



**TESTIMONY OF JODI SMITH
COMMISSIONER
North Dakota Department of Trust Lands**

Senate Concurrent Resolution 4007

**House Government and Veterans Affairs Committee
March 25, 2021**

Chairman Kasper and members of the House Government and Veterans Affairs Committee, I am Jodi Smith, the Commissioner and Secretary for the Board of University and School Lands (Board). I am here to testify in opposition to Senate Concurrent Resolution 4007.

The Department of Trust Lands (Department) is the administrative arm of the Board, serving under the direction and authority of the Board. The Board is comprised of the Governor, Secretary of State, Attorney General, State Treasurer, and Superintendent of Public Instruction. The Department's primary responsibility is managing the Common Schools Trust Fund (CSTF) and 12 other permanent educational trust funds. The beneficiaries of the trust funds include local school districts, various colleges and universities, and other institutions in North Dakota. The Department manages five additional funds: the Strategic Investment and Improvements Fund, the Coal Development Trust Fund, the Capitol Building Fund, the Indian Cultural Education Trust, and the Theodore Roosevelt Presidential Library and Museum Endowment.

The Department also administers the responsibilities outlined in the Uniform Unclaimed Property Act, N.D.C.C. ch. 47-30.1. In this role the Department collects "unclaimed property" (uncashed checks, unused bank accounts, etc.), and processes owners' claims. This property is held in permanent trust for owners to claim, with the revenue from the investment of the property benefiting the CSTF.

Additionally, the Department operates the Energy Infrastructure and Impact Office (EIIO), which provides financial support to political subdivisions that are affected by energy development. Assistance is provided through both the oil and gas impact grant program and the coal impact loan program. The EIIO also distributes energy and flood grants carried over from prior biennia.

History

State trust lands are a phenomenon dating back to the Northwest Ordinance of 1785. With this ordinance, the U.S. Congress established a policy of granting land to states when they entered the Union as an asset to generate funding to support the public education system, a fundamental state responsibility. Starting with Ohio in 1785 and ending with Arizona and New Mexico in 1910, each new state received a set of federal lands that, under federal enabling legislation and the corresponding state constitution, were to be held in trust for the benefit of the public schools. The trust mandates established by the U.S. Congress and the states are clear: to generate revenue to support the public schools and other institutions. In some cases there may be other minor institutional beneficiaries as well, but the public schools (K-12) are by far the largest beneficiary throughout the state trust land system. That singularity of purpose continues today and distinguishes state trust lands and the state programs that administer them from other types of public lands.

In the 1780s America's founders were preparing for westward expansion at the conclusion of the Revolutionary War. Thomas Jefferson developed a system -- today often referred to as the Jeffersonian Grid -- to orderly track and divide land into 36-square-mile townships/ranges/sections. Each state that joined the union after the war received a certain number of one-mile sections to be held in a trust and used for public beneficiaries, usually public schools.

In 1889, Congress passed the Enabling Act "to provide for the division of Dakota [Territory] into two states, and to enable the people of North Dakota, South Dakota, Montana, and Washington to form constitutions and state governments, and to be admitted into the union on an equal footing with the original states, and to make donations of public lands to such states." Act of February 22, 1889, Ch.180, 25 Statutes at Large 676. Section 10 of this Act granted sections 16 and 36 in every township to the new states "for the support of common schools." In cases where portions of sections 16 and 36 had been sold prior to statehood, indemnity or "in lieu" selections were allowed. In North Dakota, this grant of land totaled nearly 2.6 million acres.

The Enabling Act provided further land grants to the State of North Dakota for the support of colleges, universities, the state capitol, and other public institutions. Revenues are generated through the prudent management of trust assets, which assets include approximately 706,600 surface acres and nearly 2.6 million mineral acres. With approval of the Enabling Act in 1889, Congress granted North Dakota the ability to become a state. The Board is part of that Act, making it an agency that predates statehood. The Enabling Act, the North Dakota Constitution, and statutes passed over the last 130 years, have defined the role of the Board and its beneficiaries.

Only once in the past 130 years has the Board changed its membership.

In 1909, the Eleventh Legislative Assembly, through HB 307, created a Bureau of the Department of Agriculture and Labor to be known as the Dairy Department, which was created for the purpose of promoting, improving and regulating the dairy products of the state and to establish and enforce proper rules and regulations pertaining thereto. For 112 years, it has never been brought forth that the Agriculture Commissioner be placed on the Board.

The Forty-ninth Legislative Assembly created a Government Reorganization Committee (Committee). This Committee was assigned three studies which were completed in 1984: (1) the methods of providing for more efficient and prompt collection of taxes by the state (under HCR 3068), (2) the study of feasibility of combining the Department of Labor, Job Service North Dakota, Workmen's Compensation Bureau, and other state agencies whose primary responsibility was related to labor and employment services (under SCR 4007), and (3) the study of the financial management and administrative services of state government including the functions and services of the State Treasurer, Office of Management and Budget, State Tax Commissioner, Bank of North Dakota, State Auditor, Board, and Director of Institutions (under SCR 4043). Among other things, the Committee determined that having the State Auditor on the Board and the Public Employees Retirement System created a conflict of interest as it related to the State Auditor's duties. Thus, the State Treasurer was recommended to fill the State Auditor's position on both the Board and the Public Employees Retirement Board. The report of the committee was submitted to the Legislative Council at the biennial meeting of the Council in November 1984. The report was adopted for submission to the Forty-Ninth Legislative Assembly.

Based on the report of the Government Reorganization Committee, the Forty-Ninth Legislative Assembly through Senate Bill 2072 and Senate Concurrent Resolution 4006 provided for a resolution to remove the Auditor from the Board. In a primary election held on June 10, 1986, voters amended the Constitution

by voting to replace the State Auditor with the State Treasurer. 1985 N.D. Sess. Laws, ch. 711, § 1; 1987 N.D. Sess. Laws, ch. 187, § 1; 1987 N.D. Sess. Laws, ch. 775, § 1. Legislation also repealed custodial school fund duties of the State Treasurer. 1987 N.D. Sess. Laws, ch. 189, § 1.

Until 1987, nearly 100 years, the Board had retained its original members. Board membership was only changed after thoughtful consideration through a two-year study and was not met with opposition. Additionally, the shift in membership was the result of a specific concern relating to a conflict of interest with the State Auditor's mission and day-to-day duties.

Conflict of Interest

SCR 4007 is proposing to add the Agriculture Commissioner to the Board, which will create several serious issues that need to be taken into consideration.

First, the Agriculture Commissioner's mission is to serve, advocate, protect and promote agriculture to benefit everyone. While the Department works collaboratively with the North Dakota Department of Agriculture on issues relating to the agriculture community, the Board's mission is unique and requires the Board to prudently and professionally manage assets of the permanent trusts in order to preserve the purchasing power of the funds, maintain stable distributions to fund beneficiaries, and manage all other assets and programs entrusted to the Board in accordance with the North Dakota Constitution and applicable state law.

Oklahoma is the one state in the nation where the Agriculture Secretary is on the land board and it consistently experiences conflicts of interest issues. These conflicts of interest have led to litigation and intervention by the Oklahoma Supreme Court due to the Agriculture Secretary directing the land commissioner and influencing the land board to drop rental rates and loans to a below market value. While this benefits the constituents of the Agriculture Secretary, it does not protect the interests of the trusts.

The Board serves as a trustee and must act in the best interests of the trust beneficiaries to manage their assets; the Board is a voice for those trusts. The sponsors of this bill, the agriculture associations, and the Agriculture Commissioner have all stated the intention of placing the Agriculture Commissioner on the Board is to protect the interests of the agriculture community, not to protect the assets of the trust. The agriculture associations all testified in support of adding the Agriculture Commissioner to the Board, not to enhance the assets of the trusts but to provide a voice on the Board that is specific to their needs. This could create a conflict of interest between what the agriculture community is requesting of the Agriculture Commissioner and what is in the best interest of the trusts.

Second, the placement of the Agriculture Commissioner on the Board places the entire North Dakota Industrial Commission (NDIC) on the Board. The NDIC was created by the Legislature in 1919 to conduct and manage, on behalf of the State, certain utilities, industries, enterprises, and business projects established by state law. The members of the NDIC are the Governor, the Attorney General, and the Agriculture Commissioner. The NDIC Oil and Gas Division regulates the drilling and production of oil and gas in North Dakota. Its mission is to encourage and promote the development, production, and utilization of oil and gas in the state in such a manner as will prevent waste, maximize economic recovery, and fully protect the correlative rights of all owners to the end that the landowners, the royalty owners, the producers, and the general public realize the greatest possible good from these vital natural resources.

There are significant overlaps in topics and information relating to the NDIC Oil and Gas Division that could pose sincere conflicts of interest between the Board and the NDIC. Placing the Agriculture Commissioner, and subsequently nesting the NDIC within the Board, creates both the appearance and the opportunity to have Board members influenced by conflicting responsibilities.

There is already a quorum of the NDIC on the Board; however, the Board contains three additional members who are not part of the NDIC who impact the vote and hold a majority of the Board. The addition of the Agriculture Commissioner poses the opportunity in voting power for the NDIC to sway the vote on the Board, potentially not protecting the assets of the trusts.

Third, the NDIC oversees the Bank of North Dakota (BND). The Board has the fiduciary responsibility of administering five loan programs. For each of these separate loan programs, there is an agreement with BND to manage the applications and day-to-day functions of the loans. There are currently 71 loans managed through BND and funded by the Board. The separation in duties of the NDIC and Board ensure that there are checks and balances in place for these loan programs. Plus, the Board has several cash accounts at BND held at a minimum to meet our distribution obligations and 309 escrow accounts. Again, ensuring there is a separation of powers and duties between the NDIC and the Board as it relates to the Board's banking minimizes both the appearance of and the opportunity for conflicts of interest.

Decisions made by the NDIC, through Oil and Gas Division, could be in direct conflict with the Board's mission to protect the assets of the trusts, litigation that involves both the NDIC and the Board, and loan programs through BND.

Representation on the Board

Currently, the Board's membership includes the Governor, Attorney General, Secretary of State, Superintendent of Instruction, and the State Treasurer. Each Board member represents all of the constituents of the State, not just one subset.

If the reasoning to add the Agriculture Commissioner is because the Board manages over 700,000 surface acres and generates over \$17 Million in income during a biennium, then an argument could be made that the following additions to the Board should be considered:

Insurance Commissioner – The Board has a direct relationship with the Insurance Commissioner regarding Unclaimed Property. On average, the Board receives 1414 insurance reports, worth nearly \$5 Million, in a given biennium and it is the responsibility of the Insurance Commissioner to represent the citizens of North Dakota to ensure their interests are safeguarded, to ensure there is a competitive insurance market, and to promote a healthy and vibrant marketplace for the good of the consumer.

Tax Commissioner – The Tax Commissioner has a mission to fairly and effectively administer the tax laws of North Dakota. Some of those tax laws, specifically those that relate to the taxes that fund the CSTF, have a significant impact on the Board.

Tribal Representation – The Department currently manages 31,583 surface acres and 192,610 mineral acres within the boundaries of the reservations.

Representation from the sportsmen groups – According to North Dakota Game and Fish, the State issues 99,356 hunting licenses each year; many of those hunters hunt on lands managed by the Board. Additionally, the North Dakota Wildlife Federation states there are 116,000 sportsmen in the State and they provide \$222 Million to our economy.

Representation from conservation groups – There are over seven conservation groups located in the State that promote the sustainable use of natural resources, promote and enhance the outdoors, and protect the environment.

Commerce Commissioner – The Commerce Department works to improve the quality of life for North Dakota citizens by leading efforts to attract, train and expand wealth. In these efforts, the Commerce Department engages with businesses throughout the State. Through the Department's Unclaimed Property Division, the Board interacts and engages with every business in the State and receives nearly 6,000 reports each biennium and nearly \$30M in funds whose interest benefits the CSTF.

Petroleum Industry – The petroleum industry has an interest in the 2.6 million mineral acres managed by the Board and generates billions of dollars each biennium.

Wind Industry – The wind industry has 14 towers, generating \$200,000 annually in revenue for the trusts.

Coal Industry – The coal industry has been involved with the Board since statehood. Over the past decade, over \$35 Million in revenue has been generated for the trusts through the mining of coal.

University Systems – The Board manages 12 trusts that benefit the University system totaling \$1.5 Billion.

The Board and Commissioner communicate with ALL of the industries and officials listed above. Stakeholders regularly bring forth issues to be addressed by the Board. It is the responsibility of every agency leader to work collaboratively across state government (both elected and non-elected leaders), with our stakeholders and constituents to ensure necessary communications and voices are heard. Placing the voice of one stakeholder on the Board creates an imbalance. In summary, the Board opposes this bill because it (1) creates a conflict of interest relating to the mission of the Agriculture Commissioner and the Board, (2) it places the entire NDIC within the Board, and (3) it places the voice of one stakeholder on the Board without consideration of all our stakeholders.

I look forward to working with the committee on this issue and would be happy to answer any questions.