

# NORTH DAKOTA LEGISLATIVE COUNCIL

## Minutes of the

### AGRICULTURE COMMITTEE

Wednesday, September 27, 2000  
Roughrider Room, State Capitol  
Bismarck, North Dakota

Representative John M. Warner, Chairman, called the meeting to order at 9:00 a.m.

**Members present:** Representatives John M. Warner, James Boehm, Michael D. Brandenburg, April Fairfield, Rod Froelich, Lyle Hanson, Gil Herbel, James Kerzman, Shirley Meyer, Phillip Mueller, Jon O. Nelson, Eugene Nicholas, Robert E. Nowatzki, Dennis J. Renner, Earl Rennerfeldt, Arlo E. Schmidt, Ray H. Wikenheiser; Senators Meyer Kinnoin, Herb Urlacher

**Members absent:** Representatives Thomas T. Brusegaard, Keith A. Kempenich, Ed Lloyd; Senators Bill L. Bowman, Terry M. Wanzek

**Others present:** See attached appendix

**It was moved by Senator Urlacher, seconded by Representative Herbel, and carried on a voice vote that the minutes of the previous meeting be approved as distributed.**

#### AGRICULTURAL MARKETING STUDY

##### Trade Policy

Committee counsel provided a copy from the North Dakota Governor's office of the agenda for the Governor's office China trade mission. A copy of the agenda is on file in the Legislative Council office.

Mr. Dale R. Miller, Deputy Director, Foreign Agricultural Service, Office of Outreach and Exporter Assistance, provided testimony on the importance of agricultural exports, the Foreign Agricultural Service, United States trade prospects, federal and state partnerships, efforts to support farm income through United States trade policies and export programs and services, and on other collaborating activities. A copy of his testimony is on file in the Legislative Council office.

In response to a question from Representative Schmidt, Mr. Miller said if sanctions were removed, markets of approximately \$500 million per year for all products would be opened to this country.

In response to a question from Representative Warner, Mr. Miller said although logic dictates that Cuba would sell sugar to the United States if the United States could sell grain to Cuba, he does not know if that, in fact, would happen.

In response to a question from Representative Nelson, Mr. Miller said the export enhancement program is not used because it does not have a

significant impact on price and because of the problems it would cause with the European union. He said it does not look like the export enhancement program will be used in the future.

In response to a question from Representative Nelson, Mr. Miller said the export enhancement program is funded, and it is not used.

Representative Rennerfeldt said the export enhancement program was very effective when it was first used.

#### Bill Draft on Antitrust Investigations by the Attorney General

##### Testimony

Committee counsel provided copies of a law review article entitled *Toward an Agrarian Antitrust: A New Direction for Agricultural Law* by Jon Lauck. A copy of the article is on file in the Legislative Council office.

Committee counsel presented a bill draft to remove the requirement that the Attorney General receive district court approval before investigating antitrust violations. He said the bill draft removes subsection 4 of North Dakota Century Code (NDCC) Section 51-08.1-06.

Mr. Cal Rolfson, attorney, American Crop Protection Association, provided testimony in opposition to the bill draft. Mr. Rolfson said present law requires a district court judge acting as an independent, nonpolitical decisionmaker must find reasonable cause before the Attorney General may begin an investigation. He said the bill draft would create a one-man grand jury in the politically elected office of the Attorney General. He said it would remove a protection for individuals from government intrusion. He said the bill draft changes the burden to the accused to prove the investigation is improper.

In response to a question from Representative Nowatzki, Mr. Rolfson said the ability for an entity to appeal the use of investigatory authority remains under the bill draft; however, the individual or business being investigated has to take an affirmative action to stop the investigation.

In response to a question from Representative Rennerfeldt, Mr. Rolfson said the bill draft places too much power with the Attorney General. He said any law that places the power to investigate individuals in

one person gives cause for reflection. He said it is a minor hurdle for the Attorney General to go to court and receive approval from an impartial judge before exercising investigatory authority.

In response to a question from Representative Nelson, Mr. Rolfson said the risks as a result of changing the law outweigh any benefits.

Mr. David Huey, Assistant Attorney General, provided testimony on the bill draft. He said the requirement being removed in the bill draft is unique to this state. He said he was unsure as to why subsection 4 was included, but assumes it came from an uneasiness in giving the Attorney General too much power. He said consumer protection investigations do not need judicial oversight, and there have been no abuses of that power.

In response to a question from Representative Fairfield, Mr. Huey said most states allow the Attorney General to conduct civil investigations without court approval. He said the Attorney General of the United States is not required to get court approval before antitrust investigations.

In response to a question from Representative Schmidt, Mr. Huey said large corporations may have legal departments larger than this state's Attorney General's office. He said it is not the number of attorneys that limits actions in this state; the major factor is the lack of resources.

In response to a question from Representative Mueller, Mr. Huey said subsection 4 does not prevent anything, and he did not want to overstate it as an impediment; however, he said, it is an inconvenience. He said he made the suggestion for the bill draft in response to being questioned as to what could improve the Attorney General's antitrust powers. He said this inconvenience creates a timelag when this state is working with other states in multistate antitrust investigations.

In response to a question from Representative Meyer, Mr. Rolfson said although this bill draft may aid the Attorney General in investigating the meat-packing business through a multistate effort, the bill draft applies to all entities, including individuals being investigated for antitrust violations.

In response to a question from Representative Nelson, Mr. Huey said resources are the primary impediment to this state investigating agribusiness mergers. He said in his opinion there is no substantial merit for subsection 4 to remain as law. He said the Attorney General's office has the institutional protections of being under the control of an elected official. He said historically, the Attorney General's office has a great sensitivity to the citizens of North Dakota. He said the object of the investigation is protected because the court can quash any of the Attorney General's investigatory actions.

## Discussion

Representative Schmidt said the antitrust laws have failed the agricultural producers in this state. He said the agricultural sector has been most hurt by the mergers in business.

Representative Froelich said the bill draft basically takes the power of review from a district court judge and leaves it with an elected official, the Attorney General. He said he trusts the elected officials in this state to do the right thing.

Representative Fairfield said the Attorney General represents the people of North Dakota, and if the bill draft gives more power to the people by taking away a minor protection for big business, then that is a reasonable tradeoff.

## Recommendation

**It was moved by Representative Fairfield, seconded by Representative Kerzman, and carried on a roll call vote that the bill draft relating to the removal of district court approval before investigating antitrust violations be approved and recommended to the Legislative Council.** Representatives Warner, Fairfield, Froelich, Hanson, Kerzman, Meyer, Mueller, Nowatzki, and Schmidt and Senator Kinnoin voted "aye." Representatives Boehm, Brandenburg, Herbel, Nelson, Nicholas, Renner, Rennerfeldt, and Wikenheiser and Senator Urlacher voted "nay."

## Antitrust Appropriation and Fund Bill Draft Testimony

Committee counsel presented a bill draft to create a revolving fund for the enforcement of antitrust laws. He said the bill draft provides for an appropriation of \$500,000. He said attorney's fees and civil penalties would be deposited in the antitrust fund. He said civil penalties do not include damages.

In response to a question from Representative Nowatzki, committee counsel said all money in the antitrust fund would have to be appropriated for it to be spent.

Mr. Huey presented information on the bill draft. He said NDCC Section 54-12-17 creates the Consumer Protection and Antitrust Division. He said the division does not separate for purposes of its budget between consumer protection and antitrust duties. He said consumer protection activities dominate the work of the division. He said under Section 54-12-18, all costs, expenses, and attorney's fees and civil penalties collected by the division regarding any antitrust matter are placed into the Attorney General refund fund. He said this fund has a continuing appropriation; however, any excess funds at the end of each fiscal year are deposited in the general fund. He said the bill draft would allow moneys to stay in the fund at the end of a biennium. He said the bill draft would supersede Section 54-12-18, where there is similar wording.

In response to a question from Representative Mueller, Mr. Huey said it is conceivable, but not probable, that the antitrust fund could get large.

In response to a question from Representative Rennerfeldt, Mr. Huey said the \$500,000 appropriation would not be used as much for hiring people as for litigation expenses. He said litigation is expensive because of the use of expert witnesses, including economists.

### Discussion

Representative Warner said Senator Bowman telephoned before the meeting and said he was in support of the bill draft.

### Recommendation

**It was moved by Representative Kerzman, seconded by Representative Fairfield, and carried on a roll call vote that the bill draft to create a revolving fund for the investigation of antitrust violations be approved and recommended to the Legislative Council.** Representatives Warner, Brandenburg, Fairfield, Froelich, Hanson, Kerzman, Meyer, Mueller, Nelson, Nicholas, Nowatzki, and Schmidt and Senators Kinnoin and Urlacher voted "aye." Representatives Boehm, Herbel, Renner, Rennerfeldt, and Wikenheiser voted "nay."

## Grain Grading Resolution Draft

### Testimony

Committee counsel presented a resolution draft urging Congress to provide for consistent grain grading.

Mr. Tom Wrenn, Field Office Manager, Federal Grain Inspection Service, Grand Forks, provided testimony on official grain grading in the United States. Mr. Wrenn said the operation of the grain grading system within the United States is permissive. A copy of his testimony is on file in the Legislative Council office.

In response to a question from Representative Nowatzki, Mr. Wrenn said there is no mandatory grading within the United States. He said a producer can choose an unofficial laboratory. He said inspection is mandatory for export. He said it would greatly increase costs for there to be a mandatory system put in the United States.

In response to a question from Representative Nicholas, Mr. Wrenn said all samples are kept for three days and may be redone, sent to the federal appeal level, and the board of appeal level to determine if there is a discrepancy due to the grading system. He said there is a random check of the official system to ensure quality. He said the official grain grading system historically has a good track record.

Representative Nelson said the appeal process is not practical because farmers need to quickly determine what to do with their crops.

In response to a question from Representative Nicholas, Mr. Wrenn said the difference between the amount of damage determined by different graders may be attributed to the fact that the submitted sample is not obtained by an official sampler or in a way that ensures the sample is representative of the entire field. He said the damage determination is only for a particular sample, not the entire field.

In response to a question from Representative Nelson, Mr. Wrenn said the uniformity of damage in the field is an issue. He said when, where, and how the sample is taken affects the damage percentage. He said a sample taken in the field at one point may differ from that taken in another point of the field or one taken in the combine or in the bin.

In response to a question from Representative Nicholas, Mr. Ed Stallman, Federal Grain Inspection Service, Grand Forks, said falling numbers test is not a measure of sprout damage; however, there is a correlation between falling numbers and sprout damage. He said the falling numbers test the alpha amylase activity. He said alpha amylase activity changes when sprouting is about to happen. He said alpha amylase changes the gluten strength.

In response to a question from Representative Nicholas, Mr. Stallman said falling numbers is not damage under the official standards; however, in the marketplace a test resulting in low falling numbers means poor gluten strength, which results in bread with holes in it. He said the Federal Grain Inspection Service does not take sides but only determines the numbers as they relate to grain grading. He said what those numbers mean is between the buyer and seller.

In response to a question from Representative Nowatzki, Mr. Stallman said end users are using grain grading to purchase high-quality grain. He said a producer may not be happy with low falling numbers and low prices; however, a consumer would not be happy with large holes in bread because of no gluten strength. He said flour millers need a certain level of falling numbers, and they place that requirement in their purchase contracts.

Representative Nicholas said farmers are disadvantaged by testing. He said crop insurance does not cover the damage, and the farmer cannot sell the grain on the market because of low falling numbers.

In response to a question from Representative Nelson, Mr. Wrenn said the process of doing a damage analysis is a visual and subjective process. He said it takes five years to become an effective analyzer for wheat. He said there are line slides, objective samples, that the analyzer can compare the sample to when there is a question. He said the analysis is done through a standardized procedure including using the same surface with the same light bulbs.

In response to a question from Representative Nowatzki, Mr. Wrenn said there can be different

portions of damage in the same sample test. He said if the variations are within two standard deviations, it is not significant unless there is a pattern showing the deviation to be in one direction. He said if there is a deviation above two standard deviations, then the Federal Grain Inspection Service takes a closer look at the grading process. He said as damage increases, especially sprout damage, variability increases and does not divide out equally.

In response to a question from Representative Renner, Mr. Wrenn said the factors used in the grain grading process, including test weight, moisture, heat damage, total damage, and hard count, are chosen by Congress and effectuated through the rulemaking process. He said a falling numbers test has been recently reviewed, but there was not enough evidence to make it a function of the grading process.

In response to a question from Representative Brandenburg, Mr. Wrenn said the Federal Grain Inspection Service provides input for the changing of grain grading standards. He said crop insurance works with the grain grading standards as written, and the Federal Grain Inspection Service has no input as to crop insurance.

In response to a question from Representative Warner, Mr. Stallman said some varieties of grain are resistant to low falling numbers.

In response to a question from Representative Nelson, Mr. Wrenn said the storing of grain should not change the falling numbers. He said mixing grain with low falling numbers and no sprout damage with good grain ruins good grain.

In response to a question from Representative Meyer, Mr. Wrenn said most grain headed to the South is unloaded according to North Dakota grades. He said some elevators have had problems with elevators in the Pacific Northwest. He said large elevators in the Pacific Northwest use the destination grade. He said there is a tracking system for determining the variability for destination and origin grades. He said the system has not been used for grain going to the Northwest. He said the Federal Grain Inspection Service could do the tracking survey at the request of an elevator and at no cost to the elevator.

### Discussion

Representative Meyer said a constituent that markets to the Pacific Northwest has had grain tested in North Dakota by a federal grain grader, and when the grain reaches the Pacific Northwest, it is always graded at a lower level. She said this causes a huge financial impact to the constituent. She said the resolution suggests a change that would require the origination grade to be the grade used in determining the grade the grain is purchased at.

Representative Schmidt said he has never seen a situation as tough as it is now because of the crop insurance situation.

Representative Nicholas said falling numbers should be correlated with crop damage insurance.

Representative Nowatzki said the problem is that falling numbers test is widely used in the market but is not part of the official grain grading system.

Representative Nowatzki suggested an amendment that would require Congress to provide for "a consistent system of grain grading based upon point-of-origin grain grading," and Representative Warner suggested changing the term "wheat" to "grain."

**It was moved by Representative Nowatzki, seconded by Representative Meyer, and carried on a voice vote that the bill draft be amended to change "wheat" to "grain" and to urge Congress to provide for "a consistent system of grain grading based upon point-of-origin grain grading."**

Representative Nicholas suggested an amendment that would request risk management grades follow commodity credit corporation grades for adjustments for crop insurance purposes.

**It was moved by Representative Nicholas, seconded by Representative Meyer, and carried on a voice vote that the resolution draft be amended to include a clause stating "Whereas, the risk management grade should follow the commodity credit corporation grades for adjustments for crop insurance purposes."**

### Recommendation

**It was moved by Representative Mueller, seconded by Senator Urlacher, and carried on a roll call vote that the resolution draft, as amended, relating to consistent grain grading be approved and recommended to the Legislative Council.** Representatives Warner, Boehm, Brandenburg, Fairfield, Froelich, Hanson, Herbel, Kerzman, Meyer, Mueller, Nelson, Nicholas, Nowatzki, Renner, Rennerfeldt, Schmidt, and Wikenheiser and Senators Kinnoin and Urlacher voted "aye." No negative votes were cast.

### COMMITTEE WRAP-UP

**It was moved by Representative Kerzman, seconded by Representative Nelson, and carried that the chairman and the staff of the Legislative Council be requested to prepare a report and bill drafts recommended by the committee and to present the report and recommended bill drafts to the Legislative Council.**

**It was moved by Representative Nicholas, seconded by Representative Fairfield, and carried that the meeting be adjourned sine die.** Chairman Warner adjourned the meeting sine die at 12:45 p.m.

---

Timothy J. Dawson  
Committee Counsel  
ATTACH:1