

NORTH DAKOTA LEGISLATIVE COUNCIL

Minutes of the

AGRICULTURE AND NATURAL RESOURCES COMMITTEE

Thursday, September 15, 2005
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, Chuck Damschen, Craig Headland, Scot Kelsh, Joyce Kingsbury, Matthew M. Klein, Mike Norland, Gerald Uglem; Senators Bill L. Bowman, Stanley W. Lyson, David O'Connell, Herb Urlacher

Members absent: Representatives Michael D. Brandenburg, Tom Brusegaard, Rod Froelich, Lyle Hanson, Keith Kempenich, Jon O. Nelson, Eugene Nicholas, Dorvan Solberg; Senator Joel C. Heitkamp

Others present: See Appendix A

Senator Aaron Krauter, a member of the Legislative Council, was also in attendance.

Chairman Pollert recognized Mr. John D. Olsrud, Director, Legislative Council, who reviewed the [Supplementary Rules of Operation and Procedure of the North Dakota Legislative Council](#).

Chairman Pollert addressed the committee. He said the Legislative Council had assigned three studies to the committee. He said the committee has been assigned a study of utilization of the state's abundant energy resources to attract energy-intensive economic projects to the state, railroad fuel surcharges, and reserved water rights. In addition, he said, the Legislative Council has assigned responsibility for overview of the Garrison Diversion Project and related matters and any necessary discussions with adjacent states on water-related topics, reception of a report from the Game and Fish Department before July 1, 2006, regarding the department's findings on its assessment of the status of mountain lions in North Dakota, and reception of a report from the Agriculture Commissioner in November 2005 and June 2006 regarding all notifications and requests for assistance by individuals who believe local weed boards have not eradicated or controlled noxious weeds satisfactorily. Also, he said, the committee will receive a report from Dr. Ken Grafton, Director, Agricultural Experiment Station, regarding grain quality issues and an overview of agricultural research activities.

ENERGY-INTENSIVE ECONOMIC DEVELOPMENT STUDY

At the request of Chairman Pollert, committee counsel reviewed a memorandum entitled [Energy Resource Utilization Study - Background Memorandum](#).

Chairman Pollert recognized Representative Damschen. Representative Damschen said if North Dakota is not able to export its excess power, perhaps the state can attract businesses to use that power in state. He said that is the impetus for the study.

At the request of Chairman Pollert, Mr. Shane Goettle, Deputy Commissioner, Department of Commerce, addressed the committee. A copy of his written comments is attached as Appendix B. He reviewed the department's economic development efforts, focusing on the recruitment and development of large energy-using businesses.

Chairman Pollert recognized Ms. Linda Butts, Director, Economic Development and Finance Division, Department of Commerce. A copy of her written comments is attached as Appendix C. She discussed the work of the Department of Commerce regarding the state's energy resources, both fossil and renewable.

In response to a question from Senator Bowman, Ms. Butts said the department is currently conducting a business incentive and tax study, including information on how North Dakota's business incentives and taxes compare with other states.

In response to a further question from Senator Bowman, Ms. Butts said there are several different ways in which the Department of Commerce may become involved in locating a new business in North Dakota. Sometimes, she said, a site selector will approach the department requesting information on available options. Secondly, she said, the department assists agricultural producers in the development of value-added agricultural projects, doing everything from identifying available economic incentives to tax information. However, she said, the department does not get involved in equity fund drives for value-added

agricultural processing projects. She said the department also markets the economic climate of North Dakota to out-of-state entities looking to relocate their operations.

In response to a question from Representative Pollert, Ms. Butts said that including the two 50-million gallon ethanol plants that have announced their construction and a 100-million gallon ethanol plant that is poised to make an announcement, the state produces enough corn to feed two or three additional 50-million gallon ethanol plants in the state.

Chairman Pollert recognized Mr. Orlin Hanson, Executive Director, North Central Wind Energy, Inc. A copy of Mr. Hanson's written comments is attached as Appendix D, a map of North Dakota's wind resources is attached as Appendix E, a wind resource summary for the Loraine site is attached as Appendix F, a wind resource summary for the Renville corner site is attached as Appendix G, and a wind resource summary for the Mohall site is attached as Appendix H. Mr. Hanson discussed the efforts of North Central Wind Energy, Inc., and the Renville County Job Development Authority to develop the area's wind resources.

Chairman Pollert recognized Mr. Cory Fong, Tax Commissioner. Mr. Fong discussed tax incentives for businesses and for solar, wind, and geothermal devices. He distributed several brochures prepared by the Tax Department describing these tax incentives which are on file in the Legislative Council office. He said the Tax Department is available to assist the committee in its study of energy-intensive economic development in any way it can.

In response to a question from Representative Pollert, Mr. Fong said the legislation that reduced the assessed value for wind turbines was viewed by the Department of Commerce as a short-term measure to provide an incentive to the wind industry. In visiting with wind development proponents, he said, it appears that a more effective incentive would be a production tax credit as opposed to property tax or sales tax relief.

RAILROAD FUEL SURCHARGES STUDY

At the request of Chairman Pollert, committee counsel reviewed a memorandum entitled [*Railroad Fuel Surcharges Study - Background Memorandum*](#).

Chairman Pollert recognized Mr. Steve Strege, Executive Vice President, North Dakota Grain Dealers Association. A copy of Mr. Strege's written comments is attached as Appendix I. Mr. Strege also distributed a report prepared by Smith Barney brokerage, a subsidiary of CitiGroup, concerning fuel hedge and surcharge impacts on the air freight and surface transportation industry, which is attached as Appendix J, and a table of Burlington Northern Santa Fe (BNSF) Railway fuel surcharges prepared by the Grain Dealers Association, a copy of which is attached as Appendix K. Mr. Strege discussed the

issue of railroad fuel surcharges and their impact on North Dakota grain shippers and agricultural producers.

In response to a question from Senator Krauter, Mr. Strege said the new mileage-based fuel surcharge system being implemented by Burlington Northern Santa Fe Railway on January 1, 2006, is based on highway miles not rail miles. He said the system is based on the Rand McNally household goods movers index, which can be accessed via the Internet. However, he said, coal is still shipped based upon rail miles.

In response to a question from Representative Klein, Mr. Strege said Burlington Northern Santa Fe Railway is the only railroad switching to a mileage-based fuel surcharge program. However, he said, fuel costs were reflected in rail rate increases implemented by the Canadian Pacific Railway and thus a greater portion of its fuel costs are included in its shipping rates rather than a separate fuel surcharge.

Chairman Pollert recognized Mr. Brian Sweeney, Burlington Northern Santa Fe Railway Company. A copy of Mr. Sweeney's written comments is attached as Appendix L. Mr. Sweeney discussed railroad fuel surcharges and Burlington Northern Santa Fe's fuel surcharge program. In addition to his comments and in response to earlier comments, Mr. Sweeney said the BNSF Railway is basing the fuel surcharge on highway miles rather than rail miles because highway miles are readily accessible and highway miles are a commonly used barometer. He said the fuel surcharge implemented by the Canadian Pacific Railway is higher but less visible because a greater portion of its fuel costs are included in the shipping rate. He said BNSF Railway is not making money on its fuel surcharge and only recovers approximately one-half of its increased fuel costs through the fuel surcharge. He said the remaining increased fuel costs are recovered by the railroad through its hedging program.

Concerning the availability of railcars, Mr. Sweeney said Burlington Northern Santa Fe Railway offered more cars than it could deliver last year and was criticized as a result. In response to this criticism, he said, the railroad only offered the number of railcars it was confident it could deliver this year which resulted in fewer railcars being available. He said some railcars are sold on the secondary market but BNSF Railway does not realize any profit or gain from the sales of these cars which are conducted by third parties.

Concerning unit trains, Mr. Sweeney said Burlington Northern Santa Fe Railway is not trying to force grain shippers to utilize only 110-car unit trains. He said the development of large unit trains is in response to consolidation of the elevator industry and was first implemented by the Union Pacific Railroad. He said the market is demanding larger trains because of fewer and larger grain shipping facilities.

Concerning rail rates, Mr. Sweeney said current rates are within a few cents of rates charged by the railroad in 1981 in constant dollars. He said the railroad has been able to keep its rates the same based on constant dollars because of efficiencies implemented by the railroad, reduced crew sizes, high-capacity cars, and other steps. He said the BNSF Railway has a large presence in North Dakota and employs 1,700 people in the state. He said the railroad has made \$330 million in capital improvements in the state since 1996. He said the railroad has invested \$4 billion in new locomotives in recent years, \$2.8 billion in railcars, and \$420 million in recent years in high-capacity railcars. He said the railroad is a capital-intensive industry and incurs large operation and maintenance costs on its infrastructure.

Chairman Pollert recognized Mr. Ron Hefta, Manager, Falkirk Farmers Elevator. Mr. Hefta said the major problem with the railway industry is that there are too few players that are interrelated with each other and thus there is not sufficient competition to keep rates reasonable. Another recent development that is negatively affecting his elevator, he said, is increased utilization of 110-car unit trains which are later "exploded." He said "exploded" means 110-car trains are loaded in North Dakota and subsequently are broken apart elsewhere in the rail system. He said this procedure eliminates markets to which 25- and 52-car trains had exclusive access in the past.

Chairman Pollert recognized Mr. John Mittleider, North Dakota Farm Bureau. Mr. Mittleider said shipping rates in North Dakota are some of the highest, if not the highest, in the United States. He said these high shipping rates make North Dakota less competitive in agricultural commodity markets and reduce the income of the state's agricultural producers. He said the North Dakota Farm Bureau estimates that Burlington Northern Santa Fe Railway overcharged North Dakota producers approximately \$8 million in 2004 and the Canadian Pacific Railway overcharged North Dakota producers approximately \$2.5 million in 2004, for a total of \$10.5 million in fuel overcharges.

Chairman Pollert recognized Mr. Woody Barth, North Dakota Farmers Union. A copy of Mr. Barth's written comments is attached as Appendix M. He discussed rail fuel surcharges.

Chairman Pollert recognized Mr. Dan Wogsland, Executive Director, North Dakota Grain Growers Association and United States Durum Growers Association. Mr. Wogsland said increased fuel and energy costs are having a significant impact on North Dakota's agricultural producers. He said the North Dakota Grain Growers Association and the United States Durum Growers Association stand ready to assist the committee in its study of railroad fuel surcharges.

RESERVED WATER RIGHTS STUDY

At the request of Chairman Pollert, committee counsel reviewed a memorandum entitled [Reserved Water Rights Study - Background Memorandum](#).

Chairman Pollert recognized Mr. Robert Shaver, Director, Water Appropriations Division, State Water Commission. A copy of Mr. Shaver's comments, which were prepared by Mr. Dale L. Frink, State Engineer, is attached as Appendix N. Mr. Shaver discussed quantification of Indian and federal reserved water rights.

Chairman Pollert recognized Mr. Jon Patch, State Water Commission. Mr. Patch referred to a regional map of the Turtle Mountains showing the Turtle Mountain Band of Chippewa Indians Reservation, the Shell Valley aquifer, and tribal well locations, a copy of which is attached as Appendix O. He also referred to a map of the Shell Valley aquifer showing the water permit locations for and the order of priority of water permits for the aquifer, a copy of which is attached as Appendix P.

In response to a question from Senator Bowman, Mr. Patch said the first criteria that the State Engineer uses in issuing a water permit is that the granting of the permit will not cause any undo harm to any prior appropriator.

In response to a question from Senator O'Connell, Mr. Patch said water permits are valid in perpetuity. However, he said, there is a provision in state law that if a water permit is unused for a period of three consecutive years, the permit is deemed abandoned and the water right is forfeited.

In response to a question from Representative Bernstein, Mr. Patch said if a water source becomes insufficient to supply existing permitted uses, then junior appropriators with the least seniority must desist from pumping or diverting water until the senior appropriators are satisfied. For this reason, he said, the State Water Commission is conservative in issuing permits and defers issuance of permits pending a determination that there is sufficient water to satisfy the permit as well as senior appropriators.

In response to a question from Senator Urlacher, Mr. Patch said if two water permits are pending, a permit for domestic use will have priority over a permit for irrigation or other uses. However, he said, a prior permit for irrigation has priority over a subsequent permit for domestic use under the prior appropriation system.

In response to a question from Senator Bowman, Mr. Frink said the impetus for the study was an overture from the Turtle Mountain Band of Chippewa Indians to the State Engineer's office to quantify the reserved water rights of the tribe. He said the State Engineer's office agrees that all surface water on the reservation is reserved for the tribe. However, he said, one issue that is of first impression in North Dakota is whether the tribe has a reserved water right in off-reservation subsurface water. He said this

issue is important for North Dakota because of other water users with existing permits in the Shell Valley aquifer. If it is determined that the tribe has a reserved right to water in the Shell Valley aquifer, the tribe's priority date would precede any existing permits in the aquifer and thus the recognition of reserved water rights may detrimentally affect existing water permits.

In response to a question from Representative Bernstein, Mr. Frink said the date of priority of an Indian reserved water right is the date the reservation was established. He said the Turtle Mountain Band of Chippewa Indians Reservation was established before any of the permits were issued for the Shell Valley aquifer.

Chairman Pollert recognized Mr. Thomas D. Davis, Water Resource Director, Turtle Mountain Band of Chippewa Indians. A copy of Mr. Davis' written comments is attached as Appendix Q. Mr. Davis discussed Indian reserved water rights.

Chairman Pollert recognized Mr. Gene Laducer, Tribal Water Planner, Turtle Mountain Band of Chippewa Indians. He said the main reason the Turtle Mountain Band of Chippewa Indians would like to quantify its reserved water rights is to ensure the availability of water for the reservation and to protect the resource.

In response to a question from Senator Lyson, Mr. Frink said North Dakota is a prior appropriation state with the date of priority measured from the date the appropriator obtains a permit from the State Engineer. Thus, he said, it is conceivable that an irrigator may have priority over a municipal or domestic user. However, he said, cities have the power of eminent domain and can condemn or purchase the senior irrigator's water right and obtain water in that matter.

In response to a question from Senator Bowman, Mr. Frink said if a domestic water user were to receive priority over a prior appropriator, it would deter appropriators such as irrigators, manufacturers, and industrial users from making investments in water supply systems because that investment would be worthless if that appropriator lost its priority to a subsequent user. In addition, he said, in North Dakota most cities and municipalities have early priority dates and if there is a water shortage, junior appropriators would have to cease appropriating water before the city or municipality would be affected.

Chairman Pollert recognized Mr. Everett J. Iron Eyes, Sr., Water Administrator, Standing Rock Sioux Tribe. Mr. Iron Eyes distributed a letter from Mr. Charles W. Murphy, Chairman, Standing Rock Sioux Tribe, discussing the position and policy of the tribe to the title, use, conservation, administration, and development of its reserved and aboriginal water rights in the Missouri River and its tributaries. A copy of this document is attached as Appendix R.

GRAIN QUALITY ISSUES

Chairman Pollert recognized Dr. Grafton who discussed fusarium head blight (scab) and its impact on North Dakota wheat producers. A copy of Dr. Grafton's report is attached as Appendix S, a table showing the precipitation area for the Northern Great Plains area is attached as Appendix T, and a document describing the economic damages from scab in North Dakota is attached as Appendix U.

In response to a question from Representative Pollert, Dr. Grafton said there are new fungicides being developed that are more effective against wheat scab than Folicure. However, he emphasized the key to controlling fusarium head blight is the timing of the fungicide application.

In response to a further question from Representative Pollert, Dr. Grafton said the two biggest obstacles to finding a solution to the problems posed by fusarium head blight are technical support and the availability of sufficient greenhouse space.

STAFF DIRECTIVES

Senator Bowman requested that the Legislative Council staff compile a list of high-energy use companies in North Dakota and that representatives of these companies or industries be invited to appear at a future meeting.

Senator Urlacher requested that the Legislative Council staff work with the Department of Commerce to compile a comparison of economic development incentives available to energy-intensive businesses willing to relocate in North Dakota with those offered by nearby states.

Representative Damschen requested that the Legislative Council staff arrange for presentations by representatives of the state's energy companies on incentives they provide to bring energy-intensive businesses into the state.

Representative Pollert requested that the Legislative Council staff arrange for representatives of the Industrial Commission to report on the implementation of the transmission authority legislation enacted by the Legislative Assembly in 2005. He also requested that the Legislative Council staff provide at a future meeting information concerning the recently enacted federal energy bill.

Senator Krauter requested information on which federal agency, if any, has authority to regulate the secondary railcar market.

Senator Krauter requested that the Public Service Commission be requested to provide an update on the rail rate case. Senator Krauter suggested that the Legislative Council staff work with the North Dakota Grain Dealers Association to arrange presentations by elevator operators who may be adversely affected by railroad fuel surcharges.

Chairman Pollert requested that the Legislative Council staff work with the State Engineer's office to develop a matrix of the prior appropriation states that

have established procedures to negotiate Indian reserved water rights showing the method that each state uses to conduct negotiations.

Representative Pollert requested that the Legislative Council staff invite representatives of the North Dakota Water Users Association, the North Dakota Water Resource Districts Association, and the North Dakota Rural Water Systems Association to appear at a future meeting to discuss the issue of Indian reserved water rights.

Representative Pollert requested that the Legislative Council staff provide information on whether a state may enact legislation to compel a railroad to open its rail network to competing railroads.

No further business appearing, Chairman Pollert adjourned the meeting at 3:30 p.m.

Jeffrey N. Nelson
Committee Counsel

[ATTACH:21](#)