

FISCAL NOTE
Requested by Legislative Council
04/03/2017

Amendment to: HB 1300

- 1 A. **State fiscal effect:** *Identify the state fiscal effect and the fiscal effect on agency appropriations compared to funding levels and appropriations anticipated under current law.*

	2015-2017 Biennium		2017-2019 Biennium		2019-2021 Biennium	
	General Fund	Other Funds	General Fund	Other Funds	General Fund	Other Funds
Revenues						
Expenditures		\$20,000		\$746,720		\$601,370
Appropriations						

- 1 B. **County, city, school district and township fiscal effect:** *Identify the fiscal effect on the appropriate political subdivision.*

	2015-2017 Biennium	2017-2019 Biennium	2019-2021 Biennium
Counties			
Cities			
School Districts			
Townships			

- 2 A. **Bill and fiscal impact summary:** *Provide a brief summary of the measure, including description of the provisions having fiscal impact (limited to 300 characters).*

The bill will make the Board of University and School Lands an Administrative Agency under NDCC 28-32 for most of its responsibilities. The bill will replace existing Board authority to make rules with administrative processes, and it will implement adjudicative proceedings for most Board decisions.

- B. **Fiscal impact sections:** *Identify and provide a brief description of the sections of the measure which have fiscal impact. Include any assumptions and comments relevant to the analysis.*

Section 1, 2 and 3 would subject the Board and Commissioner of University and School Lands to administrative rule making processes and adjudicative proceeding requirements of the Administrative Agencies Practice Act (AAPA), from which they are presently exempt.

The Bill exempts some areas of the Board's responsibilities from the AAPA: managing escheat and gifts within trusts; energy impact grants; and investments. However responsibilities for sales, leases, contracts, permits, disposal, and appraisalment would all be subject to the AAPA.

There will be initial costs associated with developing and publishing administrative rules. Additional ongoing costs will be incurred for legal assistance and administrative hearing officers to conduct adjudicative proceedings. These costs will need to be appropriated from outside of the constitutional trust funds because the constitution states that these funds must not be diverted from the benefit of the common schools and other beneficiaries.

Under the Constitution and statutes, the Board has at least 85 existing sets of rules, policies and procedures related to management of land, oil and gas leasing, coal, easements, land sales and auctions (summary attached). Under the AAPA, these rules will need to be prioritized, revised into the form and style of administrative code, published, reviewed in hearings, and presented for administrative rules committee consideration.

None of the Board's current rules and procedures have been approved by the administrative rules committee, but the bill has an effective date of January 1, 2018. Given the aggressive time-frame to implement rules relating to most Board responsibilities, the estimated fiscal impact considers the need for additional staff to help manage the process and for additional legal expenses.

The Department of Trust Lands' submitted budget reduced its authorized FTE by two, but this bill would necessitate

the authorization and re-purposing of two FTEs. The Department will request an Administrative Staff Officer and Legal Assistant to assist with drafting and adopting of rules and with the ongoing processes relating to adjudicative proceedings. Compensation and operating costs for these not yet approved positions, is included in the estimated fiscal impact.

The bill will also necessitate expanded legal consultation from the Office of the Attorney General to ensure compliance with the AAPA for the Board's non-exempt duties. The legal review of existing rules, policies and procedures to identify which are subject to the rule making requirement and the subsequent drafting and revision of rules is estimated at \$10,000 per month through 2019. If the Attorney General does not have sufficient staff to support this effort, more costly outside counsel will need to be hired.

Once rule making is complete, adjudicative proceedings to address requests for rule exceptions and the consideration of draft orders will require state-appointed hearing officers at a rate of \$165 per hour.

From 2014 to 2016, the Board issued 611 easements, damage agreements, improvements, and rights-of-way. Of the 611 granted approvals, there were 75 different types of permits or use agreements. Unless specific administrative rules for each type of request were previously adopted, unique or distinct applications will need to be administered with a draft order, publication and an administrative hearing.

Requests for unique easements coupled with actions related to: acreage corrections; lease adjustments; requests for assignments of leases, extension or suspension of leases; reduction of assessed penalties; and public purpose land sales are collectively estimated to require 35 hours of administrative hearing officer time each month.

Hearings to consider draft rules and amendments, as well as proposed orders of proposed action or exemption to a rule require legal publication which is estimated at \$625 per month.

3. **State fiscal effect detail:** *For information shown under state fiscal effect in 1A, please:*

A. **Revenues:** *Explain the revenue amounts. Provide detail, when appropriate, for each revenue type and fund affected and any amounts included in the executive budget.*

The administrative processes required by the bill will create processes and delays that may reduce bonus, royalty, and easement revenues to the 13 constitutional trust funds, the Capitol Building Fund, the Indian Cultural Education Trust Fund and the Strategic Investment and Improvements Fund; but the scope of the impact cannot be determined.

Because the negative revenue impact to the Common Schools Trust Fund and 12 other trusts identified in Article IX of the Constitution, may violate provisions of Section 2 of this Article, some provisions may not be able to be implemented.

B. **Expenditures:** *Explain the expenditure amounts. Provide detail, when appropriate, for each agency, line item, and fund affected and the number of FTE positions affected.*

The legal review of existing Board rules, policies, and procedures to identify which are subject to the AAPA rule requirement plus subsequent attorney assistance in drafting proposed administrative rules is estimated at \$10,000 per month from now through the 2017-2019 biennium and \$2,500 per month during the 2019-2021 biennium. Estimated totals are \$20,000 in the current biennium, \$240,000 in the 2017-2019 biennium and \$60,000 in 2019-2021.

Under the AAPA, adjudicative proceedings for proposed orders and rule exception hearings require a state hearing officer whose rates are \$165 per hour. Comparable state agency use of the Office of Administrative hearings derived an estimated average of 35 hours per month, starting in January 2018. This totals \$103,950 in 2017-2019 and \$138,600 in 2019-2021.

The estimated expenditure includes salary, benefits and associated overhead for two additional staff. One Administrative Staff Officer III with an estimated fixed monthly salary of \$5,680 (Grade L) and the second, a Legal Assistant II with a average monthly salary of \$4,781 (Grade J). With benefits, supplies, travel and fixtures these positions are estimated at \$204,673 per biennium for the staff officer and \$183,097 per biennium for the legal assistant.

The additional costs of required publishing of proposed rules and notice of hearings is estimated at \$7,500 annually.

- C. **Appropriations:** *Explain the appropriation amounts. Provide detail, when appropriate, for each agency and fund affected. Explain the relationship between the amounts shown for expenditures and appropriations. Indicate whether the appropriation or a part of the appropriation is included in the executive budget or relates to a continuing appropriation.*

Present Department staff is fully engaged with day-to-day responsibility managing trust and State assets, complying with existing statutory requirements and deadlines, implementing performance audit recommendations and preparing for information technology upgrades. The existing staff cannot implement the requirements of the bill without additional staff and funding.

Without the approval and funding for at least two FTEs, and an appropriation from a source outside of the trusts for legal and administrative hearings costs of compliance with the AAPA, it is improbable that the Board and Department can accomplish the objectives of the bill by the January 2018 effective date. Immediate authorization and funding for legal and FTE costs may help to implement critical rules before 2018.

None of the identified costs or FTEs are included in the proposed appropriation budget for the Commissioner of University and School Lands (Department of Trust Lands).

Name: Lance Gaebe

Agency: ND Department of Trust Lands

Telephone: 701-328-2800

Date Prepared: 04/04/2017

Projected Expenditures of Implementing Administrative Rules and Adjudicative Proceedings

	FY 2017-2019	FY 2019-2021
Assistant AG and legal ¹	\$ 240,000	\$ 60,000
Administrative Hearing cost ²	103,950	138,600
Administrative Staff Officer FTE ³	204,673	204,673
Legal Assistant FTE ³	183,097	183,097
Advertising ⁴	15,000	15,000
Increase in Expenditures	\$ 746,720	\$ 601,370

¹ Legal review of existing rules, policies, and procedures to identify those impacted by the AAPA rule requirement. Estimates of legal reviews, subsequent drafting and attorney assisted revision of proposed rules is estimated at \$10,000 per month through the 17-19 biennium and \$2,500 per month for the following biennium.

² Adjudicative proceedings to address requests for rule exceptions will require assistance from the state hearing officers whose rate is \$165/hour. Estimated 35 hours/month.

³ Includes salary, benefits and associated overhead.

⁴ Required publication of rules and advertising for hearings, 17-19 biennium hearings

**Board and Commissioner of University and School Lands
Rules, Guidelines, Policies and Procedure Review List**

Surface

Chapter 15-09 Sale Policy
Commissioner Approval of Leases
Assignments and Custodial Agreements
Surface Damage Payment
Surface Easement and Permit Issuance Policy
Failure to Pay at Auction/Bidder Eligibility
Fair Market Value - Grass
Sale of State Land for Landfills
Agricultural Lease Cancellation
Cropland and Hayland Flood Mitigation
Non-commercial Roads
Agreements for Organized Events on State Lands
Grace period for lease payments
Payment Schedule (Trust Specific Activities)
Prairie Dog Control Cost Share
Non-Vehicular Public Access
Ramsey County Cropland & Hayland Flood Mitigation
Railroad Rights-of-Way Ownership
Land Retention and Sales Policy
Minimum Rent Calculations for Spring Leases
Construction Aggregate Rules (85-06-03)
Prospecting Permit & Lease Application Procedures
Prospecting Permit and Lease Management Review
Surface Lease Assignment Approval Delegation
Noxious and Invasive Weed Control Cost Share Policy
Cultivating and Seeding of Potholes
Drop Line Easement Procedure
Badlands Water Adjustment
Managing Indian Cultural Trust (NDCC 15-68)
Field Inspection Schedule
Productivity and Rental Adjustments
Lease Auction Rotation
Accepting Letters of Credit
Rent Credits and Depreciation (15-08-26)
Improvements: Pasture Drops and Permanent Tanks
Rent Reduction for Spurge Control
Salt-water Disposal Easements Due Diligence
Salt water Disposal Payment Collection
Refunds of Temporary Slope Construction Damages
Determining Crop and Hay Valuation
Determining Grassland Valuation
Water Adjustment Guidelines – Surface Rentals
Payment for Livestock Water Developments
Approving Off-Lease Mineral or Spacing Unit Well Sites
Grazing Association Administrative Fee Reduction
Fencing Adjustments
Rent Credits for Permanent Improvements

Foreclosed Properties

Accepting and Rejecting Bids on Foreclosed Property
Criteria for Retaining Foreclosed Property
Managing Acquired Properties
Subsurface Easements

Minerals

85-06-06 Oil and Gas Rules
85-06-07 Potash Rules
15-05 Coal Rules
Off Lease Mineral or Spacing Unit Well Site Requests
Mitigation of Wildlife Impact
Offset Wells
Oil and Gas Lease Assignments
Pooling Agreements
Shut in Well Policy
Unitization Requests
Oil and Gas Lease Terminations
Coal Leasing Procedures
Oil and Gas Lease Corrections
Oil and Gas Lease Extensions
Mineral Lease Nominations
Zero Production Policy
Stipulations of Interest
Mitigation of Archeological and Paleontological
Coal Lease Adjustments
Coal Lease Terminations
Other Mineral Extraction
Disclaiming/Claiming Mineral interests
Mineral Trespass

Revenue Compliance

Royalty Reporting Requirements
Assessing Penalty and Interest
Waiver of Penalties
Audit Procedures/Requested Items
Division Orders
Escrow Procedures
Assigned Fund Procedures

Other

Fee Schedules
Damage Payments
Refunding Policies
Auction Procedures

FISCAL NOTE
Requested by Legislative Council
01/12/2017

Bill/Resolution No.: HB 1300

- 1 A. **State fiscal effect:** *Identify the state fiscal effect and the fiscal effect on agency appropriations compared to funding levels and appropriations anticipated under current law.*

	2015-2017 Biennium		2017-2019 Biennium		2019-2021 Biennium	
	General Fund	Other Funds	General Fund	Other Funds	General Fund	Other Funds
Revenues	\$0	\$0	\$0	\$0	\$0	\$0
Expenditures	\$0	\$0	\$0	\$0	\$0	\$0
Appropriations	\$0	\$0	\$0	\$0	\$0	\$0

- 1 B. **County, city, school district and township fiscal effect:** *Identify the fiscal effect on the appropriate political subdivision.*

	2015-2017 Biennium	2017-2019 Biennium	2019-2021 Biennium
Counties	\$0	\$0	\$0
Cities	\$0	\$0	\$0
School Districts	\$0	\$0	\$0
Townships	\$0	\$0	\$0

- 2 A. **Bill and fiscal impact summary:** *Provide a brief summary of the measure, including description of the provisions having fiscal impact (limited to 300 characters).*

This bill would define the Board of University & School Lands as an "Administrative Agency" under N.D.C.C. § 28-32-01. While approval would increase administrative and legal expenses associated with rule making processes, an estimate of additional costs cannot be determined.

- B. **Fiscal impact sections:** *Identify and provide a brief description of the sections of the measure which have fiscal impact. Include any assumptions and comments relevant to the analysis.*

3. **State fiscal effect detail:** *For information shown under state fiscal effect in 1A, please:*

- A. **Revenues:** *Explain the revenue amounts. Provide detail, when appropriate, for each revenue type and fund affected and any amounts included in the executive budget.*
- B. **Expenditures:** *Explain the expenditure amounts. Provide detail, when appropriate, for each agency, line item, and fund affected and the number of FTE positions affected.*
- C. **Appropriations:** *Explain the appropriation amounts. Provide detail, when appropriate, for each agency and fund affected. Explain the relationship between the amounts shown for expenditures and appropriations. Indicate whether the appropriation or a part of the appropriation is included in the executive budget or relates to a continuing appropriation.*

Name: Lance Gaebe

Agency: ND Department of Trust Lands

Telephone: 701-328-2807

Date Prepared: 01/16/2017

2017 HOUSE POLITICAL SUBDIVISIONS

HB 1300

2017 HOUSE STANDING COMMITTEE MINUTES

Political Subdivision Committee
Prairie Room, State Capitol

HB 1300
1/27/2017
Job # 27544

- Subcommittee
 Conference Committee

Cameron Hinkle

Explanation or reason for introduction of bill/resolution:

Relating to agencies exempt from the definition of administrative agency

Minutes:

1,2,3,4

Chairman Klemin: Opened the hearing on HB 1300

Rep. Kempenich: (Handouts #1, #2) Introduced the bill. Basically HB 1300 on page 2 you will find lines 17 and 18 requires that Dept. of Trust and School Lands be under Chapter 28, which is the Administrative Rules Code. The University and School Lands should be required to comply with processes under the Administrative Agencies Act. The board makes several substances related decisions that directly impacting business entities that are not noticed in advance. They are not allowed an opportunity to comment and can't otherwise have decisions reviewed on appeal. It is not fair and does not provide reasonable due process with the decisions made by the board. We did a performance audit (Handout #2) on the University and School Lands there are a lot of issues going on with this agency. Some have been addressed and some haven't. This Department needs to be under Chapter 28 to have some formal processes that go with the board.

Chairman Klemin: Chapter 28-32 is the Administrative Agency Practices Act, that chapter sets out procedures that are to be followed when an Administrative Agency engages in rule making procedures. There is also a second part of the Administrative Agency Practices Act that deals with how an Administrative Agency handles administrative proceeding relating to other issues like violating laws. The chapter says this applies to all Administrative Agencies except and there is a list of those not included, which includes Board of University and School Lands is not included in the requirements other than for this chapter.

Rep. Kempenich: That refers to leases and etc. There are issues going on with this agency and I handed out the performance audits. All aspects of the agency do need some work.

Todd Kranda, Attorney Kelsch, Kelsh, Ruff, & Kranda: (Testimony #3) (Time 6:04 to 11:18).

Tyler Hamman, Lignite Energy Council: We are in support of this legislation.

Linda Fisher, Deputy Commissioner of University and School Lands: (Testimony #4)
(Time 12:57 to 20:27)

Rep. Ertelt: You said under the act there are months of public hearing, rule reviews and appeals required. Can you be more specific in the amount of time that is required?

Ms. Fisher: The act has a lot of specific acts that have time frame built in terms of how long do you wait to have a public hearing process. Then there is an Administrative Committee Rules process, then there is the appeals process and if there are changes that are made in those processes you go back and start over. Sometimes it takes a long time from the beginning of the process to the end.

Rep. Ertelt: Could you give me a minimum time for the process?

Ms. Fisher: As the board is currently exempt from that I can't give you specific time line. I am familiar with the process in that it is circular and it takes time when you include due process which is appropriate in many cases.

Rep K. Koppelman: What do you do by rule and what do you do by motion or action?

Ms. Fisher: The Board has promulgated its own rules. Those rules have not been done through the auspices of the Administrative Agency. The Board relies on the Department and Commissioner to make recommendations for policies. The Commissioner brings the recommendations to the Land Board they are discussed in an open forum, where the public is invited to attend, either a decision is made at that point. An example where the Board was considering the royalty rate increases. The Board did solicit public input and tabled making a decision until they had more information available.

Rep K. Koppelman: You realize because you are exempt from the Administrative Agency Practices Act the rules don't you make don't carry the force and effect of law?

Ms. Fisher: I do believe there are Attorney General's opinions that address that.

Rep K. Koppelman: After my 22 years in the Administrative Rules Committee that would be news to me. Do you not think you would gain some benefit if that is the case from rules being recognized to carry the force and effect of law?

Ms. Fisher: That would certainly be something the Board would be interested in

Rep K. Koppelman: I do not know of one incidence where a decision of the Administrative Rules Committee has been appealed. That procedure does exist and one of the reasons for that is the committee works in a favorable climate with most of the agencies and seldom are rules voided. Administrative Rules Committee also has the authority to compromise with an agency. There are specific parameters in the statute under which the Rules Committee can take action. If the committee believes something that is outside of Legislative intent and some

of the other reasons given the committee can work with an agency to remedy that and it can be on the spot. The process you described it has been streamlined.

Ms. Fisher: The comment that we made in terms of rigid following of it once it is approved. That is in fact true, correct? Once an administrative rule is placed, the Board would lose the ability to deviate from that. Unless it went through the process to be changed?

Rep K. Koppelman: That would be true in a sense that the rules once they are adopted carry the force and effect of law. The idea of Administrative Rules is that Constitutionally the Legislature is the law making branch of Government and in allowing administrative agencies in other words executive branch of agencies to make rules. The Legislature is in essence delegating some Constitutional authority to another branch of government. So it reserves the right to oversee that process. The downside you do have to go through a process public hearings and scrutiny by that committee. The good news is once that happens these rules are enforced and you can enforce them like law, unless the Legislature comes back and passes a law to undo them.

Ms. Fisher: We would in that case need to try and think up as many scenarios ahead of time as possible to include them in the rule making process, correct?

Rep K. Koppelman: Rule making authority does not preclude your ability to make policy. You can still do that. The only thing I would recommend if this bill passes you do in rule making the things you really want in rule to carry the force and effect of law, doesn't preclude your everyday rule making. In the constitutional provision Article 9 Section 3, it does say subject to the provisions of this article and any law that may be passed by Legislative Assembly, the Board has control of the appraisal, sale, rental and disposal of all school and university lands. The proceeds from the sale of such lands shall be invested as provided by law. The Constitution contemplates Legislative authority; would you agree with that?

Ms. Fisher: I absolutely would.

Chairman Klemin: Are the rules available on line or how does the public know what those rules are?

Ms. Fisher: Yes, we do have the rules posted on the website.

Vice Chairman Hatlestad: If you set forth a rule is there due process if I disagree with the decision you made? Is there a process to argue my point of view?

Ms. Fisher: The appellate body would be the board and there is the option of litigation.

Rep. Toman: During these meetings do you take advisement or information from those affected by these rules?

Ms. Fisher: Do people get to come to the meeting and make comments? Yes, the Board will take comments at board meetings.

House Political Subdivision Committee
HB 1300
January 27, 2017
Page 4


Chairman Klemin: Closed the hearing on HB 1300.

2017 HOUSE STANDING COMMITTEE MINUTES

Political Subdivisions Committee
Prairie Room, State Capitol

HB 1300
1/27/2017
Job # 27554

- Subcommittee
 Conference Committee



Explanation or reason for introduction of bill/resolution:

Relating to agencies exempt from the definition of administrative agency

Minutes:

1

Chairman Klemin: Opened HB 1300 for committee work.

Vice Chairman Hatlestad: Made a do pass motion.

Rep K. Koppelman: Second the motion.

Rep. Ertelt: What are they exempted from? Without having to be under this act?

Chairman Klemin: They are exempted from following the requirements of the Administrative Agency Practice Act with respect to rule making. That Act requires that they develop a proposed rule, that they give public notice that they are going to have a hearing on the rules, that people be allowed to come in and appear at the hearing before they adopt the rules. This board isn't required to follow that procedure; although they did say when they propose rules they do allow public input. Which is not the same as a hearing. To the extent that they have administrative proceedings which could be subject to administrative review. That would also be required under the Administrative Agency Practice Act.

Rep. Hanson: The board conducts its business in an open form and posts its meetings in accordance with the state meeting laws. It posts information about its public meetings on the public website and people can sign up to get notifications. It's different from the rule making process.

Rep. Ertelt: That may be they are doing that but are they required to do so, not being under the act?

Chairman Klemin: The only thing they are required to do is have an open meeting. They are not required to follow any of those procedures in the Administrative Agency Practices Act. Except for unclaimed property division.

House Political Subdivisions Committee

HB 1300

January 27, 2017

Page 2

Rep. Hanson: There was a question during testimony and Linda said there are AG opinions on the current practice they use in open meetings. And how that compares to following the Administrative Rules committee and she was to follow up with us to get us that information. I wonder if that might be useful to form our opinion.

Chairman Klemin: I don't think having an AG's opinion on open meetings really makes any difference, because they have had some controversial rule making over the last year or so. They may take public input but they can then decide however they want and that's not subject to review by a court or anyone else. At least if it is under rule making then you can have a judicial review to see if they exceeded their authority.

Rep K. Koppelman: I don't know the details of what the controversy that been but I know there has been some controversy. One individual stopped me after the hearing today and said I have been at almost every one of these meetings and I have only been allowed to speak once. When Ms. Fisher asked "gee if we do this does that mean we can't change the rules very easily". Not every decision you make is part of an Administrative Rule. But the individual said they change their rules all the time. They have a meeting and the next meeting they don't like how things are so they change the rule. That is cause enough for concern for me. If they are in a situation where they need to change a rule quickly there is an emergency process for that and they just need the Governor's authority. The Governor sits on the board. When there is an emergency rule the rule goes into effect right away. But then they still have to come under the authority of the Administrative Rules committee.

Chairman Klemin: It was also noted that the Bureau of Land Management does a lot of the same things with regards to federal land. But they follow the Federal Administrative Agency Practices.

Rep. Guggisberg: Can someone give me some examples of rules that have been made that have been problems? I don't understand the need for this.

Vice Chairman Hatlestad: Oil country. We have had a number of oil companies that have had dealings with the group and they set down the rule and the oil company has said it wasn't right we want a review, they are told no. We want to go to court, that has also been a no. They can't do anything there is no recourse nothing we can do.

Rep. Simons: There is just no recourse.

Motion for do pass carries yes 13, no 1, absent 1

Rep K. Koppelman: Will carry the bill.

Attachment #1 was turned in on February 1, 2017.

Date: 1-27-17
 Roll Call Vote: 1

**2017 HOUSE STANDING COMMITTEE
 ROLL CALL VOTES
 BILL/RESOLUTION NO. HB 1300**

House Political Subdivisions Committee

Subcommittee

Amendment LC# or Description: _____

Recommendation: Adopt Amendment
 Do Pass Do Not Pass Without Committee Recommendation
 As Amended Rerefer to Appropriations
 Place on Consent Calendar

Other Actions: Reconsider _____

Motion Made By Rep. Hatlestad Seconded By Rep. K. Koppelman

Representatives	Yes	No	Representatives	Yes	No
Chairman Klemin	/		Rep. Guggisberg	/	
Vice Chairman Hatlestad	/		Rep. Hanson		/
Rep. Beadle	/				
Rep. Becker	/				
Rep. Ertelt	/				
Rep. Johnson	/				
Rep. Koppelman	/				
Rep. Longmuir	/				
Rep. Maragos		/			
Rep. Pyle	/				
Rep. Simons	/				
Rep. Toman	/				
Rep. Zubke	/				

Total (Yes) 13 No 1

Absent 1

Floor Assignment Rep. K. Koppelman

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

REPORT OF STANDING COMMITTEE

HB 1300: Political Subdivisions Committee (Rep. Klemin, Chairman) recommends **DO PASS** (13 YEAS, 1 NAYS, 1 ABSENT AND NOT VOTING). HB 1300 was placed on the Eleventh order on the calendar.

2017 SENATE ENERGY AND NATURAL RESOURCES

HB 1300

2017 SENATE STANDING COMMITTEE MINUTES

Energy and Natural Resources Committee Fort Lincoln Room, State Capitol

HB 1300
3/10/2017
Job #29022

- Subcommittee
 Conference Committee

Committee Clerk Signature



Explanation or reason for introduction of bill/resolution: Relating to agencies exempt from the definition of administrative agency.

Minutes:

Attch#1, 2=Rep Kempenich; Attch#3, #4, #5=Todd Kranda; Attch#6=Linda Fisher

Called the committee to order. All committee members present.

Chairwoman Unruh: Let's open HB1300.

Representative Keith Kempenich, Dist 39: (1:00-3.10) This bill only changes a few words. But there are ore complications to that. (see Attch#1) I also handed out an audit. (see Attch#2) This takes the exemption away from the Land Board. Any questions?

Sen. Cook: Did the audit specifically say that?

Representative Kempenich: No, it did not. There are hearings, then, there are hearings. Some stuff should not be changed as quickly as it is. The intent was not to bring in the operating on it.

Todd Kranda, attorney: Here on behalf of ND Petroleum Council in support of HB 1300. (see Attch#3, #4, #5) (5.00-11.43) This modifies the definition of administrative agency within section 28-32-01 to include the Board of University and School Lands. Please Do pass. I'll take questions.

Sen. Cook: Was there any consideration of some of these issues that should be process of administrative rules that maybe legislation to get this instead of administrative rules?

Todd: Rather than going individually as too each aspect of different changes, we decided it was best for one set of rules to be applied going forward. I am not aware of others. I represent oil and gas. We are comfortable if the board follows the administrative rules which various other agencies are required to follow. Everyone knows what they are.

Sen. Cook: Agencies can have Century Code and Administrative Rules and then we have agency policy. How does one move agency policy to administrative rules? I know how we move policy if we don't like it to Century Code. I know how we move an administrative rule we didn't like. We put that into Code. What control do you have over all the rules have in place now? How do you get them to administrative rules? Where you have a change for public comment?

Todd: Not certain. I think it up to the board to follow. I don't know that an industry can prompt the board to take a certain action.

Sen. Cook: Maybe someone from LC can come down and tell me.

Vice Chair Kreun: Why was this not put into place when this agency was developed?

Todd: Not sure. Things have changed over the years. Maybe more activity now.

Tyler Hamman, Lignite Energy Council: We are in support of this bill. Bureaucracy is bad for business. (16.05)

Vice Chair Kreun: Any more in support? Any in opposition?

Al Jaeger, ND Secretary State: (16.24-21.00) By constitution I am a member of the State Land Board along with four other constitutional officers. I am opposed to this bill. I just completed my 24th year of the land board. I am learning things that are happening and somewhat surprised. I have been accessible for 24 years, and serve with very competent colleagues. I am serving with my fourth governor. I do not see what can be gained by this bill. The Land Board was created in 1889. We have a fiduciary responsibility. First to the school trust lands. I detect some frustration but I do not recall that I have refused anyone. I am, only one member of the board and here talking as Al Jaeger, one member. One of our staff from Trust Lands will talk to you. If there are concerns about due process. I would have like to know this a long time ago. I take issue with the first individual up here in making this broad statement that all of these five agencies are subject to those, and so should the land board.

Sen. Cook: We heard that your policy is 18% interest and 12% penalty. Do you think that in ND someone who is subject to those types of interest and penalties should have a say in what they are?

Al: I think you will have testimony that disputes that fact. We are aware of the audit. It was a long time when they were in the department and very adversarial. A lot came from that audit. In terms of technology, we have been aware we need to upgrade. This legislative body entrusted the land board, during the boom, to do grants. Millions and millions of dollars.

Sen. Cook: When there is a question of who owns the oil and mineral rights, would there be a chance for those who think they do own, be able to appeal a decision by the board?

Al: That is a very legal issue, and it is going through the courts. I don't think that the administrative rules act will address that. (25.04)

Sen. Cook: I think some of these things may have to be solved in a committee room and the floor of the senate.

Al: You would also face the challenge of what is policy and what are rules, and what needs to be in law, etc. It took the trust funds 112 years to hit a billion dollars in assets. We are now at 129th birthday, and since 2011 we are now at 4 billion. A lot has happened quickly. (27.18)

Chairwoman Unruh: Further testimony:

Linda Fisher, Dept. of Land Trust: (see Atch#6) (28.40-42.30) The 18% in in statute, to address Sen. Cook question.

Sen. Cook: I heard the same testimony when we moved DPI into administrative rules. Their reason was pretty close to the same. Where are your rules recorded?

Linda: They are posted on our agency website.

Sen. Cook: When you talk about making decisions on the go, I learned a long time ago, this is not a fast process. Do administrative rules meet quarterly? Yes, Is that too slow for you?

Linda: Can't say that. What we don't know, is how far into the process that we get. There is no definitive time frame.

Sen. Cook: The minute we give a voice to the people who are affected, it slow down the process. But there is a reason we give them a voice. That is what is debated here.

Sen. Armstrong: (44.54) The 18% is a maximum. Are you ever aware of the board negotiating that lower?

Linda: The board can issue penalty and interest waivers and has done so on many occasions.

Sen. Armstrong: Over two years, House many times has the board gone into executive session?

Linda: Maybe three or four times.

Sen. Armstrong: The litigation has been pending a decade in some form or another. It is hard to comment on pending litigation. I understand both ends.

Linda: There may be other ways to solidify the process whereby the public can provide input, without removing the boards exemption to the act entirely.

Chairwoman Unruh: Is LC here?

Vonette Richter: Here neutral just to give information. Code reviser for LC.

Sen. Cook: If you rule and agency under administrative rules, what determines which ones go before administrative rule and where they can just write rules?

Vonette: The distinction between a rule and policy and a guideline, etc. A rule is necessary if it impacts the public. They do not have the force and effect of law. Created without legislative authority.

Sen. Cook: If we have on Code that they will and draft under administrative rules authority, then they have the effect of law?

Vonette: Correct.

Sen. Cook: But if they draft policy in place, that does not have the effect of law?

Vonette: Correct.

Sen. Oban: There was reference from previous testimony about the number of time this issue came up in the past. Do you have any understanding of why we have this? Why do these come in front of us? Trying to remove the exemption?

Vonette: Not sure. I replaced John Walstradt who did this for decades. We see agencies that want to be put on this list more, rather than be taken off.

Sen. Armstrong: Administrative rules gives the regulated community an opportunity to weigh in, but maybe to give the committee an example of how some of us may frame it. Little authority administrative rules have to change what the agencies do and what are the narrow ways in which we can do this. There are limited circumstance in which we can act.

Vonette: (52.40) 28-32-18 sets out some reasons that the administrative rules committee can void a rule. They have the authority to question a rule, to ask for more information to carry it over to another meeting. But the actual authority to void the rule, is limited to 5 criteria. Absence of legislative authority, emergency relating to public health, failure to comply with expressed legislative intent, conflict with state law. In the three plus years I have been staffing the administrative rules committee, we have voided a handful of rules. It is rare and there is a appeals process. ND is one of the few states that has a procedure like this. Most state the only way to void an administrative rule is to pass a bill.

Chairwoman Unruh: The public hearing is an important piece here. How long is that public comment period open for an average rule now?

Vonette: Once the notice has been published, there are 20 days between that and the hearing. After the hearing, we keep it open for 10 days before they can finalize those rules.

After that, they are sent to the AG's Office who view the entire process to make sure they comply with the chapter and issue an opinion. It then comes back to our office and the agency supplies the rules to us, and we schedule them on the agenda for the next administrative rules committee meeting. They meet quarterly.

Chairwoman Unruh: Any more opposition? Any agencies? Seeing none, the hearing is closed.

2017 SENATE STANDING COMMITTEE MINUTES

Energy and Natural Resources Committee
Fort Lincoln Room, State Capitol

HB1300
3/23/2017
Job #29590

- Subcommittee
 Conference Committee

Committee Clerk Signature



Explanation or reason for introduction of bill/resolution: Relating to agencies exempt from the definition of administrative agency.

Minutes:

Attch#1=Land Trust

Chairwoman Unruh: Look at HB 1300. I handed out some proposed amendments from ND Dept. of Trust Lands. (see Atch#1). I will bring amendments as well. What they brought me was helpful. I think there needs to be more time lines and more structure that the way the process goes.

Sen. Cook: Is it safe to assume that the rules established here were done without any public input?

Chairwoman Unruh: Mr. Gaebe is here.

Lance Gaebe, University of School Lands, Trust Land Dept: There is no public comment period, but all the rules are adopted by the land board in public form. They are adopted in open session. We don't have a month long comment period, no. The background information I gave you, is not all the areas we think the bill would challenge. It is all the places already in Code that give the board that authority to adopt rules.

Sen. Cook: That is what all these chapters are is where you are required to adopt rules?

Lance: Correct. They can adopt or draft. These ones in the amendment are the ones that specifically say authority to adopt, draft, or incorporate.

Chairwoman Unruh: I have the additional information if anyone needs copies.

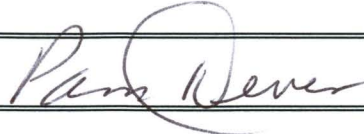
2017 SENATE STANDING COMMITTEE MINUTES

Energy and Natural Resources Committee
Fort Lincoln Room, State Capitol

HB1300
3/30/2017
Job #29820

- Subcommittee
 Conference Committee

Committee Clerk Signature



Explanation or reason for introduction of bill/resolution:

Minutes:

Attch#1,=ChairwomanUnruh;Attch#2=Trust Lands;Attch#3=ChairwomanUnruh; Attch#4=oil people amend;

Attendance was taken. All committee members present.

Chairwoman Unruh: Let's start this morning with HB 1300. Did you look at the Trust Land Amendment they brought at the hearing? (see Attch#3) I had concerns so I worked on new amendment 17.0830.01001. (see Attch#1) The Trust Lands gave me one for today. (see Attch#2). I did some work and you will find the 3 spread sheets listing Code and descriptions. (see Attch#3). I made a decision if each section was subject to AAPA. The amendment takes the two overarching section of Code that give power to the Dept., of Trust Lands and make them subject to the Section in the original bill, which is Administrative Practices Act. That is what section one and two are. The bottom of page 2, of the amendment, it lists the section of Code that would not be subject to the Admin Rule process. They can all be found on the spread sheet. Everything else on the spread sheet would be subject to Admin Rules. I removed the constitutional piece regarding trust lands. I removed the 15.01 and 15.02 and 15.08. This does not alleviate the departments issues that they had with the original bill. They are to manage trust lands. I think they should hold hearings. I did not like the oil people's amendment (see Attch4).

Chairwoman Unruh: I do not like the amendment from Trust Lands (see Attch#2) (7.47) I will give you some time to digest this.

Sen. Armstrong: I cannot come back this afternoon. We need date change?

Chairwoman Unruh: Take and break and deal with this at 11:00. I have to get this done today. Adjourned.

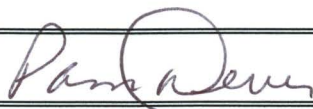
2017 SENATE STANDING COMMITTEE MINUTES

Energy and Natural Resources Committee Fort Lincoln Room, State Capitol

HB 1300
3/30/2017
Job #29841

- Subcommittee
 Conference Committee

Committee Clerk Signature



Explanation or reason for introduction of bill/resolution:

Minutes:

Attch #1

Chairwoman Unruh: Let's start with HB 1300. Morgan is making one change to my amendment. The deal will be delayed from August 1 to January 1, 2018. This will give the department time to come up with rules. (see Attch #1) The Dept. of Trust Lands had a performance audit done, so I learned about audits this morning. There are two types of audits that are completed on our state agencies. One is an operation audit, and the other is a performance audit. The operational audit focuses funds and controls and overarching policies. The performance audit really digs into policy and procedures and is more subject in their review. (2.42)

Sen. Schaible: I move to further amend .01001. **Sen. Roers:** I second.

Chairwoman Unruh: Call the roll. YES 7 NO 0 -0- absent
Amendment passed.

Chairwoman Unruh: We now have HB 1300 as amended before us.

Sen. Cook: I move a Do Pass as amended. **Vice Chair Kreun:** I second.

Chairwoman Unruh: Any discussion? Call the roll. YES 6 NO 1 -0- absent

HB 1300 Passes as amended. **Chairwoman Unruh** will carry.

PROPOSED AMENDMENTS TO HOUSE BILL NO. 1300

Page 1, line 1, after "reenact" insert "sections 15-01-02 and 15-02-05 and"

Page 1, line 2, replace "agencies exempt" with "an exemption"

Page 1, line 3, after "agency" insert " for the administrative agencies practices act; and to provide an effective date"

Page 1, after line 3, insert:

"SECTION 1. AMENDMENT. Section 15-01-02 of the North Dakota Century Code is amended and reenacted as follows:

15-01-02. Powers - Control of public lands and permanent funds.

The board has:

1. ~~Full~~ Subject to the requirements of chapter 28-32, full control of the selection, appraisal, rental, sale, disposal, and management of:
 - a. Lands donated or granted by or received from the United States or from any other source for the support and maintenance of the common schools.
 - b. All lands which fall to the state by escheat.
 - c. All lands donated or granted by or received from the United States or from any other source for the maintenance of the educational, penal, or charitable institutions.
 - d. All lands acquired by the state through the investment of the permanent school funds of the state as the result of mortgage foreclosure or otherwise.
2. Full control of the investment of the permanent funds derived from the sale of any of the lands described in subsection 1.
3. Full control of such percent of the proceeds of any sale of public lands as may be granted to the state by the United States on such sale.
4. Full control of the proceeds of any property that fall to the state by escheat and of the proceeds of all gifts and donations to the state for the support or maintenance of the common schools, and of all other property otherwise acquired by the state for the maintenance of the common schools. Any gift to the state not specifically appropriated to any other purpose must be considered as a gift for the support and maintenance of the common schools.
5. Authority to expend moneys for the purpose of making refunds in cases in which an error has been made by the board, or a person dealing with the board, with regard to any of the lands, minerals, funds, proceeds, or any other kind of property managed by the board. Moneys expended to make

OK
3/30/17
2 of 2

refunds must come from the same fund or account into which the money to be refunded was originally placed.

- 6. Authority to award and distribute energy infrastructure and impact grants from moneys deposited in the oil and gas impact grant fund, except that grants awarded annually may not exceed sixty percent of the biennial appropriation for energy infrastructure and impact grants. The board may create an advisory committee to assist the board in making its grant award determinations.

SECTION 2. AMENDMENT. Section 15-02-05 of the North Dakota Century Code is amended and reenacted as follows:

15-02-05. Powers and duties in general.

The commissioner, under such directions as may be given by the board of university and school lands, shall:

- 1. Have general charge and supervision of all lands described in section 15-01-02.
- 2. Act as general agent of the board in the performance of its duties.
- 3. Have the custody of all maps, books, and papers relating to any of the lands mentioned in this title.
- 4. Procure the books, maps, and plats required to keep a complete record of all such lands, and keep true records of all the sales, leases, permits, patents, deeds, and other conveyances of lands under the commissioner's supervision made by the state showing the amount of money paid, the date of sale and of payment, the description of lands sold or leased, the number of acres [hectares] thereof, the name of the purchaser, and the designation of the fund to be credited therewith.
- 5. Direct all appraisements, sales, and leases, and execute all contracts of sale, leases, permits, and other evidences of disposal of lands, subject to approval by the board and chapter 28-32.
- 6. Certify the book and page number of all contracts, leases, or permits recorded by the commissioner."

Page 2, line 17, remove the overstrike over "~~The board of university and school lands~~"

Page 2, line 18, after the overstruck period insert "with respect to activities under chapters 15-01, 15-02, and 15-08, sections 21-10-01, 47-30.1-24.1, 54-01-05.5, and 54-06-04, subsection 12 of section 54-23.3-04, and sections 54-27-16 and 54-30-17.1, unless otherwise specified in those chapters and sections."

Page 2, after line 31, insert:

"SECTION 4. EFFECTIVE DATE. This Act becomes effective on January 1, 2018."

Re-number accordingly

Date: 3/30/17
Roll Call Vote #: 1

2017 SENATE STANDING COMMITTEE
ROLL CALL VOTES
BILL/RESOLUTION NO. HB 1300

Senate Energy and Natural Resources Committee

Subcommittee

Amendment LC# or Description: 17.0830.01002

Recommendation: Adopt Amendment
 Do Pass Do Not Pass Without Committee Recommendation
 As Amended Rerefer to Appropriations
 Place on Consent Calendar
Other Actions: Reconsider further amend

Motion Made By Sen. Schaidt Seconded By Sen. Roers

Senators	Yes	No	Senators	Yes	No
Chairman Jessica Unruh	/		Sen. Erin Oban	/	
Vice Chair Curt Kreun	/				
Sen. Kelly Armstrong	/				
Sen. Dwight Cook	/				
Sen. Jim Roers	/				
Sen. Don Schaible	/				

Total (Yes) 7 No 0

Absent 0

Floor Assignment _____

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

Date: 3/30/17
 Roll Call Vote #: 2

**2017 SENATE STANDING COMMITTEE
 ROLL CALL VOTES
 BILL/RESOLUTION NO. HB 1300**

Senate Energy and Natural Resources Committee

Subcommittee

Amendment LC# or Description: 17.0830.01002 (end)

Recommendation: Adopt Amendment
 Do Pass Do Not Pass Without Committee Recommendation
 As Amended Rerefer to Appropriations
 Place on Consent Calendar
 Other Actions: Reconsider _____

Motion Made By Sen. Cook Seconded By Sen. Kreun

Senators	Yes	No	Senators	Yes	No
Chairman Jessica Unruh	/		Sen. Erin Oban	/	
Vice Chair Curt Kreun	/				
Sen. Kelly Armstrong		/			
Sen. Dwight Cook	/				
Sen. Jim Roers	/				
Sen. Don Schaible	/				

Total (Yes) 6 No 1

Absent -0-

Floor Assignment Sen. Unruh

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

REPORT OF STANDING COMMITTEE

HB 1300: Energy and Natural Resources Committee (Sen. Unruh, Chairman) recommends **AMENDMENTS AS FOLLOWS** and when so amended, recommends **DO PASS** (6 YEAS, 1 NAYS, 0 ABSENT AND NOT VOTING). HB 1300 was placed on the Sixth order on the calendar.

Page 1, line 1, after "reenact" insert "sections 15-01-02 and 15-02-05 and"

Page 1, line 2, replace "agencies exempt" with "an exemption"

Page 1, line 3, after "agency" insert " for the administrative agencies practices act; and to provide an effective date"

Page 1, after line 3, insert:

"SECTION 1. AMENDMENT. Section 15-01-02 of the North Dakota Century Code is amended and reenacted as follows:

15-01-02. Powers - Control of public lands and permanent funds.

The board has:

1. ~~Full~~Subject to the requirements of chapter 28-32, full control of the selection, appraisal, rental, sale, disposal, and management of:
 - a. Lands donated or granted by or received from the United States or from any other source for the support and maintenance of the common schools.
 - b. All lands which fall to the state by escheat.
 - c. All lands donated or granted by or received from the United States or from any other source for the maintenance of the educational, penal, or charitable institutions.
 - d. All lands acquired by the state through the investment of the permanent school funds of the state as the result of mortgage foreclosure or otherwise.
2. Full control of the investment of the permanent funds derived from the sale of any of the lands described in subsection 1.
3. Full control of such percent of the proceeds of any sale of public lands as may be granted to the state by the United States on such sale.
4. Full control of the proceeds of any property that fall to the state by escheat and of the proceeds of all gifts and donations to the state for the support or maintenance of the common schools, and of all other property otherwise acquired by the state for the maintenance of the common schools. Any gift to the state not specifically appropriated to any other purpose must be considered as a gift for the support and maintenance of the common schools.
5. Authority to expend moneys for the purpose of making refunds in cases in which an error has been made by the board, or a person dealing with the board, with regard to any of the lands, minerals, funds, proceeds, or any other kind of property managed by the board. Moneys expended to make refunds must come from the same fund or account into which the money to be refunded was originally placed.

6. Authority to award and distribute energy infrastructure and impact grants from moneys deposited in the oil and gas impact grant fund, except that grants awarded annually may not exceed sixty percent of the biennial appropriation for energy infrastructure and impact grants. The board may create an advisory committee to assist the board in making its grant award determinations.

SECTION 2. AMENDMENT. Section 15-02-05 of the North Dakota Century Code is amended and reenacted as follows:

15-02-05. Powers and duties in general.

The commissioner, under such directions as may be given by the board of university and school lands, shall:

1. Have general charge and supervision of all lands described in section 15-01-02.
2. Act as general agent of the board in the performance of its duties.
3. Have the custody of all maps, books, and papers relating to any of the lands mentioned in this title.
4. Procure the books, maps, and plats required to keep a complete record of all such lands, and keep true records of all the sales, leases, permits, patents, deeds, and other conveyances of lands under the commissioner's supervision made by the state showing the amount of money paid, the date of sale and of payment, the description of lands sold or leased, the number of acres [hectares] thereof, the name of the purchaser, and the designation of the fund to be credited therewith.
5. Direct all appraisements, sales, and leases, and execute all contracts of sale, leases, permits, and other evidences of disposal of lands, subject to approval by the board and chapter 28-32.
6. Certify the book and page number of all contracts, leases, or permits recorded by the commissioner."

Page 2, line 17, remove the overstrike over "~~The board of university and school lands~~"

Page 2, line 18, after the overstruck period insert "with respect to activities under chapters 15-01, 15-02, and 15-08, sections 21-10-01, 47-30.1-24.1, 54-01-05.5, and 54-06-04, subsection 12 of section 54-23.3-04, and sections 54-27-16 and 54-30-17.1, unless otherwise specified in those chapters and sections."

Page 2, after line 31, insert:

"**SECTION 4. EFFECTIVE DATE.** This Act becomes effective on January 1, 2018."

Re-number accordingly

2017 CONFERENCE COMMITTEE

HB 1300

2017 HOUSE STANDING COMMITTEE MINUTES

Political Subdivisions Committee Prairie Room, State Capitol

HB 1300
4/11/2017
Job # 30044

- Subcommittee
 Conference Committee

Cameron Hick

Explanation or reason for introduction of bill/resolution:

Relating to agencies exempt from the definition of administrative agency

Minutes:

1,2

Chairman Klemin: Open the conference committee on HB 1300. Those attending were Chairman Klemin, Rep K. Koppelman, Rep. Hanson, Sen. Unruh, Sen. Cook, Sen. Armstrong.

Chairman Klemin: (Attachment #1) Discussed the existing law as well as the amendments from the House and Senate.

Sen. Unruh: We would be amenable to taking out other specific exemptions so long as it encompasses enough of the activities within the department.

Chairman Klemin: (Proposed amendment #2) There was miscommunication with Samantha Kramer who completed the proposed amendment. Section 1 and 2 should not be in this amendment. Page 2 line 17 & 18, the way the statute would read now it would say, administrative agency term does not include the board of University and School Lands except with respect to mineral leasing and management activities.

Rep K. Koppelman: There seems to be resistance during this session by this particular agency to be included under the administrative rules process. The process as it operates now is a good one. It works well and is a check and balance in state government. The authority to make rules are law making authority, we are the constitutionally mandated branch of government that makes law. But we lent some of that authority to the executive branch and we call them rules. The process has been that because the legislature has delegated that authority it also has the authority to oversee that process. The main idea is to watch them as they go into place. I am bewildered by the resistance to being under the administrative rules process. Especially where you talk about areas where they say they don't make rules. We have some exemptions in the statute they came from the 1970's. Some agencies said they wanted to be exempt and not part of the administrative rules. The legislature at that time agree. In recent years we have exempted certain things for really good reasons. But unless there is a good reason that they shouldn't be under that process

they shouldn't be exempt. The other thing is the fiscal note we had a zero fiscal note on our side and initially you had a zero fiscal note now it is \$1.4 million over two biennium. I looked back and the Dept. of Public Instruction did not have their rules under the administrative rules process at one point but they were then put under this process. They had two rules makings to get their entire administrative rules under the process and it cost them \$2239 each time. I would prefer to work out an amendment but don't see why there should be exemptions.

Sen. Unruh: I agree with Rep Koppelman, I don't understand the fiscal note myself. The scope of what we were looking at was reduced and we got an increase in the fiscal note. But as far as the amendments the chairman passed out I would like to take a look at this, we could include unclaimed property and surface management. Or possible going back to the original version of the bill.

Chairman Klemin: With respect to unclaimed property that has been transferred over to the state treasure.

Sen Unruh: I don't know if that is finalized or not yet. That was in the works.

Chairman Klemin: The last I saw was the house had passed a bill that transferred those responsibilities to the state treasure.

Sen. Unruh: I will do some investigation on that.

Rep K. Koppelman: I would move the Senate recede from its amendments on HB 1300 without this new amendment.

Chairman Klemin: Motion fails for lack of a second. We will recess and reschedule it so we can look at this.

2017 HOUSE STANDING COMMITTEE MINUTES

Political Subdivisions Committee Prairie Room, State Capitol

HB 1300
4/12/2017
Job # 30044

- Subcommittee
 Conference Committee

Carmen Hitch

Explanation or reason for introduction of bill/resolution:

Relating to agencies exempt from the definition of administrative agency

Minutes:

1

Chairman Klemin: Opened the conference committee on HB 1300. Attending were Chairman Klemin, Rep K. Koppelman, Rep. Hanson, Sen. Unruh, Sen. Cook, Sen. Armstrong.

Chairman Klemin: (Proposed amendment #1). Discussed the proposed amendment as it was a revised version of what he handed out previously.

Sen Cook: Moved that the Senate recede from their amendments.

Rep K. Koppelman: Second the motion.

Chairman Klemin: The Senate recede from their amendments would leave the House bill as it was originally.

Roll call vote 5 yes, 1 no, 0 absent.

Date: 4-12-17
 Roll Call Vote #: 1

2017 HOUSE CONFERENCE COMMITTEE
 ROLL CALL VOTES

BILL/RESOLUTION NO. 1300

House Political Subdivisions Committee

- Action Taken
- HOUSE accede to Senate Amendments
 - HOUSE accede to Senate Amendments and further amend
 - SENATE recede from Senate amendments
 - SENATE recede from Senate amendments and amend as follows
 - Unable to agree, recommends that the committee be discharged and a new committee be appointed

Motion Made by: Sen. Cook Seconded by: Rep. K. Koppelman

Representatives	4-11	4-12	Yes	No	Senators	4-11	4-12	Yes	No
Chairman Klemin:	/	/	/		Sen. Unruh	/	/	/	
Rep K. Koppelman:	/	/	/		Sen. Cook	/	/	/	
Rep. Hanson	/	/	/		Sen. Armstrong	/	/		/
Total Rep. Vote					Total Senate Vote				

Vote Count Yes: 5 No: 1 Absent: 0

House Carrier Rep. Klemin Senate Carrier Sen. Unruh

LC Number _____ of amendment

LC Number _____ of engrossment

Emergency clause added or deleted

Statement of purpose of amendment

REPORT OF CONFERENCE COMMITTEE

HB 1300: Your conference committee (Sens. Unruh, Cook, Armstrong and Reps. Klemin, K. Koppelman, Hanson) recommends that the **SENATE RECEDE** from the Senate amendments as printed on HJ pages 1434-1436 and place HB 1300 on the Seventh order.

HB 1300 was placed on the Seventh order of business on the calendar.

2017 TESTIMONY

HB 1300

HB1300

1-27-17 #1

NORTH DAKOTA LEGISLATIVE MANAGEMENT

Minutes of the

Rep. Kempenich

LEGISLATIVE AUDIT AND FISCAL REVIEW COMMITTEE

Thursday, April 21, 2016
Roughrider Room, State Capitol
Bismarck, North Dakota

Senator Jerry Klein, Chairman, called the meeting to order at 9:00 a.m.

Members present: Senators Jerry Klein, Judy Lee, David O'Connell; Representatives Patrick R. Hatlestad, Jerry Kelsh, Keith Kempenich, Lawrence R. Klemin, Gary Kreidt, Andrew G. Maragos, Bob Martinson, Mike Nathe, Marvin E. Nelson, Robert J. Skarphol

Members absent: Representatives Corey Mock, Chet Pollert

Others present: Dick Dever, State Senator, Bismarck
See Appendix A for additional persons present.

It was moved by Senator O'Connell, seconded by Representative Maragos, and carried on a voice vote that the minutes of the January 14, 2016, meeting be approved as distributed.

AUDIT OF STATE AGENCIES, BOARDS, AND COMMISSIONS

Chairman Klein called on Mr. Ron Tolstad, Audit Manager, State Auditor's office, who presented the internal controls and compliance report on the audit of the basic financial statements included in the June 30, 2015, Comprehensive Annual Financial Report State of North Dakota Governance Communication Including the Report on Internal Control, Compliance, and Other Matters for the Year Ended June 30, 2015. Mr. Tolstad said the State Auditor's office has audited the general purpose financial statements for the state of North Dakota for the year ended June 30, 2015. He reviewed the auditor's responses to the committee guidelines and said the report contains an unmodified opinion, and the report identified one prior period adjustment and one prior period audit finding not implemented. He said the prior period audit adjustment relates to construction in progress. He said the prior period audit finding not implemented relates to improper reconciliation of motor vehicle clearing account.

Mr. Tolstad said Governmental Accounting Standards Board (GASB) State No. 70, which relates to accounting and financial reporting for nonexchange financial guarantees and GASB Statement No. 71 relating to pension transition for contributions made subsequent to the measurement date, have been implemented for the fiscal year ended June 30, 2015.

COMPREHENSIVE ANNUAL FINANCIAL REPORT

Ms. Rachel Kmetz, Accounting Manager, Office of Management and Budget, presented information on the State of North Dakota Comprehensive Annual Financial Report for the Fiscal Year Ended June 30, 2015. She reviewed the information contained in the report and a supplemental report entitled 2013-15 Biennium Budget and Actual Detail. Copies of both reports are on file in the Legislative Council office.

At the request of Chairman Klein, Ms. Kmetz provided information (Appendix B) regarding additions and deletions of the state's total debt, including bonds and notes payable for fiscal year 2015.

INTERNAL CONTROL AND COMPLIANCE REPORT

Ms. Robyn Hoffmann, Audit Manager, State Auditor's office, presented the North Dakota University System Governance Communication Including the Report on Internal Control, Compliance, and Other Matters for the Year Ended June 30, 2015. She reviewed the auditor's responses to the committee guidelines and said there were five audit recommendations, including four prior period audit recommendations not implemented.

The audit recommendations relate to legislative approval of local fund expenses, including compliance of North Dakota Century Code Sections 54-27-12 and 15-55-10, relating to approval of construction or renovation of any public building; ensuring proper controls for identifying actual sources of funds used for local projects; and taking appropriate actions to modify or clarify state laws with the Legislative Assembly to ensure the University Systems is receiving required approval for capital projects.

In addition, Ms. Hoffman said the four prior period audit recommendations not implemented relate to:

- Lack of comprehensive fraud and control risk assessment by each institution;
- Inadequate oversight of affiliated organizations compliance with State Board of Higher Education policies;
- Lack of cash reconciliations at Williston State College; and
- Inadequate employee criminal history background checks at Minot State University.

In response to a question from Representative Skarphol, Ms. Hoffmann said the Dickinson State University Foundation was unable to receive an audit opinion because of inadequate financial records. Ms. Hoffmann said the foundation has been forced into receivership by the Attorney General's office and is in the process of being dissolved.

Representative Klemin commented regarding actions to clarify state law to ensure the University System is receiving required approval for capital projects. He suggested the State Auditor's office provide recommendations to the committee regarding how to address clarifying state law.

Representative Kempenich suggested a bill be introduced to provide clarification of required approvals for University System capital projects.

COMMENTS FROM NORTH DAKOTA UNIVERSITY SYSTEM

Ms. Tammy Dolan, Chief Financial Officer, North Dakota University System, provided comments regarding the internal control and compliance report for the audit of the general purpose financial statements included in the June 30, 2015, annual financial report for the University System. She said the University System will establish a process to provide more clarity to institutions relating to capital project requirements. In addition, she said the University System will address prior audit recommendations that have not been implemented.

Representative Skarphol suggested the committee receive information from North Dakota State University regarding its goal of increasing enrollment by 4,000 students. He expressed concern that increasing the current student population will result in existing students incurring additional costs.

In response to a question from Representative Nathe, Ms. Dolan said any student fee increases must be approved by the University System office. Ms. Dolan said, if North Dakota State University increases its enrollment by 4,000 students, the University System office will be monitoring the situation to ensure student fees are not increased.

Representative Kempenich expressed concern regarding student fee increases. He said an existing student body may vote to increase student fees for a large project. He said the fee increase may continue for 10 to 15 years. He said often times, the students that voted for the student fee increases graduate before the student fee increases become effective.

Chairman Klein said the committee will ask representatives of North Dakota State University to comment on the university's goal of increasing student enrollment by 4,000 students at the next committee meeting and to confirm that student tuition and fee rates will not increase due to the enrollment increase.

UNIVERSITY SYSTEM ANNUAL FINANCIAL REPORT

Ms. Robin Putnam, Director of Financial Reporting, North Dakota University System, presented *North Dakota University System Annual Financial Report Fiscal Year Ended June 30, 2015*. She said the report for the University System includes the 11 public universities, the University System office, Core Technology Services, and 17 foundations which are required by government accounting standards to be included as component units of the University System. She said an unqualified opinion was issued on the financial statements. As of June 30, 2015, she said the University System had total assets of \$1.775 billion and total liabilities of \$550 million, resulting in net assets of \$1.225 billion. She said net assets increased \$163.3 million during fiscal year 2015.

Ms. Putnam said the annual degree credit head count for fall 2014 was 47,660, a decrease of 355 from the previous fall enrollment of 48,015.

AUDIT OF STATE AGENCIES, BOARDS, AND COMMISSIONS

Chairman Klein called on Mr. Ed Nagel, Director, State Auditor's office, who presented *Department of Public Instruction Bismarck, North Dakota Audit Report for the Biennium Ended June 30, 2015*. Mr. Nagel reviewed the auditor's responses to the committee guidelines and said the report does not include any findings or recommendations.

Mr. Nagel presented North Dakota Lottery Bismarck, North Dakota Audit Report for the Years Ended June 30, 2015 and 2014. He said the North Dakota Lottery audit is conducted on an annual basis. He reviewed the auditor's responses to the committee guidelines and said the report includes one significant accounting policy change related to GASB Statement No. 65 relating to items previously reported as assets and liabilities.

Mr. Nagel presented Office of the Governor Bismarck, North Dakota Audit Report for the Biennium Ended June 30, 2015. He reviewed the auditor's responses to the committee guidelines and said the report does not include any findings or recommendations.

Mr. Nagel presented Office of Management and Budget Bismarck, North Dakota Audit Report for the Biennium Ended June 30, 2015. He reviewed the auditor's responses to the committee guidelines and said the report identified two audit findings relating to lack of reconciliations relating to sales and deposits for surplus property, and noncompliance with procurement laws.

Mr. Nagel presented Office of the State Treasurer Bismarck, North Dakota Audit Report for the Biennium Ended June 30, 2015. He reviewed the auditor's responses to the committee guidelines and said the report does not include any findings or recommendations.

Chairman Klein called on Ms. Rhonda Mahlum, Mahlum Goodhart, PC, Certified Public Accountants, who presented Education Standards and Practices Board Audit Report June 30, 2012. She reviewed the auditor's responses to the committee guidelines and said the report identified three audit findings relating to segregation of duties, preparation of financial statements and audit notes, and reconciliation of general ledger accounts.

Ms. Mahlum presented Education Standards and Practices Board Audit Report June 30, 2013. She reviewed the auditor's responses to the committee guidelines and said the report identified three audit findings relating to segregation of duties, preparation of financial statements and audit notes, and reconciliation of general ledger accounts.

Representative Nathe and Representative Skarphol commented that due to recent media reports relating to the use of the board's credit cards, it is imperative for the committee to receive the audit report for the Education Standards and Practices Board for the fiscal years ended June 30, 2015, and 2014, at the committee's final meeting of this interim.

Chairman Klein said the committee will schedule the Education Standards and Practices Board audit reports for the fiscal years ended June 30, 2015, and 2014, at the committee's final meeting of this interim, unless the report is available earlier.

Ms. Mahlum presented North Dakota State Board of Registration for Professional Engineers and Land Surveyors Audit Report June 30, 2014. She reviewed the auditor's responses to the committee guidelines and said the report identified three audit findings relating to segregation of duties, general ledger entries, and preparation of financial statements.

Ms. Mahlum presented North Dakota Stockmen's Association Audit Report December 31, 2015 and 2014. She reviewed the auditor's responses to the committee guidelines and said the report identified one audit finding relating to segregation of duties.

Chairman Klein called on Ms. Katie Moch, Eide Bailly LLP, Certified Public Accountants, who presented Financial Statements December 31, 2015 and 2014 Beginning Farmer Revolving Loan Fund. She reviewed the auditor's responses to the committee guidelines and said the report does not include any findings or recommendations.

Ms. Moch presented Financial Statements December 31, 2015 and 2014 Community Water Facility Loan Fund. She reviewed the auditor's responses to the committee guidelines and said the report does not include any findings or recommendations.

Ms. Moch presented Financial Statements September 30, 2015 and 2014 North Dakota Guaranteed Student Loan Program. She reviewed the auditor's responses to the committee guidelines and said the report does not include any findings or recommendations.

In response to a question from Representative Kempenich, Mr. Robert Humann, Chief Lending Officer, Bank of North Dakota, provided information regarding the North Dakota guaranteed student loan program. He said many federal guaranteed student loans are being refinanced into alternative student loan consolidation programs including the DEAL One loan program at the Bank of North Dakota.

Ms. Moch presented *Financial Statements June 30, 2015 and 2014 Workforce Safety & Insurance*. She reviewed the auditor's responses to the committee guidelines and said the report includes one significant accounting policy change related to GASB Statement No. 68.

DEPARTMENT OF TRUST LANDS PERFORMANCE AUDIT - ENERGY INFRASTRUCTURE AND IMPACT OFFICE

At the request of Chairman Klein, Mr. Jason Wahl, State Auditor's office, presented Information ([Appendix C](#)) regarding the performance audit of the Department of Trust Lands Energy Infrastructure and Impact Office. Mr. Wahl said the purpose of the performance audit was to determine if the Energy Infrastructure and Impact Office effectively administers its grants. He said the Energy Infrastructure and Impact Office is a division within the Department of Trusts Lands. He said the Director is appointed by the Board of University and School Lands. He said the powers and duties of the office include:

- Developing a plan for the assistance, through financial grants for services and facilities, of counties, cities, school districts, and other political subdivisions in coal development and oil and gas development impact areas;
- Establishing procedures and providing proper forms to political subdivisions for use in making applications for impact assistance;
- Receiving and reviewing applications for impact assistance;
- Making recommendations to the Board of University and School Lands on grants to political subdivisions in oil and gas development impact areas based on identified needs and other sources of revenue available to the political subdivision; and
- Making disbursements for grants awarded by the Board of University and School Lands.

Mr. Wahl said the Board of University and School Lands approved approximately \$124 million of oil and gas impact grants for the 2011-13 biennium and \$240 million of oil and gas impact grants for the 2013-15 biennium.

Mr. Wahl said the State Auditor's office determined certain aspects of grant administration were operating ineffectively. He said the audit includes 13 recommendations, which provide for the Energy Infrastructure and Impact Office to:

1. Establish procedures for political subdivisions to use in making applications for energy infrastructure and impact grant funds set aside for emergencies and contingencies, and ensure the procedures are effectively communicated.
2. Ensure the application screening process for energy infrastructure and impact grants is transparent and provides for fair and equitable treatment of all applications, including establish a grant application screening process to identify completed applications meeting the eligibility requirements, score only completed applications meeting the eligibility requirements, re-evaluate the grant application scoring criteria to ensure criteria are reasonable, provide a method for awarding priority points, separate compound criteria, define the point scale to be used for scoring, and ensure the screening process is documented.
3. Ensure recommendations of energy infrastructure and impact grants to the Board of University and School Lands comply with eligibility requirements.
4. Ensure all eligible applications for a grant round are given consideration before making recommendations to the Board of University and School Lands.
5. Ensure projects recommended to the Board of University and School Lands are achievable at the proposed funding levels.
6. Ensure the needs of entities provided priority in law are adequately addressed before consideration is given to other eligible political subdivisions.
7. Include contingencies in the recommendations made to the Board of University and School Lands when grant application project costs for larger projects are based on estimates rather than actual bids.
8. Ensure energy infrastructure and impact grants awarded annually do not exceed the state law maximum.
9. Request the Board of University and School Lands pass a motion outlining the authority granted to the department related to scope changes of Board of University and School Lands awards and ensure all required scope changes are taken to the Board of University and School Lands for approval.
10. Ensure grant payments are limited to the reimbursement of expenditures for projects outlined in the grant application and local match requirements and special conditions of the grant award are met, requests for reimbursement are adequately supported, and expenditures claimed for reimbursement are not reimbursed twice.

11. Obtain status updates for grants with outstanding balances in a more cost-effective manner by requiring status reports or telephone discussions, conduct site visits for grant awards based on risk of political subdivision or project, ensure site visit documentation clearly identifies the grant award being monitored, and the status of the project relating to the intent of the grant application.
12. Obtain a legal interpretation of the 2013 Session Law Chapter 471, Section 9, relating to distributions to counties experiencing new oil and gas development activities to determine if other counties were eligible for a distribution, and the county that was provided a distribution was eligible.
13. Ensure advisory committees assisting the Board of University and School Lands with grant determinations comply with open meeting laws.

COMMENTS BY DEPARTMENT OF TRUST LANDS

Mr. Lance Gaebe, Director, Department of Trust Lands, provided comments ([Appendix D](#)) regarding the Department of Trust Lands - Energy Infrastructure and Impact Office performance audit. He said the statutory mission of the Energy Infrastructure and Impact Office is to assist local political subdivisions in response to the needs directly as a result of actual or anticipated extraordinary expenditures caused by energy development and its associated growth. He said programs include a grant program for oil- and gas-impacted political subdivisions and a low-interest loan program for coal-impacted political subdivisions. He said the legislative appropriations for oil and gas tax impact grants increased from \$8 million in the 2009-11 biennium to \$165 million for the 2011-13 biennium, \$240 million for the 2013-15 biennium, and \$140 million for the 2015-17 biennium. He said the annual grants are limited to 60 percent of the biennial appropriation. He said grants approved by the Board of University and School Lands were provided to address infrastructure and to provide permanent housing and public safety improvements. In addition, he said some grants were provided for rural transportation, critical education construction, and safety projects.

Mr. Gaebe expressed concern regarding the audit process. He provided, as part of his testimony, additional information regarding department responses to audit findings.

In response to a question from Senator O'Connell, Mr. Gaebe said the Energy Infrastructure and Impact Office did ask the Attorney General's office to review information to provide a legal interpretation of the 2013 Session Law Chapter 471, Section 9, relating to distributions to counties experiencing new oil and gas development activities to determine if other counties were eligible, and to confirm the county that received a distribution was eligible. Mr. Gaebe said the Attorney General's office determined the Department of Trust Lands made the distributions correctly.

In response to a question from Representative Nathe, Mr. Gaebe said he believes the Energy Infrastructure and Impact Office is complying with state law when conducting its scoring process for determining grant awards.

In response to a question from Representative Kempenich, Mr. Gaebe said pledging future grant awards was initially done to allow selected applicants requesting funding for construction projects to begin the process of hiring engineers before the construction season began.

In response to a question from Representative Nelson, Mr. Gaebe said the Board of University and School Lands approved the pledge amounts.

In response to a question from Representative Skarphol, Mr. Gaebe said the Department of Trust Lands edited its responses to the audit findings after changes were suggested in a meeting between the department and the State Auditor's office.

In response to a question from Representative Klemin, Mr. Gaebe said an applicant that has been approved and awarded a grant, receives those grant funds on a reimbursement basis by submitting the bill from a contractor, an invoice receipt, or other voucher from the project.

Chairman Klein said the Legislative Assembly may need to consider better defining the use of oil and gas impact grant funds.

Representative Skarphol suggested centralizing a number of state grant programs in one agency to provide more consistency in the process of awarding grants.

At the request of Chairman Klein, Mr. Wahl provided comments regarding the State Auditor's process of reviewing department responses to audit findings. Mr. Wahl said the State Auditor's office does not change department responses to audit findings. He said responses included in the performance audit report were the responses submitted by the department for the audit findings.

DEPARTMENT OF TRUST LANDS PERFORMANCE AUDIT - TRUST ASSETS AND DEPARTMENT RESOURCES

Mr. Wahl presented information ([Appendix E](#)) regarding the performance audit of the Department of Trust Lands trust assets and department resources. He said the purpose of the performance audit was to determine if the Department of Trust Lands is obtaining, accounting for, and using resources efficiently and effectively. He said in 1889, Congress passed the Enabling Act which provided land grants to the State of North Dakota for the support of the common schools as well as colleges, universities, the State Capitol, and other public institutions. He said the department manages trusts and tracts of land for the various beneficiaries. He said the tracts are leased by the department to generate income for the trusts assigned to the tracts. He said leases give lessees the rights to the use of surface acres and the rights to mineral development. He said the department manages the following 13 permanent educational trust funds established to provide ongoing funding for education:

1. Common schools (K-12 public education);
2. Ellendale State College;
3. Mayville State University;
4. North Dakota State College of Science;
5. North Dakota State University;
6. North Dakota Vision Services - School for the Blind;
7. School for the Deaf;
8. School of Mines;
9. State Hospital;
10. University of North Dakota;
11. Valley City State University;
12. Veterans' Home; and
13. Youth Correctional Center.

In addition, Mr. Wahl said the department manages the following trust funds for the state or other beneficiaries pursuant to state law:

- Capitol building fund;
- Coal development fund;
- Indian cultural education trust; and
- Strategic investment and improvements fund.

Mr. Wahl said the State Auditor's office audited four areas of trust assets and department resources including surface and mineral areas, financial areas, human resource areas, and additional areas needing improvement. He said the State Auditor's office determined the department was not obtaining, accounting for, and using certain resources efficiently and effectively. He said the audit includes 29 recommendations, which provide the Department of Trust Lands:

1. Ensure tracts of land managed by the department are assigned to the correct trust and obtain guidance from legal counsel on correcting net assets and past distributions for trusts incorrectly assigned to tracts.
2. Conduct a formal review of oil and gas royalty payments to ensure amounts received were based on the correct decimal interest, and establish a periodic review to ensure operators are using the correct decimal interest.
3. Ensure oil and gas royalty payments are correctly allocated to the proper trusts, and obtain guidance from legal counsel on correcting net assets and past distributions for royalty payment allocation errors.
4. Ensure information submitted with oil and gas royalty payments is consistently obtained in an electronic format and includes all necessary information to adequately monitor payment amounts, and conduct audits of oil and gas operators submitting royalty payments to the department.
5. Establish an interest rate to be assessed on late oil and gas royalty payments, and a policy identifying the circumstances under which interest will be assessed.

6. Ensure penalties are consistently assessed on late oil and gas royalty payments and that calculations are accurate.
7. Monitor changes made to information in the minerals database to ensure changes are appropriate and adequately documented, and ensure lease agreements are appropriately updated when changes occur.
8. Ensure the minimum opening bids for pastureland result in a "fair market" return.
9. Analyze the use of additional online auctions, including costs associated with online versus live auctions, and use the auction process determined to be more beneficial to the trusts.
10. Ensure agreements are entered into and information is obtained for inspections not conducted by the department on state-owned tracts, and appropriate action is taken when violations or other concerns are identified on surface tracts.
11. Comply with North Dakota Century Code requirements relating to classifying all land owned by the state or its instrumentalities according to its highest and best use, or take appropriate action to modify the requirement of classifying all land owned by the state or its instrumentalities.
12. Ensure fiduciary responsibilities are fulfilled, ensure public funds are used in an appropriate manner, and enhance the organizational culture of accountability.
13. Ensure compliance with state procurement laws, rules, and policies.
14. Ensure payments for services are made pursuant to a written contract or agreement, perform a risk analysis for all contracts and agreements to ensure appropriate insurance provisions are included, include applicable terms and conditions within contracts and agreements as recommended by the Attorney General's office, and ensure appropriate reviews are performed by legal counsel.
15. Ensure direct costs are applied to the appropriate trust, program, and activity, and ensure nondirect costs are allocated in an appropriate manner to trusts, programs, and activities.
16. Conduct a formal fraud risk assessment as required by the Office of Management and Budget policy.
17. Avoid actions resulting in or creating the appearance of losing independence or impartiality, and actions that create an adverse effect on the integrity of the Board of University and School Lands or Department.
18. Ensure individuals hired into classified, nontemporary positions meet the minimum qualifications for the job class as required by North Dakota Administrative Code.
19. Follow Human Resource Management Services' hiring process best practices, and provide proper training to employees involved in the hiring process.
20. Comply with veterans' preference hiring requirements pursuant to North Dakota Century Code.
21. Comply with legislative intent for use of authorized full-time equivalent positions.
22. Comply with salary administration requirements pursuant to North Dakota Administrative Code.
23. Comply with session law requirements related to general legislative salary increases, and North Dakota Administrative Code requirements related to annual employee performance evaluations.
24. Establish an effective process for evaluating employees' performance.
25. Ensure appropriate information technology systems exist, user manuals are established, and systems are used to the fullest extent possible.
26. Establish formal policies and procedures, use a standardized format for policies and procedures, and review policies and procedures periodically to ensure information is current and relevant.
27. Ensure policies and procedures are available to all employees in a centralized location, and require all employees to periodically review department policies and procedures and signify acknowledgment in writing.
28. Perform ongoing monitoring of the design and operating effectiveness of the department's internal control procedures.
29. In conjunction with representatives of the State Historical Society, review records and identify permanently retained records and records with archival value, and transfer applicable records to State Archives.

COMMENTS BY DEPARTMENT OF TRUST LANDS

Mr. Gaebe provided comments ([Appendix F](#)) regarding the Department of Trust Lands - Trust Assets and Department Resources performance audit. In addition, he also provided a copy ([Appendix G](#)) of the department's biennial report entitled *61st Biennium Report of the Board of University and School Lands and Commissioner of University and School Lands* for the period July 1, 2013, to June 30, 2015. He said the department does not agree with the performance audit findings that the department is not fulfilling its fiduciary responsibilities, public funds are being used inappropriately, and that the organization lacks accountability.

Mr. Gaebe said the Department of Trust Lands serves the administrative function of the Board of University and School Lands. He said the Board of University and School Lands was created to manage the common schools trust fund and other permanent trusts. He said the board and the department also manage several state funds, including the strategic investment and improvements fund, the coal development fund, and the Capitol building fund. In addition, he said the department manages 708,000 surface acres of land being leased to ranchers and farmers. He said the department also oversees 1.7 million mineral acres of land for the permanent trusts, including use for oil, gas, coal, gravel, and subsurface mineral leasing and production. He said all trust balances and funds managed by the board continue to grow. He said funds managed by the board have grown from \$900 million in 2009 to a current balance of \$3.6 billion. He said permanent trust distributions are determined based on the average value of the trusts' financial assets. He said the trusts disbursed approximately \$138.7 million during the 2013-15 biennium, and approximately \$219.1 million was approved for distribution during the 2015-17 biennium.

Mr. Gaebe said the strategic investment and improvements fund earns revenue from production of 700,000 sovereign mineral acres managed by the department and a portion of oil and gas production and extraction taxes. He said funds were used for "surge" funding and several other programs including the school construction loan program, critical access hospital loan program, and several one-time construction and infrastructure items. He said during the period of the audit, the department administered \$1.7 billion of transfers and \$218 million for improving infrastructure, including highways, cities, schools, and hospitals.

Mr. Gaebe said, during the period of the performance audit, almost all department personnel participated with interviews, desk audits, responses to requests for information relating to policies, processes, and practices, to assist the State Auditor's office staff with understanding the department's data and systems, and to provide responses to recommendations. He said the department anticipated the audit would provide recommendations that would further enhance controls, increase efficiencies, and boost productivity. He expressed concern that the audit recommendations were more generalized and subjective than anticipated. In addition, he said the audit recommendations address unintentional errors and oversights. He said the department recently began the process of hiring a private firm to analyze and prepare specific improvement options.

Representative Skarphol said the performance audit has identified deficiencies and made recommendations to improve the department's processes. He said the department should implement the recommendations as soon as possible.

Senator O'Connell commented regarding the performance audit. He said the process of going through a performance audit is about making the process better and finding efficiencies.

DEPARTMENT OF TRUST LANDS PERFORMANCE AUDIT - UNCLAIMED PROPERTY

Mr. Wahl presented information ([Appendix H](#)) regarding the performance audit of the Department of Trust Lands Unclaimed Property Division. He said the purpose of the performance audit was to determine if the Department of Trust Lands is effectively administering unclaimed property. He said unclaimed property is property held, issued, or owing in the ordinary course of a holder's business and has remained unclaimed by the owner for more than the established time frame for the type of property. He said unclaimed property may include a check, unpaid wage, stock, an amount payable under the terms of an insurance policy, or contents of a safe deposit box. He said a holder may include a bank, insurance company, hospital, utility company, retailer, or local government. He said an owner is a person or entity with a legal or equitable interest in property subject to the unclaimed property law. He said since 1975, it has been the responsibility of the Unclaimed Property Division of the Department of Trust Lands to assist individuals with identifying property presumed abandoned. He said the administrator of the division is responsible for the operations of unclaimed property. He said the division acts as custodian of the unclaimed property received from holders. He said the property is held in trust in perpetuity by the state. He said the federal 1981 Uniform Unclaimed Property Act created by the national Uniform Law Commission was adopted by the state in 1985.

Mr. Wahl said the State Auditor's office determined aspects of the unclaimed property program were operating ineffectively. He said the audit includes 19 recommendations, which provide the Department of Trust Lands:

1. Ensure complete and accurate resources are available to those searching for unclaimed property.
2. Increase efforts to locate owners of unclaimed property, and ensure efforts to locate owners are done in a fair and consistent manner.
3. Monitor abandoned property reporting information from entities in the state, and have audits of entities in the state conducted to ensure abandoned property is appropriately turned over to the department.
4. Provide proper guidance and training on unclaimed property requirements to state entities.
5. Eliminate language related to negative reporting for unclaimed property or take appropriate action to require negative reports and track holder compliance.
6. Comply with state law requirements and provide written consent to holders if property is to be submitted to the department prior to the property being presumed abandoned and ensure property is held until the proper time has passed for property to be presumed abandoned.
7. Ensure unclaimed property data is complete, accurate, and consistently entered.
8. Receipt and maintain a complete list of unclaimed property consistently and appropriately.
9. Ensure unclaimed tangible property received is accounted for timely and comply with requirements for publishing notice in the newspaper.
10. Enter owner information into the unclaimed property database when the holder provides adequate owner information regardless of the property value and take appropriate action to lower the aggregate reporting amount.
11. Adequately safeguard unclaimed property submitted to the department.
12. Adequately safeguard confidential and sensitive information obtained and maintained by the department.
13. Process claims for unclaimed property consistently and appropriately.
14. Eliminate the requirement that certain owners pay a fee to receive their unclaimed property, which has not been sold or liquidated by the department.
15. Comply with state law requirements related to unclaimed property in a state agency's name and ensure the Budget Section is provided a complete list of state agencies not submitting a claim for property after a year of being notified, not provide state agencies the "donation" option, and no longer publish state agencies in the annual notice of property.
16. Conduct periodic sales of unclaimed property and dispose of property with insubstantial commercial value.
17. Take appropriate action to establish holder, owner, and department requirements within North Dakota Administrative Code for unclaimed property.
18. Ensure proper records management series and appropriate disposal of records exist for unclaimed property.
19. Ensure the unclaimed property program operates in an effective manner and the mission of the program is accomplished. If the department is unable to operate the unclaimed property program in this manner, the department should take appropriate action to attempt to remove the function from its responsibilities.

In response to a question from Representative Klemin, Mr. Wahl said there are no legal requirements for submitting a negative report.

COMMENTS BY DEPARTMENT OF TRUST LANDS

Mr. Gaebe provided comments ([Appendix I](#)) regarding the Department of Trust Lands - Unclaimed property performance audit. He said the unclaimed property division serves as a repository for financial accounts, cash assets, and securities that have been forgotten or abandoned by the rightful owner. He said some form of the federal Uniform Unclaimed Property Act has been adopted in all 50 states and 3 Canadian provinces. He said the Act directs unclaimed or abandoned funds be turned over to the unclaimed property program after a predetermined period of inactivity or lost contact between a business and the rightful owner. He said since 1975, the Board of University and School Lands has had this responsibility. He said the department serves as the centralized custodial repository for unclaimed property. He said the objective is to return property to the rightful owner, their heirs, or assigns. He said once property is received and posted, the department begins to make individuals and businesses aware of unclaimed property and assists claimants with the process. He said a total of \$9.2 million has been

collected during the 2015-17 biennium. He said a total of \$3.5 million has been paid in claims during the 2015-17 biennium.

Representative Martinson discussed his personal experience of using the Unclaimed Property Division services. He said the department staff were helpful and worked with him to identify information that could be used to claim the unclaimed property.

UPDATE ON PERFORMANCE AUDIT OF UNIVERSITY FOUNDATIONS

Mr. Wahl provided an update regarding the timeline for the next performance audit to be conducted by the State Auditor's office relating to the university foundations. In addition, he requested clarification from the committee of its intent regarding which foundations should be included as part of the performance audit. He also suggested the committee consider the performance audit period to include fiscal years 2013, 2014, and 2015, rather than fiscal years 2012, 2013, and 2014.

It was moved by Representative Skarphol, seconded by Representative Kempenich, and carried on a roll call vote that the performance audit of the foundations at the University of North Dakota, North Dakota State University, and Dickinson State University requested by the committee at its April 21, 2015, meeting, include the major foundation of each university that provides both academic and ancillary contributions in support of the university and that the audit period include fiscal years 2013, 2014, and 2015; and that the performance audit requested for the Dickinson State University Foundation not be conducted, but instead a summary review of the conclusions of the Attorney General's office investigation and receivership of the foundation. Senators Klein and O'Connell and Representatives Hatlestad, Kempenich, Klemin, Kreidt, Martinson, Nelson, and Skarphol voted "aye." Senator Lee and Representative Kelsh voted "nay."

COMMITTEE DISCUSSION AND STAFF DIRECTIVES

The Legislative Council staff distributed a memorandum entitled *Summary of Audit Reports Not Selected for Presentation*.

Senator Lee requested the audit report for the State Board of Addiction Counseling Examiners for the fiscal year ended June 30, 2015, and 2014, be presented at the next committee meeting.

It was moved by Representative Kreidt, seconded by Senator O'Connell, and carried on a roll call vote that, pursuant to Section 54-35-02.2, the committee accept the following reports presented to the committee:

1. North Dakota Comprehensive Annual Financial Report (June 30, 2015).
2. North Dakota University System Annual Financial Report (June 30, 2015).
3. Department of Public Instruction (June 30, 2015 and 2014).
4. North Dakota Lottery (June 30, 2015 and 2014).
5. Governor's office (June 30, 2015 and 2014).
6. Office of Management and Budget (June 30, 2015 and 2014).
7. State Treasurer's office (June 30, 2015 and 2014).
8. Education Standards and Practices Board (June 30, 2013).
9. Education Standards and Practices Board (June 30, 2012).
10. State Board of Registration for Professional Engineers and Land Surveyors (June 30, 2014).
11. North Dakota Stockmen's Association (December 31, 2015 and 2014).
12. Beginning farmer revolving loan fund (December 31, 2015 and 2014).
13. Community water facility loan fund (December 31, 2015 and 2014).
14. Guaranteed student loan program (September 30, 2015 and 2014).
15. Workforce Safety and Insurance (June 30, 2015 and 2014).

Senators Klein, Lee, and O'Connell and Representatives Hatlestad, Kelsh, Kempenich, Klemin, Kreidt, Martinson, Nelson, and Skarphol voted "aye." No negative votes were cast.

It was moved by Senator Lee, seconded by Representative Skarphol, and carried on a roll call vote that, pursuant to Section 54-35-02.2, the committee accept the following reports available but not selected for presentation:

1. State Board of Optometry (June 30, 2015, 2014, and 2013).
2. Peace Officers Standards and Training Board (December 31, 2014 and 2013).
3. Real Estate Appraiser Qualifications and Ethics Board (June 30, 2011, 2010, 2009, 2008, 2007, and 2006).

Senators Klein, Lee, and O'Connell and Representatives Hatlestad, Kelsh, Kempenich, Klemin, Kreidt, Martinson, Nelson, and Skarphol voted "aye." No negative votes were cast.

It was moved by Representative Kreidt, seconded by Senator O'Connell, that pursuant to Section 54-35-02.2, the committee does not accept the following performance audit reports presented to the committee:

1. Department of Trust Lands - Energy Infrastructure and Impact Office Performance Audit (November 6, 2015).
2. Department of Trust Lands - Unclaimed Property (January 5, 2016).
3. Department of Trust Lands - Trust Assets and Department Resources (March 18, 2016).

In response to a question from Chairman Klein regarding the effect on the State Auditor's office if the report is not accepted, Mr. Robert Peterson, State Auditor, said the performance audit report for the Department of Trust Lands has been finalized and published. He said the State Auditor's position on audit findings and recommendations will not change.

Representative Skarphol suggested the committee accept the performance audit report and receive an update from the Department of Trust Lands regarding its progress in implementing the recommendations at a later committee meeting. **Representative Kreidt withdrew his motion with the consent of Senator O'Connell.**

Chairman Klein said the committee will receive an update from the Department of Trust Lands regarding its progress in implementing the recommendations provided by the State Auditor's office at a later meeting.

It was moved by Representative Kreidt, seconded by Representative Skarphol, and carried on a roll call vote that, pursuant to Section 54-35-02.2, the committee accept the following performance audit reports presented to the committee:

1. Department of Trust Lands - Energy Infrastructure and Impact Office Performance Audit (November 6, 2015).
2. Department of Trust Lands - Unclaimed Property (January 5, 2016).
3. Department of Trust Lands - Trust Assets and Department Resources (March 18, 2016).

Senators Klein, Lee, and O'Connell and Representatives Hatlestad, Kelsh, Kempenich, Klemin, Kreidt, Martinson, Nelson, and Skarphol voted "aye." No negative votes were cast.

Chairman Klein said the committee will be notified of the next meeting date.

No further business appearing, Chairman Klein adjourned the meeting at 4:45 p.m.

Michael C. Johnson
Fiscal Analyst

Allen H. Knudson
Legislative Budget Analyst and Auditor

ATTACH:9

Rep. Kempenich

PERFORMANCE AUDITS AND EVALUATIONS
University System Institutions - Use of Tuition Waivers and Student Stipends

The committee received the performance audit report of the University System institutions use of tuition waivers and student stipends. The performance audit was conducted by the State Auditor's office pursuant to authority within Chapter 54-10. The objectives of the audit were to provide:

- The number and amount of waivers or discounts granted at each institution due to statutory requirements.
- The number and amount of waivers or discounts granted at each institution due to reciprocity agreements with other states.
- The number and amount of waivers or discounts granted at each institution to graduate students.
- The average amount of tuition waived or discounted for each student receiving a waiver or waivers, including the average percentage of total tuition waivers compared to gross tuition charges for the students by institution.
- The number and amount of waivers granted at the University of North Dakota School of Medicine and Health Sciences.
- The number and amount of stipends or other payments awarded at each institution to graduate students, including the source of funds.
- The number of students that received both a waiver or discount and a stipend or other payment at each institution.
- The number of internships at each institution and those paid or subsidized by state internship programs.
- The number of Dickinson State University employees terminated during the 2009-11 biennium and the number of those employees that have been rehired.
- Recommendations for improving accountability for the awarding of tuition waivers and student stipends.
- Recommendations for improvements to the information included in student unit records and to the use of the information.
- The number and amount of waivers or discounts for resident students, nonresident students, and international students.

The audit period for which information was reviewed was the 2010-11 through 2013-14 academic years.

The committee learned a major finding of the audit was that improvements were needed for tuition discounts, waivers, and student stipends to increase uniformity and establish accountability among the institutions. The State Auditor's office established definitions for purposes of the audit because of inconsistent terminology used among the various institutions. Discount was defined as a reduction in the tuition rate prior to the charge being applied to a student's account. Waiver was defined as a reduction in the tuition charged after being applied to a student's account and no money is received or transferred. Stipend was defined as a payment made to a graduate student for work performed in the field of study. Internship was defined as any practical or work experience related to the program for which a student may receive academic credit and which is outside of the normal classroom setting. The committee learned, for the 2010-11 through 2013-14 academic years, University System institutions granted approximately \$420 million of discounts and \$130 million of tuition waivers. Discounts were available to individuals from 20 other states and 2 Canadian provinces. Tuition waivers granted were equivalent to 12 percent of the total tuition charged.

The performance audit recommended the State Board of Higher Education:

1. Establish common definitions within the University System for discounts, waivers, and stipends and review coding of discounts, waivers, and stipends.
2. Require institutions to establish policies and procedures for institutional tuition waivers, which should include eligibility, application process, selection criteria, awarding process, and monitoring.
3. Ensure all criteria are clearly defined for tuition waivers established in board policy.
4. Establish a waiver policy for institution employee spouse or dependents and University System personnel.
5. Establish policies for cultural diversity, international, graduate, and other common institutional tuition waiver types.
6. Establish limits on the amount of tuition waivers institutions can award.
7. Identify and define the relevant student information required and expected for reporting purposes.

8. Provide authority to an individual to identify the necessary student data to be obtained, which includes:

Authorizing the individual to establish standards related to consistent student data entry for the entire University System.

Requiring all institutions to follow the established standards.

9. Adequately monitor institutions for compliance with policies, procedures, and standards.

10. Define internship for the entire University System and require a reporting method to readily identify internships at institutions.

The committee accepted the performance audit of the University System institutions use of tuition waivers and student stipends.

University System Improvements to the Use of Waivers and Student Stipends at University System Institutions

The committee received a report from a representative of the University System regarding its progress toward addressing audit findings and recommendations from the performance audit report on the use of waivers and student stipends at University System institutions. The committee learned the State Board of Higher Education has recommended the University System implement the recommendations provided in the audit report as outlined. The committee also learned the University System hired a project manager to address the audit findings and recommendations, including data inconsistency issues at institutions and entities under its control, and to assist with developing policies and procedures that will correct inconsistencies across campuses.

Department of Trust Lands - Energy Infrastructure and Impact Office

The committee received the performance audit report of the Department of Trust Lands Energy Infrastructure and Impact Office. The performance audit was conducted by the State Auditor's office pursuant to authority within Chapter 54-10. The objective of the audit was to determine if the Energy Infrastructure and Impact Office effectively administers its grants, including distributions of funds and compliance with legislative intent. The audit period for which information was reviewed was January 2010 through April 2012.

Article IX of the Constitution of North Dakota created the Board of University and School Lands. The members of the board include the Superintendent of Public Instruction, Governor, Attorney General, Secretary of State, and State Treasurer. The board has the authority to award and distribute energy infrastructure and impact grants from moneys deposited in the oil and gas impact grant fund pursuant to Section 15-01-02(6). In addition, the board is allowed to create an advisory committee to assist with making grant award determinations. Grants awarded annually may not exceed 60 percent of the biennial appropriation for energy infrastructure and impact grants. The Department of Trust Lands serves as the administrative agency for the board. The Energy Infrastructure and Impact Office was created in 1979 as a division within the Department of Trust Lands pursuant to Section 57-62-04. The Director of the Energy Infrastructure and Impact Office is appointed by the board, and the powers and duties of the office include:

- Developing a plan for assistance through financial grants for services facilities to counties, cities, school districts, and other political subdivisions in coal development and oil and gas development impact areas;
- Establishing procedures and providing proper forms to political subdivisions for use in making applications for impact assistance;
- Receiving and reviewing applications for impact assistance;
- Making recommendations to the Board of University and School Lands for grants to political subdivisions in oil and gas development impact areas based on identified needs and other sources of revenue available to the political subdivision; and
- Making disbursements for grants awarded by the Board of University and School Lands.

The committee learned the statutory mission of the Energy Infrastructure and Impact Office is to assist local political subdivisions in response to the needs directly as a result of actual or anticipated extraordinary expenditures caused by energy development and its associated growth. Programs include a grant program for oil- and gas-impacted political subdivisions and a low-interest loan program for coal-impacted political subdivisions. The Board of University and School Lands approved approximately \$124 million of impact grants for the 2011-13 biennium and \$240 million for the 2013-15 biennium. Grants approved by the board were provided to address infrastructure and to provide permanent housing and public safety improvements. In addition, some grants were provided for rural transportation, critical education construction, and safety projects.

The committee learned a major finding of the audit was that aspects of grant administration functions were operating ineffectively.

The performance audit recommended the Department of Trust Lands Energy Infrastructure and Impact Office:

1. Establish procedures for political subdivisions to use in making applications for energy infrastructure and impact grant funds set aside for emergencies and contingencies, and ensure the procedures are effectively communicated.
2. Ensure the application screening process for energy infrastructure and impact grants is transparent and provides for fair and equitable treatment of all applications, including establishing a grant application screening process to identify completed applications meeting the eligibility requirements, scoring only completed applications meeting the eligibility requirements, re-evaluating the grant application scoring criteria to ensure criteria are reasonable, providing a method for awarding priority points, separating compound criteria, defining the point scale to be used for scoring, and ensuring the screening process is documented.
3. Ensure recommendations of energy infrastructure and impact grants to the Board of University and School Lands comply with eligibility requirements.
4. Ensure all eligible applications for a grant round are given consideration before making recommendations to the Board of University and School Lands.
5. Ensure projects recommended to the Board of University and School Lands are achievable at the proposed funding levels.
6. Ensure the needs of entities provided priority in law are adequately addressed before consideration is given to other eligible political subdivisions.
7. Include contingencies in the recommendations made to the Board of University and School Lands when grant application project costs for larger projects are based on estimates rather than actual bids.
8. Ensure energy infrastructure and impact grants awarded annually do not exceed the state law maximum.
9. Request the Board of University and School Lands pass a motion outlining the authority granted to the Department of Trust Lands related to scope changes of Board of University and School Lands awards and ensure all required scope changes are submitted to the Board of University and School Lands for approval.
10. Ensure grant payments are limited to the reimbursement of expenditures for projects outlined in the grant application and local match requirements and special conditions of the grant award are met, requests for reimbursement are adequately supported, and expenditures claimed for reimbursement are not reimbursed twice.
11. Obtain status updates for grants with outstanding balances in a more cost-effective manner by requiring status reports or telephone discussions, conduct site visits for grant awards based on risk of political subdivision or project, and ensure site visit documentation clearly identifies the grant award being monitored and the status of the project relating to the intent of the grant application.
12. Obtain a legal interpretation of 2013 Session Laws, Chapter 471, § 9, relating to distributions to counties experiencing new oil- and gas-development activities to determine if other counties were eligible for a distribution, and the county that was provided a distribution was eligible.
13. Ensure advisory committees assisting the Board of University and School Lands with grant determinations comply with open meeting laws.

The committee accepted the performance audit of the Department of Trust Lands Energy Infrastructure and Impact Office.

Department of Trust Lands - Trust Assets and Department Resources

The committee received the performance audit report of the Department of Trust Lands trust assets and department resources. The performance audit was conducted by the State Auditor's office pursuant to authority within Chapter 54-10. The objective of the audit was to determine if the department is obtaining, accounting for, and using resources efficiently and effectively, including the administration of the state's mineral interests and lease auctions; grazing and agriculture leases, rights-of-way, and site reclamation; management of assets in trust funds and distributions from trust funds; and mineral royalty collections, mineral-related payments, surface rents, and nonproducing leases. The audit period for which information was reviewed was July 1, 2011, through June 30, 2015.

In 1889 Congress passed the Enabling Act, which provided land grants to the state of North Dakota for the support of the common schools, colleges, universities, the State Capitol, and other public institutions. Section 10 of the Act granted land sections 16 and 36 in every township to the state for the support of common schools. The total land grant for common schools included 2.5 million acres. Sections 12, 14, 16, and 17 of the Act granted land to the state for the support of colleges, universities, the State Capitol, and other public institutions. The total land grant for colleges, universities, the State Capitol, and other public institutions included 668,000 acres. Approximately 80 percent of the land granted to the state has been sold since 1889. The state reserved no mineral rights for land sold prior to 1939, 5 percent of the mineral rights for land sold between 1939 and 1941, 50 percent of the mineral rights for land sold between 1941 and 1960, and reserved all mineral rights for land sold after 1960.

Article IX of the Constitution of North Dakota created the Board of University and School Lands to control the assets. The members of the board include the Superintendent of Public Instruction, Governor, Attorney General, Secretary of State, and State Treasurer. Pursuant to Section 15-01-02(6), the board is authorized with:

1. Full control of the selection, appraisal, rental, sale, disposal, and management of:
 - Lands donated or granted by or received from the United States or from any other source for the support and maintenance of the common schools.
 - All lands which fall to the state by escheat.
 - All lands donated or granted by or received from the United States or from any other source for the maintenance of the educational, penal, or charitable institutions.
 - All lands acquired by the state through the investment of the permanent school funds of the state as the result of mortgage foreclosure or otherwise.
2. Full control of the investment of the permanent funds derived from the sale of any of the lands described in item 1.
3. Full control of such percent of the proceeds of any sale of public lands as may be granted to the state by the United States on such sale.
4. Full control of the proceeds of any property that fall to the state by escheat and of the proceeds of all gifts and donations to the state for the support or maintenance of the common schools, and of all other property otherwise acquired by the state for the maintenance of the common schools. Any gift to the state not specifically appropriated to any other purpose must be considered as a gift for the support and maintenance of the common schools.
5. Authority to expend moneys for the purpose of making refunds in cases in which an error has been made by the board, or a person dealing with the board, with regard to any of the lands, minerals, funds, proceeds, or any other kind of property managed by the board. Money expended to make refunds must come from the same fund or account into which the money to be refunded was originally placed.

The Department of Trust Lands serves as the administrative agency for the board. The department manages approximately 656,000 surface acres of the original land grants and 51,000 surface acres of land acquired through foreclosure and other means. In addition, the department manages mineral rights for 2.6 million acres of land. The department holds public auctions for tracts of land and enters into leases for the use of surface land or for rights to mineral development. Surface lands are leased through public auctions for uses including grazing, agriculture, right-of-ways, saltwater disposal wells, and gravel mining. Mineral rights are leased through public auctions for uses including extraction and production of oil, gas, coal, and other minerals. Each tract of land is assigned to a trust. Each tract of land being leased generates income for that trust. The department manages trusts and tracts of land for various beneficiaries. The 13 permanent educational trust funds established to provide ongoing funding for education include common schools (K-12 public education), Ellendale State College, Mayville State University, North Dakota State College of Science, North Dakota State University, North Dakota Vision Services - School for the Blind, School for the Deaf, School of Mines, State Hospital, University of North Dakota, Valley City State University, Veterans' Home, and the North Dakota Youth Correctional Center. The seven beneficiaries of the Ellendale State College trust fund include Dakota College at Bottineau, Dickinson State University, Minot State University, North Dakota State College of Science, School for the Blind, State Hospital, and the Veterans' Home. In addition, the department manages trust funds for the state or other beneficiaries pursuant to state law, including the Capitol building fund, coal development trust fund, Indian cultural education trust, and strategic investment and improvements fund.

Four areas of trust assets and department resources were audited, including surface and mineral areas, financial areas, human resource areas, and additional areas needing improvement. The committee learned major findings of the audit were that the department was not obtaining, accounting for, and using certain resources efficiently and effectively, and the department was not assigning land tracts to the correct trust.

The performance audit recommended the Department of Trust Lands:

1. Ensure tracts of land managed by the department are assigned to the correct trust and obtain guidance from legal counsel on correcting net assets and past distributions for trusts incorrectly assigned to tracts.
2. Conduct a formal review of oil and gas royalty payments to ensure amounts received were based on the correct decimal interest, and establish a periodic review to ensure operators are using the correct decimal interest.
3. Ensure oil and gas royalty payments are correctly allocated to the proper trusts, and obtain guidance from legal counsel on correcting net assets and past distributions for royalty payment allocation errors.
4. Ensure information submitted with oil and gas royalty payments is consistently obtained in an electronic format and includes all necessary information to adequately monitor payment amounts, and conduct audits of oil and gas operators submitting royalty payments to the department.
5. Establish an interest rate to be assessed on late oil and gas royalty payments, and a policy identifying the circumstances under which interest will be assessed.
6. Ensure penalties are consistently assessed on late oil and gas royalty payments and that calculations are accurate.
7. Monitor changes made to information in the minerals database to ensure changes are appropriate and adequately documented, and ensure lease agreements are appropriately updated when changes occur.
8. Ensure the minimum opening bids for pastureland result in a "fair market" return.
9. Analyze the use of additional online auctions, including costs associated with online versus live auctions, and use the auction process determined to be more beneficial to the trusts.
10. Ensure agreements are entered into and information is obtained for inspections not conducted by the department on state-owned tracts, and appropriate action is taken when violations or other concerns are identified on surface tracts.
11. Comply with Century Code requirements relating to classifying all land owned by the state or its instrumentalities according to its highest and best use, or take appropriate action to modify the requirement of classifying all land owned by the state or its instrumentalities.
12. Ensure fiduciary responsibilities are fulfilled, ensure public funds are used in an appropriate manner, and enhance the organizational culture of accountability.
13. Ensure compliance with state procurement laws, rules, and policies.
14. Ensure payments for services are made pursuant to a written contract or agreement, perform a risk analysis for all contracts and agreements to ensure appropriate insurance provisions are included, include applicable terms and conditions within contracts and agreements as recommended by the Attorney General's office, and ensure appropriate reviews are performed by legal counsel.
15. Ensure direct costs are applied to the appropriate trust, program, and activity, and ensure nondirect costs are allocated in an appropriate manner to trusts, programs, and activities.
16. Conduct a formal fraud risk assessment as required by Office of Management and Budget policy.
17. Avoid actions resulting in or creating the appearance of losing independence or impartiality, and actions that create an adverse effect on the integrity of the Board of University and School Lands or department.
18. Ensure individuals hired into classified, nontemporary positions meet the minimum qualifications for the job class as required by North Dakota Administrative Code.
19. Follow Human Resource Management Services' hiring process best practices and provide proper training to employees involved in the hiring process.
20. Comply with veterans' preference hiring requirements pursuant to Century Code.
21. Comply with legislative intent for use of authorized full-time equivalent positions.
22. Comply with salary administration requirements pursuant to Administrative Code.
23. Comply with Session Laws requirements related to general legislative salary increases and Administrative Code requirements related to annual employee performance evaluations.
24. Establish an effective process for evaluating employees' performance.

25. Ensure appropriate information technology systems exist, user manuals are established, and systems are used to the fullest extent possible.
26. Establish formal policies and procedures, use a standardized format for policies and procedures, and review policies and procedures periodically to ensure information is current and relevant.
27. Ensure policies and procedures are available to all employees in a centralized location, and require all employees to periodically review department policies and procedures and signify acknowledgment in writing.
28. Perform ongoing monitoring of the design and operating effectiveness of the department's internal control procedures.
29. In conjunction with representatives of the State Historical Society, review records and identify permanently retained records and records with archival value, and transfer applicable records to State Archives.

The committee accepted the performance audit of the Department of Trust Lands trust assets and department resources.

Department of Trust Lands - Unclaimed Property

The committee received the performance audit report of the Department of Trust Lands unclaimed property function. The performance audit was conducted by the State Auditor's office pursuant to authority within Chapter 54-10. The objective of the audit was to determine if the Department of Trust Lands is effectively administering unclaimed property, including claims payments. The audit period reviewed was July 1, 2011, through June 30, 2015.

Unclaimed property is property held, issued, or owing in the ordinary course of a holder's business and has remained unclaimed by the owner for more than the established time frame for the type of property. Unclaimed property may include a check, unpaid wage, stock, an amount payable under the terms of an insurance policy, or contents of a safe deposit box. A holder may include a bank, insurance company, hospital, utility company, retailer, or local government. An owner is a person or entity with a legal or equitable interest in property subject to the unclaimed property law. Since 1975 it has been the responsibility of the Unclaimed Property Division of the Department of Trust Lands to assist individuals with identifying property presumed abandoned. The administrator of the division is responsible for the operations of unclaimed property. The division acts as custodian of the unclaimed property received from holders. The property is held in trust in perpetuity by the state. The 1981 Uniform Unclaimed Property Act, created by the national Uniform Law Commission, was adopted by the state in 1985. The Act directs unclaimed or abandoned funds to be turned over to the unclaimed property program after a predetermined period of inactivity or lost contact between a business and the rightful owner.

The following schedule provides information regarding the amounts that were collected in unclaimed property and amount paid in claims for the 2007-09 through 2013-15 bienniums.

	2007-09 Biennium	2009-11 Biennium	2011-13 Biennium	2013-15 Biennium
Collected	\$8.9 million	\$9.3 million	\$10.1 million	\$15.7 million
Claimed	\$3.6 million	\$3.3 million	\$4.0 million	\$4.9 million
Percentage of amount collected that was claimed	40.4%	35.5%	39.6%	31.2%

The committee learned a major finding of the audit was that aspects of the unclaimed property program were operating ineffectively.

The performance audit recommended the Department of Trust Lands:

1. Ensure complete and accurate resources are available to persons searching for unclaimed property.
2. Increase efforts to locate owners of unclaimed property, and ensure efforts to locate owners are done in a fair and consistent manner.
3. Monitor abandoned property reporting information from entities in the state and conduct audits of entities in the state to ensure abandoned property is appropriately turned over to the department.
4. Provide state entities proper guidance and training on unclaimed property requirements.
5. Eliminate language related to negative reporting for unclaimed property or take appropriate action to require negative reports and monitor compliance.
6. Comply with state law requirements and provide written consent to holders if property is to be submitted to the department prior to the property being presumed abandoned and ensure property is held until the proper time has passed for property to be presumed abandoned.

7. Ensure unclaimed property data is complete, accurate, and consistently entered.
8. Receipt and maintain a complete list of unclaimed property consistently and appropriately.
9. Ensure unclaimed tangible property received is accounted for timely and comply with requirements for publishing notice in the newspaper.
10. Enter owner information into the unclaimed property database when the holder provides adequate owner information regardless of the property value and take appropriate action to lower the aggregate reporting amount.
11. Adequately safeguard unclaimed property submitted to the department.
12. Adequately safeguard confidential and sensitive information obtained and maintained by the department.
13. Process claims for unclaimed property consistently and appropriately.
14. Eliminate the requirement that certain owners pay a fee to receive their unclaimed property, which has not been sold or liquidated by the department.
15. Comply with state law requirements related to unclaimed property in a state agency's name and ensure the Budget Section is provided a complete list of state agencies not submitting a claim for property after a year of being notified, not providing state agencies the "donation" option, and no longer publishing state agencies in the annual notice of property.
16. Conduct periodic sales of unclaimed property and dispose of property with minimal value.
17. Take appropriate action to establish holder, owner, and department requirements within Administrative Code for unclaimed property.
18. Ensure proper records management series and appropriate disposal of records are used for unclaimed property.
19. Ensure the unclaimed property program operates in an effective manner and the mission of the program is accomplished. If the department is unable to operate the unclaimed property program in this manner, the department should take appropriate action to attempt to remove the function from its responsibilities.

The committee accepted the performance audit of the Department of Trust Lands unclaimed property.

Department of Trust Lands Update

Later in the interim, the committee received an update from the Department of Trust Lands on the status of implementing the performance audit recommendations. The committee learned the department has developed a tool to record and review its progress in addressing audit findings. The committee learned the department has implemented many of the recommendations. The committee learned the department has also hired a consultant to assist with other process and system improvements.

Medicaid Provider and Recipient Fraud and Abuse Performance Audit Followup

The committee received the followup report to the Medicaid performance audit. The original performance audit was presented to the committee in October 2010. The audit was conducted to determine if the Department of Human Services adequately identifies and pursues Medicaid provider and recipient fraud. The followup report indicated 8 of the original recommendations have been fully implemented, 11 recommendations have been partially implemented, and 2 recommendations have not been implemented. The two recommendations not implemented relate to the Surveillance and Utilization Review System Unit being organized outside the control of other Medicaid operations and requesting a new Medicaid Fraud Control Unit waiver from the federal government. The committee learned the department is waiting for information from the United States Department of Health and Human Services Office of Inspector General regarding the ability of the state to continue to operate under conditions that exempt the state from needing a Medicaid Fraud Control Unit. The committee learned the Medicaid management information system "go-live" date was in October 2015. The committee accepted the followup report of the Medicaid performance audit.

Dickinson State University Performance Audit Followup

The committee received the followup report to the Dickinson State University performance audit. The original performance audit was presented to the committee in March 2012. The audit was conducted to determine if Dickinson State University has established an adequate system for monitoring operations. The followup report indicated 19 of the original recommendations have been fully implemented, 11 recommendations have been partially implemented, and 1 recommendation had not been implemented relating to improvements in the procurement of services. The committee learned two of the original recommendations are no longer applicable relating to awarding Roughrider scholarships and improving international recruiting agent agreements. The committee accepted the followup report of the Dickinson State University performance audit.

HB 1300

3

1-27-17

Testimony in Support of
HOUSE BILL NO. 1300
House Political Subdivisions Committee
January 27, 2017

Chairman Klemin, House Political Subdivisions Committee members, for the record my name is Todd D. Kranda. I am an attorney with the Kelsch Kelsch Ruff & Kranda Law Firm in Mandan. I appear before you today as a lobbyist on behalf of the North Dakota Petroleum Council (NDPC) to support HB 1300.

NDPC represents more than 500 companies involved in all aspects of the oil and gas industry, including oil and gas production, refining, pipelines, transportation, mineral leasing, consulting, legal work, and oilfield service activities, and has been representing the industry since 1952.

As stated by the prime sponsor, Representative Kempenich, and as described within the Fiscal Note, HB 1300 modifies the definition of "Administrative Agency" within Section 28-32-01 NDCC to include the Board of University and School Lands. (See change at HB 1300 page 2 lines 17-18).

The change proposed in HB 1300 simply removes the exception for the Board of University and School Lands (Board) as an agency that previously was not required to follow or comply with the procedures and requirements set out within the Administrative Agencies Practice Act (Chapter 28-32 NDCC).

The Board, at least with respect to the ability to adopt and modify its rules

on leasing the surface or minerals or finding someone in violation of its rules, should be included as an agency that follows and complies with the process and procedures outlined within the Administrative Agency Practice Act.

The Board, through the Surface Management Division and Minerals Management Division of the Department of Trust Lands, makes several substantive related decisions that directly impact the oil and gas industry. Those decisions should be after advance notice, with a reasonable opportunity to comment and then after a decision is rendered there should be a method available for a reasonable review process through an appeal.

It is unreasonable for an agency such as the Board to make decisions without allowing any type of reasonable due process rights to those impacted by such determinations.

As an example, with regard to the impact to the oil and gas industry, the Board, administers all state oil and gas leases (as well as coal leases, grazing leases, surface leases, easements) and currently is not subject to any of the requirements of the Administrative Agency Practice Act, Chapter 28-32 NDCC, for either rule making or for adjudications. The Board has amended rules without giving notice to the public or the affected industries.

Further, the rules by the Board are not subject to any type of reasonable review by either the Legislative Administrative Rules Committee or the Courts.

The Board has demanded payment of royalties on lake bed minerals as well as 18% interest and 12% penalty (a total interest rate of 30%). In doing so the Board's decisions are not subject to any review on appeal. Accordingly, if a company believes that a particular royalty is subject to a title question and the Board disagrees with that position, the company has no mechanism to have that decision reviewed on appeal. The company either pays the royalties or runs the risk that the Board will take action to cancel the lease.

In addition, the Board asserts the right to unilaterally decide to cancel a lease for an alleged breach. In those situations, the lessee has no right to challenge the decision or action by the Board through any type of review process with an appeal.

In comparison, the Bureau of Land Management (BLM) which regulates federal lands operates as an administrative agency and requires due process if it adopts rules or finds a party in violation. If the federal government (BLM) can provide a lessee of federal minerals and federal surface due process, the state (Board) should be able to do the same thing. It does not seem too much to ask for to get some type of advance notice and an opportunity to comment on rules and have an opportunity to counter an alleged charge of a violation or non-compliance.

HB 1300 presents a reasonable request that the Board, while acting as a trustee for the "public trust", be subject to the provisions and restrictions of the

Administrative Agency Practice Act, Chapter 28-32 NDCC. The Act simply affords basic rights like notice, hearing and appeals to the people and entities that deal with the Board without impacting the Board's ability to continue to act in a manner necessary to protect the public trust.

In conclusion, NDPC urges your support of **HB 1300** and respectfully requests a favorable **Do Pass** recommendation. Thank you and I would be happy to try to answer any questions.

1707 North 9th Street
PO Box 5523
Bismarck, ND 58506-5523
Phone: (701) 328 – 2800
Fax: (701) 328 – 3650

www.land.nd.gov

1-27-17

HB 1300

#4

Linda Fisher



Lance D. Gaebe, Commissioner

**TESTIMONY OF LINDA FISHER
DEPUTY LAND COMMISSIONER
North Dakota Department of Trust Lands**

In Opposition to House Bill 1300

**House Political Subdivisions Committee
January 27, 2017**

Chairman Klemin and members of the Political Subdivisions Committee, I am Linda Fisher, Deputy Commissioner of University and School Lands. I am here on behalf of the Department of Trust Lands in opposition to House Bill 1300. I appreciate the opportunity to provide background on the duties of the Board of University and School Lands (Board) and to offer justification for the Board's continued exemption from the Administrative Agencies Practice Act (Act).

The Board, comprised of the Governor, Secretary of State, Attorney General, Superintendent of Public Instruction and the State Treasurer, was created by Article IX of the N.D. Constitution. It has specific responsibility to manage the sale, rental, and disposal of all school and university lands; trust lands granted to North Dakota at statehood solely for purpose of funding public education.

The Board's role, as stated in the Constitution and various state statutes, is to act as a trustee in managing land, minerals and proceeds of the permanent trust funds for the exclusive benefit of specific beneficiaries. In managing these trusts, the Board operates as a fiduciary with a legal or ethical standard that is arguably beyond the requirements of the Act.

In managing trust assets, the Board's fiduciary role is similar to that of a large landowner or a trust manager in a financial institution. The Board operates in the context of contractual relationships. It has the option of negotiation when such action is legal, moral, and in the best interest of the trusts. Counterparties involved in transactions have an option to accept or decline the Board's position because it is a business relationship, not a regulatory relationship. The function of the Board is not governing, and it does not regulate the general public,

The Board conducts its business in an open forum and posts its meetings in accordance with the State's open meetings laws. Meetings are posted on the Secretary of State's public meetings web portal which provides the public with an opportunity to receive notifications when meetings are scheduled, to view agendas, and to receive updates when any details relating to the meeting are changed.

To provide guidance for Department operations and to set reasonable limits for conducting business, the Board does adopt rules and policies relating to prudent management of permanent trust assets. Currently, these include 707,000 surface acres, 1.8 million mineral acres, and as of December 31, 2016, \$3.7 billion in financial assets.

The Board, comprised of duly elected officers, is as keenly aware of the interests of the public as it is of the trusts' interest. As Board members, these individuals are responsible to the trusts, but as elected officials, they can give deference to public opinion when it is prudent to do so.

The Board has invited public input when considering rule and policy changes and implementation, but the ultimate decision-making authority rests with the Board pursuant to its Constitutional authority.

Outside the requirements of the Act, the Board in its trust management role has the ability to consider the interests of its business partners in decision-making. Because it has the authority to negotiate, the Board can respond favorably to requests by agricultural lessees and energy development partners on a case-by-case basis if the trusts are not harmed.

For example, in order to maintain the integrity of the auction and leasing process it is the Board's policy to not drop the price of a bid-up agricultural lease until the primary term expires. In a rare instance, this policy could result in land being left fallow and creating management difficulties and expense. The Board is able, under its operating policies, to consider exceptions and to be adaptable in these unique scenarios. In the example stated, the Board could agree to reconsider fair market value in order to generate income instead of incur expense.

Another example relates to oil and gas leasing. The Board's rules require an annual rental payment to hold a lease that is not yet producing. If that payment is late the lease expires. Again, this policy lends consistency to application, however under extenuating circumstances like a failed overnight delivery, the Board has discretion to consider the request of its business partner in making its determination.

Removing the Board's exemption to the Act would require strict adherence to administrative rules that could not be negotiated or changed without months of public hearings, rule review and appeals. This would negatively impact the Board's ability to make business decisions in a timely manner, potentially resulting in lost revenue to the trusts.

Currently, the activities of the Board are exempt from N.D.C.C. ch. 28-32 rulemaking requirements, except for the activities related to the Uniform Unclaimed Property Act (N.D.C.C. ch. 47-30.1); this remains appropriate. Although the Board's responsibilities as a trustee of unclaimed property are similar to its responsibility for managing trust assets, the permanent trusts do not own the unclaimed property - it belongs to the rightful owners and their heirs. The Board's role is custodial and its actions relating to holder reporting and recovering unclaimed property are not contractual.

In closing, I'd like to reiterate that continued exemption of the Board of University and School Lands from N.D.C.C. ch. 28-32 is appropriate for the simple fact that the Board is under a constitutional mandate to manage grant lands and assets in trust. The precautions, restrictions and requirements placed upon the Board as trustee already surpass the requirements of the Act.

I respectfully request that the Board remain exempt from Chapter 28-32 rulemaking requirements, with the exception of provisions relating to the Uniform Unclaimed Property Act.

1707 North 9th Street
PO Box 5523
Bismarck, ND 58506-5523
Phone: (701) 328 – 2800
Fax: (701) 328 – 3650

HB 1300 #1



www.land.nd.gov

Lance D. Gaebe, Commissioner

To: Representative Lawrence Klemin, Chairman

Cc: Political Subdivisions Committee Members

From: *Linda Fisher* Linda Fisher, Deputy Land Commissioner

Date: February 1, 2017

Re: HB 1300 Testimony Follow-Up

At the Committee's request, I am providing Attorney General Letter Opinion 2000-L-138 addressing questions relating to the full force and effect of law for rules made outside of the Administrative Agencies Practice Act.

LETTER OPINION
2000-L-138

August 24, 2000

Ms. Julie Kubisiak
Director
Student Loans of North Dakota
Bank of North Dakota
PO Box 5509
Bismarck, ND 58506-5509

Dear Ms. Kubisiak:

Thank you for your letter requesting my opinion on whether the Bank of North Dakota, acting as an extension of the Industrial Commission (Bank), is required to follow the Administrative Agencies Practice Act (AAPA), N.D.C.C. ch. 28-32, in adopting and amending rules governing the creation and operation of a college savings plan.

I am aware that the Bank is interested in amending the college savings plan rules which it has previously adopted pursuant to the AAPA. See N.D.A.C. ch. 12.5-01-01. If the Bank was not required to follow the AAPA in adopting the current rules, you further ask about the legal status of the Bank's current rules and any amendments to the rules which the Board may adopt in the future.

The 1999 Legislative Assembly gave the Bank the responsibility of creating and administering an Internal Revenue Code section 529 college savings plan. N.D.C.C. § 6-09-38. The enabling legislation, in its entirety, states as follows:

The Bank of North Dakota shall adopt rules to administer, manage, promote, and market a North Dakota higher education savings plan. The Bank shall ensure that the North Dakota higher education savings plan is maintained in compliance with internal revenue service standards for qualified state tuition programs.

Id. Since the Industrial Commission is charged with the Bank's operation, the Bank of North Dakota would be acting as an extension of the Industrial Commission in fulfilling the responsibility mandated by N.D.C.C. § 6-09-38. See N.D.C.C. §§ 6-09-02, 54-17-01, and 54-17-07.

Thus, the Bank is to fulfill the above responsibility by adopting rules under N.D.C.C. § 6-09-38. However, this does not mean the Bank is required to follow the AAPA in adopting those rules. N.D.C.C. § 28-32-01(2)(1) plainly and unambiguously states the "industrial commission with respect to the activities of the Bank of North Dakota"

Ms. Julie Kubisiak
August 24, 2000
Page 2

is not an "administrative agency" under the AAPA.¹ Since N.D.C.C. ch. 28-32 only applies to administrative agencies within the meaning of the AAPA, the Bank's adoption of rules under N.D.C.C. § 6-09-38 is not required to be done pursuant to the AAPA. See Jensen v. Little, 459 N.W.2d 237, 239 (N.D. 1990) (stating that an entity exempt from the definition of an "administrative agency" is not subject to the AAPA). Accordingly, it is my opinion that the Bank is not required to follow the AAPA in adopting or amending rules to create and operate a college savings plan pursuant to N.D.C.C. § 6-09-38.²

Rules adopted pursuant to the AAPA have the force and effect of law. N.D.C.C. § 28-32-03(3). Since the Bank is not required to adopt the college savings plan rules pursuant to the AAPA, you also question whether college savings plan rules adopted by the Bank other than pursuant to the AAPA would likewise have the force and effect of law.

"The authority of an administrative agency to adopt administrative rules is authority delegated by the legislative assembly." N.D.C.C. § 28-32-02(1). Although this provision is found in the AAPA, it nonetheless accurately reflects the underlying idea of the delegation of authority to non-AAPA agencies that have been legislatively charged with adopting rules to guide their operations. In the Bank's situation, the Legislature not only authorized the Bank to "adopt rules to administer, manage, promote, and market a North Dakota higher education savings plan," but actually required the Bank to do so. N.D.C.C. § 6-09-38 (the "Bank . . . shall adopt rules . . ."). Further, the Legislature has stated the "industrial commission shall . . . make and enforce orders, rules, regulations and bylaws for the transaction of [the Bank's] business." N.D.C.C. § 6-09-02 (emphasis added). Thus, similar to other non-AAPA agencies, the Industrial Commission has not only the authority to make rules, but also the authority to enforce those rules. See Jensen v. Little, 459 N.W.2d 237 (N.D. 1990) (upholding the enforceability of rules adopted by a non-AAPA agency, the Director of Institutions, other than pursuant to the AAPA); Letter from Attorney General Nicholas Spaeth to Serenus Hoffner (Aug. 30, 1985) (opining the rules adopted by a non-AAPA agency, the Superintendent of Public Instruction, other than pursuant to the AAPA are nonetheless enforceable).

¹ Where the language of a statute is plain and unambiguous, courts will not delve further into other sources. Little v. Tracy, 497 N.W.2d 700 (N.D. 1993).

² My opinion that the Industrial Commission is not an "administrative agency" under the AAPA does not, of course, affect its statutory status as an agency of the state of North Dakota pursuant to N.D.C.C. ch. 54-17.

Ms. Julie Kubisiak
August 24, 2000
Page 3

The authority to make rules is a quasi-legislative power the Legislature specifically delegates to state agencies. Little v. Traynor, 565 N.W.2d 766, 771 (N.D. 1997). In contrast, an agency's authority to enforce the law, as well as the agency's rules, flows from the fact it is a part of the executive branch of government. An agency's power to enforce the rules it was delegated the authority to adopt indicates those rules enjoy the legal status of having the force and effect of a law. Cf. Yamaha Corp. v. State Bd. Of Equalization, 960 P.2d 1031, 1036 (Cal. 1998) ("Because agencies granted such substantive rulemaking power are truly 'making law,' their quasi-legislative rules have the dignity of statutes."); Doyle v. Ohio Bureau of Motor Vehicles, 554 N.E.2d 97, 99 (Ohio 1990) ("'[P]urpose of administrative rule making is to facilitate the administrative agency's placing into effect the policy declared by the [legislature] in the statutes to be administered by the agency'; 'rules issued by administrative agencies pursuant to statutory authority have the force and effect of law.'"); Boot Heel Nursing Center, Inc. v. Missouri Dep't of Soc. Serv., 826 S.W.2d 14, 16 (Mo.App. 1992) ("Like statutes, rules or regulations of a state administrative agency which have been duly promulgated pursuant to properly delegated authority have the force and effect of law."); Freeman v. Florida Dept. of Corrections, 1999 WL 1457480 (N.D.Fla.) ("[W]hen the legislature delegates to governmental agencies in the executive branch the authority to enact administrative rules and regulations, those agencies have quasi-legislative power and any rules and regulations enacted pursuant to that power are 'laws'").

As long as an agency has the statutory authority to promulgate a rule, this rationale applies regardless of whether a rule is adopted pursuant to the AAPA. Therefore, it is my opinion the rules adopted by the Bank to create and administer a college savings plan have the force and effect of law, even if the rules were not adopted pursuant to the AAPA.

In originally enacting the college savings plan rules, the Bank followed the AAPA procedures and submitted the rules to this office for approval. See N.D.C.C. § 28-32-02(7). In approving the rules, I noted there was a question whether it was necessary to comply with the AAPA before the rules would have the force and effect of law. Letter from Attorney General Heidi Heitkamp to John Hoeven (Aug. 19, 1999).

For reasons identified in this opinion, the college savings plan rules adopted by the Bank have the force and effect of law regardless of whether it followed the AAPA. As such, the AAPA procedures are voluntary as applied to the Bank and the adoption of rules regarding the college savings plan. Although the Bank chose to follow those procedures in promulgating the original rules, I do not believe the Bank's choice to follow the AAPA is irrevocable. Rather, in making

Ms. Julie Kubisiak
August 24, 2000
Page 4

any future amendments to the rules, it is my opinion the Bank can choose whether to follow the procedures in the AAPA or to adopt the amendments in another fashion.

Sincerely,

Heidi Heitkamp
Attorney General

sam

Testimony in Support of HB 1300
Senate Energy and Natural Resources Committee
March 10, 2017

HB 1300
370-17
A# #1
pg 1

Chairman Unruh, Senate Energy and Natural Resources Committee members, for the record my name is Keith Kempenich, Representative from District 39. I am the prime sponsor of HB 1300. I am here to briefly explain the reason for HB 1300.

Basically, HB 1300 simply addresses the list of exceptions contained within Chapter 28-32, the Administrative Agencies Practice Act, for the various agencies that are not required to follow and comply with the procedures and requirements set out within the Administrative Agencies Practice Act.

HB 1300, makes a single change found at page 2 lines 17-18. HB 1300 proposes to remove and delete in the definition section, the Board of University and School Lands, from the list of agencies that are excepted from and not required to comply with the process and procedures in the administrative agency act.

The Board of University and School Lands should be required to comply with the process under the administrative agency act. The Board makes several substantive related decisions that directly impact businesses and entities that are not noticed in advance, not allowed an opportunity to comment and cannot otherwise have the decisions reviewed on appeal. It is not fair and does not provide reasonable due process with the decisions being made by the Board.

I urge your support of HB 1300 and request a **Do Pass** recommendation. I would be happy to try to answer any questions.

NORTH DAKOTA LEGISLATIVE MANAGEMENT

Minutes of the

LEGISLATIVE AUDIT AND FISCAL REVIEW COMMITTEE

Thursday, April 21, 2016
Roughrider Room, State Capitol
Bismarck, North Dakota

Senator Jerry Klein, Chairman, called the meeting to order at 9:00 a.m.

Members present: Senators Jerry Klein, Judy Lee, David O'Connell; Representatives Patrick R. Hatlestad, Jerry Kelsh, Keith Kempnich, Lawrence R. Klemin, Gary Kreidt, Andrew G. Maragos, Bob Martinson, Mike Nathe, Marvin E. Nelson, Robert J. Skarphol

Members absent: Representatives Corey Mock, Chet Pollert

Others present: Dick Dever, State Senator, Bismarck
See Appendix A for additional persons present.

It was moved by Senator O'Connell, seconded by Representative Maragos, and carried on a voice vote that the minutes of the January 14, 2016, meeting be approved as distributed.

AUDIT OF STATE AGENCIES, BOARDS, AND COMMISSIONS

Chairman Klein called on Mr. Ron Tolstad, Audit Manager, State Auditor's office, who presented the internal controls and compliance report on the audit of the basic financial statements included in the June 30, 2015, Comprehensive Annual Financial Report State of North Dakota Governance Communication Including the Report on Internal Control, Compliance, and Other Matters for the Year Ended June 30, 2015. Mr. Tolstad said the State Auditor's office has audited the general purpose financial statements for the state of North Dakota for the year ended June 30, 2015. He reviewed the auditor's responses to the committee guidelines and said the report contains an unmodified opinion, and the report identified one prior period adjustment and one prior period audit finding not implemented. He said the prior period audit adjustment relates to construction in progress. He said the prior period audit finding not implemented relates to improper reconciliation of motor vehicle clearing account.

Mr. Tolstad said Governmental Accounting Standards Board (GASB) State No. 70, which relates to accounting and financial reporting for nonexchange financial guarantees and GASB Statement No. 71 relating to pension transition for contributions made subsequent to the measurement date, have been implemented for the fiscal year ended June 30, 2015.

COMPREHENSIVE ANNUAL FINANCIAL REPORT

Ms. Rachel Kmetz, Accounting Manager, Office of Management and Budget, presented information on the State of North Dakota Comprehensive Annual Financial Report for the Fiscal Year Ended June 30, 2015. She reviewed the information contained in the report and a supplemental report entitled 2013-15 Biennium Budget and Actual Detail. Copies of both reports are on file in the Legislative Council office.

At the request of Chairman Klein, Ms. Kmetz provided information (Appendix B) regarding additions and deletions of the state's total debt, including bonds and notes payable for fiscal year 2015.

INTERNAL CONTROL AND COMPLIANCE REPORT

Ms. Robyn Hoffmann, Audit Manager, State Auditor's office, presented the North Dakota University System Governance Communication Including the Report on Internal Control, Compliance, and Other Matters for the Year Ended June 30, 2015. She reviewed the auditor's responses to the committee guidelines and said there were five audit recommendations, including four prior period audit recommendations not implemented.

The audit recommendations relate to legislative approval of local fund expenses, including compliance of North Dakota Century Code Sections 54-27-12 and 15-55-10, relating to approval of construction or renovation of any public building; ensuring proper controls for identifying actual sources of funds used for local projects; and taking appropriate actions to modify or clarify state laws with the Legislative Assembly to ensure the University Systems is receiving required approval for capital projects.

HB1300
3-10-17
AH #2
pg 2

In addition, Ms. Hoffman said the four prior period audit recommendations not implemented relate to:

- Lack of comprehensive fraud and control risk assessment by each institution;
- Inadequate oversight of affiliated organizations compliance with State Board of Higher Education policies;
- Lack of cash reconciliations at Williston State College; and
- Inadequate employee criminal history background checks at Minot State University.

In response to a question from Representative Skarphol, Ms. Hoffmann said the Dickinson State University Foundation was unable to receive an audit opinion because of inadequate financial records. Ms. Hoffmann said the foundation has been forced into receivership by the Attorney General's office and is in the process of being dissolved.

Representative Klemin commented regarding actions to clarify state law to ensure the University System is receiving required approval for capital projects. He suggested the State Auditor's office provide recommendations to the committee regarding how to address clarifying state law.

Representative Kempenich suggested a bill be introduced to provide clarification of required approvals for University System capital projects.

COMMENTS FROM NORTH DAKOTA UNIVERSITY SYSTEM

Ms. Tammy Dolan, Chief Financial Officer, North Dakota University System, provided comments regarding the internal control and compliance report for the audit of the general purpose financial statements included in the June 30, 2015, annual financial report for the University System. She said the University System will establish a process to provide more clarity to institutions relating to capital project requirements. In addition, she said the University System will address prior audit recommendations that have not been implemented.

Representative Skarphol suggested the committee receive information from North Dakota State University regarding its goal of increasing enrollment by 4,000 students. He expressed concern that increasing the current student population will result in existing students incurring additional costs.

In response to a question from Representative Nathe, Ms. Dolan said any student fee increases must be approved by the University System office. Ms. Dolan said, if North Dakota State University increases its enrollment by 4,000 students, the University System office will be monitoring the situation to ensure student fees are not increased.

Representative Kempenich expressed concern regarding student fee increases. He said an existing student body may vote to increase student fees for a large project. He said the fee increase may continue for 10 to 15 years. He said often times, the students that voted for the student fee increases graduate before the student fee increases become effective.

Chairman Klein said the committee will ask representatives of North Dakota State University to comment on the university's goal of increasing student enrollment by 4,000 students at the next committee meeting and to confirm that student tuition and fee rates will not increase due to the enrollment increase.

UNIVERSITY SYSTEM ANNUAL FINANCIAL REPORT

Ms. Robin Putnam, Director of Financial Reporting, North Dakota University System, presented North Dakota University System Annual Financial Report Fiscal Year Ended June 30, 2015. She said the report for the University System includes the 11 public universities, the University System office, Core Technology Services, and 17 foundations which are required by government accounting standards to be included as component units of the University System. She said an unqualified opinion was issued on the financial statements. As of June 30, 2015, she said the University System had total assets of \$1.775 billion and total liabilities of \$550 million, resulting in net assets of \$1.225 billion. She said net assets increased \$163.3 million during fiscal year 2015.

Ms. Putnam said the annual degree credit head count for fall 2014 was 47,660, a decrease of 355 from the previous fall enrollment of 48,015.

AUDIT OF STATE AGENCIES, BOARDS, AND COMMISSIONS

Chairman Klein called on Mr. Ed Nagel, Director, State Auditor's office, who presented Department of Public Instruction Bismarck, North Dakota Audit Report for the Biennium Ended June 30, 2015. Mr. Nagel reviewed the auditor's responses to the committee guidelines and said the report does not include any findings or recommendations.

HB 1300
3-10-17
Att #2
Pg 3

Mr. Nagel presented North Dakota Lottery Bismarck, North Dakota Audit Report for the Years Ended June 30, 2015 and 2014. He said the North Dakota Lottery audit is conducted on an annual basis. He reviewed the auditor's responses to the committee guidelines and said the report includes one significant accounting policy change related to GASB Statement No. 65 relating to items previously reported as assets and liabilities.

Mr. Nagel presented Office of the Governor Bismarck, North Dakota Audit Report for the Biennium Ended June 30, 2015. He reviewed the auditor's responses to the committee guidelines and said the report does not include any findings or recommendations.

Mr. Nagel presented Office of Management and Budget Bismarck, North Dakota Audit Report for the Biennium Ended June 30, 2015. He reviewed the auditor's responses to the committee guidelines and said the report identified two audit findings relating to lack of reconciliations relating to sales and deposits for surplus property, and noncompliance with procurement laws.

Mr. Nagel presented Office of the State Treasurer Bismarck, North Dakota Audit Report for the Biennium Ended June 30, 2015. He reviewed the auditor's responses to the committee guidelines and said the report does not include any findings or recommendations.

Chairman Klein called on Ms. Rhonda Mahlum, Mahlum Goodhart, PC, Certified Public Accountants, who presented Education Standards and Practices Board Audit Report June 30, 2012. She reviewed the auditor's responses to the committee guidelines and said the report identified three audit findings relating to segregation of duties, preparation of financial statements and audit notes, and reconciliation of general ledger accounts.

Ms. Mahlum presented Education Standards and Practices Board Audit Report June 30, 2013. She reviewed the auditor's responses to the committee guidelines and said the report identified three audit findings relating to segregation of duties, preparation of financial statements and audit notes, and reconciliation of general ledger accounts.

Representative Nathe and Representative Skarphol commented that due to recent media reports relating to the use of the board's credit cards, it is imperative for the committee to receive the audit report for the Education Standards and Practices Board for the fiscal years ended June 30, 2015, and 2014, at the committee's final meeting of this interim.

Chairman Klein said the committee will schedule the Education Standards and Practices Board audit reports for the fiscal years ended June 30, 2015, and 2014, at the committee's final meeting of this interim, unless the report is available earlier.

Ms. Mahlum presented North Dakota State Board of Registration for Professional Engineers and Land Surveyors Audit Report June 30, 2014. She reviewed the auditor's responses to the committee guidelines and said the report identified three audit findings relating to segregation of duties, general ledger entries, and preparation of financial statements.

Ms. Mahlum presented North Dakota Stockmen's Association Audit Report December 31, 2015 and 2014. She reviewed the auditor's responses to the committee guidelines and said the report identified one audit finding relating to segregation of duties.

Chairman Klein called on Ms. Katie Moch, Eide Bailly LLP, Certified Public Accountants, who presented Financial Statements December 31, 2015 and 2014 Beginning Farmer Revolving Loan Fund. She reviewed the auditor's responses to the committee guidelines and said the report does not include any findings or recommendations.

Ms. Moch presented Financial Statements December 31, 2015 and 2014 Community Water Facility Loan Fund. She reviewed the auditor's responses to the committee guidelines and said the report does not include any findings or recommendations.

Ms. Moch presented Financial Statements September 30, 2015 and 2014 North Dakota Guaranteed Student Loan Program. She reviewed the auditor's responses to the committee guidelines and said the report does not include any findings or recommendations.

In response to a question from Representative Kempenich, Mr. Robert Humann, Chief Lending Officer, Bank of North Dakota, provided information regarding the North Dakota guaranteed student loan program. He said many federal guaranteed student loans are being refinanced into alternative student loan consolidation programs including the DEAL One loan program at the Bank of North Dakota.

Ms. Moch presented Financial Statements June 30, 2015 and 2014 Workforce Safety & Insurance. She reviewed the auditor's responses to the committee guidelines and said the report includes one significant accounting policy change related to GASB Statement No. 68.

DEPARTMENT OF TRUST LANDS PERFORMANCE AUDIT - ENERGY INFRASTRUCTURE AND IMPACT OFFICE

At the request of Chairman Klein, Mr. Jason Wahl, State Auditor's office, presented Information (Appendix C) regarding the performance audit of the Department of Trust Lands Energy Infrastructure and Impact Office. Mr. Wahl said the purpose of the performance audit was to determine if the Energy Infrastructure and Impact Office effectively administers its grants. He said the Energy Infrastructure and Impact Office is a division within the Department of Trusts Lands. He said the Director is appointed by the Board of University and School Lands. He said the powers and duties of the office include:

- Developing a plan for the assistance, through financial grants for services and facilities, of counties, cities, school districts, and other political subdivisions in coal development and oil and gas development impact areas;
- Establishing procedures and providing proper forms to political subdivisions for use in making applications for impact assistance;
- Receiving and reviewing applications for impact assistance;
- Making recommendations to the Board of University and School Lands on grants to political subdivisions in oil and gas development impact areas based on identified needs and other sources of revenue available to the political subdivision; and
- Making disbursements for grants awarded by the Board of University and School Lands.

Mr. Wahl said the Board of University and School Lands approved approximately \$124 million of oil and gas impact grants for the 2011-13 biennium and \$240 million of oil and gas impact grants for the 2013-15 biennium.

Mr. Wahl said the State Auditor's office determined certain aspects of grant administration were operating ineffectively. He said the audit includes 13 recommendations, which provide for the Energy Infrastructure and Impact Office to:

1. Establish procedures for political subdivisions to use in making applications for energy infrastructure and impact grant funds set aside for emergencies and contingencies, and ensure the procedures are effectively communicated.
2. Ensure the application screening process for energy infrastructure and impact grants is transparent and provides for fair and equitable treatment of all applications, including establish a grant application screening process to identify completed applications meeting the eligibility requirements, score only completed applications meeting the eligibility requirements, re-evaluate the grant application scoring criteria to ensure criteria are reasonable, provide a method for awarding priority points, separate compound criteria, define the point scale to be used for scoring, and ensure the screening process is documented.
3. Ensure recommendations of energy infrastructure and impact grants to the Board of University and School Lands comply with eligibility requirements.
4. Ensure all eligible applications for a grant round are given consideration before making recommendations to the Board of University and School Lands.
5. Ensure projects recommended to the Board of University and School Lands are achievable at the proposed funding levels.
6. Ensure the needs of entities provided priority in law are adequately addressed before consideration is given to other eligible political subdivisions.
7. Include contingencies in the recommendations made to the Board of University and School Lands when grant application project costs for larger projects are based on estimates rather than actual bids.
8. Ensure energy infrastructure and impact grants awarded annually do not exceed the state law maximum.
9. Request the Board of University and School Lands pass a motion outlining the authority granted to the department related to scope changes of Board of University and School Lands awards and ensure all required scope changes are taken to the Board of University and School Lands for approval.
10. Ensure grant payments are limited to the reimbursement of expenditures for projects outlined in the grant application and local match requirements and special conditions of the grant award are met, requests for reimbursement are adequately supported, and expenditures claimed for reimbursement are not reimbursed twice.

HB 1350
3-10-17
AH #2
pg 4

HB 1300
3-10-17
AH #2
Pg 5

11. Obtain status updates for grants with outstanding balances in a more cost-effective manner by requiring status reports or telephone discussions, conduct site visits for grant awards based on risk of political subdivision or project, ensure site visit documentation clearly identifies the grant award being monitored, and the status of the project relating to the intent of the grant application.
12. Obtain a legal interpretation of the 2013 Session Law Chapter 471, Section 9, relating to distributions to counties experiencing new oil and gas development activities to determine if other counties were eligible for a distribution, and the county that was provided a distribution was eligible.
13. Ensure advisory committees assisting the Board of University and School Lands with grant determinations comply with open meeting laws.

COMMENTS BY DEPARTMENT OF TRUST LANDS

Mr. Lance Gaebe, Director, Department of Trust Lands, provided comments (Appendix D) regarding the Department of Trust Lands - Energy Infrastructure and Impact Office performance audit. He said the statutory mission of the Energy Infrastructure and Impact Office is to assist local political subdivisions in response to the needs directly as a result of actual or anticipated extraordinary expenditures caused by energy development and its associated growth. He said programs include a grant program for oil- and gas-impacted political subdivisions and a low-interest loan program for coal-impacted political subdivisions. He said the legislative appropriations for oil and gas tax impact grants increased from \$8 million in the 2009-11 biennium to \$165 million for the 2011-13 biennium, \$240 million for the 2013-15 biennium, and \$140 million for the 2015-17 biennium. He said the annual grants are limited to 60 percent of the biennial appropriation. He said grants approved by the Board of University and School Lands were provided to address infrastructure and to provide permanent housing and public safety improvements. In addition, he said some grants were provided for rural transportation, critical education construction, and safety projects.

Mr. Gaebe expressed concern regarding the audit process. He provided, as part of his testimony, additional information regarding department responses to audit findings.

In response to a question from Senator O'Connell, Mr. Gaebe said the Energy Infrastructure and Impact Office did ask the Attorney General's office to review information to provide a legal interpretation of the 2013 Session Law Chapter 471, Section 9, relating to distributions to counties experiencing new oil and gas development activities to determine if other counties were eligible, and to confirm the county that received a distribution was eligible. Mr. Gaebe said the Attorney General's office determined the Department of Trust Lands made the distributions correctly.

In response to a question from Representative Nathe, Mr. Gaebe said he believes the Energy Infrastructure and Impact Office is complying with state law when conducting its scoring process for determining grant awards.

In response to a question from Representative Kempenich, Mr. Gaebe said pledging future grant awards was initially done to allow selected applicants requesting funding for construction projects to begin the process of hiring engineers before the construction season began.

In response to a question from Representative Nelson, Mr. Gaebe said the Board of University and School Lands approved the pledge amounts.

In response to a question from Representative Skarphol, Mr. Gaebe said the Department of Trust Lands edited its responses to the audit findings after changes were suggested in a meeting between the department and the State Auditor's office.

In response to a question from Representative Klemin, Mr. Gaebe said an applicant that has been approved and awarded a grant, receives those grant funds on a reimbursement basis by submitting the bill from a contractor, an invoice receipt, or other voucher from the project.

Chairman Klein said the Legislative Assembly may need to consider better defining the use of oil and gas impact grant funds.

Representative Skarphol suggested centralizing a number of state grant programs in one agency to provide more consistency in the process of awarding grants.

At the request of Chairman Klein, Mr. Wahl provided comments regarding the State Auditor's process of reviewing department responses to audit findings. Mr. Wahl said the State Auditor's office does not change department responses to audit findings. He said responses included in the performance audit report were the responses submitted by the department for the audit findings.

**DEPARTMENT OF TRUST LANDS PERFORMANCE AUDIT -
TRUST ASSETS AND DEPARTMENT RESOURCES**

Mr. Wahl presented information (Appendix E) regarding the performance audit of the Department of Trust Lands trust assets and department resources. He said the purpose of the performance audit was to determine if the Department of Trust Lands is obtaining, accounting for, and using resources efficiently and effectively. He said in 1889, Congress passed the Enabling Act which provided land grants to the State of North Dakota for the support of the common schools as well as colleges, universities, the State Capitol, and other public institutions. He said the department manages trusts and tracts of land for the various beneficiaries. He said the tracts are leased by the department to generate income for the trusts assigned to the tracts. He said leases give lessees the rights to the use of surface acres and the rights to mineral development. He said the department manages the following 13 permanent educational trust funds established to provide ongoing funding for education:

1. Common schools (K-12 public education);
2. Ellendale State College;
3. Mayville State University;
4. North Dakota State College of Science;
5. North Dakota State University;
6. North Dakota Vision Services - School for the Blind;
7. School for the Deaf;
8. School of Mines;
9. State Hospital;
10. University of North Dakota;
11. Valley City State University;
12. Veterans' Home; and
13. Youth Correctional Center.

In addition, Mr. Wahl said the department manages the following trust funds for the state or other beneficiaries pursuant to state law:

- Capitol building fund;
- Coal development fund;
- Indian cultural education trust; and
- Strategic investment and improvements fund.

Mr. Wahl said the State Auditor's office audited four areas of trust assets and department resources including surface and mineral areas, financial areas, human resource areas, and additional areas needing improvement. He said the State Auditor's office determined the department was not obtaining, accounting for, and using certain resources efficiently and effectively. He said the audit includes 29 recommendations, which provide the Department of Trust Lands:

1. Ensure tracts of land managed by the department are assigned to the correct trust and obtain guidance from legal counsel on correcting net assets and past distributions for trusts incorrectly assigned to tracts.
2. Conduct a formal review of oil and gas royalty payments to ensure amounts received were based on the correct decimal interest, and establish a periodic review to ensure operators are using the correct decimal interest.
3. Ensure oil and gas royalty payments are correctly allocated to the proper trusts, and obtain guidance from legal counsel on correcting net assets and past distributions for royalty payment allocation errors.
4. Ensure information submitted with oil and gas royalty payments is consistently obtained in an electronic format and includes all necessary information to adequately monitor payment amounts, and conduct audits of oil and gas operators submitting royalty payments to the department.
5. Establish an interest rate to be assessed on late oil and gas royalty payments, and a policy identifying the circumstances under which interest will be assessed.

FIB 1300
3-10-17
AH #2
pg 6

HB 1300
3-10-17
AH #2
pg 7

6. Ensure penalties are consistently assessed on late oil and gas royalty payments and that calculations are accurate.
7. Monitor changes made to information in the minerals database to ensure changes are appropriate and adequately documented, and ensure lease agreements are appropriately updated when changes occur.
8. Ensure the minimum opening bids for pastureland result in a "fair market" return.
9. Analyze the use of additional online auctions, including costs associated with online versus live auctions, and use the auction process determined to be more beneficial to the trusts.
10. Ensure agreements are entered into and information is obtained for inspections not conducted by the department on state-owned tracts, and appropriate action is taken when violations or other concerns are identified on surface tracts.
11. Comply with North Dakota Century Code requirements relating to classifying all land owned by the state or its instrumentalities according to its highest and best use, or take appropriate action to modify the requirement of classifying all land owned by the state or its instrumentalities.
12. Ensure fiduciary responsibilities are fulfilled, ensure public funds are used in an appropriate manner, and enhance the organizational culture of accountability.
13. Ensure compliance with state procurement laws, rules, and policies.
14. Ensure payments for services are made pursuant to a written contract or agreement, perform a risk analysis for all contracts and agreements to ensure appropriate insurance provisions are included, include applicable terms and conditions within contracts and agreements as recommended by the Attorney General's office, and ensure appropriate reviews are performed by legal counsel.
15. Ensure direct costs are applied to the appropriate trust, program, and activity, and ensure nondirect costs are allocated in an appropriate manner to trusts, programs, and activities.
16. Conduct a formal fraud risk assessment as required by the Office of Management and Budget policy.
17. Avoid actions resulting in or creating the appearance of losing independence or impartiality, and actions that create an adverse effect on the integrity of the Board of University and School Lands or Department.
18. Ensure individuals hired into classified, nontemporary positions meet the minimum qualifications for the job class as required by North Dakota Administrative Code.
19. Follow Human Resource Management Services' hiring process best practices, and provide proper training to employees involved in the hiring process.
20. Comply with veterans' preference hiring requirements pursuant to North Dakota Century Code.
21. Comply with legislative intent for use of authorized full-time equivalent positions.
22. Comply with salary administration requirements pursuant to North Dakota Administrative Code.
23. Comply with session law requirements related to general legislative salary increases, and North Dakota Administrative Code requirements related to annual employee performance evaluations.
24. Establish an effective process for evaluating employees' performance.
25. Ensure appropriate information technology systems exist, user manuals are established, and systems are used to the fullest extent possible.
26. Establish formal policies and procedures, use a standardized format for policies and procedures, and review policies and procedures periodically to ensure information is current and relevant.
27. Ensure policies and procedures are available to all employees in a centralized location, and require all employees to periodically review department policies and procedures and signify acknowledgment in writing.
28. Perform ongoing monitoring of the design and operating effectiveness of the department's internal control procedures.
29. In conjunction with representatives of the State Historical Society, review records and identify permanently retained records and records with archival value, and transfer applicable records to State Archives.

COMMENTS BY DEPARTMENT OF TRUST LANDS

Mr. Gaebe provided comments (Appendix E) regarding the Department of Trust Lands - Trust Assets and Department Resources performance audit. In addition, he also provided a copy (Appendix G) of the department's biennial report entitled *61st Biennium Report of the Board of University and School Lands and Commissioner of University and School Lands* for the period July 1, 2013, to June 30, 2015. He said the department does not agree with the performance audit findings that the department is not fulfilling its fiduciary responsibilities, public funds are being used inappropriately, and that the organization lacks accountability.

Mr. Gaebe said the Department of Trust Lands serves the administrative function of the Board of University and School Lands. He said the Board of University and School Lands was created to manage the common schools trust fund and other permanent trusts. He said the board and the department also manage several state funds, including the strategic investment and improvements fund, the coal development fund, and the Capitol building fund. In addition, he said the department manages 708,000 surface acres of land being leased to ranchers and farmers. He said the department also oversees 1.7 million mineral acres of land for the permanent trusts, including use for oil, gas, coal, gravel, and subsurface mineral leasing and production. He said all trust balances and funds managed by the board continue to grow. He said funds managed by the board have grown from \$900 million in 2009 to a current balance of \$3.6 billion. He said permanent trust distributions are determined based on the average value of the trusts' financial assets. He said the trusts disbursed approximately \$138.7 million during the 2013-15 biennium, and approximately \$219.1 million was approved for distribution during the 2015-17 biennium.

Mr. Gaebe said the strategic investment and improvements fund earns revenue from production of 700,000 sovereign mineral acres managed by the department and a portion of oil and gas production and extraction taxes. He said funds were used for "surge" funding and several other programs including the school construction loan program, critical access hospital loan program, and several one-time construction and infrastructure items. He said during the period of the audit, the department administered \$1.7 billion of transfers and \$218 million for improving infrastructure, including highways, cities, schools, and hospitals.

Mr. Gaebe said, during the period of the performance audit, almost all department personnel participated with interviews, desk audits, responses to requests for information relating to policies, processes, and practices, to assist the State Auditor's office staff with understanding the department's data and systems, and to provide responses to recommendations. He said the department anticipated the audit would provide recommendations that would further enhance controls, increase efficiencies, and boost productivity. He expressed concern that the audit recommendations were more generalized and subjective than anticipated. In addition, he said the audit recommendations address unintentional errors and oversights. He said the department recently began the process of hiring a private firm to analyze and prepare specific improvement options.

Representative Skarphol said the performance audit has identified deficiencies and made recommendations to improve the department's processes. He said the department should implement the recommendations as soon as possible.

Senator O'Connell commented regarding the performance audit. He said the process of going through a performance audit is about making the process better and finding efficiencies.

DEPARTMENT OF TRUST LANDS PERFORMANCE AUDIT - UNCLAIMED PROPERTY

Mr. Wahl presented information (Appendix H) regarding the performance audit of the Department of Trust Lands Unclaimed Property Division. He said the purpose of the performance audit was to determine if the Department of Trust Lands is effectively administering unclaimed property. He said unclaimed property is property held, issued, or owing in the ordinary course of a holder's business and has remained unclaimed by the owner for more than the established time frame for the type of property. He said unclaimed property may include a check, unpaid wage, stock, an amount payable under the terms of an insurance policy, or contents of a safe deposit box. He said a holder may include a bank, insurance company, hospital, utility company, retailer, or local government. He said an owner is a person or entity with a legal or equitable interest in property subject to the unclaimed property law. He said since 1975, it has been the responsibility of the Unclaimed Property Division of the Department of Trust Lands to assist individuals with identifying property presumed abandoned. He said the administrator of the division is responsible for the operations of unclaimed property. He said the division acts as custodian of the unclaimed property received from holders. He said the property is held in trust in perpetuity by the state. He said the federal 1981 Uniform Unclaimed Property Act created by the national Uniform Law Commission was adopted by the state in 1985.

HB 1300
3-10-17
AH #2
pg 8

HB 1300
3-10-17
Att #2
pg 9

Mr. Wahl said the State Auditor's office determined aspects of the unclaimed property program were operating ineffectively. He said the audit includes 19 recommendations, which provide the Department of Trust Lands:

1. Ensure complete and accurate resources are available to those searching for unclaimed property.
2. Increase efforts to locate owners of unclaimed property, and ensure efforts to locate owners are done in a fair and consistent manner.
3. Monitor abandoned property reporting information from entities in the state, and have audits of entities in the state conducted to ensure abandoned property is appropriately turned over to the department.
4. Provide proper guidance and training on unclaimed property requirements to state entities.
5. Eliminate language related to negative reporting for unclaimed property or take appropriate action to require negative reports and track holder compliance.
6. Comply with state law requirements and provide written consent to holders if property is to be submitted to the department prior to the property being presumed abandoned and ensure property is held until the proper time has passed for property to be presumed abandoned.
7. Ensure unclaimed property data is complete, accurate, and consistently entered.
8. Receipt and maintain a complete list of unclaimed property consistently and appropriately.
9. Ensure unclaimed tangible property received is accounted for timely and comply with requirements for publishing notice in the newspaper.
10. Enter owner information into the unclaimed property database when the holder provides adequate owner information regardless of the property value and take appropriate action to lower the aggregate reporting amount.
11. Adequately safeguard unclaimed property submitted to the department.
12. Adequately safeguard confidential and sensitive information obtained and maintained by the department.
13. Process claims for unclaimed property consistently and appropriately.
14. Eliminate the requirement that certain owners pay a fee to receive their unclaimed property, which has not been sold or liquidated by the department.
15. Comply with state law requirements related to unclaimed property in a state agency's name and ensure the Budget Section is provided a complete list of state agencies not submitting a claim for property after a year of being notified, not provide state agencies the "donation" option, and no longer publish state agencies in the annual notice of property.
16. Conduct periodic sales of unclaimed property and dispose of property with insubstantial commercial value.
17. Take appropriate action to establish holder, owner, and department requirements within North Dakota Administrative Code for unclaimed property.
18. Ensure proper records management series and appropriate disposal of records exist for unclaimed property.
19. Ensure the unclaimed property program operates in an effective manner and the mission of the program is accomplished. If the department is unable to operate the unclaimed property program in this manner, the department should take appropriate action to attempt to remove the function from its responsibilities.

In response to a question from Representative Klemin, Mr. Wahl said there are no legal requirements for submitting a negative report.

COMMENTS BY DEPARTMENT OF TRUST LANDS

Mr. Gaebe provided comments (Appendix I) regarding the Department of Trust Lands - Unclaimed property performance audit. He said the unclaimed property division serves as a repository for financial accounts, cash assets, and securities that have been forgotten or abandoned by the rightful owner. He said some form of the federal Uniform Unclaimed Property Act has been adopted in all 50 states and 3 Canadian provinces. He said the Act directs unclaimed or abandoned funds be turned over to the unclaimed property program after a predetermined period of inactivity or lost contact between a business and the rightful owner. He said since 1975, the Board of University and School Lands has had this responsibility. He said the department serves as the centralized custodial repository for unclaimed property. He said the objective is to return property to the rightful owner, their heirs, or assigns. He said once property is received and posted, the department begins to make individuals and businesses aware of unclaimed property and assists claimants with the process. He said a total of \$9.2 million has been

collected during the 2015-17 biennium. He said a total of \$3.5 million has been paid in claims during the 2015-17 biennium.

Representative Martinson discussed his personal experience of using the Unclaimed Property Division services. He said the department staff were helpful and worked with him to identify information that could be used to claim the unclaimed property.

UPDATE ON PERFORMANCE AUDIT OF UNIVERSITY FOUNDATIONS

Mr. Wahl provided an update regarding the timeline for the next performance audit to be conducted by the State Auditor's office relating to the university foundations. In addition, he requested clarification from the committee of its intent regarding which foundations should be included as part of the performance audit. He also suggested the committee consider the performance audit period to include fiscal years 2013, 2014, and 2015, rather than fiscal years 2012, 2013, and 2014.

It was moved by Representative Skarphol, seconded by Representative Kempenich, and carried on a roll call vote that the performance audit of the foundations at the University of North Dakota, North Dakota State University, and Dickinson State University requested by the committee at its April 21, 2015, meeting, include the major foundation of each university that provides both academic and ancillary contributions in support of the university and that the audit period include fiscal years 2013, 2014, and 2015; and that the performance audit requested for the Dickinson State University Foundation not be conducted, but instead a summary review of the conclusions of the Attorney General's office investigation and receivership of the foundation. Senators Klein and O'Connell and Representatives Hatlestad, Kempenich, Klemin, Kreidt, Martinson, Nelson, and Skarphol voted "aye." Senator Lee and Representative Kelsh voted "nay."

COMMITTEE DISCUSSION AND STAFF DIRECTIVES

The Legislative Council staff distributed a memorandum entitled Summary of Audit Reports Not Selected for Presentation.

Senator Lee requested the audit report for the State Board of Addiction Counseling Examiners for the fiscal year ended June 30, 2015, and 2014, be presented at the next committee meeting.

It was moved by Representative Kreidt, seconded by Senator O'Connell, and carried on a roll call vote that, pursuant to Section 54-35-02.2, the committee accept the following reports presented to the committee:

1. North Dakota Comprehensive Annual Financial Report (June 30, 2015).
2. North Dakota University System Annual Financial Report (June 30, 2015).
3. Department of Public Instruction (June 30, 2015 and 2014).
4. North Dakota Lottery (June 30, 2015 and 2014).
5. Governor's office (June 30, 2015 and 2014).
6. Office of Management and Budget (June 30, 2015 and 2014).
7. State Treasurer's office (June 30, 2015 and 2014).
8. Education Standards and Practices Board (June 30, 2013).
9. Education Standards and Practices Board (June 30, 2012).
10. State Board of Registration for Professional Engineers and Land Surveyors (June 30, 2014).
11. North Dakota Stockmen's Association (December 31, 2015 and 2014).
12. Beginning farmer revolving loan fund (December 31, 2015 and 2014).
13. Community water facility loan fund (December 31, 2015 and 2014).
14. Guaranteed student loan program (September 30, 2015 and 2014).
15. Workforce Safety and Insurance (June 30, 2015 and 2014).

Senators Klein, Lee, and O'Connell and Representatives Hatlestad, Kelsh, Kempenich, Klemin, Kreidt, Martinson, Nelson, and Skarphol voted "aye." No negative votes were cast.

HB 1300
37077
AH #2
pg 11

It was moved by Senator Lee, seconded by Representative Skarphol, and carried on a roll call vote that, pursuant to Section 54-35-02.2, the committee accept the following reports available but not selected for presentation:

1. State Board of Optometry (June 30, 2015, 2014, and 2013).
2. Peace Officers Standards and Training Board (December 31, 2014 and 2013).
3. Real Estate Appraiser Qualifications and Ethics Board (June 30, 2011, 2010, 2009, 2008, 2007, and 2006).

Senators Klein, Lee, and O'Connell and Representatives Hatlestad, Kelsh, Kempenich, Klemin, Kreidt, Martinson, Nelson, and Skarphol voted "aye." No negative votes were cast.

It was moved by Representative Kreidt, seconded by Senator O'Connell, that pursuant to Section 54-35-02.2, the committee does not accept the following performance audit reports presented to the committee:

1. Department of Trust Lands - Energy Infrastructure and Impact Office Performance Audit (November 6, 2015).
2. Department of Trust Lands - Unclaimed Property (January 5, 2016).
3. Department of Trust Lands - Trust Assets and Department Resources (March 18, 2016).

In response to a question from Chairman Klein regarding the effect on the State Auditor's office if the report is not accepted, Mr. Robert Peterson, State Auditor, said the performance audit report for the Department of Trust Lands has been finalized and published. He said the State Auditor's position on audit findings and recommendations will not change.

Representative Skarphol suggested the committee accept the performance audit report and receive an update from the Department of Trust Lands regarding its progress in implementing the recommendations at a later committee meeting. Representative Kreidt withdrew his motion with the consent of Senator O'Connell.

Chairman Klein said the committee will receive an update from the Department of Trust Lands regarding its progress in implementing the recommendations provided by the State Auditor's office at a later meeting.

It was moved by Representative Kreidt, seconded by Representative Skarphol, and carried on a roll call vote that, pursuant to Section 54-35-02.2, the committee accept the following performance audit reports presented to the committee:

1. Department of Trust Lands - Energy Infrastructure and Impact Office Performance Audit (November 6, 2015).
2. Department of Trust Lands - Unclaimed Property (January 5, 2016).
3. Department of Trust Lands - Trust Assets and Department Resources (March 18, 2016).

Senators Klein, Lee, and O'Connell and Representatives Hatlestad, Kelsh, Kempenich, Klemin, Kreidt, Martinson, Nelson, and Skarphol voted "aye." No negative votes were cast.

Chairman Klein said the committee will be notified of the next meeting date.

No further business appearing, Chairman Klein adjourned the meeting at 4:45 p.m.

Michael C. Johnson
Fiscal Analyst

Allen H. Knudson
Legislative Budget Analyst and Auditor

ATTACH:9

Todd Kranda

7300
3-10-17

AH #3

pg 1

**Testimony in Support of
HOUSE BILL NO. 1300
Senate Energy and Natural Resources Committee
March 10, 2017**

Chairman Unruh, Senate Energy and Natural Resources Committee members, for the record my name is Todd D. Kranda. I am an attorney with the Kelsch Kelsch Ruff & Kranda Law Firm in Mandan. I appear before you today as a lobbyist on behalf of the North Dakota Petroleum Council (NDPC) to support HB 1300.

NDPC represents more than 500 companies involved in all aspects of the oil and gas industry, including oil and gas production, refining, pipelines, transportation, mineral leasing, consulting, legal work, and oilfield service activities, and has been representing the industry since 1952.

As stated by the prime sponsor, Representative Kempenich, and as described within the Fiscal Note, HB 1300 modifies the definition of "Administrative Agency" within Section 28-32-01 NDCC to include the Board of University and School Lands. (See change at HB 1300 page 2 lines 17-18).

The change proposed in HB 1300 simply removes the exception for the Board of University and School Lands (Board) as an agency that previously was not required to follow or comply with the procedures and requirements set out within the Administrative Agencies Practice Act (Chapter 28-32 NDCC).

HB 1300
3-10-17
Att #3
pg 2

The Board is comprised of five (5) members, which includes the Governor, Attorney General, Secretary of State, Superintendent of Public Instruction and State Treasurer. Each of these members are in offices that are subject to the Administrative Agency Practice Act which is what HB 1300 attempts to establish for the Board.

The Board, with respect to the ability to adopt and modify its rules on leasing the surface or minerals or finding someone in violation of its rules, should be included as an agency that follows and complies with the process and procedures outlined within the Administrative Agency Practice Act.

The Board, through the Surface Management Division and Minerals Management Division of the Department of Trust Lands, makes several substantive related decisions that directly impact the oil and gas industry. Those decisions should be after advance notice, with a reasonable opportunity to comment and then after a decision is rendered there should be a method available for a reasonable review process through an appeal.

It is unreasonable for an agency such as the Board to make decisions without allowing any type of reasonable due process rights to those impacted by such determinations.

As an example, with regard to the impact to the oil and gas industry, the Board administers all state oil and gas leases (as well as coal leases, grazing

HB 1300
3-10-17
AH A3
Pg 3

leases, surface leases, easements) and currently is not subject to any of the requirements of the Administrative Agency Practice Act, Chapter 28-32 NDCC, for either rule making or for adjudications. The Board has amended rules without giving notice to the public or the affected industries.

Further, the rules by the Board are not subject to any type of reasonable review by either the Legislative Administrative Rules Committee or the Courts. The Board has demanded payment of royalties on the lake bed minerals as well as 18% interest and 12% penalty (a total interest rate of 30%). In doing so, the Board's decisions are not subject to any review on appeal. Accordingly, if a company believes that a particular royalty is subject to a title question and the Board disagrees with that position, the company has no mechanism to have that decision reviewed on appeal. The company either pays the royalties or runs the risk that the Board will take action to cancel the lease.

In addition, the Board asserts the right to unilaterally decide to cancel a lease for an alleged breach. In those situations, the lessee has no right to challenge the decision or action by the Board through any type of review process with an appeal.

In comparison, the Bureau of Land Management (BLM) which regulates federal lands operates as an administrative agency and requires due process if it adopts rules or finds a party in violation. If the federal government (BLM) can

HB 1300
370-17
AH #3
pg 4

provide a lessee of federal minerals and federal surface due process, the state (Board) should be able to do the same thing. It does not seem too much to ask for to get some type of advance notice and an opportunity to comment on rules and have an opportunity to counter an alleged charge of a violation or non-compliance.

The Board, in opposition, will likely suggest that having to follow and comply with the Administrative Agency Practice Act will cause delays and will slow down the process of decision making by the Board which could be a detriment to the industry. While the industry recognizes the requirement for following the basic due process rules established in the Administrative Agency Practice Act would create more bureaucracy in the system, on balance, the benefits of knowing that there are a set of rules and due process rights assured to those involved in the process with the Board outweighs those concerns.

Further, if the Board, in opposition, suggests that there would be delays caused by having to follow the Administrative Agency Practice Act, industry does not necessarily agree with that premise. There does not need to be delays as may be suggested because the Board can establish a set of rules and proceed accordingly. Industry participants prefer to know that the Board has a set of due process rules that the Board must adhere to. Having that certainty of knowing that the process and rights established and created under the Administrative Agency Practice Act is better than simply having an assurance that certain rights are or

HB 1300

3-10-17

AK #3

pg 5

would be available and a certain process would be or is followed. As indicated, each individual Board member themselves are in an office that is already subject to and following the Administrative Agency Practice Act, so having the Board do so is not something new or unusual.

With regard to the Administrative Agency Practice Act itself, I have included a copy of Chapter 28-32 for your review and reference. The rule making process is described in Sections 28-32-02 through 28-32-20 NDCC and the adjudicative proceedings are described in Sections 28-32-21 through 28-32-50 NDCC.

HB 1300 presents a reasonable request that the Board, while acting as a trustee for the "public trust", be subject to the provisions and restrictions of the Administrative Agency Practice Act, Chapter 28-32 NDCC. The Act simply affords basic rights like notice, hearing and appeals to the people and entities that deal with the Board without impacting the Board's ability to continue to act in a manner necessary to protect the public trust.

In conclusion, NDPC urges your support for **HB 1300** and respectfully requests a favorable **Do Pass** recommendation. Thank you and I would be happy to try to answer any questions.

AB 1300
3-10-19
AH #4
pg 1

North Dakota Legislative Branch

Administrative Rules

The Legislative Council publishes the Administrative Code which is the codification of all rules of state administrative agencies, as that term is defined by North Dakota Century Code Section 28-32-02. Many state agencies are not administrative agencies as defined by Section 28-32-02. Although rules of those agencies are not required to be published in the Administrative Code, some agencies have consented to placing their rules in the code. Those agencies are identified with an explanatory note on the title page for that agency. The Administrative Code was initially published July 1, 1978. The Administrative Code is updated with quarterly changes. The Administrative Code is published in a CD-ROM version, for which subscriptions may be obtained from the [Secretary of State](#), and an Internet version, available here. The Internet version is derived from the database prepared by the North Dakota Legislative Council. It may vary in some respects from the text in the CD-ROM version. Updates generally will appear in the Internet version sooner than in the CD-ROM version.

The numbering system for the Administrative Code is a four-part number, with each part separated by a hyphen. The first part refers to the title, the second to the article, the third to the chapter, and the fourth to the section. Basically, each agency is listed in alphabetical order and assigned a title number, each division or major administrative area is assigned an article number, each subject area is assigned a chapter number, and each rule is assigned a section number. The decimal point system is used to designate material that has been inserted between two consecutively numbered items.

The general authority source note refers to the specific statute authorizing the agency to adopt the rule. The law implemented source note refers to the specific statute implemented by the rule. In some cases, the general authority and the law implemented will be the same. In some cases, source references may be to federal laws or regulations, or to court cases.

The table of contents to this online version of the Administrative Code is the listing of titles of the code. Titles are captioned for the agency that adopts rules in the title. Selecting the appropriate title will direct you to the articles and chapters that make up the title.

To view Administrative Rules Supplements please click [here](#).

Title 1 Reserved	Title 57 Pardon Advisory Board (Not an Administrative Agency)
Title 2 Abstracters' Board of Examiners	Title 58 Parks and Recreation Department (Not an Administrative Agency)
Title 3 Accountancy, Board of	Title 59 State Parole Board (Not an Administrative Agency)
Title 4 Management and Budget, Office of	Title 59.5 State Personnel Board
Title 4.5 Addiction Counseling Examiners, Board of	Title 60 Pesticide Control Board
Title 5 Adjutant General	Title 61 Pharmacy, State Board of
Title 6 North Dakota Aeronautics Commission	Title 61.5 North Dakota Board of Physical Therapy
Title 7 Agriculture, Commissioner of	Title 62 Plumbing, State Board of
Title 8 Architecture and Landscape Architecture, State Board of	Title 63 Board of Podiatric Medicine
Title 9 Arts, North Dakota Council on the (Not an Administrative Agency)	Title 64 Postsecondary Education Commission [Repealed]
Title 10 Attorney General	Title 65 North Dakota Potato Council
Title 11 Audiology and Speech-Language Pathology, Board of Examiners on	Title 65.5 Committee on Protection and Advocacy
Title 12 State Auditor (Not an Administrative Agency)	Title 66 Psychologist Examiners, State Board of
Title 12.5 Bank of North Dakota	Title 67 Public Instruction, Superintendent of
Title 13 Department of Financial Institutions	Title 67.1 Education Standards and Practices Board
Title 14 Barber Examiners, Board of	Title 68 Public School Education, Board of
Title 15 North Dakota Beef Commission	Title 69 Public Service Commission
Title 16 Economic Development Foundation (Not an Administrative Agency)	Title 69.5 Racing Commission, North Dakota
Title 16.5 Centennial Commission [Repealed]	Title 70 State Real Estate Commission
Title 17 Chiropractic Examiners, State Board of	Title 70.5 Real Estate Trust Account Committee
Title 18 Combined Law Enforcement Council [Repealed]	Title 71 Retirement Board
Title 18.5 Credit Review Board [Repealed]	Title 72 Secretary of State
Title 18.6 North Dakota Mediation Service and Credit Review Board	Title 73 Securities Commissioner
Title 19 North Dakota Dairy Promotion Commission (Not an Administrative Agency)	Title 74 Seed Commission
Title 20 Dental Examiners, State Board of	Title 75 Department of Human Services
Title 20.5 Dietetic Practice, Board of	Title 75.5 Social Work Examiners, North Dakota Board of
Title 21 Edible Bean Council	Title 76 Soil Classifiers, Board of Registration for Professional
Title 22 Education Factfinding Commission (Not an Administrative Agency)	Title 77 Soil Conservation Committee
Title 23 Educational Broadcasting Council (Not an Administrative Agency)	Title 78 State Fair Association (Not an Administrative Agency)
Title 24 State Electrical Board	Title 79 North Dakota Oilseed Council
Title 25 State Board of Funeral Service	Title 80 Tax Appeals Board [Unconstitutional]
Title 26 Emergency Commission [Repealed]	Title 81 Tax Commissioner
Title 27 Job Service North Dakota	Title 82 Teachers' Fund for Retirement, Board of Trustees of the
Title 28 Engineers and Land Surveyors, State Board of Registration for Professional	Title 83 Trade Commission [Defunct]
Title 29 Equalization, Board of (Not an Administrative Agency)	Title 84 Treasurer, State
Title 30 Game and Fish Department	Title 85 University and School Lands, Board of (Not an Administrative Agency)
Title 31 Governor	Title 86 Veterans' Affairs, Administrative Committee on (Not an Administrative Agency)
Title 32 Cosmetology, State Board of	Title 87 Veterinary Medical Examiners, State Board of
Title 33 State Department of Health	Title 88 Watchmaking, Board of Examiners in [Repealed]
Title 34 Heritage Commission [Repealed]	Title 89 State Water Commission
Title 35 Higher Education, State Board of (Not an Administrative Agency)	Title 90 Water Well Contractors, State Board of
Title 36 Highway Corridor Board [Repealed]	Title 91 Wheat Commission
Title 37 Department of Transportation	Title 92 Workforce Safety and Insurance
Title 38 Highway Patrol	Title 93 Private Investigative and Security Board
Title 39 Highway Patrolmen's Retirement Board [Repealed]	Title 94 Corrections and Rehabilitation, Department of
Title 40 State Historical Board	Title 95 Agricultural Products Utilization Commission
Title 41 North Dakota Indian Affairs Commission (Not an Administrative Agency)	Title 96 North Dakota Board of Clinical Laboratory Practice
Title 42 Indian Scholarships, State Board for	Title 97 Board of Counselor Examiners
Title 43 Industrial Commission	Title 98 Office of Administrative Hearings
Title 44 Institutions, Director of (Not an Administrative Agency)	Title 99 State Gaming Commission
Title 45 Insurance Commissioner	Title 100 State Seed Arbitration Board
Title 46 Labor Commissioner	Title 101 Real Estate Appraiser Qualifications and Ethics Board
Title 47 Laboratories Commission [Repealed]	Title 102 North Dakota State Investment Board
	Title 103 State Retirement and Investment Office

Title 48 State Board of Animal Health [Repealed]

Title 48.1 State Board of Animal Health

Title 49 Massage, Board of

Title 50 Medicine, North Dakota Board of

Title 51 Milk Marketing Board

Title 52 Motor Vehicle Department [Repealed]

Title 53 Natural Resources Council [Repealed]

Title 54 Nursing, State Board of

Title 55 Nursing Home Administrators, State Board of Examiners for

Title 55.5 Occupational Therapy Practice, Board of

Title 56 Optometry, North Dakota State Board of

Title 104 North Dakota Board of Hearing Instrument Dispensers

Title 105 Respiratory Care, State Board of

Title 106 North Dakota Board of Athletic Trainers

Title 107 Crop Protection Product Harmonization and Registration Board

Title 108 Department of Commerce

Title 109 Peace Officer Standards and Training Board

Title 110 Criminal Justice Information Sharing Board

Title 111 North Dakota Marriage and Family Therapy Licensure Board

Title 112 Integrative Health Care

Title 113 North Dakota Health Information Network

North Dakota Legislative Branch

Chapter 28-32

1300
3-10-17

A# 5
Pg 1

Administrative Agencies Practice Act

Section	Section Name
28-32-01	Definitions
28-32-02	Rulemaking power of agency – Organizational rule
28-32-03	Emergency rules
28-32-04	Repeal or waiver of rules from federal guidelines
28-32-05	Adoption by reference of certain rules
28-32-06	Force and effect of rules
28-32-07	Deadline for rules to implement statutory change
28-32-08	Regulatory analysis
28-32-08.1	Rules affecting small entities – Analysis – Economic impact statements – Judicial review
28-32-08.2	Fiscal notes for administrative rules
28-32-09	Takings assessment
28-32-10	Notice of rulemaking – Hearing date
28-32-11	Conduct of hearings – Notice of administrative rules committee consideration – Consideration and written record of comments
28-32-12	Comment period
28-32-13	Substantial compliance with rulemaking procedure
28-32-14	Attorney general review of rules
28-32-15	Filing of rules for publication – Effective date of rules
28-32-16	Petition for reconsideration of rule – Hearing by agency
28-32-17	Administrative rules committee objection
28-32-18	Administrative rules committee may void rule – Grounds – Amendment by agreement of agency and committee
28-32-18.1	Administrative rules committee review of existing administrative rules
28-32-19	Publication of administrative code and code supplement
28-32-20	Printing, sales, and distribution of code and code supplement
28-32-21	Adjudicative proceedings – Procedures
28-32-22	Informal disposition
28-32-23	Adjudicative proceedings – Exceptions – Rules of procedure
28-32-24	Evidence to be considered by agency – Official notice
28-32-25	Adjudicative proceedings – Consideration of information not presented at a hearing
28-32-26	Costs of investigation
28-32-27	Hearing officer – Disqualification – Substitution
28-32-28	Intervention
28-32-29	Prehearing conference
28-32-30	Default
28-32-31	Duties of hearing officers
28-32-32	Emergency adjudicative proceedings
28-32-33	Adjudicative proceedings – Subpoenas – Discovery – Protective orders
28-32-34	Administration of oaths – Parties to be advised of perjury provisions
28-32-35	Procedure at hearing
28-32-36	Agency to make record
28-32-37	Ex parte communications
28-32-38	Separation of functions
28-32-39	Adjudicative proceedings – Findings of fact, conclusions of law, and order of agency – Notice
28-32-40	Petition for reconsideration
28-32-41	Effectiveness of orders
28-32-42	Appeal from determination of agency – Time to appeal – How appeal taken
28-32-43	Docketing of appeals
28-32-44	Agency to maintain and certify record on appeal
28-32-45	Consideration of additional or excluded evidence
28-32-46	Scope of and procedure on appeal from determination of administrative agency
28-32-47	Scope of and procedure on appeal from agency rulemaking
28-32-48	Appeal – Stay of proceedings
28-32-49	Review in supreme court
28-32-50	Actions against administrative agencies – Attorney's fees and costs
28-32-51	Witnesses – Immunity
28-32-52	Elected official authority

[Back to top](#)

HB 1300
3-10-17
AH #5
P92

CHAPTER 28-32
ADMINISTRATIVE AGENCIES PRACTICE ACT

28-32-01. Definitions.

In this chapter, unless the context or subject matter otherwise provides:

1. "Adjudicative proceeding" means an administrative matter resulting in an agency issuing an order after an opportunity for hearing is provided or required. An adjudicative proceeding includes administrative matters involving a hearing on a complaint against a specific-named respondent; a hearing on an application seeking a right, privilege, or an authorization from an agency, such as a ratemaking or licensing hearing; or a hearing on an appeal to an agency. An adjudicative proceeding includes reconsideration, rehearing, or reopening. Once an adjudicative proceeding has begun, the adjudicative proceeding includes any informal disposition of the administrative matter under section 28-32-22 or another specific statute or rule, unless the matter has been specifically converted to another type of proceeding under section 28-32-22. An adjudicative proceeding does not include a decision or order to file or not to file a complaint, or to initiate an investigation, an adjudicative proceeding, or any other proceeding before the agency, or another agency, or a court. An adjudicative proceeding does not include a decision or order to issue, reconsider, or reopen an order that precedes an opportunity for hearing or that under another section of this code is not subject to review in an adjudicative proceeding. An adjudicative proceeding does not include rulemaking under this chapter.
2. "Administrative agency" or "agency" means each board, bureau, commission, department, or other administrative unit of the executive branch of state government, including one or more officers, employees, or other persons directly or indirectly purporting to act on behalf or under authority of the agency. An administrative unit located within or subordinate to an administrative agency must be treated as part of that agency to the extent it purports to exercise authority subject to this chapter. The term administrative agency does not include:
 - a. The office of management and budget except with respect to rules made under section 32-12.2-14, rules relating to conduct on the capitol grounds and in buildings located on the capitol grounds under section 54-21-18, rules relating to the classified service as authorized under section 54-44.3-07, and rules relating to state purchasing practices as required under section 54-44.4-04.
 - b. The adjutant general with respect to the department of emergency services.
 - c. The council on the arts.
 - d. The state auditor.
 - e. The department of commerce with respect to the division of economic development and finance.
 - f. The dairy promotion commission.
 - g. The education factfinding commission.
 - h. The educational technology council.
 - i. The board of equalization.
 - j. The board of higher education.
 - k. The Indian affairs commission.
 - l. The industrial commission with respect to the activities of the Bank of North Dakota, North Dakota housing finance agency, public finance authority, North Dakota mill and elevator association, North Dakota farm finance agency, the North Dakota transmission authority, and the North Dakota pipeline authority.
 - m. The department of corrections and rehabilitation except with respect to the activities of the division of adult services under chapter 54-23.4.
 - n. The pardon advisory board.
 - o. The parks and recreation department.
 - p. The parole board.
 - q. The state fair association.

HB 1300
3-10-17
RH# 5
Pg 3

- r. The attorney general with respect to activities of the state toxicologist and the state crime laboratory.
 - s. The board of university and school lands except with respect to activities under chapter 47-30.1.
 - t. The administrative committee on veterans' affairs except with respect to rules relating to the supervision and government of the veterans' home and the implementation of programs or services provided by the veterans' home.
 - u. The industrial commission with respect to the lignite research fund except as required under section 57-61-01.5.
 - v. The attorney general with respect to guidelines adopted under section 12.1-32-15 for the risk assessment of sexual offenders, the risk level review process, and public disclosure of information under section 12.1-32-15.
 - w. The commission on legal counsel for indigents.
 - x. The attorney general with respect to twenty-four seven sobriety program guidelines and program fees.
 - y. The industrial commission with respect to approving or setting water rates under chapter 61-40.
- 3. "Agency head" means an individual or body of individuals in whom the ultimate legal authority of the agency is vested by law.
 - 4. "Complainant" means any person who files a complaint before an administrative agency pursuant to section 28-32-21 and any administrative agency that, when authorized by law, files such a complaint before such agency or any other agency.
 - 5. "Hearing officer" means any agency head or one or more members of the agency head when presiding in an administrative proceeding, or, unless prohibited by law, one or more other persons designated by the agency head to preside in an administrative proceeding, an administrative law judge from the office of administrative hearings, or any other person duly assigned, appointed, or designated to preside in an administrative proceeding pursuant to statute or rule.
 - 6. "License" means a franchise, permit, certification, approval, registration, charter, or similar form of authorization required by law.
 - 7. "Order" means any agency action of particular applicability which determines the legal rights, duties, privileges, immunities, or other legal interests of one or more specific persons. The term does not include an executive order issued by the governor.
 - 8. "Party" means each person named or admitted as a party or properly seeking and entitled as of right to be admitted as a party. An administrative agency may be a party. In a hearing for the suspension, revocation, or disqualification of an operator's license under title 39, the term may include each city and each county in which the alleged conduct occurred, but the city or county may not appeal the decision of the hearing officer.
 - 9. "Person" includes an individual, association, partnership, corporation, limited liability company, state governmental agency or governmental subdivision, or an agency of such governmental subdivision.
 - 10. "Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the administrative action more probable or less probable than it would be without the evidence.
 - 11. "Rule" means the whole or a part of an agency statement of general applicability which implements or prescribes law or policy or the organization, procedure, or practice requirements of the agency. The term includes the adoption of new rules and the amendment, repeal, or suspension of an existing rule. The term does not include:
 - a. A rule concerning only the internal management of an agency which does not directly or substantially affect the substantive or procedural rights or duties of any segment of the public.
 - b. A rule that sets forth criteria or guidelines to be used by the staff of an agency in the performance of audits, investigations, inspections, and settling commercial disputes or negotiating commercial arrangements, or in the defense, prosecution, or settlement of cases, if the disclosure of the statement would:

HB 1300
3-10-17
AH # 5
pg 4

- (1) Enable law violators to avoid detection;
 - (2) Facilitate disregard of requirements imposed by law; or
 - (3) Give a clearly improper advantage to persons who are in an adverse position to the state.
- c. A rule establishing specific prices to be charged for particular goods or services sold by an agency.
 - d. A rule concerning only the physical servicing, maintenance, or care of agency-owned or agency-operated facilities or property.
 - e. A rule relating only to the use of a particular facility or property owned, operated, or maintained by the state or any of its subdivisions, if the substance of the rule is adequately indicated by means of signs or signals to persons who use the facility or property.
 - f. A rule concerning only inmates of a correctional or detention facility, students enrolled in an educational institution, or patients admitted to a hospital, if adopted by that facility, institution, or hospital.
 - g. A form whose contents or substantive requirements are prescribed by rule or statute or are instructions for the execution or use of the form.
 - h. An agency budget.
 - i. An opinion of the attorney general.
 - j. A rule adopted by an agency selection committee under section 54-44.7-03.
 - k. Any material, including a guideline, interpretive statement, statement of general policy, manual, brochure, or pamphlet, which is explanatory and not intended to have the force and effect of law.

28-32-02. Rulemaking power of agency - Organizational rule.

- 1. The authority of an administrative agency to adopt administrative rules is authority delegated by the legislative assembly. As part of that delegation, the legislative assembly reserves to itself the authority to determine when and if rules of administrative agencies are effective. Every administrative agency may adopt, amend, or repeal reasonable rules in conformity with this chapter and any statute administered or enforced by the agency.
- 2. In addition to other rulemaking requirements imposed by law, each agency may include in its rules a description of that portion of its organization and functions subject to this chapter and may include a statement of the general course and method of its operations and how the public may obtain information or make submissions or requests.

28-32-03. Emergency rules.

- 1. If the agency, with the approval of the governor, finds that emergency rulemaking is necessary, the agency may declare the proposed rule to be an interim final rule effective on a date no earlier than the date of filing with the legislative council of the notice required by section 28-32-10.
- 2. A proposed rule may be given effect on an emergency basis under this section if any of the following grounds exists regarding that rule:
 - a. Imminent peril threatens public health, safety, or welfare, which would be abated by emergency effectiveness;
 - b. A delay in the effective date of the rule is likely to cause a loss of funds appropriated to support a duty imposed by law upon the agency;
 - c. Emergency effectiveness is reasonably necessary to avoid a delay in implementing an appropriations measure; or
 - d. Emergency effectiveness is necessary to meet a mandate of federal law.
- 3. A final rule adopted after consideration of all written and oral submissions respecting the interim final rule, which is substantially similar to the interim final rule, is effective as of the declared effective date of the interim final rule.
- 4. The agency's finding, and a brief statement of the agency's reasons for the finding, must be filed with the legislative council with the final adopted emergency rule.

HB 300
3-10-17
AH #5
pg 5

5. The agency shall attempt to make interim final rules known to persons who the agency can reasonably be expected to believe may have a substantial interest in them. As used in this subsection, "substantial interest" means an interest in the effect of the rules which surpasses the common interest of all citizens. An agency adopting emergency rules shall comply with the notice requirements of section 28-32-10 which relate to emergency rules and shall provide notice to the chairman of the administrative rules committee of the emergency status, declared effective date, and grounds for emergency status of the rules under subsection 2. When notice of emergency rule adoption is received, the legislative council shall publish the notice and emergency rules on its website.
6. An interim final rule is ineffective one hundred eighty days after its declared effective date unless first adopted as a final rule.

28-32-04. Repeal or waiver of rules from federal guidelines.

1. An agency shall repeal or amend any existing rule that was adopted from federal guidelines and which is not relevant to state regulatory programs.
2. An agency may not adopt rules from federal guidelines which are not relevant to state regulatory programs when developing or modifying programs.
3. An agency shall seek a waiver from the appropriate United States agency when the United States agency is evaluating current programs or delegating or modifying programs to relieve the agency from complying with or adopting rules that are not relevant to state regulatory programs.

28-32-05. Adoption by reference of certain rules.

1. When adopting rules, an agency shall adopt by reference any applicable existing permit or procedural rules that may be adapted for use in a new or existing program.
2. An agency shall seek authorization from the appropriate United States agency to adopt by reference applicable existing permit or procedural rules that may be adapted for use in a new or existing program when the United States agency is delegating or modifying a program.

28-32-06. Force and effect of rules.

Upon becoming effective, rules have the force and effect of law until amended or repealed by the agency, declared invalid by a final court decision, suspended or found to be void by the administrative rules committee, or determined repealed by the legislative council because the authority for adoption of the rules is repealed or transferred to another agency.

28-32-07. Deadline for rules to implement statutory change.

Any rule change, including a creation, amendment, or repeal, made to implement a statutory change must be adopted and filed with the legislative council within nine months of the effective date of the statutory change. If an agency needs additional time for the rule change, a request for additional time must be made to the legislative council. The legislative council may extend the time within which the agency must adopt the rule change if the request by the agency is supported by evidence that the agency needs more time through no deliberate fault of its own.

28-32-08. Regulatory analysis.

1. An agency shall issue a regulatory analysis of a proposed rule if:
 - a. Within twenty days after the last published notice date of a proposed rule hearing, a written request for the analysis is filed by the governor or a member of the legislative assembly; or
 - b. The proposed rule is expected to have an impact on the regulated community in excess of fifty thousand dollars. The analysis under this subdivision must be available on or before the first date of public notice as provided for in section 28-32-10.

HB 1300
3-10-17
AA # 5
Pg 6

2. The regulatory analysis must contain:
 - a. A description of the classes of persons who probably will be affected by the proposed rule, including classes that will bear the costs of the proposed rule and classes that will benefit from the proposed rule;
 - b. A description of the probable impact, including economic impact, of the proposed rule;
 - c. The probable costs to the agency of the implementation and enforcement of the proposed rule and any anticipated effect on state revenues; and
 - d. A description of any alternative methods for achieving the purpose of the proposed rule that were seriously considered by the agency and the reasons why the methods were rejected in favor of the proposed rule.
3. Each regulatory analysis must include quantification of the data to the extent practicable.
4. The agency shall mail or deliver a copy of the regulatory analysis to any person who requests a copy of the regulatory analysis. The agency may charge a fee for a copy of the regulatory analysis as allowed under section 44-04-18.
5. If required under subsection 1, the preparation and issuance of a regulatory analysis is a mandatory duty of the agency proposing a rule. Errors in a regulatory analysis, including erroneous determinations concerning the impact of the proposed rule on the regulated community, are not a ground upon which the invalidity of a rule may be asserted or declared.

28-32-08.1. Rules affecting small entities - Analysis - Economic impact statements - Judicial review.

1. As used in this section:
 - a. "Small business" means a business entity, including its affiliates, which:
 - (1) Is independently owned and operated; and
 - (2) Employs fewer than twenty-five full-time employees or has gross annual sales of less than two million five hundred thousand dollars;
 - b. "Small entity" includes small business, small organization, and small political subdivision;
 - c. "Small organization" means any not-for-profit enterprise that is independently owned and operated and is not dominant in its field; and
 - d. "Small political subdivision" means a political subdivision with a population of less than five thousand.
2. Before adoption of any proposed rule, the adopting agency shall prepare a regulatory analysis in which, consistent with public health, safety, and welfare, the agency considers utilizing regulatory methods that will accomplish the objectives of applicable statutes while minimizing adverse impact on small entities. The agency shall consider each of the following methods of reducing impact of the proposed rule on small entities:
 - a. Establishment of less stringent compliance or reporting requirements for small entities;
 - b. Establishment of less stringent schedules or deadlines for compliance or reporting requirements for small entities;
 - c. Consolidation or simplification of compliance or reporting requirements for small entities;
 - d. Establishment of performance standards for small entities to replace design or operational standards required in the proposed rule; and
 - e. Exemption of small entities from all or any part of the requirements contained in the proposed rule.
3. Before adoption of any proposed rule that may have an adverse impact on small entities, the adopting agency shall prepare an economic impact statement that includes consideration of:
 - a. The small entities subject to the proposed rule;

HB1300
3-10-17
Att # 5
pg 7

- b. The administrative and other costs required for compliance with the proposed rule;
 - c. The probable cost and benefit to private persons and consumers who are affected by the proposed rule;
 - d. The probable effect of the proposed rule on state revenues; and
 - e. Any less intrusive or less costly alternative methods of achieving the purpose of the proposed rule.
4. For any rule subject to this section, a small entity that is adversely affected or aggrieved by final agency action is entitled to judicial review of agency compliance with the requirements of this section. A small entity seeking judicial review under this section must file a petition for judicial review within one year from the date of final agency action.
 5. This section does not apply to any agency that is an occupational or professional licensing authority, nor does this section apply to the following agencies or divisions of agencies:
 - a. Council on the arts.
 - b. Beef commission.
 - c. Dairy promotion commission.
 - d. Dry bean council.
 - e. Highway patrolmen's retirement board.
 - f. Indian affairs commission.
 - g. Board for Indian scholarships.
 - h. State personnel board.
 - i. Potato council.
 - j. Board of public school education.
 - k. Real estate trust account committee.
 - l. Seed commission.
 - m. Soil conservation committee.
 - n. Oilseed council.
 - o. Wheat commission.
 - p. State seed arbitration board.
 - q. North Dakota lottery.
 6. This section does not apply to rules mandated by federal law.
 7. The adopting agency shall provide the administrative rules committee copies of any regulatory analysis or economic impact statement, or both, prepared under this section when the committee is considering the associated rules.

28-32-08.2. Fiscal notes for administrative rules.

When an agency presents rules for administrative rules committee consideration, the agency shall provide a fiscal note or a statement in its testimony that the rules have no fiscal effect. A fiscal note must reflect the effect of the rules changes on state revenues and expenditures, including any effect on funds controlled by the agency.

28-32-09. Takings assessment.

1. An agency shall prepare a written assessment of the constitutional takings implications of a proposed rule that may limit the use of private real property. The agency's assessment must:
 - a. Assess the likelihood that the proposed rule may result in a taking or regulatory taking.
 - b. Clearly and specifically identify the purpose of the proposed rule.
 - c. Explain why the proposed rule is necessary to substantially advance that purpose and why no alternative action is available that would achieve the agency's goals while reducing the impact on private property owners.
 - d. Estimate the potential cost to the government if a court determines that the proposed rule constitutes a taking or regulatory taking.

HB 1300
3-10-17
AH 45
pg 8

- e. Identify the source of payment within the agency's budget for any compensation that may be ordered.
 - f. Certify that the benefits of the proposed rule exceed the estimated compensation costs.
2. Any private landowner who is or may be affected by a rule that limits the use of the landowner's private real property may request in writing that the agency reconsider the application or need for the rule. Within thirty days of receiving the request, the agency shall consider the request and shall in writing inform the landowner whether the agency intends to keep the rule in place, modify application of the rule, or repeal the rule.
 3. In an agency's analysis of the takings implications of a proposed rule, "taking" means the taking of private real property, as defined in section 47-01-03, by government action which requires compensation to the owner of that property by the fifth or fourteenth amendment to the Constitution of the United States or section 16 of article I of the Constitution of North Dakota. "Regulatory taking" means a taking of real property through the exercise of the police and regulatory powers of the state which reduces the value of the real property by more than fifty percent. However, the exercise of a police or regulatory power does not effect a taking if it substantially advances legitimate state interests, does not deny an owner economically viable use of the owner's land, or is in accordance with applicable state or federal law.

28-32-10. Notice of rulemaking - Hearing date.

1. An agency shall prepare a full notice and an abbreviated notice of rulemaking.
 - a. The agency's full notice of the proposed adoption, amendment, or repeal of a rule must include a short, specific explanation of the proposed rule and the purpose of the proposed rule, identify the emergency status and declared effective date of any emergency rules, include a determination of whether the proposed rulemaking is expected to have an impact on the regulated community in excess of fifty thousand dollars, identify at least one location where interested persons may review the text of the proposed rule, provide the address to which written comments concerning the proposed rule may be sent, provide the deadline for submission of written comments, provide a telephone number and post-office or electronic mail address at which a copy of the rules and regulatory analysis may be requested, and, in the case of a substantive rule, provide the time and place set for each oral hearing. The agency's full notice must include a statement of the bill number and general subject matter of any legislation, enacted during the most recent session of the legislative assembly, which is being implemented by the proposed rule. The agency's full notice must be filed with the legislative council, accompanied by a copy of the proposed rules.
 - b. The agency shall request publication of an abbreviated newspaper publication notice at least once in each official county newspaper published in this state. The abbreviated newspaper publication of notice must be in a display-type format with a minimum width of one column of approximately two inches [5.08 centimeters] and a minimum depth of approximately three inches [7.62 centimeters] and with a headline describing the general topic of the proposed rules. The notice must also include the telephone number or address to use to obtain a copy of the proposed rules, identification of the emergency status and declared effective date of any emergency rules, the address to use and the deadline to submit written comments, and the location, date, and time of the public hearing on the rules.
2. The agency shall mail or deliver by electronic mail a copy of the agency's full notice and proposed rule to each member of the legislative assembly whose name appeared as a sponsor or cosponsor of legislation, enacted during the most recent session of the legislative assembly, which is being implemented by the proposed rule and to each person who has made a timely request to the agency for a copy of the notice and proposed rule. The agency may mail or otherwise provide a copy of the agency's full notice to any person who is likely to be an interested person. The agency may charge

HB 1300
3-10-17
HH 45
Pg 9

persons who are not members of the legislative assembly fees for copies of the proposed rule as allowed under section 44-04-18.

3. In addition to the other notice requirements of this subsection, the superintendent of public instruction shall provide notice of any proposed rulemaking by the superintendent of public instruction to each association with statewide membership whose primary focus is elementary and secondary education issues which has requested to receive notice from the superintendent under this subsection and to the superintendent of each public school district in this state, or the president of the school board for school districts that have no superintendent, at least twenty days before the date of the hearing described in the notice. Notice provided by the superintendent of public instruction under this section must be by first-class mail. However, upon request of a group or person entitled to notice under this section, the superintendent of public instruction shall provide the group or person notice by electronic mail.
4. The legislative council shall establish standard procedures for all agencies to follow in complying with the provisions of this section and a procedure to allow any person to request and receive mailed copies of all filings made by agencies pursuant to this section. The legislative council may charge an annual fee as established by the administrative rules committee for providing copies of the filings.
5. At least twenty days must elapse between the date of the publication of the notice and the date of the hearing. Within fifteen business days after receipt of a notice under this section, a copy of the notice must be mailed by the legislative council to any person who has paid the annual fee established under subsection 4.

28-32-11. Conduct of hearings - Notice of administrative rules committee consideration - Consideration and written record of comments.

The agency shall adopt a procedure whereby all interested persons are afforded reasonable opportunity to submit data, views, or arguments, orally or in writing, concerning the proposed rule, including data respecting the impact of the proposed rule. The agency shall adopt a procedure to allow interested parties to request and receive notice from the agency of the date and place the rule will be reviewed by the administrative rules committee. In case of substantive rules, the agency shall conduct an oral hearing. The agency shall consider fully all written and oral submissions respecting a proposed rule prior to the adoption, amendment, or repeal of any rule not of an emergency nature. The agency shall make a written record of its consideration of all written and oral submissions contained in the rulemaking record respecting a proposed rule.

28-32-12. Comment period.

The agency shall allow, after the conclusion of any rulemaking hearing, a comment period of at least ten days during which data, views, or arguments concerning the proposed rulemaking will be received by the agency and made a part of the rulemaking record to be considered by the agency.

28-32-13. Substantial compliance with rulemaking procedure.

A rule is invalid unless adopted in substantial compliance with this chapter. However, inadvertent failure to supply any person with a notice required by section 28-32-10 does not invalidate a rule. Notwithstanding subsection 2 of section 28-32-42, an action to contest the validity of a rule on the grounds of noncompliance with this chapter may not be commenced more than two years after the effective date of the rule.

28-32-14. Attorney general review of rules.

Every rule proposed by any administrative agency must be submitted to the attorney general for an opinion as to its legality before final adoption, and the attorney general promptly shall furnish each such opinion. The attorney general may not approve any rule as to legality when the rule exceeds the statutory authority of the agency or is written in a manner that is not concise or easily understandable or when the procedural requirements for adoption of the rule in

HB 1300
3-10-17
AH #5
pg 10

this chapter are not substantially met. The attorney general shall advise an agency of any revision or rewording of a rule necessary to correct objections as to legality.

28-32-15. Filing of rules for publication - Effective date of rules.

1. A copy of each rule adopted by an administrative agency, a copy of each written comment and a written summary of each oral comment on the rule, and the attorney general's opinion on the rule must be filed by the adopting agency with the legislative council for publication of the rule in the North Dakota Administrative Code.
2. a. Nonemergency rules approved by the attorney general as to legality, adopted by an administrative agency, and filed with the legislative council and not voided or held for consideration by the administrative rules committee become effective according to the following schedule:
 - (1) Rules filed with the legislative council from August second through November first become effective on the immediately succeeding January first.
 - (2) Rules filed with the legislative council from November second through February first become effective on the immediately succeeding April first.
 - (3) Rules filed with the legislative council from February second through May first become effective on the immediately succeeding July first.
 - (4) Rules filed with the legislative council from May second through August first become effective on the immediately succeeding October first.
- b. If publication is delayed for any reason other than action of the administrative rules committee, nonemergency rules, unless otherwise provided, become effective when publication would have occurred but for the delay.
- c. A rule held for consideration by the administrative rules committee becomes effective on the first effective date of rules under the schedule in subdivision a following the meeting at which that rule is reconsidered by the committee.

28-32-16. Petition for reconsideration of rule - Hearing by agency.

Any person substantially interested in the effect of a rule adopted by an administrative agency may petition such agency for a reconsideration of any such rule or for an amendment or repeal thereof. Such petition must state clearly and concisely the petitioners' alleged grounds for such reconsideration or for the proposed repeal or amendment of such rule. The agency may grant the petitioner a public hearing upon such terms and conditions as the agency may prescribe.

28-32-17. Administrative rules committee objection.

If the legislative management's administrative rules committee objects to all or any portion of a rule because the committee deems it to be unreasonable, arbitrary, capricious, or beyond the authority delegated to the adopting agency, the committee may file that objection in certified form with the legislative council. The filed objection must contain a concise statement of the committee's reasons for its action.

1. The legislative council shall attach to each objection a certification of the time and date of its filing and, as soon as possible, shall transmit a copy of the objection and the certification to the agency adopting the rule in question. The legislative council also shall maintain a permanent register of all committee objections.
2. The legislative council shall publish an objection filed pursuant to this section in the next issue of the code supplement. In case of a filed committee objection to a rule subject to the exceptions of the definition of rule in section 28-32-01, the agency shall indicate the existence of that objection adjacent to the rule in any compilation containing that rule.
3. Within fourteen days after the filing of a committee objection to a rule, the adopting agency shall respond in writing to the committee. After receipt of the response, the committee may withdraw or modify its objection.

AB1300
3-10-17
AH #5
P811

4. After the filing of a committee objection, the burden of persuasion is upon the agency in any action for judicial review or for enforcement of the rule to establish that the whole or portion thereof objected to is within the procedural and substantive authority delegated to the agency. If the agency fails to meet its burden of persuasion, the court shall declare the whole or portion of the rule objected to invalid and judgment must be rendered against the agency for court costs. These court costs must include a reasonable attorney's fee and must be payable from the appropriation of the agency which adopted the rule in question.

28-32-18. Administrative rules committee may void rule - Grounds - Amendment by agreement of agency and committee.

1. The legislative management's administrative rules committee may find that all or any portion of a rule is void if that rule is initially considered by the committee not later than the fifteenth day of the month before the date of the administrative code supplement in which the rule change is scheduled to appear. The administrative rules committee may find a rule or portion of a rule void if the committee makes the specific finding that, with regard to that rule or portion of a rule, there is:
 - a. An absence of statutory authority.
 - b. An emergency relating to public health, safety, or welfare.
 - c. A failure to comply with express legislative intent or to substantially meet the procedural requirements of this chapter for adoption of the rule.
 - d. A conflict with state law.
 - e. Arbitrariness and capriciousness.
 - f. A failure to make a written record of its consideration of written and oral submissions respecting the rule under section 28-32-11.
2. The administrative rules committee may find a rule void at the meeting at which the rule is initially considered by the committee or may hold consideration of that rule for one subsequent meeting. If no representative of the agency appears before the administrative rules committee when rules are scheduled for committee consideration, those rules are held over for consideration at the next subsequent committee meeting. Rules are not considered initially considered by the committee under this subsection until a representative of the agency appears before the administrative rules committee when the rules are scheduled for committee consideration. If no representative of the agency appears before the administrative rules committee meeting to which rules are held over for consideration, the rules are void if the rules were adopted as emergency rules and for rules not adopted as emergency rules the administrative rules committee may void the rules, allow the rules to become effective, or hold over consideration of the rules to the next subsequent committee meeting. Within three business days after the administrative rules committee finds that a rule is void, the legislative council shall provide written notice of that finding and the committee's specific finding under subdivisions a through f of subsection 1 to the adopting agency and to the chairman of the legislative management. Within fourteen days after receipt of the notice, the adopting agency may file a petition with the chairman of the legislative management for review by the legislative management of the decision of the administrative rules committee. If the adopting agency does not file a petition for review, the rule becomes void on the fifteenth day after the notice from the legislative council to the adopting agency. If within sixty days after receipt of the petition from the adopting agency the legislative management has not disapproved by motion the finding of the administrative rules committee, the rule is void.
3. An agency may amend or repeal a rule or create a related rule if, after consideration of rules by the administrative rules committee, the agency and committee agree that the rule amendment, repeal, or creation is necessary to address any of the considerations under subsection 1. A rule amended, repealed, or created under this subsection is not subject to the other requirements of this chapter relating to adoption of administrative rules and may be published by the legislative council as amended, repealed, or created. If requested by the agency or any interested party, a rule amended, repealed,

or created under this subsection must be reconsidered by the administrative rules committee at a subsequent meeting at which public comment on the agreed rule change must be allowed.

28-32-18.1. Administrative rules committee review of existing administrative rules.

1. Upon request by the administrative rules committee, an administrative agency shall brief the committee on its existing administrative rules and point out any provisions that appear to be obsolete and any areas in which statutory authority has changed or been repealed since the rules were adopted or amended.
2. An agency may amend or repeal a rule without complying with the other requirements of this chapter relating to adoption of administrative rules and may resubmit the change to the legislative council for publication provided:
 - a. The agency initiates the request to the administrative rules committee for consideration of the amendment or repeal;
 - b. The agency provides notice to the regulated community, in a manner reasonably calculated to provide notice to those persons interested in the rule, of the time and place the administrative rules committee will consider the request for amendment or repeal of the rule; and
 - c. The agency and the administrative rules committee agree the rule amendment or repeal eliminates a provision that is obsolete or no longer in compliance with law and that no detriment would result to the substantive rights of the regulated community from the amendment or repeal.

28-32-19. Publication of administrative code and code supplement.

1. The legislative council shall compile, index, and publish all rules filed pursuant to this chapter in a publication which must be known as the North Dakota Administrative Code, in this chapter referred to as the code. The code also must contain all objections filed with the legislative council by the administrative rules committee pursuant to section 28-32-17. The legislative council shall revise all or part of the code as often as the legislative council determines necessary.
2. The legislative council may prescribe a format, style, and arrangement for rules which are to be published in the code and may refuse to accept the filing of any rule that is not in substantial compliance therewith. In arranging rules for publication, the legislative council may make such corrections in spelling, grammatical construction, format, and punctuation of the rules as determined proper. The legislative council shall keep and maintain a permanent code of all rules filed, including superseded and repealed rules, which must be open to public inspection during office hours.
3. The legislative council shall compile and publish the North Dakota Administrative Code supplement according to the schedule of effective dates of rules in section 28-32-15.
 - a. The code supplement must contain all rules that have been filed with the legislative council or which have become effective since the compilation and publication of the preceding issue of the code supplement.
 - b. The code supplement must contain all objections filed with the legislative council by the administrative rules committee pursuant to section 28-32-17.
4. The legislative council, with the consent of the adopting agency, may omit from the code or code supplement any rule the publication of which would be unduly cumbersome, expensive, or otherwise inexpedient, if the rule in printed or duplicated form is made available on application to the agency, and if the code or code supplement contains a notice stating the general subject matter of the omitted rule and stating how a copy may be obtained.
5. The code must be arranged, indexed, and printed or duplicated in a manner to permit separate publication of portions thereof relating to individual agencies. An agency may print as many copies of such separate portions of the code as it may require. If the legislative council does not publish the code supplement due to technological problems or lack of funds, the agency whose rules would have been published in the

HB1300
3-15-17
AA #5
pg 12

code supplement shall provide a copy of the rules to any person upon request. The agency may charge a fee for a copy of the rules as allowed under section 44-04-18.

HB 1300
3-10-17
AH #5
Pg. 3

28-32-20. Printing, sales, and distribution of code and code supplement.

1. The secretary of state shall distribute the code and code supplement and shall distribute copies of the code, revisions, and the code supplement without charge to the following:
 - a. Governor, one copy.
 - b. Attorney general, one copy.
 - c. Each supreme court judge, one copy.
 - d. Each district court judge, one copy.
 - e. Each county auditor of this state, for the use of county officials and the public, one copy.
 - f. Supreme court library, one copy.
 - g. State library, one copy.
 - h. Law library of the university of North Dakota, one copy.
 - i. Each of the five depository libraries in this state, one copy, upon request.
 - j. Secretary of state, one copy.
 - k. Legislative council, four copies.
 - l. Each member of the legislative assembly, one copy, upon request.
2. The legislative council, each county auditor in the state, and the librarians for the supreme court library, the state library, the university of North Dakota law library, and the five depository libraries as designated according to subsection 1 and section 54-24-09 shall maintain a complete, current set of the code, including revisions and the code supplement.
3. The secretary of state shall make copies of and subscriptions to the code and code supplement available to any person upon payment of the appropriate subscription fee.
4. The legislative council shall determine the appropriate fee for subscribing to the code and code supplement.
5. All fees collected by the secretary of state must be deposited in the general fund of the state treasury.
6. If applicable, the administrative code, revisions to the administrative code, and the code supplement must be considered sixth-class printing under sections 46-02-04 and 46-02-09.

28-32-21. Adjudicative proceedings - Procedures.

Administrative agencies shall comply with the following procedures in all adjudicative proceedings:

1. a. For adjudicative proceedings involving a hearing on a complaint against a specific-named respondent, a complainant shall prepare and file a clear and concise complaint with the agency having subject matter jurisdiction of the proceeding. The complaint shall contain a concise statement of the claims or charges upon which the complainant relies, including reference to the statute or rule alleged to be violated, and the relief sought.
- b. After a complaint is filed, the appropriate administrative agency shall serve a copy of the complaint upon the respondent in the manner allowed for the service of process under the North Dakota Rules of Civil Procedure at least forty-five days before the hearing on the complaint.
- c. The administrative agency shall designate the time and place for the hearing and shall serve a copy of the notice of hearing upon the respondent in the manner allowed for service under the North Dakota Rules of Civil Procedure, at least twenty days before the hearing on the complaint. Service of the notice of hearing may be waived in writing by the respondent, or the parties may agree on a definite time and place for hearing with the consent of the agency having jurisdiction.

pg 14

- d. A complaint may be served less than forty-five days before the time specified for a hearing on the complaint and a notice of hearing on a complaint may be served less than twenty days before the time specified for hearing if otherwise authorized by statute. However, an administrative hearing regarding the renewal, suspension, or revocation of a license may not be held fewer than ten days after the licensee has been served, personally or by certified mail, with a copy of a notice for hearing with an affidavit, complaint, specification of issues, or other document alleging violations upon which the license hearing is based.
 - e. A complaint may inform the respondent that an answer to the complaint must be served upon the complainant and the agency with which the complaint is filed within twenty days after service of the complaint, or the agency may deem the complaint to be admitted. If the respondent fails to answer as required within twenty days after service of the complaint, the agency may enter an order in default as the facts and law may warrant. Answers must be served in the manner allowed for service under the North Dakota Rules of Civil Procedure.
 - f. Service is complete upon compliance with the provisions of the North Dakota Rules of Civil Procedure. Proof of service may be made as provided in the North Dakota Rules of Civil Procedure.
 - g. A respondent may be given less than twenty days to answer the complaint, pursuant to another statute, but no respondent may be required to answer a complaint in less than five days and an answer must be served on the complainant and the agency with which the complaint is filed at least two days before the hearing on the complaint.
 - h. Amended and supplemental pleadings may be served and filed with the agency in the manner allowed for amended and supplemental pleadings under the North Dakota Rules of Civil Procedure.
2. At any hearing in an adjudicative proceeding, the parties shall be afforded opportunity to present evidence and to examine and cross-examine witnesses as is permitted under sections 28-32-24 and 28-32-35.
 3.
 - a. If the adjudicative proceeding does not involve a hearing on a complaint against a specific-named respondent, the provisions of subsection 1 do not apply. Unless otherwise provided by law, the provisions of subdivisions b through d apply.
 - b. The administrative agency shall designate the time and place for the hearing and shall serve a copy of the notice of hearing upon all the parties in the manner allowed for service under the North Dakota Rules of Civil Procedure at least twenty days before the hearing. Service of the notice of hearing may be waived in writing by the parties, or the parties may agree on a definite time and place for the hearing with the consent of the agency having jurisdiction.
 - c. A hearing under this subsection may not be held unless the parties have been properly served with a copy of the notice of hearing as well as a written specification of issues for hearing or other document indicating the issues to be considered and determined at the hearing. In lieu of, or in addition to, a specification of issues or other document, an explanation about the nature of the hearing and the issues to be considered and determined at the hearing may be contained in the notice.
 - d. Service is complete upon compliance with the provisions of the North Dakota Rules of Civil Procedure. Proof of service may be made as provided in the North Dakota Rules of Civil Procedure.

28-32-22. Informal disposition.

Unless otherwise prohibited by specific statute or rule, informal disposition may be made of any adjudicative proceeding, or any part or issue thereof, by stipulation, settlement, waiver of hearing, consent order, default, alternative dispute resolution, or other informal disposition, subject to agency approval. Any administrative agency may adopt rules of practice or procedure for informal disposition if such rules do not substantially prejudice the rights of any party. Such

rules may establish procedures for converting an administrative matter from one type of proceeding to another type of proceeding.

28-32-23. Adjudicative proceedings - Exceptions - Rules of procedure.

Notwithstanding the requirements for standardization of procedures in adjudicative proceedings under this chapter, an administrative agency may adopt specific agency rules of procedure not inconsistent with this chapter. An administrative agency may also adopt specific agency rules of procedure when necessary to comply with requirements found elsewhere in this code or when necessary to comply with the requirements of federal statutes, rules, or standards.

pg 15

28-32-24. Evidence to be considered by agency - Official notice.

1. The admissibility of evidence in any adjudicative proceeding before an administrative agency shall be determined in accordance with the North Dakota Rules of Evidence. An administrative agency, or any person conducting proceedings for it, may waive application of the North Dakota Rules of Evidence if a waiver is necessary to ascertain the substantial rights of a party to the proceeding, but only relevant evidence shall be admitted. The waiver must be specifically stated, orally or in writing, either prior to or at a hearing or other proceeding.
2. All objections offered to evidence shall be noted in the record of the proceeding. No information or evidence except that which has been offered, admitted, and made a part of the official record of the proceeding shall be considered by the administrative agency, except as otherwise provided in this chapter.
3. Upon proper objection, evidence that is irrelevant, immaterial, unduly repetitious, or excludable on constitutional or statutory grounds, or on the basis of evidentiary privilege recognized in the courts of this state, may be excluded. In the absence of proper objection, the agency, or any person conducting a proceeding for it, may exclude objectionable evidence.
4. The North Dakota Rules of Evidence in regard to privileges apply at all stages of an administrative proceeding under this chapter.
5. All testimony must be made under oath or affirmation. Relevant statements presented by nonparties may be received as evidence if all parties are given an opportunity to cross-examine the nonparty witness or to otherwise challenge or rebut the statements. Nonparties may not examine or cross-examine witnesses except pursuant to a grant of intervention.
6. Evidence may be received in written form if doing so will expedite the proceeding without substantial prejudice to the interests of any party.
7. Official notice may be taken of any facts that could be judicially noticed in the courts of this state. Additionally, official notice may be taken of any facts as authorized in agency rules.

28-32-25. Adjudicative proceedings - Consideration of information not presented at a hearing.

In any adjudicative proceeding, an administrative agency may avail itself of competent and relevant information or evidence in its possession or furnished by members of its staff, or secured from any person in the course of an independent investigation conducted by the agency, in addition to the evidence presented at the hearing. It may do so after first transmitting a copy of the information or evidence or an abstract thereof to each party of record in the proceeding. The agency must afford each party, upon written request, an opportunity to examine the information or evidence and to present its own information or evidence and to cross-examine the person furnishing the information or evidence. Any further testimony that is necessary shall be taken at a hearing to be called and held, giving at least ten days' notice. Notice must be served upon the parties in the manner allowed for service under the North Dakota Rules of Civil Procedure. This section also applies to information officially noticed after

HB 1300
3-10-17
AA #5
Pg 16

the hearing when the issuance of any initial or final order is based in whole or in part on the facts or material noticed.

28-32-26. Costs of investigation.

An agency may assess the costs of an investigation to a person found to be in violation of a statute or rule as a result of an adjudicative proceeding or informal disposition. The total costs assessed and any civil penalty that may be imposed as a result of violation may not exceed the statutorily authorized civil penalty for the violation. For the purposes of this section, costs mean reasonable out-of-pocket agency costs, not including any attorney's fees, actually incurred in conducting the investigation for which they may be assessed. Any such costs paid must be paid into the general fund and are appropriated as a refund to the agency for the purposes of defraying the costs of undertaking the investigation.

28-32-27. Hearing officer - Disqualification - Substitution.

1. Any person or persons presiding for the agency in an administrative proceeding must be referred to individually or collectively as hearing officer. Any person from the office of administrative hearings presiding for the agency as a hearing officer in an administrative proceeding must be referred to as an administrative law judge.
2. Any hearing officer is subject to disqualification for good cause shown.
3. Any party may petition for the disqualification of any person presiding as a hearing officer upon discovering facts establishing grounds for disqualification.
4. A person whose disqualification is requested shall determine whether to grant the petition, stating facts and reasons for the determination.
5. If a substitute is required for a person who is disqualified or becomes unavailable for any other reason, the substitute may be appointed by:
 - a. The attorney general, if the disqualified or unavailable person is an assistant attorney general;
 - b. The agency head, if the disqualified or unavailable person is one or more members of the agency head or one or more other persons designated by the agency head;
 - c. A supervising hearing officer, if the disqualified or unavailable person is a hearing officer designated from an office, pool, panel, or division of hearing officers; or
 - d. The governor, in all other cases.
6. Any action taken by a duly appointed substitute for a disqualified or unavailable person is as effective as if taken by the disqualified or unavailable person.
7. Any hearing officer in an administrative proceeding, from the time of appointment or designation, may exercise any authority granted by law or rule. A hearing officer may be designated to preside over the entire administrative proceeding and may issue orders accordingly. A procedural hearing officer may only issue orders in regard to the course and conduct of the hearing under statute or rule and to otherwise effect an orderly hearing. If a procedural hearing officer is designated, the agency head must be present at the hearing and the agency head shall issue findings of fact and conclusions of law, as well as any order resulting from the hearing.

28-32-28. Intervention.

An administrative agency may grant intervention in an adjudicative proceeding to promote the interests of justice if intervention will not impair the orderly and prompt conduct of the proceeding and if the petitioning intervenor demonstrates that the petitioner's legal rights, duties, privileges, immunities, or other legal interests may be substantially affected by the proceeding or that the petitioner qualifies as an intervenor under any provision of statute or rule. The agency may impose conditions and limitations upon intervention. The agency shall give reasonable notice of the intervention to all parties. An administrative agency may adopt rules relating to intervention in an adjudicative proceeding.

28-32-29. Prehearing conference.

Before a hearing, an administrative agency may conduct a prehearing conference after giving reasonable notice to all parties and other interested persons. A prehearing conference may be conducted in total or in part by making use of telephone, facsimile services, television, or other electronic means, as long as such use does not substantially prejudice or infringe on the rights and interests of any party. An administrative agency may adopt rules regarding the availability of, notice of, and procedures for prehearing conferences.

HB 1306
3-10-17
AA #5
pg 17

28-32-30. Default.

1. If a party fails to attend or participate in a prehearing conference, hearing, or other stage of an adjudicative proceeding, the agency may enter and serve upon all parties written notice of default and a default order, including a statement of the grounds for default.
2. Within seven days after service of the default notice, order, and grounds, the party against whom default was ordered may file a written motion requesting that the default order be vacated and stating the grounds relied upon. During the time within which a party may file a written motion under this section, or at the time of issuing notice and the default order, the agency may adjourn the proceedings or conduct them without the participation of the party against whom a default order was issued, having due regard for the interests of justice and the orderly and prompt conduct of the proceedings. If an agency conducts further proceedings necessary to complete the administrative action without the participation of a party in default, it shall determine all the issues involved, including those affecting the defaulting party.

28-32-31. Duties of hearing officers.

All hearing officers shall:

1. Assure that proper notice has been given as required by law.
2. Conduct only hearings and related proceedings for which proper notice has been given.
3. Assure that all hearings and related proceedings are conducted in a fair and impartial manner.
4. Make recommended findings of fact and conclusions of law and issue a recommended order, when appropriate.
5. Conduct the hearing only and perform such other functions of the proceeding as requested, when an agency requests a hearing officer to preside only as a procedural hearing officer. If the hearing officer is presiding only as a procedural hearing officer, the agency head must be present at the hearing and the agency head shall make findings of fact and conclusions of law and issue a final order. The agency shall give proper notice as required by law. The procedural hearing officer may issue orders in regard to the conduct of the hearing pursuant to statute or rule and to otherwise effect an orderly and prompt disposition of the proceedings.
6. Make findings of fact and conclusions of law and issue a final order, if required by statute or requested by an agency.
7. Function only as a procedural hearing officer, when an agency requests a hearing officer to preside for a rulemaking hearing. The agency head need not be present. The agency shall give proper notice as required by law.
8. Perform any and all other functions required by law, assigned by the director of administrative hearings, or delegated to the hearing officer by the agency.

28-32-32. Emergency adjudicative proceedings.

An administrative agency may use an emergency adjudicative proceeding, in its discretion, in an emergency situation involving imminent peril to the public health, safety, or welfare.

1. In an emergency, the administrative agency may take action pursuant to a specific statute as is necessary to prevent or avoid imminent peril to the public health, safety, or welfare.

- HB 1300
3-10-17
AA #5
18 pg
2. In an emergency, in the absence of a specific statute, an administrative agency may serve a complaint fewer than forty-five days before the hearing and give notice of a hearing on the complaint by giving less than twenty days' notice as is necessary to prevent or avoid imminent peril to the public health, safety, or welfare. But, every party to the emergency adjudicative proceeding must be given a reasonable time within which to serve an answer and to prepare for the hearing, which may be extended by the agency upon good cause being shown.
 3. In an emergency, in the absence of a specific statute, in an adjudicative proceeding that does not involve a complaint against a specific-named respondent, an administrative agency may give notice of a hearing by giving less than twenty days' notice as is necessary to prevent or avoid imminent peril to the public health, safety, or welfare. But, every party to the emergency adjudicative proceeding shall be given a reasonable time to prepare for the hearing, which may be extended by the agency upon good cause being shown.
 4. As a result of the emergency adjudicative proceeding, in the absence of a specific statute requiring other administrative action, the administrative agency shall issue an order. The order must include a brief statement of the reasons justifying the determination of imminent peril to the public health, safety, or welfare and requiring an emergency adjudicative proceeding to prevent or avoid the imminent peril.
 5. After issuing an order pursuant to this section, the administrative agency shall proceed as soon as possible to complete any other proceedings related to the emergency adjudicative proceeding that do not involve imminent peril to the public health, safety, or welfare.

28-32-33. Adjudicative proceedings - Subpoenas - Discovery - Protective orders.

1. In an adjudicative proceeding, discovery may be obtained in accordance with the North Dakota Rules of Civil Procedure.
2. In any adjudicative proceeding, upon the request or motion of any party to the proceeding or upon the hearing officer's own motion on behalf of the agency, a hearing officer may issue subpoenas, discovery orders, and protective orders in accordance with the North Dakota Rules of Civil Procedure. A motion to quash or modify, or any other motion relating to subpoenas, discovery, or protective orders must be made to the hearing officer. The hearing officer's rulings on these motions may be appealed under section 28-32-42 after issuance of the final order by the agency. The cost of issuing and serving a subpoena in any adjudicative proceeding must be paid by the person or agency requesting it.
3. Any witness who is subpoenaed under the provisions of this section and who appears at a hearing or other part of an adjudicative proceeding, or whose deposition is taken, shall receive the same fees and mileage as a witness in a civil case in the district court. Witness fees and mileage shall be paid by the party or agency at whose instance the witness appears. Any hearing officer may order the payment of witness fees or mileage by the appropriate party or agency.
4. Subpoenas, discovery orders, protective orders, and other orders issued under this section may be enforced by applying to any judge of the district court for an order requiring the attendance of a witness, the production of all documents and objects described in the subpoena, or otherwise enforcing an order. Failure of a witness or other person to comply with the order of the district court is contempt of court which is punishable by the district court, upon application. The judge may award attorney's fees to the prevailing party in an application under this subsection.

28-32-34. Administration of oaths - Parties to be advised of perjury provisions.

Any hearing officer in an administrative proceeding has the power to examine witnesses and records and to administer oaths to witnesses. At the time the person presiding administers the oath to a witness, the person shall advise the witness of the provisions of subsection 1 of section 12.1-11-01 and of the maximum penalty for perjury.

28-32-35. Procedure at hearing.

The person presiding at a hearing shall regulate the course of the hearing in conformity with this chapter and any rules adopted under this chapter by an administrative agency, any other applicable laws, and any prehearing order. To the extent necessary for full disclosure of all relevant facts and issues, the person presiding at the hearing shall afford to all parties and other persons allowed to participate the opportunity to respond, present evidence and argument, conduct cross-examination, and submit rebuttal evidence, except as restricted or conditioned by a grant of intervention or by a prehearing order. A hearing may be conducted in total or in part by making use of telephone, television, facsimile services, or other electronic means if each participant in the hearing has an opportunity to participate in, to hear, and, if practicable, to see the entire proceeding while it is taking place, and if such use does not substantially prejudice or infringe on the rights and interests of any party.

HB 1300
3-10-17
AH # 5
pg 19

28-32-36. Agency to make record.

An administrative agency shall make a record of all testimony, written statements, documents, exhibits, and other evidence presented at any adjudicative proceeding or other administrative proceeding heard by it. Oral testimony may be taken by a court reporter, by a stenographer, or by use of an electronic recording device. All evidence presented at any proceeding before the administrative agency shall be filed with the agency. A copy of the record of any proceeding before an administrative agency, or a part thereof, must be furnished to any party to the proceeding and to any other person allowed to participate in the proceeding, upon written request submitted to the agency and upon payment of a uniform charge to be set by the agency. Any fee paid to an administrative agency for the record, or a part thereof, shall be paid into the general fund and is appropriated as a refund to the agency for the purposes of defraying the costs of preparing the record. An agency may contract with any person or another agency to prepare a record, or a part thereof, of any proceeding before the agency.

28-32-37. Ex parte communications.

1. Except as provided in subsections 2 and 4 or unless required for the disposition of ex parte matters specifically authorized by another statute, an agency head or hearing officer in an adjudicative proceeding may not communicate, directly or indirectly, regarding any issue in the proceeding, while the proceeding is pending, with any party, with any person who has a direct or indirect interest in the outcome of the proceeding, with any other person allowed to participate in the proceeding, or with any person who presided at a previous stage of the proceeding, without notice and opportunity for all parties to participate in the communication.
2. When more than one person is the hearing officer in an adjudicative proceeding, those persons may communicate with each other regarding a matter pending before the panel. An agency head or hearing officer may communicate with or receive aid from staff assistants if the assistants do not furnish, augment, diminish, or modify the evidence in the record.
3. Except as provided in subsection 4 or unless required for the disposition of ex parte matters specifically authorized by statute, no party to an adjudicative proceeding, no person who has a direct or indirect interest in the outcome of the proceeding, no person allowed to participate in the proceeding, and no person who presided at a previous stage in the proceeding may communicate directly or indirectly in connection with any issue in that proceeding, while the proceeding is pending, with any agency head or hearing officer in the proceeding without notice and opportunity for all parties to participate in the communication.
4. In an adjudicative proceeding conducted by a hearing officer other than the agency head, counsel for the administrative agency and the agency head, without notice and opportunity for all parties to participate, may communicate and consult regarding the status of the adjudicative proceeding, discovery, settlement, litigation decisions, and other matters commonly communicated between attorney and client, to permit the agency head to make informed decisions. This subsection does not apply after recommended findings of fact, conclusions of law, and orders have been issued,

HB 1300
3-10-17
AA # 5
Pg 20

except counsel for the administrative agency and the agency head may communicate regarding settlement and negotiation after recommended findings of fact, conclusions of law, and orders have been issued.

5. If, before being assigned, designated, or appointed to preside in an adjudicative proceeding, a person receives an ex parte communication of a type that could not properly be received while presiding, the person, promptly after being assigned, designated, or appointed, shall disclose the communication in the manner prescribed in subsection 6.
6. An agency head or hearing officer in an adjudicative proceeding who receives an ex parte communication in violation of this section shall place on the record of the pending matter all written communications received, all written responses to the communications, or a memorandum stating the substance of all oral communications received, all responses made, and the identity of each person from whom the person received an ex parte oral communication, and shall advise all parties, interested persons, and other persons allowed to participate that these matters have been placed on the record. Any person desiring to rebut the ex parte communication must be allowed to do so, upon requesting the opportunity for rebuttal. A request for rebuttal must be made within ten days after notice of the communication.
7. If necessary to eliminate the effect of an ex parte communication received in violation of this section, an agency head or hearing officer in an adjudicative proceeding who receives the communication may be disqualified, upon good cause being shown in writing to the hearing officer or to the agency. The portions of the record pertaining to the communication may be sealed by protective order issued by the agency.
8. The agency shall, and any party may, report any willful violation of this section to the appropriate authorities for any disciplinary proceedings provided by law. In addition, an administrative agency may, by rule, provide for appropriate sanctions, including default, for any violations of this section.
9. Nothing in this section prohibits a member of the general public, not acting on behalf or at the request of any party, from communicating with an agency in cases of general interest. The agency shall disclose such written communications in adjudicative proceedings.

28-32-38. Separation of functions.

1. No person who has served as investigator, prosecutor, or advocate in the investigatory or prehearing stage of an adjudicative proceeding may serve as hearing officer.
2. No person who is subject to the direct authority of one who has served as an investigator, prosecutor, or advocate in the investigatory or prehearing stage of an adjudicative proceeding may serve as hearing officer.
3. Any other person may serve as hearing officer in an adjudicative proceeding, unless a party demonstrates grounds for disqualification.
4. Any person may serve as hearing officer at successive stages of the same adjudicative proceeding, unless a party demonstrates grounds for disqualification.

28-32-39. Adjudicative proceedings - Findings of fact, conclusions of law, and order of agency - Notice.

1. In an adjudicative proceeding an administrative agency shall make and state concisely and explicitly its findings of fact and its separate conclusions of law and the order of the agency based upon its findings and conclusions.
2. If the agency head, or another person authorized by the agency head or by law to issue a final order, is presiding, the order issued is the final order. The agency shall serve a copy of the final order and the findings of fact and conclusions of law on which it is based upon all the parties to the proceeding within thirty days after the evidence has been received, briefs filed, and arguments closed, or as soon thereafter as possible, in the manner allowed for service under the North Dakota Rules of Civil Procedure.

3. If the agency head, or another person authorized by the agency head or by law to issue a final order, is not presiding, then the person presiding shall issue recommended findings of fact and conclusions of law and a recommended order within thirty days after the evidence has been received, briefs filed, and arguments closed, or as soon thereafter as possible. The recommended findings of fact and conclusions of law and the recommended order become final unless specifically amended or rejected by the agency head. The agency head may adopt the recommended findings of fact and conclusions of law and the recommended order as final. The agency may allow petitions for review of a recommended order and may allow oral argument pending issuance of a final order. An administrative agency may adopt rules regarding the review of recommended orders and other procedures for issuance of a final order by the agency. If a recommended order is issued, the agency must serve a copy of any final order issued and the findings of fact and conclusions of law on which it is based upon all the parties to the proceeding within sixty days after the evidence has been received, briefs filed, and arguments closed, or as soon thereafter as possible, in the manner allowed for service under the North Dakota Rules of Civil Procedure.

HB 1300
3-10-17
AH #5
Pg 21

28-32-40. Petition for reconsideration.

1. Any party before an administrative agency who is aggrieved by the final order of the agency, including the administrative agency when the hearing officer is not the agency head or one or more members of the agency head, within fifteen days after notice has been given as required by section 28-32-39, may file a petition for reconsideration with the agency. Filing of the petition is not a prerequisite for seeking judicial review. If the agency's hearing officer issues the agency's final order, the petition for reconsideration must be addressed to the hearing officer, who may grant or deny the petition under subsection 4.
2. Any party, including workforce safety and insurance, that appears before workforce safety and insurance may file a petition for reconsideration within thirty days after notice has been given as required by section 28-32-39.
3. The party must submit with the petition for reconsideration a statement of the specific grounds upon which relief is requested or a statement of any further showing to be made in the proceeding. The petition must also state whether a rehearing is requested. The petition and any statement shall be considered a part of the record in the proceeding.
4. The administrative agency may deny the petition for reconsideration or may grant the petition on such terms as it may prescribe. If a rehearing is granted, the agency may allow a new hearing or limit the hearing as appropriate. The agency may dissolve or amend the final order and set the matter for further hearing. The petition is deemed to have been denied if the agency does not dispose of it within thirty days after the filing of the petition. Any rehearing must be presided over by the same person or persons presiding previously at the hearing, if available. Any amended findings, conclusions, and orders must be issued by the same person or persons who issued the previous recommended or final orders, if available. Within thirty days after the close of proceedings upon reconsideration, or as soon thereafter as possible, the agency shall issue and give notice of its order upon reconsideration as required in subsection 3 of section 28-32-39.
5. This section does not limit the right of any agency to reopen any proceeding or rehear any matter under any continuing jurisdiction which is granted to the agency by statute.

28-32-41. Effectiveness of orders.

Unless a later date is stated in the order, a final order of an administrative agency is effective immediately, but a party may not be required to comply with a final order unless it has been served upon the party and notice is deemed given pursuant to section 28-32-39 or the party has actual knowledge of the final order. A nonparty may not be required to comply with a final order unless the agency has made the final order available for public inspection and copying or the nonparty has actual knowledge of the final order. This section does not preclude

AB 1300
3-10-17
AH #5
Pg 22

an agency from taking emergency action to protect the public health, safety, or welfare as authorized by statute.

28-32-42. Appeal from determination of agency - Time to appeal - How appeal taken.

1. Any party to any proceeding heard by an administrative agency, except when the order of the administrative agency is declared final by any other statute, may appeal from the order within thirty days after notice of the order has been given as required by section 28-32-39. If a reconsideration has been requested as provided in section 28-32-40, the party may appeal within thirty days after notice of the final determination upon reconsideration has been given as required by sections 28-32-39 and 28-32-40. If an agency does not dispose of a petition for reconsideration within thirty days after the filing of the petition, the agency is deemed to have made a final determination upon which an appeal may be taken.
2. Any interested person who has participated in the rulemaking process of an administrative agency may appeal the agency's rulemaking action if the appeal is taken within ninety days after the date of publication in the North Dakota Administrative Code of the rule resulting from the agency rulemaking action.
3.
 - a. The appeal of an order may be taken to the district court designated by law, and if none is designated, then to the district court of the county in which the hearing or a part thereof was held. If the administrative proceeding was disposed of informally, or for some other reason no hearing was held, an appeal may be taken to the district court of Burleigh County. Only final orders are appealable. A procedural order made by an administrative agency while a proceeding is pending before it is not a final order.
 - b. The appeal of an agency's rulemaking action may be taken to the district court of Burleigh County.
4. An appeal shall be taken by serving a notice of appeal and specifications of error specifying the grounds on which the appeal is taken, upon the administrative agency concerned, upon the attorney general or an assistant attorney general, and upon all the parties to the proceeding before the administrative agency, and by filing the notice of appeal and specifications of error together with proof of service of the notice of appeal, and the undertaking required by this section, with the clerk of the district court to which the appeal is taken. In an appeal of an agency's rulemaking action, only the administrative agency concerned, the attorney general, or an assistant attorney general, as well as the legislative council, need to be notified.
5. The notice of appeal must specify the parties taking the appeal as appellants. The agency and all other parties of record who are not designated as appellants must be named as appellees. A notice of appeal of agency rulemaking actions need not name all persons participating in the rulemaking proceeding as appellees. The agency and all parties of record have the right to participate in the appeal. In the appeal of agency rulemaking action, any person who has participated in the rulemaking process has the right to participate in the appeal.
6. A bond or other undertaking for costs on appeal must be filed by the appellant as is required by appellants for costs on appeal in civil cases under the rules of appellate procedure. The bond or other undertaking must be filed with the clerk of the district court with the notice of appeal, must be made to the state of North Dakota, and may be enforced by the agency concerned for and on behalf of the state as obligee. A bond or other undertaking is not required when filing fees have been waived by a district court pursuant to section 27-01-07 or when the costs of preparation and filing of the record of administrative agency proceedings have been waived by a district court pursuant to subsection 3 of section 28-32-44.

28-32-43. Docketing of appeals.

Appeals taken in accordance with this chapter must be docketed as other cases pending in the district court are docketed and must be heard and determined by the court without a jury at such time as the court shall determine.

HB1300
3-10-17
AH #5
pg 23

28-32-44. Agency to maintain and certify record on appeal.

1. An administrative agency shall maintain an official record of each adjudicative proceeding or other administrative proceeding heard by it.
2. Within thirty days, or a longer time as the court by order may direct, after an appeal has been taken to the district court as provided in this chapter, and after payment by the appellant of the estimated cost of preparation and filing of the entire record of the proceedings before the agency, the administrative agency concerned shall prepare and file in the office of the clerk of the district court in which the appeal is pending the original or a certified copy of the entire record of proceedings before the agency, or an abstract of the record as may be agreed upon and stipulated by the parties. Upon receiving a copy of the notice of appeal and specifications of error pursuant to subsection 4 of section 28-32-42 and unless the agency is appealing, the administrative agency shall notify the party appealing of the estimated costs of preparation and filing of the record. Thereafter, unless the agency is appealing, the party appealing shall pay the administrative agency the estimated costs required by this subsection. If the actual costs of preparation and filing of the entire record of the proceedings is greater than the estimated costs, the party appealing shall pay to the agency the difference. If the actual costs are less than the estimated costs, the agency shall pay to the party appealing the difference. Any payment for the costs of preparation and filing of the record must be paid into the insurance recovery fund and is appropriated as a refund to the agency for the purposes of defraying the costs of preparing and filing the record. An agency may contract with any person or another agency to prepare and file the record of any proceeding before the agency.
3. The cost of preparation and filing of the record may be waived by the district court upon application by an appellant, showing that the appellant is a low-income person unable to afford these costs. When a waiver is granted, the costs of preparation and filing of the record must be paid by the administrative agency.
4. The agency record of the proceedings, as applicable, may consist of only the following:
 - a. The complaint, answer, and other initial pleadings or documents.
 - b. Notices of all proceedings.
 - c. Any prehearing notices, transcripts, documents, or orders.
 - d. Any motions, pleadings, briefs, petitions, requests, and intermediate rulings.
 - e. A statement of matters officially noticed.
 - f. Offers of proof and objections and rulings thereon.
 - g. Proposed findings, requested orders, and exceptions.
 - h. The transcript of the hearing prepared for the person presiding at the hearing, including all testimony taken, and any written statements, exhibits, reports, memoranda, documents, or other information or evidence considered before final disposition of proceedings.
 - i. Any recommended or proposed order, recommended or proposed findings of fact and conclusions of law, final order, final findings of fact and conclusions of law, or findings of fact and conclusions of law or orders on reconsideration.
 - j. Any information considered pursuant to section 28-32-25.
 - k. Matters placed on the record after an ex parte communication.
5. Except to the extent that this chapter or another statute provides otherwise, the agency record constitutes the exclusive basis for administrative agency action and judicial review of an administrative agency action.
6. The record on review of agency rulemaking action, as applicable, may consist of only the following:
 - a. All agency notices concerning proposed rulemaking.
 - b. A copy of the proposed rule upon which written and oral submissions were made.
 - c. A copy of the rule as submitted for publication.
 - d. Any opinion letters by the attorney general as to a rule's legality or the legality of the agency's rulemaking action.

HB 1300
3-10-17
AH #5
Pg 24

- e. A copy of any interim rule and the agency's findings and statement of the reasons for an interim rule.
 - f. The regulatory analysis of a proposed rule.
 - g. The transcript of any oral hearing on a proposed rule.
 - h. All written submissions made to the agency on a proposed rule.
 - i. Any staff memoranda or data prepared for agency consideration in regard to the proposed rule.
 - j. Any other document that the agency believes is relevant to the appeal.
 - k. Any other document that is not privileged and which is a public record that the appellant requests the agency to include in the record, if relevant to the appeal.
7. If the notice of appeal specifies that no exception or objection is made to the agency's findings of fact, and that the appeal is concerned only with the agency's conclusions of law based on the facts found by it, the agency may submit an abstract of the record along with such portions of the record as the agency deems necessary, to be supplemented by those portions of the record requested to be submitted by the appellant or by the other party when the agency is appealing.
 8. The court may permit amendments or additions to the record filed by the administrative agency in order to complete the record.

28-32-45. Consideration of additional or excluded evidence.

If an application for leave to offer additional testimony, written statements, documents, exhibits, or other evidence is made to the court in which an appeal from a determination of an administrative agency is pending, and it is shown to the satisfaction of the court that the additional evidence is relevant and material and that there were reasonable grounds for the failure to offer the evidence in the hearing or proceeding, or that the evidence is relevant and material to the issues involved and was rejected or excluded by the agency, the court may order that the additional evidence be taken, heard, and considered by the agency on terms and conditions as the court may deem proper. After considering the additional evidence, the administrative agency may amend or reject its findings of fact, conclusions of law, and order and shall file with the court a transcript of the additional evidence with its new or amended findings of fact, conclusions of law, and order, if any, which constitute a part of the record with the court.

28-32-46. Scope of and procedure on appeal from determination of administrative agency.

A judge of the district court must review an appeal from the determination of an administrative agency based only on the record filed with the court. After a hearing, the filing of briefs, or other disposition of the matter as the judge may reasonably require, the court must affirm the order of the agency unless it finds that any of the following are present:

1. The order is not in accordance with the law.
2. The order is in violation of the constitutional rights of the appellant.
3. The provisions of this chapter have not been complied with in the proceedings before the agency.
4. The rules or procedure of the agency have not afforded the appellant a fair hearing.
5. The findings of fact made by the agency are not supported by a preponderance of the evidence.
6. The conclusions of law and order of the agency are not supported by its findings of fact.
7. The findings of fact made by the agency do not sufficiently address the evidence presented to the agency by the appellant.
8. The conclusions of law and order of the agency do not sufficiently explain the agency's rationale for not adopting any contrary recommendations by a hearing officer or an administrative law judge.

If the order of the agency is not affirmed by the court, it must be modified or reversed, and the case shall be remanded to the agency for disposition in accordance with the order of the court.

28-32-47. Scope of and procedure on appeal from agency rulemaking.

A judge of the district court shall review an appeal from an administrative agency's rulemaking action based only on the record filed with the court. If an appellant requests documents to be included in the record but the agency does not include them, the court, upon application by the appellant, may compel their inclusion. After a hearing, the filing of briefs, or other disposition of the matter as the judge may reasonably require, the court shall affirm the agency's rulemaking action unless it finds that any of the following are present:

1. The provisions of this chapter have not been substantially complied with in the agency's rulemaking actions.
2. A rule published as a result of the rulemaking action appealed is unconstitutional on the face of the language adopted.
3. A rule published as a result of the rulemaking action appealed is beyond the scope of the agency's authority to adopt.
4. A rule published as a result of the rulemaking action appealed is on the face of the language adopted an arbitrary or capricious application of authority granted by statute.

If the rulemaking action of the agency is not affirmed by the court, it must be remanded to the agency for disposition in accordance with the order of the court, or the rule or a portion of the rule resulting from the rulemaking action of the agency must be declared invalid for reasons stated by the court.

28-32-48. Appeal - Stay of proceedings.

An appeal from an order or the rulemaking action of an administrative agency does not stay the enforcement of the order or the effect of a published rule unless the court to which the appeal is taken, upon application and after a hearing or the submission of briefs, orders a stay. The court may impose terms and conditions for a stay of the enforcement of the order or for a stay in the effect of a published rule. This section does not prohibit the operation of an automatic stay upon the enforcement of an administrative order as may be required by another statute.

28-32-49. Review in supreme court.

The judgment of the district court in an appeal from an order or rulemaking action of an administrative agency may be reviewed in the supreme court on appeal in the same manner as provided in section 28-32-46 or 28-32-47, except that the appeal to the supreme court must be taken within sixty days after the service of the notice of entry of judgment in the district court. Any party of record, including the agency, may take an appeal from the final judgment of the district court to the supreme court. If an appeal from the judgment of the district court is taken by an agency, the agency may not be required to pay a docket fee or file a bond for costs or equivalent security.

28-32-50. Actions against administrative agencies - Attorney's fees and costs.

1. In any civil judicial proceeding involving as adverse parties an administrative agency and a party not an administrative agency or an agent of an administrative agency, the court must award the party not an administrative agency reasonable attorney's fees and costs if the court finds in favor of that party and, in the case of a final agency order, determines that the administrative agency acted without substantial justification.
2. This section applies to an administrative or civil judicial proceeding brought by a party not an administrative agency against an administrative agency for judicial review of a final agency order, or for judicial review pursuant to this chapter of the legality of agency rulemaking action or a rule adopted by an agency as a result of the rulemaking action being appealed.
3. Any attorney's fees and costs awarded pursuant to this section must be paid from funds available to the administrative agency the final order, rulemaking action, or rule of which was reviewed by the court. The court may withhold all or part of the attorney's fees from any award if the court finds the administrative agency's action, in the case of a final agency order, was substantially justified or that special circumstances exist which make the award of all or a portion of the attorney's fees unjust.

HB1300
3-10-17
AH #5
pg 25

- HB 1300
3-10-17
AA #5
pg 26
4. This section does not alter the rights of a party to collect any fees under other applicable law.
 5. In any civil judicial proceeding involving adverse parties to an appeal or enforcement action involving an environmental permit issued under chapter 23-20.3, 23-25, 23-29, or 61-28 in which two or more of the adverse parties are not an administrative agency or an agent of an administrative agency, the court may award the prevailing nonagency party reasonable attorney's fees and costs if the court finds in favor of that party and determines that the nonprevailing nonagency party acted without substantial justification, or on the basis of claims or allegations that are factually unsupported. The court shall award reasonable attorney's fees and costs if the court determines that the nonprevailing nonagency party's claims or allegations are frivolous as provided in section 28-26-01. If the appeal or civil judicial proceeding covered by this subsection involves multiple claims or allegations, the court may apportion attorney's fees and costs in proportion to the time reasonably spent by a prevailing party relating to claims pursued by the nonprevailing party that were frivolous, factually unsupported, or without substantial justification.

28-32-51. Witnesses - Immunity.

If any person objects to testifying or producing evidence, documentary or otherwise, at any proceeding before an administrative agency, claiming a privilege against self-incrimination, but is directed to testify or produce evidence pursuant to the written approval of the attorney general, that person must comply with the direction but no testimony or evidence compelled from that person, after a valid claim of privilege against self-incrimination has been made, may be used against that person in any criminal proceeding subjecting that person to a penalty or forfeiture. No person testifying at any proceeding before an administrative agency may be exempted from prosecution and punishment for perjury or giving a false statement, or for contempt committed in answering, or failing to answer, or in producing, or in failing to produce, evidence pursuant to direction given under this section.

28-32-52. Elected official authority.

This chapter does not prohibit an elected official from presiding at that agency's cases, nor from deciding cases within that agency's jurisdiction.

1707 North 9th Street
PO Box 5523
Bismarck, ND 58506-5523
Phone: (701) 328 – 2800
Fax: (701) 328 – 3650

www.land.nd.gov



Lance D. Gaebe, Commissioner

HB 1300
3-10-17
AA #6
pg 1

opposed

**TESTIMONY OF LINDA FISHER
Deputy Commissioner
North Dakota Department of Trust Lands**

In Opposition to House Bill 1300

**Senate Energy and Natural Resources Committee
March 10, 2017**

Chairman Unruh and members of the Senate Energy and Natural Resources Committee, I am Linda Fisher, Deputy Commissioner for the North Dakota Department of Trust Lands. I appear on behalf of the Department of Trust Lands (Department) in opposition to House Bill 1300. I appreciate the opportunity to provide a history of the Board of University of School Lands' (Board) exemption from the Administrative Agencies Practice Act (Act), information as to the Board's duties, and justification for the Board's continued exemption from the Act.

The Board, comprised of the Governor, Secretary of State, Attorney General, Superintendent of Public Instruction and the State Treasurer, was created by N.D. Const. art. IX, § 3, which states: "Subject to the provisions of this article and any law that may be passed by the legislative assembly, the board has control of the appraisal, sale, rental, and disposal of all school and university lands, and the proceeds from the sale of such lands shall be invested as provided by law." Over the years, the legislature has delegated to the Board additional duties including unclaimed property administration, energy impact grants, managing minerals under sovereign lands and certain other state owned lands, etc.

Consideration of agency exemptions from the Act's requirements in N.D.C.C. ch. 28-32 are not new. In 1986 and 1987, the Administrative Rules Committee studied and took testimony from each agency exempted from the Act. In 1993 SB 2023, which proposed to remove agency exemptions and was introduced by the Interim Administrative Rules Committee, failed to pass on a vote of 1 to 45. In 2007, HB 1479 called for Legislative Council to study each agency exemption. The study was completed in 2008. The Legislative Council report to the 61st Legislative Assembly (page 21) stated: "It appears committee members agreed that exemptions under current law are still appropriate for each agency that has an exemption."

Unlike a majority of the agencies subject to the Act, the Board does not regulate but instead functions like a property manager. The Board's role, as stated in the Constitution and various state statutes, is to act as a trustee in managing state owned land, minerals and proceeds of the permanent trust funds for the exclusive benefit of specific beneficiaries.

In managing trust assets, the Board's fiduciary role is similar to that of a large landowner or a trust manager in a financial institution. The Board operates in the context of contractual relationships and has the authority to negotiate when it is in the best interests of the trusts. Because it is a business and not a regulatory relationship, parties to Board transactions have the option to, or not to, conduct business with the Board. For the most part, the function of the Board is not governing. Board actions do not directly impact the everyday lives of the general public.

original

AB 1300
3-10-17
AH #4
pg 2

Although the Board is not currently subject to the requirements of the Act, it has adopted formal rules and policies relating to prudent management of permanent trust assets. Many are in place to provide guidance for Department operations and consistency to business practices or are extensions and clarifications of lease contracts.

North Dakota Century Code grants rulemaking authority to the Board in numerous statutes, and because rulemaking authority is legislatively authorized, Board rules carry the full force and effect of law. N.D.A.G. 2000-L-138.

In testimony provided by supporters of this bill during the House hearing, the following mischaracterizations were stated and require clarification:

1. The Board amended rules without giving notice to the public or the affected industries.

- A. The Board conducts its business in an open forum. In accordance with state law, its meetings are posted on the Secretary of State's public meetings web portal which provides the public the opportunity to receive notifications when meetings are scheduled, view agendas, and receive updates when any meeting details are changed.
- B. The Board, on multiple occasions, has invited formal public input on rule changes. A formal invitation for public and industry comment was provided on proposed changes to the Board's oil and gas rules in 2009, 2010, and 2012. A rule change in 2016 did not include a public comment period, but favored industry by increasing the reporting period for gas royalties from 30 days to 60 days, thereby lessening the necessity to assess late filing penalties.
- C. The Board has also specifically invited industry to the table to discuss proposed rule changes – both in 2013 when amending the Board's coal lease rules, and again in 2014 when refreshing the Board's coal lease template.

2. The Board has demanded payments of royalties on lake bed minerals as well as 18% interest and 12% penalty.

The 18% interest rate assessed for late payment of royalty is pursuant to state law, N.D.C.C. § 47-16-39.1; not Board rules. Repealing the Board's exemption from the Act would not change the rate. The 12% interest rate has been part of the Board's oil and gas lease rules since 1979.

3. The Board asserts the right to unilaterally decide to cancel a lease for an alleged breach and the lessee has no right to challenge the Board's action or decision.

The leases issued by the Board contain all the terms upon which a standard lease can be canceled. A lessee of Board-managed property always has the right to challenge in district court the Board's termination of a lease or enforce its rights under the lease. Because it is able, the Board on many occasions has acted on the request of a lessee to reinstate a cancelled lease, issue a protective lease, grant a waiver, or renegotiate the terms of a lease. Restrictive rules may preclude this adaptability.

HB 1300
3-10-17
AH #6
pg 3

It is clear from the comments provided in the House testimony that industry desires to have a more defined voice in the Board's rulemaking processes.

Removing the Board's exemption to the requirements of the Act would be one way to accomplish that objective but it needs to be emphasized that the requirements of the Act do not relate only to rulemaking.

Operationally, there are two distinct parts to the Act – N.D.C.C. §§ 28-32-02 – 28-32-20 provide regulations for the adoption of agency rules; and N.D.C.C. §§ 28-32-21 – NDCC § 28-32-52 provide regulations for adjudicative proceedings. "Adjudicative proceeding" is defined by the Act as "an administrative matter resulting in an agency issuing an order after an opportunity for hearing is provided or required." N.D.C.C. § 28-32-01(1).

Removing the Board's exemption to the Act would not only require more formal rulemaking processes, but would also require strict adherence to rules for administrative processes and decision making once approved. The end product may not allow requests for exceptions to policies and rules to be addressed by the Board or staff, but could be subject to time consuming processes outlined in the adjudicative proceedings sections of the Act.

Subjecting the Board to the adjudicative proceedings portion of the Act would implement two drastic changes to the way the Board currently operates:

1. Any order issued by the Board could be the subject of a petition for reconsideration or appeal to district court as provided under N.D.C.C. §§ 28-32-40, 28-32-42. **An order is defined as, "any agency action of particular applicability which determines the legal rights, duties, privileges, immunities or other legal interest of one or more specific persons."** N.D.C.C. § 28-32-01(7). This broad definition potentially includes a majority of the routine, everyday decisions made by the Board. Rather than having timely finality of Board action, decisions or orders would not be final until the appeal period has closed (no less than 60 days).
2. Under the Act, a formal hearing is required whenever hearing is either required by law or the agency acts in a quasi-judicial capacity. *Steele v. N.D. Workmen's Comp. Bureau*, 273 N.W.2d 692, 701 (N.D. 1978). Quasi-judicial capacity has been defined as decision making by an agency when it has the power to exercise judgment and discretion. See *Kouba v. State*, 2004 ND 186, ¶ 9, 687 N.W.2d 466.

Because judgment and discretion guide a majority of its decisions, the Board is concerned the requirements of the Act will restrict its ability to timely grant exceptions to rules and policies in response to unique situations. Under the Act, the Board's land use and leasing decision making would more closely resemble Federal process requirements imposed on industry by, for example, the United States Forest Service and the Bureau of Land Management.

If this bill were to pass, policy exception requests that currently could be addressed by the Board on a monthly basis would need to be deferred to adjudicative proceedings which could take many months to complete, resulting in delays and increased costs for both industry and the Board. Subjecting a land manager to the formal provisions of the Act will likely make state assets less attractive to lease and devalue the property resulting in less income to the Trusts.

HB 1300
3-10-17
Att #6
pg 4

Some examples of common activities that could be subject to formal adjudicative proceedings under the Act include:

- Granting extensions of oil and gas leases
- Accepting late payments to avoid lease cancellation
- Renegotiating royalties
- Reinstating cancelled leases
- Analyzing shut-in well requests
- Implementing lease corrections
- Determining force majeure applications
- Processing assignment requests
- Processing right-of-way requests
- Assessment, reduction, or waiver of penalty and interest

Specific examples of these types of decisions, often made in a public forum, are provided in Appendix A and Appendix B.

Besides delaying development, passing this bill would result in increased costs for industry. In many of the instances referred to above, time is money. Project delays and burdensome administrative requirements come with a price.

Significant costs to the Trusts would be realized as well. The Department's fiscal note indicated that the extent of increased costs related to rulemaking and adjudicative proceedings is unknown, but certainly these activities would require additional staff time, considerably increased legal costs, publication costs and costs for contracted hearing officers.

In addition to the direct costs, more staff resources would be devoted to administrative oversight and less to on-the-ground land management, lessee relations, and improving trust assets.

It is questionable whether the Board's general continuing appropriation authority, which limits expenditures to those that help manage, preserve, and enhance the value of the trust asset, would apply. The actions of HB 1300 will not add value to trust assets. Because these expenditures would not comply with continuing appropriation authority, the Department would need appropriation authority to cover these additional expenditures.

Furthermore, costs of complying with the Act could not be paid by the permanent funds because such payment would conflict with the Constitutional mandates. Another source of funding would need to be identified.

Article IX, § 2 of the North Dakota State Constitution states in part:

*Distributions from an educational or charitable institution's trust fund must be faithfully used and applied each year for the benefit of the institution **and no part of the fund may ever be diverted, even temporarily, from this purpose** or used for any purpose other than the maintenance of the institution, as provided by law.*

(Emphasis added).

HB 1300
3-10-17
AH #6
pg 5

There is one area of the Board's responsibilities where administrative rulemaking requirements apply. Those responsibilities are related to managing the Uniform Unclaimed Property Act (N.D.C.C. ch. 47-30.1). This is appropriate. Although the Board's responsibilities as a trustee of unclaimed property are similar to its responsibilities for managing trust assets, the permanent trusts do not own the unclaimed property - it belongs to the rightful owners and their heirs. The Board's role is custodial and its actions relating to reporting, compliance, and processing of unclaimed property claims are not contractual. The costs of rulemaking in this case would be borne by the Common Schools Trust Fund which benefits from unrecovered unclaimed property proceeds.

IN CONCLUSION:

The Department, on behalf of the Board, opposes repealing the Board's exemption to the Act because:

1. The Board, as a fiduciary trustee and under the authority of the Constitution, the Enabling Act, and case law in North Dakota and other jurisdictions, is not a regulatory body and operates pursuant to contractual agreements.
2. The Board regularly holds public meetings that provide a forum for input and a platform for appeal.
3. The Board regularly invites public input and collaborates with industry prior to making rules changes.
4. The direct and indirect costs associated with rulemaking and adjudicative proceedings would have a negative impact on industry and the Trusts.
5. Adjudicative proceedings requirements outlined in the Act will create bureaucratic red tape and create unnecessary and costly delays.

Therefore, I respectfully request that the Board remain exempt from the requirements of Chapter 28-32, with the exception of provisions relating to the Uniform Unclaimed Property Act.

Thank you for your consideration on this matter and I would respond to any questions.

AB 1300
3-10-17
Att # 6
PS 6

APPENDIX A
Examples of Board Actions Relating to Requests for Policy Exceptions

DATE	COMPANY	REQUEST	BOARD ACTION
3/2008	Tracker Resources Development II, LLC	Failed to make the annual delay rental payment on leases assigned from Marathon – requested the Board to allow them to pay the late delay rentals and reinstate the canceled leases	Reinstated leases – all five leases remain in full force and effect. Board stated that precedence is not being established.
3/2008	Missouri River Royalty	Missouri River Royalty preferred not to grant an assignment of the producing formation back to Illinois Energy B so it was necessary to reinstate the cancelled lease to complete and finalize the transactions.	Board rescinded the January 31, 2008 action to cancel the lease for underpayment of royalties, and therefore ratified (not canceled) OG-99-00132.
1/2010	Playa Oil and Gas LP	Request for Lease Reinstatement for acres recently terminated due to annual delay rental not being paid on time	Denied request.
11/2010	Exterra Resources LLC	Cancellation of sale of tracts or reduction of amount due as representative mistakenly overbid	Temporarily suspended Exterra Resources from bidding at mineral auctions until further review and decision as to potential for damages and 5 unpaid tracts put on the next mineral auction list
1/2012	Department of Trust Lands	Adjustment of Royalty Rate for Oil and Gas Leases – from 1/6 to 3/16 as 1/6 is below the rate received by most fee owners in western North Dakota – and ensured trust funds receive fair market value from the lands owned	01/04/12: No Action – Commissioner was directed to get more data and input from the public and return to a subsequent meeting with a recommendation. 01/26/12: Reviewed data summaries and public input and adopted the proposed changes to Oil and Gas Rules 85-06-06 to increase the royalty rate to 3/16 on oil and gas leases issued by the Department of Trust Lands within Billings, Divide, Dunn, Golden Valley, McKenzie, Mountrail and Williams Counties.
6/2012	EOG Resources	Lease Amendment to Authorize Wayzetta #4-16H Secondary Recovery Efforts – allow for testing of new technique to enhance recovery of hydrocarbons	Authorized the Commissioner to amend the leases regarding this well to allow EOG to conduct tests to possibly enhance recovery of this and future wells
12/2013	N/A	Proposed Coal Rule Amendments	Approved coal rules on 12/18/13. An advisory group consisting of representatives of the coal industry, the Attorney General's office, and Department staff jointly reviewed and revised the entirety of the coal rules.

HB 1300
 3-10-17
 RA # 16
 pg 7

DATE	COMPANY	REQUEST	BOARD ACTION
12/2013	Conoco	Provision of oil and gas lease which permits 30 day cumulative day cessation of production to allow for reworking operations be waived and extended to allow time to redrill and stimulate a non-performing well	Authorized Commissioner to sign the agreement with Conoco which will maintain the lease hold on the well and permit the company to suspend production up to 100 days while reworking well; and to permit Commissioner to approve similar reworking agreements on Board's behalf if those do not extend beyond the 100 days cumulative production cessation and would likely enhance production and benefit trusts.
2/2014	N/A	Proposed Coal Lease Template and Surface use Addendum	Approved coal lease template and the mine-specific surface-related terms lease addendum. "The coal lease amendment recommendations were the result of extensive discussions with industry to modernize the language and reflect the need for a separate surface damage addendum."
3/2014	North American Coal Corporation and BNI Coal	Legislature removed statutory royalty minimums for coal and suggests that the board may adjust royalties on existing leases. North American and BNI requested renegotiation of the royalty rate of the current leases – both active and planned project area mines.	Board directed Commissioner to review private leases and competitiveness of trust coal and then offer recommendation regarding possible renegotiation.
6/2014	Oasis Petroleum North America LLC	Delineation study revealed new tracts not historically in the Department's inventory. Tracts were drilled by Oasis Petroleum and had producing wells – without an active lease for sovereign minerals. Oasis requested the Board issue direct lease to Oasis, rather than auction the lease, due to inability to nominate tracts that were in pending status and Oasis made significant investments in the land since 2010.	Authorized Commissioner to issue an oil and gas mineral lease on 720.99 acres more or less to Oasis for tracts.
6/2014	North American Coal (Coteau Mine)	Adjustment of 14 coal leases.	Board approve issuance of replacement amended coal leases with reduced royalty using the new lease form and under existing board rules.

HB 1300
 3-10-17
 AH #6
 pg 8

DATE	COMPANY	REQUEST	BOARD ACTION
7/2014	BNI Coal	Adjust royalty on 5 tracts of lease coal minerals	Authorized issuance of amended coal leases using the current lease template and under the current board rules (to maximize recovery of coal)
12/2015	North American Coal	Request to renegotiate 10 leases with Falkirk Mine	Authorized Commissioner to evaluate Falkirk's request to amend 10 leases and investigate whether individual lease changes would be in the trusts' best interests. If adjustments are recommended, Commissioner will investigate fair market rate and negotiate possible amended lease terms for Board's consideration.
3/2016	Dakota Access, LLC	Easement for Dakota Access route	Board approved easements on 4.5 miles of pipeline across 3 western counties.
4/2016		Requests for Off Lease Well Locations	Directed Commissioner and staff to continue to work to ensure the trusts, including sovereign minerals, are appropriately compensated and fairly treated.
4/2016	Coyote Creek Mine	Successfully petitioned Mercer County for temporary closure of area roads and section lines to conduct surface coal mining and reclamation operations – temporary road and section line closure includes Common Schools Trust surface and undocumented road. Department offered the county an easement for existing road – but no application made.	Board requested Attorney General to continue to take an active role in protecting the Trusts' interests to permit coal to be mined and Board defers to Attorney General regarding appropriate legal means to close undocumented road and allow coal mining to commence.
6/2016	Oasis Petroleum	Reduction of Interest on Late Payment of Royalties	The Board authorized the reduction of the Department's February 4, 2016 assessment from \$682,805.09 to \$363,631.42, eliminating the interest assessed on royalty escrowed because of a title dispute.
6/2016		Amendment to Oil & Gas Rule 85-06-06-10	The Board amended Oil and Gas Rule 85-06-06-10 to extend the deadline for reporting gas royalties from 30 days to 60 days of the last day of the month of gas production.
1/2017	Falkirk Mining	Request to renegotiate 10 leases with Falkirk mine.	Board approved the issuance of amended coal leases for a revised royalty \$0.16 per ton with an annual 3% escalator to the Falkirk Mining Company on 10 leases.

DB 1300
3-10-17
Att #6
pg 9

APPENDIX B EXAMPLES OF CURRENT DISCRETIONARY AUTHORITY

Mineral Leasing

- **Extension Requests.** The Board's oil and gas lease requires commercial production prior to expiration of the primary term of the lease but allows, at the Commissioner's discretion, for an extension for up to two (2) 180-day periods. Lease extension requests typically are made on the eve of the primary term expiration, meaning the lease has expired, or will expire, prior to finalizing the paperwork. When appropriate and in the best interests of the trusts, the Commissioner, as delegated by the Board, has granted leniency to this timeframe. Should this bill pass, the Board may have to require a formal application, give notice, and hold a formal evidentiary hearing in order to extend a lease. This process could take months. Lease extension requests filed on the eve of expiration will expire at 12:01 a.m. of the fifth anniversary of the lease. In the last lease cycle, two large leases that the Commissioner opted to extend would have expired.
- **Renegotiated Royalties:** N.D.C.C. § 15-05-01 previously required the Board to issue coal leases with a royalty rate of the greater of \$0.25 per ton or 6% of the cost of coal. The statute was amended in 2013 to remove the minimum allowable royalty rate and allowed the Board discretion to renegotiate terms of leases. The Board did not oppose the changes. Since N.D.C.C. § 15-05-01 was amended, the Board has re-negotiated a lower royalty rate on several coal leases which has allowed state-owned minerals to continue to be mined. If the Board is subject to the Act, the Board may only be able to adjust a royalty rate after receiving a formal application, giving notice, and having a public evidentiary hearing. The Board may not be allowed to negotiate directly with coal companies on a new rate.
- **Shut-in requests.** Board leases require that a lease remain in producing status to stay active. A non-producing lease will expire after 60 days with no production. Due to the serious implications of lease termination, when breakdowns at the wellsite require repair time, and production stops, latitude has been given regarding the timing of shut-in requests. The majority of the shut-in requests received are past the 60 day window and under the terms of the lease should be terminated. If the Board is subject to the Act, the Board may only be able to grant a shut-in request if a formal application is filed with the Board, notice is given and an evidentiary hearing is held. Such a process would not only strip the Board of the ability to negotiate directly with the operator but would take months, leaving operators in limbo about the status of their lease.
- **Lease Assignments.** Each year, the Department handles thousands of requests to shift a lease from one entity to another. Under the terms of the lease, these assignments must be approved by the Board. Any disruption in the current process would lead to delays in companies buying, selling, or trading all or a portion of their leases.
- **Lease Corrections.** Any lease correction or modification would potentially need to go through the adjudicative proceedings process. Something as simple as a scrivener's error on a description could take months to propose a corrective order and implement a fix. Currently, staff handles these errors at the administration level.

HB 1300
3-10-17
AH # 6
Pg 18

- **Lease Auctions.** The Minerals Management Division hosts a quarterly auction offering mineral tracts for lease. In advance of auctions, tracts are nominated, vetted for archeological, historical and wildlife impact, and offered at public auction. If HB 1300 passes, hearings and possible appeals may become part of the vetting process. This has the effect of stalling development for industry, delaying revenue to the trusts, and devaluing state-owned resources.
- **Force Majeure Determinations.** Situations involving accidents, breakdowns, natural disasters or other “Acts of God” occur during development. If these incidents were not contemplated and approved in rulemaking, a draft order would likely be required to reach resolution.

Surface Leasing

- **Dropped tracts/Minimum Rents:** The Board’s surface leasing policy provides guidelines for setting minimum rents if a tract is terminated for non-payment. Exceptions are considered when an unleased tract results in not only lost income for the Trusts, but also incurs management expense. Under the Act, such requests may require the Board to follow formal adjudicative proceedings to reduce the minimum rent in order to lease a tract.

Rights-of-Way

- **Price negotiations.** On behalf of the Board, staff negotiates right-of-way consideration on a tract-by-tract basis to ensure fair compensation to the Trusts for rights-of-way issued on trust land compared to compensation for rights-of-way on private land.
- **Routing.** The Board issues dozens of different types of rights-of-way (24 different types in the first two months of 2017 alone). Each type is unique and requires consideration of environmental impact and future development potential of the tract. Delays will be introduced if each route needs to be evaluated through an adjudicative proceeding.

Land Sales

- The Board’s limited land sale policy provides guidelines for when trust property is eligible for sale. From time to time, policy exceptions are requested that require the Board to consider whether a sale would have a long-term benefit to the Trusts. Policy exceptions relating to appraisals have also been necessary in establishing the minimum opening bid to ensure fair compensation to the Trusts. Under the Act, decisions of sales may require the Board to follow formal adjudicative proceedings to consider such a request.

Revenue Compliance - Penalty and Interest Assessments

- Operator requests for waivers of penalty and interest can be granted by the Department or, for requests exceeding \$2500, by the Board. Under the Act, such requests would require a formal application to the Board, public notice, and a formal adjudicative hearing. This process would strip the Board of the ability to work directly with the operator on these issues and delay decisions for months.
- Oftentimes technical errors occur during reporting, such as: new payer, new employees, software upgrade issues, and data entry errors. Department staff has used discretion to not assess penalties in these situations. With administrative rules, these penalties may likely be assessed and will require a hearing to waive, even if the errors are outside of the payers’ control or for insignificant amounts.

1707 North 9th Street
PO Box 5523
Bismarck, ND 58506-5523
Phone: (701) 328-2800
Fax: (701) 328-3650

www.land.nd.gov



Date: March 22, 2017
To: Chairman Unruh and Members of the Senate Energy and Natural Resources Committee
cc: Members of the Board of University and School Lands
From: Linda Fisher, Deputy Commissioner of University and School Lands
Re: HB 1300 – Proposed Amendment

HB 1300 seeks to remove the exemption of the Board of University and School Lands (Board) from the Administrative Agencies Practice Act (Act). This has been characterized by some as a simple bill; however, it is anything but a simple bill. In a nutshell, passing this bill as proposed would subject the Board to administrative rulemaking processes and adjudicative proceeding requirements and is not in concert with the Board's Constitutional mandate to: 1) manage the educational land grant assets and proceeds for the exclusive benefit of the trusts; and 2) to prohibit diversion of funds, even temporarily, from that purpose. N.D. Const. art. IX.

Legislative review of this topic in 1986, 1987, 1993 and 2008 concluded that the Board's management of Trust assets outside the requirements of the Act is appropriate. Case law indicates the Board's duties and powers require an exercise of judgment and discretion.

The board . . . has full control of the selecting, appraisal, rental, sale, disposal and management of school lands of the state. It acts as a body for and on behalf of the state. With this grant of general power is expressly and impliedly conferred the duty of using judgment and discretion in such matters, commensurate with the importance of the trust reposed in it. This is the plain intent of the Constitution and statute creating the board and defining its duties. It is then a board vested with discretion in the performance of its duties generally"

Fuller v. Bd. of Univ. & Sch. Lands, 129 N.W. 1029, 1031 (N.D. 1911).

That being said, despite the Board conducting its business in open forums, testimony of industry representatives alleged exclusion from the rulemaking process and those concerns have not fallen on deaf ears. The attached amendment seeks to codify a more structured approach to the Board's rulemaking process. It ensures a greater voice to stakeholders without imposing unnecessary administrative burdens, time delays, and costs of adjudicative proceedings on the Board, the Trusts, and its stakeholders.

To reiterate, a wholesale repeal of the Board's exemption to the Act is opposed because:

1. The Board is a fiduciary trustee under the authority of the Constitution, the Enabling Act, and case law in North Dakota and other jurisdictions. It is not a regulatory body and in managing Trust assets operates largely via contractual agreements.
2. The direct and indirect costs associated with rulemaking and adjudicative proceedings under the Act would have a negative impact on stakeholders and the Trusts. (Spending authority does not exist for operating costs related to complying with the Act and Constitutional mandates prohibit permanent funds from paying the costs of rulemaking and adjudicative proceedings.)
3. The Board currently works with stakeholders to resolve problems in a reasonable and timely manner. Adjudicative proceeding requirements of the Act will create bureaucratic red tape and unnecessary, costly delays for all involved.
4. Adoption of the proposed amendment would provide multiple opportunities for stakeholder participation in the Board's rulemaking process.

Attachment: Proposed Amendment

1707 North 9th Street
PO Box 5523
Bismarck, ND 58506-5523
Phone: (701) 328 – 2800
Fax: (701) 328 – 3650

www.land.nd.gov



Lance D. Gaebe, Commissioner

PROPOSED AMENDMENTS TO HOUSE BILL NO. 1300

Page 1, line 1, after "A BILL" replace the remainder of the bill with "for an Act to create and enact a new section to chapter 15-01 of the North Dakota Century Code relating to Board of University and School Lands procedural requirements for establishing and amending rules.

BE IT ENACTED BY THE LEGISLATIVE ASSEMBLY OF NORTH DAKOTA:

SECTION 1. A new section to chapter 15-01 of the North Dakota Century Code is created and enacted as follows:

Rules Procedure.

1. Rules established or amended by the board under the board's rulemaking authority granted in sections 15-03-04.2, 15-05-05, 15-05-09, 15-05-10, 15-05-12.1, 15-07-02, 15-07-20, 38-11-02.1, and 38-11-10 must be subject to a public notice preceding introduction and a first reading at a public meeting of the board, a formal comment period, and a second reading at a public meeting of the board.
2. Adopted rules must be consolidated and published.
3. The board may, upon determination that a documented emergency calls for expeditious action, waive the requirement of a second reading and immediately approve the new policy or amendment following introduction and first reading.

Renumber accordingly

March 29, 2017

HB1300
3-30-17
AH #1
pg 1

PROPOSED AMENDMENTS TO HOUSE BILL NO. 1300

Page 1, line 1, after "reenact" insert "sections 15-01-02 and 15-02-05 and"

Page 1, after line 3, insert:

"SECTION 1. AMENDMENT. Section 15-01-02 of the North Dakota Century Code is amended and reenacted as follows:

15-01-02. Powers - Control of public lands and permanent funds.

The board has:

1. ~~Full~~ Subject to the requirements of chapter 28-32, full control of the selection, appraisal, rental, sale, disposal, and management of:
 - a. Lands donated or granted by or received from the United States or from any other source for the support and maintenance of the common schools.
 - b. All lands which fall to the state by escheat.
 - c. All lands donated or granted by or received from the United States or from any other source for the maintenance of the educational, penal, or charitable institutions.
 - d. All lands acquired by the state through the investment of the permanent school funds of the state as the result of mortgage foreclosure or otherwise.
2. Full control of the investment of the permanent funds derived from the sale of any of the lands described in subsection 1.
3. Full control of such percent of the proceeds of any sale of public lands as may be granted to the state by the United States on such sale.
4. Full control of the proceeds of any property that fall to the state by escheat and of the proceeds of all gifts and donations to the state for the support or maintenance of the common schools, and of all other property otherwise acquired by the state for the maintenance of the common schools. Any gift to the state not specifically appropriated to any other purpose must be considered as a gift for the support and maintenance of the common schools.
5. Authority to expend moneys for the purpose of making refunds in cases in which an error has been made by the board, or a person dealing with the board, with regard to any of the lands, minerals, funds, proceeds, or any other kind of property managed by the board. Moneys expended to make refunds must come from the same fund or account into which the money to be refunded was originally placed.

HB 1300
3-30-17
AH #1
pg 2

6. Authority to award and distribute energy infrastructure and impact grants from moneys deposited in the oil and gas impact grant fund, except that grants awarded annually may not exceed sixty percent of the biennial appropriation for energy infrastructure and impact grants. The board may create an advisory committee to assist the board in making its grant award determinations.

SECTION 2. AMENDMENT. Section 15-02-05 of the North Dakota Century Code is amended and reenacted as follows:

15-02-05. Powers and duties in general.

The commissioner, under such directions as may be given by the board of university and school lands, shall:

1. Have general charge and supervision of all lands described in section 15-01-02.
2. Act as general agent of the board in the performance of its duties.
3. Have the custody of all maps, books, and papers relating to any of the lands mentioned in this title.
4. Procure the books, maps, and plats required to keep a complete record of all such lands, and keep true records of all the sales, leases, permits, patents, deeds, and other conveyances of lands under the commissioner's supervision made by the state showing the amount of money paid, the date of sale and of payment, the description of lands sold or leased, the number of acres [hectares] thereof, the name of the purchaser, and the designation of the fund to be credited therewith.
5. Direct all appraisements, sales, and leases, and execute all contracts of sale, leases, permits, and other evidences of disposal of lands, subject to approval by the board and chapter 28-32.
6. Certify the book and page number of all contracts, leases, or permits recorded by the commissioner."

Page 2, line 17, remove the overstrike over "~~The board of university and school lands~~"

Page 2, line 18, after the overstruck period insert "with respect to activities under chapters 15-01, 15-02, and 15-08, sections 21-10-01, 47-30.1-24.1, 54-01-05.5, and 54-06-04, subsection 12 of section 54-23.3-04, and sections 54-27-16, and 54-30-17.1, unless otherwise specified in those chapters and sections."

Renumber accordingly

*from Dept. Lands
Treat*

*AB 1300
3-30-17
AH #2
ps1*

PROPOSED AMENDMENTS TO HOUSE BILL NO. 1300

Page 1, line 1, after "A BILL" replace the remainder of the bill with "for an Act to create and enact a new section to chapter 15-01 relating to Board of University and School Lands procedural requirements for establishing and amending rules.

BE IT ENACTED BY THE LEGISLATIVE ASSEMBLY OF NORTH DAKOTA:

SECTION 1. A new section to Chapter 15-01 of the North Dakota Century Code is created and enacted as follows:

- A. Rules established or amended by the board under the board's rulemaking authority granted in §§ 15-03-04.2, 15-05-05, 15-05-09, 15-05-10, 15-05-12.1, 15-07-02, 15-07-20, 38-11-02.1, and 38-11-10 must be subject to a public notice preceding introduction and a first reading at a public meeting of the board, a formal comment period, and a second reading at a public meeting of the board.
- B. Adopted rules must be consolidated and published.
- C. The board may, upon determination that a documented emergency calls for expeditious action, waive the requirement of a second reading and immediately approve the new policy or amendment following introduction and first reading.

Renumber accordingly

HB 1300

3-30-17
AH # 2
pg 2

15-03-04.2	Farm Loans - authority to promulgate
15-05-05	Coal - may make such rules
15-05-09	OG - may make and establish rules
15-05-10	royalty - may adopt rules
15-05-12.1	mineral lease improvements - may provide by rule or lease term
15-07-02	sale of nongrant lands - may make such rules and regulations
15-07-20	leasing nongrant lands - under reasonable rules as it may establish
38-11-02.1	all state mineral leasing - authority to establish standards, policies, terms, conditions, rules, and regulations for such activity
38-11-10	leasing any state minerals - authorized to promulgate such rules and regulations

HB 1306
3-30-17
AH #3
pg 1

Sections enumerated in the proposed amendment	
Section	Description
15-03-04.2	Board authority over farm land
15-05-05	Board to make rules and regulations governing coal leasing
15-05-09	Leases for oil, gas, and other products
15-05-10	Royalties from oil leases - Rents from others leases - Rules
15-05-12.1	Improvements made on lands by a mineral lessee
15-07-02	Rules and regulations for sale of nongrant lands - Powers of board
15-07-20	Leasing of nongrant lands
38-11-02.1	Board of university and school lands to oversee all mineral leasing
38-11-10	Rules and regulations (lease of minerals on public lands)

Other sections that provide rulemaking authority to the board of university and school lands	
Section	Description
15-03-04.1	Loan pool account (board may authorize Bank to renegotiate mortgages in loan pool account as long as the renegotiation follows the board's rules)
15-05-14	Bonds for rents and royalties
15-05-18	Leases of sand and gravel, construction, aggregate, and other construction materials
15-06-39	State forester to control lands designated for forest management (state forester may issue permits to cut hay on certain state land, subject to rules of the board and the state forester)
38-09-15	Public offering of leases - State
38-11-04	Offering of mineral leases to be public (sets out a procedure for public auction of mineral leases on public lands)

HB 1300
 3-30-17
 AH #3
 PG 2

Other provisions that give the board or commissioner authority, impose a duty on the board or commissioner, or exempt the board or commissioner from legal requirements	
Citation	Description
Article IX of the Constitution	Trust lands
6-06-34	Unclaimed dividends of credit unions
10-15-49	Amounts due to unknown persons
Chapter 15-01	Board of university and school lands
Chapter 15-02	Commissioner of university and school lands
15-03-17	Redemption of bonds by political subdivisions (board shall allow certain political subdivisions to redeem bonds under certain conditions)
Chapter 15-04	Leases of original grant lands for agricultural purposes
Chapter 15-05	Leasing coal, oil, gas, and other rights
Chapter 15-06	Sale of original grant lands
Chapter 15-07	Sale and lease of nongrant lands
Chapter 15-08	Provisions relating to original grant and nongrant lands
Chapter 15-08.1	Transfer of possessory interests in realty
Chapter 15-09	Condemnation of public lands and sales in lieu thereof
15.1-36-02	School construction projects - Loans
20.1-11-12	Acquisition of school lands for wildlife restoration projects
21-02-11	Advertising for bids - When required - Procedure similar to bonds (political subdivisions' certificates of indebtedness sold to board do not need to be advertised for bids)
21-10-01	State investment board - Membership - Term - Compensation - Advisory council (commissioner to serve on state investment board)

HB 1300
 3-30-17
 AH 'B'
 pg 3

21-03-30	Municipal bonds - Private sale to the United States or state agencies
38-11-02.2	Authority of the board (board authority with respect to oversee all leasing of state-owned minerals)
38-11-15.1	Sale of private mineral interests at public offerings for state mineral leases
47-16-39.1	Obligation to pay royalties - Breach
47-30.1-24.1	Claims by state agencies - Budget section approval and report (commissioner to provide report to budget section)
47-30.1-32	Enforcement - Appeals (board provides hearing for persons appealing an audit finding regarding unclaimed property)
48-10-02	Capitol building fund to be administered by the capitol grounds planning commission - Continuing appropriation - Procedure for expenditure of certain funds (board invests and manages capitol building fund)
54-01-05.5	Bills authorizing sale or exchange of state-owned land - Written report - Opinion
54-06-04	Form and number of reports to be submitted (board must submit biennial reports to governor and secretary of state)
subsection 12 of section 54-23.3-04	Director - Powers and duties (board to provide technical assistance and advice to director of department of corrections in transactions involving state lands)
54-27-16	Permission of industrial commission necessary for investment of public funds (exemption for board)
54-30-17.1	Land acquired by state treasurer - Sale or lease by the Bank of North Dakota or board of university and school lands - Deposit of net proceeds in bond sinking fund
61-01-19	Right of way granted (board consent required for right of way over state lands)
61-15-06	Board of university and school lands empowered to grant easements for water and wildlife conservation
Chapter 61-33	Sovereign land management

Fr. Oil people

#B 1300
3-30-17
AH # 4
PS 1

**PROPOSED AMENDMENTS TO
HOUSE BILL NO. 1300**

Page 2, remove the overstrike over line 17

Page 2, line 18, remove the overstrike over "~~chapter 47-30.1~~" and insert immediately thereafter insert "for the administration of unclaimed property laws, under section 15-01-01 for the management of state lands, under chapter 15-05 for the leasing of oil, gas and coal, under chapter 38-11 for the leasing of other minerals, under chapters 15-06 and 15-07 for the sale or lease of grant or non-grant lands or interests in such lands, including easements and rights of way, and under chapter 61-33 for the management of sovereign lands"

Renumber accordingly

17.0830.01000
Sixty-fifth
Legislative Assembly
of North Dakota

11:00am
mtg

Fr.
Harrick

HB 1300
3-30-17
Att #1
Att #1
pg 1

INTERN DRAFT AMENDMENT TO FURTHER AMEND 17.0830.01001

After section 2, insert:

SECTION 3. EFFECTIVE DATE. This Act is effective after January 1, 2018.

4-11-17
HB 1300

Date: April 10, 2017
To: Chairman Klemin, Conference Committee – HB 1300
From: Linda Fisher, Deputy Commissioner of University and School Lands
Re: Request for Information - HB 1300 (With Senate Amendments)

You requested copies of all Land Board rules that fall within the scope of the exempted statutes listed in the Senate amendments to HB 1300. Many of the exemptions apply to obscure and rarely used statutes and as such, no policy or rules exist.

EXEMPTED SECTIONS AND SUBSECTIONS REFERENCED IN HB 1300 WITH SENATE AMENDMENTS

Broadly, the exemptions proposed by the Senate that refer to N.D.C.C. chapters 15-01 and 15-02 relate to:

- N.D.C.C. § 15-01-02(2),(3): Investment of permanent funds derived from the sale of school lands: The Board has adopted an Investment Policy Statement pertaining to the management of all of its investments, no rules or policies exist specific to investing sale proceeds.
- N.D.C.C. § 15-01-02(4) Managing escheated or gifted assets: The Board has historically treated gifted or escheated lands as it would all of the other trust lands it manages. No specific rules or policies exist.
- N.D.C.C. § 15-01-02(5) Issuing refunds for payment errors: The multiple scenarios that may require a refund are handled on a case-by-case basis. A number of policies reference refunds, but no rules or policies exist specific to refunds.
- N.D.C.C. § 15-01-02(6) This exemption is specific to the Board's authority to award and distribute grant funds. The statutes regulating energy infrastructure and impact administration are found within N.D.C.C. ch. 57-62 which is not exempted in HB 1300.
- N.D.C.C. § 15-02-05: Generalized Commissioner authority: No specific Board rules exist.
 1. Charge and supervision of lands described in N.D.C.C. § 15-01-02
 2. Agent of the board
 3. Custodian of all maps, books, and papers relating to any of the lands mentioned in this title
 4. Trust land record keeper (State records retention policies apply)
 5. *Not applicable (subject to Administrative Agencies Practice Act).*
 6. Certify recording information.

Exemptions in N.D.C.C. ch. 15-08 refer to historical administrative functions of the board – mostly relevant to a point in history when the Land Board was actively selling land, making loans and managing contracts for sales. No specific rules or policies exist.

§ 21-10-01: State investment board - Membership - Term - Compensation - Advisory council.

Pertaining only to the membership of the Land Commissioner on the State Retirement and Investment Board, no rules or policies exist.

§ 47-30.1-24.1: Claims by state agencies – Budget section approval and report.

This specifies how unclaimed property reported in the name of a state agency must be managed. The statute is self-explanatory. No rules or policies exist.

§ 54-01-05.5: Bills authorizing sale or exchange of state-owned land – Written report- Opinion.

Amended by SB 2102 and signed by the Governor on March 14, 2017, this statute requires the Land Commissioner to review legislative bills and the written report from any supervising agency proposing the sale or exchange of state-owned lands. It gives the Commissioner the option to provide a written assessment pertaining to the “highest and best use” of State lands being considered by sale. There is no recent history of such a request being made by a selling agency. As such, no rules or policies exist.

§ 54-06-04: Form and number of reports to be submitted.

This statute requires the Board of University and School Lands to submit a biennial report to the governor and secretary of state covering its operations each biennium. No rules or policies exist.

Subsection 12 of section § 54-23.3-04

This statute states that the Commissioner of University and School Lands or the Commissioner's designee shall provide technical assistance and advice to the director of the department of corrections and rehabilitation in any transaction. There is no recent history of such a request. As such, no rules or policies exist.

§ 54-27-16: Permission of industrial commission necessary for investment of public funds.

This section exempts the board of university and school lands from seeking the state industrial commission permission to manage and invest trust assets. No rules or policies exist.

§ 54-30-17.1: Land acquired by state treasurer – Sale or lease by the Bank of North Dakota or Board of University and School Lands – Deposit of net proceeds in bond sinking fund.

This statute provides the Board of University and School Lands with authority to enter into a management agreement with the state treasurer to manage lands acquired by the state treasurer. However, the section requires that the sale and leasing of such lands must be done in accordance with N.D.C.C. ch. 15-07 which is not exempted from rulemaking in the Senate amendments.

**Board and Commissioner of University and School Lands
Rules, Guidelines, Policies and Procedure Review List (04-10-17)**

Surface Management

Chapter 15-09 Sale Policy
Commissioner Approval of Leases
Assignments and Custodial Agreements
Surface Damage Payment
Surface Easement and Permit Issuance Policy
Failure to Pay at Auction/Bidder Eligibility
Fair Market Value - Grass
Sale of State Land for Landfills
Agricultural Lease Cancellation
Cropland and Hayland Flood Mitigation
Non-commercial Roads
Agreements for Organized Events on State Lands
Grace period for lease payments
Payment Schedule (Trust Specific Activities)
Prairie Dog Control Cost Share
Non-Vehicular Public Access
Ramsey County Cropland & Hayland Flood Mitigation
Railroad Rights-of-Way Ownership
Land Retention and Sales Policy
Minimum Rent Calculations for Spring Leases
Construction Aggregate Rules (85-06-03)
Prospecting Permit & Lease Application Procedures
Prospecting Permit and Lease Management Review
Surface Lease Assignment Approval Delegation
Noxious and Invasive Weed Control Cost Share Policy
Cultivating and Seeding of Potholes
Drop Line Easement Procedure
Badlands Water Adjustment
Managing Indian Cultural Trust (NDCC 15-68)
Field Inspection Schedule
Productivity and Rental Adjustments
Lease Auction Rotation
Accepting Letters of Credit
Rent Credits and Depreciation (15-08-26)
Improvements: Pasture Drops and Permanent Tanks
Rent Reduction for Spurge Control
Salt-water Disposal Easements Due Diligence
Salt water Disposal Payment Collection
Refunds of Temporary Slope Construction Damages
Determining Crop and Hay Valuation
Determining Grassland Valuation
Water Adjustment Guidelines – Surface Rentals
Payment for Livestock Water Developments
Approving Off-Lease Mineral or Spacing Unit Well Sites
Grazing Association Administrative Fee Reduction
Fencing Adjustments
Rent Credits for Permanent Improvements
Subsurface Easements

Foreclosed Properties

Accepting and Rejecting Bids on Foreclosed Property
Criteria for Retaining Foreclosed Property
Managing Acquired Properties

Minerals Management

85-06-06 Oil and Gas Rules
85-06-07 Potash Rules
15-05 Coal Rules
Off Lease Mineral or Spacing Unit Well Site Requests
Mitigation of Wildlife Impact
Offset Wells
Oil and Gas Lease Assignments
Pooling Agreements
Shut in Well Policy
Unitization Requests
Oil and Gas Lease Terminations
Coal Leasing Procedures
Oil and Gas Lease Corrections
Oil and Gas Lease Extensions
Mineral Lease Nominations
Zero Production Policy
Stipulations of Interest
Mitigation of Archeological and Paleontological
Coal Lease Adjustments
Coal Lease Terminations
Other Mineral Extraction
Disclaiming/Claiming Mineral interests
Mineral Trespass

Revenue Compliance

Royalty Reporting Requirements
Assessing Penalty and Interest
Waiver of Penalties
Audit Procedures/Requested Items
Division Orders
Escrow Procedures
Assigned Fund Procedures

Other

Fee Schedules
Damage Payments
Refunding Criteria
Auction Procedures

Energy Infrastructure and Impact Office

Application Processes
Award Processes
Cancellation Processes
Advisory Committee Scoring Criteria (Critical Access Hospitals)
Advisory Committee Scoring Criteria (Developmentally Disabled Grants)
Advisory Committee Scoring Criteria (District Health Units)
Advisory Committee Scoring Criteria (Emergency Medical Services)
Advisory Committee Scoring Criteria (Fire Dept)

Investments

Farm Loan Pool Rules & Regulations
All Aspects of the Investment Policy Statement

**Board and Commissioner of University and School Lands
North Dakota Century Code Potentially Impacted in HB 1300 (04-10-17)**

The Department compiled the following list of North Dakota Century Code statutes (with some noted exceptions) which that appear to be impacted by the Board's inclusion in the Administrative Agencies Practice Act:

* N.D.C.C. § 6-06-34 – Unclaimed Dividends of credit unions

* N.D.C.C. § 10-15-49 – Cooperative Associations – Amounts due unknown persons

N.D.C.C. ch. 15-01 – Board of University and School Lands - excepting N.D.C.C. § 15-01-02(2), (3), (4), (5), (6)

N.D.C.C. ch. 15-02 – Commissioner of University and School Lands - excepting N.D.C.C. § 15-02-05(1), (2), (3), (4), (6)

N.D.C.C. ch. 15-03 – Investment of Funds

N.D.C.C. ch. 15-04 – Leases of Original Grant Lands for Agricultural Purposes

N.D.C.C. ch. 15-05 – Leasing Coal, Oil, Gas and Other Rights

N.D.C.C. ch. 15-06 – Sale of Original Grant Lands

N.D.C.C. ch. 15-07 – Sale and Lease of Nongrant Lands

N.D.C.C. ch. 15-08.1 – Transfer of Possessory Interests in Realty

N.D.C.C. ch. 15-09 – Condemnation of Public Lands and Sales in Lieu Thereof

N.D.C.C. § 15.1-36-02 – School Construction Projects - Loans

N.D.C.C. § 20.1-02-05(10) – Game and Fish Department Special Hunting Permits on Trust Land

N.D.C.C. § 20.1-11 – Acquisition of School Lands for Wildlife Restoration Projects

N.D.C.C. ch. 38-09 – Exploration and Production on Publicly Owned Lands

N.D.C.C. ch. 38-11 – Lease of Minerals on Public Lands

N.D.C.C. § 47-16-39.1 – Leasing of Real Property (Obligation to Pay Royalties)

* N.D.C.C. ch. 47-30.1 – Uniform Unclaimed Property Act - excepting N.D.C.C. § 47 - 30.1 - 24.1

N.D.C.C. § 48-10-02 – Capitol Grounds Planning Commission – Procedure for expenditure of certain funds

N.D.C.C. ch. 57-62 – Aid Impact Program

N.D.C.C. § 61-01-19 – Right of way granted (Board consent for water users' permits)

N.D.C.C. § 61-15-06 – Water Conservation (Easements to USA for water and wildlife conservation)

N.D.C.C. ch. 61-33 – Sovereign Land Management

* - Refers to Unclaimed Property

PROPOSED AMENDMENTS TO HOUSE BILL NO. 1300

That the Senate recede from its amendments as printed on pages 1434-1436 of the House Journal and pages 1090-1092 of the Senate Journal and that House Bill No. 1300 be amended as follows:

Page 1, line 1, after "reenact" insert "sections 15-01-02 and 15-02-05 and"

Page 1, line 2, replace "agencies exempt" with "an exemption"

Page 1, line 3, after "agency" insert " for the administrative agencies practices act"

Page 1, after line 3, insert:

"**SECTION 1. AMENDMENT.** Section 15-01-02 of the North Dakota Century Code is amended and reenacted as follows:

15-01-02. Powers - Control of public lands and permanent funds.

The board has:

1. ~~Full~~ Subject to the requirements of chapter 28-32, full control of the selection, appraisal, rental, sale, disposal, and management of:
 - a. Lands donated or granted by or received from the United States or from any other source for the support and maintenance of the common schools.
 - b. All lands which fall to the state by escheat.
 - c. All lands donated or granted by or received from the United States or from any other source for the maintenance of the educational, penal, or charitable institutions.
 - d. All lands acquired by the state through the investment of the permanent school funds of the state as the result of mortgage foreclosure or otherwise.
2. Full control of the investment of the permanent funds derived from the sale of any of the lands described in subsection 1.
3. Full control of such percent of the proceeds of any sale of public lands as may be granted to the state by the United States on such sale.
4. Full control of the proceeds of any property that fall to the state by escheat and of the proceeds of all gifts and donations to the state for the support or maintenance of the common schools, and of all other property otherwise acquired by the state for the maintenance of the common schools. Any gift to the state not specifically appropriated to any other purpose must be considered as a gift for the support and maintenance of the common schools.

5. Authority to expend moneys for the purpose of making refunds in cases in which an error has been made by the board, or a person dealing with the board, with regard to any of the lands, minerals, funds, proceeds, or any other kind of property managed by the board. Moneys expended to make refunds must come from the same fund or account into which the money to be refunded was originally placed.
6. Authority to award and distribute energy infrastructure and impact grants from moneys deposited in the oil and gas impact grant fund, except that grants awarded annually may not exceed sixty percent of the biennial appropriation for energy infrastructure and impact grants. The board may create an advisory committee to assist the board in making its grant award determinations.

SECTION 2. AMENDMENT. Section 15-02-05 of the North Dakota Century Code is amended and reenacted as follows:

15-02-05. Powers and duties in general.

The commissioner, under such directions as may be given by the board of university and school lands, shall:

1. Have general charge and supervision of all lands described in section 15-01-02.
2. Act as general agent of the board in the performance of its duties.
3. Have the custody of all maps, books, and papers relating to any of the lands mentioned in this title.
4. Procure the books, maps, and plats required to keep a complete record of all such lands, and keep true records of all the sales, leases, permits, patents, deeds, and other conveyances of lands under the commissioner's supervision made by the state showing the amount of money paid, the date of sale and of payment, the description of lands sold or leased, the number of acres [hectares] thereof, the name of the purchaser, and the designation of the fund to be credited therewith.
5. Direct all appraisements, sales, and leases, and execute all contracts of sale, leases, permits, and other evidences of disposal of lands, subject to approval by the board and chapter 28-32.
6. Certify the book and page number of all contracts, leases, or permits recorded by the commissioner."

Page 2, line 17, remove the overstrike over "~~The board of university and school lands except with respect to~~" and insert immediately thereafter "mineral leasing and management"

Page 2, line 17, remove the overstrike over "activities"

Page 2, line 18, remove the overstrike over the overstruck period

Renumber accordingly

Introduced by

Representatives Kempenich, K. Koppelman, Olson

Senators Klein, D. Larson, Unruh

1 A BILL for an Act to amend and reenact subsection 2 of section 28-32-01 of the North Dakota
2 Century Code, relating to agencies exempt from the definition of administrative agency.

3 **BE IT ENACTED BY THE LEGISLATIVE ASSEMBLY OF NORTH DAKOTA:**

4 **SECTION 1. AMENDMENT.** Subsection 2 of section 28-32-01 of the North Dakota Century
5 Code is amended and reenacted as follows:

- 6 2. "Administrative agency" or "agency" means each board, bureau, commission,
7 department, or other administrative unit of the executive branch of state government,
8 including one or more officers, employees, or other persons directly or indirectly
9 purporting to act on behalf or under authority of the agency. An administrative unit
10 located within or subordinate to an administrative agency must be treated as part of
11 that agency to the extent it purports to exercise authority subject to this chapter. The
12 term administrative agency does not include:
- 13 a. The office of management and budget except with respect to rules made under
14 section 32-12.2-14, rules relating to conduct on the capitol grounds and in
15 buildings located on the capitol grounds under section 54-21-18, rules relating to
16 the classified service as authorized under section 54-44.3-07, and rules relating
17 to state purchasing practices as required under section 54-44.4-04.
 - 18 b. The adjutant general with respect to the department of emergency services.
 - 19 c. The council on the arts.
 - 20 d. The state auditor.
 - 21 e. The department of commerce with respect to the division of economic
22 development and finance.
 - 23 f. The dairy promotion commission.
 - 24 g. The education factfinding commission.

Sixty-fifth
Legislative Assembly

- 1 h. The educational technology council.
- 2 i. The board of equalization.
- 3 j. The board of higher education.
- 4 k. The Indian affairs commission.
- 5 l. The industrial commission with respect to the activities of the Bank of North
6 Dakota, North Dakota housing finance agency, public finance authority, North
7 Dakota mill and elevator association, North Dakota farm finance agency, the
8 North Dakota transmission authority, and the North Dakota pipeline authority.
- 9 m. The department of corrections and rehabilitation except with respect to the
10 activities of the division of adult services under chapter 54-23.4.
- 11 n. The pardon advisory board.
- 12 o. The parks and recreation department.
- 13 p. The parole board.
- 14 q. The state fair association.
- 15 r. The attorney general with respect to activities of the state toxicologist and the
16 state crime laboratory.
- 17 s. [The board of university and school lands except with respect to unclaimed](#)
18 [property activities under chapter 47-30.1, mineral leasing and management](#)
19 [activities, and surface management activities related to mineral activities.](#)
- 20 t. The administrative committee on veterans' affairs except with respect to rules
21 relating to the supervision and government of the veterans' home and the
22 implementation of programs or services provided by the veterans' home.
- 23 ~~u.t.~~ The industrial commission with respect to the lignite research fund except as
24 required under section 57-61-01.5.
- 25 ~~v.u.~~ The attorney general with respect to guidelines adopted under section 12.1-32-15
26 for the risk assessment of sexual offenders, the risk level review process, and
27 public disclosure of information under section 12.1-32-15.
- 28 ~~w.v.~~ The commission on legal counsel for indigents.
- 29 ~~x.w.~~ The attorney general with respect to twenty-four seven sobriety program
30 guidelines and program fees.

Sixty-fifth
Legislative Assembly

- 1 y.x. The industrial commission with respect to approving or setting water rates under
- 2 chapter 61-40.

17.0830.01009
Title.

Prepared by the Legislative Council staff for
Representative Klemin
April 12, 2017

PROPOSED AMENDMENTS TO HOUSE BILL NO. 1300

That the Senate recede from its amendments as printed on pages 1434-1436 of the House Journal and pages 1090-1092 of the Senate Journal and that House Bill No. 1300 be amended as follows:

Page 2, line 17, remove the overstrike over "~~The board of university and school lands except with respect to~~" and insert immediately thereafter "unclaimed property"

Page 2, line 17, remove the overstrike over "~~activities under~~"

Page 2, line 17, remove the overstrike over "~~chapter 47-30.1~~" and insert immediately thereafter ", mineral leasing and management activities, and surface management activities related to mineral activities"

Page 2, line 18, remove the overstrike over the overstruck period

Page 2, line 19, remove the overstrike over "~~t.~~"

Page 2, line 22, remove the overstrike over "~~u.~~"

Page 2, line 22, remove "t."

Page 2, line 24, remove the overstrike over "~~v.~~"

Page 2, line 24, remove "u."

Page 2, line 27, remove the overstrike over "~~w.~~"

Page 2, line 27, remove "v."

Page 2, line 28, remove the overstrike over "~~x.~~"

Page 2, line 28, remove "w."

Page 2, line 30, remove the overstrike over "~~y.~~"

Page 2, line 30, remove "x."

Re-number accordingly