

2011 HOUSE POLITICAL SUBDIVISIONS

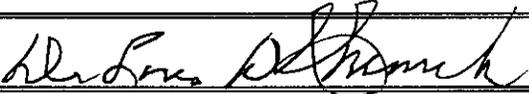
HB 1290

# 2011 HOUSE STANDING COMMITTEE MINUTES

House Political Subdivisions Committee  
Prairie Room, State Capitol

HB 1290  
February 11, 2011  
Job #14414

Conference Committee

Committee Clerk Signature 

## Explanation or reason for introduction of bill/resolution:

An Act to establish a state heritage foundation; and to provide for reports to the budget section.

## Minutes:

Chairman Johnson: Opened the hearing on HB 1290.

Rep. Pietsch: Rep. Koppelman was asking about the numbers of the bill that might be in with something like this. Rep. Belter has one for 1459 and Senator Leyck has S 2280 and Sen. J. Miller has one that might be involved in this too,

Rep. Kasper: A couple of years ago I heard about the Northern Plains Heritage Foundation which former Senator Potter had congress establish in the state of ND. At that time I was pretty concerned about it and didn't know what it did and didn't do. I had concerns about what the property rights of the citizens of ND may face because of the foundation. I have been doing some research and visiting and found that the Northern Plains Heritage Foundation will not infringe on property rights of the people of ND. One day I called legislative council and said what would happen if we created a state heritage foundation? What would it be? I thought it would simply be like the Northern Heritage Foundation established by the federal government, but it would be a state heritage foundation, but I want to go beyond what the federal government does with their heritage foundation. I would like to have one for the entire state that simply says our state is a state heritage foundation and all the property rights that the citizens have under the constitution of the State of ND and the Constitution of the US are hereby guaranteed. I visited with Jeff Nelson of Legislative Council and he said nothing in state or federal law that would be prohibited from doing it. What do we have to do to set up the state heritage foundation? He said you draft a bill that enables and establishes it. Would we have to staff it; no. Would we have to pass any other legislation; no. Would we need to do anything besides establishing the foundation and it was no again? That is the intent of Section 1 of this bill is to establish the State Heritage Foundation. We would be the first in the nation. It simply does give one important area if we establish and that is the term standing because many times the Constitution of the US and what the Congress does, in my opinion is in direct violation of the Constitution of the US and in many cases the Constitution of the state of ND. If we pass this bill we would have standing for our state to defend the property rights of the citizens of ND if our state Attorney General determined that we needed to take court

action against any type of action that Congress might take. Section 2 was an idea to take a look at the Northern Plains Heritage Foundation and as I began researching the enabling legislation and what it can and cannot do I became much more comfortable with what it does and what it does not do. It does not infringe on property rights and it cannot by its charter and by the federal statute infringe on property rights. It cannot require any citizens to do anything that they do not wish to do with their property. It is an entity that is there to help in certain areas of economic development and advice and counsel and things like that and heritage and historical things. I want to amend out Section 2 and delete the bill from line 11 to the end because it is not needed. The key is Section 1. I would hope you would pass the bill and establish a state heritage foundation and protect the citizens in an additional way from federal legislation which maybe passed in the future that might contradict or attempt to take away the property rights of the citizens of our state.

Rep. Klemin: I don't see any amendments in Section 2 to start with?

Rep. Kasper: I am proposing that this committee amend out Section 2. I did not bring the amendment.

Rep. Klemin: We have the supremacy clause in the US Constitution. How does this bill legate somehow the supremacy clause where it says that this designation is superior to any contrary or conflicting claim of any federal mandate or law effecting property. Supremacy law cares through not only on the federal constitution, but on federal laws. There is another section of federal law that elaborates on the supremacy clause so I am not quite sure how I see that what this is saying constitutional under the federal constitution.

Rep. Kasper: There are scholars who differ about the power of the supremacy clause. The Supreme Court is the ultimate determinate of the reach of the supremacy clause. In our energy committee we have a bill in front of the committee right now about the US Fish and Wildlife Service and dealing with these pot holes and places in the fields of farmers that get water and retract and so on. These farmers have signed in many cases a perpetual lease and back when they signed it sometimes it was the third and fourth property owner back didn't know really what they were doing and were not given council. Under that situation it appears that once you sign a perpetual lease you are stuck with it. I don't know what the federal government is going to do in the future; although I don't trust what they are going to do very much based upon what I have seen them do, there are differences on how far the supremacy clause should reach. This would give our Attorney General the opportunity to challenge federal statute if he or she desired to do so based upon the protection of the property rights of the citizens of our state. So it is just another tool in the tool box to protect the property rights of the people of our state.

Rep. Klemin: State Heritage Foundation consists of all property in this state. How is that not considered taking without just compensation when maybe not all property owners in this state want their land to be part of the state heritage foundation.

Rep. Kasper: There is no taking in the bill because it takes nothing. It declares the state to be a heritage foundation and it declares that the purpose of the heritage foundation is to guarantee the property rights of the citizens of our state based on the constitution of our

state and the Constitution of the United States. If you wish to go deeper than that please contact Jeff Nelson at Legislative Council and ask his opinion.

Rep. Koppelman: On Section 2 was that none of the languages underscored and I think it is all new language from your testimony so I think it should have been.

Rep. Kasper: Yes I think it was.

Rep. Zaiser: Discussing federal power versus state government. Most people would interrupt the constitution differently.

Rep. Kasper: The Tenth Amendment reads as follows: for the powers not delegated to the United States by the Constitution nor prohibited by it to the states are reserved to the states respectively or to the people. So if you look back at the history of the US Constitution our founding fathers were very clear in their intent. The intent was to have a limited federal government and to give them specific powers in the Constitution. They were very fearful of a federal government over reaching into areas that they did not wish for them to go into and therefore they put in the tenth amendment to state that. Over the years the congress and the Supreme Court, in my opinion, have failed to remember what the Constitution says and failed to follow the intent of the framers of the Constitution.

Rep. Klemin: I am still having trouble with this consists of all property in the state. It sounds to me like what the state is going to the people is the same thing you are trying to prevent the federal government from doing to the people. The guarantees of the Constitution are there regardless of whether we pass a bill that says so.

Rep. Kasper: On line 7 the State Heritage Foundation consists it could possible read the State Heritage Foundation is to protect instead of consists. On this particular bill I would hope that your committee would work to try to get to the intent that I have and put language in there that would solve your problem and still preserve the intent of the bill. It does not say the State Heritage Foundation owns the property. It says we are creating the State Heritage Foundation to protect the property rights.

Chairman Johnson: Have you been in contact with the Attorney General's office. Is this something we need in our state from that prospective?

Rep. Kasper: No I don't generally ask the Attorney General whether or not I should put a bill in. If I think it is the right thing to do I am going to do it. The constitutionality of a bill is not determined until four of the five Supreme Court Justice say it is not constitutional. This legislative body passing a bill makes it constitutional.

Opposition: None

Neutral:

Tracy Potter, Executive director of the Ft. Abe Lincoln Foundation, President of the Missouri River Boat Inc.: The Ft. Abe Lincoln Foundation administers to the Northern Plains Heritage Foundation. I was also its first president and I am no longer on the board but I am

quite involved in the system. We are testifying in a neutral position because the bill really has no impact on our heritage foundation. The questions you raised about constitutionality are extremely valid questions. The supremacy clause I think is clearly questions by Section 1. Section 2 which Rep. Kasper is suggesting be eliminated actually provides no burden at all to the Northern Plains Heritage Foundation. There is again a question on the authority of the legislature to require a private nonprofit not receiving any funds from state government to report to the budget section. The budget section itself of course is not unconstitutional except when it does something; then it is unconstitutional as I rose on the Senate floor in two sessions in a row. It is giving you power to approve that is unconstitutional but receiving a report certainly is not. However, despite the fact I don't see the authority we have no problem with that because we like to tell our story any time we get a chance. Reporting on a regular basis is one we would embrace. The language in lines 12-15 which suggests that the foundation will follow the laws of North Dakota; the constitution of the US and of ND. We have never had a discussion with the board of directors as to whether or not we should follow the law, but I sure the board would agree that is a good idea and we would like to continue to do that. We are not in opposition to it. I did want to explain what the Heritage Foundation is and what the Northern Plains National Heritage area does. There are 49 national heritage areas. They range in size as small as the city of Detroit. The entire state of Tennessee is a national heritage area. These are congressionally directed parts of the National Park Service that have no actual physical manifestation. That is you may say the entire state of Tennessee is in a heritage area, but this has no implications for the people who live in Tennessee; other than as a marketing technique to bring people there to find out about their civil war history. They likely faced the same questions that we did as we were starting the Northern Plains National Heritage area. What should be the logical boundaries? Our feasibility study looked at the area between Hoff, which is a national landmark and a state historic site to Knife Indian Villages. It is the homeland of the Mandan people. It is the birth place of agriculture in the northern plains nine hundred to a thousand years ago. The National Park Service is an unwilling partner in national heritage areas because they are congressionally designated as opposed to coming down from the executive budget. I believe National Park Service has testified against every heritage area. When I was there they testified against all eight bills because they were coming from Congress. They put in very specific restrictions on the powers; no regulatory authority and only incentives. There is an authorization which no one has ever achieved but an authorization for \$10 million over a 15 year period that can come to the Northern Plains Heritage Foundation to match local funds being used to do things like repair buildings at Ft. Lincoln or aid in the development of the State Heritage Center or put up the new cabin at Cross Ranch or anything like. I am in process of writing the management plan that will put in the guidelines on what those kind of grants will be but basically what it says is the grants are going to pass through to this organization which is going to have a committee that will review grant applications from the area and anybody who wants to do something that is progressively adding to our economic development; our heritage preservation they can come forward. No private land is within the heritage area. We are the only heritage area that has that restriction. That was a result of misunderstandings about what the heritage area did. It was called a \$4.7 million acre land grab by the federal government giving virtually the powers of a czar to Tracy Potter. So Senator Dorgan put in an amendment that said in this heritage area any private landowner that wants to participate has to have a written application. Public lands are in the heritage

area unless they opt out. All the heritage area is doing is basically a conduit for some federal funds to go to heritage organization in the area. We are not in opposition to the bill.

Rep. Zaiser: Do you see any tangible benefit that has been derived from this distinction being termed the heritage area? How would you measure it and what are the kinds of things that would happen?

Tracy Potter: It is a little early to be able to gage with any measuring device what the implications have been. As soon as you are designated that becomes known to the people who go to websites about the national heritage areas. They can see that there is this area that has been said by Congress to be so significant that you might want to visit there for historical reasons. That is the concert positive that is already taking place. It has had some funding. The first \$150,000 was appropriated in fiscal ten. We finally received the first \$10,000 payment for the administrative services that my foundation provides to the Northern Plains Heritage Foundation in January. It made payroll for us and is already supporting one of the foundations in the area.

Rep. Zaiser: What about folks that visited? I am curious of how they benefited outside of collecting dollars?

Tracy Potter: There are annual reports from these organizations and I have looked at some of them. They have energized local communities to pull themselves together and recognize some of the things they have. An old canal that was just there and everybody turns their back on from the 1800's and nobody pays attention to it. Now communities are picking up the litter and creating trails along it and making it useful. It seems to have leveraged local money for a positive result. In our area we have held public meetings in all five counties in this area and there have been some hostile people speaking about you put my land in this area; we are mad but there have been other people from the railroad museum in Mandan or the Knife River Indian Villages that have said we would like to excess some of these things, but we are not built to write grants and compete with the big guys like you buys at Ft. Lincoln or Ft. Mandan. Our response has been great. How can we help? That is one of the things that the heritage area does.

Rep. Zaiser: It could be a gimmick compared to back in Fargo where I created River Keepers. We did that just as a private nonprofit, but didn't go through the glanderous process that you are going through. Is it a little bit of building pyramids almost?

Tracy Potter: If I were a cynic I would say it is a federal program replacing the federal earmarks that use to go some of the organizations within this area. It makes it programmed so that there will always be some support at least over this fifteen year period for these kinds of heritage activities. If you get a \$2 million dollar earmark you are giddy and rolling in the doe. If you get a steady flow over fifteen year period you are much more able to deal with that in terms of making a positive impact on the community.

Rep. Kretschmar: The bill says the State Heritage Foundation consists of all property in this state. Does that include what we call personal property or are you just looking at real estate?

Tracy Potter: I am not prepared to answer it. You will have to ask the drafter.

Hearing closed.

Motion by Rep. Klemin to delete Section 2 on HB 1290. Seconded by Rep. Maragos:

Discussion:

Rep. Shirley Meyer: Did you want to remove consists of all on line 7 and put protects?

Voice vote carried.

Do Not Pass As Amended Rep. Klemin: Seconded by Rep. Devlin:

Discussion:

Rep. Klemin: I think I understood what Rep. Kasper's point was but I just don't see how this bill means anything. Ordinarily a foundation receives money and pays out money and does things like that. This foundation has no purpose other than to guarantee something that is guaranteed. It guarantees all property rights that are guaranteed. As far as giving the state of ND standing to challenge federal government on anything I think the state of ND has probably got standing to do that anyway. I am not sure what all of this means and I don't think it would survive a constitutional challenge.

Chairman Johnson: I did take the time to visit with the Attorney General's office and they have looked at this and they said if you wanted a written opinion we would do it. I didn't request it early enough to get it. Right now some of the concerns that Rep. Kasper has expressed on the floor and in his legislation that he proposes about the healthcare act and if you can give the state protection and what the Attorney General said to me was that we are going through the proper procedures now. We are involved in several lawsuits that challenge what is happening at the national level in the proper process that is designed already in the constitution to use. I don't know why this would be needed particularly because we already we do have standing as a state. In my IBL committee Rep. Kasper also has a bill in there that he is trying to make it a criminal act in ND to require a citizen to purchase health insurance. He is saying that would then give standing to the state in lawsuits to not have to abide by the federal laws. That is what he is trying to do in this same type of legislation is to give state standing so that what becomes federal laws our state does not necessarily have to abide by.

Rep. Koppelman: I have real problems with the language here. I am not sure it accomplishes anything here. I had a conversation with the Attorney General when he was contemplating joining the lawsuit against the federal government and I know he did comment that if had we passed something last session it would have given him stronger standing in that lawsuit. I believe it was Rep. Kasper that had a constitutional amendment resolution before us last session and he has this bill and another one in the IBL committee. I have not visited with the Attorney General on that but I intent to.

Vote: 12 Yes 2 No 0 Absent Carrier: Rep. Klemin:

February 11, 2011

VK  
2/11/11

PROPOSED AMENDMENTS TO HOUSE BILL NO. 1290

Page 1, line 1, remove "; and to provide for reports to the"

Page 1, line 2, remove "budget section"

Page 1, remove lines 11 through 24

Renumber accordingly

Date: 2-11-11  
Roll Call Vote # 1

2011 HOUSE STANDING COMMITTEE ROLL CALL VOTES  
BILL/RESOLUTION NO. 1290

House Political Subdivisions Committee

Check here for Conference Committee

Legislative Council Amendment Number \_\_\_\_\_

Action Taken  Do Pass  Do Not Pass  Amended  Adopt  
Amendment

Rerefer to Appropriations  Reconsider \_\_\_\_\_

Motion Made By Rep. Klemin Seconded By Rep. Maragos

Representatives	Yes	No	Representatives	Yes	No
Chairman Nancy Johnson			Rep. Kilichowski		
Vice Chairman Hatelstad			Rep. Shirley Meyer		
Rep. Beadle			Rep. Mock		
Rep. Devlin			Rep. Zaiser		
Rep. Heilman					
Rep. Klemin					
Rep. Koppelman					
Rep. Kretschmar					
Rep. Maragos					
Rep. Pietsch					

Total (Yes) \_\_\_\_\_ No \_\_\_\_\_

Absent \_\_\_\_\_

Floor Assignment \_\_\_\_\_

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

Delete Section 2

Voice Vote Carried

Date: 2-11-11  
Roll Call Vote #: 2

2011 HOUSE STANDING COMMITTEE ROLL CALL VOTES  
BILL/RESOLUTION NO. 1290

House Political Subdivisions Committee

Check here for Conference Committee

Legislative Council Amendment Number \_\_\_\_\_

Action Taken  Do Pass  Do Not Pass  Amended  Adopt  
Amendment

Rerefer to Appropriations  Reconsider \_\_\_\_\_

Motion Made By Rep. Klemin Seconded By Rep. Devlin

Representatives	Yes	No	Representatives	Yes	No
Chairman Nancy Johnson	✓		Rep. Kilichowski	✓	
Vice Chairman Hatelstad	✓		Rep. Shirley Meyer	✓	
Rep. Beadle	✓		Rep. Mock	✓	
Rep. Devlin	✓		Rep. Zaiser		✓
Rep. Heilman	✓				
Rep. Klemin	✓				
Rep. Koppelman	✓				
Rep. Kretschmar	✓				
Rep. Maragos		✓			
Rep. Pietsch	✓				

Total (Yes) 12 No 2

Absent 0

Floor Assignment Rep. Klemin

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

**REPORT OF STANDING COMMITTEE**

**HB 1290: Political Subdivisions Committee (Rep. N. Johnson, Chairman)** recommends **AMENDMENTS AS FOLLOWS** and when so amended, recommends **DO NOT PASS** (12 YEAS, 2 NAYS, 0 ABSENT AND NOT VOTING). HB 1290 was placed on the Sixth order on the calendar.

Page 1, line 1, remove "; and to provide for reports to the"

Page 1, line 2, remove "budget section"

Page 1, remove lines 11 through 24

Renumber accordingly