

2011 SENATE NATURAL RESOURCES

SB 2234

# 2011 SENATE STANDING COMMITTEE MINUTES

## Senate Natural Resources Committee Fort Lincoln Room, State Capitol

SB 2234  
January 28, 2011  
13635

Conference Committee

Committee Clerk Signature *Veronica Sparling*

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

A BILL for an Act to prohibit federal designation over land or water resources in North Dakota without state approval

### Minutes:

Testimony Attached

**Chairman Lyson** opened the hearing on SB 2234.

**Senator Margaret Sitte** introduced the bill. See **Attachment #1**.

**Senator Terry Wanzek** spoke in support of the bill. This puts our state legislature in a position to have some oversight. Some of my experiences with land that has easements on it have not been very good.

**Julie Ellingson**, representing the North Dakota Stockmen's Association, spoke in support of SB 2234. See **Attachment #2**.

**Sandy Clark**, representing North Dakota Farm Bureau, stood in support of the bill.

**Glen Baltrusch** from Harvey, ND presented written testimony in favor of the bill. See **Attachment #3**.

### Opposition

**Terry O'Clair**, Director of the Air Quality Division with the North Dakota Department of Health, identified the concerns the Department of Health has with SB 2234. See **Attachment #4**.

**Chairman Lyson**: Do you have any suggestions of how to fix the bill so you would not be affected?

**Terry O'Clair**: The bill refers to land and water resources and we work with air quality. I'm not sure that it specifically covers that. We would be happy to work with the committee to make amendments to the bill.

**Senator Hogue:** Does the State Department of Health make designations as well? Is that what you are saying?

**Terry O'Clair:** We make recommendations for what we feel the designations should be. The Clean Air Act requires EPA to make the final determination. To date they have not disagreed with us on anything.

**Terry** clarified what his concern was with the timeline of the EPA requirements.

**Senator Hogue** questioned Terry how exactly the EPA requirements are made and met.

**Chairman Lyson** closed the hearing on SB 2234.

# 2011 SENATE STANDING COMMITTEE MINUTES

Senate Natural Resources Committee  
Fort Lincoln Room, State Capitol

SB 2234  
February 10, 2011  
Job # 14459

Conference Committee

Committee Clerk Signature



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

A BILL for an Act to prohibit federal designation over land or water resources in North Dakota without state approval.

## Minutes:

Attachments

**The Senate Natural Resources Committee is meeting to discuss SB 2234.**

**Senator Lyson opens the discussion on SB 2234.**

**Senator Triplett makes a motion for DO NOT PASS.**

**No second.**

**Senator Lyson states the motion DIES FOR LACK OF A SECOND.**

**Senator Triplett** states that this bill is so unconstitutional that there is nothing to be done to it. This is a matter of Federal Preemption since we cannot tell the federal government what to do in the state of ND with their land and their business. Congress has given them the authority over controlling the Missouri River. We are not going to take that control away by this one sentence. I could give you 100 more examples but I think you know the gist of it.

**Senator Hogue** states that I agree. When there is a conflict between federal law and state law, where Congress regulates the entire field, the law generally says that state law must give way and yield to the federal law. However, often times Congress and the states regulate an area together, so that what the states do isn't always preempted by what the federal government does. The value in this legislation is that we have a statute in place that says the federal government has to confer with us. It just makes it more likely that the federal government in the future would start designating land areas or water masses without conferring with the states. I think this is the value of the legislation. If Congress decides it is going to do something, it has preemptive authority over states.

**Senator Triplett** directs the committee to the letter opinion of Attorney General Wayne Stenehjem, dated 2/3/2011 and numbered 2011-L-01, in which he discusses the constitutionality of some of the bills that are present before the legislature this year. See

**Attachment #1.** The letter is directed to the Honorable Al Carlson and the Honorable Robin Weisz and this bill is one of the topics, in which he discusses preemption and constitutionality.

**Senator Uglem** asks, "For the sake of discussion, where would this go in law?"

**Senator Triplett** states that we have given Mr. Wanzek, as our official code reviser, permission to decide which bills are of a permanent enough and significant nature to be in the code and the fact that it is drafted this way might be his opinion that this one doesn't even deserve to go in the code.

Chairman Lyson asks that everyone reads Attachment #1 and states that it will be discussed on 2/11/2011.

# 2011 SENATE STANDING COMMITTEE MINUTES

Senate Natural Resources Committee  
Fort Lincoln Room, State Capitol

SB 2234  
February 17, 2011  
Job # 14701

Conference Committee

Committee Clerk Signature

*Veronica Spaulding*

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

A BILL for an Act to prohibit federal designation over land or water resources in North Dakota without state approval.

## Minutes:

"Attached Amendment"

**Chairman Lyson** opened the discussion on SB 2234.

**Senator Triplett** made a motion for a DO NOT PASS.

**Senator Schneider:** Second

**Senator Triplett:** Letter Opinion 2011-L-01 dated February 3, 2011 was written to Representatives Carlson and Weisz in response to questions about the constitutionality of a couple of House Bills, but in that opinion Attorney General Stenehjem did in a footnote discuss a couple of additional bills with similar concerns about constitutionality and this was one of the bills he referenced in footnote 10. With the Atty. General's opinion in mind, I would either like to change the bill or give it a Do Not Pass recommendation.

**Roll Call Vote:** 3-4-0

**Senator Hogue:** I will make a Do Pass Motion. I do respect the opinion of the Atty. General. He does have concern about it and mentions it in a footnote. I appreciate his concern, but if anyone in the state government has to stand up for the sovereignty of the state it has to be the legislative assembly. We need to do that and the only way we can speak is through legislation. What this bill does is say that the federal government cannot do federal designations without approval of the legislative assembly. We all know they can do lots of things without our consent. It seems to me if we have passed into law a statute that says you need to get our consent, just maybe they will get our consent.

**Senator Triplett:** There is a long history here and the obvious one is the wetlands easement issue from the 1970s which the state as part of its' response tried by legislation to tell the federal government that they could not get wetlands easements on North Dakota property. That went all the way to the US Supreme Court twice in two different contexts and

in both cases the US Supreme Court said the North Dakota legislature was some sort of a simpleton for even thinking that it could tell the federal government agencies what to do or not to do. I think this issue has been litigated to death over decades and the answer is about as clear as it gets. I will oppose the motion unless we make some changes to this.

**Senator Schneider:** I agree with Senator Triplett. I think there are ways to express your disapproval with the federal government without doing something that is a per se violation of the constitution. I think turning this into a resolution urging the federal government to buy in from the state or a state agency before establishing a federal designation over land or water would be a good way to go. That would be a proper way for the legislature to express its' disapproval.

**Roll Call Vote:** 3-4-0

**Senator Schneider:** I move that we amend this into a resolution encouraging the federal government or any agency of the federal government to not establish federal designation over land or water resources of North Dakota without the approval of the legislative assembly.

**Senator Hogue:** Second

Senator Uglem: Yesterday I found out from Legislative Council that it is not possible to turn a bill into a resolution. A bill can be turned into a study, but not into a resolution.

**Senator Schneider:** Withdrew his motion

**Senator Schneider:** made a motion to turn the bill into a "Study Resolution" with the words "shall consider" making it discretionary. This would be done by amending the bill.

**Senator Triplett:** I would rather send this out without committee recommendation.

There was discussion about the merits of sending it out of committee with or without recommendation.

**Senator Hogue:** I would support a study. It is good policy for the state to assert autonomy over the boundaries of our state.

**Senator Triplett:** I move to amend the amendment by deleting the word "prohibiting" on the first line of the amendment and inserting the phrase "various mechanisms for improving coordination and consultation regarding" and deleting "without state approval". It just removes the notion of prohibiting and state approval and instead we are encouraging the legislative management to think about various alternatives for improving coordination and consultation. That is what we are asking for anyway. We know we are not going to get prohibition, and that is the offending word here to the constitution.

**Senator Schneider:** Second

**Senator Triplett:** With this proposed wording in place I would not mind a study being done.

The motion to amend the amendment carried by voice vote.

The motion to adopt the amended amendment carried by voice vote.

**Senator Schneider:** I move a Do Pass as Amended.

**Senator Triplett:** Second

**Roll Call Vote:** 7-0-0

**Carrier:** Senator Triplett



Date: 2-10-11  
Roll Call Vote # 1

2011 SENATE STANDING COMMITTEE ROLL CALL VOTES  
BILL/RESOLUTION NO. 2234

Senate Natural Resources Committee

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

Action Taken:  Do Pass  Do Not Pass  Amended  Adopt Amendment  
 Rerefer to Appropriations  Reconsider

Motion Made By Triplett Seconded By Dies for Lack of second

Senators	Yes	No	Senators	Yes	No
Chairman Lyson			Senator Schneider		
Vice-Chair Hogue			Senator Triplett		
Senator Burckhard					
Senator Freborg					
Senator Uglem					

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

Absent \_\_\_\_\_

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

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

Date: 2-17-11  
 Roll Call Vote # 1

2011 SENATE STANDING COMMITTEE ROLL CALL VOTES  
 BILL/RESOLUTION NO. 2234

Senate Natural Resources Committee

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

Action Taken:  Do Pass  Do Not Pass  Amended  Adopt Amendment  
 Rerefer to Appropriations  Reconsider

Motion Made By Sen. Triplett Seconded By Senator Schneider

Senators	Yes	No	Senators	Yes	No
Chairman Lyson	✓		Senator Schneider	✓	
Vice-Chair Hogue		✓	Senator Triplett	✓	
Senator Burckhard		✓			
Senator Freborg		✓			
Senator Uglem		✓			

*Motion fails*

Total (Yes) 3 No 4

Absent 0

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

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

*Sen. Triplett requested AG letter.*

Date: 2-17-11  
Roll Call Vote # 2

2011 SENATE STANDING COMMITTEE ROLL CALL VOTES  
BILL/RESOLUTION NO. 2234

Senate Natural Resources Committee

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

Action Taken:  Do Pass  Do Not Pass  Amended  Adopt Amendment  
 Rerefer to Appropriations  Reconsider

Motion Made By Sen. Hogue Seconded By Uglen?

Senators	Yes	No	Senators	Yes	No
Chairman Lyson		✓	Senator Schneider		✓
Vice-Chair Hogue	✓		Senator Triplett		✓
Senator Burckhard	✓				
Senator Freborg		✓			
Senator Uglen	✓				

Total (Yes) 3 No 4

Absent 0

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

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

*Motion Failed*

**Proposed Amendment to SB 2234**

Page 1, line 1, after "A BILL" replace the remainder of the bill with "for an Act to provide for a legislative management study relating to prohibiting federal designation over land or water resources in North Dakota without state approval.

**BE IT ENACTED BY THE LEGISLATIVE ASSEMBLY OF NORTH DAKOTA:**

**SECTION 1. LEGISLATIVE MANAGEMENT STUDY – LAND OR WATER RESOURCES.**

Legislative management shall consider studying, during the 2011-2012 interim, prohibiting federal designation over land or water resources in North Dakota without state approval. Legislative management shall report its findings and recommendations, together with any legislation necessary to implement the recommendations, to the sixty-third legislative assembly.

Renumber accordingly.

Meter: 7:09

Date: 2-17-11  
Roll Call Vote # 3

2011 SENATE STANDING COMMITTEE ROLL CALL VOTES  
BILL/RESOLUTION NO. 2234

Senate Natural Resources Committee

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

Action Taken:  Do Pass  Do Not Pass  Amended  Adopt Amendment  
 Rerefer to Appropriations  Reconsider

Motion Made By Sen. Schneider Seconded By Sen. Hogue

Senators	Yes	No	Senators	Yes	No
Chairman Lyson			Senator Schneider		
Vice-Chair Hogue			Senator Triplett		
Senator Burckhard					
Senator Freborg					
Senator Uglen					

*WITHDRAWN*

Total (Yes) \_\_\_\_\_ No \_\_\_\_\_  
Absent \_\_\_\_\_  
Floor Assignment \_\_\_\_\_

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

Amend this into "Resolution"  
Uglen states: Bill cannot be turned into resolution but can be turned into a study.

Meter 9:00  
13.26

Date: 2-17-11  
Roll Call Vote # 4

2011 SENATE STANDING COMMITTEE ROLL CALL VOTES  
BILL/RESOLUTION NO. 2234

Senate Natural Resources Committee

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

Action Taken:  Do Pass  Do Not Pass  Amended  Adopt Amendment  
as by voice vote #5  
 Rerefer to Appropriations  Reconsider

Motion Made By Sen. Schneider Seconded By Sen. Triplett  
*Carried by Voice Vote*

Senators	Yes	No	Senators	Yes	No
Chairman Lyson			Senator Schneider		
Vice-Chair Hogue			Senator Triplett		
Senator Burckhard					
Senator Freborg					
Senator Uglem					

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

Absent \_\_\_\_\_

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

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

*Amendment for "STUDY RESOLUTION"*

Date: 2-17-11  
Roll Call Vote # 5

2011 SENATE STANDING COMMITTEE ROLL CALL VOTES  
BILL/RESOLUTION NO. 2234

Senate Natural Resources Committee

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

Action Taken:  Do Pass  Do Not Pass  Amended  Adopt Amendment  
*the amendment*  
 Rerefer to Appropriations  Reconsider

Motion Made By Triplet Seconded By Schneider

*Voice Vote - Carried*

Senators	Yes	No	Senators	Yes	No
Chairman Lyson	}		Senator Schneider	}	
Vice-Chair Hogue			Senator Triplet		
Senator Burckhard					
Senator Freborg					
Senator Uglem					

Total (Yes) 7 No 0

Absent \_\_\_\_\_

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

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

"Amend" Amendment. *delete the word "prohibiting" and insert "various mechanisms for improving coordination and consultation regarding"*  
"Motion Carried" *and delete "without state approval"*

*Meter  
16:24*

Date: 2-17-11  
Roll Call Vote # 6

2011 SENATE STANDING COMMITTEE ROLL CALL VOTES  
BILL/RESOLUTION NO. 2234

Senate Natural Resources Committee

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

Action Taken:  Do Pass  Do Not Pass  Amended  Adopt Amendment  
 Rerefer to Appropriations  Reconsider

Motion Made By Sen. Schneider Seconded By Triplett

Senators	Yes	No	Senators	Yes	No
Chairman Lyson	✓		Senator Schneider	✓	
Vice-Chair Hogue	✓		Senator Triplett	✓	
Senator Burckhard	✓				
Senator Freborg	✓				
Senator Uglem	✓				

Total (Yes) 7 No 0

Absent 0

Floor Assignment Senator Triplett

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



**REPORT OF STANDING COMMITTEE**

**SB 2234: Natural Resources Committee (Sen. Lyson, Chairman)** recommends **AMENDMENTS AS FOLLOWS** and when so amended, recommends **DO PASS** (7 YEAS, 0 NAYS, 0 ABSENT AND NOT VOTING). SB 2234 was placed on the Sixth order on the calendar.

Page 1, line 1, after "A BILL" replace the remainder of the bill with "for an Act to provide for a legislative management study relating to mechanisms for improving coordination and consultation regarding federal designation over land or water resources in North Dakota.

**BE IT ENACTED BY THE LEGISLATIVE ASSEMBLY OF NORTH DAKOTA:**

**SECTION 1. LEGISLATIVE MANAGEMENT STUDY - LAND OR WATER RESOURCES.** The legislative management shall consider studying, during the 2011-12 interim, various mechanisms for improving coordination and consultation regarding federal designation over land or water resources in North Dakota. The legislative management shall report its findings and recommendations, together with any legislation necessary to implement the recommendations, to the sixty-third legislative assembly."

Renumber accordingly

2011 HOUSE ENERGY AND NATURAL RESOURCES

SB 2234

# 2011 HOUSE STANDING COMMITTEE MINUTES

House Energy and Natural Resources Committee  
Pioneer Room, State Capitol

SB 2234  
3/10/11  
15223

Conference Committee

Committee Clerk Signature *J. Minuth*

## Minutes:

2 "attached testimony."

Rep. Porter: We will open SB 2234.

Rep. Sitte: Senator from District 35. This bill is a state response to the ever encroaching reach of the federal government over private and public property. (See attachment1) I urge a Do Pass on the study.

Curly Haugland: I represent the Land Owners Association of North Dakota. We find ourselves fighting many of these battles on the uses of the private property. The study would be very beneficial; we hope you will support this study.

Sheyna Strommen: I represent the North Dakota Stockman's Association. We are in support of SB 2234. (See attachment 2).

Rep. Porter: Is there any opposition to SB 2234? We will close the hearing on SB 2234.

Rep. Keiser: I move a Do Pass on SB 2234.

Rep. Anderson: Second.

Rep. Porter: Is there any discussion? Clerk will take roll call motion carries.

YES 14 NO 0 ABSENT: 1 CARRIER: Rep. Anderson

Date: 3-10-11  
 Roll Call Vote #: 1

2011 HOUSE STANDING COMMITTEE ROLL CALL VOTES  
 BILL/RESOLUTION NO. 2234

House House Energy and Natural Resources Committee

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

Action Taken:  Do Pass  Do Not Pass  Amended  Adopt Amendment  
 Rerefer to Appropriations  Reconsider

Motion Made By Rep Keiser Seconded By Rep Anderson

Representatives	Yes	No	Representatives	Yes	No
Chairman Porter	✓		Rep. Hanson	✓	
Vice Chairman Damschen	✓		Rep. Hunskor	AB	
Rep. Brabandt	✓		Rep. Kelsh	✓	
Rep. Clark	✓		Rep. Nelson	✓	
Rep. DeKrey	✓				
Rep. Hofstad	✓				
Rep. Kasper	✓				
Rep. Keiser	✓				
Rep. Kreun	✓				
Rep. Nathe	✓				
Rep. Anderson	✓				

Total (Yes) 14 No 0

Absent 1

Floor Assignment Rep Anderson

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

**REPORT OF STANDING COMMITTEE**

**SB 2234, as engrossed: Energy and Natural Resources Committee (Rep. Porter, Chairman) recommends DO PASS (14 YEAS, 0 NAYS, 1 ABSENT AND NOT VOTING). Engrossed SB 2234 was placed on the Fourteenth order on the calendar.**

2011 TESTIMONY

SB 2234

#1

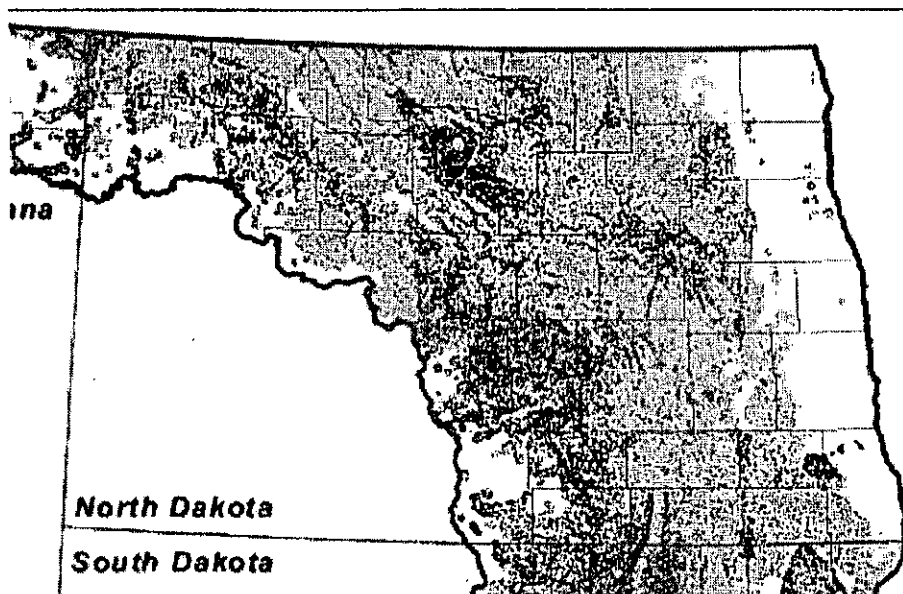
Testimony on SB 2234  
Senate Natural Resources  
January 28, 2011

Mr. Chairman and members of the Committee,

Senate Bill 2234 is a simple response to the ever encroaching reach of the federal government. The bill affirms state sovereignty over its lands by saying that the North Dakota Legislative Assembly must concur on any federal designation over land or water resources. This bill isn't negating these designations; it's just saying the state must approve them.

Here are some of the federal designations to which I am referring: National Forests; National Parks; Wilderness Areas; Roadless Areas; Wild, Scenic and Recreational Rivers; National Monuments; National Conservation Areas; National Recreation Areas; National Heritage Areas; Scenic Byways; National Wildlife Refuges; Wilderness Study Areas; Municipal Watersheds; Conservation Easements; Grasslands; Wetlands; Prairie Potholes and more!

The latest example of a federal designation is the proposed Dakota Grassland Conservation Area, in which the United States Fish and Wildlife Service wants to conserve 12 million acres of privately held land in South Dakota, North Dakota, and Montana. Here is the map of the area on which they want easements in this state.



What does ownership of land mean when landowners must pay the taxes but are not free to use the land as they want because the land is part of a federal land management plan? I urge you to support state's rights and property owners' rights by supporting this bill.

North Dakota



#2

## STOCKMEN'S ASSOCIATION

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SB 2234

Good morning, Chairman Lyson and members of the Senate Natural Resources Committee. For the record, my name is Julie Ellingson and I represent the North Dakota Stockmen's Association.

We stand in support of SB 2234, which requires legislative approval before a federal designation is established over land or water resources in North Dakota.

In some cases, wild and scenic river, wilderness and other federal designations have resulted in diminished private property rights and a whole litany of new requirements for property owners, whether it be grazing reductions, management restrictions or other burdensome compliance rules.

Because of the possible implications of these designations, legislative approval does not seem inappropriate. Plus, it is a way to ensure a fully transparent process and at least one public hearing opportunity for citizens to discuss the issue and weigh its merits.

For these reasons, we respectfully request your favorable consideration of the bill.

Thank you.



**SENATE BILL 2234**  
**Before the Natural Resources Committee**  
**January 27, 2011 at 9:00 A.M.**  
**Submitted by Glen E. Baltrusch**

Good morning Chairman Lyson and committee members,

My name is Glen Baltrusch. I was born and raised in the great state of North Dakota, and I reside in Harvey, North Dakota, which is in District 14. I stand before you today in support of **Senate Bill 2234** and respectfully request that this committee unanimously agree to a “**DO PASS**” recommendation to the floor of the Senate after this hearing is completed.

Mr. Chairman, committee members, I believe **SB 2234** is required legislation; especially when federal agencies are attempting to usurp the sovereignty of the several states, bypassing the congress, and attempting to do such by executive order(s). I do believe that the language needs to be more direct and can be with the following amendment:

Page 1, line 6, replace “may” with “shall”

Hopefully this provides more effective legislation.

Therefore, I request that this committee report a unanimous “**DO PASS**” recommendation on **SB 2234** to the full Senate for consideration on the floor with amendment.

Chairman Lyson, committee members, thank-you for your time and consideration in this pertinent matter. If you have any questions, I will try to answer them for you.

H 4

Testimony

Senate Bill 2234

Natural Resources Committee

Friday, January 28, 2011; 9:00 am

North Dakota Department of Health

Good morning Chairman Lyson and members of the Senate Natural Resources Committee. My name is Terry O'Clair and I serve as the Director of the Air Quality Division with the North Dakota Department of Health. I am here today to identify the Department's concerns regarding SB 2234.

The Department is tasked with the responsibility to implement environmental protection programs aimed at protecting public and environmental health. As part of our responsibilities, we are required to insure that the air quality in the state complies with standards established by the U.S. Environmental Protection Agency and adopted by the state. Among other things, the Clean Air Act requires the state to designate areas within the state as being in attainment, nonattainment or unclassifiable with specific air quality standards. The state's designation is based on data collected and analyzed by the Department. The recommended designation is submitted to the EPA, which reviews the state recommendation and makes the final determination as to the status of the state's compliance with the specific air quality standard. Because these state recommendations and EPA determinations are subject to federally-imposed timelines, they may often have to be made quickly and at times when the state legislature is not in session.

Although we are not sure that SB 2234 was intended to apply to this type of situation, our concern is that this bill could be interpreted to have an impact on the state submittal and EPA approval process for Air Quality designations. There could be negative consequences of applying this bill to such designations. For example, EPA could decide to make the determination without state input. Limiting the state's substantial and critical voice in the identification and determination of environmental designations in the state could result in delayed or nonfactual determinations, which, in turn, could result in delayed permitting actions, preclude development or have other adverse economic impacts.

This concludes my testimony and I am available to answers any questions you may have relating to this matter.

#1

**LETTER OPINION  
2011-L-01**

February 3, 2011

The Honorable Al Carlson  
Majority Leader  
House of Representatives  
State Capitol  
Bismarck, ND 58505-0360

The Honorable Robin Weisz  
State Representative  
State Capitol  
Bismarck, ND 58505-0360

Dear Representatives Carlson and Weisz:

Thank you for your letter asking about the constitutionality of H.B. 1286, 2011 N.D. Leg. (H.B. 1286). In light of the strong presumption of constitutionality of legislative enactments,<sup>1</sup> the Attorney General's role to defend statutory enactments from constitutional attacks, and as no specific facts are identified in your request, I am unable to provide a specific opinion on the constitutionality of H.B. 1286. However, based on the plain language of H.B. 1286, it is my opinion that it is likely preempted by federal law and, thus, likely violative of the Supremacy Clause.

In light of the numerous federal laws covering aspects of the provision of medical services and health insurance coverage, if H.B. 1286 passes, I believe a conflict likely would arise between H.B. 1286 and federal law. If H.B. 1286 passes and an actual conflict arises between H.B. 1286 and federal law, I further believe a court would likely find H.B. 1286 preempted by federal law and unconstitutional under the Supremacy Clause.

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<sup>1</sup> See N.D.A.G. 2003-L-21.

SB 2234 #1

ANALYSIS

The primary question raised is whether H.B. 1286 is preempted by federal law, making its application unconstitutional under the Supremacy Clause.<sup>2</sup>

The United States Supreme Court summarized the preemption doctrine in Fidelity Federal Savings & Loan Association v. de la Cuesta.<sup>3</sup> In doing so, it wrote:

The pre-emption doctrine, which has its roots in the Supremacy Clause, U.S. Const., Art. VI, cl. 2, requires us to examine congressional intent. Pre-emption may be either express or implied, and "is compelled whether Congress' command is explicitly stated in the statute's language or implicitly contained in its structure and purpose." *Jones v. Rath Packing Co.*, 430 U.S. 519, 525, 97 S.Ct. 1305, 1309, 51 L.Ed.2d 604 (1977). Absent explicit pre-emptive language, Congress' intent to supersede state law altogether may be inferred because "[t]he scheme of federal regulation may be so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it," because "the Act of Congress may touch a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject," or because "the object sought to be obtained by federal law and the character of obligations imposed by it may reveal the same purpose." *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230, 67 S.Ct. 1146, 1152, 91 L.Ed. 1447 (1947).

Even where Congress has not completely displaced state regulation in a specific area, state law is nullified to the extent that it actually conflicts with federal law. Such a conflict arises when "compliance with both federal and state regulations is a physical impossibility." *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-143, 83 S.Ct. 1210, 1217, 10 L.Ed.2d 248 (1963), or when state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress," *Hines v. Davidowitz*, 312 U.S. 52, 67, 61 S.Ct. 399, 404, 85 L.Ed. 581 (1941). See also *Jones v. Rath Packing Co.*, 430 U.S., at 526, 97 S.Ct., at 1310; *Bethlehem Steel Co. v.*

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<sup>2</sup> See U.S. Const. art. VI, cl. 2; Crosby v. Nat'l Foreign Trade Council, 530 U.S. 363, 388 (2000).

<sup>3</sup> 458 U.S. 141 (1982).

*New York Labor Relations Bd.*, 330 U.S. 767, 773, 67 S.Ct. 1026, 1029, 91 L.Ed. 1234 (1947).<sup>4</sup>

The categories of preemption are not “rigidly distinct.”<sup>5</sup> “Because a variety of state laws and regulations may conflict with a federal statute, whether because a private party cannot comply with both sets of provisions or because the objectives of the federal statute are frustrated, ‘field pre-emption may be understood as a species of conflict pre-emption.’”<sup>6</sup>

Whether a particular state law is preempted by federal law cannot be determined in the abstract; a specific federal law must be identified to determine congressional intent and whether the state law actually conflicts with the federal law. A court’s “ultimate task in any pre-emption case” is to determine whether the state statute is consistent with the structure and purpose of the federal statute as a whole, looking to “‘the provisions of the whole law, and to its object and policy’ . . . .”<sup>7</sup> “The question, at bottom, is one of statutory intent . . . .”<sup>8</sup>

Simply stated, H.B. 1286 makes it a crime for federal or state employees to apply federal law, including federal regulations and rules, when determining a North Dakota resident’s right of access to medical services and health insurance coverage, unless the federal law has “received specific statutory approval by the North Dakota legislative assembly.” Thus, H.B. 1286, by its very terms, pits state law against federal law, making compliance with both state and federal law impossible. Because “the Supremacy Clause prohibits states from enacting laws that make compliance with both federal and state law a physical impossibility or that ‘stand[ ] as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress,’”<sup>9</sup> if a conflict arises between H.B. 1286 and federal law, a court would likely find H.B. 1286 violative of the Supremacy Clause.

It is speculative whether a conflict will ever arise between H.B. 1286 and federal law. Some factors affecting whether a conflict will arise include the nature of current and future federal laws regarding the provision of medical services and health insurance

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<sup>4</sup> *Id.* at 152-53; *see also Gade v. Nat’l Solid Wastes Mgmt. Ass’n*, 505 U.S. 88, 98-99 (1992).

<sup>5</sup> *Crosby*, 530 U.S. at 373 n.6 (quoting *English v. Gen. Elec. Co.*, 496 U.S. 72, 79 n.5 (1990)).

<sup>6</sup> *Id.* (quoting *English*, 496 U.S. at 79-80 n.5).

<sup>7</sup> *Gade*, 505 U.S. at 98 (quoting *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 51 (1987)).

<sup>8</sup> *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 383 (1992).

<sup>9</sup> *Chamber of Commerce v. Edmondson*, 594 F.3d 742, 766-67 (10th Cir. 2010) (quoting *Fid. Fed. Sav. & Loan Ass’n*, 458 U.S. at 152-53).

coverage, which federal laws receive specific statutory approval by the North Dakota Legislative Assembly, and any future specific requests for medical services and health insurance coverage by North Dakota residents and inhabitants. The mandate presented by H.B. 1286 is exacerbated by the fact that Congress meets continually while the Legislature meets only every two years, unless a special session is called. For example, under the current version of H.B. 1286, Congress could pass a law that would not be considered until the next regular legislative session in 2013.<sup>10</sup>

Whether H.B. 1286 is preempted by federal law and unconstitutional under the Supremacy Clause is a fact sensitive inquiry that cannot be answered in the abstract.<sup>11</sup> However, in light of the numerous federal laws preempting certain aspects of the provision of medical services and health insurance coverage,<sup>12</sup> if H.B. 1286 passes, it is likely an actual conflict will arise between H.B. 1286 and federal law. If H.B. 1286 passes and an actual conflict arises between H.B. 1286 and federal law, a court would likely find H.B. 1286 preempted by federal law and unconstitutional under the Supremacy Clause.<sup>13</sup>

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<sup>10</sup> There are two additional bills with provisions that raise similar concerns. The first, H.B. 1287, provides a state agency with authority to approve or disapprove of rules adopted by the [U.S.] environmental protection agency as well as authority to pre-approve or disapprove of visitations or inspections in North Dakota by the environmental protection agency. The second, S.B. 2234, provides the Legislative Assembly with authority to approve or disapprove, by concurrent resolution, any "federal designation" over land or water resources in North Dakota by the federal government or any agency or instrumentality of the federal government.

<sup>11</sup> See Phi, Inc. v. Office & Prof'l Emps. Int'l Union, Civ. A. Nos. 06-1469, 06-2243, 2010 WL 3905084, at \*10 (W.D. La. Sept. 27, 2010) (explaining "whether a state law claim is preempted under federal law is a highly nuanced, fact-specific inquiry"); Buffalo S. R.R. v. Vill. of Croton-on-Hudson, 434 F. Supp. 2d 241, 249 (S.D.N.Y. 2006) (stating "whether a certain state action is preempted requires a fact-specific inquiry"); Aloha Airlines, Inc. v. Mesa Air Group, Inc., No. 07-0007 DAE-BMK, 2007 WL 1582707, at \*2 (D. Hawaii May 31, 2007) (explaining some preemption questions are of a "fact-intensive nature" and do not "involve a pure question of law").

<sup>12</sup> See, e.g., the Patient Protection and Affordable Care Act, Pub. L. 111-148, 124 Stat. 119 (2010), as amended by the Health Care and Educ. Reconciliation Act of 2010, Pub. L. 111-152, 124 Stat. 1029; the Emp. Ret. Income Sec. Act, 29 U.S.C. § 1001, et seq.; and the Federal Food, Drug, & Cosmetics Act, 21 U.S.C. § 301, et seq.

<sup>13</sup> In reviewing Idaho legislation intended to nullify the application of the federal health law, the Office of Attorney General of the State of Idaho concluded that the legislation would conflict with the Supremacy Clause in Article VI of Clause 2 of the United States Constitution. Letter from Brian Kane, Ass't Chief Deputy Att'y Gen. of Idaho, to Rep. William Killen (Jan. 21, 2011).

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February 3, 2011  
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It should be noted, as you are probably aware, that I joined a lawsuit in the federal district court for the Northern District of Florida challenging the constitutionality of the federal health care law, the Patient Protection and Affordable Care Act (Act).<sup>14</sup> On January 31, 2011, United States District Court Judge Roger Vinson ruled Congress exceeded the bounds of its authority in passing the Act with the individual mandate—specifically, the requirement individuals carry health insurance or face a tax penalty. He also found the individual mandate not severable from the Act (*i.e.*, that it is an essential and indispensable part of the Act). Because the individual mandate is unconstitutional and not severable, Judge Vinson declared the entire Act void. In addition, United States District Court Judge Henry Hudson ruled in a Virginia case that Congress does not have the power to require individuals to carry health insurance or face a tax penalty. Other federal district courts have upheld the Act against constitutional challenge. It is widely agreed that the constitutionality of the Act will ultimately be resolved by the Supreme Court. Nothing in this opinion regarding the constitutionality of H.B. 1286 should be construed as departing from my view that the individual mandate in the Patient Protection and Affordable Care Act exceeds congressional power under the Commerce Clause of the Constitution and is unconstitutional.

Sincerely,

Wayne Stenehjem  
Attorney General

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This opinion is issued pursuant to N.D.C.C. § 54-12-01. It governs the actions of public officials until such time as the question presented is decided by the courts.<sup>15</sup>

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<sup>14</sup> Florida v. U.S. Dep't of Health and Human Servs., Case No. 3:10-cv-91-RV/EMT.

<sup>15</sup> See State ex rel. Johnson v. Baker, 21 N.W.2d 355 (N.D. 1946).

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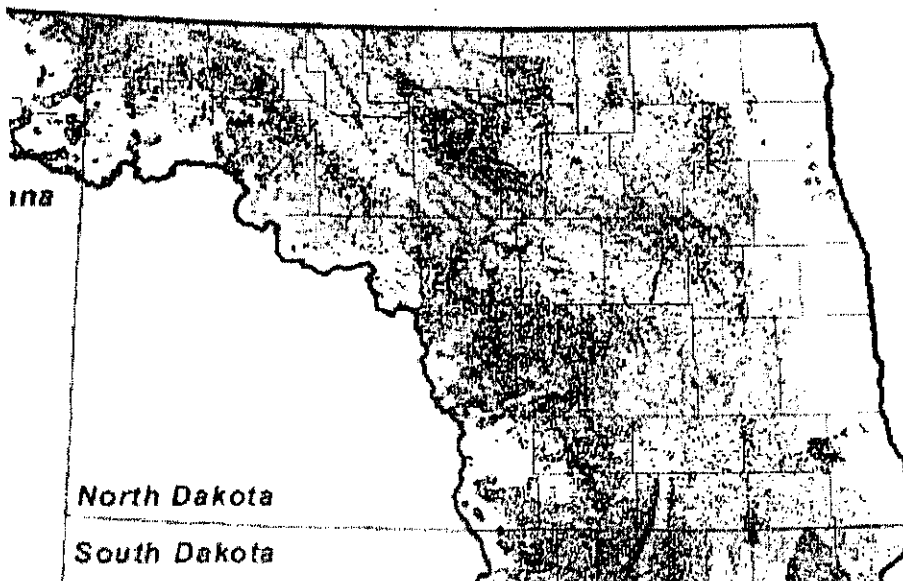
Testimony on SB 2234  
House Energy and Natural Resources Committee  
9 a.m. March 10, 2011, Pioneer Room

Mr. Chairman and members of the Committee,

I am Margaret Sitte, Senator from District 35. Senate Bill 2234 is a state response to the ever encroaching reach of the federal government over private and public property. The bill has been amended to request a study of the mechanisms for improving coordination and consultation of federal designations over land or water resources in this state.

Here are some of the federal designations to which I am referring: National Forests; National Parks; Wilderness Areas; Roadless Areas; Wild, Scenic and Recreational Rivers; National Monuments; National Conservation Areas; National Recreation Areas; National Heritage Areas; Scenic Byways; National Wildlife Refuges; Wilderness Study Areas; Municipal Watersheds; Conservation Easements; Grasslands; Wetlands; Prairie Potholes and more!

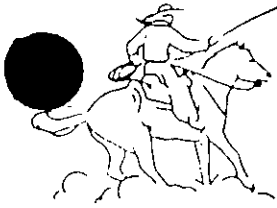
A recent example of a federal designation is the proposed Dakota Grassland Conservation Area, in which the United States Fish and Wildlife Service wants to conserve 12 million acres of privately held land in South Dakota, North Dakota, and Montana. Here is the map of the area on which they want easements in this state.



What does ownership of land mean when landowners must pay the taxes but are not free to use the land as they want because the land is part of a federal land management plan or the water is regulated to prevent use of these citizens? I urge you to support state's rights and property owners' rights by supporting this study.



North Dakota



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SB 2234

Good morning, Chairman Porter and members of the House Energy and Natural Resources Committee. For the record, my name is Julie Ellingson and I represent the North Dakota Stockmen's Association.

Our association stands in support of SB 2234, which calls for improved coordination and consultation regarding federal designation over land or water resources in North Dakota.

We think that this study would be appropriate, because, in some cases, wild and scenic river, wilderness and other federal designations have resulted in diminished private property rights and a whole litany of new requirements for property owners, whether it be grazing reductions, management restrictions or other burdensome compliance steps.

Even worse is when such designations come as a surprise, and landowners and other stakeholders do not have a chance to voice their concerns or influence decisions regarding these designations until they have already been made.

For these reasons, a study that helps identify various mechanisms to improve the transparency in and the communication through the process would be beneficial for all North Dakota citizens.

For these reasons we ask for your favorable consideration of this bill.