

# NORTH DAKOTA LEGISLATIVE MANAGEMENT

Minutes of the

## ADMINISTRATIVE RULES COMMITTEE

Tuesday, March 9, 2010  
Roughrider Room, State Capitol  
Bismarck, North Dakota

Senator Jerry Klein, Chairman, called the meeting to order at 10:00 a.m.

**Members present:** Senators Jerry Klein, John M. Andrist, Tom Fischer, Joan Heckaman, Tracy Potter; Representatives Randy Boehning, Chuck Damschen, Duane DeKrey, Jim Kasper, Kim Koppelman, George J. Keiser, Joe Kroeber, Jon Nelson, Blair Thoreson, Francis J. Wald, Lonny Winrich, Dwight Wrangham

**Members absent:** Senator Layton W. Freborg; Representatives Wesley R. Belter, Stacey Dahl, Mary Ekstrom

**Others present:** See [Appendix A](#)

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

### STATE WATER COMMISSION

Chairman Klein called on Mr. Dale Frink, State Engineer, State Water Commission, for comments on State Water Commission rules carried over from the previous committee meeting. Mr. Frink said the rules submitted for Administrative Rules Committee consideration relate to management of sovereign lands but do not make changes in law or rules determining what is included in sovereign lands. He said in 1989 the Legislative Assembly transferred sovereign lands management from the Land Department to the State Engineer. He said a 2005 Attorney General opinion required development of a comprehensive plan for management of sovereign lands. He said the required comprehensive plan has been completed. He said the existence of the comprehensive plan has been beneficial because issues and uses relating to sovereign lands have grown in recent years. He said some rules changes were needed to conform preexisting rules to the comprehensive plan. He said that is the reason the rules were adopted.

Mr. Frink said the rules adopted cover issues relating to uses of sovereign lands, but he understands the concern of the committee is with obtaining information on what is included in sovereign lands and how the phrase "navigable waters" is defined. He said Mr. Charles Carvell, Director, Natural Resources and Indian Affairs Division, Attorney General's office, is the state's most experienced legal adviser on these issues, and he

asked Mr. Carvell to provide information to the committee on these issues.

Representative Keiser asked why these changes were made through rules instead of legislation. Mr. Frink said the comprehensive plan as developed and implemented required adjustment of existing rules of the State Water Commission. Representative Keiser asked why sovereign lands are defined in rules instead of legislation. Mr. Frink said the definition of sovereign lands in the rules is identical to a definition in statute. He said the rules do not make any change in what is included within the coverage of the term sovereign lands.

Mr. Carvell provided testimony ([Appendix B](#)) based on a written outline distributed to the committee. He traced the history of the sovereign lands doctrine.

In response to a question from Representative Keiser, Mr. Carvell said constitutionally it is probably not possible for the state to change the status of sovereign lands because the waters that were navigable at statehood are the basis of the state's sovereign lands.

Senator Klein asked whether the federal government under Section 404 of the Clean Water Act is looking for ways to expand its jurisdiction by expanding what are considered navigable waters for Clean Water Act purposes. Mr. Carvell said that appears to be true.

In response to a question from Representative Kasper, Mr. Carvell said with regard to water and lands at Lake Sakakawea, the Army Corps of Engineers owns most shorelands and land underlying the lake, with the exception of state ownership of the original river channel, and the state cannot preempt federal ownership and control.

Representative Koppelman said as he understands the policy, navigable waters at statehood are certain defined waters but water level changes can change what land is included in sovereign lands of the state. Mr. Carvell said that is correct.

Senator Heckaman said at Devils Lake agricultural lands have been inundated and former owners are continuing to pay minimal property taxes on the property. Mr. Carvell said he does not see any reason why those owners should pay property taxes. He said the state owns the land under sovereign lands coverage, and those owners will be restored to ownership when the water recedes.

Mr. Frink said it is a local decision on property taxes on inundated lands. He said owners of those

inundated properties pay minimal taxes in the belief that it will help them establish ownership rights when the waters recede.

## **SUPERINTENDENT OF PUBLIC INSTRUCTION**

Chairman Klein called on Ms. Linda M. Paluck, Director, School Approval and Accreditation, Department of Public Instruction, for comments on rules of the Superintendent of Public Instruction carried over for consideration from the previous committee meeting.

Ms. Paluck said with regard to the driver's education credential, the rule elimination was adopted because the credential is no longer issued by the Department of Public Instruction but is now issued by the Education Standards and Practices Board.

Senator Heckaman asked whether some credentialing for teachers is done by the Department of Public Instruction and some by the Education Standards and Practices Board. Ms. Paluck said that is correct. Senator Heckaman said there must be some uncertainty among new teachers about where to go to obtain credentials. Ms. Paluck said that is true and the Department of Public Instruction directs individuals to the appropriate place for the credential they are seeking.

Ms. Paluck said with regard to rules for alternative schools, it is important to recall that students at alternative schools do not need to meet state curriculum requirements. She said enactment of 2009 House Bill No. 1400 allows alternative school curriculum variances for diploma requirements.

In response to a question from Senator Heckaman, Ms. Paluck said minimum credits are 22 credit-hours for state curriculum requirements and 21 credit-hours for alternative school diploma requirements. In response to another question from Senator Heckaman, Ms. Paluck said the diploma obtained for alternative education is the same as the diploma received for graduation upon meeting state curriculum requirements.

In response to a question from Representative Boehning, Ms. Paluck said alternative high school diploma requirements were established to allow the possibility of obtaining a diploma for some students who have fallen behind. She said this option allows an alternative for those students who might otherwise drop out of school.

## **AGRICULTURE COMMISSIONER**

Chairman Klein called on Ms. Judy Carlson, Plant Industries Director, Department of Agriculture, for presentation of testimony ([Appendix C](#)) relating to April 2010 rules of the Agriculture Commissioner.

## **ATTORNEY GENERAL**

Chairman Klein called on Mr. Ken Sorenson, Assistant Attorney General, for testimony relating to two sets of rules adopted by the Attorney General. A

copy of Mr. Sorenson's prepared testimony relating to concealed weapons licensing rules is attached as [Appendix D](#). A copy of Mr. Sorenson's prepared testimony relating to DNA collection and analysis rules is attached as [Appendix E](#).

Senator Klein said there appear to be reciprocity issues with concealed weapons licensing recognition among states. Mr. Sorenson said that is correct and there are several categories of state standards on reciprocity. He said some states recognize the North Dakota concealed weapons license and some states do not.

Representative Koppelman asked if North Dakota is now on par with Utah or other states where North Dakota residents have obtained permits or licenses that are recognized by a greater number of states. Mr. Sorenson said it is difficult to address that question, and he can provide more detailed information on reciprocity among states. He provided written information ([Appendix F](#)) later in the meeting on reciprocity among states.

Representative Damschen said proficiency tests for concealed weapons permits were eliminated by 2005 legislation. He asked why the rules being amended still contained provisions relating to proficiency tests. Mr. Sorenson said 2009 legislation created a new classification of concealed weapons permit, deemed to be more likely to achieve reciprocity acceptance in other states, for which a proficiency test is required. Mr. Sorenson said the rules have been updated to provide for proficiency testing for Class 1 licenses but not for Class 2 licenses.

Representative Winrich said a recent change is that the test for the concealed weapons license must be administered in North Dakota. He said previously it was possible to take the test outside the state, and eliminating the option of taking the test in Minnesota has caused some inconvenience in cities along the border. Mr. Lonnie Grabowska, Bureau of Criminal Investigation, said the primary reason for the change is that there is no way to control the content of courses conducted outside the state.

Representative Thoreson said with regard to the DNA collection rules, court sentencing will often include expungement of records upon compliance with terms of probation or suspended sentence. He asked whether the records are automatically expunged at the conclusion of the probation or suspended sentence or if the offender must request expungement. Mr. Sorenson said the individual must request expungement of records.

Chairman Klein called on Mr. Edward Erickson, Assistant Attorney General, for presentation of testimony ([Appendix G](#)) relating to questions asked of the Attorney General by the Administrative Rules Committee relating to imposition of criminal and civil penalties by administrative rules.

Mr. Erickson said administrative agencies do not have inherent authority to impose criminal or civil consequences by rule and must obtain that authority

through statutory provisions. He said the North Dakota Supreme Court follows the modern trend of considering procedural safeguards and standards provided by statutory delegation of authority to determine whether the public is protected against arbitrary power and to ensure that administrative agencies are not given uncontrolled discretion. He said an administrative rule that imposes a criminal or civil penalty must be based on authority delegated to the agency by statute. He said if that authority is delegated by statute, there is no legal impediment to prevent the agency from adopting a rule providing a penalty and enforcing that rule in the appropriate forum.

Representative Keiser said the information presented by Mr. Erickson is very useful and asked whether the testimony could be considered an opinion of the Attorney General. Mr. Erickson said the testimony is not a formal opinion of the Attorney General, but the Attorney General has reviewed and approved this testimony.

Representative Koppelman asked how often the Attorney General rejects agency rules that are adopted and submitted for review. Mr. Erickson said it is not common that an agency adopting rules has no authority to do so. He said more often there are issues that relate to whether the rules contain a clear statement of policy, whether adequate notice of rulemaking has been provided to the public, and whether the agency has exceeded the boundaries of its statutory authority.

In response to a question from Representative Koppelman, Mr. Erickson said penalty provisions in rules are always examined closely during Attorney General review of rules submitted for consideration.

Representative Kasper asked whether it would be possible to request the testimony presented by Mr. Erickson to be designated as an official opinion of the Attorney General. Mr. Erickson said it could be possible to do so if that is the request of the committee. Chairman Klein asked Mr. Erickson to proceed to have the testimony designated as a signed opinion of the Attorney General.

### **OIL AND GAS DIVISION, INDUSTRIAL COMMISSION**

Chairman Klein called on Mr. Bruce E. Hicks, Assistant Director, Department of Mineral Resources, Industrial Commission, for testimony ([Appendix H](#)) relating to rules adopted by the Oil and Gas Division.

Mr. Hicks said several comments were received relating to the rules, most of which related to carbon dioxide storage provisions. He said 130 modifications were made to the proposed rules as a result of comments received. He said a detailed review of comments received and action taken by the division is attached to his prepared testimony.

### **INSURANCE COMMISSIONER**

Chairman Klein called on Ms. Mary N. Hoberg, legal counsel, Insurance Department, for testimony ([Appendix I](#)) relating to several sets of rules adopted by the Insurance Commissioner.

Representative Kasper said the risk retention group rules in North Dakota Administrative Code Section 45-05-05-06 reference liability insurance. He asked what is included within the coverage of liability insurance. Mr. Michael Fix, Life and Health Division Director and Actuary, Insurance Department, said liability insurance includes only property and casualty insurance.

Representative Kasper asked how many providers are licensed for life settlement coverage. Mr. Fix said 10 providers and 16 brokers are licensed for life settlement coverage.

Chairman Klein called on Ms. Melissa Hauer, General Counsel, Insurance Department, for testimony ([Appendix J](#)) relating to several sets of rules adopted by the Insurance Commissioner. Ms. Hauer said the rules covered in her testimony include four chapters of financial solvency rules and chapters covering variable life insurance rules, elimination of obsolete rules on purchasing cooperatives, and boiler inspection rules.

Representative Keiser asked if deferred taxes and deferred compensation issues are covered in the rules. Ms. Carole Kessel, Chief Examiner, Insurance Department, said the National Association of Insurance Commissioners has a committee that has been working on these issues and the accounting practices and procedures manual, but she does not see anything in the rules relevant to domestic insurance companies. Representative Keiser said policyholders in North Dakota of foreign insurers may need protection so these issues may be important for the commissioner to consider.

### **STATE PLUMBING BOARD**

Chairman Klein called on Mr. Jack Skaley, Secretary and Chief Inspector, State Plumbing Board, for testimony ([Appendix K](#)) relating to rules adopted by the State Plumbing Board.

Representative Keiser said the State Plumbing Board has adopted the Uniform Plumbing Code as the State Plumbing Code, with exceptions. He asked whether political subdivisions are allowed to adopt stricter or more lenient standards for local plumbing codes. Mr. Skaley said political subdivisions are allowed to adopt stricter provisions but are not allowed to adopt more lenient standards.

### **DEPARTMENT OF HUMAN SERVICES**

Chairman Klein called on Ms. Julie Leer, legal counsel, Department of Human Services, for testimony relating to five sets of rules adopted by the Department of Human Services. Ms. Leer distributed copies of prepared testimony relating to child care assistance ([Appendix L](#)), eligibility for Medicaid

([Appendix M](#)), child support guidelines ([Appendix N](#)), licensing of child-placing agencies ([Appendix O](#)), and services for transition-aged youth at risk ([Appendix P](#)).

Senator Klein inquired about the nature of the child support guidelines changes, and Mr. James Fleming, Deputy Director and Chief Legal Counsel, Child Support Enforcement, Department of Human Services, said the rules changes relate primarily to treatment of atypical overtime and nonrecurring bonuses and treatment of obligors' loss of employment.

Representative Keiser said there must be difficult situations to determine what is atypical for earnings purposes. Mr. Fleming said complications occur and the rules are geared toward consideration of annual earnings to account for bonuses or increased hours of employment on a seasonal basis.

Chairman Klein called on Ms. Leer to provide information ([Appendix Q](#)) on behalf of the Department of Human Services relating to penalty provisions in rules adopted by the department and application of standards from other than state or federal law which have not been adopted as administrative rules.

Senator Fischer asked whether all penalties imposed by the Department of Human Services are in law or administrative rules. Ms. Leer said that is correct. Senator Fischer said as he understands the procedure, if an aggrieved party prevails against the department in an administrative hearing, the department has the option to refuse to comply with the administrative hearing conclusion and the aggrieved party then has to appeal to the district court. Ms. Leer said that is correct.

Representative Kasper asked if there are any programs administered by the Department of Human Services which benefit nonresidents or noncitizens. Ms. Leer said she believes there are such programs. Representative Kasper asked if he can be provided information on the number of citizens, noncitizens, and nonresidents receiving benefits under programs administered by the department. Ms. Leer said the department staff would be glad to discuss the issue with Representative Kasper to identify what information he is seeking and provide the information.

### ATTORNEY GENERAL

Chairman Klein called on Mr. Erickson. Mr. Erickson said he spoke with the deputy attorney general regarding an earlier question from the committee about having the information he presented to the committee designated as an opinion of the Attorney General. He said the Attorney General's office would like to have the questions raised by the committee presented in the format seeking a formal opinion. He said the Attorney General's office would be pleased to work with committee counsel to work through the process.

Chairman Klein said the committee would simply like the four questions already addressed in the information presented by Mr. Erickson to be answered in the form of an opinion of the Attorney General.

Representative Keiser said the answers provided in Mr. Erickson's testimony were sound, but the committee would like the responses issued as an opinion of the Attorney General.

### BILL DRAFT

Chairman Klein called on committee counsel to review a bill draft [[10020.0100](#)] prepared for committee consideration. Committee counsel said the bill draft was prepared as a result of discussion at the previous committee meeting regarding the statutory requirement for an agency to maintain an organizational rule in its administrative rules. He said the bill draft makes it optional for an administrative agency to have an organizational rule in its published administrative rules.

**It was moved by Representative Keiser, seconded by Representative Nelson, and carried on a roll call vote that the Administrative Rules Committee approve and recommend to the Legislative Management the bill draft to make it optional, rather than mandatory, for an agency to include an organizational rule in its administrative rules.** Voting in favor of the motion were Senators Klein, Andrist, Fischer, Heckaman, and Potter and Representatives Boehning, Damschen, DeKrey, Keiser, Koppelman, Kroeber, Nelson, Thoreson, Wald, Winrich, and Wrangham. Representative Kasper voted "nay."

### ADMINISTRATIVE CODE PUBLICATION

Chairman Klein called on committee counsel for information on publication of the Administrative Code in a CD-ROM format. Committee counsel said at the previous meeting, the committee approved changing the publication of Administrative Code from a paper replacement page format to a CD-ROM format. He said this change will result in substantial savings to the state.

Committee counsel said the reduced cost to the state of using CD-ROM publication also makes it possible to substantially reduce the cost of subscriptions to the Administrative Code. He said under the current publication format, subscribers pay \$460 for an initial set of the Administrative Code and \$260 per year for update replacement pages. He said under the CD-ROM publication format, subscribers will not have to pay for an initial set of the Administrative Code because each CD-ROM will contain the entire current Administrative Code. He said subscriber costs for annual subscriptions can be reduced from \$260 to \$60, which should cover the cost of publication and distribution for the state. He said some subscribers may want additional copies of the CD-ROM, and state and local government entities that receive a free copy of the Administrative Code may want additional copies. He said he would suggest that for subscribers receiving one subscription, either free of charge or at a fee of \$60 per year, additional subscriptions could be provided at a cost of \$30. He

said it is not necessary for the Administrative Rules Committee to take formal action to establish subscription costs because that function is assigned to the Legislative Council by statute. He said he wanted to present the proposed subscription costs to the committee to see if committee members are in agreement with the proposed costs. Committee members expressed agreement with the proposed pricing.

### **DEPARTMENT OF TRANSPORTATION**

Chairman Klein called on Ms. Linda Butts, Deputy Director, Driver and Vehicle Services, Department of Transportation, for testimony ([Appendix R](#)) relating to penalties imposed by rules and any standards imposed by rules that are drawn from other than state or federal law.

In response to a question from Representative Koppelman, Ms. Butts said administrative rulemaking is a better approach for the Department of Transportation because federal requirements often change and require state compliance on a short timeline. She said because of the length of time between legislative sessions, it may be impossible to make legislative changes in compliance with federal timeline requirements, but administrative rulemaking can be used to achieve state compliance.

### **SECURITIES COMMISSIONER**

Chairman Klein called on Ms. Karen Tyler, Securities Commissioner, Securities Department, for presentation of information ([Appendix S](#)) regarding standards for North Dakota investors in real estate investment trusts (REITs).

Ms. Tyler said the Administrative Rules Committee requested the Securities Commissioner to meet with interested parties regarding offer and sale of REITs in North Dakota. She said the policy applied by the North Dakota Securities Commissioner is the guidelines used by the North American Securities Administrators Association relating to suitability of shareholders. She said the current guideline requires REIT investors to have a minimum annual gross income of \$70,000 and net worth of \$70,000 or a minimum net worth of \$250,000 with no minimum income requirement. She said INREIT and Dakota REIT have obtained approval from the Securities Commissioner for a reduced standard that the investor must have a minimum of annual gross income of at least \$45,000 and a net worth of \$45,000 or a net worth of at least \$150,000, without consideration of annual income.

Ms. Tyler said in the meeting with interested parties representing North Dakota REITs, representatives requested elimination of investor standards. She said the request was declined. She said she believes the standards required are important safeguards to protect small investors with regard to REIT investments that have less liquidity than other investment options.

Representative Koppelman said he has no doubt that investments have risks. He said the issue he sees as significant is that the standards applied do not have the force of law because they have not been adopted as administrative rules. He asked whether Ms. Tyler sees that as a significant concern. Ms. Tyler said suitability standards are certainly viewed as an important protection for small investors. She said if the Securities Department has to change the guidelines to administrative rules, the department will do so, but for 23 years the standards have functioned well for the protection of North Dakota investors.

Representative Koppelman said enforceability is an issue if the guidelines lack the force of law. Ms. Tyler said that is a valid concern, but the Securities Department has never encountered a challenge of the validity of guidelines.

Representative Koppelman asked whether counterpart agencies in other states impose these standards by rules or statutes. Ms. Tyler said in some states the guidelines are imposed by statute, in some states they are imposed by rule, and in some states they are imposed by policy.

Representative Kasper said the discussion of risks described in prospectuses appears to be based on common required warnings of risks of investment. Ms. Tyler said all material risks must be disclosed in a prospectus for securities offerings.

Representative Keiser asked if the issue is suitability of investments, why REITs would be considered riskier investments than common stock, which does not have net worth requirements for investors. Ms. Tyler said nonexchange traded securities, such as certain REIT offerings, are not as liquid as common stock because they are not sold on exchanges. She said these types of investments lack a history of performance during a period of economic crisis in real estate, and the REITs in question were founded after the 1980s real estate decline in North Dakota.

Representative Kasper asked whether it is true that these standards of the North American Securities Administrators Association were established to address schemes or abuses that occurred in other states. Ms. Tyler said that is true, but market forces across states are very similar. She said she does not believe it is appropriate to eliminate standards of public protection just because North Dakota has not experienced all of the problems experienced elsewhere.

Chairman Klein called on Mr. Gary Pearce, Gary Pearce Financial Services, for comments on standards applied for investments in real estate investment trusts. Mr. Pearce said he has been in the securities business since 1970 and started selling REITs to investors in 1986. He said his personal experience with customers is that REITs provide about 9 percent annual yield. He said INREIT investors would have earned 9 percent to 10 percent since 2002 after sales charges.

Mr. Pearce said North Dakota REITs are not comparable to those in other states that have generated concerns for regulators. He said the Securities Commissioner mentioned that liquidity of REIT investments is a matter of concern. He said he has been able to cash out INREIT investors within three weeks.

Mr. Pearce said he believes an investor should be allowed to decide on the investment. He said the restrictions imposed based on income and net worth interfere with the investor's freedom to invest in REITs.

Representative Kasper asked what current standards exist for investors in REITs and what Mr. Pearce believes the standard should be. Mr. Pearce said the current standard requires a \$45,000 annual income before an investor may invest in REIT securities. He said he believes restrictions are inappropriate because investors have many other investment choices for which restrictions do not exist.

### STATE DEPARTMENT OF HEALTH

Chairman Klein called on Mr. L. David Glatt, Chief of the Environmental Health Section, State Department of Health, for information ([Appendix T](#)) relating to legal authority of the United States Environmental Protection Agency (EPA) to require states to comply with or implement federal rules.

Representative Nelson said under the Clean Air Act it appears the EPA is seeking authority to regulate carbon dioxide emissions. He asked how those regulatory efforts fit into this process. Mr. Glatt said once the EPA has determined that a public health issue exists, regulatory proceedings of the EPA can move forward. He said the EPA has made the determination that a public health issue exists regarding carbon dioxide emissions.

Representative Nelson asked whether he would prefer regulation by the EPA or by Congress through legislation. Mr. Glatt said the State Department of Health is on record favoring regulation by congressional action. He said the EPA has not been

consistent over the years, and regulatory efforts change as administrations change.

Representative Wald asked if the EPA is considering becoming involved in regulation of flared gas. Mr. Glatt said volatile organic compound emissions from the flaring of gas have drawn EPA attention, and the State Department of Health has been monitoring the situation and meeting with industry representatives and others on this issue.

### COMMITTEE DISCUSSION

Representative Keiser said it appears necessary to have further meetings between the Securities Commissioner and representatives of REIT entities. He said it may be appropriate for the chairman to appoint a subcommittee of committee members to sit in on the meeting.

Committee counsel said the Legislative Management rules governing interim committees provide that a subcommittee may not be appointed without prior approval of the Legislative Management chairman. He said this does not mean that interested committee members could not sit in on the meeting.

Chairman Klein asked committee counsel to discuss with the Legislative Management chairman appointment of a subcommittee to sit in on meetings between REIT representatives and the Securities Commissioner.

Representative Winrich said the committee should explore the feasibility of moving the securities standards from policy standards to administrative rules to provide the force of law.

No further business appearing, Chairman Klein adjourned the meeting at 3:50 p.m.

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John Walstad  
Code Revisor

ATTACH:20