

NORTH DAKOTA LEGISLATIVE COUNCIL

Minutes of the

ADVISORY COMMISSION ON INTERGOVERNMENTAL RELATIONS

Monday, April 29, 2002
Harvest Room, State Capitol
Bismarck, North Dakota

Representative Scot Kelsh, Chairman, called the meeting to order at 9:00 a.m.

Members present: Representatives Scot Kelsh, Kim Koppelman; Senator Herb Urlacher; Citizen Members Bob Frantsvog, Les Korgel, Jon Martinson, Maxine Olson-Hill, Devra Smestad

Members absent: Senator Dennis Bercier; Citizen Members Randy Bina, Donny L. Malcomb; Governor John Hoeven

Others present: Wade Williams, North Dakota Association of Counties, Jamestown

John W. Hoganson, Geological Survey, Bismarck
Fern Swenson, Paul Picha; State Historical Society Bismarck

David Sprynczynatyk, Tim Horner, Dave Leftwich; Department of Transportation, Bismarck

Connie Sprynczynatyk, North Dakota League of Cities, Bismarck

Marcy Dickerson, Gary Anderson; Tax Department, Bismarck

DISCOVERY OF CULTURAL AND PALEONTOLOGICAL RESOURCES STUDY

At the request of Chairman Kelsh, Mr. John Bjornson, commission counsel, reviewed a memorandum entitled *Discovery of Cultural Resources Within Local Road Projects - Funding Mechanisms - Background Memorandum*. He said the 1999 Legislative Assembly considered, but did not pass, House Bill No. 1236, which would have established a cost-sharing method to assist counties, cities, and townships in paying the additional costs associated with the discovery of cultural resources during highway construction or maintenance. Although the state has laws protecting cultural and paleontological resources, he said, there is no cost-sharing mechanism to assist local governments when cultural or paleontological resources are unexpectedly discovered during a local road project.

Mr. John W. Hoganson, State Paleontologist, Geological Survey, said the fossil excavation and restoration fund provided for under North Dakota Century Code (NDCC) Section 54-17.4-09.1 consists primarily of a large donation received from an individual. He said in 1989 the Legislative Assembly adopted legislation to protect paleontological

resources because fossils were being removed from the state at an alarming rate. He said the Industrial Commission was given the authority to protect fossil resources.

In response to a question from Senator Urlacher, Mr. Hoganson said the fossil excavation and restoration fund is being used to renovate the paleontological laboratory and set up a fossil exhibit.

In response to a question from Representative Kelsh, Mr. Hoganson said fossils are more likely to be discovered in the western portion of the state.

In response to a question from Senator Urlacher, Mr. Hoganson said the Geological Survey has a data base to help assess the potential for the discovery of paleontological resources before a project is begun. He said if a significant fossil resource is identified at the site of a road project, he will alter his field schedule to address the find. He said fossils are very important to the state's heritage and can enhance tourism to museums and through public digs. In addition, he said, fossils have great education and scientific value. He said if the discovery of fossils is determined to not be significant, no further action will likely be taken with respect to the discovery.

In response to a question from Citizen Member Korgel, Mr. Hoganson said if a significant fossil resource is discovered during a local road project, he is usually able to find volunteers to conduct a dig. Because paleontological sites are generally point source sites, he said, the sites are generally easy to mitigate by removing the fossil.

In response to a question from Representative Kelsh, Mr. Hoganson said he removes fossils that are considered to be significant finds through the use of funds appropriated to the State Paleontologist.

In response to a question from Senator Urlacher, Mr. Hoganson said the time that may be necessary to remove a fossil can be a concern to the entity conducting the road project. He said the time for mitigation varies due to the circumstances of each find. He said if road projects are evaluated in advance of the actual construction, there is less likelihood of a delay due to unexpected discoveries of fossils.

In response to a question from Representative Koppelman, Mr. Hoganson said he works with the Department of Transportation to evaluate state and federal highway projects in advance. He said if fossils

are discovered on private property, the private landowners own the fossils.

In response to a question from Citizen Member Martinson, Mr. Hoganson said the State Paleontologist is handicapped by the lack of time and personnel. He said enhancing his budget would allow quicker mitigation of unexpected discoveries of fossils.

In response to a question from Senator Urlacher, Mr. Hoganson said there are four other paleontologists in the state who are employees of universities. He said those paleontologists usually have research projects and are not generally available for digs resulting from unexpected discoveries during road projects.

Mr. David Sprynczynatyk, Director, Department of Transportation, submitted written comments, a copy of which is on file in the Legislative Council office. Mr. Sprynczynatyk said the Department of Transportation works closely with other jurisdictions to provide an integrated system of roads and streets. He said 37 percent of the revenue from the state highway distribution fund is provided to counties and cities with 23 percent going to the counties and smaller cities and 14 percent going to the 13 largest cities. In addition, he said, one cent per gallon of the state motor fuel tax goes directly to townships and is not allocated through the state highway distribution fund. He said the state funds provided to cities, counties, and townships may be used for cultural resource work related to highway projects if the local government so chooses.

Mr. Sprynczynatyk said about 26 percent of the state's federal highway funding is distributed to the counties and 13 largest cities to be used for eligible road and bridge construction projects. He said counties receive about 9 percent of the federal funds and cities receive about 17 percent. In addition, he said, counties receive one-half of the annual bridge replacement funding, which amounts to about \$5 million per year. He said cities and counties also benefit from interstate, railroad, bridge, and safety funding from the federal government and the amount of federal funding that the Department of Transportation distributes to the counties and cities greatly exceeds that which is required by federal law.

Mr. Sprynczynatyk said the discovery of cultural resources can occur in either the preconstruction or the construction phase of a road project. He said federal aid is eligible for use during the preconstruction phase, but the department generally allows it to be used only during the construction phase. Because the amount of available federal funding is limited, he said, the department's policy is that federal transportation aid be used to maximize the benefit to infrastructure by using it for construction rather than preconstruction. He said it generally costs a city or county between \$1,500 and \$2,500 to determine whether cultural resources will be affected by a road project. If cultural resources may be impacted, he

said, the local government can redesign the project to avoid the site; or if avoidance is not possible, mitigation may be necessary. He said mitigation could add \$10,000 to \$50,000 to the cost of a project.

Mr. Sprynczynatyk said the National Environmental Policy Act and Section 106 of the National Historic Preservation Act encourage avoidance over mitigation. He said all parties involved with road projects seek to use state and federal highway funding in the most effective way and the department works with cities and counties to plan future roadways to effectively use the funding.

In response to a question from Representative Koppelman, Mr. Sprynczynatyk said the preliminary engineering phase of a project must address potential cultural resources. He said the cost of a study in the preliminary phase is paid for by the local jurisdiction conducting the project. He said the study is usually conducted by a consultant hired by the local government.

In response to a question from Senator Urlacher, Mr. Sprynczynatyk said he is aware of a few projects where unexpected discoveries of fossils have been made. He said if it is a local project, the local jurisdiction will likely have to hire someone to assess the find to determine if mitigation is necessary.

In response to a question from Citizen Member Frantsvog, Mr. Sprynczynatyk said unexpected discoveries of fossils are not very common. However, he said, certain areas of the state, such as the western portion, have greater potential for the discovery of fossils or other cultural resources. He said unexpected discoveries are very infrequent in the construction phase, particularly if the consultant does a good job during the preconstruction phase.

In response to a question from Citizen Member Martinson, Mr. Sprynczynatyk said the project sponsor should be responsible for the cost of mitigation or avoidance of fossils or cultural resources. He said the project sponsor should be aware of the risks involved when the decision is made to go forward with a project.

In response to a question from Representative Kelsh, Mr. Sprynczynatyk said funding is built into a federally funded project to address cultural resources.

Ms. Fern Swenson, Director of Historic Preservation, State Historical Society, said most projects involving cultural resources are federal undertakings governed by federal law. She said early in the process, the federal agency responsible contacts the state office of historic preservation regarding recommendations with respect to the project to determine if there is a need for further examination. She said if there is potential for the discovery of cultural resources, it is better to know early because it is often easier to avoid resources than to excavate or otherwise mitigate.

Mr. Wade Williams, North Dakota Association of Counties, said counties conduct some projects with all local funding and usually do not have additional funds

to address the unexpected discovery of cultural or paleontological resources. He said problems associated with unexpected discoveries are more common in the western portion of the state. He said a situation in Mercer County was the main reason behind the study resolution and the 1999 legislation.

In response to a question from Senator Urlacher, Mr. Williams said although there is flexibility when dealing with state and federal funds, counties have problems addressing unexpected discoveries with wholly locally funded projects.

In response to a question from Representative Koppelman, Mr. Williams said although the cost of mitigation varies according to the find, local governments usually cannot afford the additional costs of mitigation or avoidance.

In response to a question from Representative Koppelman, Mr. Hoganson said fossils are treated differently from cultural resources. He said the State Paleontologist will address paleontological resources at state expense.

In response to a question from Representative Koppelman, Ms. Swenson said if a burial site is discovered, the archaeologists usually will examine the site to determine if the discovery should be removed, avoided, or left intact. She said under state law, a developer is responsible for the cost of removal of a burial site.

Chairman Kelsh said he would like to have representatives of the North Dakota Association of Counties or someone from Mercer County provide additional details to the commission regarding the discovery that gave rise to the study resolution and the 1999 legislation.

TAXATION OF ELECTRONIC COMMERCE

Chairman Kelsh called on Mr. Gary Anderson, Tax Commissioner's office, for comments regarding taxation of electronic commerce. Mr. Anderson submitted written testimony, a copy of which is on file in the Legislative Council office. He said the Internet Tax Freedom Act, which was passed by the United States Congress on October 21, 1998, placed a three-year moratorium on the imposition of new taxes on Internet commerce. He said the Internet Tax Freedom Act was extended an additional two years as a result of legislation signed by the President on November 28, 2001.

Mr. Anderson said the Internet Tax Freedom Act provides a sales tax exemption on Internet access charges that each Internet user pays when they subscribe to Internet services. However, he said, 10 states, including North Dakota, were grandfathered in because their laws applied taxes on Internet access before the passage of the Act. He said the Act prohibits the imposition of multiple or discriminatory taxes on e-commerce. He said state and local sales taxes may continue to be applied on sales of tangible

personal property if the Internet seller has a physical presence in the state in which the sale occurs.

Mr. Anderson said because 45 states, the District of Columbia, and over 7,500 local jurisdictions apply a sales or special excise tax, significant cumulative administrative burdens would exist for Internet businesses having to comply with state and local taxes on a multistate business. He said in the fall of 1999, the National Conference of State Legislatures, the National Governors Association, the Federation of Tax Administrators, and the Multistate Tax Commission initiated the streamlined sales tax project to develop and provide to all vendors a simplified system for collecting sales and use taxes. He said based on the efforts of the streamlined sales tax project, about 26 states have adopted legislation that reflects a commitment by those states to incorporate the recommendations of the streamlined sales tax project into an interstate agreement that can be used to ensure a streamlined sales tax administrative system to all vendors, including those involved in e-commerce. He said key characteristics of the streamlined sales tax system include uniform definitions within tax bases, rate simplification, uniform sourcing rules, and providing sellers with the opportunity to use different technology modes such as third-party certified service providers to perform all or some of the sellers' sales tax functions.

Mr. Anderson said the 2001 Legislative Assembly adopted the simplified Sales and Use Tax Administration Act through passage of Senate Bill No. 2455. As a result, he said, North Dakota is recognized as a member of the implementing states that participate in the multistate discussions that are anticipated to result in a proposed model sales and use tax interstate agreement. However, he said, legislative action will be necessary to initiate any changes that would specifically address the state's sales tax law.

Mr. Anderson said from data provided by the Interstate Institute for State Studies, the Tax Commissioner's office estimates the revenue loss attributed to e-commerce in North Dakota to be about \$13 million this year and the potential revenue loss in five years to be \$40 million per year. However, he said, the Research Division of the Tax Commissioner's office believes the estimates may be overstated.

In response to a question from Representative Koppelman, Mr. Anderson said representatives of North Dakota have participated in the streamlined sales tax project for two years. However, he said, the state is not committed to any changes in its sales tax law. He said legislation will be necessary to implement any changes. Although five states have gone forward with the initial model proposed by the streamlined sales tax project, there will be additional changes based upon a subsequent review by the National Conference of State Legislatures. He said uniformity especially with respect to definitions is an important goal.

Senator Urlacher said the impacts of recommendations of the streamlined sales tax project would be minimal on North Dakota and there would be more positive results than negative impacts.

Mr. Anderson said it is difficult to determine or define when a tax should be applied because there are so many different taxing entities. He said he hopes that the tax system will be so simple that businesses will collect taxes even if there is no legal obligation to collect the taxes.

In response to a question from Citizen Member Korgel, Mr. Anderson said the zip code plus four will likely provide enough information for sellers to identify if a remote buyer lives within a city that imposes a sales tax. He said other methods, such as global positioning systems, are being examined. If a rural resident does not want to pay a city sales tax, the rural resident will likely use whatever address is necessary to avoid paying the tax. He said local taxes are applied to items received at a mailbox in a city that imposes a sales tax.

In response to a question from Representative Kelsh, Mr. Anderson said 89 cities and two counties in the state have local sales and use taxes. He said all of those entities contract with the state for administration of the taxes. He said a few communities collect their own lodging taxes.

Representative Koppelman requested Mr. Anderson to keep the commission updated regarding any changes with respect to taxation of e-commerce.

STATE AID DISTRIBUTION FUND

Mr. Anderson submitted written testimony regarding the state aid distribution fund, a copy of which is on file in the Legislative Council office. He said since fiscal year 1990 revenue sharing and personal property tax replacement have been paid directly to political subdivisions through the state aid distribution fund rather than being appropriated from the general fund. He said state law provides that a portion of the sales, use, and motor vehicle excise taxes collected are to be deposited by the State Treasurer into the state aid distribution fund and then distributed to counties and cities in the first month after each quarterly period.

Mr. Anderson said the formula for computing the funds to be deposited into the state aid distribution fund is equal to 40 percent of the amount determined by multiplying the quotient of 1 percent divided by the general sales tax rate that was in effect when the taxes were collected, times the net sales, use, and motor vehicle excise tax collections. Thus, he said, the funds deposited are currently equal to 8 percent of the net sales, use, and motor vehicle excise tax collections. He said 53.7 percent of the state aid distribution fund is allocated to counties based upon the population of the counties and 46.3 percent is allocated to cities based upon the city populations.

He said a county receiving state aid distribution funds is required to deposit the money into the county's general fund, reserving a portion of the money for subsequent distribution to or expenditure on behalf of townships, rural fire protection districts, rural ambulance districts, soil conservation districts, the Garrison Diversion Conservancy District, the Southwest Water Authority, and other taxing districts within the county, excluding school districts, cities, and taxing districts within cities. He said a city receiving state aid distribution funds is required to deposit the money into the city's general fund, reserving a portion of the money for subsequent distribution to or expenditure on behalf of park districts and other taxing districts within the city, excluding school districts.

Mr. Anderson said the deposits in the state aid distribution fund for the previous four years are:

- 1998 - \$23,857,242.
- 1999 - \$30,212,364.
- 2000 - \$30,907,216.
- 2001 - \$31,890,641.

Ms. Connie Sprynczynatyk, North Dakota League of Cities, said the changes to the state aid distribution fund agreed to in 1997 and implemented after 1999 have worked well. However, she said, the 2000 census will change allocations from the fund. As a result, she said, the Legislative Assembly will need to look at a new formula during the 2003 legislative session. She said as a result of population changes, there likely will be more losers than winners after the new census figures are applied.

PARK DISTRICT MILL LEVY CONSOLIDATION

Ms. Marcy Dickerson, State Supervisor of Assessments, Tax Commissioner's office, said 2001 House Bill No. 1031 consolidated several park district mill levies into the park district general fund. She said although a few county auditors had questions when completing the maximum levy worksheets under the new law, no serious problems were encountered in implementing the new law. She said consolidation appears to have had little effect on the 2001 taxes levied by park districts. She said taxable values increased by 6.6 percent from 2000 to 2001 and taxes levied increased by 6.7 percent during that period.

PUBLIC SCHOOL FUNDING AND TAXATION

Ms. Dickerson submitted written testimony regarding school district taxable values and taxes levied from 1987 through 2001. She said that over the last eight years the average mill rate levied by school districts has changed little. A copy of a spreadsheet showing total school district taxable values and taxes levied is on file in the Legislative Council office.

POTENTIAL STUDY AREAS

Mr. Williams said representatives of the North Dakota Association of Counties indicated at the last meeting of the commission that they would present potential areas of study to the commission at this meeting. Mr. Williams said potential areas of study that would affect counties include making the state aid distribution fund reflective of the new census, consolidation of county mill levies, consideration of a homeland security levy for local governments, a review of zoning and land use issues, and an update on the utilization of the tool chest provisions.

In response to a question from Representative Kelsh, Mr. Williams said a local levy may be necessary to address additional law enforcement and 911 capabilities as the result of homeland security requirements.

In response to a question from Senator Urlacher, Mr. Williams said consolidation of county mill levies would provide counties with additional flexibility in budgeting.

In response to a question from Representative Kelsh, Mr. Williams said the North Dakota Association of Counties would provide the commission with additional information at its next meeting regarding consolidation of county mill levies and potential changes to the state aid distribution fund formula.

Representative Koppelman requested Mr. Williams to provide an update to the commission at its next meeting regarding use of tool chest provisions. Chairman Kelsh said the next meeting of the commission will be on June 7, 2002. He requested commission counsel to work with Mr. Hoganson and representatives of the State Historical Society to examine the potential for viewing a paleontological or archaeological dig at a meeting in August.

There being no further business, Chairman Kelsh adjourned the meeting at 11:25 a.m.

John Bjornson
Commission Counsel