MICROFILM DIVIDER

OMB/RECORDS MANAGEMENT DIVISION
SFN 2053 (2/85) 5M

ROLL NUMBER

DESCRIPTION

2040

2005 SENATE NATURAL RESOURCES

SB 2040

2005 SENATE STANDING COMMITTEE MINUTES

BILL/RESOLUTION NO. SB 2040

Senate Natural Resources Committee

❑ Conference Committee

Hearing Date January 6, 2005

Tape Number	Side A	Side B	Meter #
1	X		1.6 -17.2
Committee Clerk Signature	Janet James		

Minutes:

Senator Stanley Lyson, Chairman of the Senate Natural Resources Committee brought the meeting to order.

All members of the committee were present.

Senator Lyson opened the hearing on SB 2040, relating to the notice of release of surface coal mining performance bonds.

Jim Deutsch (2.5), Director of the Reclamation Division of the Public Service Commission testified in support of SB 2040 (See attached testimony).

Senator John Traynor asked for clarification if the present state law is more comprehensive than the federal requirements and if this bill would in fact reduce the state's requirements.

Jim Deutsch confirmed this would make the state law comply with the federal requirements by reducing the number of notifications required.

Senator John Warner (5.3) of District 17 and Chairman of the Natural Resources Interim

Committee testified on SB 2040, encouraging the committee to take affirmative action on the bill.

Jeff Nelson (6.1) Staff Attorney with the Legislative Council who served as the counsel for the Interim committee, testified in neither support or opposition to SB 2040. He relayed the background of the bill as being developed as the result of the study of HCR 3075. The committee undertook a comprehensive review of the coal mining reclamation and bonding procedures and present statutes and developed SB 2040. This bill would reduce the publication of the bond release notification to only the official county newspaper as required by federal law instead of the addition general circulation newspaper as presently required by North Dakota law. Bond release notices to property owners (surface and subsurface) that are presently required would be decreased to follow federal law.

Senator Lyson asked for opposing testimony of SB 2040.

Roger Bailey (11.1) the Executive Director of North Dakota Newspaper Association testified in opposition to SB 2040 stating his organization represents the newspapers of the state along with the public and their right to notification of government activities. The change of notification requirements would have little fiscal impact for both the coal companies and the newspapers, however it is a good idea to keep the present requirements in order to keep the public informed.

Senator Lyson asked for neutral testimony and having none he closed the hearing on SB 2040

Senator Layton Freborg made a motion for a DO PASS of SB 2040.

Senator Traynor second the motion.

A roll call vote of SB 2040 was taken indicating 7 YEAS, 0 NAYS AND 0 ABSENT OR NOT VOTING.

Senator Traynor will carry SB 2040.

Senator Lyson closed the meeting on SB 2040.

Date: 1-6
Roll Call Vote #: 1

2005 SENATE STANDING COMMITTEE ROLL CALL VOTES
BILL/RESOLUTION NO. SB 2040

Senate Senate Natural Resources Committee

☐ Check here for Conference Committee

Legislative Council Amendment Number

Action Taken Do Pass

Motion Made By Fuglestad Seconded By Traynor

Senators	Yes	No	Senators	Yes	No
Senator Stanley Lyson	✓		Senator Michael Every	✓	
Senator Ben Tollefson	✓		Senator Joel Heitkamp	✓	
Senator Layton Freborg	✓				
Senator John Traynor	✓				
Senator Rich Wardner	✓				

Total (Yes) 7 No 0

Absent 0

Floor Assignment Traynor

If the vote is on an amendment, briefly indicate intent:

REPORT OF STANDING COMMITTEE

SB 2040: Natural Resources Committee (Sen. Lyson, Chairman) recommends **DO PASS** (7 YEAS, 0 NAYS, 0 ABSENT AND NOT VOTING). SB 2040 was placed on the Eleventh order on the calendar.

2005 HOUSE NATURAL RESOURCES

SB 2040

2005 HOUSE STANDING COMMITTEE MINUTES

BILL/RESOLUTION NO. SB 2040

House Natural Resources Committee

❑ Conference Committee

Hearing Date February 24, 2005

Tape Number	Side A	Side B	Meter #
1	x		0-928
Committee Clerk Signature	Karen Bonnet		

Minutes:

Chr. Jon O. Nelson: Called the meeting to order and asked clerk to call the roll, Rep. Drovdal absent. The clerk read the bill aloud.

Jeff Nelson, Legislative Council: The interim committee fully reviewed the coal mining industry, the reclamation process, and the bonding requirements and bonding release requirements of current statutory law. **(Written testimony attached-Natural Resources Committee)**

Chr. Nelson: Are there any questions?

Rep. Scot Kelsh: On line 23-24 of page 1, it looks like redundant language.

Jeff Nelson: It is something in current state law that is not required in federal law.

Kelsh: It's redundant in terms of line 22-23, "has sent to all owners of surface rights within the permit area proposed for bond release," then, "all owners of subsurface rights within the permit area ...".

Jeff Nelson: Right.

Chr. Nelson: Are there any further questions? Seeing none, thank you for your testimony. Is there further supporting testimony?

Jim Deutsch, Public Service Commission: (Written testimony attached) We believe the changes proposed will reduce some of the administrative costs associated with bond release for the mining companies, possibly by as much as several hundred dollars on each bond release application.

Chr. Nelson: Are there any questions? Rep. Nottestad, you were on the interim Natural Resource Committee, is this the only bill that was proposed in this bond release?

Rep. Darrell D. Nottestad: As far as I know this was the only one. This is in essence what we talked about and makes good sense.

Chr. Nelson: Is there further supporting testimony? Is there any opposition to SB 2040? Seeing none, I'll close the hearing on SB 2040.

Rep. Nottestad: I move a do pass on SB 2040.

Rep. George J. Keiser: Second.

Chr. Nelson: A motion for do pass has been made and seconded. Committee discussion? Seeing none, Karen call the roll:

Do Pass, Vote:

11-Yeas; 0-Nays; 3-Absent; CARRIER: Nottestad

Date: 2/24/05
Roll Call Vote #: 1

2005 HOUSE STANDING COMMITTEE ROLL CALL VOTES
BILL/RESOLUTION NO. 2040

House NATURAL RESOURCES Committee

☐ Check here for Conference Committee

Legislative Council Amendment Number :

Action Taken : Do Pass

Motion Made By : Nottestad Seconded By : Keiser

Representatives	Yes	No	Representatives	Yes	No
Chairman - Rep. Jon O. Nelson	✓		Rep. Lyle Hanson	✓	
Vice Chairman - Todd Porter	Abs		Rep. Bob Hunskor	✓	
Rep. Dawn Marie Charging	✓		Rep. Scot Kelsh	✓	
Rep. Donald L. Clark	✓		Rep. Dorvan Solberg	✓	
Rep. Duane DeKrey	Abs				
Rep. David Drovdal	Abs				
Rep. Dennis Johnson	✓				
Rep. George J. Keiser	✓				
Rep. Mike Norland	✓				
Rep. Darrell D. Nottestad	✓				

Total (Yes) 11 No 0

Absent 3 - Porter, DeKrey, Drovdal

Floor Assignment Nottestad

If the vote is on an amendment, briefly indicate intent:

REPORT OF STANDING COMMITTEE

SB 2040: Natural Resources Committee (Rep. Nelson, Chairman) recommends **DO PASS** (11 YEAS, 0 NAYS, 3 ABSENT AND NOT VOTING). SB 2040 was placed on the Fourteenth order on the calendar.

2005 TESTIMONY

SB 2040

Senate Bill 2040

Public Service Commission Testimony

Presented by: **Jim Deutsch**
Director, Reclamation Division
Public Service Commission

Before: **Senate Natural Resources Committee**
Senator Stanley W. Lyson, Chairman

Date: **January 6, 2005**

Mr. Chairman and committee members, I am Jim Deutsch, Director of the Public Service Commission's (Commission) Reclamation Division. I appear on behalf of the Commission in support of SB 2040.

SB 2040 is legislation introduced by the interim Natural Resources Committee that studied state and federal statutory and regulatory policies affecting final bond release on reclaimed coal mined lands in North Dakota. The changes proposed to North Dakota's reclamation law by SB 2040 were suggested by the Commission following the preparation of a side-by-side comparison of the bond release provisions in the state and federal reclamation laws. North Dakota's reclamation law needs to be consistent with the federal Surface Mining Control and Reclamation Act of 1977 in order for the State to administer the coal regulatory program.

The two changes proposed by SB 2040 reduce some of the notice requirements associated with bond release applications. The first change will delete the requirement that mining companies publish newspaper notices in daily newspapers of general circulation in the mine's locality. If this change is made, mining companies must continue to publish bond release notices in the official county newspaper where the bond release tract is located. The notice must be published once a week for four consecutive weeks. The federal law requires that a newspaper notice be published in a newspaper of general circulation near the mine

and publication of the notice in the official county newspaper will be consistent with that provision.

The second change proposed by SB 2040 will delete the provision that requires mining companies to send bond release notices to subsurface owners of tracts proposed for bond release. By the time any stage of bond release is requested, coal removal from the tract will be complete and any subsurface owner who doesn't have a surface interest will not be affected by the reclamation work. If this change is made, mining companies must still send notices to the surface owners and adjoining property owners and this is consistent with language in the federal reclamation law.

The Commission urges a Do Pass recommendation for SB 2040.

NATURAL RESOURCES COMMITTEE

The Natural Resources Committee was assigned two studies. House Concurrent Resolution No. 3075 directed a study of federal and state statutory and regulatory policies that discourage or prevent final bond release applications from being filed and Public Service Commission regulatory policies that could be implemented to encourage flexibility in proving reclamation success and reducing administrative and regulatory burdens necessary for bond release applications and actions being undertaken by the mining companies to achieve final bond release. Senate Concurrent Resolution No. 4022 directed a study of proposed legislation permitting the Game and Fish Department to coordinate with game and fish programs conducted by the tribal governments of the federally recognized Indian tribes in North Dakota. The Legislative Council also assigned responsibility for overview of the Garrison Diversion Unit Project and related matters and any necessary discussions with adjacent states on water-related topics to the committee.

Committee members were Representatives John Warner (Chairman), Arden C. Anderson, LeRoy G. Bernstein, Tracy Boe, Glen Froseth, Lyle Hanson, Gil Herbel, Scot Kelsh, Darrell D. Nottestad, Todd Porter, and Dorvan Solberg and Senators Bill L. Bowman, Robert S. Erbele, Ronald Nichols, and Michael Polovitz.

The committee submitted this report to the Legislative Council at the biennial meeting of the Council in November 2004. The Council accepted the report for submission to the 59th Legislative Assembly.

RELEASE OF COAL MINE RECLAMATION PERFORMANCE BOND STUDY

Coal Mining, Reclamation, and Bonding

North Dakota's coal resources are in the form of lignite–a low-grade, low-sulfur coal. Lignite was first mined in North Dakota by underground methods. This type of mining was gradually replaced by the safer and more economical method of mining called surface or strip mining, and all lignite mined in North Dakota since 1960 has been recovered by surface mining. There are six active coal mines in North Dakota. There are four large mines and two small mines that produce leonardite. The large mines are BNI Coal, Ltd.'s Center Mine, Dakota Westmoreland Corporation's Beulah Mine, Coteau Properties Company's Freedom Mine, and Falkirk Mining Company's Falkirk Mine. The Coteau Properties Company and Falkirk Mining Company are subsidiaries of The North American Coal Corporation. In addition to these mines, there are five other mines that have closed and remain permitted and bonded for reclamation purposes. These are the Gascoyne, Glenharold, Indian Head, Larson, and Royal Oak Mines.

Coal plays an important part in North Dakota's economy. The production for fiscal year 2001 was 30,550,000 tons, compared to 16,750,000 tons in 1980 and 5,000,000 tons in 1970. Most of this coal is burned to generate electricity and for conversion to synthetic natural gas.

Surface coal mining operators in North Dakota must supply a performance bond before the Public Service Commission will issue a mining permit. The reason for requiring a performance bond is to ensure that land disturbed for coal mining will be reclaimed at no cost to the state or to the public in the event an operator's mining permit is revoked or the operator goes out of business. The commission accepts several kinds of performance bonds, including surety, collateral, self-bonding, or a combination of these types. Following removal of the coal resource, the land must be returned to its premined level of productivity before the mining operator will be released from liability. This is usually accomplished through proof of successful revegetation of the mined lands, and the revegetation requirement must be satisfied before the mine operator or permittee will be relieved of that person's legal liability to reclaim the land.

Since July 1, 1975, North Dakota law has required that reclaimed lands designated for agricultural purposes be restored to a level of productivity equal to or greater than that which existed before mining. Since July 1, 1979, all land disturbed for coal mining is subject to a 10-year period of responsibility for successful revegetation.

The performance bond normally is released incrementally. Up to 40 percent of the bond may be released on disturbed acreage following the backfilling, grading, and establishment of drainage control on the acreage. Another 20 percent may be released following the respreading of subsoil and topsoil. An additional amount of bond may be released once vegetation has been established, but enough bond must be retained to cover the costs of reseeding or minor erosion control during the 10-year period of responsibility for successful revegetation should that be necessary. When the mine operator has successfully completed all requirements of the regulatory program and has completed the 10-year period of responsibility, the Public Service Commission may release the remaining performance bond. Mining companies must show that lands reclaimed to agricultural use produce at least as much as the land did before mining.

Surface mining and reclamation operations are governed by North Dakota Century Code (NDCC) Chapter 38-14.1. Section 38-14.1-01 provides the declaration of findings and intent and provides that the Legislative Assembly finds and declares that many surface coal mining operations may result in disturbances of surface areas that adversely affect the public welfare by diminishing the utility of land for commercial, industrial, residential, cultural, educational, scientific, recreational, agricultural, and forestry purposes, by causing erosion, by polluting the water, by destroying fish and wildlife habitats, by impairing natural beauty, by damaging the property of citizens, by creating hazards dangerous to life and property, by degrading the quality of life in local

communities, and by counteracting governmental programs and efforts to conserve soil, water, other natural resources, and cultural resources. This section provides that the expansion of coal mining to meet the [redacted]s energy needs makes even more urgent the e[redacted]ishment of appropriate standards to minimize damage to the environment and to productivity of the soil and to protect the health and safety of the public. This section states that surface mining and reclamation technology as now developed require effective and reasonable regulation of surface coal mining operations in accordance with the requirements of Chapter 38-14.1 to minimize so far as practicable the adverse social, economic, and environmental effects of such mining operations. This section provides further that surface coal mining operations contribute to the economic well-being, security, and general welfare of the state and should be conducted in an environmentally sound manner and that surface coal mining and reclamation operations should be so conducted as to aid in maintaining and improving the tax base, to provide for the conservation, development, management, and appropriate use of all the natural resources of affected areas for compatible multiple purposes, and to ensure the restoration of affected lands designated for agricultural purposes to the level of productivity equal to or greater than that which existed in the permit area prior to mining. Finally, this section provides that warrantless inspections are necessary in this state to ensure effective enforcement of surface coal mining and reclamation operation [redacted]ements.

[redacted]rth Dakota Century Code Section 38-14.1-10 provides that it is unlawful for any operator to engage in surface coal mining operations without first obtaining from the commission a permit to do so. Section 38-14.1-16 requires a performance bond and establishes the amount and sufficiency of the required surety. This section provides that as part of a surface coal mining and reclamation permit application, the permit applicant must file with the Public Service Commission, on a form prescribed and furnished by the commission, a bond for performance payable to the state of North Dakota and conditioned upon faithful performance of all the requirements of Chapter 38-14.1 and the requirements of all rules adopted pursuant to Chapter 38-14.1 and all permit terms and conditions. The commission is required to set the bond amount sufficient to complete the reclamation plan in the event of forfeiture. The bond for the permit area must be at least $10,000. The bond must cover that area of land within the permit area upon which the permittee will initiate and conduct surface coal mining and reclamation operations for the ensuing year. Before initiating and conducting succeeding increments of surface coal mining and reclamation operations within the permit area, the permittee must file with the commission an additional bond or bonds to cover the increments in accordance with Section 38-14.1-16. Liability under [redacted]nd, subject to allowable releases, is for the dura[redacted] the surface coal mining reclamation operation and for a period coincident with the permittee's responsibility for revegetation requirements and until such time as the lands included in the surface coal mining operation have been approved and released by the commission. The bond must be executed by the permit applicant and a corporate surety licensed to do business in North Dakota, except that the permit applicant may elect to deposit cash, negotiable bonds of the United States or of North Dakota, or negotiable certificates of deposit of any bank organized or transacting business in the state. The cash deposit or market value of the securities must be equal to or greater than the amount of the bond required for the bonded area. Cash or securities deposited must be deposited upon the same terms as the terms upon which surety bonds may be deposited. The securities are security for the repayment of the negotiable certificate of deposit. A bond filed for areas not yet affected by surface coal mining and reclamation operations may not be canceled by the surety unless it gives not less than 90 days' notice to the commission. For lands on which surface coal mining and reclamation operations are being conducted, the bond may not be canceled by the surety unless a substitute surety assuming liability from the initiation of the operations is obtained and is approved by the commission. If the corporate surety's license is suspended or revoked, the permittee, after notice from the commission, must provide a substitute performance bond. If the permittee fails to make substitution within 30 days, the commission may suspend the permit. If substitution is not made within 90 days, the commission is required to suspend the permit. The commission may accept the bond of the permit applicant itself without separate surety when a permit applicant demonstrates to the satisfaction of the commission the existence of a suitable agent to receive service of process and a history of financial solvency and continuous operation sufficient for authorization to self-insure or bond such amount. The amount of the bond or deposit required and the terms of each acceptance of the permit applicant's bond must be adjusted by the commission from time to time as acreages affected by surface coal mining operations are increased or decreased or if the cost of future reclamation changes. The amount of any forfeiture of the bond or security must be the amount prescribed in the permit for each acre or portion thereof on which surface coal mining and reclamation operations are being conducted.

North Dakota Century Code Section 38-14.1-17 governs the release of performance bonds. A permittee may file a request with the Public Service Commission for the release of all or part of a performance bond or deposit furnished subsequent to July 1, 1975. As part of any bond release application, the permittee must submit within 30 days after filing the request a copy of an advertisement placed at least once a week for four successive weeks in the official newspaper of each county in which the surface coal mining operation is located and in other daily newspapers of general circulation in the locality of the surface coal mining operation. The advertisement must contain notification of the precise location and the number of acres of land affected, the permit and the date approved, the amount of the bond filed and the portion sought to be released, the type and approximate

dates of reclamation work performed and a description of the results achieved as they relate to the permittee's approved reclamation plan, and the right to file written objections and to request a public hearing or an informal conference. The permittee is also required to submit copies of letters that the permittee has sent to all owners of surface rights within the permit area proposed for bond release, to all owners of subsurface rights within the permit area proposed for bond release, to adjoining property owners, to certain state agencies, to heads of local governmental bodies, including the county commissioners and mayors of municipalities, to planning agencies, to sewage and water treatment authorities, and to water companies in the locality in which the surface coal mining and reclamation operations took place, notifying them of the permittee's intention to seek release from the bond. The letters must also contain notice of the right to file written objections and request an informal conference or a public hearing.

North Dakota Century Code Section 38-14.1-17 provides further that a person having a valid legal interest that is or may be adversely affected by release of the bond or the responsible officer or head of any state or local governmental agency that has jurisdiction by law or special expertise with respect to any environmental, social, or economic impact involved in the surface coal mining operation, or is authorized to develop and enforce environmental standards with respect to the operations, has the right to file written objections to the proposed release from bond with the commission and to request an informal conference or a public hearing within 30 days after the last publication of the notice. Upon receipt of the application for bond release, the commission is required, within 30 days, to conduct an inspection and evaluation of the reclamation work involved. The evaluation must consider, among other things, the degree of difficulty to complete any remaining reclamation, whether pollution of surface and subsurface water is occurring, the probability of continuance or future occurrence of such pollution, the estimated cost of abating such pollution, the effectiveness of soil erosion control measures employed, and the level of bonding. The commission is then required to make written findings with its rulings to release or not to release all or part of the performance bond or deposit within 60 days from the filing of the request for bond release, if no informal conference or public hearing is held, and if there has been an informal conference or a public hearing, within 30 days thereafter. Section 38-14.1-17(4) provides that the foregoing time periods do not apply if effective inspections cannot be carried out because of inclement weather.

If the commission disapproves the application for release of the bond or portion thereof, the commission is required to state the reasons for disapproval, recommend corrective actions necessary to secure the release, and provide the permittee with an opportunity for a formal public hearing. If the commission decides to release the bond either totally or in part, the commission must notify the county commissioners and the mayors of the municipalities in the county in which the applicable surface coal mining operation is located by certified mail at least 30 days before the actual release of all or a portion of the bond. Finally, the commission may release bond as follows:

- When the permittee completes the backfilling, regrading, and drainage control in a bonded area, 40 percent of the bond for the area may be released.
- After spreading suitable plant growth material or other suitable strata on the regraded land, 20 percent of the bond for the area may be released.
- After vegetation is established on the regraded land, additional bond may be released. The commission is required to retain sufficient bond to cover third-party revegetation and associated costs for 10 years, provided there may not be a release until certain environmental protection performance standards are met and prime farmlands are returned to productivity equal to or greater than nonmined prime farmland in the surrounding area under equivalent management practices and if there is a permanent silt dam impoundment, bond may be released if the commission approves the commitments for future maintenance.
- When the permittee has successfully completed all surface coal mining and reclamation operations, and after the period set by NDCC Section 38-14.1-24(18), which is 10 years, the remaining bond may be released. No bond may be fully released until all reclamation requirements are met.

Control of the affected lands remains in the commission, and the commission may not allow use of the land which is inconsistent with reclamation until reclamation has been accomplished to the satisfaction of the commission and until the bond has been fully released.

The 10-year successful revegetation requirement contained in NDCC Section 38-14.1-24(18) is required by the federal Surface Mining Control and Reclamation Act. The Surface Mining Control and Reclamation Act requires that, as a prerequisite for obtaining a coal mining permit, a person must post a reclamation bond to ensure that the regulatory authority will have funds to reclaim the site if the permittee fails to complete the reclamation plan approved in the permit. Section 515 of the Surface Mining Control and Reclamation Act (30 U.S.C. 1265) provides that any permit issued under any approved state or federal program pursuant to the Surface Mining Control and Reclamation Act to conduct surface coal mining operations must require that the surface coal mining operations will meet all applicable performance standards of the Act and such other requirements as the regulatory authority may issue. General performance standards are applicable to all surface coal mining and reclamation operations and must require the operation as a minimum to assume the responsibility for successful revegetation for a period of

five full years after the last year of augmented seeding, fertilizing, irrigation, or other work except in those areas or regions of the country where the annual average precipitation is 26 inches or less, then the operator's assumption of responsibility and liability will extend for a period of 10 full years after the last year of augmented seeding, fertilizing, irrigation, or other work.

Coal Mining Exception to Corporate Farming Law

Testimony relating to House Concurrent Resolution No. 3075 indicated that since nothing in state or federal law requires mining companies to apply for final bond release on strip-mined lands they have reclaimed, the mining companies are violating the spirit of the corporate or limited liability company farming law. However, NDCC Section 10-06.1-06 provides a specific exemption from the corporate or limited liability company farming law for surface coal mining. This section provides that a corporation or limited liability company not engaged in the business of farming or ranching may own or lease lands used for farming or ranching, when the business of the corporation or limited liability company is the conducting of surface coal mining operations or related energy conversion, and when the owning or leasing of lands used for farming or ranching is reasonably necessary in the conduct of the business of surface coal mining or related energy conversion. This section provides further that when the necessity for owning or leasing the lands used for farming or ranching no longer exists, the exception provided in this section ceases and the corporation or limited liability company owning or leasing the lands is subject to Chapter 10-06.1.

2003 Proposed Legislation

The 58th Legislative Assembly (2003) considered a bill relating to coal mine reclamation. House Bill No. 1470, which failed to pass the House, would have provided that for reclaimed tracts that are 80 acres or larger and have an agriculture postmining land use, the permittee must prepare for final bond release by beginning vegetation measurements for proving reclamation success no later than the eighth year of the 10-year period of revegetation responsibility. The beginning of the 10-year responsibility period for this requirement would have been based on the latest date that any area within the tract was initially planted; however, the permittee would also have to have applied for any variances that were available to expedite the final bond release process. Once the vegetation measurements had shown that the reclamation success standards had been met and the 10-year responsibility period had ended, the permittee would have been required to submit an application for final bond release during the growing season of the following year. The bill also would have provided that if the permittee did not submit an application for final bond release as required, the Public Service Commission would have been required to assess the permittee an annual fee. The fee would have been $25 an acre the first year the eligible lands were not bond-released, and the fee would have increased $5 per acre for each successive year until final bond release was obtained.

Testimony and Committee Activities

The committee received testimony from Public Service Commission staff to the effect that approximately 2,000 acres of land are disturbed each year by surface mining activities. A similar number of acres is reclaimed in most years. The total acreage under permit for surface coal mining is approximately 94,000 acres. All but a very small amount of this acreage has been permitted under the current reclamation law, which became effective in 1979 after the federal reclamation law was enacted in 1977. Public Service Commission staff estimated that 53,000 acres have been mined or otherwise used in support of surface mining since 1979. Of this total, approximately 34,000 acres have been reclaimed. Over 18,000 acres are being used for active mining operations or long-term facilities, such as roads, soil stockpiles, sedimentation ponds, and other surface mining support activities. Another 1,000 acres are under active reclamation. Of the 34,000 acres that have been reclaimed, Public Service Commission staff reported that 5,129 acres have received final bond release. Public Service Commission staff estimated that approximately 12,000 acres have been seeded for 10 years or more.

Public Service Commission staff reported that in addition to the 5,129 acres that have received final bond release under the current reclamation law, over 5,700 acres that were mined under the earlier state reclamation laws have received final bond release. All but approximately 600 acres mined under the earlier state reclamation laws have received final bond release. Most of the unreleased acreage is adjacent to roads or other facilities that support post-1979 mining activities.

Since January 1, 2003, the Public Service Commission has approved bond release on 2,008 acres of land at five mines. Of this total, 1,614 acres are reclaimed lands that had been disturbed by mining activities. The remaining 394 acres were undisturbed lands adjacent to the reclaimed lands. Pending applications for final bond release total another 1,537 acres at five mines. Public Service Commission staff reported these applications should be approved before December 31, 2004, and Public Service Commission staff expect more applications for final bond release this year.

Public Service Commission staff reported that the commission has undertaken a number of steps to encourage mining companies to apply for final bond release. The Public Service Commission and the Lignite Energy Council proposed that the statutory requirement that bond release notices be sent to mineral owners be deleted. Federal law only requires that bond release notices be sent to surface owners. Another proposed statutory change identified by Public Service Commission staff was to delete the statutory requirement that bond release notices be published in daily newspapers of general circulation in the locality of the mine. Federal

law only requires that the notice be published in a newspaper of general circulation near the mine.

Public Service Commission staff reported that Public Service Commission Policy Memorandum No. 20 to Mine Operators is being updated. The commission adopted the policy to allow variances from the 10-year revegetation responsibility period for areas affected by sedimentation ponds and related support facilities. The policy allows the revegetation liability period for the ponds and related areas to be combined with that of the surrounding reclamation tract. The policy is intended to help expedite the bond release process since sedimentation ponds usually remain in place for at least two years after the surrounding watershed is reclaimed. Changes to the policy were proposed to allow variances for small tracts that were mined or used for haul roads. As part of a request for variances for areas other than water management structures, mining companies would be required to provide an explanation as to why reclamation on the proposed variance area was not completed at the same time the adjoining areas were reclaimed and to explain potential obstacles and bond release delays if a variance were not granted. The policy currently states the size of variance areas should generally not exceed 20 percent of the acreage in the surrounding reclamation tract. Public Service Commission staff reported that additional language will be added to the policy to allow the commission to grant variances for a larger percentage on a case-by-case basis.

Public Service Commission staff reported that the Reclamation Division of the commission has developed a new policy for repermitting bond-released lands if a released tract is later needed to support ongoing mining operations--Public Service Commission Policy Memorandum No. 22 to Mine Operators. If a mining company shows a need to repermit bond-released lands, the mining company will most likely add that acreage to an existing permit. The mining company will have to provide a summary of the reclamation activities that were previously carried out in the bond-released tract, including land uses, topsoil and subsoil thicknesses that were previously respread; the specific revegetation success standards that apply to the tract; and the final postmining topographic map. The appropriate mining and reclamation plans will also have to be provided.

Public Service Commission staff reported that the Reclamation Division will allow mining companies to publish a combined newspaper notice when partial bond release is requested as part of a permit renewal application. This procedure will reduce costs for publishing notices.

Public Service Commission staff reported that the Reclamation Division staff plans to meet with each mining company to discuss bond release plans and to identify potential bond release tracts that appear to be logical management units. The emphasis of these meetings will be to discuss bond release plans for reclaimed tracts that are nearing the end of the 10-year liability period.

Public Service Commission staff reported that during the annual evaluation period ending June 30, 2003, federal Office of Surface Mining staff found only one-quarter section of reclaimed land where all of the tracts in that quarter had been seeded for 10 years or more. All other tracts of one-quarter section in size contained lands that were not eligible for bond release. Most of these tracts were broken up by mine haul roads and access roads, topsoil stockpiles, or temporary sedimentation ponds. In addition, some tracts contained tree planting, which did not meet the minimum 10-year liability period. In summary, Public Service Commission staff reported that mining companies are making progress pursuing final bond release on manageable units that are eligible for bond release. Public Service Commission staff reported that, considering the amount of vegetation data that is required and associated costs, it generally appears mining companies will not request final bond release until all reclaimed tracts within a quarter section of land become eligible for release based on the expiration of the 10-year liability period.

The committee received testimony from representatives of the Falkirk Mining Company that the Falkirk Mine has 23,000 acres under permit with 45 percent of this acreage undisturbed, 28 percent of the acreage reclaimed, and 27 percent of the acreage disturbed. As mines develop, the permitted areas closest to the mine buildings and power plant are mined and reclaimed first. However, facilities must be left in place on the reclaimed land that may be eligible for bond release in order to facilitate mining on land further from the mine buildings and power plant. Thus, representatives of Falkirk Mining Company testified mine operators cannot apply for bond release on this land because the land must be used for access to land being mined further from the mine buildings and power plants. The committee received testimony that at the Falkirk Mine there is not a complete quarter section that does not have an access road, haul road, or sedimentation pond on it, making these lands inappropriate for bond release applications.

The committee received testimony from representatives of Coteau Properties Company's Freedom Mine that the tracts at the Freedom Mine that have been reclaimed for more than 10 years are located nearest the power plant and the coal gasification plant because these lands were mined first. However, the company must maintain access to these lands to ship coal from the more recently mined areas to the power plant and the coal gasification plant. In addition, reasons for not applying for bond release include the irregular shape of the tracts, difficulty of access, and the fact that the tracts are within an active mine.

The committee received testimony from representatives of BNI Coal, Ltd.'s Center Mine that that company prefers to wait until an entire field is reclaimed for the 10-year period before applying for bond release on that field. The committee received testimony from representatives of Dakota Westmoreland Corporation that the company has applied for bond release at its Beulah Mine on the one area of the mine that comprises a contiguous

160-acre tract that has been reclaimed for 10 years. Other areas that have been reclaimed for 10 years lie along access roads or contain stockpiles or sedimentation ponds and it would be difficult to apply for bond [redacted]ase on these tracts because they are necessary for [redacted]g operations.

The committee received testimony from representatives of the Dakota Resource Council that some method should be developed to encourage or require mine operators to release reclaimed lands as soon as the 10-year reclamation period expires and that mining companies should be encouraged to develop mining plans that do not leave areas within reclaimed areas to justify the delay of bond release applications.

Committee Considerations

The committee considered a bill draft that deleted the requirement that the request for bond release be published in other daily newspapers of general circulation in the locality of the surface coal mining operation in addition to the official newspaper of the county and that subsurface owners within the permit area proposed for bond release be notified.

The committee received information from Public Service Commission staff that North Dakota provisions require that the bond release notice be published in the official county newspaper and a daily newspaper of general circulation in the locality of the mine. However, federal provisions only require the notice to be published in a newspaper of general circulation in the locality of the [redacted]. Therefore, North Dakota's provisions place an [redacted]ional requirement on mining companies to publish the notice in two newspapers rather than one. Also, North Dakota provisions on the notice mining companies must send to property owners and government agencies on plans to seek bond release include more owners and state agencies than the counterpart federal provisions. State law requires notice be sent to surface and subsurface owners within the permit area proposed for bond release and state agencies that are listed as advisory committee members.

The committee received testimony from a member of the Public Service Commission that the commission supports the bill draft and testimony from the president of the Lignite Energy Council that the council supports the bill draft.

The committee considered a bill draft that would have provided that for reclaimed tracts that are 80 acres or larger and have an agricultural postmining land use, the permittee must prepare for final bond release by beginning vegetation measurements for proving reclamation success no later than the eighth year of the 10-year period of revegetation responsibility. The beginning of the 10-year responsibility period for this requirement must be based on the latest date that any area within the tract was initially planted; however, the permittee must also apply for any variances that are available to expe[redacted] the final bond release process. Once the vegetation [redacted]surements show that the reclamation success stan[redacted]ds are met and the 10-year responsibility period has ended, the permittee must submit an application for final bond release during the growing season of the following year. If the permittee does not submit an application for final bond release, the Public Service Commission would have been required to assess the permittee an annual fee. The fee would have been $25 per acre the first year that eligible lands are not bond-released and the fee would have increased $5 per acre for each successive year until final bond release was obtained.

The committee received testimony from representatives of the Dakota Resource Council that the bill draft would encourage surface mining companies to apply for final bond release in a more timely manner. The bill draft was opposed by the Lignite Energy Council. Representatives of the council testified that the bill draft would be counterproductive in expediting bond release by requiring a permittee to submit a final bond release application in a certain timeframe regardless of what the operational situation was and regardless of quarter section or larger reclamation tract planning that is occurring within the mine. Representatives of the council testified the bill draft was impractical as it breaks up one-half section or section fields into 80-acre tracts; is costly in that more data and more applications from industry and more review time by regulators would be required as smaller bond release areas are required; that release of one 80-acre tract could cause delays in other tracts because of additional water management structures being required; and the bill draft would require farmers to determine yield data by 80-acre tracts versus fields that are laid out to accommodate changes in topography, drainage systems, and other site-specific conditions. Representatives of the Lignite Energy Council testified that the bill draft would add unnecessary costs to the industry of over one-half million dollars per biennium.

Representatives of the Lignite Energy Council testified that significant progress was being made before the 2003 legislative session and continues to be made in reducing unnecessary costs, increasing flexibility, and encouraging bond release. They noted that the Public Service Commission has completed several regulatory initiatives and that others are in progress, including revising rules on data collection, revising rules on native grasslands standards, changing boundary informational requirements for partial bond release, revising Policy Memorandum No. 20 to provide increased flexibility in the release of associated disturbances that are greater than 20 percent of the reclamation tract, allowing flexibility to the operator so that it is not necessary to use the last year of data which is before the federal Office of Surface Mining for approval, reducing the amount of information required for repermitting which is before the Public Service Commission, as well as other regulatory changes under review. These representatives noted that between January 2003 and April 2004 an additional 2,000 acres of land had been released from bond at five mines while another 1,500 acres are pending before the Public Service Commission.

Two members of the Public Service Commission testified in opposition to the bill draft. They testified that there is no evidence to suggest there is widespread

hoarding of land under bond by North Dakota's coal companies and that while there are acres that have been reclaimed for a number of years and which are still under bond, the commission has found that there are almost always sound reasons the bond has not been released. In some cases, the commissioners testified, the land is an oddly shaped parcel that is unsuitable for sale until adjacent land is reclaimed and that in other cases the land is held under bond because future mine plans necessitate further use of the land. The commissioners testified it is unlikely that there is an incentive for mining companies to hoard land because the faster they can release the land, the quicker their liability ends.

Representatives of the Dakota Resource Council testified that nearly 12,000 acres of reclaimed land at active and inactive mines are fully reclaimed but only a small number of acres of agricultural land has been returned to private hands. They testified the bill draft would provide an incentive for mining companies to expedite bond release applications.

The committee considered a bill draft that would have provided that in addition to the annual map that must be submitted by a mine operator to the Public Service Commission for each year of the permit term and until the total bond amount has been released, that not later than September 1, 2005, each mine operator would have to submit a map to the commission indicating parcels of reclaimed land for which the operator intends to apply for final bond release during the 12-month period immediately subsequent to the report. The bill draft would have provided further that for active mines, the total acreage of these parcels could not be less than the total acreage disturbed during the immediately preceding 12 months and that for inactive mines, the total acreage of these parcels could not be less than 25 percent of all land eligible for final bond release or 10 percent of the total remaining acreage. The bill draft also would have provided that before October 1, 2006, the commission would have to submit to the Legislative Council a report on the progress of mine operators in applying for final bond releases.

Representatives of the Dakota Resource Council testified the bill draft would serve to notify the Public Service Commission as well as the public of acreage that has been through the 10-year revegetation reclamation process and is eligible for final bond release and encourage mining companies to apply for final bond release as soon as possible in order that the land may be returned to farm and ranch operators.

The bill draft was supported by a member of the Public Service Commission who indicated that it would be very helpful to have a requirement in state law that serves to focus the mining company's attention on final bond release on a yearly basis. The commissioner testified that an annual map would provide helpful information to the commission and would provide a document that would be helpful to the public as well. However, the commissioner said the bill draft should be amended to provide that not later than September 1, 2005, and each year thereafter, each operator should be required to submit a map to the commission indicating parcels of reclaimed land for which the operator intends to apply for final bond release during the 36-month period immediately subsequent to the report. The commissioner testified that inserting a 36-month planning period would allow mining companies to group bond-release properties together in logical parcels.

The Lignite Energy Council opposed the bill draft. A representative of the Lignite Energy Council testified that mine operators are already required to submit maps to the commission indicating parcels of reclaimed land for which each operator intends to apply for final bond release, that establishing a percentage of lands to be released each year is arbitrary and impractical, and that requiring the Public Service Commission to report to the Legislative Council is administratively burdensome.

Two members of the Public Service Commission testified in opposition to the bill draft. The commissioners testified that requiring mining companies to submit a map to the commission indicating the reclaimed lands that a mine operator intends to apply for final bond release during the next 12-month period is not necessary because the commission has the rulemaking authority to require mining companies to file such plans if the commission deems it necessary. The commissioners testified that requiring the Public Service Commission to report to the Legislative Council is not necessary as such reports could be requested by the Legislative Council at any time.

Recommendation

The committee recommends Senate Bill No. 2040 to delete the requirement that a request for bond release be published in other daily newspapers of general circulation in the locality of the surface coal mining operation in addition to the official newspaper of the county and that subsurface owners within the permit area proposed for bond release be notified.

TRIBAL GAME AND FISH COORDINATION STUDY

Background

Senate Concurrent Resolution No. 4022 reflected the Legislative Assembly's concern that the various tribal governments of the federally recognized Indian tribes within North Dakota assert a federally recognized right to regulate hunting and fishing within the reservations set aside for their benefit and have established game and fish departments that assist in that regulation and that various issues have arisen between the state Game and Fish Department and the Indian tribes regarding such issues as jurisdiction, recognition of tribal and state hunting and fishing permits, and coordination of activities such as hunting and fishing seasons, among others, and that it would be desirable to resolve these issues, if at all possible.

State Ownership of Wildlife

North Dakota Century Code Section 20.1-01-03 provides that the ownership and title to all wildlife in this state is in the state for the purpose of regulating the enjoyment, use, possession, disposition, and conservation of the wildlife and for maintaining action for damages. A person catching, killing, taking, trapping, or possessing any wildlife protected by law at any time or in any manner is deemed to have consented that the title to the wildlife remains in the state for the purpose of regulating the taking, use, possession, and disposition of the wildlife. This section provides that the state, through the Attorney General's office, may institute and maintain any acts for damages against any person who unlawfully causes, or has caused within this state, the death, destruction, or injury of wildlife, except as may be authorized by law.

The state has a property interest in all protected wildlife. This interest supports a civil action for damages for the unlawful destruction of wildlife by willful or grossly negligent act or omission. The United States Supreme Court in *Geer v. Connecticut*, 161 U.S. 519, 530 (quoting *State v. Rodman*, 59 N.W. 1098, 1099 (Minn. 1894)), stated that "[w]e take it to be the correct doctrine in this country that the ownership of wild animals, so far as they are capable of ownership, is in the state, not as proprietor but in its sovereign capacity, as a representative and for the benefit of all its people in common." In *Lacoste v. Department of Conservation*, 263 U.S. 545, 551 (1924), the United States Supreme Court said that protection of fish and wildlife "is particularly within the police power and the state has great latitude in determining what means are appropriate for its protection." However, state regulation of fish and wildlife must yield when it conflicts or interferes with federal law. Treaties and other federal laws that guarantee Indian hunting or fishing rights may preempt state police powers under the supremacy clause of the United States Constitution.

Regulation of Game and Fish in Indian Country

Indian rights to hunt and fish, and tribal power to regulate hunting and fishing, may arise from treaties, statutes, judicial decisions, executive orders, or agreements. The *American Indian Law Desk Book* published by the Association of Western Attorneys General notes that a treaty or other federal law creating a reservation may provide for exclusive tribal use and occupancy of the reserved lands, from which courts have inferred a tribe's power to exclude others from those lands. Therefore, within Indian reservations, tribal hunting and fishing rights and regulatory powers arise generally from the federal law creating the reservation and the tribal power of exclusion. Indian rights outside reservation boundaries typically arise from a specific federal law that reserves or creates such off-reservation rights.

Outside reservation boundaries, the issue is whether tribal members have federally protected hunting or fishing rights and, if so, the extent to which state law may be applied to their activities. The *American Indian Law Desk Book* notes that tribal members seldom are subject to state fish and game laws when hunting or fishing on lands reserved for the tribe. However, there is an exception to this general rule. The exception is when state regulation is necessary for conservation of the resource. The *American Indian Law Desk Book* notes that states presumptively have jurisdiction over nonmember conduct on reservations when the conduct does not occur on tribal lands. Generally, states have full police powers outside Indian country.

Concerning state regulation of off-reservation hunting and fishing, an Indian tribe or its members may assert hunting or fishing rights within an area that once was a part of the tribe's reservation or aboriginal territory. However, even when a federally secured off-reservation hunting and fishing right exists, its exercise may be subject to some measure of state regulation. These include state health and safety regulations that do not otherwise prevent the exercise of off-reservation treaty rights provided they are nondiscriminatory or not banned by express federal regulation and necessary conservation measures designed to conserve fish and game resources.

Game and Fish Department Position Paper

The Game and Fish Department has issued a position paper on hunting and fishing within the external boundaries of North Dakota Indian reservations. This paper provides that the department recognizes tribal self-governance and the protocols of a government-to-government relationship with Indian tribes and recognizes that Indian tribes are governmental sovereigns. Inherent in this sovereign authority is the power to make and enforce laws, administer justice, manage and control Indian lands, exercise tribal rights, and protect tribal trust resources. The position paper provides that Indian lands are not state public lands nor part of the public domain and are not subject to state public land laws. Indian lands are retained by tribes or were set aside for tribal use pursuant to treaties, statutes, judicial decisions, executive orders, or agreements. These lands are managed by Indian tribes in accordance with tribal goals and objectives, within the framework of applicable laws.

However, the position paper provides that because of the checkerboard nature of reservations in North Dakota, people need to be acutely aware of the obligation to nonmembers or at least non-Indians who happen to own land in fee title or live within Indian reservations. These nonmembers have the right to be governed by the state, not the tribe, and to enjoy the privileges provided by state law, such as the right to certain property rights, licenses, landowner preference, and free hunting privileges on their own land. The right to regulate those fee lands, and to assure that those individuals enjoy the same privileges and state services as are afforded other residents of the state, must be protected. The position paper states that it has always been the position of the state of North Dakota that the department has jurisdiction in wildlife-related matters throughout the state over all its citizens and any visitors within the state's boundaries.

Concerning tribal hunting and fishing licenses issued to nonmembers, the position paper provides that the department regards these as "trespass fees" to allow nonmembers to use Indian trust lands and that non-Indians must possess a valid state license and federal waterfowl stamp, if hunting migratory waterfowl, when hunting or fishing on any land within the exterior boundaries of a reservation, and must abide by state and federal law and related proclamations.

Finally, the position paper provides that as a practical matter, not related to jurisdictional activity, members of a tribe are allowed to hunt or fish, according to tribal game and fish code and related proclamations, anywhere within the exterior boundaries of a reservation, without state licenses. However, when hunting or fishing on deeded land, tribal members must obtain permission of the landowner if the land is posted to prohibit hunting or fishing. In addition, if wildlife is removed from a reservation for processing or other reasons, it must be tagged so as to indicate it was taken on the reservation according to tribal regulations.

Concerning enforcement of game and fish laws, the position paper provides that when a law enforcement officer discovers or responds to a complaint of violation of state law or tribal law on any land inside a reservation boundary and the violator is an enrolled member or a nonmember Indian, the violation will be turned over to tribal officers for prosecution. The position paper provides that if tribal law does not cover the violation, the state reserves the right to prosecute the violation in state court. When tribal officers encounter non-Indians who are in violation of state law on land within a reservation, they are to refer the individual to state or federal officers. Non-Indians found in violation of tribal law will be referred to federal officers. Finally, the position paper concludes by stating that nothing in these procedures is intended to acquire or relinquish jurisdiction over anyone by the state or a tribe.

State-Tribal Cooperative Agreements

North Dakota Century Code Chapter 54-40.2 provides for agreements between public agencies and Indian tribes. "Public agency" means any political subdivision, including municipalities, counties, school districts, and any agency or department of North Dakota. "Tribal government" means the officially recognized government of an Indian tribe, nation, or other organized group or community located in North Dakota exercising self-government powers and recognized as eligible for services provided by the United States, but does not include an entity owned, organized, or chartered by a tribe which exists as a separate entity authorized by a tribe to enter agreements of any kind without further approval by the government of the tribe.

Section 54-40.2-02 provides that any one or more public agencies may enter an agreement with any one or more tribal governments to perform any administrative service, activity, or undertaking that any of the public agencies or tribal governments is authorized to perform by law and to resolve any dispute in accordance with Chapter 54-40.2 or any other law that authorizes a public agency to enter an agreement.

Section 54-40.2-03.1 provides that after the parties to an agreement have agreed to its contents, the state agency involved is required to publish a notice containing a summary of the agreement in the official newspaper of each county of the state reasonably expected to be affected by the agreement. The notice must also be published in any newspaper of general circulation for the benefit of any members of the tribe affected by the agreement. The notice must also be posted plainly at the tribal office of any tribe affected by the agreement and in the county court of any county affected by the agreement. The notice must state that the state agency will hold a public hearing concerning the agreement upon the request of any resident of the county in which the notice is published if the request is made within 30 days of the publication of the notice.

Section 54-40.2-03.2 provides that if a state agency receives a request pursuant to Section 54-40.2-03.1, the state agency is required to hold a public hearing before submitting the agreement to the Governor, at which any person interested in the agreement may be heard. Notice of the time, place, and purpose of the hearing must be published before the hearing in the official newspaper of each county of the state reasonably expected to be affected by the agreement. The notice of the public hearing must also be published in a newspaper of general circulation published for the benefit of the members of any tribe affected by the agreement. The notice must also be posted plainly at the tribal office of any tribe affected by the agreement and in the county courthouse of any county affected by the agreement. The notice must describe the nature, scope, and purpose of the agreement and must state the times and places at which the agreement will be available to the public for inspection and copying.

Section 54-40.2-04 provides that as a condition precedent to an agreement made under Chapter 54-40.2 becoming effective, the agreement must have the approval of the Governor and the governing body of the tribes involved. If the agreement provides, it may be submitted to the Secretary of the Interior for approval.

Section 54-40.2-05 provides that within 10 days after a declaration of approval by the Governor and following approval of the agreement by the tribe or tribes affected by the agreement and prior to commencement of its performance, the agreement must be filed with the Secretary of the Interior, the clerk of court of each county in which the principal office of one of the parties is located, the Secretary of State, and the affected tribal government.

Section 54-40.2-05.1 provides that upon the request of a political subdivision or any tribe affected by an approved agreement, the Indian Affairs Commission is required to make findings concerning the utility and effectiveness of the agreement taking into account the original intent of the parties and the Indian Affairs Commission may make findings as to whether the parties are in substantial compliance with all provisions

of the agreement. In making its findings, the commission is required to provide an opportunity, after public notice, for the public to submit written comments concerning the execution of the agreement. The commission is required to prepare a written report of its findings made pursuant to Section 54-40.2-05.1 and to submit copies of the report to the affected political subdivision or public agency, the Governor, and the affected tribes. The findings of the commission made under Section 54-40.2-05.1 are for informational purposes only. In an administrative hearing or legal proceeding in which the performance of a party to the agreement is at issue, the findings may not be introduced as evidence, or relied upon, or cited as controlling by any party, court, or reviewing agency, nor may any presumption be drawn from the findings for the benefit of any party.

Section 54-40.2-06 provides that an agreement made pursuant to Chapter 54-40.2 must include provisions for revocation. Section 54-40.2-08 enumerates specific limitations on agreements between public agencies and Indian tribes. This section provides that Chapter 54-40.2 may not be construed to authorize an agreement that enlarges or diminishes the jurisdiction over civil or criminal matters that may be exercised by either North Dakota or tribal governments located in North Dakota; authorize a public agency or tribal government, either separately or pursuant to agreement, to expand or diminish the jurisdiction presently exercised by the government of the United States to make criminal laws for or enforce criminal laws in Indian country; authorize a public agency or tribal government to enter into an agreement except as authorized by its own organizational documents or enabling laws; or authorize an agreement that provides for the alienation, financial encumbrance, or taxation of any real or personal property, including water rights, belonging to any Indian or Indian tribe, band, or community that is held in trust by the United States or subject to a restriction against alienation imposed by the United States. Finally, Section 54-40.2-09 provides that Chapter 54-40.2 does not affect the validity of any agreement entered between a tribe and a public agency before August 1, 1999.

Testimony and Committee Activities

The committee received testimony from a representative of the Game and Fish Department that the department has several concerns with the current status of hunting on the state's reservations. These include the dual-licensing system, the status of nontribal members hunting within reservations, and the different seasons between the reservations and the rest of the state. Department representatives testified that although the department has had discussions with tribal leaders on developing a single state-tribal cooperative agreement that would be uniform for the state and the tribes, developing a uniform agreement is very difficult because of the different federal laws and treaties governing each tribe, the different tribal game and fish codes, the different ways in which land is held within the external boundaries of the different reservations, and the different goals and objectives each tribe has for its game and fish programs.

The committee received testimony from representatives of the Standing Rock Sioux Tribe that the state should recognize tribal game and fish licenses and tags issued to both members and nonmembers and that the state should recognize tribal game and fish licenses just as it honors licenses issued by other states.

The chairman of the Three Affiliated Tribes testified that that tribe believes that the reservation of game and fish rights on the reservation not only guarantees tribal members the right to hunt and fish on tribal lands, but as an attribute of tribal sovereignty, allows the tribe to issue nonmembers licenses to hunt on tribal trust lands. The chairman testified that the Three Affiliated Tribes would like to avoid an adversarial relationship with the state on game and fish issues but would like to work cooperatively with the state as it has on Missouri River issues. The chairman of the Three Affiliated Tribes testified the tribe has prepared a draft memorandum of understanding between the Three Affiliated Tribes fish and game department and the North Dakota Game and Fish Department which recognizes tribal sovereignty as well as state game and fish laws and regulations and provides for a dual license for tribal lands with a state license at no cost and a tribal license at cost which would solve the problem of transportation of game taken on tribal trust lands off the reservation.

Committee Considerations

The committee considered a bill draft that provided that properly tagged game birds legally taken on Indian trust land could be possessed, transported, or shipped in state and that properly tagged big game legally taken on Indian trust land could be transported, shipped, or possessed within the state.

The chairman of the Three Affiliated Tribes testified that the bill draft will help rectify the tribe's problems with the Game and Fish Department as it would allow nonmembers who take game on Indian trust land to transport the game throughout the state. However, he suggested, "Indian trust lands" be replaced with "Indian reservation" so that lands owned by tribal members but not held in trust were covered by the bill draft. A representative of the Standing Rock Sioux Tribe testified that the words "and allotted lands" within any Indian reservation should be added to the bill draft.

A representative of the Game and Fish Department testified that the bill draft is confusing in that it does not clarify who is entitled to take game and fish on Indian trust land. The representative testified that if the bill draft is interpreted to mean anyone may take game and fish on Indian trust land and that nonmembers could take game and fish on Indian trust land without a state permit, it would be a shift in state policy. The representative testified that although tribes have the right to set game and fish seasons for tribal members on tribal lands, if the bill draft is interpreted to mean that nonmembers do not need a state-issued license to take game on Indian trust

land, it would make the management of the state's game and fish resources more difficult.

Recommendation

The committee recommends Senate Bill No. 2041 to provide that properly tagged game birds legally taken on Indian trust land may be possessed, transported, or shipped in state and that properly tagged big game legally taken on Indian trust land may be transported, shipped, or possessed within the state.

GARRISON DIVERSION UNIT PROJECT, DEVILS LAKE, AND NORTHWEST AREA WATER SUPPLY PROJECT

Representatives of the Garrison Diversion Conservancy District testified that in fiscal year 2003-04, the federal appropriation for the Garrison Diversion Unit Project was $47.3 million, which included funds for Indian and non-Indian municipal, rural, and industrial water supply projects, Indian irrigation projects, and wildlife mitigation. Representatives of the Garrison Diversion Conservancy District also noted this funding is supplemented by a one-mill levy on the counties within the conservancy district. As of June 30, 2004, federal municipal, rural, and industrial water supply funds expended during the fiscal year for rural water systems in North Dakota was over $3.5 million with total state and federal funding for construction of the All Seasons Rural Water Project, McKenzie County Rural Water Project, Ramsey County Rural Water Project, Williams County Rural Water Project, Tri-County Rural Water Project, and Northwest Area Water Supply Project at over $52 million. Also, in fiscal year 2003-04, the conservancy district budgeted $238,500 for research on high-value crop production, processing, and marketing.

Representatives of the Garrison Diversion Conservancy District testified that the conservancy district is the state lead and co-partner on the Red River Valley Water Supply Project Environmental Impact Statement. The conservancy district's role is to work with state, local, and end users to determine the best way to meet the water supply needs of the Red River Valley. The environmental impact statement is scheduled to be completed in December 2005. Representatives of the conservancy district testified that the Dakota Water Resources Act increased the federal authorization for recreation development and the Garrison Diversion Conservancy District has dedicated two-tenths of its one-mill levy to its recreation program. Representatives of the conservancy district reported that last fiscal year, the district provided over $253,000 in funding for 20 projects across the district.

The committee received updates concerning Devils Lake flooding from the State Engineer. Devils Lake has risen approximately 24 feet since 1993. The lake's flooded area has increased from 47,000 acres to 120,000 acres. Over $400 million has been spent on flood control at Devils Lake. Devils Lake's natural outlet is still 11 to 12 feet higher than the current water level and the lake would double in size before it reaches its natural overflow elevation.

The State Engineer testified that the state has taken a three-pronged approach to finding a solution to Devils Lake flooding. The first prong involves infrastructure changes in the Devils Lake Basin, such as raising roads, building dikes, and moving houses and towns. The second prong involves changes within the watershed, including restoring wetlands and increasing storage in the basin. The third prong is construction of an outlet to Devils Lake. The estimated cost of a federal outlet is $208 million, of which $135 million would be federal funds and $73 million state funds. In addition, the state would be responsible for all operation and maintenance costs, including operating a sand filter system at a cost of over $1 million per year, on a federal outlet. The committee received testimony from the State Engineer that although a state outlet raises concerns, state officials believe these concerns are more manageable than those relating to a federal outlet. The State Engineer testified that an outlet with a capacity of 100 cubic feet per second and an operating plan that provides for pumping only when downstream water quality standards can be met satisfies the provisions of the Boundary Waters Treaty of 1909 between the United States and Canada.

The committee received testimony that construction on the Northwest Area Water Supply Project began in April 2002. The two pipeline contracts for 2002 and 2003 totaled 19 miles of the 45 miles between Lake Sakakawea and the city of Minot with bidding for another 10 miles of pipeline to take place in 2004. This project is being constructed with 65 percent federal municipal, rural, and industrial water supply funds and 35 percent nonfederal funds, mostly provided by Minot city sales tax revenue.

Senate Bill 2040

Public Service Commission Testimony

Presented by: **Jim Deutsch**
Director, Reclamation Division
Public Service Commission

Before: **House Natural Resources Committee**
Representative Jon O. Nelson, Chairman

Date: **February 24, 2005**

Mr. Chairman and committee members, I am Jim Deutsch, Director of the Public Service Commission's (Commission) Reclamation Division. I appear on behalf of the Commission in support of SB 2040.

SB 2040 was introduced by the interim Natural Resources Committee that studied state and federal statutory and regulatory policies affecting final bond release on reclaimed coal mined lands in North Dakota. The changes proposed to North Dakota's reclamation law by this bill were suggested by the Commission after preparing a side-by-side comparison of the bond release provisions in the state and federal reclamation laws. North Dakota's reclamation law needs to be consistent with the federal Surface Mining Control and Reclamation Act of 1977 in order for the State to administer the coal regulatory program.

The two changes proposed by SB 2040 reduce some of the notice requirements associated with bond release applications. The first change will delete the requirement that mining companies publish newspaper notices in daily newspapers of general circulation in the mine's locality. If this change is made, mining companies must continue to publish bond release notices in the official county newspaper where the bond release tract is located. The notice must be published once a week for four consecutive weeks. The federal reclamation law requires that the bond release notice be published in a newspaper of general

circulation near the mine. The publication of the notice in the official county newspaper will be consistent with that provision.

The second change proposed by SB 2040 will delete the provision that requires mining companies to send bond release notices to subsurface owners of tracts proposed for bond release. By the time any stage of bond release is requested, coal removal from the tract will be complete and any subsurface owner who doesn't have a surface interest will not be affected by the reclamation work. If this change is made, mining companies must still send bond release notices to the surface owners of the bond release tract and the adjoining property owners. This is also consistent with language in the federal reclamation law.

These changes will slightly reduce some of the mining companies administrative costs associated with bond release and the Commission urges a Do Pass recommendation for SB 2040.