



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

Senate Concurrent Resolution 4007

**Senate Government and Veterans Affairs Committee
February 4, 2021**

Chairman Vedaa and members of the Senate 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 on 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

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.

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 System. 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 49th Legislative Assembly.

Based on the report of the Government Reorganization Committee, in the 49th Legislative Assembly Senate Bill 2072 and Senate Concurrent Resolution 4005 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. S. L. 1987, Ch. 187. Legislation also repealed custodial school fund duties of the State Treasurer. S. L. 1987, Ch. 189.

Until 1986, the Board had retained its original members - nearly 100 years. 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 as it related to a conflict of interest with the State Auditor's mission and day-to-day duties.

SCR 4007 is proposing the removal of the State Treasurer and replacing that position with the Agriculture Commissioner. The Board believes it is an error to shift the membership by removing the State Treasurer. The Board has a fiduciary duty to all of the assets under management to uphold through administration, investment, monitoring, and distribution of property. This duty requires the Board make careful, good-faith decisions in the best interest of the trusts, independent of undue influence from any party. Removing a key Board member, one whose responsibility is to pursue and administer sound financial practices and programs benefiting the all of the citizens of North Dakota could have serious unintended consequences. Of those states who have Land Boards, all have a member whose day-to-day responsibility is based in finance (Treasurer, State Controller, Commissioner of Securities, State Auditor). Removal of this key role creates a void on the Board.

Placing the Agriculture Commissioner on the Board creates 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. In the one state in the nation where the Agriculture Secretary is on the land board, there are consistently issues with conflicts of interest. 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.

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 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 and the 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 will 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.

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 relating to 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 the conflict of interest that can occur.

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

In summary, the Board opposes this bill because it (1) removes a key member from the Board who provides financial expertise relating to the significant responsibility of managing the assets of the Board, (2) creates a conflict of interest relating to the mission of the Agriculture Commissioner and the Board, and (3) it places the entire NDIC within the Board.

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