NORTH DAKOTA LEGISLATIVE COUNCIL

Minutes of the

# AGRICULTURE AND NATURAL RESOURCES COMMITTEE

Tuesday, June 6, 2006
Roughrider Room, State Capitol
Bismarck, North Dakota

Representative Chet Pollert, Chairman, called the meeting to order at 9:00 a.m.

**Members present:** Representatives Chet Pollert, LeRoy G. Bernstein, Michael D. Brandenburg, Chuck Damschen, Rod Froelich, Lyle Hanson, Craig Headland, Keith Kempenich, Joyce Kingsbury, Matthew M. Klein, Mike Norland, Dorvan Solberg, Gerald Uglem; Senators Bill L. Bowman, Joel C. Heitkamp, Stanley W. Lyson, Herb Urlacher

**Members absent:** Representatives Tom Brusegaard, Scot Kelsh, Jon O. Nelson, Eugene Nicholas; Senator David O'Connell

**Others present:** See Appendix A

**It was moved by Representative Klein, seconded by Representative Solberg, and carried on a voice vote that the minutes of the January 12, 2006, meeting be approved as distributed.**

## RAILROAD FUEL SURCHARGES STUDY

At the request of Chairman Pollert, committee counsel distributed a packet of information relating to the federal Surface Transportation Board's May 11, 2006, public hearing on the proceeding entitled "Rail Fuel Surcharges," STB Ex Parte No. 661. Included in the packet of information is a press release from the Surface Transportation Board entitled "Public and Media Advisory: Surface Transportation Board Provides Schedule of Speaker's Appearances for May 11 Public Hearing on Fuel Surcharges Collected by Railroads"; Chairman Buttrey's opening statement; Commissioner Mulvey's opening statement; comments of the North Dakota Grain Dealers Association; oral comments of the North Dakota Grain Dealers Association; a press release from the National Grain and Feed Association; comments by the acting undersecretary, Marketing and Regulatory Programs, United States Department of Agriculture; comments of the Montana Wheat and Barley Committee, Colorado Wheat Administrative Committee, Idaho Barley Commission, Idaho Wheat Commission, Nebraska Wheat Board, Oklahoma Wheat Commission, South Dakota Wheat Commission, Texas Wheat Producers Board, Washington Wheat Commission, and National Association of Wheat Growers; the presentation submitted by the Burlington Northern Santa Fe Corporation; and a copy of the May 15, 2006, issue of *Rail Business* published by Argus Media containing an article entitled "Shippers and Railroads Spar Over Fuel Surcharges." This material is on file in the Legislative Council office.

Chairman Pollert recognized Dr. Kimberly Vachal, Advanced Research Fellow, Upper Great Plains Transportation Institute, North Dakota State University, Fargo. Dr. Vachal discussed railroad fuel surcharges and other railroad transportation issues, including railroad shipping rates and the Upper Great Plains Transportation Institute's recent survey concerning transportation issues in North Dakota. A copy of the PowerPoint presentation used in her presentation is attached as Appendix B. She also distributed a copy of the March 2006 North Dakota elevator transportation survey, a copy of which is attached as Appendix C. She said there are over 400 elevators in North Dakota that market, in total, over 550 million bushels of grain annually. She said rail accounted for 79 percent of 2005 shipments. Concerning modal cost comparisons, she said, trucks are cost-effective over short distances and barges are cost-effective over very long distances but rail is the most efficient method over the middle distance.

In response to a question from Representative Kempenich, Dr. Vachal said the modal efficiency mileage for trucks is approximately 200 to 250 miles. However, she cautioned, this estimate depends upon other factors, such as backhaul opportunities available to truckers.

Concerning railroad fuel surcharges, Dr. Vachal said Escalation Consultants has found that the recovery above fuel costs for major United States and Canadian railroads ranges between 1.8 and 12.1 percent.

In response to a question from Representative Pollert, Dr. Vachal said the Upper Great Plains Transportation Institute is a research and information-providing entity and does not take a position on issues, such as railroad fuel surcharges.

Chairman Pollert recognized Mr. Steven D. Strege, Executive Vice President, North Dakota Grain Dealers Association, Fargo. Mr. Strege complimented the Burlington Northern Santa Fe Corporation for adopting a mileage-based surcharge. He said this method of calculating the railroad fuel surcharge is an important first step.

Chairman Pollert recognized Mr. John Olson, Burlington Northern Santa Fe Corporation. Mr. Olson said the Burlington Northern Santa Fe Corporation stands ready to assist the committee in any way it can.

In response to a question from Representative Kempenich, Mr. Olson said the assumption would be that if fuel prices decline, the corresponding fuel surcharge would also decline. However, he cautioned, railroad fuel costs do not correspond exactly with the price of fuel. For example, he said, large transportation corporations, including the Burlington Northern Santa Fe Corporation, attempt to reduce their fuel costs through hedging. He said this is a practice whereby the corporation attempts to predict fuel prices and make purchases in the futures market accordingly. However, he said, there have been times in the past when this program has not been as successful as the corporation would have liked and the corporation lost money on the hedging program.

## ENERGY-INTENSIVE ECONOMIC DEVELOPMENT STUDY

Chairman Pollert recognized Mr. John W. Dwyer, President, Lignite Energy Council. Mr. Dwyer reviewed the lignite resource and production and conversion facilities and presented a summary of future projects. A copy of Mr. Dwyer's PowerPoint presentation is attached as Appendix D.

Chairman Pollert recognized Mr. Jim Lepinski, Headwaters, Inc., South Jordan, Utah. Mr. Lepinski discussed the coal-to-liquids facility being constructed by Headwaters, Inc., Great River Energy, Falkirk Mining Company, and North American Coal Corporation at Underwood. A copy of Mr. Lepinski's PowerPoint presentation is attached as Appendix D. He said the coal-to-liquids project will produce 50,000 barrels of fuel per day, export up to 500 megawatts of electricity, consume 15 million tons of lignite per year, employ 1,000 people, and cost $5 billion. He said benefits of the project for North Dakota include a multibillion dollar investment, thousands of direct and indirect jobs, millions of dollars of additional tax revenue, efficient use of natural resources, production of clean fuel, generation of clean power, downstream industrial growth, and will make North Dakota the leader in the United States in clean coal and energy security.

Chairman Pollert recognized Ms. Bonnie Turner, Director, Government and Community Affairs, Westmoreland Coal Company, Colorado Springs, Colorado. Ms. Turner discussed the FutureGen proposal and the Lignite Vision 21 Gascoyne project. A copy of her PowerPoint presentation is attached as Appendix D. She said FutureGen is a prototype coal-fired power plant that will be used to test coal gasification, carbon capture and sequestration, and hydrogen production technologies. She said the goal of the FutureGen coal-fired power plant is near zero emissions. She said the proposal calls for a 275-megawatt plant at a cost of $1 billion shared by the Department of Energy and an industrial alliance. She said the Department of Energy will pay three-fourths or $750 million for the cost of the plant and the alliance will pay one-quarter or $250 million. She said the industrial alliance is composed of major coal companies, utilities, and other countries. She said 12 sites have been submitted from seven states, including 2 lignite sites--1 in North Dakota and 1 in Texas. She said the list will be pared by the fall of 2006 and a one-year environmental impact statement process will begin for the short-listed sites.

Ms. Turner said North Dakota's site is the Gascoyne site. She said this site is supported by the North Dakota Industrial Commission and is being developed by the Energy and Environmental Research Center at the University of North Dakota and Westmoreland Coal Company. She said the North Dakota FutureGen site possesses a number of advantages, including abundant coal; inexpensive and easily developed land; a mine-mouth lignite operation and rail access to all ranks of coal; ideal geology for carbon dioxide sequestration; an available workforce; national research and training centers; low construction and operation costs; available rail, transmission, water, and other infrastructure; absence of environmental constraints; regional markets for power, hydrogen, and carbon dioxide; support of government and business; and strong local, state, and regional community support.

Concerning the Lignite Vision 21 Gascoyne project, Ms. Turner said Westmoreland Coal Company is pursuing a 500-megawatt project by itself. She said the Gascoyne site can accommodate air permits for a 500-megawatt project and 275-megawatt FutureGen project. She said Westmoreland Coal Company is pursuing potential customers, continuing the permitting process, exploring opportunities to partner with wind energy producers, and exploring transmission issues. She said possible legislative and regulatory initiatives include funding of the transmission authority, financial and tax incentives, regulatory and legal structure changes, and workforce training.

Chairman Pollert recognized Mr. Rick Lancaster, Vice President, Generation, Great River Energy, Elk River, Minnesota. Mr. Lancaster discussed Great River Energy's resource plans, including the Spiritwood Industrial Park, Blue Flint ethanol project, coal-to-liquids project, and baseload issues. A copy of Mr. Lancaster's PowerPoint presentation is attached as Appendix D. He said the Spiritwood Industrial Park will be composed of the Cargill malting plant, the Spiritwood ethanol plant, and the Spiritwood energy generation facility. Following the upgrade at the Cargill malting plant, he said, it will be the world's largest malting plant. He said the Spiritwood ethanol plant will produce 100 million gallons of ethanol per year and the energy facility will provide electricity for the malting plant and ethanol plant.

Concerning the Blue Flint ethanol plant, Mr. Lancaster said it will be constructed by a partnership comprised of Headwaters, Inc., and Great

River Energy. He said the plant will be adjacent to Great River Energy's Coal Creek Station at Underwood and will produce 50 million gallons of ethanol per year. He said the plant will be built to allow expansion to 100 million gallons per year. He said the plant will utilize 18 million bushels of No. 2 yellow corn, will be McLean Electric Cooperative's largest customer, and in addition to the 50-million gallons of ethanol will produce 160,000 tons of dry or 420,000 tons of wet distillers grain. He said the distillers grain will be sufficient to feed 225,000 head of feeder cattle. He said the Blue Flint ethanol plant will employ 37 full-time employees.

In response to a question from Representative Solberg, Mr. Lancaster said Headwaters, Inc., will own 51 percent of the Blue Flint ethanol plant and Great River Energy will own 49 percent.

In response to a question from Senator Urlacher, Representative Pollert said that with the Blue Flint ethanol plant and the Spiritwood ethanol plant there will be six ethanol plants in North Dakota, including the existing plants at Walhalla and Grafton and the plants being constructed at Richardton and Hankinson.

Chairman Pollert recognized Mr. Rich Voss, Vice President for Power Development, Great Northern Power Development, Bismarck. Mr. Voss discussed the Lignite Vision 21 South Heart project. A copy of Mr. Voss's PowerPoint presentation is attached as Appendix D. He said Great Northern Properties L.P. owns the coal reserves contained in the former Great Northern Railways land grant lands. He said Great Northern Properties is the nation's largest private coal owner and owns 20 billion tons of coal and lignite reserves. He said Great Northern Properties receives royalties on this production and operates five mines producing 25 million metric tons of coal per day. He said Great Northern Power Development is focused on using Great Northern Properties' coal reserves and in developing mine-mouth power plants in North Dakota and Montana. He said the South Heart power project is on schedule for commencing commercial operations for the period 2013 to 2015.

Mr. Voss said Great Northern Power Development is more optimistic than some other industry members concerning the solvability of transmission issues. He said Great Northern Power Development is exploring the North Dakota Transmission Authority as well as other options to solve this issue.

In response to a question from Representative Solberg, Mr. Voss said Great Northern Power Development is optimistic that easements for transmission lines can be secured in Minnesota. However, he said, like all transmission line and pipeline projects that require easements, there will be certain segments that may be difficult to acquire, but overall he is optimistic. He said the project's potential customers, Xcel Energy, Inc., and Great River Energy feel the same way.

Chairman Pollert recognized Mr. Dale Niezwaag, Senior Legislative Representative, Basin Electric Power Cooperative. Mr. Niezwaag discussed economic development and updated the committee on specific developments that Basin Electric is undertaking. A copy Mr. Niezwaag's PowerPoint presentation is attached as Appendix D and a copy of his written comments is attached as Appendix E. He said Basin Electric Power Cooperative does not have any suggestions for tax incentives at this time. He said Basin Electric Power Cooperative strongly believes that its rates, reliability, and investment and research are the biggest incentives for economic development. He said Basin Electric Power Cooperative looks forward to working with the committee members to advance energy development in North Dakota.

Chairman Pollert recognized Mr. David Sogard, Vice President, Legal and Governmental Affairs, Minnkota Power Cooperative, Grand Forks. Mr. Sogard discussed Minnkota Power Cooperative's resource plans, including the Young III Station. A copy of Mr. Sogard's PowerPoint presentation is attached as Appendix D.

Chairman Pollert recognized Mr. Dwyer. A copy of Mr. Dwyer's PowerPoint presentation is attached as Appendix D. Mr. Dwyer said the best incentive the Legislative Assembly can provide is ensuring that the historical partnership between the state and the lignite industry continues. He said a healthy legislative and regulatory climate is critical to the industry's future. He said the state and the Legislative Assembly impact the competitiveness of the state's lignite industry through taxation policies, regulatory policies, and funding of lignite research and development. He said potential legislation is being formulated but will probably not be approved for submission to the committee or the next Legislative Assembly until late October. He said potential legislation includes increasing the coal trust fund allocation for lignite research and development from 70 to 100 percent as well as other proposals.

Chairman Pollert recognized Mr. Wallie Hardie, Director, North Dakota Corn Growers Association, Fairmount. A copy Mr. Hardie's PowerPoint presentation is attached as Appendix F. Mr. Hardie also distributed a packet of materials prepared by the North Dakota Corn Utilization Council and the North Dakota Corn Growers Association which is on file in the Legislative Council office. He said 70 percent of the input cost of ethanol is the price of corn. He said North Dakota has the widest basis in the nation next to South Dakota. He said North Dakota currently produces enough corn for more plants plus there is growth potential for more corn production in North Dakota. He said North Dakota is losing the value-added potential of exported corn which is 65 percent of total corn production in North Dakota.

Mr. Hardie said the goal of the North Dakota Corn Growers Association is to increase production of ethanol from 35 million to 130 million gallons per year. He said the North Dakota Corn Growers Association would like to increase the availability of E85 fuel along major corridors, including one station in each of the eight planning regions in North Dakota. He said the corn growers support incentives for production and use of ethanol, education regarding production and use of ethanol, and increased funding for research and pilot projects. He said the economic impact of one new 40-million-gallon ethanol plant will expand the economic base of the state by $110.2 million, generate an additional $19.6 million in household income, employ 40 people, create 696 additional new permanent jobs, generate at least $1.2 million in tax revenue, and increase the average local basis for corn by 5 to 10 cents. He said a 2006 South Dakota study estimated that a new 40-million-gallon ethanol plant would make a $1 billion contribution and a 2004 Minnesota study showed that $19 is generated for each $1 invested. He said the gross economic return of one acre of corn is $241.50 if that corn is exported, whereas the value is $1,135 if converted to ethanol.

Concerning state investment incentives, Mr. Hardie said the Legislative Assembly should consider increasing the $20,000 lifetime cap for the Ag PACE for ag producers program. Also, he said, the Envest North Dakota program should be amended to treat non-ag investors the same as producers. He said the North Dakota agricultural business investment tax credit is working well and should be continued. In conclusion, he said, North Dakota producers not invested in ethanol plants benefit to the extent that the increased demand for corn may narrow the basis for corn. He said that from 2003 to 2006 South Dakota corn for ethanol grew from every third row to every other row. However, he said, that during this same time, the cash price for corn in South Dakota decreased and the basis widened. He said the majority of the economic benefit of ethanol plants goes to the owners of the plants and the market price of ethanol is not related to the market price of corn. He said the production cost of ethanol is closely related to the market price of corn.

Chairman Pollert recognized Mr. Jared Hagert, Vice President, North Dakota Soybean Growers Association, Emerado. Mr. Hagert said the North Dakota Soybean Growers Association supports any effort to increase the use of renewable fuels in North Dakota. However, he said, one problem soybean growers may face, as a result of increased production of ethanol, is the increased production of distillers grain which competes with soybean meal as food for cattle. The solution to this problem, he said, is the promotion of increased cattle feeding in the state.

In response to a question from Representative Kempenich, Mr. Hagert said most of the soybeans grown in North Dakota are shipped to the Pacific Northwest for export to Asia. He said consumers in Asia have switched from buying soybean meal to buying the whole soybean.

## NOXIOUS WEED REPORT

Chairman Pollert recognized Mr. Roger Johnson, Commissioner, Department of Agriculture. Mr. Johnson presented an updated report on noxious weed control referrals made to the department as required by North Dakota Century Code Chapter 63-01.1. A copy of Mr. Johnson's written comments is attached as Appendix G. He said since the law went into effect on July 1, 2005, the department has received only one referral.

## ENDANGERED SPECIES ACT

Chairman Pollert recognized Mr. Johnson who discussed the Environmental Protection Agency's endangered species protection program and potential roles that the North Dakota Department of Agriculture can play in this process. A copy of Mr. Johnson's written comments is attached as Appendix H. Under the endangered species protection program, he said, endangered species protection bulletins will be developed to add pesticide use restrictions beyond those found on the pesticide label. He said the department is analyzing what role the state should play in developing the bulletins. He said the department has identified three options. He said option 1 is to have the Environmental Protection Agency develop bulletins for North Dakota just as it will do for most states. He said this is the default option if the state does nothing. Option 2, he said, is to have the department take complete ownership of the program under a state-initiated endangered species protection program. This option, he said, is estimated by the department to require five additional full-time equivalent (FTE) positions and $1.5 million in state funds. Option 3, he said, is a hybrid approach under which the Environmental Protection Agency would retain ultimate responsibility for the preparation and publication of bulletins but the department could offer its input to the agency and furnish agency staff with local pesticide use data, cropping data, species distribution maps, environmental monitoring data, and its recommendations for bulletin language. He said the department estimates that this option would require an additional three FTE positions and approximately $500,000 in additional funds per biennium. He said he is recommending that the state pursue option 3 as it would allow significant input in the process and allow the state some control over the pesticide use restrictions found in the bulletins.

In response to a question from Senator Bowman, Mr. Bill Bicknell, United States Fish and Wildlife Service, Bismarck, said there are eight threatened or endangered species present in North Dakota. He said these include the whooping crane, blackfooted ferret, and gray wolf. However, he said, the gray wolf is currently being considered for removal from the list. In addition, he said, the threatened and endangered species list includes the bald eagle, piping plover, western prairie fringed orchid, least tern, and the pallid sturgeon. He said there is also a species of butterfly in the state--the Dakota Skipper--that is a candidate for inclusion on the threatened and endangered species list.

Chairman Pollert recognized Mr. Jim Gray, Pesticide Registration Coordinator, Department of Agriculture. Mr. Gray said under the bulletins being developed by the Environmental Protection Agency, pesticides would not be banned within an entire county but only in the area around the threatened or endangered species habitat located in that county. He said the Environmental Protection Agency plans to release the bulletins by yearend and that the bulletins will only be published online.

In response to a question from Representative Pollert, Mr. Gray said no state has assumed a state-only-administered program. He said if the state does nothing, then the first option--an Environmental Protection Agency-sponsored program--is the default option for the state.

Chairman Pollert recognized Mr. Brian Kramer, Public Policy Director, North Dakota Farm Bureau, Bismarck. A copy of Mr. Kramer's written comments is attached as Appendix I. He said the North Dakota Farm Bureau supports option 3--the hybrid approach--under which the Environmental Protection Agency would retain ultimate responsibility for the preparation and publication of bulletins, but with state input. He said this option would provide substantial cost-savings and may provide the most workable solution.

Chairman Pollert recognized Mr. Woody Barth, North Dakota Farmers Union, Solen. A copy of Mr. Barth's written comments is attached as Appendix J. He said the North Dakota Farmers Union supports the hybrid approach being recommended by the Department of Agriculture.

Chairman Pollert recognized Mr. Dan Wogsland, Executive Director, North Dakota Grain Growers Association. Mr. Wogsland discussed the Endangered Species Act as well as pesticide regulation. A copy of his written comments is attached as Appendix K. He said the North Dakota Grain Growers Association supports the hybrid approach being recommended by the Department of Agriculture.

Chairman Pollert recognized Mr. Doug Kuruc, Vice President, North Dakota Agricultural Association, Mooreton. Mr. Kuruc discussed the future of North Dakota's endangered species protection program and the regulation of pesticides. He said the North Dakota Agricultural Association supports the hybrid approach recommended by the Department of Agriculture.

## MOUNTAIN LION ASSESSMENT REPORT

Chairman Pollert recognized Mr. Randy Kreil, Chief, Wildlife Division, Game and Fish Department. Mr. Kreil introduced Dr. Dorothy Fecske, Furbearer Biologist, Wildlife Division, Game and Fish Department, who presented the mountain lion assessment report. A copy of the report entitled *Status of Mountain Lions in North Dakota* is on file in the Legislative Council office and a copy of Dr. Fecske's PowerPoint presentation is attached as Appendix L. She said that prior to the current presence of mountain lions in North Dakota, the last confirmed recorded mountain lion in North Dakota was shot 25 miles southeast of Williston in 1902. Between 1958 and 1991, she said, there were 11 confirmed sitings of mountain lions in North Dakota. In 1991, she said, the Legislative Assembly classified mountain lions as furbearers and directed the department to manage them with other rare furbearers in a closed season. However, she said, there are statutory provisions allowing individuals to take mountain lions to protect livestock. She said North Dakota Century Code Section 20.1-07-04 allows a landowner or tenant or that person's agent to catch or kill any wild fur-bearing animal that is committing depredations upon that person's poultry or domestic animals. However, she said, the section requires a person catching or killing a mountain lion to report the capture or killing to the department within 24 hours and the entire animal must be turned over to the department. Between 1991 and 2003, she said, there were 26 confirmed reports of mountain lions in North Dakota. She said a new reporting system was developed by the department beginning in 2004 to obtain specific locational information on mountain lions; to attempt to verify sightings based on physical evidence; and to classify sightings as unfounded, improbable unverified, probable unverified, or verified. She said approximately 2 percent of North Dakota can support a small population of mountain lions. She said the suitable habitat is located in the Badlands and Missouri River breaks and assuming there is no managed harvest, can support between 45 and 74 mountain lions.

Concerning the experimental mountain lion season, Dr. Fecske said the department held the season between September 2, 2005, and March 12, 2006. She said a quota of five mountain lions was allowed and when this quota was reached, the season was closed. She said the first mountain lion was harvested on November 16 and the final mountain lion taken on January 15, 2006.

In conclusion, Dr. Fecske said most of North Dakota does not contain habitat that is suitable for mountain lions. She said the Badlands and Missouri River breaks have a sufficient amount of suitable habitat, approximately 2 percent of the state, to support a small population of mountain lions. She said mountain lions either have recolonized or are in the process of recolonizing a portion of their former range in the Badlands. She said individual lions travel through the other portions of the state and are most likely young dispersing animals. She said the lion population in North Dakota likely will be limited due to geographic isolation from other lion populations in adjacent states.

In response to a question from Senator Bowman, Mr. Kreil said mountain lions were not introduced by any person or organization to see if they could survive in North Dakota but the animals present in North Dakota have arrived naturally.

In response to a question from Representative Froelich, Mr. Kreil said seven bighorn sheep have been killed by mountain lions with mountain lions suspected in another three sheep deaths. He said the department has invested substantial resources in expanding the bighorn sheep population in the state and if it is documented that a mountain lion is taking sheep, the lion will be removed by the department.

In response to a question from Representative Pollert, Mr. Kreil said the department will again offer an experimental mountain lion hunting season in 2006-07. He said the season will run from September 2, 2006, through March 12, 2007, or when the quota of five mountain lions has been reached. He said the season will be very similar to the 2005-06 season; however, no hunting or pursuing with dogs will be allowed until after January 1, 2007. Also, he said, individuals hunting with dogs may not pursue or take a female mountain lion accompanied by kittens. He said any mountain lion other than kittens, lions with visible spots, or females accompanied by kittens will be a legal animal. Finally, he said, in the event that none of the five lions are taken on the Fort Berthold Reservation, one additional mountain lion may be taken on the reservation when the quota has been reached and the statewide season closed.

## RESERVED WATER RIGHTS STUDY

At the request of Chairman Pollert, committee counsel presented a bill draft [70063.0100] to authorize the Governor to negotiate reserved water rights of the United States and federally recognized Indian tribes.

Chairman Pollert recognized Mr. Steve Kelly, Attorney, Three Affiliated Tribes, New Town. Mr. Kelly said the issue of reserved water rights is very important to the Three Affiliated Tribes. One of the objections of the Three Affiliated Tribes to the bill considered by the Legislative Assembly last session, he said, was that the Legislative Assembly delegated authority to negotiate Indian and federal reserved water rights to the State Engineer. He said the tribe favors legislation, whereby a commission would be established to negotiate federal and Indian reserved water rights. He suggested that the legislation might be similar to legislation enacted in Montana and that the Governor appoint a number, such as four or five, to a commission to negotiate reserved water rights. Ideally, he said, the commission would include members of the Legislative Assembly so the Legislative Assembly had ownership in the compact or agreement negotiated by the commission. In this manner, he said, the agreement would fare better before the Legislative Assembly.

Mr. Kelly said another aspect of the Montana commission system that the tribe favors is that there is an interim process, whereby water rights can be used until final negotiations are concluded. If members of the Legislative Assembly were represented on a commission, he said, many of the political aspects of the negotiations would be resolved during the negotiation process and before the compact is submitted to the Legislative Assembly. He said the Three Affiliated Tribes is also opposed to subsection 4 of Section 4 of the bill draft, whereby if an administrative law judge sustains an exception to the agreement, the judge is required to remand the agreement to the Governor or the Governor's designee for further negotiation. He said a provision should be inserted that when the commission has negotiated the agreement and it is ratified by the Legislative Assembly and the federal government if necessary, the agreement is final.

In response to a question from Representative Froelich, Mr. Kelly said the Three Affiliated Tribes has not met with representatives of the Standing Rock Sioux Nation concerning the bill draft. However, he noted, the proposed legislation is permissive and provides an opportunity for those tribes that wish to quantify their reserved water rights to do so and those tribes that do not wish to are not required to under the proposed legislation.

Chairman Pollert recognized Mr. Jon Patch, Assistant Division Director, Water Appropriation Division, State Water Commission. Mr. Patch discussed water permits and reported water use for the Shell Valley Aquifer. A copy of the tables and maps used in his presentation is attached as Appendix M.

Concerning the bill draft authorizing the Governor to negotiate reserved water rights of the United States and federally recognized Indian tribes, Mr. Patch said the State Engineer and State Water Commission do not take a position.

Chairman Pollert recognized Mr. Thomas Davis, Water Resource Director, Turtle Mountain Band of Chippewa Indians, Belcourt. Mr. Davis said the Turtle Mountain Band of Chippewa Indians has attempted to encourage the state to enter into negotiations with the tribe to quantify the tribe's reserved water rights. He said the tribe's water resource is very important to the tribe and essential for the tribe to develop its resources. He said the tribe prefers to negotiate with the state rather than to litigate its reserved water rights. However, he said, the tribe is running out of patience and would like to know whether the state intends to enact legislation authorizing an individual or commission to negotiate with the tribe or whether the tribe will be forced to pursue litigation.

In response to a question from Representative Solberg, Mr. Davis said he will meet with tribal attorneys and the tribal government to formulate a recommendation and present it to the committee at a future meeting.

## STAFF DIRECTIVES

Chairman Pollert requested that the Legislative Council staff revise the reserved water rights bill draft to provide for a commission to negotiate on behalf of the state rather than the Governor.

No further business appearing, Chairman Pollert adjourned the meeting at 4:50 p.m.

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Jeffrey N. Nelson
Committee Counsel

ATTACH:13