

NORTH DAKOTA LEGISLATIVE MANAGEMENT

Minutes of the

NATURAL RESOURCES COMMITTEE

Friday, August 27, 2010

Ionian/Mediterranean Room, Holiday Inn Riverside
Minot, North Dakota

Senator Robert S. Erbele, Chairman, called the meeting to order at 9:00 a.m.

Members present: Senators Robert S. Erbele, Arden C. Anderson, Bill Bowman, David Hogue, Ryan M. Taylor, Constance Triplett; Representatives Mike Brandenburg, Donald L. Clark, David Drovdal, Lyle Hanson, Bob Hunsakor, Bob Martinson, Shirley Meyer, Kenton Onstad, Todd Porter, Mike Schatz, Elwood Thorpe

Members absent: Representatives Stacey Dahl, Chuck Damschen, James Kerzman

Others present: Tom Conklin, State Representative, Douglas

Blair Thoreson, State Representative, Fargo

See [Appendix A](#) for additional persons present.

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

SURFACE OWNER ISSUES

Mr. Ron Ness, President, North Dakota Petroleum Council, made a presentation ([Appendix B](#)) on the North Dakota Petroleum Council Surface Owner Info Center and the Split Estate Task Force. In addition, he provided a handout ([Appendix C](#)) on the Surface Owner Information Center. He said this state's surface owner damages law is a model for the other states. He said it was the first surface owner damages Act. He said it is one of the most stringent in the United States. He said the North Dakota Petroleum Council may not discuss the prices paid surface owners by oil companies because of antitrust laws.

In response to a question from Senator Erbele, Mr. Ness said the North Dakota Petroleum Council is made up of all levels of the petroleum business and some economic development officials. He said some of the 15 committees meet on a monthly basis, and others meet quarterly or as needed.

Mr. Eric Dillé, Chairman, North Dakota Petroleum Council Split Estate Task Force, Denver, Colorado, made a presentation (on page 3 of [Appendix B](#)) on EOG Resources and the Split Estate Task Force. He said EOG Resources produces 13.5 million barrels of oil and pays \$79.9 million in gross production taxes for oil. He said EOG Resources produces 3.5 million cubic feet of natural gas and pays \$.6 million in gross production taxes. He said EOG Resources pays

\$492,297 in property taxes. He said EOG Resources has over 100 full-time employees in Stanley. He said the North Dakota Century Code allows for annual payments or a lump sum payment to surface owners, not annual payments and lump sum payments. He said surface owner payments are different from easements for pipelines and wind towers because the payments are for damages. He said the mineral owner has the right to access minerals and, therefore, is not paying for access.

Ms. Susan Casale, Land Professional, Marathon Oil Company, made a presentation ([Appendix D](#)) on Marathon Oil and its presence in North Dakota. In addition, she reviewed the site selection process and process for working with surface owners.

Mr. Jeff Herman, Region Land Manager, Petro-Hunt, L.L.C., made a presentation ([Appendix E](#)) on the determination of payments to surface owners. He said Petro-Hunt uses United States Department of Agriculture values for land and multiplies those values by four as a starting point for surface owner damages.

In response to a question from Senator Taylor, Mr. Herman said 75 percent of surface owners settle on the first offer. He said confidentiality clauses in surface owner agreements are not the norm.

In response to a question from Representative Drovdal, Mr. Herman said the lump sum may be taken all at once or divided into annual payments.

In response to a question from Representative Onstad, Mr. Herman said Petro-Hunt overcompensates surface owners by paying the actual land value multiplied by four.

In response to a question from Representative Onstad, Mr. Herman said there is no duration term in the surface owner agreement.

In response to a question from Representative Onstad, Mr. Herman said Petro-Hunt does not issue a take-it-or-leave-it ultimatum early in negotiations.

In response to a question from Representative Onstad, Mr. Herman said Petro-Hunt uses the United States Department of Agriculture values as a guide and would consider a different value if a landowner could show above-average property value.

In response to a question from Senator Erbele, Mr. Herman said there would be an inflation adjustment in an annual payment; however, he has never had anyone want annual payments over a one-time upfront payment.

In response to a question from Representative Meyer, Mr. Herman said the North Dakota Petroleum

Council committees may not discuss bad actors that are paying too little because of antitrust laws. He said these laws prohibit the discussion of price.

In response to a question from Representative Meyer, Mr. Herman said a surface owner may take the money or go to court. He said if the surface owner settles out of court, the money is taken out of escrow. He said there is no statutory provision as to whether payment from escrow may be done on agreement or is required under court order.

In response to a question from Representative Meyer, Mr. Dillé said there is a \$100,000 payment to the tribe to explore for oil. He said there is a \$60,000 tribal employment rights fee and a \$40,000 fee for roads.

In response to a question from Representative Meyer, Mr. Dillé said the \$60,000 fee is sometimes called a siting fee but is a tribal employment rights fee.

Representative Meyer said the tribal-state compact does not allow a tribal employment rights fee.

In response to a question from Representative Drovdal, Mr. Herman said the surface owner cannot deny access because of the shared right.

Mr. Ness said it would not help to have surface owners on the North Dakota Petroleum Council committees to fight over each case in which a surface owner feels aggrieved by an oil company. He said it may help to have legislators or other representatives of surface owners on the committees. He said setting the price for surface owner damages legislatively is a bad precedent. He said no one price fits all, and a landowner may wish for in-kind compensation instead of monetary compensation. He said the present system allows flexibility.

In response to a question from Senator Hogue, Mr. Dillé said of the 17 incidents in which EOG Resources has not settled with a surface owner and has explored or is exploring for oil on that land, the majority of surface owners do not own any mineral interests. He said money is a part of the issue, but some surface owners do not want oil development, for example, a gentleman with a hunting preserve. He said one of the incidents is in litigation.

In response to a question from Representative Thorpe, Mr. Dillé said the reason that a wind tower easement receives \$5,000 to \$8,000 per year and a surface owner agreement for oil development receives \$5,000 to \$8,000 one time is because the surface owner owns the surface as to a wind tower and an easement must be obtained from the wind developer and in a mineral lease the surface owner receives damages.

Mr. Ness said wind developers pay no sales or production tax, 15 percent of the property tax, and no corporate income tax as a result of production tax credits. He said oil development results in payment of a lot of taxes. He said not every oil company is a large company, and some run stripper wells and marginal wells. He said if costs increase, then these businesses may be run out of existence.

In response to a question from Representative Schatz, Mr. Dillé said lawmakers may change or place conditions on the dominance of the mineral interest.

In response to a question from Representative Onstad, Mr. Dillé said Wyoming has nonbinding arbitration for surface owner damages. Mr. Ness said the North Dakota Petroleum Council has reviewed Wyoming's law, and over 75 percent of mineral rights are federal in Wyoming.

Mr. Lynn Helms, Director, Department of Mineral Resources, made a presentation ([Appendix F](#)) on statutes and rules for the conservation of oil and gas. He reviewed recent changes in rules. In addition, he made a presentation ([Appendix G](#)) on the discount for oil and costs added to oil from the cost of production by state taxes, purchasers/aggregators, transporters, refiners, product shippers, jobbers, and retailers.

Mr. Helms said most of the issues presented last meeting came from the last oil boom. He said the Industrial Commission does not have any authority relating to the agreement with surface owners. He said the duties of the Industrial Commission relate to conservation of the resource and correlative rights. He said the largest concern he hears from surface owners is when a surface owner discovers that a well has been staked on the surface owner's land without notification. He said surveyors should engage with surface owners before staking. He said staking without notification is disruptive to the surface owner, and something could be done legislatively to address this issue. He said if his office receives one written complaint from a surface owner, then his office does not renew a temporary abandoned status. He said the siting jurisdiction as to saltwater injection is limited to geology. He said many problems the committee has heard are real, but are 10 years or more old. He said the rules have been updated to address these problems, and his office has addressed these problems when allowed to by law.

In response to a question from Senator Bowman, Mr. Helms said he polls his staff and reviews legislation before developing a potential rule. He said once the potential rule is in written form, it is shown to private attorneys who are experts in oil and gas law. He said after this, the rulemaking process begins with comments from anyone. He said the Industrial Commission must adopt the rules, and the rules are sent to the Administrative Rules Committee after adoption.

In response to a question from Senator Hogue, Mr. Helms said the Environmental Protection Agency (EPA) and the Interstate Oil and Gas Compact Commission have both studied fracture jobs twice. He said there have been no incidents of contamination of freshwater due to fracture jobs. He said the tests were driven by the development of coalbed methane. He said the EPA has adopted rules on coalbed methane. He said there was a bad cement job in Rifle, Colorado, that caused a leak into a creek. He said North Dakota has very strict cement rules. He said North Dakota requires multiple

pressure tests. He said EPA regulation can only add time to the process.

In response to a question from Senator Taylor, Mr. Helms said visits to well sites are based on a risk-based data management system. He said during the siting, cementing, and surface casings portion, a well site is checked one time per week for a vertical well and two times a week for a horizontal well. He said once a well is in production, it is checked one time per month and then one time per quarter. He said injection wells are checked one time per month. He said he is about to hire the 15th field inspector and is looking to hire less-trained individuals for simple inspections.

In response to a question from Representative Hunskor, Mr. Helms said his counterpart in Alberta thinks that mediation is a great process. He said Manitoba and Alberta like the process. He said there is 100 percent split estates in Alberta. He said all minerals belong to the Crown. He said Wyoming has had positive results with arbitration.

In response to a question from Representative Hunskor, Mr. Helms said if there is a problem with the well, his office first calls the pumper. He said he allows the company to take care of the problem, and if the problem is not fixed, a letter is sent to the pumper. He said his office can file a complaint through the Attorney General's office. He said this process moves slowly. He said most companies negotiate stipulated agreements to forgive part of the fines as part of this process. He said this works 70 percent of the time. He said a couple of operators cause most of the problems. He said these operators have dwindled over the years as a result of enforcement.

In response to a question from Representative Onstad, Mr. Helms said the state of North Dakota ultimately is responsible for cleaning up abandoned wells. He said there is an abandoned well restoration fund and a cash bond fund with approximately \$600,000 total in these funds to pay for cleanup.

In response to a question from Senator Triplett, Mr. Helms said the \$600,000 may not be enough because of the increase in oil activity. He said he is looking at the issue and considering legislation.

In response to a question from Representative Brandenburg, Mr. Helms said a 2007 North Dakota State University study showed that 20 percent to 25 percent of mineral owners are surface owners. He said the study showed that 51 percent of mineral owners are North Dakota citizens, and 49 percent are from out of state. He said most of the owners are individuals and not land companies.

Mr. Helms said the state is the No. 1 extractor from the revenue stream for oil from production to consumer. He said there can be gouging if there is a refinery or a pipeline capacity upset which creates opportunities, especially for purchasers. He said the Tesoro Refinery shutdown caused a recent increase in the oil discount.

In response to a question from Representative Meyer, Mr. Helms said pipelines are regulated by the

Federal Energy Regulatory Commission, the tariff is determined early in the project, and the tariff does not change for a long period of time.

In response to a question from Representative Meyer, Mr. Helms said taxes apply to blowback in the pit based upon the type of oil. He said waste oil is exempt from taxation. He said blowback oil is tested and is taxed, and royalties must be paid on the oil. He said it may take up to two months for the royalty to appear in the mineral owner's check.

In response to a question from Representative Onstad, Mr. Helms said a recent Attorney General's opinion stated that the Industrial Commission has the authority over siting a saltwater injection well as it relates to traffic control. He said for the next rulemaking process his office is looking at including factors other than geology in the siting of a saltwater injection well.

Mr. Daryl Peterson, land and mineral owner, Antler, presented written testimony ([Appendix H](#)) to the committee on the need for consequences for not reporting spills or not complying with rules on proper dikes, inadequate equipment, or ignoring environmental and property damage to the landowner.

In response to a question from Representative Onstad, Mr. Peterson said negotiation and arbitration create an atmosphere of cooperation.

In response to a question from Representative Thorpe, Mr. Peterson said there may need to be more state personnel because property is being harmed by oil development. He said state response to spills is slow and minimal. He said there is a lot of animosity in his area as to a couple of oil companies.

Mr. Frankie Kartch, landowner in Mountrail County, Duluth, Minnesota, provided written testimony ([Appendix I](#)) on legislative proposals to:

1. Require a written agreement between oil companies and landowners before drilling of wells and disposal of waste on a landowner's property.
2. Require the state Oil and Gas Division to give equal weight to the landowner's concerns with an emphasis on the protection of clean water.
3. Hold oil companies and the state responsible for any cleanup over the lifetime of the reserve pit.

In addition, Mr. Kartch provided a video of an oil pit on his property. He said he was suing EOG Resources over the pit and the reclamation of the pit. He said the negotiations between him and EOG Resources involved an offer of \$8,000, take it or leave it. He said EOG Resources would not make an annual payment. He said the free market needs to be brought to surface owner and oil company relationships. He said a closed-loop system should be mandated so that there are not any reserve pits.

In response to a question from Senator Triplett, Mr. Kartch said all of the issues relating to oil development have not been thought through, for example, the cost and availability of purchasing insurance for property with a reclaimed pit.

In response to a question from Senator Erbele, Mr. Kartch said Article I, Section 16, of the Constitution of North Dakota states that private property shall not be taken for the use of any private entity unless the property is necessary for conducting a common carrier or utility business. He said oil development is neither. He said oil companies should be responsible for the pit.

In response to a question from Senator Hogue, Mr. Kartch said there has not been any negotiation by EOG Resources as to the well site. He said his house is about one-half mile away from the well site. He said his main concern is the close proximity of the well site to water.

In response to a question from Representative Porter, Mr. Kartch said EOG Resources has a huge swatch of leases in the area and could have moved the well site. He said the well site was a wildcat well, and initial production was 58 barrels a day.

Mr. Courtney Krenz, Operations Manager, Prairie Disposal, Tioga, testified on the waste in the pit. He said he owns a company that disposes of the pit waste. He said waste removed from the well site cannot be directly buried. He said if he were to bury it offsite, he needs to monitor it for 30 years. He said pits are unregulated mini waste dumps. He said closed system drilling rigs should be required because they do not have a pit. He said the pit devalues the land.

In response to a question from Representative Meyer, Mr. Krenz said the State Department of Health is not allowed on well sites because it does not have jurisdiction.

Mr. Helms said cuttings and mud, which are left in the pit, are Class 2 waste and are not hazardous waste under federal law. He said the consolidation of all waste from all pits would be a hazard. He said the video showed a violation by EOG Resources because the nets were down. He said there were no birds in the pit. He said all the oil and water was removed from the pit before it was buried. He said the pit has to be clay soil-lined. He said he was present the day the pit was reclaimed. He said fly ash was added to solidify the matter in the pit. He said the pit was tested for contamination. He said four feet of clay and topsoil was placed back over the pit.

In response to a question from Senator Triplett, Mr. Helms said the oil from the pit is placed in a tank and taken to a waste oil treater. He said the water is taken to a saltwater disposal site. He said his office allows one year for reclamation. He said the pit needs at least one good drying season before being reclaimed. He said someday there will be no liquids in the pits due to regulation.

In response to a question from Senator Triplett, Mr. Helms said the fly ash makes a solid material that is impervious to water. He said his office has found diesel in a reclaimed pit and made the operator dig out the pit matter at a cost of approximately \$250,000. He said the State Department of Health regulates what type of fly ash can be used to reclaim a pit.

Committee counsel presented a memorandum entitled [Surface Owner Protection Acts and Oil and Gas Development](#). The memorandum relates to oil and gas production damage compensation Acts in this state and other states. In addition, committee counsel provided a copy of the boilerplate oil and gas lease surface damage agreement ([Appendix J](#)) of the Land Department. He said the compensation received by the Land Department is the same as private landowners. He said the department asks the company what it is paying private landowners and accepts the same payment in nearly all cases. He said payments are generally \$1,600 to \$2,000 per acre for the well pad and road. He said all of the Land Department's well sites are on grasslands. He said companies pay an additional \$25 per rod for roads if the road is relatively long. He said similar to what is offered many private surface owners, within the past year or two many companies started paying an annual fee. He said the annual fee ranges from \$1,000 to \$2,000 per well site. In addition, he provided a letter ([Appendix K](#)) by Mr. Richard B. Baer on surface owner issues.

REPORT ON STUDY OF LINKING AND IMPROVING SITES ALONG THE SIBLEY AND SULLY HISTORIC TRAILS

Mr. Mark Zimmerman, Director, Parks and Recreation Department, provided testimony based on a handout ([Appendix L](#)) on the study mandated by 2009 Senate Bill No. 2309 on the linking and improving of public sites along the Sibley and Sully historic trails. He said there were three basic options--do nothing; simple development of enhancements and signage; and significant development, including property purchases.

In response to a question from Representative Hanson, Mr. Zimmerman said the study provided an estimate of cost but did not investigate funding sources.

Mr. Bill Jensen, Big Game Biologist, Game and Fish Department, made a presentation ([Appendix M](#)) and provided the full report entitled *Report for Senate Bill 2309: Review of Potential Developments to Sibley and Sully Battlefields and Trails into a Series of Cultural History and Wildlife Recreation Areas* ([Appendix N](#)).

Mr. Mike McEnroe, North Dakota Chapter of the Wildlife Society, presented information on the study. He said Ducks Unlimited may be interested in partnering in the eastern portion of the state. He said the federal government may be interested in cooperating on federal lands. He said the tribes would have to be consulted regarding the study and the use of tribal lands.

In response to a question from Representative Thorpe, Mr. Zimmerman said the study did not include interpretive centers because of maintenance costs.

In response to a question from Senator Erbele, Mr. Jensen said 400,000 tourists come to the state

each year, and if one-half spend \$10 more, that is \$2 million. He said the Custer Battlefield is in the middle of nowhere, and it has 400,000 to 500,000 visitors a year. He said the Sibley and Sully routes have great potential for people coming from the east to the Big Horn Battlefield.

In response to a question from Senator Erbele, Mr. Jensen said heritage tours could be tied into these trails.

In response to a question from Representative Schatz, Mr. Zimmerman said the State Historical Society owns a small portion of the battlefields. He said these sites need better signage. He said not all battlefields are owned by the state. He said the Whitestone Hill site is approximately 40 acres, and the Killdeer Mountain site is approximately 1 acre.

In response to a question from Senator Bowman, Mr. Jensen said tying tourism and hunting together for these trails brings in more money for the project from nongovernmental organizations.

Mr. McEnroe said Basin Electric Power Cooperative has provided 320 acres around Long Lake and might be able to provide funding to preserve the view shed for the battle sites.

In response to a question from Senator Bowman, Mr. McEnroe said he is not recommending buying land in the west because of the National Grasslands providing great opportunity for public access. He said this report is not subterfuge to buy hunting land under the appearance of preserving history.

Senator Erbele said the hunting, tourism, and conservation groups need to work together with the landowners. He said incentive programs for landowners work the best.

STATE LANDS STUDY

At the request of Chairman Erbele, committee counsel presented a memorandum prepared for Senator Taylor in October 2008 entitled [Leasing of State Lands](#).

In response to a question from Senator Erbele, committee counsel said the length of the lease and the prohibition on a preference to the current lessee are contained in the Constitution of North Dakota.

WEED CONTROL STUDY

At the request of Chairman Erbele, committee counsel presented a concurrent resolution draft [\[13007.0100\]](#) urging Congress to return to the state of North Dakota land controlled by the Army Corps of Engineers which is not necessary for flood control.

Representative Brandenburg said oil companies need access to Lake Sakakawea for water and are being denied access to the water by the Army Corps of Engineers. He said the resolution draft should be amended to address this issue.

Senator Triplett said Garrison Dam is for flood control and for other authorized purposes. She said on page 1, line 2, "flood control" should be changed to "authorized purposes".

Senator Hogue said the property should be returned to the landowners, not the state.

It was moved by Representative Meyer, seconded by Representative Hanson, and carried on a roll call vote that Congress be urged to return to the riparian landowner land controlled by the Army Corps of Engineers which is not necessary for authorized purposes. Senators Erbele, Bowman, Hogue, Taylor, and Triplett and Representatives Brandenburg, Hanson, Hunsakor, Martinson, Meyer, Onstad, and Thorpe voted "aye." Representatives Clark, Porter, and Schatz voted "nay."

Representative Porter said the Army Corps of Engineers giving the land back to the landowner will not be considered by the Army Corps of Engineers. He said if the land were returned to the state, the state would work with landowners to address the concerns of the landowners. He said the return of land to the state has already worked in South Dakota. He said it would be administratively burdensome to return the land to landowners because the people lost the land in the 1950s, and some have sold the land between that time and now. He said this raises the issue of whether the old or new owner should receive the land. He said the federal government paid for the land and may want the money paid returned. He said this adds complications.

Senator Hogue said returning the land to the riparian landowner is a good opening position. The fallback position should be return of the property to the state. He said he supports the return to the landowner because that is the right thing to do. He said rights relating to changing courses of water are determined all the time and can be done in this instance. He said the land should be allocated to the current landowner.

It was moved by Representative Brandenburg, seconded by Senator Triplett, and carried on a roll call vote that the concurrent resolution draft urging Congress to return to the riparian landowner land controlled by the Army Corps of Engineers which is not necessary for authorized purposes be approved and recommended to the Legislative Management. Senators Erbele, Bowman, Hogue, Taylor, and Triplett and Representatives Brandenburg, Clark, Hanson, Hunsakor, Martinson, Meyer, Onstad, and Thorpe voted "aye." Representatives Porter and Schatz voted "nay."

DISCUSSION

Senator Triplett said the committee should consider legislation to address the concerns of surface owners.

Chairman Erbele said surface owner damages are not within the scope of the study.

Representative Onstad said a mediation board bill will be introduced during the legislative session.

In response to a question from Representative Meyer, committee counsel said the study is of severed and abandoned mineral rights. He said the legislative

history reveals the impetus for the study was a desire to have abandoned minerals returned to the surface owner.

Senator Erbele said when a person purchases land without mineral rights that is a known fact.

Senator Triplett said prior notification of staking and mediation does not alter rights.

Senator Taylor said Mr. Helms spoke highly of Manitoba and Alberta and the mediation process.

Representative Brandenburg said 50 percent of the complaints are because of surveyors staking land without giving notice.

Representative Porter said 96 percent or 97 percent settle. He said the other 3 percent would not be happy no matter how much money was offered. He said the industry is working on the issues, and the committee would need two more meetings to address these issues. He said there is not enough time left in the interim to address a bill of that magnitude.

Senator Erbele said he was glad the committee could hear testimony from the 3 percent. He said this state's legislature is a citizens' legislature, and it is important for all to have a voice.

Representative Onstad said although 3 percent do not settle immediately, there are many people who settle immediately but are not happy.

Representative Hunskor said there are some habitual complainers, and there are some people with legitimate concerns. He said if there is some way to minimize the issues between landowners and oil companies, the committee should address the issues.

Representative Hanson said the issues can be addressed during the legislative session.

Chairman Erbele said he would not ask for a motion to adjourn sine die in case these issues required another meeting; however, he did not expect for there to be another meeting.

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

No further business appearing, Chairman Erbele adjourned the meeting at 3:10 p.m.

Timothy J. Dawson
Committee Counsel

ATTACH:14