative Assembly by high school groups. The tour guide program is extensively used by high school groups during the session, and other groups have been placed on the tour schedule at their request. For the 1985 session two tour guides were hired due to the heavy workload in scheduling tour groups. The committee approved the continuation of the legislative tour guide program for the 1987 session.

### **Legislative Document Library Distribution Program**

During the 1983 session, the Legislative Assembly provided bills and resolutions, journals, and bill status reports to 30 libraries throughout the state which had requested this service. During the 1985 session, 46 libraries received these documents. The service was well received and libraries reported extensive use of the documents by library patrons. Additional libraries requested this service during the 1987 session, and the committee approved expanding the service so that 48 libraries will receive legislative documents on a daily basis throughout the 1987 session.

### **Bill Status Report System Access**

The bill status report system began in 1969 as a Legislative Council computerized in-house operation to provide day-old hard copy information concerning the progress of bills and resolutions through the legislative process. The bill status report system has grown to an on-line system providing up-to-the-minute information concerning the status of bills and resolutions for use by legislative personnel and outside users. Although most outside users are other state agencies, a number of private entities have gained access through arrangements with the Legislative Council and the Central Data Processing Division of the Office of Management and Budget. During the 1981 session two private entities were authorized access to the on-line system, during the 1983 session six private entities were authorized access, and during the 1985 session 19 private entities were authorized access.

The committee reviewed enhancements proposed for the system for use during the 1987 session. These enhancements include access to text of the journals, access to text of the most recent version of the measure as approved by a chamber, and an index to enrolled measures (the regular subject index in the system is to measures as introduced).

The committee approved the providing of access to the enhanced on-line bill status report system to outside (private entity) users provided that the user have compatible equipment and that each user pay the full cost of usage. The committee also approved placing a terminal having access to the bill status report system in each legislative study room for use by legislators.

### **Bill Subscription Fee**

Under House and Senate Rules 404 any statewide organization or association may be provided a copy of each introduced bill or resolution upon payment of

a subscription fee established by the committee. The committee reviewed the cost of providing this service and established a fee of \$425 for the 1987 session.

### **Doctor-of-the-Day Program**

The North Dakota Medical Association has made medical services available during legislative sessions and expressed a willingness to continue this program during the 1987 session. The committee accepted the offer of the association to continue the doctor-of-the-day program during the 1987 session.

### **Chaplaincy Program**

In cooperation with the Bismarck Ministerial Association, the House of Representatives and the Senate have chaplains open daily sessions with a prayer. During the 1983-84 interim, the Legislative Procedure and Arrangements Committee was informed of problems occurring during the 1983 session with respect to the tradition of permitting individual legislators to preempt the clergy scheduled by the Bismarck Ministerial Association with clergy from throughout the state. As a result of this concern, legislators were given until December 31, 1984, to schedule out-of-town clergymen to deliver daily prayers during the 1985 session.

The committee reviewed the effect of the limitation on scheduling out-of-town clergymen during the 1985 session and requested the Legislative Council staff to again send letters to all legislators prior to the convening of the session giving legislators until December 31, 1986, to schedule out-of-town clergymen to deliver daily prayers during the 1987 session.

### **Session Employee Screening and Training**

The committee approved the hiring of personnel representing the two major political parties to screen legislative employee applicants prior to the 1987 session. The committee also authorized the Legislative Council staff to conduct a one-day training session for committee clerks prior to the 1987 session.

### **Bill Room Employee**

Bills may be prefiled before the convening of the Legislative Assembly in January. Prefiled bills are delivered to the printer and copies are then printed and placed in the bill room. Several requests are made for copies of prefiled bills, because hearings generally are scheduled on these bills early in the legislative session. The Legislative Procedure and Arrangements Committee first authorized the Employment Committees to hire an individual to operate the bill room prior to the convening of the 1979 Legislative Assembly. The committee reviewed the usefulness of this practice and authorized the Employment Committees to hire an individual to operate the bill room prior to the convening of the 1987 Legislative Assembly.

### **State of the State Address**

The committee received a request that the Governor's State of the State address be scheduled in the early evening instead of in the afternoon. The change was described as for the purpose of allowing as much live media coverage as possible so the public

could follow the proceedings. The committee took no action on the request, with the understanding that a decision could be made during the organizational session.

#### **State of the Judiciary Address**

The committee authorized the Legislative Council staff to make plans with the Chief Justice of the North Dakota Supreme Court for the State of the Judiciary Address during the first week of the 1987 session.

#### **Tribal Address**

During the 1983-84 interim, representatives of Indian tribes in North Dakota requested the Legislative Procedure and Arrangements Committee to allow a spokesman for them to appear before the Legislative Assembly to describe from their perspective the current status of the relationship between the tribes and the state of North Dakota. The intent of the address was to clarify areas of concern that would be relevant to the Legislative Assembly. An intended result was improving tribal-state relations by providing a means of direct communication between tribal governments and the Legislative Assembly. That committee extended an invitation to representatives of the Indian tribes, and a spokesman from the tribes addressed each house of the Legislative Assembly early in the 1985 session.

The committee received a similar request this interim and reviewed the purposes for the address. The committee authorized the extension of an invitation to representatives of the Indian tribes to make a presentation to each house of the Legislative Assembly early in the 1987 session similar to the presentation made during the 1985 session.

#### **Legislative Compensation Commission Report**

The committee requested that the report of the Legislative Compensation Commission be presented by the chairman of the commission to each house the first week of the 1987 session.

#### **Military Exchange Program**

During the 1983-84 interim, the Legislative Procedure and Arrangements Committee approved a request for a military-state government leadership exchange program. The purposes of the program included acquainting senior military leaders stationed in North Dakota with the people and processes of state government, acquainting state government leaders with the operations and personnel of the major military installations in the state, and fostering a closer personal relationship between military leaders and government leaders in the state. As a result of an invitation extended by that committee, the exchange program was held early in the 1985 session.

This interim the committee received a request from a representative of the Minot Air Force Base to continue the military-state government leadership exchange program. The committee authorized continuation of the program and extended an invitation to the military personnel to make arrangements for a military exchange program during the 1987 session similar to the program held during the 1985 session.

#### **Physical Fitness Day**

The committee was requested to continue the physical fitness day program initiated during the 1985 session. The committee requested the staff to prepare a concurrent resolution for introduction by the leaders in the 1987 session to declare a physical fitness day for health screening purposes and other demonstrations.

#### **Number of Journals**

Journals of the House of Representatives and the Senate are printed daily during the legislative session. During the 1985 session, 2,300 small-size House journals were printed and 2,200 small-size Senate journals were printed daily. The chief bill and journal room clerk and the Secretary of the Senate recommended lowering the number of journals as a means of eliminating unnecessary copies. The committee approved the reduction in the number of small-size daily journals to 2,000 for each chamber.

#### **Tape Recorders**

The committee received a suggestion from the sergeant-at-arms and the Chief Clerk of the House of Representatives that new tape recorders and headsets be purchased due to the numerous problems with the tape recorders used during the 1985 session. The committee approved the purchase of new tape recorders to record committee meetings. The new recorders are similar to the tape recorders used by the desk forces during the 1985 legislative session.

#### **Fiscal Notes**

Committee members discussed whether fiscal notes should be placed in the legislators' bill racks. The committee adopted the position that the initial fiscal notes be attached to the bills in the legislators' bill racks. If the fiscal notes are revised, the Chief Clerk of the House of Representatives or the Secretary of the Senate is to read the change.

#### **Bill Summaries**

A suggestion was made by the desk page and the Chief Clerk of the House of Representatives to eliminate bill analyses. Bill analyses are prepared by the legislative interns and reviewed by the Legislative Council staff prior to being printed in final form. The committee surveyed all legislators with respect to whether bill analyses are used and whether they should be continued. Eighty-four legislators indicated that the bill analyses are useful and 82 legislators indicated that the preparation of bill analyses should be continued.

The committee approved the redesignation of bill analyses as bill summaries and the continuation of the preparation of bill summaries. The bill analyses are redesignated as bill summaries to reflect the fact that what is referred to as a "bill analysis" is actually a bill summary in that the provisions of the bill are summarized rather than subjected to an in-depth analysis.

#### **Bill Distribution Policy**

The chief bill and journal room clerk and the Secretary of the Senate recommended that a

procedure be established to provide for the mailing of bills to individuals who request them. During the 1985 session the chief bill and journal room clerk used his own money to pay for sending bills to individuals and requested reimbursement from those individuals. The cost of mailing bills to individuals at their request was estimated at \$300 to \$400 during the 1985 session. The committee reviewed practices in two other states that charge for the mailing of bills to individuals. Discussion indicated that the establishment of a revolving fund to provide postage would result in a substantial amount of administrative work with respect to a relatively small amount of money. The committee adopted the policy that a small number of bills should be mailed at no charge to a requestor, but if the request is made for a large number of bills or for all the bills introduced, the requestor should pay the postage.

#### **Journal Distribution Policy**

The committee approved continuation of the policy initiated in 1985 in that legislators would not be asked to fill out a list of persons who are to receive daily journals but that legislators upon request may be permitted to have daily journals sent to as many as 15 persons.

#### **House Chamber Furnishings**

The Chief Clerk of the House of Representatives recommended that the two wood file cabinets in the front of the House chamber be replaced. Difficulties in using the current file cabinets were expressed with respect to broken keys and inaccessible drawers. The committee approved the purchase of two oak file cabinets for placement in front of the House chamber.

The Chief Clerk also recommended that the unpadding page benches in the House be padded. The committee approved the padding of the unpadding page benches in the House chamber.

#### **Joint Steno Pool**

The chief stenographer and payroll clerk of the Senate recommended that applicants for the joint steno pool be given a shorthand, typing, and spelling test, with a recommended typing speed of 60 to 70 words per minute and a shorthand speed of 80 words per minute. Discussion indicated that the recommended speeds were reasonable and there should not be a problem in obtaining applicants with the qualifications. The committee approved this suggestion that applicants for the joint steno pool be given shorthand, typing, and spelling tests and that this suggestion be presented to the Employment Committees. The committee also approved the installation of a copier in or near the joint steno pool area as a means of reducing reliance on the one copier in the Senate committee clerks' area.

#### **Legislator Supplies**

The committee approved continuation of the current policies of providing letter files and stationery to legislators and of providing legislator nameplates for committee tables.

#### **Bill Introduction Privilege**

By joint rule executive branch agencies and the Supreme Court have been granted the privilege of introducing bills in the Legislative Assembly. This permits agencies to introduce prospective legislation of interest to the agencies without the necessity of contacting members of the Legislative Assembly. These bills must be prefiled, which provides the Legislative Assembly with the opportunity to schedule a full slate of committee hearings early in each session. Committee members expressed interest in encouraging agencies to prefile bills instead of waiting until the session has begun and requesting individual legislators to introduce agency bills. The committee requested the Legislative Council staff to write to all agencies and point out the problem of managing the legislative workload and ask for the agencies' full cooperation in managing that workload by prefilng agency bills.

#### **Telephones and Incoming WATS Lines**

The Chief Clerk of the House of Representatives recommended that each committee clerk have a telephone on the clerk's desk in the clerk's area. The committee approved of the installation of a telephone on each committee clerk's desk.

The Legislative Assembly has provided incoming WATS lines during recent legislative sessions to allow constituents to leave messages or get information. During the 1985 session four incoming WATS lines were provided. No complaints were received concerning line unavailability, and the committee approved the installation of four incoming WATS lines for the 1987 session.

During the interim telecommunications functions were transferred from the Director of Institutions' office to the Division of Central Data Processing. Part of the transfer included proposals to transfer the operation of the incoming legislative WATS line from the central switchboard to the Legislative Council office and to transfer the cost of operation of the WATS line from the Director of Institutions to the Legislative Assembly. The committee approved the transfer of the incoming WATS line to the Legislative Council and the inclusion of the cost of the incoming WATS line service in the Legislative Assembly budget request.

#### **Telegram Printer**

The committee received a request from Western Union for the placement of a telegram printer in the State Capitol during legislative sessions. Western Union would pay for the costs of installation, and legislative employees would be responsible for delivering the telegrams. The committee authorized Western Union to place a printer in the Capitol during the legislative session. The printer is scheduled for placement in the legislative telephone room so that the telephone operators can deliver the telegrams.

#### **Organizational Session Agenda**

The committee approved a tentative agenda for the 1986 organizational session. The approved agenda is based essentially on the agenda for the 1984 organizational session.

### **Special Session Arrangements**

The committee reviewed plans for arrangements necessary if the Governor were to call a special session of the Legislative Assembly.

The legislative rules were reviewed and 10 areas of consideration with respect to rules applicable to a special session were discussed and the research on these areas of consideration was forwarded to each member of the House and Senate Committees on Rules.

Of particular concern to the committee was the manner of limiting the number of bills that could be introduced during a special session. During the 1981 reconvened session, each house used its Committee on Delayed Bills to limit the introduction of bills and the House of Representatives expanded the membership of its committee. At the request of committee members, the Legislative Council staff prepared a listing of possible criteria to be used to determine whether a bill or resolution should be allowed to be introduced during a special or reconvened session of the Legislative Assembly.

The committee reviewed the employee positions filled during the 1981 reconvened session, which was a "one-issue" session. The committee also discussed the changes in the duties of employees since 1981 and the possibility of a special session dealing with more than one issue. The committee adopted a position that if a special session were to be called, the number of employees for that session be the same number as employed during the 1981 reconvened session.

The committee reviewed the telephone plan used during the 1981 reconvened session. The committee approved a telephone plan for a special session, based on the telephones installed during the 1981 reconvened session and which also provided for telephones in the legislative study rooms.

The committee also adopted the position that expenses of a special session be paid out of funds appropriated by a bill passed by that special session and that employee compensation be established by a concurrent resolution passed during that special session.

Representatives of the Governor appeared before the committee at its last meeting and reported that the Governor intended to call a special session during the 1986 organizational session. The calling of a special session during the organizational session raises different issues with respect to employees and bill referrals (because committee membership is being established at the organizational session). The committee indicated that the Employment Committees should be prepared to hire three committee clerks for the special session, who could handle all committee responsibilities whether or not House and Senate committees hold joint sessions. The committee requested the staff to prepare temporary rules for a special session which would require bills to have the approval of a Delayed Bills Committee and would allow consideration, passage, and transmittal on the same day without the necessity of suspending the rules. The committee also requested that the Governor be informed that if a special session is to be called during the organizational session, it is the committee's preference that the session be called on the first day of the organizational session.

## **MEMORIAL HALL GUIDELINES**

### **Background**

North Dakota Century Code Section 54-35-02(8) provides the Legislative Council with the power and duty to control the use of the legislative chambers and permanent displays in Memorial Hall. This authority has customarily been delegated to the committee, and under the guidelines adopted in 1981, the committee annually reviews permanent displays in Memorial Hall. In 1982 the committee approved relocating the Liberty Bell to the Heritage Center and in 1984 the committee approved relocating two statues to the Heritage Center.

### **Current Interim**

The committee received a request for a permanent display in Memorial Hall of the flags of all 50 states. Committee members suggested alternatives to displaying the flags in Memorial Hall, and no further action was taken by the committee.

The committee also received a request to authorize the use of the legislative chambers for a reunion of delegates to the 1972 Constitutional Convention. The committee reviewed this request because the planned function did not fit within the guidelines' requirement that it be an educational activity or a memorial for a person who has served in an elective national, state, or legislative office, or be sponsored by a governmental entity. The committee approved the request.

In 1986 the committee viewed Memorial Hall, in which no permanent displays are now located.

## **FRINGE BENEFIT JURISDICTION STUDY**

### **Background**

The Legislative Council's Committee on Public Employees Retirement Programs is the product of a recommendation by the 1975-76 Legislative Procedure and Arrangements Committee. The rationale for creating the Retirement Committee was the recognition of the legislature's difficulty in responding on an informed basis when proposed changes in retirement programs are suggested during, or immediately prior to, a legislative session. North Dakota Century Code Sections 54-35-02.3 and 54-35-02.4 provide for the appointment of the Retirement Committee by the Legislative Council and the powers and duties of the committee. As originally enacted in 1977, Section 54-35-02.4 provided that a legislative measure affecting a public employees' retirement program could not be introduced to either house unless accompanied by a report from the committee. The committee was required to make a thorough review of any measure or proposal which it took under its jurisdiction, including an actuarial review. In 1981 the powers and duties of the committee were expanded by amendments to the statutes which provided that the committee has authority to establish rules for its operation, the committee has sole authority to determine whether any legislative measure affects a public employees' retirement program, any amendment during a legislative session to a measure affecting a public employees' retirement program

may not be considered unless it is accompanied by a report from the committee, and any legislation enacted in contravention of the requirements is invalid.

### **Fringe Benefits for State Employees**

State employees receive or may participate in the following fringe benefits: retirement programs; deferred compensation and annuity programs; health insurance; life insurance; Social Security; workmen's compensation; unemployment compensation; holidays; annual leave; sick leave; military leave; funeral leave; jury and witness leave; overtime pay; moving expenses; and severance pay.

### **Concerns**

In recent years, the Legislative Assembly has dealt with a substantial number of bills concerning fringe benefits for state employees. In addition to considering bills, the Committees on Appropriations also affect fringe benefit programs when decisions are made as to the funding of various employee benefits.

Committee members were concerned over whether consolidated jurisdiction over the various types of fringe benefit programs should be placed in one committee. Concern was expressed over the constitutional question involved with requiring every retirement bill and amendment to go through the Retirement Committee to be effective and whether this type of requirement would be appropriate with respect to fringe benefit proposals. Concern was also expressed over the impact of removing from the Committees on Appropriations the subject area of fringe benefits.

In addition to concerns over the appropriateness of placing jurisdiction over all types of fringe benefits in one committee, concern was expressed over the workload of the Retirement Committee during the interim and during a legislative session.

### **Conclusion**

The committee makes no recommendation with respect to the feasibility and desirability of increasing the jurisdiction of the Committee on Public Employees Retirement Programs to include all fringe benefit programs for state employees. During deliberations with respect to this study, committee members indicated that such jurisdiction by the

Retirement Committee was not warranted at this time.

## **LEGISLATIVE EXPENSE REIMBURSEMENT POLICY**

### **Background**

Section 26 of Article XI of the Constitution of North Dakota provides that payment for necessary expenses for legislators may not exceed that allowed for other state employees. The 1985 Legislative Assembly authorized legislators to receive up to \$600 per month as reimbursement for lodging. Because of the constitutional provision, reimbursement was made pursuant to the policies established by the Office of Management and Budget with respect to state employees who rent apartments while away from their usual work locations for extended periods of time. Several questions arose after the 1985 session as to the reimbursement of items such as utilities, furniture rental, and repairs. The Legislative Council adopted the position that legislators be reimbursed for what is identified as lodging expenses, including utilities and furniture rentals, and referred the expense reimbursement issue to the Legislative Procedure and Arrangements Committee for resolution.

### **1985 Policy**

The committee reviewed a list of items which are included as part of lodging by certain landlords, particularly hotels and motels. The committee approved the following items as includable in reimbursable lodging expenses during the 1985 session: utilities—electricity and heat, water (including garbage collection and sewer charges), basic telephone service, and telephone installation charges; furniture—rental of furniture and appliances and transit charges for moving rental furniture and appliances; and repairs—repairs to structure, plumbing or electrical repairs, and repairs to furniture or appliances.

### **1987 Policy**

The committee adopted the 1985 policy as the policy to be applied for determining reimbursable lodging expenses for the 1987 session. However, with respect to reimbursements for repairs, only repairs for damage occurring during the legislator's tenancy are intended to be reimbursable.

# OIL AND GAS COMMITTEE

The Oil and Gas Committee was assigned one study. House Concurrent Resolution No. 3105 directed a study of the state's oil and gas laws, with emphasis on those laws relating to royalty owners and surface owner protection. Specifically, the study resolution directed a study of the oil and gas statutes, administrative rules, and practices in this state, with emphasis on making the statutes and rules clear and understandable and assuring that taxes are correctly reported and paid and that royalty owners and surface owners are adequately protected and have access to production reports and other information necessary to determine their rights.

Committee members were Representatives Joseph R. Whalen (Chairman), Steve Hughes, David J. Koland, William E. Kretschmar, Ray Meyer, Marshall W. Moore, Jack Murphy, and Alice Olson; Senators Bruce Bakewell, Adam Krauter, Rick Maixner, Dean Meyer, Don Moore, Duane Mutch, and Rolland W. Redlin; and Citizen Members Owen L. Anderson, John W. Morrison, Greg Schneider, Jeff Tescher, and Dean Winkjer.

The report of the committee was submitted to the Legislative Council at the biennial meeting of the Council in November 1986. The report was adopted for submission to the 50th Legislative Assembly.

## Background

House Concurrent Resolution No. 3105 reflects the Legislative Assembly's concern regarding the state's oil and gas laws and the administration and enforcement of those laws. One of the underlying reasons cited for the study was the lack of communication between the oil and gas industry and oil and gas royalty and surface owners. Other reasons cited for the study included errors by oil and gas companies concerning the payment and reporting of oil and gas royalties and problems associated with the provisions of the Oil and Gas Production Damage Compensation Act.

## Existing State Law

Although most of the rights and obligations affecting the relationship between the mineral owner (lessor) and the mineral developer (lessee) are governed by the underlying lease agreement between the parties, North Dakota Century Code (NDCC) Section 47-16-39.1 provides that the obligation to pay royalties is the essence of the lease contract and that breach of that obligation may constitute grounds for the cancellation of such lease in such cases where it is determined by the court that the equities of the case require cancellation. However, the statute provides that cancellation is not applicable if royalties are paid in-kind or in cases where there is a title dispute. If the royalty owner initiates a contract action for money damages, the measure of damages is the amount of royalty accrued and the royalty owner is entitled to interest, computed at 18 percent per year on the delinquent royalties, and court costs and reasonable attorney's fees.

However, one of the difficulties in proving damages under a contract action for unpaid royalties is that

the lessee does virtually all of the accounting of the production and has sole access to the information. In an attempt to ameliorate this problem, NDCC Section 38-08-06.3 was enacted in 1983. This section provides:

Any person who makes a payment to an owner of a royalty interest in land in this state for the purchase of oil or gas produced from that royalty interest must provide with the payment to the royalty owner an information statement that will allow the royalty owner to clearly identify the amount of oil or gas sold and the amount and purpose of each deduction made from the gross amount due. The statement must be on forms approved by the industrial commission and contain the information that the commission prescribes by rule. A person who fails to comply with the requirements of this section is guilty of a class B misdemeanor.

North Dakota Administrative Code Section 43-02-06-01 provides that the royalty owner information statement must include information identifying the royalty owner and the property subject to the lease agreement; the month and year during which the sales occurred for which payment is being made; the total number of barrels of oil or thousand cubic feet of gas sold; the price per barrel or thousand cubic feet; the total amount of state severance and other production taxes; the windfall profits tax paid on the owner's interest; any other deductions or adjustments; net value of total sales after deduction; the owner's interest in sales from the lease, property, or well expressed as a decimal; the owner's share of the total value of sales prior to any tax deductions; the owner's share of sales value less deductions; and an address where additional information may be obtained upon inquiry.

At common law, in instances where the mineral estate has been severed from the surface estate, the mineral estate is dominant and the surface estate is subservient. That is, the owner of the mineral estate could enter the surface overlying the minerals and use it in a reasonably necessary manner in developing the mineral interest. This rule is based on the rationale that since the underlying minerals would be worthless if the owner were denied access to them, the parties in interest when the minerals were severed from the surface must have intended that the right to enjoy the benefits of the mineral estate accompanied them at the time of severance.

However, the dominance of the mineral estate was not unlimited in that the owner could only make reasonable use of the surface. This was usually defined as the right of ingress and egress and the right to conduct any surface operations reasonably necessary to extract the minerals. Nonetheless, the mineral owner could not entirely destroy the surface. If the mineral owner used more of the surface than was reasonably necessary, the mineral owner could be held liable for waste or trespass.

In recent years, the increasing concern with protecting the environment contrasted with the growing need for energy resources has led various oil and gas producing states to enact legislation

modifying the common law regarding surface damage incident to oil and gas development.

In 1979 the North Dakota Legislative Assembly enacted NDCC Chapter 38-11.1, the Oil and Gas Production Damage Compensation Act, which provides that owners of the surface estate and other persons should be justly compensated for injury to their persons or property and interference with the use of their property occasioned by oil and gas development. For purposes of this chapter, "surface owner" is defined as the person who has possession of the surface of the land either as an owner or as a tenant. More specifically, Section 38-11.1-04 requires compensation for "loss of agricultural production and income, lost land value, lost use of and access to the surface owner's land, and lost value of improvements caused by drilling operations."

Further protection is accorded the surface estate under NDCC Chapter 38-08.1. This chapter contains the requirements for drilling and plugging geophysical exploration test holes.

Oil and gas exploration, development, and production in North Dakota is regulated by the Industrial Commission. This authority not only encompasses drilling and production but includes the power to establish spacing units and to adopt orders pursuant to the state's conservation statutes.

### **Royalty Owner Concerns**

Testimony indicated the study of the state's oil and gas laws, with emphasis on those laws relating to royalty owners and surface owner protection, resulted from a lack of communication between the oil and gas industry and oil and gas royalty and surface owners. In addition, many persons cited errors by oil and gas companies concerning the payment and reporting of oil and gas royalties as an underlying reason for the study.

In September 1985 the committee toured the oil and gas producing areas of the state and held public meetings in Mohall, Williston, and Medora. Testimony indicated many benefits as well as problems associated with the development of oil and gas resources. Benefits included the creation of jobs as well as other contributions to the economy of the area. Problems enumerated by various individuals included the retention of oil and gas royalty payments by oil and gas purchasers, inaccurate reporting of oil and gas production, late or inadequate royalty payments, inadequate information on oil and gas royalty statements, the issuance of lease altering division orders, improper deductions from royalty payments, and the improper metering of oil and gas production.

Regarding this area of the study, the committee considered a proposal to establish an ombudsman to represent surface and mineral interest owners at North Dakota Industrial Commission proceedings. An ombudsman is a public official appointed to investigate citizens' complaints against government agencies that may be infringing on the rights of individuals. The function of an ombudsman is to furnish information, refer inquiries to the proper place or person, and to investigate and seek to resolve citizens' complaints and problems. Because the

Industrial Commission is required to be an impartial arbiter, not an advocate for either the oil and gas industry or surface and royalty owners, in administering and enforcing the oil and gas statutes and resolving disputes, it was proposed that the committee recommend establishing an ombudsman to represent surface and oil and gas royalty owners at Industrial Commission proceedings.

The committee also studied several proposals to redress the problem of the inadequate and late payment of oil and gas royalties to people entitled to them. Among the proposals considered by the committee was a bill draft that allowed a royalty owner to inspect and copy the oil and gas production and royalty payment records of the person obligated to pay such royalties. The bill draft also included several alternatives as to where these records should be made available and allowed the royalty owner to recoup the cost of inspecting and copying these records. The rationale for this bill draft was that the royalty owner needs access to the oil and gas purchaser's production and royalty payment records in order to determine if that person has been properly paid.

The committee also considered a bill draft that outlined the function and operation of oil and gas division orders. As a means of obviating the effect of a division order that varies the terms of the lease, the bill draft provided that the division order is invalid to the extent that the terms of the division order vary from the lease and the terms of the oil and gas lease take precedence over the conflicting terms in the division order.

The committee also contemplated a bill draft that would have allowed a mineral owner/lessor to cancel a lease in certain instances if the oil and gas purchaser failed to pay the correct amount of royalties. Testimony pointed out that the provision allowing cancellation of the lease if the amount of unpaid royalties is greater than \$10,000 (one of the instances where the lease could be cancelled) was arbitrary and did not include provisions for cases where there is a title dispute or other factors involved. Also, some opponents indicated the bill draft was unnecessary because current law allows for cancellation of oil and gas leases for nonpayment of royalties.

### **Surface Owner Concerns**

Problems presented to the committee concerning the surface owner portion of the study included the improper reclamation and maintenance of reserve pits (the excavation on a well site that holds the drilling mud) resulting in damage to the surface and to freshwater aquifers; the fact that the Oil and Gas Production Damage Compensation Act does not allow damages to be recovered by the surface owner as well as the person in possession of the property for oil and gas related damage to the surface; damage caused to freshwater wells, springs, and aquifers by geophysical exploration; problems caused by the presence of hydrogen sulfide near well sites; siting of oil and gas wells; and the flaring of natural gas. Also, testimony evinced that in some cases mineral developers are not complying with the provisions of the Oil and Gas

Production Damage Compensation Act.

Testimony received from representatives of the Oil and Gas Division of the Industrial Commission indicated that they are faced with four major problem areas concerning the regulation of the state's oil and gas industry. These include the improper metering of oil and gas production, the failure to properly reclaim reserve pits, problems associated with flaring, and the transfer of ownership interests among working interest owners with the subsequent owner not complying with the appropriate bonding and permitting requirements. The committee also received testimony from representatives of the Public Service Commission, Board of University and School Lands, State Auditor, Attorney General, Tax Commissioner, and the North Dakota Geological Survey.

Representatives of the Dakota Resource Council submitted a number of problems for the committee's consideration. These included problems associated with the reclamation of reserve pits, geophysical exploration and its effect on water wells, the Oil and Gas Production Damage Compensation Act, siting of oil and gas wells, flaring, and the spacing of wildcat, i.e., exploratory, wells.

In this area of the study the committee studied a bill draft that broadened the definition of surface owner for purposes of the Oil and Gas Production Damage Compensation Act to include the actual surface owner as well as the person in possession of the surface. The present definition of surface owner is limited to the person who has possession of the surface of the land either as an owner or as a tenant; thus, the definition precludes the payment of surface damage awards to the actual surface owner in cases where that person is not in possession of the surface. This is true even though the surface interest of the actual owner may also be damaged by oil and gas exploration and development.

The committee also considered several other proposals affecting the Oil and Gas Production Damage Compensation Act. Testimony indicated that drilling completion operations may not be covered by the present definition of drilling operations. As a result, the committee considered a bill draft that included completion operations within the definition of drilling operations for purposes of the Act.

Another bill draft considered by the committee concerned the protection of water wells, springs, and other surface and ground water sources from damage caused by oil and gas exploration and development. This bill draft required that if a surface owner's water source is harmed by drilling operations the mineral developer, i.e., the person who acquires the mineral estate or lease for the purpose of extracting or using the minerals for nonagricultural purposes, must make repairs to the surface owner's water supply or ensure the delivery of water of the same quality and quantity available to the surface owner prior to the commencement of drilling operations. The claim for relief would apply to damage caused by geophysical exploration as well as drilling operations. This bill draft also contained a provision establishing a claim for relief for the surface owner against a mineral developer to recover for surface damage resulting

from natural drainage of waters contaminated by drilling operations.

Also in this area, the committee considered a bill draft that would have required the Industrial Commission to investigate surface owner complaints of damage to surface and ground water sources caused by mineral developers. This bill draft would have allowed a surface owner whose water supply had been adversely affected by drilling operations to file a complaint with the Industrial Commission detailing the loss in quality and quantity in the water supply. The Industrial Commission then would have been required to investigate the complaint and, if a loss in water quality or quantity was indicated, to order the mineral developer to replace the water supply immediately on a temporary basis to provide the needed water. Within a reasonable time, the mineral developer would have had to replace the water in like quality, quantity, and duration, if the loss were determined to be caused by the mineral developer's drilling operations. In addition, the bill draft would have allowed the Industrial Commission to order the suspension of the mineral developer's drilling permit for failure to replace the water until such time as the mineral developer provides substitute water or if the damage complained of has been caused by a person engaging in geophysical exploration to notify the board of county commissioners issuing the geophysical exploration permit of the complaint and findings of the commission. Both the oil and gas industry and the Industrial Commission opposed this bill draft. The industry felt this bill draft unnecessary in light of existing law, and representatives of the Industrial Commission felt that the commission did not have the requisite expertise to implement and administer such a program.

Another bill draft considered by the committee required the mineral developer to include a provision in the notice of drilling operations mandated by NDCC Section 38-11.1-05 informing the surface owner of the right to request the State Department of Health to inspect and monitor oil and gas well sites for the presence of hydrogen sulfide. Currently, the State Department of Health conducts an inspection for the presence of hydrogen sulfide if requested to do so by the surface owner.

The committee also reviewed a bill draft that established a civil penalty for violating a state or county zoning ordinance containing regulations pertaining to geophysical exploration. This bill draft included a \$1,000 penalty for violating such an ordinance. The bill draft stemmed from testimony indicating that the current criminal penalty is not entirely effective in protecting surface owners from damage caused by geophysical exploration.

#### **Administration and Enforcement Concerns**

Testimony indicated that the members of the Industrial Commission do not have the time or requisite expertise to properly oversee the state's petroleum industry, and as a result administration and enforcement of the state's oil and gas laws and rules as well as development of the state's oil and gas resources are suffering.

In this area the committee considered a bill draft

that would have established an oil and gas commission. The oil and gas commission would have consisted of three commissioners appointed by the Governor and confirmed by the Senate. The commissioners would have served four-year terms but could have been removed by the Governor for cause. The commissioners' positions would have been full time.

The bill draft was opposed by the Governor, acting as chairman of the Industrial Commission, as well as by representatives of the North Dakota Petroleum Council and several committee members. Reasons cited by the opponents of the bill draft were the expenses associated with establishing such a commission, the belief that appointed commissioners would be more politicized than the current elected commissioners, and the conviction that the Oil and Gas Division of the Industrial Commission is doing a good job regulating the state's oil and gas industry.

An alternative to this bill draft, discussed by the committee, was to transfer authority of the petroleum industry to the Public Service Commission. Some committee members supported this proposal because Public Service Commissioners are elected rather than appointed as the oil and gas commissioners under the proposal to establish an oil and gas commission would be, and because Public Service Commissioners deal closely with energy and regulation issues.

Another bill draft considered by the committee required that all Industrial Commission hearings concerning orders to be issued by the commission be held in the county in which the oil or gas well or the property affected by the order is located. In addition, the bill draft included a provision allowing any person adversely affected by a hearing order to appeal the order to the district court for the county in which the oil or gas well or the affected property is located. Proponents of this bill draft stated that it would make hearings and appeals more accessible to the people affected by such proceedings. Representatives of the Industrial Commission, however, opposed the section of the bill draft which would have required that all Industrial Commission hearings concerning orders to be issued by the commission be held in the county in which the oil or gas well or the property affected by the order is located. In their view, the requirement would increase the number of hearings and associated costs of administering the state's oil and gas laws.

### **Oil and Gas Taxation Concerns**

Testimony was presented urging the committee to consider a proposal providing an exemption for oil wells completed after December 31, 1985, from the oil extraction tax, the exemption to continue for a 36-month period following completion of each well. However, it was pointed out that the chairman of the Legislative Council had assigned to the interim Taxation Committee a study of energy taxes, which included the taxes on oil, gas, and lignite coal, including the correlation between the taxes on these mineral resources and the development of those resources. As a result, the committee did not pursue this matter any further.

### **Recommendations**

The committee recommends Senate Bill No. 2071 to allow royalty owners to inspect and copy the oil and gas production and royalty payment records of the person obligated to pay royalties under the lease. The bill requires the person obligated to pay royalties to make that person's records available for inspection and copying at that person's usual and customary place of business within the United States. In addition, if the royalty owner is successful in a proceeding brought to enforce this right, the district court may allow the royalty owner to recover the cost of inspecting and copying the records of the person obligated to pay royalties under the lease. This bill draft is intended to help ensure that royalty owners receive the royalties to which they are entitled.

The committee recommends House Bill No. 1059 to define the function and operation of oil and gas division orders. The bill defines a division order as an instrument executed by the operator, the royalty owners, and any other person having an interest in the production directing the purchaser of oil or gas to pay for the products taken in the proportion set out in the instrument. The bill provides that royalty payments may not be withheld because an interest owner has not executed a division order. In addition, the bill provides that the division order may not alter or amend the terms of the oil and gas lease and the division order is invalid to the extent it does so.

The committee recommends Senate Bill No. 2072 to define the term "surface owner" for purposes of the Oil and Gas Production Damage Compensation Act as any person having a present possessory or future possessory interest in the surface of the land. This would allow the actual surface owner as well as the person in possession of the surface to receive damages for injury to the surface caused by oil and gas exploration and development. The bill also allows compensation for severance damages as well as retaining the provisions allowing damage and disruption payments for loss of agricultural production and income, lost land value, lost use of and access to the surface owner's land, and lost value of improvements caused by drilling operations.

The committee recommends Senate Bill No. 2073 to include completion operations within the definition of drilling operations for purposes of the Oil and Gas Production Damage Compensation Act. This bill is intended to address the uncertainty of whether completion operations are included in the definition of drilling operations.

The committee recommends Senate Bill No. 2074 to allow a surface owner to recover for damage to water wells, springs, and other surface and ground water sources caused by oil and gas exploration and development. This bill requires that if a surface owner's water supply has been disrupted or diminished in quality or quantity by drilling operations, the mineral developer must ensure the delivery to the surface owner of the same quality and quantity of water available to the surface owner prior to the commencement of drilling operations. The bill provides further that if an aquifer has been penetrated or disrupted in such a manner as to cause

a diminution in water quality or quantity, the burden of proof shifts to the mineral developer to show that the surface owner's water supply was not injured by the mineral developer's drilling operations. The bill also allows a surface owner to recover for surface damage caused by natural drainage of waters contaminated by drilling operations.

The committee recommends Senate Bill No. 2075 to require that the mineral developer include a statement in the notice of drilling operations required under Section 38-11.1-05 informing the surface owner of the right to request the State Department of Health to inspect and monitor the well site for the presence of hydrogen sulfide. In addition, the bill requires the State Department of Health, upon request by a surface owner, to conduct this inspection.

The committee recommends House Bill No. 1060 to establish a civil penalty applicable to persons convicted of violating any state law or county zoning ordinance relating to geophysical exploration. The

board of county commissioners may impose the penalty and is empowered to compromise the penalty. In addition, the bill provides that the penalty is recoverable by suit filed by the state's attorney on behalf of the board of county commissioners in the county court in the county in which the violation occurred.

The committee recommends House Bill No. 1061 to allow any person adversely affected by an Industrial Commission order to appeal the order to the district court for the county in which the oil or gas well or the affected property is located. If the oil or gas well or the property affected by the order is located in or underlies more than one county, the appeal may be taken to the district court for any county in or under which any part of the affected property is located. Presently, all appeals of Industrial Commission orders must be taken to the district court for Burleigh County.

# RETIREMENT COMMITTEE

The Retirement Committee has statutory study jurisdiction and was assigned a number of other studies. Under North Dakota Century Code (NDCC) Section 54-35-02.4, the committee is required to consider and report on measures over which it takes jurisdiction and which affect, actuarially or otherwise, retirement programs of state employees or employees of any political subdivision. Under the statute, the committee can decide which measures over which it will take jurisdiction. The committee is allowed to engage an actuary to assist in its deliberations on measures within its jurisdiction. The committee is allowed to solicit draft measures from interested persons during the interim. A copy of the committee's report is required to be attached to any measure accepted by the committee as in its jurisdiction and introduced in the Legislative Assembly. Amendments to measures during a session that affect a public employees retirement program are also required to have such a report. Under the statute, legislation enacted in contravention of its requirement is invalid and benefits provided under such legislation are required to be reduced to the level in effect before enactment.

In addition to its statutory responsibilities, the committee was assigned four study resolutions and two issues by direction of the Legislative Council. House Concurrent Resolution No. 3007 directed a study of the feasibility and desirability of consolidating the various public employee retirement funds in the state. House Concurrent Resolution No. 3008 directed a study of the feasibility and desirability of imposing actuarial reporting and evaluation standards on all public employees retirement programs in the state. House Concurrent Resolution No. 3009 directed a study of the actuarial soundness and financial status of public employee retirement programs authorized by state law for employees of political subdivisions. House Concurrent Resolution No. 3010 directed a study of the actuarial soundness of the Alternate Firemen's Relief Association retirement programs under NDCC Chapter 18-11. The Legislative Council directed a study of early retirement for law enforcement personnel and of the question of unclaimed retirement funds.

Committee members were Representatives Bob Martinson (Chairman), Richard Kloubec, Jack Riley, and W. C. Skjerven; and Senators Clayton A. Lodoen, Gary J. Nelson, and Joseph A. Satrom.

The report of the committee was submitted to the Legislative Council at the biennial meeting of the Council in November 1986. The report was adopted for submission to the 50th Legislative Assembly.

## CONSIDERATION OF RETIREMENT PROPOSALS Background

The committee established April 1, 1986, as the deadline for submission of retirement proposals. The deadline was established to allow the committee and its actuary sufficient time to evaluate the proposals. The committee also limited the submission of

retirement proposals considered by it to legislators and those agencies entitled to the bill introduction privilege. Fifty-nine bill drafts were submitted to the committee by the deadline. Another four bill drafts were submitted after the deadline which had some potential relationship to retirement programs.

The committee reviewed each proposal submitted and solicited testimony from proponents, retirement program administrators, and other interested persons. The committee used the actuarial services of the Martin E. Segal Company in evaluating proposals submitted. The committee obtained written actuarial information on each proposal.

In evaluating each proposal, the committee considered the proposal's actuarial cost effect, the number of people affected, the method of funding, the effect on the state's general fund, the effect on the retirement program, and other consequences of the proposal or alternatives to it. Based on these factors, each proposal received a favorable recommendation, an unfavorable recommendation, no recommendation, was not acted on, or had consideration deferred. Those for which consideration was deferred may be reconsidered by the committee at a meeting in December 1986 or January 1987.

A copy of the actuarial evaluation and the committee's report on each proposal will be appended to the proposal and delivered to its sponsor. Each sponsor is responsible for securing introduction of the proposal in the 50th Legislative Assembly.

## Public Employees Retirement System

The Public Employees Retirement System is generally governed by NDCC Chapter 54-52. The plan is supervised by the Retirement Board (PERS Board) and covers most employees of the state, district health units, and the Garrison Diversion Conservancy District. Elected officials and officials first appointed before July 1, 1979, can choose to be members. Officials appointed to office after that date are required to be members. Most Supreme Court and district court judges are also members of the plan, but receive benefits different from other members. A county, city, or school district may choose to participate on completion of an employee referendum and making an agreement with the Retirement Board.

The plan presently provides for employees other than judges a benefit of 1.3 percent of final average salary times the number of years of service. For judges the multiplier is three percent for the first 10 years of judicial service, two percent for the next 10 years, and one percent for service after 20 years. Under NDCC Section 54-52-17(2), final average salary is defined as the average of the highest salary for any 60 consecutive months of the last 10 years of employment. The normal retirement benefit is payable at age 65. A reduced early retirement benefit is payable for vested employees who have reached age 62. An employee is vested after 10 years of service. Vested employees who are at least 60 may retire at full benefits when their number of years of services,

added to their age, equals at least 90. No restriction is placed on the number of years of service used in computing the benefit amount. Historically, changes in benefits have been applied to retired employees as well as then-currently working employees. The original benefit multiplier was 1.04 percent; it was later increased to 1.2 percent, and then to the present 1.3 percent.

The employer contributes 5.12 percent of covered salary to the plan and the employee contributes four percent. For many employees, no deduction is made from pay for the employee's share. This is the result of 1983 legislation that provided for a phased-in "pick up" of the employee contribution in lieu of a salary increase at that time.

The latest available report of the consulting actuary was dated July 1, 1985. According to the report, on that date the Public Employees Retirement System had gross assets that cost \$174.2 million, with a market value of \$182.9 million. Total membership was 13,289 (5,803 men other than judges, 7,461 women other than judges, and 25 judges). The report indicated an employer contribution of 2.98 percent of June 30, 1985, compensation would be necessary to meet the normal cost and payment on unfunded liability. This results in an actuarial margin of 2.14 percent, the difference between the indicated required employer contribution and the statutory 5.12 percent. Benefit enhancements totaling less than the actuarial margin would, if the actuarial estimates meet experience, be actuarially sound.

Following is a summary of the proposals and committee action on bills relating to the Public Employees Retirement System and, as to those introduced by the PERS Board, for which that board did not withdraw its support. All bills changing the benefit multiplier did not change the judges' benefit multiplier.

**Bill No. 1. SPONSOR:** Representative Bob Martinson

**PROPOSAL:** Increase benefit multiplier to 1.6 percent and repeal age 60 rule, amended to increase benefit multiplier to 1.5 percent, establish eight-year vesting, and repeal age 60 rule.

**ACTUARIAL ANALYSIS:** The annual actuarial cost impact of the original proposal would be approximately \$6,192,142 or 2.79 percent of June 30, 1985, total covered compensation. The annual actuarial cost impact of the amended proposal would be approximately \$4,216,871 or 1.9 percent of June 30, 1985, total covered compensation.

**COMMITTEE REPORT:** Favorable recommendation because the benefits can be provided within the actuarial margin of 2.14 percent. The committee believes this selection of benefit enhancements is the preferable use of the available actuarial margin. It still leaves some room for possible variation between experience and the calculated actuarial margin.

**Bill No. 2. SPONSOR:** Representative Mary Kay Sauter

**PROPOSAL:** Increase benefit multiplier to 1.5 percent, eight-year vesting, and repeal age 60 rule.

**ACTUARIAL ANALYSIS:** The annual actuarial cost impact would be \$4,216,871 or 1.9 percent of June 30, 1985, total covered compensation.

**COMMITTEE REPORT:** Unfavorable recommendation in light of approval of Bill No. 1, which includes a 1.5 percent benefit multiplier, eight-year vesting, and repeal age 60 rule.

**Bill No. 3. SPONSOR:** PERS Board

**PROPOSAL:** Increase benefit multiplier to 1.5 percent.

**ACTUARIAL ANALYSIS:** The annual actuarial cost impact would be approximately \$3,906,155 or 1.76 percent of June 30, 1985, total covered compensation.

**COMMITTEE REPORT:** Unfavorable recommendation in light of approval of Bill No. 1, which includes a 1.5 percent benefit multiplier.

**Bill No. 4. SPONSOR:** PERS Board

**PROPOSAL:** Repeal age 60 rule.

**ACTUARIAL ANALYSIS:** The annual actuarial cost impact would be approximately \$245,547 or 0.11 percent of June 30, 1985, total covered compensation.

**COMMITTEE REPORT:** Unfavorable recommendation in light of Bill No. 1, which includes a repeal of the age 60 rule.

**Bill No. 6. SPONSOR:** PERS Board

**PROPOSAL:** Substitute Rule of 85 for Rule of 90; repeal age 60 rule.

**ACTUARIAL ANALYSIS:** The annual actuarial cost impact would be \$781,287 or 0.35 percent of June 30, 1985, total covered compensation.

**COMMITTEE REPORT:** Unfavorable recommendation in light of Bill No. 1, which includes a repeal of the age 60 rule and retains the Rule of 90.

**Bill No. 7. SPONSOR:** Senator Joseph A. Satrom  
**PROPOSAL:** Substitute Rule of 80 for Rule of 90.

**ACTUARIAL ANALYSIS:** The annual actuarial cost impact would be \$1,331,644 or 0.60 percent of June 30, 1985, total covered compensation.

**COMMITTEE REPORT:** Unfavorable recommendation in light of unavailable actuarial margin, assuming approval of Bill No. 1, and preference for using

- available actuarial margin for proposals included in Bill No. 1.
- Bill No. 9. SPONSOR: Senator Joseph A. Satrom  
PROPOSAL: Allow early retirement on occurrence of reductions in force (RIFs), using Rule of 80 and age 55 rule; special one-time encouragement of early retirement.  
ACTUARIAL ANALYSIS: The annual actuarial cost impact would be approximately \$1,331,644 or 0.60 percent of June 30, 1985, total covered compensation.  
COMMITTEE REPORT: Consideration deferred.
- Bill No. 11. SPONSOR: Representative Dagne Olsen  
PROPOSAL: Substitute five-year vesting for 10-year vesting.  
ACTUARIAL ANALYSIS: The annual actuarial cost impact would be approximately \$66,582 or 0.03 percent of June 30, 1985, total covered compensation.  
COMMITTEE REPORT: Unfavorable recommendation. Bill No. 1 substitutes eight-year vesting.
- Bill No. 12. SPONSOR: Senator Joseph A. Satrom  
PROPOSAL: Substitute highest three for highest five years of salary in computing retirement benefits.  
ACTUARIAL ANALYSIS: The annual actuarial cost impact would be approximately \$1,464,808 or 0.66 percent of June 30, 1985, total covered compensation.  
COMMITTEE REPORT: Unfavorable recommendation in light of insufficient actuarial margin, assuming approval of Bill No. 1, and preference for using available actuarial margin for proposals included in Bill No. 1. Also the bill might create two classes of retirees—those receiving benefits based on three-year calculation and those on a five-year calculation.
- Bill No. 14. SPONSOR: Senator Joseph A. Satrom  
PROPOSAL: Allow purchase of prior service credit for up to four years of military service. Bill amended to limit eligibility to members with 10 years of service under the Public Employees Retirement System and to require election to be made within 90 days of eligibility.  
ACTUARIAL ANALYSIS: There would be no actuarial cost impact.  
COMMITTEE REPORT: Favorable recommendation because of lack of actuarial cost and similarity to program provided to teachers. Amendments were made to prevent the employee from buying the credit and forfeiting purchase before vesting and to facilitate administration of plan and calculation of potential liabilities.
- Bill No. 15. SPONSOR: PERS Board  
PROPOSAL: Allow prior service benefit for employees with significant prior experience who joined 1966 plan.  
ACTUARIAL ANALYSIS: The annual actuarial cost impact would be approximately \$156,257 or 0.07 percent of June 30, 1985, total covered compensation.  
COMMITTEE REPORT: Favorable recommendation because it provides a benefit enhancement at reasonable cost to the system.
- Bill No. 16. SPONSOR: PERS Board  
PROPOSAL: Allow repurchase of service credit forfeited and refunded when departing one system and later entering another. The bill covers the Public Employees Retirement System, Teachers' Fund for Retirement, and Highway Patrolmen's plan. The bill was amended to require exercise within 90 days of eligibility.  
ACTUARIAL ANALYSIS: The bill would have no actuarial impact assuming the cost basis for the repurchase is not subsidized by the system.  
COMMITTEE REPORT: Favorable recommendation because it has no actuarial cost and allows employees to transfer between systems without loss of coverage.
- Bill No. 17. SPONSOR: Representative Bob Martinson  
PROPOSAL: Allow prior service credit for pre-1966 service for employees who withdrew from 1966 plan in 1977.  
ACTUARIAL ANALYSIS: Assuming that 400 eligible employees take advantage of the bill, that the average regrant is eight years, that the average age of eligible employees is 59, and that their average salary is \$18,000, the actuarial cost impact is approximately 0.37 percent of June 30, 1985, covered compensation, or \$821,180. The actuarial cost expressed in terms of compensation of the eligible employees is 11.36 percent.  
COMMITTEE REPORT: Consideration deferred.
- Bill No. 18. SPONSOR: Representative Charles F. Mertens  
PROPOSAL: Establish 80 percent disability benefit.

**ACTUARIAL ANALYSIS:** The annual actuarial cost impact would be approximately \$1,220,673 or 0.55 percent of June 30, 1985, total covered compensation.

**COMMITTEE REPORT:** Unfavorable recommendation in light of insufficient actuarial margin, assuming approval of Bill No. 1, and preference for using available actuarial margins for proposals included in Bill No. 1. The present disability benefit is 60 percent of salary, with a Social Security offset. Since Social Security seldom equals 60 percent of salary, almost the entire cost of the enhanced benefit would have to be borne by the system. An 80 percent benefit might also reduce the incentive for rehabilitation.

Bill No. 21. **SPONSOR:** Representative Thomas C. Wold

**PROPOSAL:** Lower employer contribution to extent actuarially sound.

**ACTUARIAL ANALYSIS:** Unknown because it would require use of investment yield and salary increase assumptions that cannot be predictably applied to the system's long-term experience.

**COMMITTEE REPORT:** Unfavorable recommendation because the present employer contribution is already comparatively low, compared to other public retirement programs in the country. The benefits are comparably low also. The proposal was opposed by representatives of present and retired employees as well as by the PERS Board.

Bill No. 35. **SPONSOR:** PERS Board

**PROPOSAL:** Add, to presently allowed accrual of benefit eligibility among the Public Employees Retirement System, Teachers' Fund for Retirement, and Highway Patrolmen's plan, accrual of benefits among those plans and the college retirement fund.

**ACTUARIAL ANALYSIS:** The actuarial cost impact would be minimal. Reciprocal rights for transfer of contributions from the college retirement fund are not available because that plan is not controlled by the state.

**COMMITTEE REPORT:** Unfavorable recommendation because of lack of reciprocity for transfer from TIAA-CREF to the Public Employees Retirement System.

Bill No. 36. **SPONSOR:** Senator Joseph A. Satrom  
**PROPOSAL:** Allow transfer of Public Employees Retirement System

employer contribution to college retirement fund; Public Employees Retirement System rights would be forfeited. The bill was amended to limit eligibility to employees who transferred their own contributions to TIAA-CREF.

**ACTUARIAL ANALYSIS:** No actuarial cost.

**COMMITTEE REPORT:** Consideration deferred.

Bill No. 39. **SPONSOR:** PERS Board

**PROPOSAL:** Allow disability appeals.

**ACTUARIAL ANALYSIS:** The actuarial impact would be minimal.

**COMMITTEE REPORT:** Unfavorable recommendation because of uncertainty over ultimate actuarial cost and the precise cases to which the new right would apply.

Bill No. 54. **SPONSOR:** PERS Board

**PROPOSAL:** Allow prefunded medical insurance to retirees with employers contributing 0.5 percent of covered payroll.

**ACTUARIAL ANALYSIS:** No actuarial cost impact on the Public Employees Retirement System.

**COMMITTEE REPORT:** Consideration deferred. Although the proposal has no actuarial cost impact on the retirement system, it has a substantial and unknown impact on the health insurance plan. The committee will solicit further data on the cost of such a proposal.

Bill No. 63. **SPONSOR:** Interim Agriculture Committee

**PROPOSAL:** Transfer the State Forester from the Board of Higher Education to the Soil Conservation Committee. About 11 employees would be transferred to the Public Employees Retirement System.

**ACTUARIAL ANALYSIS:** The estimated annual actuarial cost impact is 6.6 percent of the salary of the 11 employees involved or 0.01 percent of total Public Employees Retirement System fiscal year 1986 covered compensation.

**COMMITTEE REPORT:** Favorable recommendation as to the retirement issue because of minimal impact and necessity, assuming the State Forester is transferred. The committee expresses no opinion on the transfer proposal itself.

The Retirement Board withdrew its support for a number of bills which it had introduced. Accordingly, the committee took no action with respect to these bills:

- Bill No. 5. PROPOSAL: Make the Rule of 90 retroactive to presently retired employees.  
ACTUARIAL ANALYSIS: The annual actuarial cost impact would be \$66,582 or 0.03 percent of June 30, 1985, total covered compensation.
- Bill No. 8. PROPOSAL: Allow normal retirement at age 62 instead of age 65.  
ACTUARIAL ANALYSIS: The annual actuarial cost impact would be approximately \$1,540,251 or 0.69 percent of June 30, 1985, total covered compensation.
- Bill No. 10. PROPOSAL: Allow retirement after 30 years of service with full benefits, regardless of age.  
ACTUARIAL ANALYSIS: The annual actuarial cost impact would be approximately \$446,450 or 0.2 percent of June 30, 1985, total covered compensation.
- Bill No. 13. PROPOSAL: Use highest three instead of highest five years of salary in computing retirement benefits; change definition of permanent employee. (See Bill No. 12 for a similar proposal which received an unfavorable recommendation.)  
ACTUARIAL ANALYSIS: The annual actuarial cost impact would be approximately \$1,473,284 or 0.66 percent of June 30, 1985, total covered compensation.
- Bill No. 19. PROPOSAL: Establish cost-of-living adjustments for disabled retirees after 24 months of retirement, and other retirees after 48 months of retirement.  
ACTUARIAL ANALYSIS: The annual actuarial cost impact would be approximately \$1,339,349 or 0.6 percent of June 30, 1985, total covered compensation.
- Bill No. 20. PROPOSAL: Establish postretirement investment fund.  
ACTUARIAL ANALYSIS: The annual actuarial cost impact would be minimal.
- Bill No. 58. PROPOSAL: Continue state payment of group health insurance for disabled annuitants.  
ACTUARIAL ANALYSIS: No actuarial cost impact.

### Teachers' Fund for Retirement

Former NDCC Chapter 15-39 established the Teachers' Insurance and Retirement Fund. This fund, the rights to which were preserved by NDCC Section 15-39.1-03, provides a fixed annuity for full-time teachers whose rights vested in the fund before July 1, 1971. The plan was repealed in 1971 when the Teachers' Fund for Retirement was established with the enactment of NDCC Chapter 15-39.1.

The Teachers' Fund for Retirement plan provides a benefit of 1.15 percent of final average salary times the number of years of service. Final average salary is defined as the average of the highest monthly salary received for any three years employed during the last 10 years of membership in the fund. Full benefits are payable under any of the following conditions:

1. When the teacher has completed 10 years of teaching credit and is at least 65 years of age.
2. When the teacher is at least 65 years of age and completed the final year of teaching in 1971.
3. When the teacher has a combined total of years of service credit and age that is at least equal to 90, and one year of that credit was completed after July 30, 1979.

Both the employer and employee contribute 6.25 percent of covered salary to the plan. Employers are permitted to pay the employee's share.

The plan provides for a minimum benefit for post-1970 retirees of \$6 per month per year of teaching for the first 25 years of service and \$7.50 per month of teaching credit for service over 25 years.

After retirement, benefits are adjusted as deemed necessary by the Legislative Assembly. Under certain circumstances teachers can continue partial service after retirement. A reduced early retirement benefit is payable at age 55 after 10 years of service. Disabled teachers receive a benefit equal to the retirement benefit credits earned to the date of disability. The board of trustees (TFFR Board) of the plan determines disability after examination of the teacher by two physicians appointed by the board.

The latest available report of the consulting actuary was dated July 1, 1985. According to the report, on that date, the fund had total assets with a market value of \$238.3 million and an actuarial value of \$236.8 million. Total active membership was 8,954 (3,433 men and 5,521 women). The report indicated that an employer contribution of 5.54 percent of projected fiscal 1986 compensation would be necessary to meet the normal cost and payment on unfunded liability. This results in an actuarial margin of 0.71 percent, the difference between the indicated required employer contribution and the statutory 6.25 percent. Benefit enhancements totaling less than the actuarial margin would, if the actuarial estimates meet experience, be actuarially sound.

Following is a summary of the proposals and committee action relating to the Teachers' Fund for Retirement over which the committee took jurisdiction:

Bill No. 22. SPONSOR: TFFR Board

PROPOSAL: Increase benefit multiplier from 1.15 to 1.5 percent, increase contribution rate from 6.25 to 6.5 percent, normal retirement at age 65 with five years of service instead of 10, allow deferred retirement after five years of service instead of 10, allow partial service retirement at age 62 with five years of service instead of age 65 and 10 years, change survivor annuity option, grant former plan's retirees benefit increase of \$15 per month plus

\$3 for each year of receiving benefits to a maximum total of \$75, increase benefits for Teachers' Fund for Retirement retirees as of June 30, 1987, by \$3 per month for each year of receiving benefits.

**ACTUARIAL ANALYSIS:** The net actuarial cost impact would be approximately \$9,232,995 or approximately 4.47 percent of projected fiscal year 1986 compensation.

**COMMITTEE REPORT:** Consideration deferred. An amendment removing the change in the contribution rate was suggested. This and other suggestions may change the actuarial analysis.

Bill No. 23. **SPONSOR:** Senator Stanley Wright

**PROPOSAL:** Allow use of any three years of service in computing retirement benefits.

**ACTUARIAL ANALYSIS:** The proposal would have no actuarial cost impact.

**COMMITTEE REPORT:** Consideration deferred.

Bill No. 24. **SPONSOR:** Senator Stanley Wright

**PROPOSAL:** Allow withdrawal from the plan after 20 years of service and cessation of employment, with refund of employee's and employer's contributions.

**ACTUARIAL ANALYSIS:** The actuarial cost impact would be approximately \$2,561,278 or 1.24 percent of fiscal year 1986 projected payroll.

**COMMITTEE REPORT:** Consideration deferred.

Bill No. 25. **SPONSOR:** Representative Richard Kloubec

**PROPOSAL:** Provide for retroactive increase in benefits based on reference to former statutes.

**ACTUARIAL ANALYSIS:** The actuarial cost impact would be approximately \$1,858,992 or 0.9 percent of projected fiscal year 1986 covered compensation.

**COMMITTEE REPORT:** Consideration deferred.

Bill No. 26. **SPONSOR:** Senator Curtis Peterson

**PROPOSAL:** Provide for retroactive increase in benefits based on definition of time of retirement.

**ACTUARIAL ANALYSIS:** The annual actuarial cost impact would be approximately \$103,277 or 0.05 percent of projected fiscal year 1986 total covered compensation.

**COMMITTEE REPORT:** Consideration deferred.

Bill No. 27. **SPONSOR:** Representative Jack A. Riley

**PROPOSAL:** Establish benefit of \$250 per teaching year, make contribution and assessments of four percent, and limit computation of benefits to \$10,000 of salary.

**ACTUARIAL ANALYSIS:** The actuary estimated the cost of preparing an analysis for this proposal would be substantial. Accordingly an analysis was not prepared.

**COMMITTEE REPORT:** Consideration deferred. The committee decided not to have an actuarial analysis prepared because of the cost of the analysis and the substantial likelihood such a proposal would be unsuccessful. The committee notes the proposal would provide a benefit unrelated to earnings, which would be a disincentive to seeking advancement within the profession and its resulting higher salary and concomitant increase in benefits.

Bill No. 28. **SPONSOR:** TFFR Board

**PROPOSAL:** Reduce disability eligibility service time from 10 years to one year.

**ACTUARIAL ANALYSIS:** The estimated actuarial cost would be approximately \$61,966 or 0.03 percent of projected fiscal year 1986 covered salary.

**COMMITTEE REPORT:** Consideration deferred.

Bill No. 29. **SPONSOR:** TFFR Board

**PROPOSAL:** Establish postretirement investment fund.

**ACTUARIAL ANALYSIS:** This proposal would have minimal actuarial cost impact.

**COMMITTEE REPORT:** Consideration deferred.

#### **Other Retirement Plans**

The committee considered a number of proposals dealing with changes to other benefit plans, particularly the Highway Patrolmen's plan and the Old-Age and Survivor Insurance System.

The committee considered the following proposals:

Bill No. 32. **SPONSOR:** PERS Board

**PROPOSAL:** Allow disability benefits under Highway Patrolmen's plan.

**ACTUARIAL ANALYSIS:** The estimated actuarial cost impact of this proposal on the Highway Patrolmen's fund is four percent of total covered compensation.

**COMMITTEE REPORT:** Consideration deferred. The committee notes that

presently there is no disability program for Highway Patrolmen.

- Bill No. 33. SPONSOR: PERS Board  
PROPOSAL: Allow repurchase of Highway Patrolmen's benefit; make statutory changes.  
ACTUARIAL ANALYSIS: The estimated actuarial cost impact of this proposal on the Highway Patrolmen's fund is 0.5 percent of total covered compensation.  
COMMITTEE REPORT: Consideration deferred.
- Bill No. 34. SPONSOR: Job Service North Dakota  
PROPOSAL: Increase Old-Age and Survivor Insurance System benefits by \$40 per month for fiscal year 1987 and by another \$20 per month for fiscal year 1988.  
ACTUARIAL ANALYSIS: Due to the small number of retirees, this proposal would have minimal actuarial impact on the Old-Age and Survivor Insurance System.  
COMMITTEE REPORT: Favorable recommendation to provide necessary postretirement benefit adjustments.

The Public Employees Retirement System Board introduced two proposals concerning the Highway Patrolmen's plan but withdrew its support for them before the final committee meeting. Accordingly the committee took no action with respect to these bills:

- Bill No. 30. PROPOSAL: One-time cost-of-living adjustment for Highway Patrolmen's plan. Revision of statutory reference.  
ACTUARIAL ANALYSIS: The estimated actuarial cost impact of this proposal is 0.2 percent of covered compensation.
- Bill No. 31. PROPOSAL: Establish postretirement cost-of-living adjustment.  
ACTUARIAL ANALYSIS: The estimated actuarial cost impact of this proposal is 3.4 percent of total covered compensation.

#### **Bills With Minimal Actuarial Impact**

The committee considered many bills that have minimal or no actuarial impact. In many cases the bills do not directly affect the relevant retirement program, although they relate to employee benefits. Because of the lack of impact, the committee waived jurisdiction with respect to these bills. By waiving jurisdiction, the committee indicates its belief that each proposal should stand or fall on its own merits. Following is a summary of these bills:

#### **Plan Administration and Participation**

- Bill No. 37. SPONSOR: PERS Board  
PROPOSAL: Prohibition of assignment of benefits.

- Bill No. 38. SPONSOR: PERS Board  
PROPOSAL: Make records of PERS and TFFR boards confidential and exempt from open public records requirement.
- Bill No. 40. SPONSOR: PERS Board  
PROPOSAL: Repeal spousal veto of named beneficiary.
- Bill No. 41. SPONSOR: PERS Board  
PROPOSAL: Increase PERS Board chairman's compensation to \$300 per month from \$50 per day.
- Bill No. 42. SPONSOR: PERS Board  
PROPOSAL: Increase PERS board members' compensation to \$200 per month from \$50 per month.
- Bill No. 43. SPONSOR: PERS Board  
PROPOSAL: Allow use of investment counselor.
- Bill No. 44. SPONSOR: PERS Board  
PROPOSAL: Repeal obsolete statutes.
- Bill No. 45. SPONSOR: TFFR Board  
PROPOSAL: Operation of board; change method of determining interest. Amended to remove reference to changing interest determination. Actuarial analysis of that portion had indicated a cost of 0.16 percent of projected fiscal year 1986 covered compensation, or \$330,488.
- Bill No. 46. SPONSOR: TFFR Board  
PROPOSAL: Allow use of outside managers for up to 40 percent of fund moneys instead of present 20 percent.
- Bill No. 47. SPONSOR: Interim Judicial Process Committee  
PROPOSAL: General exemption from process of retirement benefits.
- Bill No. 48. SPONSOR: Interim Court Services Committee  
PROPOSAL: Establish intermediate appellate court adding three judges to the Public Employees Retirement System.

#### **Fringe Benefit Bills**

The following bills deal with fringe benefits and the committee also waived jurisdiction on them:

- Bill No. 49. SPONSOR: Representative Michael Unhjem  
PROPOSAL: Allow retired employees to continue group plan life insurance.
- Bill No. 50. SPONSOR: PERS Board  
PROPOSAL: Change definition of qualifying full-time service with respect to group health eligibility.
- Bill No. 51. SPONSOR: PERS Board  
PROPOSAL: Allow members of boards and commissions to participate in uniform group health insurance program.

- Bill No. 52. SPONSOR: PERS Board  
 PROPOSAL: Allow surviving spouse of a retired employee to participate in group health plan.
- Bill No. 53. SPONSOR: PERS Board  
 PROPOSAL: Allocation of insurance premium between state agencies when both spouses are employees and participate in the group health insurance plan.
- Bill No. 55. SPONSORS: Senators John M. Olson and Corliss Mushik  
 PROPOSAL: Allow purchase of postretirement health insurance with unused sick leave.
- Bill No. 56. SPONSOR: PERS Board  
 PROPOSAL: Allow self-administration of group health insurance program.
- Bill No. 57. SPONSOR: PERS Board  
 PROPOSAL: Repeal stop loss provisions under group health insurance program.
- Bill No. 59. SPONSOR: PERS Board  
 PROPOSAL: Require PERS Board to administer deferred compensation program.

**Late Submitted Bills**

Bill Nos. 60 through 64 were submitted to the committee after its April 1, 1986, deadline. The actuarial analyses of Bill Nos. 60, 61, and 62 indicated no actuarial impact. The committee waived jurisdiction on those bills. Following is a summary of the bills:

- Bill No. 60. SPONSOR: Interim Jobs Development Commission  
 PROPOSAL: Require investment of at least two percent of assets of the Teachers' Fund for Retirement, the Public Employees Retirement System, and other funds in North Dakota investments if the investments are consistent with fiduciary responsibilities.
- Bill No. 61. SPONSOR: Interim Jobs Development Commission  
 PROPOSAL: Require the Teachers' Fund for Retirement Board to use the "prudent investor" rule.
- Bill No. 62. SPONSOR: Interim Jobs Development Commission  
 PROPOSAL: Require investment of at least two percent of assets of the Teachers' Fund for Retirement and the Public Employees Retirement System in North Dakota investments. No provision was made concerning the fiduciary responsibilities of the proposal. (The Jobs Development Commission did not recommend this proposal to the Legislative Council.)

**NONSTATUTORY STUDIES**

Because of budgetary constraints, the committee was unable to undertake the studies directed by resolutions and the Legislative Council. Accordingly, its report is limited to measures within its statutory jurisdiction.

# TAX ADMINISTRATION COMMITTEE

The Tax Administration Committee was assigned three studies. House Concurrent Resolution No. 3074 directed a study of confidentiality statutes governing state tax records. House Concurrent Resolution No. 3061 directed a study of the personal property tax replacement formula and this study was expanded by the chairman of the Legislative Council to include study of the state's revenue sharing formula. The chairman of the Legislative Council assigned the committee a study of property tax levy limitations that apply to political subdivisions.

Committee members were Senators Joseph A. Satrom (Chairman), William S. Heigaard, Jim Kusler, Don Moore, and Dan Wogsland; and Representatives Jim Brokaw, Orlin Hanson, Alvin Hausauer, Eugene J. Nicholas, Alice Olson, Emil J. Riehl, Raymond Schmidt, John T. Schneider, A. R. Shaw, and Don Shide.

The report of the committee was submitted to the Legislative Council at the biennial meeting of the Council in November 1986. The report was adopted for submission to the 50th Legislative Assembly.

## TAX RECORDS CONFIDENTIALITY STUDY Background

North Dakota law generally favors public access to state government records. North Dakota's open records law is found in virtually identical provisions of Section 6 of Article XI of the Constitution of North Dakota and North Dakota Century Code (NDCC) Section 44-04-18, both of which provide that unless an exemption is provided all state government records are open for public inspection. Specific exemptions exist to protect secrecy of tax return information under financial institutions' taxes, estate taxes, sales and use taxes, and corporate and individual income taxes. There is no provision in state law for confidentiality or secrecy of information for property taxes, aircraft excise taxes, alcoholic beverage taxes, tobacco taxes, coal severance and conversion taxes, oil and gas gross production taxes, oil extraction taxes, taxation of rural electric cooperatives or cooperative electrical generating plants, insurance premiums taxes, mobile homes taxes, motor vehicle fuels and special fuels taxes, and proceedings of the State Board of Equalization in taxation of centrally assessed property. Where no secrecy provision exists, the open records law applies to make such records available for public inspection.

Under federal law, contained in 26 U.S.C. 6103, confidentiality is required for federal income tax returns and return information. An exception to these secrecy provisions allows disclosure to state tax officials of federal income tax return information and this is an important resource for states in enforcing tax compliance. Federal law provides that federal return information will not be furnished to a state unless the state adopts statutory provisions that protect the confidentiality of the federal return and the federal return information reflected on the state tax return.

Secrecy of North Dakota state income tax returns is required under NDCC Section 57-38-57. This

section provides that any particulars disclosed in any report or return are confidential. A 1958 Attorney General's opinion concluded that the fact that a return has not been filed by a taxpayer is not covered by the secrecy provision because disclosure of the fact that no return is on file is not disclosure of information contained in a return. Under this Attorney General's interpretation, the Tax Commissioner is not allowed to respond to questions of whether a person or corporation has a tax return on file if a return is on file. However, if a corporation or individual has not filed a return, the Tax Commissioner is allowed to disclose that there is no record of a tax return. This issue comes to public attention most often with situations involving campaigns for public office. The news media frequently questions the Tax Department about the income tax filing status of a number of candidates for public office and, when certain candidates have no return on file, that information is reported in the news media. When such disclosures become public, controversy arises over whether this type of information should be available to the public. This is one of the reasons for the study of confidentiality under tax laws.

The standing committee testimony on House Concurrent Resolution No. 3074 indicates other reasons for introduction of the study resolution. The Tax Department makes public announcement of large tax settlements with corporate taxpayers. Because disclosure of the amount to be collected under a settlement is not subject to confidentiality rules but the taxpayer's identity, the reason for settlement, and other information about the tax settlement is confidential, concern exists in some quarters that announcement of settlement amounts is questionable policy because other relevant information is not available. Another concern expressed was that a Tax Commissioner would be defenseless against unfair charges of favoritism or failure to collect taxes due because the information required to refute such charges is confidential.

## Testimony

The Tax Commissioner described the audit and collection methods of the Tax Department. He said North Dakota collects a high percentage of assessed taxes in comparison with other states and the federal government. The Tax Commissioner does not believe confidentiality protection should be extended to taxpayers who have not filed tax returns. Under present law the Tax Commissioner is allowed to answer no or to give no answer in response to questions of whether a tax return has been filed. The Tax Commissioner suggested that authority should be provided to answer yes or no to these types of questions.

The Tax Commissioner recommended that confidentiality under the oil and gas tax laws should be reviewed. The commissioner believes that access to oil and gas tax return information for royalty owners is desirable, but oil and gas companies are reluctant to provide information because oil and gas

tax return information is open to public inspection. The Tax Commissioner suggested that if oil and gas tax return information were confidential, oil companies would be more willing to provide information that would help in collecting oil and gas taxes.

A Tax Department representative reviewed Tax Department guidelines for audit and settlement of contested tax liability. The director of the applicable division of the Tax Department may waive up to one-half of interest and adjust an assessment if the total adjustment does not exceed \$50,000 for corporate income taxes or oil and gas taxes and if the total adjustment does not exceed \$10,000 for all other taxes. The guidelines provide that the Tax Commissioner must be consulted for approval of settlements beyond these limits.

The Attorney General informed the committee that the role of the Attorney General is very limited in tax settlements. Five assistant attorneys general in the Tax Department have primary responsibility for tax settlements, and the Attorney General is not involved in a tax settlement unless it is a major case. The five assistant attorneys general in the Tax Department are employees of the Tax Department but are appointed by the Attorney General.

The State Auditor's office is not involved during negotiations and settlement of disputed tax liability cases. In auditing the records of the Tax Department, the State Auditor's office selects tax returns at random and seeks confirmation from the taxpayers of the accuracy of the receivable balance shown in the Tax Department's records. Auditors trace selected balances to the original tax return and to applicable documentation in the account during the period under audit. Payments received on account are traced to the receivables ledger to ensure proper posting. A sample of accounts classified as doubtful or uncollectible is reviewed to determine whether they are properly classified. The State Auditor believes that testing of taxes receivable is quite extensive and that it constitutes an adequate basis for an opinion on the correctness of amounts shown to be due. The State Auditor believes that the present level of involvement of the State Auditor's office is sufficient to accomplish the objectives of a financial audit. He said involvement of the auditor's office in negotiation of tax settlements would not benefit the state or the taxpayer because negotiations are sensitive and deal with technical matters outside the expertise of the State Auditor's staff.

Survey requests were sent to all states that impose income taxes. Responses were received from 37 states and, of those responding, only nine states allow disclosure of whether or not an income tax return has been filed. None of the 37 states allows disclosure of whether a taxpayer has obtained an extension of time to file a return, and only two of the 37 states require greater disclosure from returns of elected officials than from returns of other taxpayers.

Under federal law, the Internal Revenue Service will not disclose whether or not a taxpayer has filed any report or return. No disclosure of returns is required of members of Congress although annual reports of income are required.

Exceptions exist under North Dakota law to allow disclosure of income tax return information under limited circumstances for judicial orders, publication of statistics, access by the Attorney General when legal actions concerning the return are commenced, tax agencies of other states, the Internal Revenue Service, the Multistate Tax Commission, the Workmen's Compensation Bureau, Job Service North Dakota, collection agencies for collection of delinquent taxes from a taxpayer not living in North Dakota, child support enforcement, auditing of the Tax Commissioner's records by the State Auditor, contractors' bonding and licensing, and for consideration by employees at the Grafton State School or the State Hospital when patients apply for state payment of all or a portion of the costs of care.

Representatives of mineral interest owners' groups urged the committee to retain public access to oil and gas tax return information. Access to such information was said to be important to mineral interest owners because these records provide an opportunity to determine whether proper credit is reported in royalty statements from oil and gas companies.

### **Recommendations**

The committee recommends two bills relating to income tax record confidentiality and makes no recommendation for changes in other tax laws under which reports or returns are confidential or subject to public inspection.

The committee recommends House Bill No. 1062 to prohibit disclosure of whether or not an individual or corporation has filed an income tax return.

The committee recommends House Bill No. 1063 to allow disclosure of whether or not an income tax return has been filed by an individual or a corporation. Under the bill, disclosure of the fact that no return has been filed may be made only if the taxpayer's return is delinquent, the Tax Commissioner's records contain no notice of an extension of time to file the return, and the taxpayer is not exempt from filing an income tax return. Although difficulty may be encountered in determining whether a taxpayer is exempt from filing a return, the committee chose to include this requirement to protect taxpayers with low income from the embarrassment of public disclosure. The bill requires any taxpayer seeking a federal extension of time to file a return to notify the Tax Department of the request in order to qualify for an extension of time to file the state return.

The bills recommended take different approaches to resolution of the income tax disclosure question. Although the approaches are irreconcilable, the committee chose to recommend both bills so that the full Legislative Assembly may consider each alternative.

## **PERSONAL PROPERTY TAX REPLACEMENT AND REVENUE SHARING STUDY**

### **Background**

Personal property taxes were an important component of the tax structure in North Dakota from statehood until the personal property tax was

repealed in 1969. Personal property made up approximately 20 percent of the political subdivisions' property tax base, so the personal property tax base was very significant to political subdivisions. However, the personal property tax was unpopular, difficult to administer, and viewed as detrimental to the state's economy because it tended to discourage investment in large items of personal property necessary for farming, business, and industrial development.

The personal property tax was repealed in 1969 by exemption of nearly all personal property not required by the Constitution of North Dakota to be assessed by the State Board of Equalization. The 1969 bill provided for a one percentage point sales and use tax increase and a distribution of state revenue to political subdivisions to offset the loss of personal property tax revenues.

The personal property tax replacement formula, which is codified as NDCC Section 57-58-01, originally provided that each county auditor was to certify to the Tax Commissioner the total amount of real and personal property taxes levied, the total valuation of real property, and the total of real property taxes levied for each taxing district in the county in 1968. The first distribution of personal property tax replacement revenue under the formula was made in 1971 on the basis of the 1968 information. The information collected for the 1968 tax year was used as the base year and a growth factor was contained in the original formula that provided that for each \$4 increase in real property taxation within the county the state would contribute an additional \$1 over the amount distributed to the county in 1971.

In 1971 the distribution formula for personal property tax replacement was amended. Certification and payment dates were advanced, provision was made to include in the formula taxes levied in 1970 for a purpose for which a levy was not made in the year 1968, and adjustments were made to tax bases if classification of property was changed from real to personal or from personal to real property. The most significant change in 1971 was made to the growth formula. The base amount was changed from 100 percent to 95 percent of the 1971 payment and the growth factor was changed from 4 to 1 to 7 to 1.

In 1973 school districts were removed from the political subdivisions receiving funding under the formula. For the years after 1973, school district personal property tax replacement has been included in state foundation aid payments. Only revenue for junior colleges and school district public recreation systems continues to be allocated to school districts under the personal property tax replacement formula.

In 1985, House Bill No. 1660 amended the personal property tax replacement formula by providing that for years after 1985, payments to counties would be based upon a growth factor of 19 to 1 rather than 7 to 1. This amendment is effective only through June 30, 1987, and after that date the growth factor will revert to 7 to 1.

The executive budget recommendations to the 1985 Legislative Assembly included a recommendation for

personal property tax replacement funding of \$44,500,000 for the 1985-87 biennium. House Bill No. 1005 was passed by the Legislative Assembly providing an appropriation of \$44,540,000 for personal property tax replacement. House Bill No. 1005 was vetoed by the Governor, who stated in his veto message that he believed the amount appropriated was "clearly in excess of what the state can afford and is unacceptable." After the Governor's veto, House Bill No. 1660 was passed providing an appropriation for personal property tax replacement of \$24,069,346 for the 1985-87 biennium, and Senate Bill No. 2511 was passed providing a deficiency appropriation of \$8,507,654 for personal property tax replacement for the last six months of the 1983-85 biennium.

The state revenue sharing formula, presently contained in NDCC Sections 54-27-20.1, 54-27-20.2, and 54-27-20.3, was enacted by approval of an initiated measure at the November 7, 1978, general election. The formula provides that total revenue sharing distributions are equal to five percent of the net proceeds from state income taxes and sales and use taxes. Revenue sharing funds are to be distributed to counties and cities, half on the basis of population and half on the basis of property tax levies. Townships share in the revenue allocated to counties and park districts share in the revenue allocated to cities, with the allocations prorated on the basis of property tax levies.

Although the personal property tax replacement formula and the revenue sharing formula provide for determination of a total amount to be due to political subdivisions, and provide for distribution to political subdivisions of amounts due, the total amounts available under both programs are subject to legislative appropriation. Under Section 12 of Article X of the Constitution of North Dakota no state moneys may be disbursed except pursuant to appropriation made by the Legislative Assembly.

### Considerations

Political subdivision representatives testified that it appears that recent Legislative Assemblies have appropriated personal property tax replacement funds not on the basis of the distribution formula, but rather, on the basis of moneys available in the state budget. It was recommended that a formula be established which can be supported by legislators and political subdivision representatives and that future appropriations should be in line with the amounts determined under the formula.

The committee considered a bill draft that would have changed the personal property tax replacement formula and based total funding on a percentage of net proceeds of state income and sales and use taxes for the previous year. The bill draft would have changed distribution from the current formula by eliminating use of the base year 1968 and substituting a new distribution formula to distribute revenue based upon the previous year's tax levy of each political subdivision compared to the previous year's tax levies of all political subdivisions in the state. The Tax Department analyzed distribution of an equal amount of revenue under the distribution

## POLITICAL SUBDIVISIONS LEVY LIMITATIONS STUDY

### Background

The primary funding source for operation of local government is the levy of real property taxes. In the years prior to 1981, a number of factors combined to cause the 1981 Legislative Assembly to restructure the state's system for assessment of property for tax purposes.

Prior to 1981, North Dakota law called for equal assessment of all taxable property at true and full market value. However, a system evolved which was characterized by disparity of assessments within districts, among districts, and among counties. Inflation was responsible for a part of the disparity in assessments because the assessed values of different classes of property did not keep pace with the actual increase in property values. In the 10 years from 1966 to 1976, the weighted average of all classes of property showed that assessment had decreased from an average of 25 percent to an average of 12.3 percent of true and full value. An additional complication was the fact that a de facto system of classification of property for assessment purposes developed under which different types of property were assessed at different percentages of value. Because of these disparities the assessment ratio for agricultural, residential, and commercial property decreased more rapidly from 1965 to 1980 than did the assessment ratios for railroad or utility property.

Although the Legislative Assembly had been wrestling with the property tax assessment problem for many years, it had not reached a consensus on how to make necessary changes. The event that triggered property tax reform was the North Dakota Supreme Court decision in *Soo Line Railroad Company v. State of North Dakota*, 286 N.W.2d 459 (1979). In its suit against the state the Soo Line Railroad challenged the assessments made by the State Board of Equalization for the years 1974, 1975, and 1976. The Supreme Court ruled that the use of a higher assessment ratio for centrally assessed property than was used for locally assessed property was impermissible under state law and the court stated that it would "no longer countenance de facto classification of property in North Dakota for purposes of taxation."

At the beginning of the 1981 legislative session, there were nine bills to deal with the assessment dilemma. The bill that ultimately passed was 1981 Senate Bill No. 2323. This bill extensively reshaped North Dakota's property tax assessment procedures. The bill provided that all property would be assessed at its "true and full value" and that, for agricultural land, "true and full value" would be its agricultural value. A formula was established to determine agricultural value based upon productivity. Assessment ratios for the various classes of property were set as follows: residential—nine percent; agricultural, commercial, and railroad—10 percent; and utilities—14 percent declining to 10 percent by 1985. The provisions of 1981 Senate Bill No. 2323 which are most relevant to the present study were contained in a section to provide protection for taxpayers and taxing districts.

formula in the bill draft and under the distribution formula in existing law. The analysis determined potential revenue distributions for each political subdivision in the state and found that significant differences in distributions to some political subdivisions would occur in changing from the present formula to the formula provided in the bill draft. No general trend is discernible to determine which subdivisions would receive increased revenue and which would receive decreased revenue under the bill draft approach. Under the bill draft, Bismarck would have received seven percent more, Fargo would have received five percent less, Grand Forks would have received six percent more, and Minot would have received 12 percent more personal property tax replacement revenue. The changes in distribution appeared to be at least in part attributable to the fact that the present formula uses the 1968 tax base as a basis for distribution and significant changes have occurred in political subdivision tax bases since 1968. Under the present formula, some political subdivisions, which are of approximately the same population and tax base, receive substantially dissimilar personal property tax replacement payments. In addition, some political subdivisions are presently levying no property taxes but are receiving personal property tax replacement revenue under the present distribution formula. It was stated that there appears to be some inequity in the present formula.

The committee considered two bill drafts that would have combined state revenue sharing and personal property tax replacement formulas into a single state aid to political subdivisions program. Under both bill drafts distribution of state aid would have been on the basis of proration of funds by comparison of a political subdivision's tax levies to tax levies of all political subdivisions within the state. Under one bill draft, total state aid would have been determined as a percentage of the net proceeds of state sales, income, and use tax revenues. Under the other bill draft, total state aid would have been equal to 30 percent of all property taxes levied by political subdivisions statewide. The advantage suggested for basing payments on 30 percent of local levies was that political subdivisions would be able to estimate the next year's state aid revenue because for each \$1 levied in property taxes 30 cents in state aid would be returned.

Representatives of political subdivisions opposed combining revenue sharing and personal property tax replacement programs. They also opposed basing total state aid on local property tax levies. They supported basing total personal property tax replacement payments on state sales, use, and income tax revenues and said that they are willing to accept increases and decreases in state revenues for determination of personal property tax replacement.

### Conclusion

The committee makes no recommendation for changes in state revenue sharing or personal property tax distribution formulas. The committee was unable to achieve a majority vote on any of the bill drafts considered.

The necessity of special provision for taxpayers and taxing districts was that the effect of the changes on tax bases of taxing districts caused by Senate Bill No. 2323 varied considerably among taxing districts. The statewide effect of the bill for all property showed little change with slight increases in assessments for farm property and commercial property, a slight decrease in assessments for residential property, and significant reductions in assessments for railroad and utility property. Although statewide averages showed only small variations, at local levels erratic changes in tax bases were likely after passage of Senate Bill No. 2323. It was known that assessed values would increase in 38 counties, with 25 counties showing an increase of 10 percent or more. It was also known that assessed values would decrease in 15 counties, with four counties having a decrease of 10 percent or more. Assessed valuations in smaller political subdivisions were sometimes subject to even more radical fluctuations.

The erratic pattern of increase or decrease in assessments among political subdivisions was caused by several factors. One factor was the mix of the types of property within the assessment district, since assessments of some property types increased and some decreased. Another factor was that generally higher quality agricultural land was undervalued in the market and tended to increase in value more rapidly under the productivity valuation approach than lower quality land. Another factor was that the state average assessment ratio for farmland was 5.9 percent in 1979 but there were significant differences among counties in applied assessment ratios. The new valuation method applied the 10 percent assessment ratio uniformly. Another contributing factor to variations was that actual crop production for the years used in computations may have varied from one county to another from the long-term norm. The net result was that great variations in total assessed value among political subdivisions made it impossible to assure that political subdivisions would retain the same, or even nearly the same, tax base as before the passage of the 1981 legislation, and very significant tax increases or decreases could have occurred in some political subdivisions by application of existing mill levy limitations to the new assessed or taxable values of property within the taxing district.

A change in the tax base due to increases or decreases in assessed values does not automatically mean a change in taxes levied by the taxing district. The budget approved by the governing body determines the taxes to be levied, subject to levy limitations. If the tax base is increased, the mill levy rate can be reduced to raise an equal amount of revenue. If the tax base is decreased, the mill levy rate can be increased to raise an equal amount of revenue except mill levy limitations could limit the actual amount that could be levied. For some taxing districts, the increase in assessed valuations would have allowed maximum tax levies to be increased so significantly as to virtually remove mill levy limitations, while for other taxing districts, decreases in assessed valuation would have decreased maximum tax levies to a level far below those previously in place and made it impossible to continue

the previous level of services to taxpayers.

The means chosen to achieve stability in local tax levy limitations in Senate Bill No. 2323 used the actual 1980 tax levy in dollars as a basis for 1981 tax levies. The bill provided that taxing districts could increase levies by seven percent in 1981 and by an additional seven percent in 1982 over the amount which had been levied in dollars in the preceding year. It was anticipated that this percentage increase limitation would be temporary and would be replaced when further study determined a method to revert to mill levy limitations.

The 1981-82 interim Finance and Taxation Committee studied this issue but found no solution and recommended legislation to extend the allowable seven percent annual budget increase in dollars for the years 1983 and 1984. The bill introduced as a result of this study was 1983 House Bill No. 1053, which was passed by the Legislative Assembly with an amendment that reduced the allowable increase to four percent per year for 1983 and 1984.

Political subdivisions' levy limitations were again the subject of debate during the 1985 Legislative Assembly. The result of 1985 deliberations was passage of 1985 Senate Bill No. 2345, which once again extended for two years the limitation on tax levies in dollars. The 1985 bill provided that taxing districts could increase levies by up to three percent for 1985 and 1986 over the amount levied in dollars in the previous year. The 1985 legislation was again temporary in nature and will expire at the end of 1986.

### Testimony

The State Supervisor of Assessments presented information to the committee comparing total taxes levied for the years 1965-84. The average percentage change from the previous year for the entire 20-year period is an increase of 6.04 percent for rural real estate, 8.10 percent for urban real estate, and 7.05 percent for all types of real estate. It had been feared that the percentage increase type limitation for tax levies would allow great increases in actual tax levies but from the data available it appears that recent growth in actual taxes levied has been about equal to the normal rate of growth for the entire 20-year period. The State Supervisor of Assessments said one difficulty exists with present property tax levy limitations which also existed prior to 1981. The difficulty perceived is that tax levy limitations put pressure on local assessors to increase assessed valuations to allow an increase in tax dollars levied. He said the imposition of revenue considerations on the assessment process can be a problem for assessors and the property tax system as a whole.

Representatives of the Department of Public Instruction testified that school districts are in a somewhat different position from other political subdivisions. Although the three percent budget increase limitation applies to school districts, other limitations also exist. The school district general fund levy limitation is 70 mills and, if the school district is levying less than 70 mills it may increase its levy by 18 percent by resolution of the school board as long

as the 18 percent increase does not increase the mill levy to more than 70 mills. Department of Public Instruction representatives testified that schools that are at or near the statutory mill levy limits are in a difficult situation and, without going to voters for approval, may increase their levy by only three percent under the limitations bill which applies to all political subdivisions. Information presented showed that 125 school districts in the state levied more than 70 mills for general purposes for 1985.

Representatives of political subdivisions testified that some political subdivisions favor the percentage increase in dollars levied method of limiting local taxation, some favor reversion to mill levy limitations, and some favor unlimited mill levies. It appears that the majority of political subdivisions would oppose unlimited mill levies. No consensus recommendation from political subdivisions was made as to the method of limiting tax levies of political subdivisions, although it appears limitations would be favored.

The committee reviewed mill levy limitations provided by law. It appears 18 different types of political subdivisions have tax levy authority under law. There are 71 separate mill levy limitations that apply to counties, 17 separate levy limitations that apply to city park districts, 63 separate levy limitations that apply to cities, and 29 separate levy limitations that apply to townships. The committee considered alternatives for consolidating mill levy limitations to decrease the number of different limitations that apply. One difficulty with consolidation of levies is that some may be levied by action of the governing body while others require a vote of the people. Different percentage vote requirements are required from the governing body or by voters to approve the levying of certain taxes. For these reasons, consolidation of mill levies is difficult without making changes in the manner in levying some taxes.

Committee members expressed concern that existing law allowing a percentage levy increase tends to force political subdivisions to keep levies at a high level. The reason for this concern is that the previous year's levy is the basis for determination of the present year's limitation. Concern for future limitations may have an inflationary influence on present levy considerations. Committee members expressed the belief that using the highest of the three

previous years' levy as a basis for current limitations would allow political subdivisions to decrease levies with less concern about reducing future limitations.

### **Recommendation**

The committee recommends Senate Bill No. 2076 to make permanent the limitation of levies to a percentage of a prior year's levy in dollars as was enacted temporarily in 1981, 1983, and 1985. The most significant differences between the recommended bill and the 1985 legislation is that the recommended bill provides for a permanent law and the recommended bill bases the limitation on the highest tax levy of the three most recent taxable years rather than using the limitation from only the previous year. The bill allows taxing districts to levy three percent more in dollars in any taxable year than the amount levied in the year with the highest levy in dollars of the three most recent taxable years.

The bill provides that the amount levied in the base year must be reduced to reflect property that was removed from the tax rolls for the current year, increased to reflect property added to the tax rolls since the base year, and reduced to reflect expired temporary mill levy increases authorized by the voters of the taxing district. In the alternative, the taxing district may levy an amount in dollars equal to the amount levied in the base year, reduced to reflect expired temporary mill levy increases, and increased by an amount equal to the sum determined by application of mill levies authorized but not levied for the base year and any mill levies specifically authorized by the voters but not levied for the base year. A taxing district electing to increase its levy by unlevied mills may not add the percentage increase otherwise allowed. The bill allows all taxing districts to increase levies in dollars to reflect new or increased mill levies authorized by the Legislative Assembly or authorized by the voters. Under the bill a taxing district that elects a percent increase in taxes levied in dollars may supersede any mill levy limitations which would otherwise apply or a taxing district may levy up to mill levy limitations otherwise provided by law without reference to the bill. The provisions of the bill do not apply to irrevocable taxes to pay bonded indebtedness or the one-mill levy for the state medical center. The bill is effective for all taxable years after 1986.

# TAXATION COMMITTEE

The Taxation Committee was assigned three studies. House Concurrent Resolution No. 3025 directed a study of sales and use tax exemptions to determine their impact on state revenues, their effect on public and fiscal policy, and their administrative burden on retailers. Senate Concurrent Resolution No. 4050 directed a study of existing and alternative methods of unitary corporate income taxation. The chairman of the Legislative Council assigned to the committee a study of taxation of oil, gas, and coal.

Committee members were Senators Mark Adams (Chairman), James A. Dotzenrod, Donald J. Kilander, Joseph A. Satrom, Floyd Stromme, and Jerry Waldera; and Representatives Ronald A. Anderson, William G. Goetz, Lyle Hanson, Alvin Hausauer, Steve Hughes, David W. Kent, Charles Linderman, Marshall W. Moore, William Starke, Kenneth N. Thompson, Mike Timm, and Gene Watne.

The report of the committee was submitted to the Legislative Council at the biennial meeting of the Council in November 1986. The report was adopted for submission to the 50th Legislative Assembly.

## SALES AND USE TAX EXEMPTIONS STUDY

### Background

North Dakota's first sales tax was enacted in 1933 but was referred to and disapproved by the voters. In 1935 the first North Dakota sales tax became effective. Each Legislative Assembly from 1935 through 1965 reenacted the sales tax by passage of a bill effective for two years.

In 1937 the motor vehicle excise tax was created to provide a separate sales tax on sales of motor vehicles. In 1939 the use tax was created as a companion to the sales tax and essentially the same exemptions exist under the use tax as exist under the sales tax. The rate of sales, use, and motor vehicle excise taxes was two percent from 1935 until 1963, when the tax rates were increased to 2.25 percent.

In 1965 the sales tax law was referred and disapproved. The state was without a sales tax from July 1, 1965, to April 1, 1967. During that period use taxes were collected in place of the disapproved sales tax.

In 1967 a three percent sales and use tax was enacted as permanent law. In 1969 the sales and use tax rate was increased to four percent effective January 1, 1970. In 1976 an initiated measure was approved which reduced the sales and use tax rates and motor vehicle excise tax rate from four percent to three percent, eliminated the sales tax on electricity, and reduced the rate of sales and use taxes to two percent on farm machinery and irrigation equipment effective January 1, 1977. On April 1, 1983, the rates of sales, use, and motor vehicle excise taxes were increased from three to four percent for general sales and from two to three percent for sales of farm machinery, irrigation equipment, and mobile homes. Another 1983 change increased the separate sales tax on sales of alcohol and tobacco from three to five percent.

As enacted in 1935, the sales tax law provided by definition or by specific exemption for exemption of

certain sales from the sales tax. The most notable exemptions by definition were the exemptions of casual sales and sales of services, which are not included in the definition of retail sales and are therefore not subject to sales taxes. In the 1935 law only four specific sales tax exemptions were provided which were for sales not taxable under the Constitution of North Dakota or the United States Constitution; sales of transportation services; sales of property used for public works contracts; and sales of tickets to fairs and educational, religious, or charitable activities.

In 1937 a sales tax exemption was created for sales by school boards of books and school supplies to students. In 1943 sales tax exemptions were created for sales of property processed from agricultural products and for sales to the United States, the state of North Dakota, or a political subdivision. In 1953 sales tax exemptions were created for sales of prescription drugs and sales of fertilizers and seeds, bulbs, and plants for gardens or agricultural purposes. In 1959 a sales tax exemption was created for sales of oxygen purchased under a doctor's order. In 1961 an exemption was added for sales of magazine subscriptions and a "retail sale" subject to sales tax was redefined to exempt sales of products to be processed or resold.

From 1965 to 1983 the sales tax base was greatly reduced by the enactment of most of the existing exemptions from the sales tax. In 1965 sales tax exemptions were created to add private schools and parochial schools to the exemptions for school books and supplies. Legislation passed in 1965 and 1967 exempted sales of gasoline, insurance, alcohol, tobacco, aircraft, and other products that are subject to special taxes. In 1967 sales tax exemptions were created for livestock feed; sales from vending machines; sales to contractors holding a use tax permit; newsprint and ink for newspapers; sales to nonresidents residing in adjoining states that do not levy sales taxes; and sales of services of hospitals, sanitariums, and nursing homes. In 1969 sales tax exemptions were created for agricultural chemicals and fertilizers, mixed drinks containing alcohol, food sold to school lunch programs, and motion picture rentals. In 1969 the sales tax base was broadened to include sales of alcoholic beverages, tobacco, and oleomargarine and the exemption for sales from vending machines was reduced to exempt only sales of 15 cents or less. In 1971 residents of Canada were added to the exemption for sales to nonresidents and exemptions were created for rental of housing for 30 days or more and sales of food on university boarding contracts. In 1969 a sales tax exemption was created for meat, fish, poultry, and dairy products. In 1973 this exemption was expanded to cover all foods and food products for human consumption off the premises where purchased. In 1975 exemptions were created for sales of artificial devices for handicapped persons, sales of coal subject to coal severance taxes, sales to nursing homes and intermediate care facilities, and sales of certain religious books to nonprofit religious organizations. In 1977 a sales tax exemption was

created for sales to homes for the aged. In 1979 sales tax exemptions were created for sales to hospitals, sales of ostomy devices and supplies, and the exemption for devices to aid the handicapped was expanded. In 1981 sales of water and sales of used mobile homes were exempted from the sales tax. In 1983 sales tax exemptions were added for sales of air carrier transportation property subject to ad valorem taxation, rental of hotel or motel room or tourist court accommodations for periods of 30 or more consecutive days, and sales of aircraft subject to a special aircraft excise tax. In 1985 no new sales tax exemptions were created and the exemption was removed for sales of candy, chewing gum, carbonated beverages, powdered drink mixes, and soft drinks containing less than 70 percent fruit juice.

### **Testimony**

The committee received testimony relating to sales tax exemptions on sales of goods for agricultural uses. A recently enacted Minnesota law reduced the Minnesota sales tax rate from six percent to two percent on sales of new farm machinery and removed the six percent sales tax on sales of farm machinery repair parts. The committee was urged to recommend that similar exemptions be enacted in North Dakota. The committee was urged to leave existing agricultural sales tax exemptions in place if no recommendation would be made to increase these exemptions.

The committee examined the rationale for each sales tax exemption and determined that the following exemptions are not likely to be removed: sales to federal, state, and local governments; sales to hospitals and nursing homes; sales of meals to shut-ins; sales to voluntary health associations; sales in interstate commerce; mobile home rentals; casual sales; sales for processing or resale; and sales to Indians. The revenue loss from these exemptions was not calculated. Fiscal estimates were obtained on revenue losses attributable to all other sales tax exemptions. Lost sales tax revenue for sales of exempt products was estimated to be from \$99,405,500 to \$112,484,100 annually. Lost sales tax revenue from sales of exempt services was estimated to be from \$25,750,000 to \$38,600,000 annually. Lost sales tax revenue from miscellaneous exemptions was estimated at \$1,655,000 to \$1,955,000 annually. Combining these fiscal estimates indicates a total annual sales tax revenue loss to the state of from \$126,810,500 to \$153,039,100. Because estimated annual sales tax revenues during the current biennium are approximately \$150 to \$160 million, and annual revenue loss estimates from the exemptions examined may exceed \$150 million annually, it appears that the volume of sales exempt from the sales tax is approximately equal to the volume of sales subject to the sales tax.

The committee examined sales tax rates and exemptions in surrounding states and provinces. It appears that North Dakota allows more sales tax exemptions than do surrounding states and provinces but substantial similarity of major exemptions exists except in Montana, where no sales tax is imposed, and South Dakota, which has a very broad based sales tax.

North Dakota and South Dakota general sales tax rates are four percent, Minnesota and Manitoba rates are six percent, and the rate in Saskatchewan is five percent.

The committee was requested to review a perceived inequity which arises in application of the sales tax exemption for educational, religious, or charitable activities and purchases by these exempt organizations. It appears that inequity exists when exempt organizations engage in regular competition with private enterprise and have the competitive advantage of a sales tax exemption. It appears that some exempt organizations engage in continuing fundraising sales campaigns, which compete with private business and go beyond the perceived intent of the exemption for educational, religious, or charitable activities.

### **Recommendation**

The committee recommends Senate Bill No. 2077 to provide that the exemption otherwise available for educational, religious, or charitable activities does not apply to consistent retail sales that are in direct competition with retailers. The exemption would remain for casual sales, such as infrequent fundraising activities and similar functions. In addition, the sales tax exemption for purchases by hospitals and similar institutions is limited to purchases made for the use or benefit of a patient or occupant of the facility.

Committee members commented that proposals for further exemptions from sales taxes should be strictly scrutinized. Existing sales tax exemptions were found to be adequately justified.

## **UNITARY TAXATION**

### **Background**

Unitary taxation is formula apportionment of income of related corporations for corporate income tax purposes. The goal of formula apportionment is to determine how much corporate income is properly taxable within the state for corporations operating across state borders. Due to the complexity of interrelationships that may exist between related corporations, the difficulty of establishing the situs of taxable income of corporations and affiliates operating across state boundaries, the various methods used by states to apportion corporate income for income tax purposes, and the resulting dissatisfaction of states and corporate taxpayers, the corporate income tax imposed by state governments has been problematic since the earliest days of imposition of corporate income taxes by states.

In North Dakota the state corporate income tax was first imposed in 1919. From the beginning of imposition of corporate income taxes, the state has used apportionment to determine the proportion of corporate income attributable to North Dakota for tax purposes. Legal challenges to North Dakota's apportionment approach have occurred from the early 1920s to the present.

North Dakota's experience with challenges to its method of apportioning corporate income is not unique. All states imposing corporate income taxes had similar challenges. The states imposing corporate

income taxes used similar but different methods of apportioning corporate income. The diversity of state income apportionment approaches made it likely that either more or less than 100 percent of corporate income was taxable by states and provided incentives for various means of legal tax avoidance. This proved to be an unacceptable situation to both states and corporate taxpayers. In an attempt to address the problem of diverse approaches, the National Conference of Commissioners on Uniform State Laws proposed the Uniform Division of Income Tax Act in 1957 and the Act was enacted in North Dakota in 1965. The Uniform Division of Income Tax Act is codified as North Dakota Century Code Chapter 57-38.1 and has been amended once since 1965. Under this Act affiliated corporations' property, payroll, and sales within North Dakota are compared to their property, payroll, and sales worldwide to determine what portion of their income is taxable in North Dakota. Although the Act does not specify worldwide unitary apportionment is to be used, that method has been employed in North Dakota since 1973 under an administrative interpretation by the Tax Commissioner.

As of 1984, 45 states imposed corporate income taxes and all of those states utilized formula apportionment to divide taxable income of a single corporation operating across state boundaries. Twenty-three of the corporate income tax states used the apportionment method for allocating income of multicompany corporations operating across state lines through subsidiaries. Eleven of these 23 states applied their apportionment formula to the combined income and business activities of related United States corporations forming a unitary business. The remaining 12 of these 23 states, including North Dakota, utilized worldwide unitary taxation, which included foreign activities that are part of a unitary business.

It was the worldwide unitary method of apportioning corporate income which drew the wrath of domestic and foreign-based multinational corporations and foreign governments. A significant corporate income tax case decided by the United States Supreme Court, Container Corporation of America v. Franchise Tax Board, 463 U.S. 159 (1983), held that the worldwide unitary combination method was constitutionally permissible. After this decision multinational corporations and foreign governments assailed the President with requests that the federal government support legislation to limit or prohibit state use of worldwide unitary taxation. The administration responded by establishing in July 1983 a Cabinet Counsel on Economic Affairs Working Group to identify federal and state interests in the worldwide unitary method of taxation. In September 1983 the President established the Worldwide Unitary Taxation Working Group, chaired by Treasury Secretary Donald T. Regan. The group was composed of federal and state government representatives and business leaders and the group was unable to agree fully on all areas of discussion. The final report of that group was issued in August 1984. The working group agreed on three principles:

1. Water's edge unitary combination apportionment

should be applied to both United States and foreign-based companies.

2. Increased federal administrative assistance and cooperation with the states should be provided to promote full taxpayer disclosure and accountability.
3. Competitive balance should be established under state tax policies for United States multinationals, foreign multinationals, and purely domestic businesses.

Only these broad principles were agreed upon by the working group and remaining issues were left for resolution at the state level.

With pressure from the administration and from two bills introduced in Congress (S. 1974 and H.R. 3980), nine of the 12 states that had used worldwide unitary apportionment in 1984 have receded to water's edge unitary apportionment as of November 1986. The most recent and most notable of these nine states is California, which was a primary concern of foreign governments due to the level of corporate activity in that state. North Dakota is one of the three remaining states, with Alaska and Montana, which still use worldwide unitary apportionment for corporate income tax purposes.

During the 1985 legislative session, Senate Bill No. 2343 was considered by the North Dakota Legislative Assembly. This bill would have changed North Dakota law to provide for water's edge unitary taxation. The bill passed in the Senate and was substantially amended before failing to pass in the House of Representatives.

Although the majority of states that had used worldwide unitary apportionment in 1984 have now gone to water's edge unitary apportionment, several areas of difference exist among the laws of these states. Probably the most significant areas of difference and concern are definition of what constitutes a unitary group, treatment of dividends received from foreign corporations, and treatment of income from domestic corporations that have 80 percent or more of their property, payroll, and sales in foreign countries (called 80/20 corporations).

### Testimony

The Tax Commissioner told the committee that, although North Dakota's use of worldwide apportionment is by administrative decision, he would not administratively revert to a water's edge approach. He said the matter is too significant for administrative resolution and should be decided by the Legislative Assembly. The committee considered bill drafts patterned after recent unitary legislation in Oregon, Colorado, and Idaho, as well as 1985 Senate Bill No. 2343, as amended by the House of Representatives. The consensus of business representatives was that the bill patterned after the Colorado approach was most favored, the bill patterned after the Idaho approach was also acceptable, but the bill drafts patterned after the Oregon approach and 1985 Senate Bill No. 2343 were unacceptable and would not meet minimum standards in pending federal legislation. The primary concerns of business representatives were with treatment of 80/20 corporations and foreign

corporations. Business representatives recommended that 80/20 corporations and foreign source dividends should be taxed equally because these businesses compete on the same basis without regard to choice of the place of incorporation.

Under the worldwide unitary combination approach presently used in North Dakota, income of all companies with greater than 50 percent ownership by common corporate interests, 80/20 corporation income, and foreign dividend income are included in the unitary group. Under 1985 Senate Bill No. 2343 as introduced income of all domestic corporations with greater than 50 percent ownership by common corporate or noncorporate interests, 80/20 corporation income, and foreign dividend income are included in the unitary group. Under 1985 Senate Bill No. 2343 as amended by the House of Representatives income of all domestic corporations with greater than 50 percent common corporate or noncorporate ownership is included in the unitary group, 80/20 corporation income is excluded, and foreign dividend income is excluded if the foreign corporation is 80 percent or more owned by members of the unitary group.

Under the Colorado approach a line of business determination defines the unitary group, 80/20 corporation income is excluded, and foreign dividends are excluded if the foreign effective tax rate is 46 percent or greater. Under the Oregon approach, line of business corporations are included in the unitary group if they have been included in a federal consolidated return, 80/20 corporations are included in the group if they are 80 percent or more owned by interests within the group, and foreign dividends are 85 percent excluded. Under the Idaho approach, corporations eligible for inclusion in a federal consolidated return are included in the unitary group and income from 80/20 corporations and foreign dividends is 85 percent excluded.

Because a significant revenue loss to the state was anticipated from reverting from worldwide to water's edge unitary combination, the committee requested calculation of the fiscal impact of all bill draft approaches under consideration. Representatives of the Tax Commissioner estimated fiscal losses of \$3.9 million to \$6.2 million under the approach in 1985 Senate Bill No. 2343 as introduced; \$14.9 million to \$18.1 million under 1985 Senate Bill No. 2343 as amended by the House of Representatives; \$12.6 million to \$15.7 million under the Colorado approach; \$9.4 million to \$11 million under the Oregon approach; and \$13.4 million to \$14.9 million under the Idaho approach. All of these fiscal calculations were done under the assumption that the approach in question would be in place for the entire 1987-89 biennium and the estimates are based on comparison to current worldwide unitary taxation based on revenue projections for the 1985-87 biennium. Business representatives disputed the fiscal estimates as being too high in terms of revenue lost.

### **Recommendation**

The committee recommends House Bill No. 1064, which is patterned after legislation recently enacted in Idaho. The most substantial difference between the bill recommended and the legislation enacted in Idaho

is that the bill draft provides for mandatory unitary filing on a water's edge basis while the Idaho legislation provides the option for taxpayers to file on a worldwide combination basis.

The principal provisions of the bill are that corporations included in the water's edge unitary group are any corporations more than 50 percent of the voting stock of which are owned directly or indirectly by another corporate member of the water's edge combined group. Any corporation subject to the income tax must apportion its income under the bill. Included in apportionment is income from any of the following entities: any affiliated corporation eligible for inclusion in a federal consolidated return which has more than 20 percent of its payroll and property assigned to locations inside the 50 states and District of Columbia; domestic international sales corporations; foreign sales corporations; export trade corporations; foreign corporations disposing of a United States real property interest; tax haven corporations; and a foreign corporation with more than 20 percent of its payroll and property assignable to locations within the United States. Dividends received from foreign corporations and income from 80/20 corporations are subject to apportionment but 85 percent of income from both sources is excluded. The bill is effective for taxable years beginning after December 31, 1988, except that the bill may become effective earlier if federal legislation is enacted requiring corporations to file with the Internal Revenue Service a domestic disclosure spreadsheet providing full disclosure as to income reported to each state, the state tax liability, the method used for apportioning or allocating income to the states, and any other information as may be necessary to determine properly the amount of taxes due to each state and to identify the water's edge corporate group and providing that this information be made available to the states. Because of the contingent effective date clause and the fact that the bill may not become effective until taxable year 1989, this bill may have little or no fiscal effect during the 1987-89 biennium. If the first year for which the bill is effective is the 1989 taxable year, no tax liability would accrue for corporations filing under the bill until January 1, 1990, which is beyond the 1987-89 biennium. For this reason, only minimal fiscal effect may occur during the 1987-89 biennium which would be attributable to reduced estimated corporate income tax payments.

Among the significant considerations of the committee in recommending the bill is the equal treatment of 80/20 corporations and income received in foreign dividends. The decision of whether to incorporate in a foreign country or in the United States is often based on factors other than taxation, 80/20 corporations are in direct competition with foreign corporations, and the bill taxes such entities on an equal basis.

The bill appears to comply with minimum requirements contained in pending federal legislation.

The bill contains a statement of intent to the effect that any revenue loss to the state from the bill should be offset by appropriate adjustments to corporate

income tax rates or deductions. The committee was unable to propose appropriate changes because of a lack of information on corporate income tax revenue for future bienniums under new federal tax law. Necessary information should be available during the 1987 legislative session.

## **ENERGY TAXATION**

### **Background**

North Dakota imposes four separate direct taxes upon the mining or conversion of energy sources. Oil and gas are taxed under the oil and gas gross production tax enacted in 1953. Oil is also taxed by the oil extraction tax created by an initiated measure approved in 1980. The coal severance tax and the coal conversion facilities privilege tax, both enacted in 1975, are the two taxes imposed on the coal industry.

Present tax rates are five percent for the oil and gas gross production tax and 6.5 percent for the oil extraction tax. The coal severance tax rate is tied to increases in the wholesale price index and is presently at a rate of \$1.04 per ton. For electrical generating plants the present coal conversion tax rate is one-half of one mill per kilowatt hour of electricity produced for the purpose of sale. For coal gasification plants constructed prior to July 1, 1985, the coal conversion tax is either 2.5 percent of gross receipts or 15 cents per 1,000 cubic feet of synthetic natural gas, whichever is greater. For coal gasification plants constructed after July 1, 1985, the rate of tax is either 2.5 percent of gross receipts or 10 cents per 1,000 feet of synthetic natural gas, whichever is greater. These energy sources or conversion facilities are not subject to sales taxes or property taxes.

The incidence of the energy boom of the 1970s and early 1980s heightened interest in severance taxes as a source of general fund revenue for the state. The creation of coal severance and conversion taxes in 1975 and the oil extraction tax in 1980 increased state reliance on revenue from taxation of energy sources. Dependence of the state general fund on revenue from these tax sources is evidenced by the fact that estimates for the 1985-87 biennium called for almost one-fourth of all state general fund revenue to come from oil and gas gross production taxes, oil extraction taxes, coal severance taxes, and coal conversion taxes.

The recent worldwide glut of oil has resulted in substantial decreases in the price of oil. Oil price decreases have been felt in North Dakota in terms of lost employment, lost exploration activity, lost state and political subdivision revenue, and difficulties of the state and political subdivisions to cope with the rapidly changing energy industry. Falling prices for sub-bituminous coal in neighboring states have increased competitive pressure on the North Dakota lignite industry, causing problems similar to those experienced because of the difficulties of the oil industry.

The chairman of the Legislative Council assigned the committee the duty of studying taxes on oil and gas and lignite coal, including the correlation between the taxes on mineral resources and the development of those resources. In addition, the Legislative Council contracted with the University of North Dakota Bureau of Business and Economic Research to

conduct an independent study of the effect of severance taxes on North Dakota industries, and to report its findings to the Taxation Committee.

### **Testimony**

North Dakota Lignite Council representatives proposed reducing the coal severance tax rate from \$1.04 to \$.60 per ton, removing the escalator clause in the coal severance tax rate formula, and adjusting distribution of coal severance tax revenues. Several arguments were advanced in favor of the reduced coal severance tax rate. In 1986 North Dakota lignite production will be approximately 2 million tons below 1985 production levels, reversing a steady increase in production during the last decade. The principal reason given for this decline in production was that North Dakota lignite has become increasingly less competitive in the market as prices of higher grade coal from Montana and Wyoming have fallen. It was estimated that 500 jobs in the coal industry have been lost during the past year in North Dakota due to production declines and efforts of the industry to reduce costs. An additional 2,300 jobs indirectly related to coal production were also estimated to have been lost in North Dakota as a result of decreased coal production. Lignite industry representatives indicated that they are not relying solely on severance tax relief to aid the industry in its competitive struggle. Efforts are presently underway to reduce reclamation costs, reduce mining costs by increasing productivity, reduce federal coal royalties, reduce state severance taxes, and restrict or impede the flow of Canadian hydroelectricity into the North Dakota market. Concern was expressed for future production levels because of likely increases in competition from Montana and Wyoming coal and great increases in competition from Canadian hydroelectricity. It was stated that the North Dakota lignite industry has excess capacity and, if that excess capacity is to be used, the cost of North Dakota lignite must be reduced to compete in an increasingly competitive market.

Lignite industry representatives presented information on comparative tax rates per ton for coal mined in North Dakota, Wyoming, and Montana. These comparisons show that the rate of tax per ton of coal in North Dakota is less than that in Wyoming and Montana, both of which impose property taxes in addition to severance taxes. However, Wyoming and Montana coal is a higher grade of coal than lignite, and produces more energy per ton of coal. Thus, North Dakota's coal severance tax is higher than Montana's or Wyoming's, on the basis of energy produced per ton of coal.

The committee toured the coal production area of North Dakota and received substantial testimony from representatives of political subdivisions in the coal production area. Testimony from these individuals was generally to the effect that political subdivisions in the production area support the reduction in coal severance taxes to assist the lignite industry but oppose the reduction in impact funding which was proposed by the Lignite Council. Extensive testimony was received on tax levy and indebtedness levels of subdivisions in the coal production area in support of arguments that coal impact is still

problematic and must be offset through the energy impact fund.

North Dakota Petroleum Council representatives testified that oil exploration in North Dakota has come to a virtual standstill in 1985-86. Much of the loss in exploration was explained as due to the extremely depressed price of oil, but it was pointed out that extensive exploration is underway in Saskatchewan because of favorable governmental regulation and taxation policy. The committee was urged to recommend reduction of oil severance tax rates not only for new wells, but also for existing wells and marginal production wells.

A representative of the Dakota Resource Council testified in opposition to reduced coal severance taxes. Any reduction in coal taxes was seen as necessarily forcing a higher proportion of the tax burden onto the agricultural sector of the state's economy.

### **Bureau of Business and Economic Research Report**

Dr. David E. Ramsett, University of North Dakota Bureau of Business and Economic Research, presented a report titled "Economic Dimensions of Severance Taxation on North Dakota Industries." The report was commissioned by the Legislative Council. This study attempted to identify major determinants for oil exploration and drilling in the Williston Basin region with special reference to the role of the severance tax. The study focused on net present value to determine the incentive to drill for oil. Net present value was determined by incorporation of geoeconomic variables including drilling costs, success rates, discovery size, and production decline rate; taxes and royalties including royalty rates, federal and state income taxes, production taxes, the windfall profits tax, and the percentage depletion allowance; and economic variables including net operating costs per barrel, market price, and discount rates. Using this method, Dr. Ramsett determined that a positive net present value indicating incentive to drill is reached for development wells at a price of \$16 to \$18 per barrel and for exploratory wells at a price of \$21 to \$23 per barrel. Price is the most important determinant in the decision to drill and with oil prices in the \$13 to \$14 per barrel range, very little drilling activity will occur under any state taxing scheme. If oil prices begin to increase oil severance tax rates will become important to the decision to drill for oil when net present value is near zero or at the margin.

Dr. Ramsett made several recommendations regarding oil taxation which are summarized as follows:

1. The oil extraction tax exemption for the royalty owners' interest in the first 100 barrels per day of production should be rescinded.
2. The five percent oil production tax on stripper wells should be removed.
3. Oil severance taxes should constitute no more than 10 percent of the value of a barrel of oil.
4. The primary focus of any change in the oil severance tax structure should be on new wells drilled.
5. The rate of the oil severance tax should be tied

to the price of oil or exemptions should be provided on the initial production flow from each new successful well.

Dr. Ramsett reported that the situation which exists in the coal industry is not similar to that which exists for oil because coal production is still comparatively strong but he made several recommendations regarding coal taxation which are summarized as follows:

1. Great excess capacity for power generation exists in the North Dakota lignite industry and utilization of as much of that capacity as possible should be the goal of state tax policy.
2. Adjustments to the coal severance tax should not be tied to changes in a price index.
3. A reduction in the level of taxation on coal and electrical power production is needed and it should be implemented as soon as possible.
4. A temporary reduction should be made in the coal conversion tax of one-fourth of one mill per kilowatt hour and a temporary reduction should be made in the severance tax of 29 cents per ton.

North Dakota Lignite Council representatives supported Dr. Ramsett's study and recommendations with the exception of the recommendation for reduced coal conversion taxes. It was pointed out that approximately one-third of all North Dakota coal production is not subject to the coal conversion tax, and it was suggested that all tax reductions for coal should be from the coal severance tax, which would benefit the entire coal industry.

A North Dakota Petroleum Council representative supported the recommendations made by Dr. Ramsett regarding oil with the exception that objection was taken to the recommendation that different tax rates should apply at different values of oil. It was recommended that a single tax rate should be applied to oil without changes based upon prices.

### **Recommendation**

The committee recommends Senate Bill No. 2078 to provide a two-year oil extraction tax exemption for all new wells drilled and completed between March 31, 1987, and June 30, 1989. The bill is intended to provide substantial incentive for drilling new wells, which will increase proven reserves of oil in North Dakota, and thereby increase future oil tax collections.

The committee recommends Senate Bill No. 2079 to reduce the oil extraction tax rate by three-fourths of one percent per year for a four-year period, making a total reduction of three percentage points in the rate of the oil extraction tax by 1991. The bill also eliminates the royalty owner exemption from the oil extraction tax and provides a one-year extraction tax exemption for new wells drilled and completed before June 30, 1988. The bill is intended to provide incentive for new drilling activity and for continued oil production. The removal of the royalty owner exemption will generate revenue to offset losses from the reduced taxes and will not serve any disincentive to drilling activity.

Estimates of fiscal effect of the recommended bills on oil taxes are subject to extensive change before 1987. Estimates available for consideration by the

1987 Legislative Assembly should be more dependable.

The committee recommends House Bill No. 1065 to reduce the coal severance tax rate from \$1.04 per ton to 60 cents per ton. The bill reduces the allocation of coal severance tax revenues from 35 to 15 percent to the energy development impact fund, leaves unchanged the allocation of 15 percent to the coal trust fund, increases from 20 to 35 percent the

allocation to political subdivisions, and increases from 30 to 35 percent the allocation to the state general fund. Estimated revenue losses from allocation of anticipated revenue under current law compared to allocation under the bill are approximately \$13.7 million in impact funding, \$3.3 million in the trust fund, and \$5.1 million in the state general fund. A gain of approximately \$100,000 is estimated in allocations to political subdivisions.

# TRANSPORTATION COMMITTEE

The Transportation Committee was assigned four studies. House Concurrent Resolution No. 3069 directed a study of the present transportation system of the state and the ability of that system to provide for the efficient transportation of people, services, and goods. House Concurrent Resolution No. 3079 directed a study of the impact of proposed cutbacks in federal funding for transportation assistance programs benefiting the elderly and disabled, and the adequacy and appropriateness of funding programs by which transportation assistance is made available to the elderly and disabled in the state. Senate Concurrent Resolution No. 4055 directed a study of the effects of existing state and federal laws on the motor carrier industry of the state. Finally, at the direction of the chairman of the Legislative Council, the committee studied the issue of the partial exemption from motor fuel taxation of alcohol-blended fuels.

Committee members were Representatives Mike Timm (Chairman), Ronald A. Anderson, John Dorso, Ralph C. Dotzenrod, William G. Goetz, David W. Kent, Larry A. Klundt, Clarence Martin, Allen Richard, Ben Tollefson, and Adella J. Williams; and Senators Mark Adams, E. Gene Hilken, Donald J. Kilander, Byron Langley, and Duane Mutch.

The report of the committee was submitted to the Legislative Council at the biennial meeting of the Council in November 1986. The report was adopted for submission to the 50th Legislative Assembly.

## THE TRANSPORTATION SYSTEM STUDY Background

The study resolution mentioned the three main components of the state's transportation system—the highway system, the air system, and the railroad system. The geography and demography of North Dakota combine to make the highway system the preeminent component of the transportation system of the state.

### The Highway System

North Dakota is one of the smallest states in the country measured by population, yet one of the larger states measured by area. Because of its relatively flat terrain in most areas, the state can be and is criss-crossed by a vast network of highways and roads amounting to about 106,000 miles. Based on the state's population, this means that every person in the state is "responsible" for over 850 feet of roadway. This figure is one of the highest in the nation. The four main elements of the 106,000-mile road system in North Dakota are the state, county, township, and city systems. Nearly 86,000 miles are actively maintained while the remaining 20,000 are unmaintained roads such as trails and section lines open to the public.

Limited by law to no more than seven percent of the state's total road mileage or a maximum of 7,700 miles, the state highway system now consists of about 7,200 miles of road. However, this system carries about 65 percent of all traffic in the state and consists of the interstate, U.S.-numbered, and state-numbered

highways. This heavy use makes the state system the most expensive and the recipient of the majority of available highway funds.

The 53 counties of the state are responsible for about 20,600 miles of paved and unpaved roads. These roads are the major traffic collectors for the county and generally lead to a paved state highway or population center. The 1,345 organized townships in the state are responsible for 55,000 miles of township roads, ranging from five miles in Hughes Township (Slope County) to 116 miles in St. Thomas Township (Pembina County). About 360 cities in the state are responsible for some 3,200 miles of roads within city limits that are not also part of the state or county system.

Most highway funding for highway purposes comes from user fees—federal and state taxes on various fuels, tires, and other automotive items. For the state highway system, federal funding provides a main source of revenue, supplemented by state user fees. Federal matching funds have been the major single source of funds for roads and bridges in the state. Since the late 1970s, these funds have shown a steady increase in constant dollars. The state fees are collected primarily as a tax on various fuels and as an excise tax on the purchase of motor vehicles. Most of these taxes are distributed through the highway tax distribution fund—63 percent to the state system and 37 percent to counties and cities. Local revenue consists primarily of mill levies and special assessments. These mill levies are used for certain county, township, and city roads; mill levies for roads are not used at the state level. Frequently special assessments are used to meet road and bridge building needs at the neighborhood level.

### The Air Transportation System

North Dakota has over 100 publicly owned and used airports as well as some 450 private landing strips. Regularly scheduled airline service has been provided from time to time to the eight major cities. Service between these cities and other airports around the state is generally provided by private air taxi operators.

Probably the most dramatic change in the air transportation system felt during the interim was the result of deregulation of the airline industry. During the interim many major air carriers were merged with others, some went bankrupt, and the number of airlines providing service in North Dakota had been drastically reduced. A major event was the shutdown of Frontier Airlines. In November 1986 Continental Airlines reinstated some of the service formerly provided by Frontier.

As in the case of highways, North Dakota's unusual geographical traits present problems in the area of airport funding. In order to have an air carrier airport (one served by an airline on a regular schedule), it is necessary to build a runway that is long enough to accommodate jets used by airlines. However, compared to airports in larger cities, there are fewer air carrier operations over which to spread the cost of building these runways. A primary source of funds

for air carrier airports is federal aid, part of which is provided on a basis to help alleviate the lack of economies of scale in states such as North Dakota.

Some state aid to air carrier airports is based on a block grant program governed by North Dakota Century Code (NDCC) Section 2-05-06.5. Under that program air carrier airports are entitled to a grant of at least \$25,000 a year, with more made available on the basis of passenger activity in excess of 20,000 boardings a year. The total appropriation for the 1985-87 biennium for this program was \$1 million. Additional sources of state funding for airports include a four percent excise tax on aviation and jet fuel. This is used by the Aeronautics Commission for airport construction. Finally, many local jurisdictions have mill levies for funding an airport.

### **The Railroad System**

The third component of the state's transportation system is its railroads. The major emphasis of this system is on freight transportation, although some passenger service is provided. A subject of recurring concern in the context of the railroad system is the abandonment of railroad branch lines. The closing of a branch line means that commodities formerly brought to terminals along that line must be moved by highway to another terminal, resulting in a significant impact on highway wear. Although several hundred miles of branch line had been decommissioned in previous years, during the interim there was little activity in the area of branch line abandonment. Accordingly, the committee concentrated its deliberations for the transportation system study on the highway system and the air transportation system.

## **Testimony**

### **The Highway System**

Valuable information and advice was provided by the Upper Great Plains Transportation Institute at North Dakota State University. The information and advice resulted from research and surveys conducted by the institute under agreement with the Highway Department.

One of the most important recent events affecting the condition of the highway system was the change in federal law requiring states, with few exceptions, to allow longer, wider, and heavier vehicles. However, the anomaly was pointed out that federal law requires weight limits of up to 105,500 pounds on noninterstate highways, while limiting the weight on interstate highways to 80,000 pounds. These limits apply despite the fact that the interstate system is built to a higher standard. Frequent heavy loads were described as having the potential to lead to rutting and severe pavement distress, in some instances leading to total destruction of the road because of the passage of extraordinarily heavy loads.

Axle configurations were described as an important factor in this regard. Researchers from the Upper Great Plains Transportation Institute reported that highway engineers in the United States and Canada are studying this issue with a view toward possibly changing some of the standards developed in the 1950s. The importance of axle configuration was

dramatically brought forth when it was explained that if the road wear of a 15,000-pound axle is defined as 1, and 18,000-pound axle produces a wear of 2, and a 20,000-pound axle produces a wear of 3. It was reported that vehicle weights and allowable configurations affect the construction method that can be used, sometimes making a staged construction method unfeasible. Axle configuration was described as more important than gross weight, as almost any weight can be carried if enough wheels are used. The change in axle configuration was cited as responsible for reduction of 20-year road design lives to 12 years.

External factors also affected the weight issue, particularly activities affecting roads designed for lighter vehicles. The committee learned that occasionally commercial enterprises, such as grain elevators, that require heavy vehicle traffic, have been built in places that require travel over low weight roads. It was suggested that the Highway Department be notified of such projects before they are begun so the department can advise local officials and developers of the significance of heavy vehicle traffic on nearby roads and suggest locations where the project could be placed that would not have such an adverse impact on nearby highways.

It was reported that the number of miles added to the state highway system has in recent years been close to the 50-mile-per-year statutory limit. An added factor is that, although total road mileage for state highways has been within the limit, "four-laning" activities (upgrading a road from two lanes to four lanes divided) have increased total lane mileage by over 15 percent.

The committee was told that North Dakota has a very favorable return on its federal highway taxes, receiving over \$2 for every \$1 of federal highway taxes paid by North Dakota motorists. However, federal highway funds decreased from \$88 million to \$77 million between the first and second years of the biennium. Occasionally federal funds have been carried over from one year to the next because of lack of available state matching money. States are generally allowed three years and no federal funds have yet been permanently lost. By the end of the biennium, however, there is a possibility that North Dakota's share of federal highway funds would be jeopardized by a proposed change in federal highway fund allocation. Under most federal programs, each state is entitled to at least one-half of one percent of the total funds available on a national basis. This works to North Dakota's advantage because its share of population and national traffic volume is much less, so programs based solely on population or traffic volume would provide less funding for North Dakota. It was reported that North Dakota almost lost some of its federal highway money because of speed limit violations. North Dakota was one of five states in danger of losing federal funds, and two states had already been penalized by the end of the interim.

Concern was expressed over use of certain portions of the highway tax distribution fund for purposes perceived as not being highway uses. Under Section 11 of Article X of the Constitution of North Dakota, revenue from gasoline and other motor fuel excise and license taxation, as well as certain other sources, is

limited to use for construction, reconstruction, repair, and maintenance of public highways. The 1985 Legislative Assembly provided an appropriation from the highway tax distribution fund for the Highway Patrol and for the Economic Development Commission. Although a lawsuit was initiated to contest this use of revenues, the use was upheld by the Burleigh County District Court.

The issue of the increase in the motor fuel taxes was discussed. State motor fuel taxes had been increased from eight cents to 13 cents per gallon by the 1983 Legislative Assembly. However, only one cent of the five-cent increase ended up as an addition to the highway tax distribution fund. One cent was dedicated to township roads and the remaining three cents was used to make up for loss of oil and gas production tax revenue. It was reported that a 1983 prediction that a 20-year replacement program could be achieved by 1992, could no longer be met and the estimate was revised to 1995.

Other factors affecting highway finances were described to the committee. For example, it was reported that the advent of increasingly fuel-efficient cars, resulting in an increase of average statewide fuel economy of one mile per gallon, would result in a loss of motor fuel tax revenue of \$2.8 million.

Against stabilizing or decreasing motor fuel tax revenue, according to witnesses, there is placed the problem of increasing construction costs. It was reported that the State Highway Department's spending in constant dollars had decreased in recent years. Because of a slightly greater increase in road mileage, the constant dollar spending for highways by counties and cities had increased somewhat.

Highway Department officials reported that a general policy goal has been to resurface highways on a 20-year cycle. Lack of funds was cited as a reason for losing ground on this goal. Other significant costs include snow removal, and it was reported that the State Highway Department budget is 110,000 man-hours per winter for snow removal activities.

It was further reported that some counties have been required to "depave" roads; namely, remove paving from a road and return it to gravel status. The primary reason for doing this is the cost of maintaining a paved road, which requires significantly greater annual maintenance effort.

An important issue to local jurisdictions, as described to the committee, was that of liability for roads. In response to a survey conducted by the Upper Great Plains Transportation Institute as part of the study, many county officials reported liability as the number one issue concerning roads.

One suggestion resulting from the research of the Upper Great Plains Transportation Institute was to adopt a plan similar to one in Minnesota whereby it is possible for a local jurisdiction to declare a road a minimum maintenance road, sign it appropriately, and then be immune from liability for failure to maintain the road to higher level traffic standards. Proponents of this idea suggested it would allow counties to reduce their involvement with roads that have very little use. However, it was suggested to the committee that the expense of placing signs on the road might outweigh the savings and further that

persons living along such roads would object to the minimum maintenance signs.

Another issue described as important is the mill levy ceilings imposed on counties and the impact on the ability to maintain roads. A number of counties have experimented with cost-saving methods, including consolidation of county and city highway departments, and intercounty cooperation.

The research of the Upper Great Plains Transportation Institute and its reports to the committee led to other suggestions. One such suggestion related to the county farm-to-market road program. This program is funded on the basis of federal funds, some state funds, and by county participation through a special mill levy. The mill levy is in addition to the normal highway mill levies and must be voted on specially by the voters, with the proposed roads and priorities being specifically listed on the ballot measure. County officials reported that projections of future road usage made at the time of an election often turn out to be inaccurate some years later. One particular example reported was of a four-mile road scheduled for paving. By the time the road reached the top of the list, nobody lived along the road. Therefore the suggestion was made that county officials be permitted to adjust road priorities by holding a hearing rather than a new election. It was also suggested that the linkage to federal funds for the program be removed, in case federal funds become unavailable.

Another problem reported as occurring at the county level related to bid procedures for county road equipment. Because present law requires bidding if the purchase is for more than \$15,000, it was reported that county officials are often unable to buy road equipment at auctions and secure advantageous prices.

### **The Air Transportation System**

The air transportation system in North Dakota changed dramatically during the interim. The biggest cause was the recent deregulation of the airline industry at the federal level and resulting changes in that industry.

Early in the interim it was reported that passenger boardings had increased in recent years. This increase was attributed to more low fares offered by airlines, which encouraged discretionary travel. It was noted that the air transportation system competes with the highway system for some traffic and Interstate 94 is a significant competitor to the air transportation system in some circumstances.

By the middle of the interim the committee heard a prediction that only about five or six airlines will emerge after the current competition under deregulation. This was not seen as a negative factor for North Dakota, as it was predicted that competition would keep fares low on a national scale and that if an airline started charging excessive fares in this market, another airline would enter the market to try to secure some of the traffic. It was also pointed out to the committee that the existence of competing airlines under regulation had not necessarily meant lower fares between North Dakota and places like Minneapolis.

The Aeronautics Commission commissioned a study of air carrier service demand in North Dakota and presented the results to the committee. It was reported that although markets might not exist to justify service by full-size jets, there is a market for service provided by smaller airplanes linking with the hub cities of the major airlines.

By the end of the interim the airline industry had changed significantly. Peoples Express Airlines was bankrupt and Frontier Airlines, pending bankruptcy, had suspended its service. This left North Dakota without direct service to Denver and without service to Manitoba and Saskatchewan. A proposed merger of Continental Airlines and Frontier Airlines was expected to alleviate some of these problems. At the committee's final meeting, it was suggested that the committee express its support for this service and join in a resolution to be signed by the Governor urging the Secretary of Transportation to approve the merger. After the committee's final meeting, Continental Airlines announced resumption of service to Denver, to take effect in November 1986.

### **Proposals**

The committee considered several proposals resulting from the research and reports of the Upper Great Plains Transportation Institute. These proposals included the following, some of which are more fully described in the "testimony" portion of this report:

1. Allow county officials to rearrange county farm-to-market road priority listing by holding a public hearing rather than an election.
2. Allow designation of low traffic volume roads as minimum maintenance and reduce political subdivision liability for such roads. Under present law as interpreted by the Attorney General, a new election is required to make the change. The proposal was revised to include the removal of the requirement of available federal funds.
3. Increase from \$15,000 to \$25,000 the amount at which bids are required for purchase of county road equipment.
4. Allow counties and cities to form joint stockpiles to achieve cost savings.
5. Require that the Highway Department be notified of proposals requiring building permits in which the structure involved would attract significant use of heavy vehicles.
6. Develop a program to rehabilitate recreational roads.
7. Require fines for violation of weight limits to be paid to the jurisdiction responsible for the road.
8. Maintain the 1984-85 level of the highway tax distribution fund.
9. Assist local officials in transportation planning.

### **Recommendations**

The committee recommends Senate Bill No. 2080 to allow local jurisdictions to designate minimum maintenance roads and then be immune from liability for failure to maintain the roads to a higher standard. Adequate signs must be posted designating the road as a minimum maintenance road. Roads on boundaries must be approved by both jurisdictions.

The bill prohibits use of eminent domain power to designate a road as minimum maintenance in most circumstances.

The committee recommends Senate Bill No. 2081 to allow boards of county commissioners to change the listing of priorities in roads in older county farm-to-market road programs. This is accomplished by explicitly making retroactive a provision of existing law that already allows the change. The bill also removes the requirement of the existence of federal funds for the program.

The committee recommends House Bill No. 1066 to require notice be given to the Highway Department of proposed construction of a building that would attract a high number of heavy vehicles. The notification is required if it is estimated that the building will attract at least 10 heavy vehicles per day, a heavy vehicle being defined as one weighing at over 60,000 pounds. The Highway Department is not given authority to stop the project.

Finally, the committee recommends that the merger of Continental Airlines and Frontier Airlines be approved by the Department of Transportation. The committee expressed its support for the merger and sent a letter to the Secretary of Transportation outlining the committee's views on the subject.

## **ELDERLY AND HANDICAPPED TRANSPORTATION STUDY**

### **Background**

The committee concentrated its deliberation on three main federal programs providing transportation assistance. Each program is named for its position in the federal law establishing it. The Section 16(b)(2) program provides funding from the Urban Mass Transportation Administration. The program provides funding for mass transportation facilities to meet the special needs of the elderly and handicapped. North Dakota first received funding under this program in 1975. For 1983 the state's share of federal funding for this program was \$240,000. The funding resulted in eight projects receiving funds and 12 vehicles being placed into service.

Under the Section 16(b)(2) program, funding is provided on a grant basis to nonprofit corporations that provide qualifying service. Funds for capital equipment and construction are made available on a cost-sharing ratio of 80 percent federal funds and 20 percent local funds. The local funds can come from any nonfederal source, such as the state, local government, service revenue, or private contributions.

The Section 9 and Section 18 programs are aimed at providing public transportation in general. Although not specifically earmarked for the elderly or handicapped populations, these programs are important to those populations as those populations make disproportionate use of the services funded with the programs. The Section 9 program deals with areas defined as "urban" under the federal law. North Dakota has three such areas — Bismarck-Mandan, Grand Forks, and Fargo. The federal funds allocated to the Bismarck-Mandan area have been transferred by the Governor to Grand Forks and Fargo because Bismarck-Mandan does not have public

transportation service. This transfer is permitted under federal statute.

Section 18 programs complete the gap left by the Section 9 programs—namely the “nonurban” areas in the rest of the state. Federal funding is provided on a 50-50 basis for operating expenses and an 80-20 basis for capital expenditures and administration.

The issue of federal funding for these programs was important to the committee’s deliberation because of the serious possibility, raised at the beginning of the interim, that federal funds would be unavailable entirely or would be significantly cut. Presently there is no state funding earmarked for providing transportation service for the elderly and handicapped, other than the administrative expenses of the Highway Department, in carrying out the federal programs.

### **Testimony**

It was reported that only eight states, including North Dakota, do not provide state level funding assistance for elderly and handicapped transportation programs. The chief role of the State Highway Department was described as coordinating applications for funding under the federal programs and deciding which competing services would be the recipients of the funds. It was noted that other federal funds are available which can be used to provide transportation assistance. For example, funds made available under the Older Americans Act are used by the Aging Services Office. Known as Title III funds, these funds can be used to provide assistance to transportation projects. However, it was noted that these funds are also used for many nontransportation services so are not generally considered as transportation funds.

The cost of providing transportation to elderly and handicapped passengers was described as significant. The committee learned it is difficult for many service providers to obtain insurance due to insurance companies being reluctant to insure what was described as the fragile clientele of the services. Because many providing groups do not receive federal funding when they first request it, many apply in later years and are eventually granted funding. It was also reported that, technically, the Section 9 and Section 18 funds are for general transportation assistance and the general public is allowed to ride buses and vans funded from those programs. In fact, vehicles funded by the programs must bear a legend noting that public ridership is permitted.

Since “local funding” is required for most of the federal programs, sources of these funds were discussed. The committee was told that for many local projects, riders are asked to contribute toward the cost of the service and this sometimes lessens the necessity of local government funding. Other jurisdictions have used money available under a senior citizens mill levy program to provide local contributions.

The wide ranging impact of handicapped and elderly transportation services was described by a number of people. For example, it was reported that a service in the Minot area provides over 40,000 rides a year on a demand-response basis, and over 10 percent of the rides are for passengers in wheelchairs.

It was estimated about 1,200 to 1,500 people take advantage of the service.

A number of multicounty transportation services have been established to make local funds available to meet the federal funding requirements. One provider uses senior citizens mill levy funds from seven different counties to provide a regional service. Because Sections 9 and 18 program rules prohibit any fare discrimination between elderly or handicapped riders and the general population, no distinction is made on fares charged to the general population. Officials representing one transportation service reported that the cost per ride is \$4.66, of which the federal government contributed about \$3.77, with the remainder coming from contributions and the fare box. Escalating costs of insurance for these services were reported, with increases from \$700 to \$1,660, and from \$500 to \$1,500, being given as examples.

Federal funds are made available for up to three years after the initial appropriation and the heavy demand in North Dakota has prevented the loss of any federal funds for lack of local matching funds. One suggestion made was to use a state lottery to provide local matching funds for these federally assisted programs.

Highway Department officials described the allocation process among competing services. It was reported that an 11 percent reduction in federal funds, totaling \$266,000 by the middle of the interim, would require more rigorous screening standards. An unmet need of \$436,000 was estimated for fiscal year 1985 for elderly and handicapped transportation services. This estimate was based on the difference between the total requested funds and the amount available. It was reported that the Highway Department concentrates its grants on existing facilities and services to prevent the deterioration of existing service. Diminishing funds were cited as the cause of the lack of some intercity service, although it was reported that projects within cities had maintained a relatively constant service level during the interim. Further, some projects have become old enough now that they require replacement vehicles, for which funding is made on an 80-20 basis.

Service schedules are established by each project and are not controlled by state officials. It was reported that each project determines the needs of its own riders, and the state officials do not get involved in scheduling decisions.

Some private companies receive subsidies under the federal aid programs. However, Highway Department officials said applications from major interstate carriers have been declined on the ground that other localities needed the resources more desperately.

### **Conclusion**

The committee did not consider any specific proposals relating to the provision of service for elderly and handicapped citizens of the state, and accordingly has no recommendation to make in this regard.

## **MOTOR CARRIER REGULATION STUDY Background**

Substantial deregulation of the interstate motor

carrier industry was the backdrop for the committee's consideration of the regulation of North Dakota's intrastate motor carrier industry. Until 1980 interstate motor carriers were extensively regulated by the Interstate Commerce Commission. In 1980 federal law was changed to make issuance of a certificate by the Interstate Commerce Commission hinge only on the issue of whether the applicant is fit, willing, and able to provide the service and whether there is demand for the service. The Interstate Commerce Commission is specifically prohibited from considering diversion of revenue or traffic from an existing carrier as a disqualifying factor for granting a certificate. As a result, by the interim's start, about 90 percent of applications to the Interstate Commerce Commission for certificates were being granted and frequently for authority broader than that requested by the carrier.

Motor carrier regulation in North Dakota is governed by NDCC Chapter 49-18. The Public Service Commission is responsible for issuing certificates allowing motor carriers to operate in intrastate service—which is service entirely within the state. The standards which the commission was required to follow remained essentially unchanged from the 1933 advent of the commission's authority until 1979. The 1979 legislation removed the requirement that the commission consider the effect on other essential forms of transportation. At the time proponents said the change was designed to increase competition in the industry. In 1981 a further change was made to require that the commission grant a permit if competing service was not in fact being provided. Under former law, permit denial was allowed if the service could be provided by an existing carrier even if it in fact was not. This too was described as a method of improving the development of a healthy competitive atmosphere in the industry. In 1985 a proposal was made to further deregulate the industry by removing a requirement that the commission consider, as factors in deciding on an application, the need for the service, the increased cost of maintaining the highways concerned, and the effect on other existing transportation facilities. This proposal, House Bill No. 1317, failed to pass the House of Representatives. One result of that consideration was the resolution directing this study.

Almost every other state has had some form of regulated motor carrier industry since the 1930s. In the early 1980s a move began to deregulate intrastate industries. One of the earliest occurrences was in Florida, where the industry was deregulated in 1980. By then, the certificates of authority in Florida had become valuable assets in and of themselves, with an airport general limousine certificate selling for \$19,000, a general commodities trucking certificate selling for \$175,000, a sightseeing bus certificate for \$250,000, and a regular route bus certificate for \$198,000. Other states have had experience with partial deregulation. For example, Arizona imposes only safety and financial responsibility tests. In Missouri a regulatory system is retained but is generally limited to setting rate ceilings, with carriers being allowed to implement rate changes under the ceiling within less than a week. In West Virginia a

zone of rate freedom system prevails under which the regulatory agency establishes maximum and minimum rates, with carriers being allowed to charge any rate within the limits. California has essentially deregulated its intrastate motor carrier industry.

### Testimony

Opponents of deregulation said service to smaller markets would decrease; there would be uncertainty as to quality and availability of service; carriers would be forced to rely on older and more wornout equipment; older equipment would cause a threat to safety on the highways; and wages of drivers would be depressed. Proponents of deregulation said a regulated environment discourages price competition and that entry into the industry should be based on whether the applicant has the ability to provide the service and not whether it would have an adverse effect on competitors.

Surveys of the motor carrier industry and shipping public were conducted by the Upper Great Plains Transportation Institute as well as by representatives of the industry. According to the institute's survey, most segments of the industry have operating ratios at a level that will produce adequate profit. It was further reported that there is significant concentration in some industry segments. In one segment the largest firm earns 46 percent of the operating revenue and operates 36 percent of the miles driven, and the top two firms gain 65 percent of the revenue and 54 percent of the mileage.

The Upper Great Plains Transportation Institute's survey concluded that the viability of the industry depends on its stability, that the industry has become more competitive, that motor vehicle safety is an important or preeminent concern for most motor carriers, and promoting competition guarantees service. Representatives of the Public Service Commission distributed a position paper favoring deregulation.

The impact of proposed deregulation on state finances was also discussed. Interstate carriers are required to purchase local licenses, popularly referred to as bingo stamps, when traveling in North Dakota. It was reported that the bingo stamps generate about \$1.2 million in annual revenue for the general fund. The budget of the Transportation Division of the Public Service Commission was reported to be about \$300,000.

Representatives of the industry distributed a position paper opposing deregulation. The survey of shippers conducted by the institute showing that shippers favored deregulation was criticized by representatives of the regulated industry. The grounds for the criticism were that the survey was five years old and was conducted when there had been little experience with deregulation. It was also noted that some rate flexibility exists in the regulated environment through the use of discounts from the formally published rate. It was reported that it is uncommon for a shipper to pay the published rate, especially in interstate shipping. It was also reported that the Public Service Commission has adopted a policy of easing entry into the industry and that over 80 percent of applications for authority to provide

service have been granted. Normally the Public Service Commission conducts hearings concerning proposed applications to provide service only if protests are received. Lack of protest was described as a factor in making such applications for authority very inexpensive to process.

The argument was also made that regulated carriers undertook an entrepreneurial risk in acquiring companies in a regulated environment. The purchaser of such a company said this risk was taken despite there being no guarantee of approval of the purchase proposal.

The subject of experience with deregulation, both in the motor carrier industry and other industries, generated considerable testimony. The experience in California was frequently cited. It was reported that moves are afoot in California to end deregulation, even though deregulation is less than 10 years old. It was reported that competition in Colorado had led to recent offers of as much as a 50 percent discount from published rates. Cited as a factor in the occurrence of such deep discounts in the moving industry was the inability of many small moving companies to determine costs accurately, therefore unwittingly offering unprofitable rates.

Comparisons were drawn to the deregulation experience with airlines. The committee was told Bismarck formerly had six airlines and, by the end of the interim, had been effectively limited to two. This factor was cited as evidence that costs to consumers for air tickets would increase. The wisdom of drawing conclusions on the basis of shipper-consumer surveys before deregulation was also questioned. It was noted that many consumers favored deregulation of the telephone industry and breakup of the major company. However, once that had occurred many users of the service realized that had been a mistake.

The importance to safety of a regulated environment was also stressed to the committee. The authority of the regulatory agency to remove a certificate on the grounds of safety was mentioned as an effective safety promotion tool. Deregulation was cited as a factor in a 10-fold increase in the accident rate in California.

The committee was advised that when federal deregulation was being considered, little debate was given to the impact of deregulation on safety issues. The committee learned that significant safety problems have arisen since federal deregulation.

Opponents of deregulation said it would increase the cost of service in smaller communities. Some said it may even eliminate such service entirely. A Wisconsin study was cited which showed that, with deregulation, some rates for service in smaller communities were 2.5 times as much for shipments of comparable distances between larger communities.

Other nonregulatory factors affecting the industry were discussed. It was suggested that having a certificate of authority does not ensure profitability. Even if a carrier has such a certificate, some shippers provide their own service and are no longer available as customers. For specialized carriers serving clientele such as the oil industry, their fortunes also depend on that of their customers' industry.

Deregulation was also cited as a cause of wage cutting to drivers. It was reported that the California experience of lower prices resulted from cutting wages of drivers rather than from operating efficiency. It was reported that California was required to compel a 10 percent increase in rates and to establish minimum rates so that carriers could at least meet the cost of providing the service and so that destructive pricing would not occur.

Representatives of the industry reported they had conducted their own survey of shippers and carriers. They argued their survey was more comprehensive than that of the institute because more attempts were made to contact people who did not respond to initial inquiries. This survey was then cited as evidence that the shipping and motor carrier public favor the present regulatory environment.

The importance of general knowledge of rate levels was also discussed. Opponents of deregulation said regulated firms are required to disclose their rates on request and that a deregulated environment promotes the possibility of unpublished rates and secret agreements between carriers and shippers.

Proponents of deregulation argued that many shippers have responded to regulated shipping costs, perceived as high, by establishing their own shipping departments. One proponent reported that many shippers were reluctant to do this but high shipping costs made that action a necessity; although, many shippers would welcome competition to lower regulated costs and get themselves out of the shipping business.

A suggestion was made that the committee consider allowing presently exempted carriers to carry commodities presently in the regulated domain. For example, agriculture carriers do not have to obtain certificates of authority. It was suggested that these carriers be allowed to carry other commodities to prevent "deadhead" trips (trips in which the truck is empty) on the way to picking up agricultural commodities or after dropping them off.

### Proposals

The committee considered the following bill drafts relating to the motor carrier industry:

1. A bill draft that would reintroduce 1985 House Bill No. 1317, removing as a factor in determining whether a motor carrier permit should be granted, the issues of need for service proposed by the applicant; the increased cost of maintaining the highway concerned; and the effect on other existing transportation facilities.
2. A bill draft that would allow the Public Service Commission to establish maximum rates that could be charged by motor carriers.
3. A bill draft that would prohibit motor carriers from establishing rates collectively.

The committee also considered proposals suggesting that the Public Service Commission repeal its present requirement that interstate carriers buy the "bingo stamps." An estimated loss of \$1.2 million to the general fund was a factor in not adopting this proposal. The committee also considered a proposal encouraging the Tax Commissioner to establish a multistate motor fuel tax payment process. This

proposal was not adopted on the grounds that it is the subject of administrative action.

### **Conclusion**

The committee makes no recommendation concerning motor carrier regulation.

## **ETHANOL TAX EXEMPTION STUDY**

### **Background**

The basic motor fuel tax rate in North Dakota is 13 cents per gallon. A partial exemption from that tax is allowed for gasohol-motor fuel containing ethanol. Ethanol is the alcohol blended with the motor fuel. Gasohol is the final product of gasoline and ethanol. To qualify for the exemption, the ethanol used must normally be methanol from coal or alcohol derived from United States agricultural products. The gasohol must consist of at least 10 percent of qualifying ethanol. The exemption is eight cents per gallon until July 1, 1987, when it is reduced to four cents per gallon until the end of 1992, when it expires. The impact of the ethanol tax exemption was the subject of a special study undertaken at the direction of the chairman of the Legislative Council.

The ethanol exemption was established in 1983 as part of the legislation increasing the motor fuel tax rate from eight cents per gallon to 13 cents per gallon. Under the 1983 legislation, the exemption was on an increasing and then decreasing scale, as follows:

1. July through December 1983—four cents.
2. Calendar year 1984—five cents.
3. Calendar year 1985—six cents.
4. From January 1986 through June 1992—four cents.
5. After June 30, 1992, none.

The 1985 legislation changed this exemption schedule for general motor fuels by increasing the exemption effective for the 1985-87 biennium to eight cents per gallon from the former six cents and four cents per gallon. For the 5.5-year period from July 1987 through December 1994, the exemption will be four cents per gallon—the prior four-cent-per-gallon exemption was extended six months. Under the 1985 legislation, the exemption will expire at the end of 1992. The 1985 legislation did not apply to special motor fuel taxes, for which the exemption continues as provided in the 1983 legislation, and for which there is no requirement as to the source of the ethanol.

The fiscal note provided for the 1985 legislation was signed by Tax Department officials and reportedly concurred in by the Highway Department. The note indicated a state fiscal impact of a cost of \$455,000 for the biennium. Early in the interim it became apparent that the impact would be considerably more, with estimates ranging from \$8 to \$11 million as the total loss to the highway tax distribution fund for the biennium. Much of the committee's deliberations concentrated on the fiscal note process and the significance of the greater impact on motor fuel tax revenue.

According to a report of the Highway Users Federation issued in October 1986, four states had in 1985 repealed or decreased their ethanol exemptions, two states had extended their exemption, and no state

had enacted a new exemption or increased an existing one. The report indicated that the 16-cent-per-gallon exemption in Louisiana had been repealed and been replaced with a direct subsidy to producers until 1992. According to the report, the subsidy is derived from 14 cents of the tax imposed on ethanol. In Minnesota the four-cent-per-gallon exemption is reduced to 2.5 cents per gallon for the year beginning July 1, 1986, and to 2.0 cents per gallon from July 1, 1987, until 1992. In South Dakota, the three-cent-per-gallon exemption is reduced to two cents per gallon for the period July 1, 1986, through June 30, 1992. In Virginia an eight-cent-per-gallon exemption was repealed and replaced with a direct subsidy to producers until 1992. The subsidy fund is derived from revenues collected on motor fuel and special fuels taxes. The four-cent-per-gallon exemption in Idaho was continued until April 30, 1992. In Kentucky, a 3.5-cent-per-gallon tax credit to in-state producers was continued until June 30, 1988. The same report indicated that, since 1982, 21 states had reduced or eliminated an ethanol exemption.

### **Testimony**

By early 1986, Highway Department officials estimated that the total loss in highway revenue for the 1985-87 biennium would be \$11 million. Based on the formula for the highway tax distribution fund, this implied a loss to cities of \$1.6 million, to counties of \$2.5 million, and to the state of \$6.9 million. It was reported that the state exemption of eight cents per gallon, when combined with the federal ethanol exemption of six cents per gallon, results in a total of a 14-cent-per-gallon exemption for ethanol. By early 1986, 29 states provided tax exemptions for ethanol, ranging from one cent to 16 cents per gallon.

The importance of the ethanol industry to the state was generally accepted. There are ethanol plants in Walhalla (capacity of 10 million gallons a year of ethanol) and Grafton (four million). Representatives of one plant reported that the plant represents a \$50 million investment of venture capital in North Dakota and described the decision to allow the exemption as evidence of the foresight of the Legislative Assembly. The decision to allow the exemption was also characterized as a contract under which there is an obligation to continue the exemption until its benefits accrue to the industry. It was estimated that the exemption would be necessary for at least another six years for the industry to become self-supporting.

A devastating factor for the ethanol industry in North Dakota has been the decline in oil prices. It was reported that the break-even point for the industry occurs at an oil price of about \$27 per barrel. The committee learned that the ethanol plant in Walhalla employs about 70 full-time workers. The industry was described as a major purchaser of North Dakota grain, and it was reported that such grain is normally purchased at a premium of up to 15 cents per bushel. The premium is paid to ensure an adequate daily supply of the grain necessary to run the ethanol plant. Industry representatives estimated that about 96 percent of the corn and 100 percent of the barley used by the Walhalla plant come from North Dakota. It

was further reported that the eight-cent-per-gallon exemption is spread among the ethanol producer, the motor fuel wholesaler, and the motor fuel retailer.

Proponents of a repeal of the ethanol exemption expressed support for the establishment of the ethanol production industry in North Dakota. However, they argued the support should be a direct subsidy rather than a loss of motor fuel tax revenue. They said the impact of the introduction of ethanol was significantly underestimated and that, by June 1986, ethanol represented about 20 percent of all motor fuel sales. It was estimated that if both ethanol plants in North Dakota produced at full capacity and this capacity was translated to ethanol sales in the state, the share would be in the vicinity of 30 percent.

The issue of the disparity between the fiscal note provided to the 1985 Legislative Assembly and the ultimate loss of revenue was the subject of considerable discussion. Representatives of the industry conceded that the original fiscal note report of \$455,000 was not an accurate prediction of future impact. As it turned out, the loss to the distribution fund for fiscal year 1986 was \$4.7 million. The fiscal note estimate was reportedly based on prior experience and did not take into account a change in demand for ethanol. However, industry representatives reported that an effort was made to communicate a revised estimate of the impact, estimated to be about \$16 million for the biennium, to the Legislative Assembly, in particular the House of Representatives, which had the bill when the difference became known.

It was noted that just because many states are reducing their exemptions for ethanol, it does not necessarily mean such a reduction should occur in North Dakota. The point was made that in most states the industry managed to get its start before the increase in oil prices in the early 1980s and thus was able to be in a favorable competitive position regarding sale of its product. On the other hand, the North Dakota industry was described as being unable to get in such a position before oil prices had already started their decline, thus making ethanol a less desirable product. Industry representatives reported that byproducts of the ethanol production process may turn out to be a more important factor in industry survival than production of the ethanol itself.

The importance of ethanol usage in the context of worldwide oil sales was also discussed. Industry representatives reported in October 1986 that

imported oil had risen to 42 percent of the sales in the United States, an increase from 23 percent in six months. It was suggested that another price squeeze by the Organization of Petroleum Exporting Countries is much more possible by the increased dependence on foreign oil.

It was reported that a gasoline price of \$1.30 a gallon is necessary for the ethanol industry to break even. In November 1986 gasoline prices in some parts of the state were under 85 cents per gallon.

Representatives of the ethanol industry and of jurisdictions affected by the loss of highway tax revenue met several times during the interim in an attempt to resolve the problems presented by the increasing use of gasohol. At the committee's final meeting, the representatives presented what was described as a last best offer of each side. The representatives noted that the offer was not binding on either side after that meeting. The final offer of the industry was for a phased decrease in the exemption from eight cents until June 30, 1987, to six cents until June 30, 1988, and to four cents until June 30, 1989, with no exemption after then. The exemption would be limited to prevent revenue loss of more than \$6 million, \$8.5 million, and \$7.5 million for each period, respectively. On the other hand, the last best offer by those favoring alternate financing was for an eight-cent exemption through June 30, 1987, four cents through June 30, 1988, and three cents through December 1, 1988, with no exemption after then. Revenue loss limits of \$6 million, \$6 million, and \$2 million were proposed for each period, respectively.

### **Conclusion**

The committee had encouraged the parties interested in the issue to attempt to reach a resolution on their own. When it was apparent, by the committee's final meeting, that such a resolution had not been achieved, the committee did not consider a specific proposal to resolve the matter. Therefore, the committee makes no recommendation concerning the ethanol tax exemption. However, the committee notes that there has been a lot of negotiation on possible solutions to the dilemma. The committee notes that the failure to make a recommendation does not mean the committee is taking a position in favor of the present law but rather was unable because of the time available to explore all possible solutions.

# STUDY RESOLUTIONS AND ASSIGNMENTS FOR THE 1985-86 INTERIM

The following table identifies the resolutions prioritized by the Legislative Council for study during the 1985-86 interim under authority of North Dakota Century Code Section 54-35-03. The table also identifies statutory responsibilities that are assigned to interim committees. The table lists the resolutions approved for study or the responsibilities involved, the subject matter, and the interim committee that was assigned the study or responsibility.

1985 Concurrent Resolution		1985 Concurrent Resolution	Subject Matter (Committee)
No.	Subject Matter (Committee)	No.	Subject Matter (Committee)
3001	Statutes governing rulemaking procedures and grants of rights of appeal from decisions of administrative agencies (Administrative Rules Committee)	3028	Consolidation of services provided by the Department of Human Services and the relationship between the department, the county social service boards, and mental health services; services being provided by regional human service centers and to determine how responsive those centers are to referrals from the court system and other community agencies; and alternatives for more efficient delivery of human services in the state (Budget Committee on Human Services)
3006	Feasibility and desirability of expanding the jurisdiction of the Committee on Public Employees Retirement Programs to include all fringe benefits for state employees (Legislative Procedure and Arrangements Committee)	3034	Feasibility and desirability of consolidating the statutory authority and administration of financial institutions organized under state laws in light of federal changes regarding regulation of financial institutions (Industry and Business Committee)
3007	Feasibility and desirability of consolidating the various public employee retirement funds in the state (Retirement Committee)	3036	Impacts and problems associated with numerous specific kinds and types of statutory liens and various types of property that are exempt from attachment or mesne process and levy or sale upon execution and other final process issued from any court and the various priorities and rights they create (Judicial Process Committee)
3008	Feasibility and desirability of imposing actuarial reporting and evaluation standards on all public employee retirement programs in the state (Retirement Committee)	3037	Need for additional appellate court services (Court Services Committee)
3009	Actuarial soundness and financial status of public employee retirement programs authorized by state law for employees of political subdivisions (Retirement Committee)	3058	All facets of the state's finance formulas used in making payments to public elementary and secondary schools for instructional and transportation services and what, if any, changes in those formulas should be made (Education Finance Committee)
3010	Actuarial soundness of the Alternate Firemen's Relief Association retirement programs under North Dakota Century Code Chapter 18-11 (Retirement Committee)	3061	Formula for state distribution of personal property tax replacement revenues to political subdivisions (Tax Administration Committee)
3020	Feasibility and desirability of establishing a central filing office for criminal judgments (Law Enforcement Committee)	3062	Need for comprehensive in-home and community support services to maintain, enhance, or prolong the independence and self-support of the partially dependent elderly population, and the possibility of making additional county funds available for such services by eliminating the county contributions to the medical assistance program under Medicaid (Budget Committee on Human Services)
3022	Need for revision of statutes and the Senate and House rules in light of the 1984 amendments to Article IV of the Constitution of North Dakota (Legislative Procedure and Arrangements Committee)	3063	Structure of the state law enforcement system in the state (Law Enforcement Committee)
3025	Exemptions allowed by law from state sales and use taxes to determine their impact on state revenues, their effect on public and fiscal policy, and their administrative burden upon retailers who must document exempt sales (Taxation Committee)	3064	Feasibility of establishing an enhanced 911 emergency telecommunications

1985 Concurrent Resolution No.	Subject Matter (Committee)
	system for the state (Government Administration Committee)
3065	North Dakota's wetlands (Agriculture Committee)
3067	Feasibility and desirability of placing the delivery of vocational education services and programs under the supervision of the Superintendent of Public Instruction, administrative structures for the delivery of vocational education services and programs in other states, and federal requirements regarding the delivery of vocational education services and programs by states (Education Committee)
3069	Capability of the various street, highway, and air transportation systems of the state to provide for the efficient transportation of people, goods, commodities, and services, and the resources needed to provide adequate and efficient street, highway, and air transportation systems in the future (Transportation Committee)
3071	Extent liability insurance coverage is provided for state and political subdivision employees and the necessity and desirability of providing or authorizing that coverage, and the desirability of expanding governmental immunity for political subdivisions (Judiciary Committee)
3074	Confidentiality statutes governing the office of the Tax Commissioner (Tax Administration Committee)
3076	State agency and institution pay practices (Budget Committee on Government Finance)
3077	Ongoing implementation of the federal district court order concerning deinstitutionalization of developmentally disabled persons (Budget Committee on Human Services)
3078	Regulation of property and casualty insurance plans created by local groups or associations (Industry and Business Committee)
3079	Adequacy and appropriateness of the funding of transportation assistance programs for the elderly and handicapped in the state (Transportation Committee)
3082	Cancellation, nonrenewal, and declination procedures and requirements for property and casualty insurance and automobile insurance (Industry and Business Committee)
3084	Monitor and study the implementation of the new state accounting system (Legislative Audit and Fiscal Review Committee)
3085	Maximum usage and accessibility of computers for all state agencies and institutions (Government

1985 Concurrent Resolution No.	Subject Matter (Committee)
	Administration Committee)
3086	Duties, qualifications, and authority of the State Forester, the location of the office of the State Forester, and the placement of the State Forest Service under the jurisdiction of the Board of Higher Education (Agriculture Committee)
3089	Grain warehousemen insolvencies and insolvencies of grain buying or commission firms, and the feasibility of providing bond coverage for credit-sales contracts (Agriculture Committee)
3094	Feasibility of and the various means and methods of, as well as the timing involved in, the development and transition to an alternative structure for the higher education system encompassing all state institutions of higher education in the state of North Dakota, and admissions and tuition policies for foreign and nonresident students, with the study to be conducted in cooperation with the Board of Higher Education (Budget Committee on Higher Education)
3096	Positive and adverse impacts of current tuition reciprocity agreements on postsecondary educational institutions, the communities where such institutions are located, postsecondary students, and state government (Budget Committee on Higher Education)
3097	Whether there is a need for a medical examiner system in the state, and the feasibility of implementing a medical examiner system that would include the use of a full-time forensic pathologist as chief medical examiner (Law Enforcement Committee)
3098	Uniform Marital Property Act, existing marital property law in this state, and the marital property laws of other states (Judiciary Committee)
3104	Municipal court services (Court Services Committee)
3105	Oil and gas laws with emphasis on those laws relating to royalty owners and surface owner protection (Oil and Gas Committee)
4001	Investment powers and performance of the State Investment Board and funds of the Public Employees Retirement System (Budget Committee on Government Finance)
4030	Bank of North Dakota's loan programs (Legislative Audit and Fiscal Review Committee)
4036	Problems associated with, and compile information regarding, the protection and rejuvenation of shelterbelts (Agriculture Committee)
4047	Methods and efforts to initiate and sustain new economic development and

**1985  
Concurrent  
Resolution**

<b>No.</b>	<b>Subject Matter (Committee)</b>
	to spur the creation of new employment opportunities for the citizens of this state, through a Jobs Development Commission composed of legislators, officials from the executive branch of government, officials from higher education, and representatives of private industry (Jobs Development Commission)
4050	Existing and alternative methods of unitary taxation (Taxation Committee)
4051	With the assistance of citizen advisers, to study issues of concern to the state and persons living within the boundaries of the Fort Berthold Reservation (Indian Jurisdiction Committee)
4052	Whether the state compulsory school attendance law should be revised to accommodate alternative methods of student instruction (Education Committee)
4055	Motor carrier laws and regulations as they relate to the trucking industry (Transportation Committee)
4065	Comparative negligence laws and their interaction with the products liability, strict liability, and workmen's compensation laws in light of recent North Dakota Supreme Court decisions (Judicial Process Committee)
4066	Status and impact of charitable gambling in the state (Law Enforcement Committee)
4075	Issue of state courts' jurisdiction over civil cases that arise within the exterior boundaries of Indian reservations and to urge a concurrent study by the Congress of the United States (Indian Jurisdiction Committee)

<b>NDCC Citation</b>	<b>Subject Matter (Committee)</b>
15-10-12.1	Approve any gift of a higher education facility (Budget Section)
15-10-18	Approve nonresident student tuition fees charged at state institutions of higher education (Budget Section)
15-59-05.2	Receive reports on interagency agreements for education services to handicapped students (Education Committee)
15-65-03	Approve any gift of a tax-producing educational broadcasting facility (Budget Section)
21-11-05	Receive any application for a natural resource bond loan (Budget Section)
38-14.1-04.2	Receive annual reports of Reclamation Research Advisory Committee (Agriculture Committee)
50-06-05.1	Approve termination of federal food stamp or energy assistance programs (Budget Section)
54-14-01.1	Periodically review actions of the Office

<b>NDCC Citation</b>	<b>Subject Matter (Committee)</b>
	of the Budget (Budget Section)
54-14-03.1	Receive reports on fiscal irregularities (Budget Section)
54-16-01	Approve excess transfers from state contingency fund (Budget Section)
54-27-22	Approve use of capital improvements planning revolving fund (Budget Section)
54-35-02	Review uniform laws recommended by Commission on Uniform State Laws (Judiciary Committee)
54-35-02	Establish guidelines for use of legislative chambers and displays in Memorial Hall (Legislative Procedure and Arrangements Committee)
54-35-02.2	Study and review audit reports submitted by the State Auditor (Legislative Audit and Fiscal Review Committee)
54-35-02.4	Review legislative measures and proposals affecting public employees retirement programs (Retirement Committee)
54-35-02.6	Study and review rules of administrative agencies (Administrative Rules Committee)
54-35-02.7	Legislative overview of the Garrison Diversion Project and related matters (Garrison Diversion Overview Committee)
54-35-11	Make arrangements for 1987 session (Legislative Procedure and Arrangements Committee)
54-44.1-07	Receive executive budget (Budget Section)
54-44.4-04	Approve state purchasing rules (Administrative Rules Committee)
54-52-06	Receive report on state retirement fund's actuarial soundness (Budget Committee on Government Finance)
57-01-11.1	Receive quarterly reports on auditing enhancement program and settlement of tax assessments (Budget Section)

<b>1985 Session Laws Citation</b>	<b>Subject Matter (Committee)</b>
Chapter 1	Receive quarterly reports on farm credit counseling program (Budget Section)
Chapter 5	Receive report on plans for the old State Office Building (Budget Section)
Chapter 8	Receive report on federal financial participation rate changes (Budget Section)
Chapter 20	Approve use of Souris River Flood Control Project funds (Budget Section)
Chapter 51	Receive annual Land Reclamation Research Center reports (Agriculture Committee)
Chapter 51	Approve any gift for an experiment station research facility (Budget Section)
Chapter 72	Approve expenditure of funds for modernization of data processing and

1985 Session Laws Citation	Subject Matter (Committee)
Chapter 77	accounting systems of the Workmen's Compensation Bureau (Budget Section)
Chapter 751	Administer legislative space improvements appropriation (Legislative Procedure and Arrangements Committee)
Chapter 757	Receive report of Governor's Commission on Children and Adolescents at Risk (Budget Committee on Human Services)
Chapter 805	Hold legislative hearings on block grants (Budget Section)
Chapter 808	Receive report of Department of Human Services Medicaid reimbursement system revision (Budget Committee on Human Services)
Chapter 831	Receive report on coordination of efforts of Department of Labor, Workmen's Compensation Bureau, and Job Service North Dakota (Government Administration Committee)
Chapter 866	Monitor United States Congress and federal agency actions having a fiscal impact on the state (Budget Section)
	Receive report on Governor's fish species, biota, and pathogens transfer to Hudson Bay Drainage Basin study (Garrison Diversion Overview Committee)

#### Added Committee Responsibilities

The following table identifies additional assignments by the Legislative Council or the Legislative Council chairman to interim committees. The table lists the subject matter and the interim committee to which it was referred:

Responsibility	Interim Committee
Comprehensive review of state employee fringe benefits, including their cost and adequacy, and the feasibility of "cafeteria-style" benefit programs	Budget Committee on Government Finance
Monitor status of state agency and institution appropriations	Budget Committee on Government Finance
Financial aid for students	Budget Committee on Higher Education
Monitor court decisions and proposals for federal legislation concerning pornography	Court Services Committee
Review state plan for vocational education	Education Committee
Foundation program eligibility for summer physical education programs	Education Finance Committee
Statutory and constitutional revision	Judiciary Committee
Establish policy on legislative expense reimbursement	Legislative Procedure and Arrangements Committee
Provide Census Bureau with legislative apportionment information requirements for 1990 census tracts	Legislative Procedure and Arrangements Committee
Review impact of federal wage and hour laws on legislative branch	Legislative Procedure and Arrangements Committee

Responsibility	Interim Committee
Review authority of state entities to accept gifts	Legislative Procedure and Arrangements Committee
Review early retirement for law enforcement personnel	Retirement Committee
Review the question of unclaimed retirement funds	Retirement Committee
State revenue sharing formula	Tax Administration Committee
Political subdivision property tax levy limitations	Tax Administration Committee
Taxation and development of mineral resources	Taxation Committee
Partial exemption from motor fuel taxation of alcohol-blended fuels	Transportation Committee

#### STUDY RESOLUTIONS NOT PRIORITIZED

The following table lists the resolutions not prioritized by the Legislative Council for study during the 1985-86 interim under authority of North Dakota Century Code Section 54-35-03. The subject matter of many of these resolutions is the same or similar to subject matter of resolutions that were given priority or of study assignments by the Legislative Council.

#### 1985 Concurrent Resolution

No.	Subject Matter
3011	Feasibility and desirability of establishing a prefunded retirement health care plan for public employees through the state uniform group insurance plan
3026	Special education needs of gifted children and special education programs available to gifted children and what improvements to those programs can and should be made
3035	Issuance of licenses and permits to hunt and fish in the state
3039	Availability and adequacy of financial aid available for students attending state postsecondary educational institutions and the feasibility of initiating new state programs to provide financial aid to those students
3046	System of health care service delivery, the reasons for the rapidly increasing costs of health care and health care insurance, and alternatives to contain those costs
3050	Feasibility of mapping known landfills within the state
3051	Desirability and feasibility of establishing a state-sponsored legal services corporation to provide legal services to persons with low incomes
3056	Methods of controlling pornography in the state, with an emphasis on educating the public regarding the harmful effects of pornography

1985 Concurrent Resolution No.	Subject Matter
3060	Methods of attracting and retaining qualified teachers in North Dakota public schools
3070	Problems of solid waste disposal in landfills in the state
3073	Tuition laws for elementary and secondary school students who cross the North Dakota-South Dakota border to attend school
3075	Desirability of adopting uniform or model laws where uniformity in state laws is desirable and practicable
3080	Feasibility and desirability of establishing a "cafeteria-style" benefit program for state employees
3083	Public policy of enacting legislation to regulate the issuance of life, property, casualty, and accident and health insurance by insurance agents who are owned or controlled by financial institutions
3087	Desirability of providing for self-administration of the state uniform group health insurance program
3090	Pembina River Basin, including soil, water, wildlife, and ecological resource management needs and the potential for the development of recreational and historical resources
3092	Present adequacy and equity of the structure of taxes levied by the state and the prospects for future changes in revenues from the various taxes imposed by the state
3101	Alternative organizational and administrative structures for the Workmen's Compensation Bureau
3107	Determine current state construction needs, develop a systematic approach for the planning and the establishment of priorities for future state construction projects, and study alternative means to finance such projects
4013	Methods to encourage the use of modern energy saving construction techniques including use of super insulation and the feasibility and desirability of requiring use of such techniques in future construction
4026	Equity of the rate of and exemptions from the coal severance tax, equity of the farm resident property tax exemption, and recent changes in classification and assessment of real property for purposes of ad valorem taxation and the effects of these changes upon mill levy limitations imposed by law on political subdivisions
4027	Availability and coverage of long-term care insurance
4032	Chemical manufacturing plants and

1985 Concurrent Resolution No.	Subject Matter
	storage facilities in the state near residential areas
4034	Life insurance needs of persons born with incurable diseases
4040	Existing state law enforcement agencies
4046	Problems presented by lobbyists, representing special interest organizations, who refuse to divulge the membership or sources of financial support of the special interest organizations
4053	Sales and purchases of power produced by producers of small amounts of power
4054	Regulatory and enforcement authority of the State Highway Department, the Highway Patrol, and the Motor Vehicle Department
4056	Investigation and prosecution procedures for child abuse and neglect cases and whether state law protects the interests of justice and of all parties involved in such cases
4058	Feasibility of allowing the conducting of various games of chance, on an infrequent basis, by small charitable organizations, and the licensing process applicable to such events
4060	Alternatives to the present court system for solving civil disputes
4061	State laws relating to the issuance, suspension, and revocation of drivers' licenses with specific emphasis on the efficient administration of those laws, the use of uniform terms in the relevant statutes, and the adequacy of drivers' education programs
4062	Financial basis under which airports in this state and elsewhere operate, including the manner and degree in which scheduled air carriers are the source of the cost of airports, and the extent to which scheduled airlines should help bear these costs
4064	Governmental immunity for political subdivisions, the desirability of enacting a tort claims act, liability insurance for political subdivisions, and the desirability of enacting a state insurance program to provide coverage for political subdivisions
4070	Problems faced by small rural hospitals in the state and possible alternative courses of action for the state and these hospitals to ensure the continued viability of the small rural hospital in North Dakota
4080	Existing services provided for vulnerable elderly persons, whether the delivery of those services might be better coordinated, and whether existing services are adequate in scope to protect elderly incapacitated persons

# HOUSE BILL AND RESOLUTION SUMMARIES

**House Bill No. 1029—Administrative Agency Definition.** This bill makes the Wheat Commission and the Department of Human Services with respect to its rules under the family subsidy program subject to the Administrative Agencies Practice Act, North Dakota Century Code Chapter 28-32. (Administrative Rules Committee)

**House Bill No. 1030—State Department of Forestry.** This bill makes the State Department of Forestry a division of the State Soil Conservation Committee, requires the Soil Conservation Committee to appoint a State Forester, requires the State Forester to have a degree in forestry, and requires the office of the State Forester to be located in Bismarck. (Agriculture Committee)

**House Bill No. 1031—Investments of the State Investment Board.** This bill imposes a prudent investor rule for investments of the State Investment Board, requires the State Investment Board to meet eight times each year, and removes the requirement that the Bank of North Dakota president serve as the secretary of the State Investment Board. (Budget Committee on Government Finance)

**House Bill No. 1032—State Building Authority.** This bill extends the authority of the Industrial Commission to act as the State Building Authority through June 30, 1989, with the specific projects funded by bond issues to be authorized by the Legislative Assembly. (Budget Committee on Higher Education)

**House Bill No. 1033—Human Services Board.** This bill establishes a human services board with the authority to establish administrative policy of the Department of Human Services and to administer the department through the executive director. (Budget Committee on Human Services)

**House Bill No. 1034—Administrative Structure of the Department of Human Services.** This bill deletes the statutory references to all offices and divisions within the Department of Human Services except for the State Hospital, the Governor's Council on Human Resources, the regional human service centers, and the vocational rehabilitation unit. This bill allows the department to deliver required services through the administrative structure it believes most appropriate. (Budget Committee on Human Services)

**House Bill No. 1035—Administration of the State Hospital.** This bill provides that the State Hospital's administrator, who must be a qualified and experienced hospital administrator with a master's degree, will have the responsibilities previously assigned to the superintendent of the State Hospital. The bill also provides the medical director of the State Hospital must be a board-eligible or board-certified psychiatrist. (Budget Committee on Human Services)

**House Bill No. 1036—Court of Appeals Established.** This bill requires the Governor to appoint judges to a court of appeals if the Supreme Court has disposed of 250 cases by opinion in the one-year period prior to September 1 of any year, as certified to the Governor by the Chief Justice of the Supreme Court. In addition, the bill allows the Supreme Court to provide for the establishment of

additional temporary panels of the court of appeals. (Court Services Committee)

**House Bill No. 1037—Summer Education Programs.** This bill permits proportionate foundation aid payments for eligible summer courses, including physical education courses, and requires the Superintendent of Public Instruction to adopt rules regarding the eligibility of all summer school programs to receive proportionate foundation aid payments. (Education Finance Committee)

**House Bill No. 1038—Computer Fraud and Computer Crime Classifications and Penalties.** This bill makes it a crime to gain or attempt to gain unauthorized access to any computer, computer system, or computer network with or without the intent to deceive. It also updates the terminology in the law relating to computer crime. (Government Administration Committee)

**House Bill No. 1039—Legislative Council Committee on State and Tribal Relations.** This bill establishes a Legislative Council state and tribal relations committee to study problems that exist between state or local governments and Indian tribes. (Indian Jurisdiction Committee)

**House Bill No. 1040—Reports by Executive and Administrative Officers and Departments.** This bill requires all executive and administrative officers and departments required to submit biennial reports to the Governor and the Office of Management and Budget to include in their reports a statement of sources and expenditures of public funds for state services that benefit Indians residing on Indian reservations. (Indian Jurisdiction Committee)

**House Bill No. 1041—Creditor Priority in a Financial Institution Insolvency.** This bill provides the following order for paying expenses of and claims against an insolvent bank: administrative expenses; unsecured claims for wages, salaries, or commissions up to \$5,000 per individual; claims of depositors; other unsecured and secured claims; claims for subordinated debts; and equity capital of shareholders. (Industry and Business Committee)

**House Bill No. 1042—Capital Stock and Surplus Requirements.** This bill raises the capital stock requirements of a banking association from \$50,000 to \$100,000 and raises the surplus requirements from \$25,000 to \$50,000. (Industry and Business Committee)

**House Bill No. 1043—Investments of the State Investment Board.** This bill requires the State Investment Board to apply the prudent investor rule in investing for funds under its supervision. (Jobs Development Commission)

**House Bill No. 1044—Statutory Agricultural Liens.** This bill establishes a statutory agricultural processor's lien available to any person processing any crop or agricultural product and a statutory agricultural supplier's lien available to any person furnishing supplies used in the production of crops or agricultural products. (Judicial Process Committee)

**House Bill No. 1045—Comparative Fault.** This bill establishes comparative fault and provides that comparative fault principles will be applied in

negligence, strict liability in tort, and dram shop actions. (Judicial Process Committee)

**House Bill No. 1046—Insurance Company Annual Report.** This bill requires an annual filing of statistical data by property and casualty insurance companies. (Judiciary Committee)

**House Bill No. 1047—Joint Underwriting Associations.** This bill authorizes the Commissioner of Insurance to establish joint underwriting associations. (Judiciary Committee)

**House Bill No. 1048—Self-Insurance Plan Regulation.** This bill authorizes the Commissioner of Insurance to adopt rules regulating self-insurance plans. (Judiciary Committee)

**House Bill No. 1049—Uniform Marital Property Act.** This bill enacts the Uniform Marital Property Act with minor changes concerning insurance and with a three-year delayed effective date. (Judiciary Committee)

**House Bill No. 1050—Technical Corrections Act.** This bill eliminates inaccurate or obsolete name and statutory references or superfluous language. (Judiciary Committee)

**House Bill No. 1051—Criminal History Records.** This bill requires reporting of criminal history information concerning misdemeanors to the Bureau of Criminal Investigation. (Law Enforcement Committee)

**House Bill No. 1052—Peace Officer Licensing.** This bill establishes standards, training, and licensing for peace officers. (Law Enforcement Committee)

**House Bill No. 1053—Law Enforcement Training Center Expansion.** This bill provides an appropriation of \$480,000 from the general fund for the expansion of the Law Enforcement Training Center in Bismarck, with funding provided by a temporary motor vehicle operator's license fee of \$1. (Law Enforcement Committee)

**House Bill No. 1054—Medical Examiner System.** This bill establishes a state medical examiner system and provides an appropriation of \$470,216 from the general fund to start the system. (Law Enforcement Committee)

**House Bill No. 1055—Medical Examiner Funding.** This bill provides funding for the medical examiner system if House Bill No. 1054 (LC 53.04) passes. (Law Enforcement Committee)

**House Bill No. 1056—Legislative Article-Related Changes.** This bill makes the changes recommended in light of different procedures under the new Article IV of the Constitution of North Dakota. (Legislative Procedure and Arrangements Committee)

**House Bill No. 1057—Bill Filing Requirements.** This bill sets the time frame within which the Governor must file bills with the Secretary of State. The time period coincides with that allowed the Governor to veto bills. (Legislative Procedure and Arrangements Committee)

**House Bill No. 1058—Legislative Wing Improvements.** This bill appropriates \$55,880 from the interest and income fund of the Capitol building fund for improvements to the legislative wing. (Legislative Procedure and Arrangements Committee)

**House Bill No. 1059—Oil and Gas Division Orders.** This bill defines a division order as an instrument executed by the operator, the royalty owners, and any other person having an interest in the production directing the purchaser of oil or gas to pay for the products taken in the proportion set out in the instrument. The bill provides that a division order may not alter or amend the terms of the oil and gas lease and is invalid to the extent it does so. (Oil and Gas Committee)

**House Bill No. 1060—Violation of State or County Geophysical Exploration Requirements.** This bill establishes a civil penalty applicable to persons convicted of violating any state law or county zoning ordinance relating to geophysical exploration. (Oil and Gas Committee)

**House Bill No. 1061—Appeals from Industrial Commission Orders.** This bill allows any person adversely affected by an Industrial Commission order to appeal the order to the district court for the county in which the oil or gas well or the affected property is located. (Oil and Gas Committee)

**House Bill No. 1062—No Disclosure of Income Tax Return Filing Status.** This bill prohibits any disclosure of whether or not any income tax report or return has been filed. (Tax Administration Committee)

**House Bill No. 1063—Disclosure of Income Tax Return Filing Status.** This bill requires taxpayers obtaining an extension of time to file a federal income tax return to notify the Tax Commissioner of the extension. The bill allows the Tax Commissioner to disclose whether or not a taxpayer has filed an income tax return. No disclosure is allowed if the taxpayer has received an extension of time to file a return or if the taxpayer is exempt from filing a return. (Tax Administration Committee)

**House Bill No. 1064—Water's Edge Unitary Apportionment for Corporate Income Tax Purposes.** This bill requires apportionment of corporate income on a water's edge basis, rather than a worldwide basis, and eliminates 85 percent of the income from foreign dividends and 80/20 corporations from apportionment to the unitary group. (Taxation Committee)

**House Bill No. 1065—Coal Severance Tax.** This bill reduces the coal severance tax rate from \$1.04 per ton to 60 cents per ton and adjusts the formula for distribution of coal severance tax revenue to the impact fund, coal trust fund, coal producing counties, and to the state general fund. (Taxation Committee)

**House Bill No. 1066—Highway System Impact Notice.** This bill requires that notice be given to the Highway Department of proposed construction of a building that would attract a large number of heavy vehicles. (Transportation Committee)

**House Concurrent Resolution No. 3001 — Administrative Agencies Practice Act Study.** This resolution directs the Legislative Council to study the Administrative Agencies Practice Act, North Dakota Century Code Chapter 28-32. (Administrative Rules Committee)

**House Concurrent Resolution No. 3002—Model Municipal Ordinances.** This resolution directs the Legislative Council to study methods for providing and maintaining model municipal ordinances for the

protection of small North Dakota cities. (Court Services Committee)

**House Concurrent Resolution No. 3003 — Payments in Lieu of Real Property Taxes on Land Held in Trust for Indians and Indian Tribes.** This resolution urges Congress to make payments in lieu of real property taxes on all land withdrawn or purchased for federal purposes or held in trust for Indians or Indian tribes. (Indian Jurisdiction Committee)

**House Concurrent Resolution No. 3004 — Impact of Federal Indian Policies on Non-Indians Study.** This resolution urges Congress to study the impact of federal Indian policies on non-Indians living or working on or near Indian

reservations in the United States. (Indian Jurisdiction Committee)

**House Concurrent Resolution No. 3005—Jobs Development Study.** This resolution directs the Legislative Council to establish a jobs development commission to study methods and coordinate efforts to initiate and sustain new economic development and to stimulate the creation of new employment opportunities for the citizens of the state. (Jobs Development Commission)

**House Concurrent Resolution No. 3006 — Insurance Industry Study.** This concurrent resolution directs the Legislative Council to study the insurance industry. (Judiciary Committee)

# SENATE BILL AND RESOLUTION SUMMARIES

**Senate Bill No. 2032—Financial Assistance to Develop Water Projects.** This bill provides financial assistance, through the agribond program, to landowners for the development of water projects. (Agriculture Committee)

**Senate Bill No. 2033—Wetlands Mediation Advisory Board.** This bill establishes a wetlands mediation advisory board to resolve conflicts between landowners and the United States Fish and Wildlife Service pertaining to wetlands. (Agriculture Committee)

**Senate Bill No. 2034—County Commissioner Approval for Federal Acquisition of Wetlands.** This bill requires an affirmative recommendation by the board of county commissioners before the Governor may approve proposed acquisitions of wetlands by the federal government. (Agriculture Committee)

**Senate Bill No. 2035—State Wetlands Policy.** This bill declares the wetlands policy of the state. (Agriculture Committee)

**Senate Bill No. 2036—Continuum of Services for Chronically Mentally Ill Individuals.** This bill requires the Department of Human Services to develop an integrated, multidisciplinary continuum of services for chronically mentally ill individuals. (Budget Committee on Human Services)

**Senate Bill No. 2037—Mandatory Long-Term Care Preadmission Screening.** This bill requires mandatory preadmission screening of each person prior to admission to a long-term care facility and requires the facility to inform individuals of available in-home and community-based services and of the individual's opportunity to choose among the appropriate alternatives. (Budget Committee on Human Services)

**Senate Bill No. 2038—Continuum of Community-Based Services for the Elderly and Disabled.** This bill provides for a continuum of community-based services for the elderly and disabled to make it possible for individuals to remain in their homes and communities and to delay or prevent institutional care. (Budget Committee on Human Services)

**Senate Bill No. 2039—Children's Coordinating Cabinet.** This bill establishes the Children's Coordinating Cabinet, consisting of the Governor, Attorney General, Superintendent of Public Instruction, executive director of the Department of Human Services, State Health Officer, Director of Job Service, Director of Institutions, Director of Vocational Education, and state juvenile services coordinator, or their designees, to develop and implement a plan for coordinating delivery of services to children and adolescents at risk. (Budget Committee on Human Services)

**Senate Bill No. 2040—County Court Jurisdiction and Transfer of Municipal Court Cases to County Courts.** This bill extends the jurisdiction of county courts to criminal misdemeanor, infraction, and noncriminal traffic cases involving

violations of city ordinances and allows for the transfer of certain municipal court cases to county courts. (Court Services Committee)

**Senate Bill No. 2041—Part-Time County Judge.** This bill allows the board of county commissioners of any county to authorize by resolution one part-time county judge. (Court Services Committee)

**Senate Bill No. 2042—Special Education Costs.** This bill makes the state financially responsible to pay the entire tuition and excess costs for handicapped children placed outside their school districts of residence if the placement was made by a county or state social service agency, from a state-operated institution, or by a court or juvenile supervisor. (Education Finance Committee)

**Senate Bill No. 2043—General Fund Transfers to Building Funds.** This bill allows school districts to create and add to building funds by making transfers from general fund appropriations regardless of whether a building fund tax levy has been authorized. (Education Finance Committee)

**Senate Bill No. 2044—Nonoperating School Districts.** This bill requires all school districts that do not operate either an approved elementary school or a high school to reorganize with or annex their territory to a school district that operates either an approved elementary or high school. (Education Finance Committee)

**Senate Bill No. 2045—Emergency Services Communications System Advisory Committee for 911 Telephone Systems.** This bill establishes a nine-member, Governor-appointed advisory committee to set standards for a statewide 911 telephone system. The bill also provides that systems installed after July 1, 1987, identify the emergency caller's location and that the collection of the excise tax on telephone access lines as imposed by North Dakota Century Code Section 57-40.6-02 be contingent upon compliance with the guidelines and standards established by the advisory committee. (Government Administration Committee)

**Senate Bill No. 2046—Membership of the Indian Affairs Commission.** This bill includes the Attorney General as a member of the North Dakota Indian Affairs Commission. (Indian Jurisdiction Committee)

**Senate Bill No. 2047—Investigations on Indian Reservations by the Attorney General.** This bill requires the Attorney General to investigate any complaint alleging the deprivation of any constitutional, civil, or legal right of an individual residing on an Indian reservation upon the request of a state's attorney. (Indian Jurisdiction Committee)

**Senate Bill No. 2048—Reciprocal Recognition of Certain State and Tribal Court Decisions.** This bill requires state courts to recognize decisions of the tribal court of the Three Affiliated Tribes of the Fort Berthold Reservation in certain cases if the tribal court had jurisdiction over the subject matter of the decision and recognizes state court decisions under the same conditions. The bill is effective through June 30, 1989. (Indian Jurisdiction Committee)

**Senate Bill No. 2049—Agreements Between Public Agencies and Indian Tribes.** This bill requires any public agency that enters into an agreement with a tribal government to hold a public hearing prior to submitting the agreement to the Governor for approval and requires any public agency to review and determine biennially the utility and effectiveness of any approved agreement entered into with an Indian government and whether the parties are in compliance with the agreement. (Indian Jurisdiction Committee)

**Senate Bill No. 2050—Public Venture Capital Corporation.** This bill establishes a public corporation to organize and manage an investment fund capitalized through the sale of stock to the Bank of North Dakota and other public and private investors to provide investment capital for business and industry. (Jobs Development Commission)

**Senate Bill No. 2051—Investments of the State Investment Board and Public Employees Retirement Board in State-Related Investments.**

This bill requires the State Investment Board and the Public Employees Retirement Board to invest not less than two percent of the assets of certain funds under their control in state-related investments when consistent with their fiduciary responsibilities. (Jobs Development Commission)

**Senate Bill No. 2052—Exemption for Public Retirement Benefits, Assistance for Dependent Children, and Crime Victims Reparations Awards.** This bill consolidates the exemptions available for public retirement benefits, assistance for dependent children, and crime victims reparations awards provided under current law. (Judicial Process Committee)

**Senate Bill No. 2053—Exemption of Rights in Life Insurance Policies and Pensions from Executions of Judgments.** This bill exempts rights in life insurance policies, pensions, annuity policies or plans, individual retirement accounts, Keogh plans, and simplified employee pension plans from attachment or process, levy and sale upon execution, and any other final process to the extent reasonably necessary for the support of the debtor. (Judicial Process Committee)

**Senate Bill No. 2054—Judicial Officers' Legal Defense and Indemnification.** This bill provides for civil action indemnification and legal defense for any Supreme Court justice, Supreme Court surrogate justice, district court judge, district court surrogate judge, county court judge, judicial referee, and juvenile supervisor. (Judiciary Committee)

**Senate Bill No. 2055—Statute of Limitations for Actions Against the State.** This bill reduces from six to three years the general statute of limitations for bringing an action against the state. (Judiciary Committee)

**Senate Bill No. 2056—Joint and Several Liability.** This bill provides that a political subdivision is liable for only that part of any uncollectible party's share of an award in proportion to the percentage of the negligence attributable to the political subdivision. (Judiciary Committee)

**Senate Bill No. 2057—Liability for Emergency Care.** This bill extends the immunity granted persons

rendering emergency care or services to cover not only actions taken at the scene of an accident but actions taken when going to and coming from the scene of the accident. (Judiciary Committee)

**Senate Bill No. 2058—Exemplary Damage Claims.** This bill provides that a plaintiff can seek exemplary damages only by amending the pleading after a court finds that, after a hearing on the motion, prima facie evidence exists in support of the motion. (Judiciary Committee)

**Senate Bill No. 2059—Political Subdivision Employee Immunity.** This bill clarifies the word employee to include board members and volunteers of a political subdivision in the chapter that grants immunity to political subdivision employees. (Judiciary Committee)

**Senate Bill No. 2060—Motor Vehicle Modification.** This bill makes a technical correction to amend all pertinent North Dakota Century Code sections to make reference to Section 39-21-45.1, relating to motor vehicle modification, as a criminal traffic offense. (Judiciary Committee)

**Senate Bill No. 2061—Noncriminal Violations of Game and Fish Rules and Governor's Proclamations.** This bill clarifies that the procedures in North Dakota Century Code Sections 20.1-01-28 and 20.1-01-29 are applicable to pertinent noncriminal violations of the Game and Fish Commissioner's rules and of the Governor's proclamations and the bond required for appearance is equal to the amount set forth in the rule, order, or proclamation. (Judiciary Committee)

**Senate Bill No. 2062—Charitable Gambling Commission.** This bill establishes a charitable gambling commission with general supervisory authority over charitable gambling. (Law Enforcement Committee)

**Senate Bill No. 2063—Dedicated Gross Proceeds Charitable Gambling Tax.** This bill provides a basic charitable gambling tax of one percent of gross proceeds and dedicates the tax revenue to a special charitable gambling enforcement fund. (Law Enforcement Committee)

**Senate Bill No. 2064—Rent Limits.** This bill establishes a rent limitation, in addition to rent allowable for blackjack, of \$150 per month for pull tab and jar game sites. (Law Enforcement Committee)

**Senate Bill No. 2065—Pull Tab Prize Limit.** This bill limits pull tab and jar game prizes to a highest denomination winner of \$500. (Law Enforcement Committee)

**Senate Bill No. 2066—Bingo Prize Limit.** This bill limits bingo prizes to \$10,000 per session, with a grand prize limit of \$5,000. (Law Enforcement Committee)

**Senate Bill No. 2067—Charitable Game Piece Manufacturers' Licensing.** This bill requires licensing of manufacturers of game pieces used in pull tab and jar games. (Law Enforcement Committee)

**Senate Bill No. 2068—Care and Treatment Expenses of Patients at Grafton State School and the State Hospital.** This bill requires the State Hospital and the Grafton State School to establish billing procedures recognizing the patient's ability to pay for care and treatment expenses, allows the

Grafton State School to write off uncollectible accounts, and provides that Grafton State School nonresident patients and responsible relatives must pay the full cost of care and treatment. (Legislative Audit and Fiscal Review Committee)

**Senate Bill No. 2069—Capitol Grounds Planning Commission Gift Acceptance Authority.** This bill grants the Capitol Grounds Planning Commission the exclusive authority to accept or reject gifts of property for exterior placement on the Capitol grounds and clarifies that approval must be obtained for construction or placement of an item on the Capitol grounds except for construction or placement authorized by the Legislative Assembly. (Legislative Procedure and Arrangements Committee)

**Senate Bill No. 2070—State Gift Acceptance Authority and Records.** This bill limits the authority of state entities to accept gifts to those gifts relating to the statutory responsibilities of the entities; requires recordation of gifts to the state with the State Historical Board; and requires a determination of artistic value by the State Council on the Arts when a gift is intended to be placed on the Capitol grounds. (Legislative Procedure and Arrangements Committee)

**Senate Bill No. 2071—Inspection of Oil and Gas Production and Royalty Payment Records.** This bill allows a royalty owner to inspect and copy the oil and gas production and royalty payment records of the person obligated to pay royalties under a lease. (Oil and Gas Committee)

**Senate Bill No. 2072—Definition of Surface Owner and Surface Damage Payments With Respect to Oil and Gas Production Damage.** This bill defines the term "surface owner" as any person having a present possessory or future possessory interest in the surface of the land for purposes of the Oil and Gas Production Damage Compensation Act. The bill also allows compensation for severance damages caused by oil and gas drilling operations. (Oil and Gas Committee)

**Senate Bill No. 2073—Definition of Drilling Operations.** This bill includes completion operations within the definition of drilling operations for purposes of the Oil and Gas Production Damage Compensation Act. (Oil and Gas Committee)

**Senate Bill No. 2074—Protection of Surface and Ground Water.** This bill allows a surface owner to recover for damage to water wells, springs, and other surface and ground water sources caused by oil and gas exploration and development. (Oil and Gas Committee)

**Senate Bill No. 2075—Information to Accompany Notice of Drilling Operations.** This bill requires a mineral developer to include a statement in the notice of drilling operations informing the surface owner of the right to request the State Department of Health to inspect and monitor the well site for the presence of hydrogen sulfide. The bill also requires the State Department of Health, upon request by a surface owner, to conduct this inspection. (Oil and Gas Committee)

**Senate Bill No. 2076—Tax Levy Limitations of Political Subdivisions.** This bill allows political

subdivisions to increase tax levies by three percent above the highest amount levied in dollars in the three most recent taxable years. (Tax Administration Committee)

**Senate Bill No. 2077—Sales Tax Exemption Removed for Certain Organizations When in Competition With Retail Businesses.** This bill removes the exemption otherwise available for educational, religious, or charitable activities, when those activities involve regular retail sales that are in direct competition with retailers. The bill removes the exemption for purchases made by a hospital, nursing home, and similar facility if those purchases are not made for the benefit of a patient or occupant of the facility. (Taxation Committee)

**Senate Bill No. 2078—Oil Extraction Tax Exemption for New Wells.** This bill provides a two-year exemption from the oil extraction tax for any well in which drilling begins after March 31, 1987, and is completed before July 1, 1989. (Taxation Committee)

**Senate Bill No. 2079—Oil Extraction Tax Rate Reduction.** This bill reduces the rate of the oil extraction tax by three-fourths of one percent each year for a four-year period, making a total reduction to 3.5 percent in the oil extraction tax rate. The bill removes the royalty owner exemption from the oil extraction tax and provides a one-year exemption from the oil extraction tax for wells on which drilling is completed by June 30, 1988. (Taxation Committee)

**Senate Bill No. 2080—Minimum Maintenance Roads.** This bill allows local jurisdictions to designate minimum maintenance roads and be subjected to less liability for negligence concerning those roads. (Transportation Committee)

**Senate Bill No. 2081—County Road Program Changes.** This bill allows boards of county commissioners to change the listing of priorities for roads in county farm-to-market programs. (Transportation Committee)

**Senate Concurrent Resolution No. 4001—Board of Higher Education Members, Qualifications, and Terms of Office.** This resolution amends the constitution to increase the size of the Board of Higher Education from seven to nine members, to reduce the length of board member terms from seven to five years, to limit board members to two terms, and to remove the requirement that no more than one graduate of any one of the institutions may be on the Board of Higher Education at any one time. (Budget Committee on Higher Education)

**Senate Concurrent Resolution No. 4002—Board of Higher Education Nominations—Screening Committee.** This resolution amends the constitution to change the members of the screening committee, which submits nominations for the Board of Higher Education to the Governor, from the president of the North Dakota Education Association, the Chief Justice of the Supreme Court, and the Superintendent of Public Instruction to the Superintendent of Public Instruction, Commissioner of Agriculture, chairman of the board of the Greater North Dakota Association, Speaker of the House, and an appointee of the Governor. (Budget Committee on Higher Education)

**Senate Concurrent Resolution No. 4003 — Human Service Delivery System.** This resolution urges the Department of Human Services to implement 21 recommended changes to improve

coordination, planning, administration, and staff training in the human service delivery system.  
(Budget Committee on Human Services)