

# AGRICULTURE AND NATURAL RESOURCES COMMITTEE

The Agriculture and Natural Resources Committee was assigned two studies.

- Section 22 of House Bill No. 1009 (2021) directed a study of how the North Dakota Beef Commission (NDBC) operates and selects commission members.
- House Concurrent Resolution No. 3019 (2021) directed a study of the fiscal and safety impacts of United States Fish and Wildlife Service (FWS) easements in North Dakota on the Department of Transportation (DOT), Department of Agriculture, and counties.

The committee was assigned the responsibility to receive six reports:

- A report from the Advisory Committee on Sustainable Agriculture (ACSA) on the status of the committee's activities, pursuant to North Dakota Century Code Section 4.1-01-11.
- A biennial report from the Federal Environmental Law Impact Review Committee (FELIRC), pursuant to Section 4.1-01-21.1.
- A report from the State Board of Agricultural Research and Education (SBARE) on its annual evaluation of research activities and expenditures, pursuant to Section 15-12.1-17(8).
- The final report from DOT regarding information collected from transportation network companies during the biennium under Section 39-34-05, prior to its repeal.
- Reports from DOT, as requested, on the road train pilot program, pursuant to Section 1 of Senate Bill No. 2176 (2019).
- A report from DOT, before August 1, 2022, on the findings and recommendations of its study and pilot projects on the feasibility and impact of long combination vehicle operations on North Dakota roadways, pursuant to Section 1 of Senate Bill No. 2026 (2021).

Committee members were Senators Randy D. Lemm (Chairman), Michael Dwyer, Jay R. Elkin, Robert O. Fors, Oley Larsen, Larry Luick, Janne Myrdal, Merrill Piepkorn, and Terry M. Wanzek and Representatives Mike Beltz, Mike Brandenburg, Chuck Damschen, Dori Hauck, Dennis Johnson, Dwight Kiefert, Dave Nehring, Kathy Skroch, Paul J. Thomas, Wayne A. Trottier, and Bill Tveit.

## NORTH DAKOTA BEEF COMMISSION

Section 22 of House Bill No. 1009 (2021) directed a study of the NDBC, including the operations of the commission and the selection of commission members.

### Background

House Bill No. 1487 (2021) would have changed the state beef checkoff assessment from a mandatory assessment of \$1 for each animal sold in the state or from the state to a permissive assessment the producer could choose whether to pay. The bill failed to pass the House. House Bill No. 1009 was introduced to provide an appropriation for defraying the expenses of the agriculture commissioner. The enrolled version of the bill directed the Legislative Management to study the NDBC, including the operations of the commission and the selection of commission members. Representatives of the Independent Beef Association of North Dakota (IBAND) testified in support of the study. Testimony indicated concerns were raised regarding the membership of the commission, the need to study the membership and operations of the commission, and displeasure with the beef checkoff system. Testimony suggested the members of the commission should be elected rather than appointed by the Governor, and membership on the board should be diversified to include representatives of all agricultural organizations in the state representing livestock producers, rather than a few select organizations. Testimony indicated diversifying the membership of the commission would be consistent with other commodity groups in the state and surrounding states.

### History of the North Dakota Beef Commission and Federal Law

The Agricultural Marketing Act of 1937 [Pub. L. 75-137; 50 Stat. 246; 7 U.S.C. 674 et seq.] authorized the United States Secretary of Agriculture to set marketing quotas and price schedules, sign voluntary marketing agreements with producers, and issue marketing orders to establish and maintain orderly marketing conditions and prices for agricultural commodities in interstate commerce. The Act authorized commodity councils to regulate and market-specific commodities, including the authority to establish a fee paid by producers to fund research and promotion of the relevant commodity. The federal Beef Promotion and Research Act, which was included in the 1985 Farm Bill [Pub. L. 99-198; 99 Stat. 1354], mandated a national beef checkoff program. The assessment under the national program was, and still is, \$1 per head of cattle sold.

House Bill No. 1327 (1973), also known as the Beef Promotion Act, established the NDBC to provide programs to increase the consumption of domestic beef through advertising and local and national sales promotion and education. The Act also was intended to support research and educational activities of the national livestock and meat board and its beef industry council with at least 50 percent of assessments collected; support research efforts toward solving problems, primarily health, involved in the production of North Dakota beef cattle with at least 25 percent of assessments collected; and enhance the sale of North Dakota cattle. In 1973, the NDBC consisted of nine members appointed by the Governor, including three beef producers, one cattle feeder, one dairy producer, one public livestock market representative, and three representatives at-large. The terms of commission members were 3 years with a restriction that a member could not serve more than two successive 3-year terms. The 1973 Act also required commission members to be United States citizens and residents of the state, be engaged in the phase of the cattle industry the individuals represented for 5 years, and derive a substantial portion of the individual's income from the cattle industry represented.

The 1973 Act was codified as Chapter 4-34. Section 4-34-04 required the three beef producer members to be appointed by the Governor from nominations made by the North Dakota Stockmen's Association, the cattle feeder member to be appointed from nominations made by the North Dakota Cattle Feeders Association, the dairy producer member to be appointed from nominations by the North Dakota State Milk Producers Association, and the public livestock market representative to be appointed from nominations by the North Dakota Livestock Auction Markets Association and the board of governors at the West Fargo Stockyards. Section 4-34-06 required the commission to hold at least three meetings per year. Section 4-34-08 required an assessment of 10 cents per head of cattle sold within the state or from the state.

### **Current Statutory Provisions**

As part of a rewrite of agriculture provisions in the Century Code, which began during the 2007-08 interim, provisions related to the NDBC were repealed in House Bill No. 1025 (2009) and were moved into the newly created Chapter 4.1-03. In 2009, many of the statutory provisions related to the commission existed as enacted in 1973. In 2009, following the rewrite, the nine members of the commission who represented the various interests continued to be appointed by the Governor; however, several changes were made to the appointment process. The beef producer members still are required to be appointed by the Governor from a list of at least two names submitted by the North Dakota Stockmen's Association. However, the cattle feeder member is required to be appointed from a list of at least two names submitted by the North Dakota Stockmen's Association Feeder Council. The dairy producer is required to be appointed from a list of at least two names submitted by the Milk Producers Association of North Dakota. The public livestock market representative is required to be appointed from a list of at least two names submitted by the North Dakota Livestock Marketing Association but the involvement of the board of governors of the West Fargo Stockyards has been removed. The 2009 rewrite also authorized the commission to appoint up to four nonvoting members for a term of 1 year each. The nonvoting members can serve an unlimited number of terms. By 2009, the assessment for cattle sold within the state or from the state increased to 50 cents per head sold or the amount set forth under federal law.

Chapter 4.1-03 provides the general provisions regarding the NDBC, including definitions. Section 4.1-03-02 addresses the membership and qualifications for membership on the NDBC. The section has not been amended since its enactment in 2009. The section requires each commission member be a United States citizen and resident of the state, be actively engaged in the phase of the cattle industry the member represents, be actively engaged in the designated phase of the cattle industry for a period of 5 years, and be a participating producer apart from the representative of the public livestock market. Section 4.1-03-03 provides the term of commission members is 3 years with members prohibited from serving more than two consecutive terms. The section has not been amended since 2009. Section 4.1-03-07, which requires three annual meetings, has not been amended since its enactment in 2009. The beef checkoff assessment under Section 4.1-03-11, which was amended by House Bill No. 1238 (2015), requires a person that sells cattle in the state or from the state to pay an assessment equal to the amount set forth under federal law and an additional state assessment of \$1 for each animal sold.

The requirement to pay an additional assessment of \$1 per head sold included an expiration date clause whereby the additional assessment becomes ineffective if the Attorney General certifies to the NDBC the amount of the assessment due under federal law has increased beyond the amount in effect on July 31, 2015. The amount of the assessment due under federal law in effect on July 31, 2015, was \$1 per head of cattle sold, and the amount due under federal law has not increased. Therefore, the requirement to pay an additional state assessment of \$1 per head sold remains in effect. As a result, a person that sells cattle in the state or from the state is required to pay \$1 per head sold for the federal beef checkoff assessment, and an additional \$1 per head sold under the state assessment. Proceeds from the federal checkoff are split equally between the national program and the NDBC. The entirety of the proceeds from the state checkoff are retained by the NDBC.

## Testimony

### **Agriculture Commissioner**

The committee received testimony from the Agriculture Commissioner regarding discussions with the North Dakota Stockmen's Association, IBAND, North Dakota Farmers Union, and North Dakota Farm Bureau related to the member selection process and operation of the NDBC. The Department of Agriculture facilitated a meeting for interested groups to offer suggestions for reforming the member selection process for the NDBC.

### **North Dakota Beef Commission**

The committee received testimony from several representatives of the NDBC. The North Dakota Beef Commission represents all beef producers in the state and the beef checkoff exists to enhance demand for beef and beef products through promotion, research, and educational efforts. Approximately 1.1 million head of cattle are marketed annually in the state, which generates \$2.2 million in checkoff assessment revenue, of which approximately \$550,000 is remitted to the national board as required by law. Historically, refunds have been requested on approximately 12 percent of checkoff assessments. Unlike state checkoff funds, there is no opportunity for a refund of the federal checkoff assessment. Producers who request a state checkoff assessment refund do not qualify for membership on the NDBC under state law. State and federal checkoffs are assessed each time a head of cattle is sold and may be collected multiple times on a single animal. For the 2019-20 fiscal year, the state checkoff generated \$1.1 million and 913 requests for refunds were received totaling \$136,000.

Beef checkoff funds remitted to the national board are invested with contractors to promote beef and beef products to consumers domestically and internationally, educate stakeholders regarding the benefits of beef and beef products, and conduct research on beef and beef products at the national level. North Dakota beef checkoff funds are invested with contractors for beef promotion, education, and research. Contractors are used to manage the state's beef research portfolio because contractors have the needed expertise and staff to conduct the research more efficiently than NDBC staff. The purpose of the beef checkoff is to create demand for beef and beef products through the funding of research and promotion programs. The committee was informed the demand for beef is at an all-time high.

Representatives from the NDBC supported the current process of determining membership for the NDBC.

### **North Dakota Stockmen's Association**

The committee received testimony from representatives of the North Dakota Stockmen's Association related to the member selection process for the NDBC. Testimony indicated changing the appointment process for the NDBC from the Governor to the Agriculture Commissioner may not result in change to the structure or board makeup of the commission. Also, changing to an election process for board members will require decisions regarding the funding and the organization of elections, as well as a determination of who is a qualified candidate. The North Dakota Stockmen's Association is tasked with submitting names to the Governor for consideration for appointment to the NDBC.

The committee was informed federal law allows for a referendum to terminate or suspend the beef checkoff upon a petition signed by 10 percent, or approximately 88,000, of the eligible producers in the country. The most recent petition to terminate the beef checkoff did not receive the requisite signatures.

### **Independent Beef Association of North Dakota**

The committee received testimony from representatives of IBAND. Testimony indicated concerns with the operations and membership selection procedure of the NDBC and the beef checkoff system. The Independent Beef Association of North Dakota did not oppose the beef checkoff but wanted to ensure state checkoff funds are invested in the promotion, education, and research of beef through in-state programs and the expansion of existing in-state projects. Nominations are regularly submitted by IBAND to the Governor for consideration for appointment to the at-large member seats on the NDBC. Representatives stated no IBAND-nominated individual has been appointed to the commission. Testimony indicated IBAND would be open to amendments to statutory provisions either to give the Agriculture Commissioner the authority to appoint board members or to replace the appointment process with an election process to ensure the commission has a more accurate representation of all producers in the state. The proposed changes to the NDBC included creating eight beef districts in the state determined by the number of cattle in each district; creating an election-based process in which one individual is elected to serve on the NDBC from each of the eight beef districts; and removing the prohibition against serving on the NDBC if an individual has received an assessment refund in the preceding 3 years. The recommended changes would help alleviate concerns from the IBAND members and other beef producers who feel the beef checkoff assessment, membership selection, and appointment process of the NDBC do not adequately represent their interests.

### **North Dakota Farmers Union**

The committee received testimony from a representative of the North Dakota Farmers Union in support of legislation mandating the election of NDBC members because selection of members through an election gives all producers an equal opportunity to serve on the board. An elected board, from North Dakota Farmers Union's perspective, would encourage broader engagement across the industry.

## **North Dakota CattleWomen**

The committee received testimony from a representative of the North Dakota CattleWomen. The North Dakota CattleWomen organization is an affiliate of the American National CattleWomen and an auxiliary of the North Dakota Stockmen's Association. The organization's function is beef promotion and education. North Dakota CattleWomen provided continued support of the current makeup and functions of the NDBC.

## **Various Cattle Producers**

The committee received testimony from various cattle producers from around the state. Some producers were in favor of reforming the beef checkoff and the member selection process of the NDBC, while others were against any further reformation.

## **Committee Considerations**

The committee expressed mixed opinions regarding IBAND's proposal to change the member selection process of the NDBC. The committee discussed the merits of implementing an election process, rather than an appointment process, for members of the NDBC. The committee also discussed reforming the beef checkoff. The committee determined IBAND's ideas regarding the selection process of the NDBC and the beef checkoff held merit, but would need further discussion and clarification throughout the 2023 legislative session.

## **Conclusion**

The committee makes no recommendation regarding its study of the how the NDBC operates and selects its commission members.

## **IMPACTS OF UNITED STATES FISH AND WILDLIFE SERVICE EASEMENTS**

House Concurrent Resolution No. 3019 (2021) directed a study of the fiscal and safety impacts of FWS easements in North Dakota on the DOT, Department of Agriculture, and counties. The study was proposed because the FWS owns perpetual easements in North Dakota, including easements adjacent to roadways; the FWS may impose regulatory requirements on state agencies and political subdivisions constructing or improving roads or engaging in other projects when the FWS deems the projects would impact its interests; the imposition of federal requirements may delay or otherwise negatively impact the construction and improvement of roads or other projects in North Dakota; and delays and other impacts from federal requirements may impede road improvements and repairs necessary for public safety and increase the cost of construction to the state and political subdivisions.

## **Background**

### **Legislative History**

During the 2021 legislative session, representatives of the North Dakota Grain Growers Association, the North Dakota Farm Bureau, and the North Dakota Stockmen's Association testified in support of the study of FWS easements. Testimony expressed concerns regarding negative impacts of FWS perpetual easements on North Dakota infrastructure and taxpayers. Testimony suggested the FWS has mismanaged both land and water under the easements relating to highways, roads, and landowners subjected to the easements. Testimony further suggested the FWS places its interests above the safety and financial interests of the state, and the mismanagement of the easements results in DOT, other state agencies, and political subdivisions using their limited resources to mitigate the damage caused by the easement mismanagement. Testimony also suggested wet conditions in past years have increased the size of many wetlands in the state under FWS control, and poor management of those wetlands resulted in political subdivisions spending large amounts of money on road maintenance. Finally, testimony suggested the regulations imposed by the federal government burden political subdivisions and delay improvements to important construction projects, and the federal government should be held accountable for its actions.

### **Federal Laws and Procedures**

Congress established the original precursor to the FWS in 1871 and the FWS was established in 1956. The Fish and Wildlife Service primarily is responsible for the conservation and management of fish, wildlife, and plants, and their habitats through the implementation of federal environmental laws relating to migratory birds and endangered species. Conservation easements are agreements for the protection of wetlands, floodplains, riparian corridors, and endangered species habitats. Easements are rights created by an express voluntary legal agreement to allow a person to make lawful and beneficial use of the land of another without possessing the land. Wetland easements allow the FWS to acquire the right to maintain wetlands on described tracts of land and restrict the landowner from draining, burning, filling, or leveling the wetlands. Easements are recorded on an abstract of title to keep a record of the history of the property. An easement is specific to acreage purchased. As held by the United States District Court of North Dakota in *United States v. Albrecht*, 364 F.Supp. 1349 (1973), an agreement granting the FWS an "...easement or right of way for the maintenance of the land ... as a waterfowl production area in perpetuity..." is a "permanent interest" that continues with the land even if there is a change in ownership.

A FWS easement can be a standard conservation easement or a nonstandard conservation easement. A standard conservation easement conveys a perpetual interest in the lands covered by the easement and provides authorities a legal description, covenants by the landowner, rights reserved by the United States, easement management, and general provisions. A nonstandard conservation easement is similar to a standard conservation easement except it includes a variance allowing farming activity on all or some wetlands. Farming activities include grazing, haying, cutting, plowing, working, and cropping when the wetlands are dry due to natural causes. The Fish and Wildlife Service follows a 16-point process when acquiring easements, which include evaluating property proposed for easements; providing the proposed delineated easement map to the appropriate refuge supervisor for approval; logging the approved delineation package into FWS's land acquisition tracking system; inspecting the property; finalizing the legal description to be included in the easement area; conducting an abstract of title search to ascertain ownership of the property; determining whether there are judgments, liens, or unpaid taxes on the property proposed for easement; sending a formal offer letter to the landowner with a compensation offer, maps, and legal descriptions of the proposed easement area; preparing the easement conveyance document if an offer is accepted; obtaining the title of insurance; receiving a check for consideration; and closing and recording the original documents with the county.

The wetland easement program is authorized by the Migratory Bird Conservation Act of 1929 [Pub. L. 70-770; 45 Stat. 1222; 16 U.S.C. 715 et seq.] and the Migratory Bird Hunting Stamp Act of 1934 [48 Stat. 452; 16 U.S.C. 718 et seq.]. Under the Migratory Bird Conservation Act, "[t]he Secretary of the Interior is authorized to purchase or rent such areas as have been approved for purchase or rental by the commission ... and to acquire by gift or devise, for use as inviolate sanctuaries for migratory birds, areas which he shall determine to be suitable for such purposes..." (16 U.S.C. 715d). The Act also provides, "[n]o deed or instrument of conveyance shall be accepted by the Secretary of the Interior under ... (the Act) ... unless the state in which the area lies shall have consented by law to the acquisition by the United States of lands in that state" (16 U.S.C. 715f). Nor shall land "be acquired with moneys from the migratory bird conservation fund unless the acquisition thereof has been approved by the governor of the state or appropriate state agency" (16 U.S.C. 715k-5). The North Dakota Legislative Assembly consented "to the United States acquiring, by purchase, gift, devise, or lease, land or water in this state as the United States may deem necessary to establish migratory bird reservations" in accordance with the required consent provision of the federal Act. The consent is codified in Section 20.1-02-18.

Under the Migratory Bird Hunting Stamp Act, the Secretary of the Interior is authorized to sell stamps and use the migratory bird conservation fund "to acquire or defray the expense incident to the acquisition by gift, devise, lease, purchase, or exchange of, small wetland and pothole areas, interests therein, and right-of-way to provide access thereto" (16 U.S.C. 718d (c)). All money received for the stamps is paid into a special fund known as the migratory bird conservation fund (16 U.S.C. 718d). The fund "shall be available for the location, ascertainment, and acquisition of suitable areas for migratory bird refuges under the provisions of the migratory bird conservation Act..." (16 U.S.C. 718d (b)). A 1958 amendment, known as the Small Wetlands Acquisition Program, gave the Secretary of the Interior flexibility to acquire lands or interests in land for waterfowl production areas.

The North Dakota Game and Fish Department receives federal funds for wildlife purposes under the Wildlife Restoration Act (16 U.S.C. 669), which provides the "Secretary of the Interior is authorized to cooperate with the states, through their respective state fish and game departments, in wildlife-restoration projects...; but no money apportioned under this chapter to any state shall be expended therein until its legislature ... shall have assented to the provision of this chapter and shall have passed laws for the conservation of wildlife.... The Secretary of the Interior and the state fish and game department of each state accepting the benefits of this chapter, shall agree upon the wildlife-restoration projects to be aided in such state under the terms of this chapter and all projects shall conform to the standards fixed by the Secretary of the Interior." The term "wildlife-restoration project" must be construed to mean "the selection, restoration, rehabilitation, and improvement of areas of land or water adaptable as feeding, resting, or breeding places for wildlife, including acquisition by purchase, condemnation, lease, or gift of such areas ... as are suitable ... therefor..." (16 U.S.C. 669a). If the Secretary of the Interior finds the projects conform to standards established by the secretary and approves the plans, "he may finance up to 75 per centum of the cost of implementing segments of those plans meeting the purposes" of the chapter (16 U.S.C. 669e(a)(1)). The Legislative Assembly assented to the Wildlife Restoration Act in Section 20.1-02-17.

Under the Acts previously discussed, North Dakota governors approved or consented to the acquisition of easements by the FWS of over 1.2 million acres of wetlands for waterfowl production areas between 1961 and 1977.

In *Sagsveen Waterfowl Production Areas: A State Perspective*, 60 N.D.L. Rev. 659, 659-661, the author summarized the authorization of waterfowl production areas in reviewing the historical context of the federal-state dispute over these areas. The author noted the 1929 Migratory Bird Conservation Act authorized the acquisition of land for inviolate migratory bird sanctuaries. Section 7 of the Act contained an unusual accommodation to the federal-state relationship--the federal government could not acquire land unless a state consented by law. The State of North Dakota gave its consent in 1931. The 1934 Migratory Bird Hunting Stamp Act, which provided a funding mechanism for the refuge

acquisition program, authorized the sale of migratory bird hunting and conservation stamps (duck stamps) to generate revenue for the newly created migratory bird conservation fund. In addition, the 1958 amendment provided the Secretary of the Interior could acquire waterfowl production areas without the state legislative consent required in the 1929 Act. However, Congress also recognized the tradition of state involvement should be extended to all acquisitions involving money from the Migratory Bird Conservation Fund. The legislation, as finally enacted, states, "[n]o land shall be acquired with moneys from the migratory bird conservation fund unless the acquisition thereof has been approved by the Governor of the State or appropriate State agency."

Following the enactment and consent to the federal Acts by the state, issues arose concerning the duration of easements and the areas covered by FWS easements which led to the enactment of several statutory provisions in 1977 and subsequent litigation. The terms of pre-1976 easements prohibited the draining, filling, leveling, or burning of all wetlands located on the easement acres. The Fish and Wildlife Service estimated pre-1976 easements protected 758,645 wetland acres. However, wetland acres in pre-1976 easements were not delineated, and the actual number of wetland acres protected by the pre-1976 easements is unclear because the tracts of land considered by the easements totaled approximately 4.8 million acres. The easements described the entire parcel of land as subject to an easement instead of the wetland area itself. Pre-1976 easements did not include an agreed-upon easement map showing areas protected by the easement, but the easement summaries described the wetland acres restricted under the easement conveyance which led to disagreements over the location and boundaries of the covered easement areas. In 1977, the Legislative Assembly attempted to limit the duration of wetland easements with the enactment of Section 47-05-02.1.

In 2019, the United States Department of the Interior issued guidance to prioritize mapping of all pre-1976 FWS waterfowl production area perpetual easements to help delineate the wetland easements and settle the issue of which areas are the protected areas of the easements by using high-quality aerial images and including the acreage believed to be protected by the easements. According to the guidance, owners who object to the location or acreage of the new FWS easement map can appeal within 40 days of the date of receipt of the map. The Fish and Wildlife Service issued guidance encouraging FWS personnel and landowners to work on protecting wetland easements without restricting landowner activities on their property. The Fish and Wildlife Service also provides landowners opportunities to participate in an administrative appeal process to resolve questions about compliance and help avoid unnecessary legal actions.

The Fish and Wildlife Service also acts upon requests for right of way for various projects, including highway improvement projects by DOT. Formal requests for right-of-way projects regarding FWS land interests are governed by the rules and regulations under Title 50, Code of Federal Regulations, part 29, regarding land use management for wildlife and fisheries. If federal money is used for the road project, which includes most county road projects, additional requirements may apply, such as compliance with Executive Order No. 11990 regarding the protection of wetlands. The Department of Transportation also is required to comply with additional rules and regulations when undertaking road construction projects on state highways, including Title 23, Code of Federal Regulations, part 771, regarding environmental impacts and related procedures; Title 23, Code of Federal Regulations, part 774, regarding parks, recreation areas, wildlife and waterfowl refuges, and historic sites; and Title 23, Code of Federal Regulations, part 777, regarding mitigation of impacts to wetlands and natural habitats. The Department of Transportation routinely coordinates highway projects with the FWS, which may impact property interests held by the FWS. The property impacts may be in the form of easements that encumber the subject property or may be in the form of fee title property owned outright by the FWS.

### **State Laws and Procedures**

Chapter 20.1-02 provides the statutory provisions for the Game and Fish Department. Section 20.1-02-17 was enacted in 1973 to provide state assent to the Wildlife Restoration Act, subject to the conditions of Section 20.1-02-17.1. Section 20.1-02-17.1, also enacted in 1973, provided the procedures and conditions for land acquisitions for wildlife and fish restoration under the Wildlife Restoration Act. Section 20.1-02-18, enacted in 1973, gives the state's conditional consent to the United States' acquisition of land or interests in land for migratory bird reservations, subject to gubernatorial consent. Section 20.1-02-18.1, enacted in 1977, requires the submission of proposed federal wildlife area acquisitions to the board of county commissioners of the county or counties where the land is located, requires an opportunity for public comment, and requires an impact analysis before the acquisition may be approved. Section 20.1-02-18.2, enacted in 1977, allowed landowners to negotiate the terms of leases, easements, and servitudes for wildlife production purposes. Under the section, as originally enacted, easements terminated upon the death of the landowner or the transfer of ownership. However, the section was amended in 1985 to remove the requirement that an easement terminates upon the death of a landowner or upon change of ownership. The section also was amended in 1985 to require the duration of an easement for a waterfowl production area acquired by the federal government and consented to by the Governor or appropriate state agency after July 1, 1985, to be limited to 50 years. Section 20.1-02-18.3, enacted in 1981, prohibited the United States from acquiring land or interests in the state for migratory bird reservations, and prohibited the Governor from approving acquisitions with money from the migratory bird conservation fund until December 31, 1985, or until the date a management plan, jointly prepared by the Secretary of the Interior and the Governor, for the land was approved by the Legislative Assembly and the Governor.

Chapter 47-05 provides statutory provisions relating to servitudes (easements) in the title on property. Section 47-05-02.1, enacted in 1977 to limit the duration of wetland easements, established conditions governing easements, servitudes, and other restrictions on the use of real property and restricted easements to a duration of 99 years. The section was amended in 1985 to limit easement durations for waterfowl production areas acquired by the federal government, and consented to by the Governor after July 1, 1985, to 50 years. The section was amended again in 1991 to limit the duration of wetland reserve program easements acquired by the federal government under the Food, Agriculture, Conservation, and Trade Act of 1990 after July 1, 1991, to 30 years. However, in *North Dakota v. United States*, 460 U.S. 300 (1983), the United States Supreme Court found the provisions of Section 47-05-02.1 which purport to limit wetland easements to a term of 99 years may not be applied to wetland easements acquired by the United States under gubernatorial consents previously given. Since the FWS still was acquiring wetland easements under the consents given in 1983, the state was not allowed to limit the duration of the pre-1976 easements. After the decision in *North Dakota v. United States*, it appears the duration of wetland easements under consents given before 1976 are perpetual, the duration of easements for waterfowl production areas consented to by the Governor or an appropriate state agency after July 1, 1985, is 50 years, and the duration of wetlands reserve program easements acquired pursuant to the Food, Agriculture, Conservation, and Trade Act of 1990 after July 1, 1991, is 30 years.

Section 47-05-02.1 was amended by House Bill No. 1399 (2013) to provide waterfowl production area easements exceeding 50 years or which purport to be perpetual may be extended by negotiation between the owner of the easement and the owner of the servient tenement. The amendment also provided waterfowl production easements exceeding 50 years or purporting to be perpetual, which are not extended by negotiation, are void. The legislative history of the bill indicated the bill was intended to provide a method of resisting the federal government's policy of perpetual waterfowl easements.

Procedures have been developed to assist in both the replacement of the natural or ecological impacts and the replacement of property value impacts for the loss of property. The Department of Transportation practices avoidance and minimization of impacts to FWS property interests while undertaking a project. The project development activities include early and ongoing coordination in a manner that keeps both parties informed of the project, impacts, and mitigation to occur.

According to DOT, the process of undertaking a road construction project of state highways that may impact a FWS property interest includes numerous steps such as: surveying the field to determine where a project needs to occur; researching necessary property titles; submitting a solicitation letter to the FWS indicating the intent to start a project and requesting whether the FWS has an interest that will be impacted; receiving information for a contact person within the FWS for the project; establishing a memorandum of understanding between DOT and the FWS; completing an environmental impact statement for the project necessary to remain in compliance with federal requirements, including identified property interests and proposed mitigation for unavoidable impacts that may include an exchange of property; and obtaining a special use permit issued by the FWS to DOT to begin the project. According to DOT, the process of determining where to initiate a project, planning the project, and mapping can take up to a year. Project design can take approximately 6 months, and processing and receiving a special use permit for the project from the FWS can take up to 3 months after the project plan is in place and the permit application has been drafted. If a DOT construction project will be located within a FWS easement area but will not impact a delineated wetland within the easement area, no mitigation or wetland exchange process is necessary; however, the project requires a FWS special use permit to proceed.

In addition to working with the FWS, DOT is required to work with the State Engineer, local flood plain managers, the Federal Highway Administration, and the Army Corps of Engineers when undertaking road construction projects where wetlands are impacted. According to DOT, 41 special use permit applications for projects have been granted by the FWS and processed since 2009, and easement exchanges were required in 31 special use permit applications.

### **Legal Challenges to State Law**

In 1979, the United States brought an action against the state seeking declaratory judgment that the state's statutes restricting the acquisition of land for migratory bird refuges and waterfowl production areas enacted in 1977 were unconstitutional. In *North Dakota v. United States*, the United States Supreme Court ruled the consent of the Governor required for land acquisition previously given cannot be revoked at-will by an incumbent governor. The Court further held the state may not revoke its consent based on noncompliance with the conditions set forth in the 1977 legislation. The Court held to the extent the 1977 legislation authorized landowners to drain wetlands that had increased in size after the granting of the easement contrary to the terms of the easement agreement, it was hostile to federal law and interests and could not be applied to easements under previously given gubernatorial consents. For the same reason, the statutes limiting perpetual easements to 99 years were found to be unconstitutional as applied to wetlands to which acquisitions by the United States had been approved previously under prior gubernatorial consent. The Court held North Dakota may not restrict the acquisition of easements under previously given gubernatorial consents.

In *United States v. Johansen*, 93 F.3d 459, 463 (8th Cir. 1996), two brothers were charged with violating the terms of an easement agreement entered in the 1960s by draining wetlands on their property after being denied permission by the FWS. The brothers argued only the original number of acres contracted for in the easement summaries were covered by the agreement, not the wetland areas that expanded after a rainy season. The United States argued the easement summaries were not a part of the official recorded easement, the recorded easements described and covered larger tracts of land, and the easements encompassed all wetlands on an encumbered parcel. The Eighth Circuit Court of Appeals held federal wetland easements are limited to the wetland acreage provided in the easement summaries because the easement is limited to wetland acres only. The court of appeals based its opinion on the United States Supreme Court decision in *North Dakota v. United States* and the district court decision in *United States v. Vesterso*, 828 F.2d 1234 (8th Cir. 1987). The court of appeals held the FWS acquired an easement and paid the landowner based on the wetland easement acreage summary sheet. Further, the defendant must have had knowledge the parcel was encumbered by a wetland easement, and the drained wetlands must be part of the easement summary. The court of appeals, interpreting the *Vesterso* decision, also noted the United States must prove beyond a reasonable doubt that identifiable, covered wetlands, as existing at the time of the easement's conveyance and described in the easement summary, were damaged and the defendant knew the parcel was subject to a federal easement.

Pre-1976 waterfowl production area easements describe the entire parcel of land as subject to an easement; however, courts have held the FWS only purchased the right to prohibit the draining, filling, and burning of wetlands on the property when the easement was conveyed. Nonwetland areas on the property are not covered by the easements. However, following the decision in *United States v. Johansen*, there still are disputes regarding the acreage covered by FWS easements.

## Testimony

### Department of Agriculture

The committee received testimony from the Agriculture Commissioner, regarding FWS easements in North Dakota. Testimony indicated concerns exist over the perpetual nature of these easements. Communication with the Department of Interior and the FWS has occurred to delineate the wetlands and buffer zones with easements. North Dakota landowners have struggled to implement projects that would improve their lands because many original maps differed from the outdated or inaccurate maps the FWS was using. Additionally, through the course of the current FWS wetland delineation process, an appeals process was implemented so landowners have a path forward if the landowner has a reason to question the delineation.

### United States Fish and Wildlife Service

The committee received testimony from a representative of the FWS, Arrowwood Wetland Management District. Testimony indicated landowners have the right to graze, hay, plow, plant, and farm on FWS easement areas without restriction when the areas are naturally dry. All easements acquired by the FWS are subject to valid existing rights of way, and if a political subdivision is conducting a road construction project in an area covered by a right of way, the FWS easement is subject to the project even if the project results in the draining or filling of a protected wetland in the right-of-way area. The Fish and Wildlife Service only has jurisdiction when a road construction project is outside a right-of-way area, the project is within the boundaries of an easement tract, and a protected wetland will be impacted by the project. Road construction projects often are subject to federal requirements under Section 404 of the Clean Water Act and Executive Order 11990 regarding the protection of wetlands. Even if a FWS easement is not impacted by a project, other federal requirements often are applicable if the project involves federal highways and federal funding. The use of wetland banks will help mitigate the impacts on FWS easement interests by road construction projects.

### Department of Transportation

The committee received testimony from a representative of DOT. The Department of Transportation practices avoidance and minimization of impacts to property interests encountered in the development of a project. The project development activities include early and ongoing coordination in a manner that keeps both parties informed of the project, impacts, and mitigation. Sometimes a highway project may impact property interests held by the FWS. The property interests may be in the form of easements or in the form of fee title. Agreements and procedures have been developed to efficiently address both the replacement of the natural or ecological impacts (wetland impacts), and the replacement of property interest or land value for the loss of property. The Department of Transportation maintains banks for both wetland and grassland impacts and property interests which allows for exchanges based on credit values. Wetland impacts usually are mitigated in DOT developed banks at a cost of about \$15,000 to \$22,000 per credit. Land values are determined by an appraisal. A memorandum of understanding between DOT and the FWS was executed in 2012 to help facilitate mitigation and exchange of these wetland and property interest impacts. The Department of Transportation works with the FWS to mitigate impacts to protected wetland easements when undertaking state highway road projects, but other projects involving county or township road projects typically are addressed by the county or township.



### **North Dakota Grain Growers Association**

The committee received testimony from a representative of the North Dakota Grain Growers Association. Concerns were raised regarding the impacts of FWS easements on North Dakota taxpayers and infrastructure. Almost every county in the state is subject to and impacted by FWS wetland easements. It was suggested the Legislative Assembly enact a moratorium on the acquisition of wetland easements by the FWS until the full impact of existing easements on landowners, road projects, and infrastructure can be determined and resolved.

### **North Dakota Farm Bureau**

The committee received testimony from a representative of the North Dakota Farm Bureau. Support was offered for the elimination of perpetual wetland easements when the land is sold and the property title is transferred, and the establishment of a buyout program for FWS easements.

### **Ward County Highway Department**

The committee received testimony from the Ward County Highway Department. Information and data were provided regarding the process of completing road construction projects in relation to impacted FWS easements.

### **Legal Professionals**

The committee received testimony from an attorney at the Rinke Noonan Law Firm in St. Cloud, Minnesota. Testimony indicated the firm has been involved in over 200 easement map appeals relating to new maps issued by the FWS delineating wetland easement interests conveyed before 1976. The Fish and Wildlife Service creates an easement summary sheet at the time an easement is conveyed to record payments made to landowners. Many landowners were unaware of the easement summary sheets and did not agree to the acreage recorded on the sheets by the FWS. Courts have limited easements to the maximum number of wetland acres listed on FWS easement summary sheets. Landowners are concerned the FWS is claiming smaller areas of acreage as wetland areas protected by the easements on the new maps, while not claiming larger more established bodies of water, which are clearly visible on the maps as being protected. The United States can prosecute an individual for misdemeanor offenses or gross misdemeanor offenses if the government believes the individual has violated the terms of an easement agreement. There is not a duty to maintain a protected easement area, but a landowner may not impact the easement by draining, filling, or burning the area without permission from the FWS. An easement applies to areas existing at the time the easement was conveyed by the landowner and may not fluctuate due to increased rainfall. If an easement area increases due to rainfall after the easement was conveyed, the landowner is allowed to drain and reduce the area to the original wetland boundary area. A landowner has the right to drain larger bodies of water if the water area is not protected by the FWS. The Fish and Wildlife Service likely excludes larger bodies of water from protection under the new wetland area easement maps because larger areas are very difficult to drain. Excluding larger bodies of water allows the FWS to claim smaller areas as being protected while allowing the larger bodies of water to exist on the property unprotected, which does not count toward the maximum number of protected acres. If a landowner does not object to the new maps delineating the wetland areas covered by the perpetual easements within 40 days of receiving the map, the map is considered final for FWS enforcement purposes.

### **Ducks Unlimited**

The committee received testimony from a representative of Ducks Unlimited. Support was offered for clear mapping of easement areas and the establishment of an appeals process for landowners when disagreements exist with the FWS.

### **Landowner Rights Easement Act**

The committee received an update on HR 7021, which is commonly referred to as the Landowner Rights Easement Act. The Act was introduced in the United States House of Representatives on March 9, 2022. The Act prohibits the Department of the Interior from entering a conservation easement with a term of more than 50 years. The Act sets forth requirements for the renegotiation of a conservation easement at the request of an owner of land subject to a conservation easement that has been in effect for longer than 50 years or was put into effect before 1977 without the creation of an official corresponding map. The Act requires the Department of the Interior to notify such an owner of the owner's right to submit a request for renegotiation of the conservation easement.

### **Committee Considerations**

The committee expressed opposition to how FWS easements operate in North Dakota. However, because FWS easements are governed by federal law, the committee acknowledged the state's options for reform are limited. Several committee members expressed support for the federal Landowner Rights Easement Act and believe the Act would solve several of the issues raised in committee deliberation. A resolution to Congress urging the passage of the Act was discussed. However, no committee members moved for the creation of a resolution.

### **Conclusion**

The committee makes no recommendation regarding its study of the fiscal and safety impacts of FWS easements in North Dakota on the DOT, Department of Agriculture, and counties.

## **ADVISORY COMMITTEE ON SUSTAINABLE AGRICULTURE REPORT**

The committee received a report, pursuant to Section 4.1-01-11, from the ACSA on the status of the committee's activities. The report indicated most members of the ACSA are appointed by the Agriculture Commissioner. The committee members include the chairpersons of the House and Senate Agriculture Committees; the Commissioner of Commerce; agriculture producers; agriculture industry representatives and marketers; as well as a member of the minority party appointed by the Legislative Management Chairman if both houses of the Legislative Assembly are controlled by the same party. The committee is directed to examine the sustainability of various conventional farming practices and modern technology-based production practices; to examine the efficiency of various production practices, including those that promote efficiency, human health, and economic opportunity; to advise the Agriculture Commissioner on sustainable certification program marketing and packaging; and to consider existing standards of international private sector certifying groups to assess whether such standards may be applicable to a potential certification program in this state.

The Advisory Committee on Sustainable Agriculture met in 2009 and 2010. The committee determined the word "sustainability," as referenced in Section 4.1-01-11, would need to be defined and a certification program would not be beneficial to most North Dakota producers. Specifically, the program only would benefit a small number of producers and likely would be cost-prohibitive to state producers. Accordingly, the implementation of a sustainable certification program was not recommended by the ACSA.

During the 2021 legislative session, Section 4.1-01-11 was amended to change the Agriculture Commissioner's duty to appoint an advisory committee from a mandatory duty to a permissive power. This modification provided flexibility for the ACSA to convene and meet at any time in the future. The report indicated the flexibility to continue to appoint the ACSA still may be beneficial, but the committee is not currently necessary due to a lack of participation.

### **Committee Considerations**

A committee member presented a bill draft to repeal Section 4.1-01-11, regarding the ACSA. The committee was informed the ACSA has not met since 2010 and is no longer necessary.

### **Recommendation**

The committee recommends a bill draft [23.0015.01000] to repeal the ACSA.

## **FEDERAL ENVIRONMENTAL LAW IMPACT REVIEW COMMITTEE REPORT**

The committee received a biennial report, pursuant to Section 4.1-01-21.1(8), from the FELIRC. The report indicated FELIRC was created by the 64<sup>th</sup> Legislative Assembly with the directive to review federal environmental legislation and regulations that are or could be unnecessarily detrimental to the agricultural and energy sectors. The majority of FELIRC funding continues to be used for litigation surrounding the Waters of the United States (WOTUS) ruling. The Federal Environmental Law Impact Review Committee also has proactively funded studies on threatened and endangered species and habitat to gather sound, scientific data before a species is listed as endangered. Of significant note, the preliminary findings from the study on bats has been used in early stages of species and habitat assessments being undertaken by the FWS.

The Federal Environmental Law Impact Review Committee was expanded during the 66<sup>th</sup> Legislative Assembly to include a new directive with the Environmental Impact Mitigation Fund (EIMF). The committee membership was increased and charged with the responsibility of aiding landowners with the mitigation of agricultural land impacted by development. The Environmental Impact Mitigation Fund has a continuing appropriation that is separate from the fund for FELIRC. The Environmental Impact Mitigation Fund is triggered if there is a deposit made by a company to assist with mitigation efforts. The 67<sup>th</sup> Legislative Assembly split the mitigation fund deposits between the EIMF and the FELIRC fund. The Environmental Impact Mitigation Fund may be used for consultation with environmental scientists or engineers for relevant services to implement mitigation impacts to agricultural operations where no consideration was given before.

The Chairman of FELIRC is the Agriculture Commissioner. The membership of FELIRC includes the Governor; the House and Senate Majority Leaders; a member of the minority party; representatives from the six different private agriculture groups; the Chairman of the Public Service Commission; the State Engineer; the Director of the Game and Fish Department; the Director of the Department of Transportation; the Director of the Department of Environmental Quality; representatives from both an investor-owned utility company and the North Dakota Rural Electric Cooperatives Association; and two representatives from the energy community. Over the past 5 years, over \$8 million have been appropriated to the FELIRC fund. In that time, FELIRC has had total expenditures and future obligations of approximately \$2.5 million. Of that amount, approximately \$1.5 million has been expended for litigation expenses relating to federal WOTUS regulations. Another \$800,000 have been provided to the North Dakota State University (NDSU) to fund endangered species studies. Currently, the FELIRC has approximately \$5.65 million in uncommitted funds. The report indicated the current federal administration is attempting to redefine WOTUS and continues to move ahead with a federal rule-making process in an attempt to dramatically increase federal jurisdiction over all state lands and state waters. If

the Environmental Protection Agency and Army Corps of Engineers enact such a federal administrative rule, existing available FELIRC funds will be necessary to pay for further litigation.

## **STATE BOARD OF AGRICULTURAL RESEARCH AND EDUCATION REPORT**

The committee received a report, pursuant to Section 15-12.1-17(8), from SBARE regarding its annual evaluation of research and extension activities and expenditures. The report indicated the State Board of Agricultural Research was established by the Legislative Assembly in 1997. The board was responsible for budgeting and policymaking associated with the supervision of the North Dakota Agricultural Experiment Station. The law was amended in 1999 to include responsibility for the NDSU Extension Service and the board's name was changed to SBARE. The duties and functions of SBARE are outlined in Section 15-12.1-17. As required by Section 15-12.1-17, SBARE develops a biennial budget request by receiving information from stakeholders. Beginning in November 2021, SBARE received over 90 messages from stakeholder groups, citizens, and other interested parties sharing thoughts and concerns about agricultural research and extension efforts in the state. The prioritization process includes evaluating, ranking, and prioritizing stakeholder input. Final rankings are organized into three categories: Agricultural Experiment Station programmatic needs; NDSU Extension programmatic needs; and capital improvement projects. The State Board of Agricultural Research and Education will publish the findings of the prioritization process in March 2023.

## **DEPARTMENT OF TRANSPORTATION - NETWORK COMPANIES REPORT**

Prior to its repeal in August 2021, Section 39-34-05 required transportation network companies to report information from the prior 6 months to DOT on June 15 and December 15 of each year. In addition, the section required DOT to report the information collected each biennium to the Legislative Management. The committee received the biennial report from DOT of data received before Section 39-34-05 was repealed. The report indicated between June 1, 2020, and November 30, 2020, Uber operated in all political subdivisions throughout the state, while Lyft operated only in Alexander, Belfield, Bismarck, Burlington, Casselton, Coleharbor, Dickinson, Emerado, Fargo, Glen Ullin, Glenburn, Grand Forks, Grand Forks Air Force Base, Gwinner, Harding, Harwood, Hebron, Horace, Larimore, Mandan, Manvel, Mapleton, Maxbass, Menoken, Minot, Minot Air Force Base, Mott, New Leipzig, New Salem, Oxbow, Pick City, Portal, Ross, South Heart, St. Michael, Stanley, Surrey, Taylor, Thompson, Tioga, Trenton, Valley City, Warren, Watford City, West Fargo, Williston, and Wilton. Three accidents were reported to Uber during the passenger onboard stage. Four accidents were reported to Lyft during the passenger onboard stage. The number and types of traffic violations and any other violations reported to Uber during the passenger onboard stage included one count of physical altercation and three counts of inappropriate driver conduct. The number and types of traffic violations and any other violations reported to Lyft during the passenger onboard stage included 15 traffic violations and no other violations.

## **DEPARTMENT OF TRANSPORTATION ROAD TRAINS AND LONG COMBINATION VEHICLES REPORT**

On or before August 1, 2022, DOT was required to present the findings and recommendations of its study, mandated by Section 1 of Senate Bill No. 2026 (2021), on pilot projects on the feasibility and impact of long combination vehicle operations on North Dakota roadways. The Department of Transportation also was required to report, as requested, on the road train pilot program.

The committee received a verbal and a written report relating to the road train and long combination vehicle pilot project. Several representatives of DOT and the Upper Great Plains Transportation Institute discussed the pilot project. State and county highways were approved for use in the pilot program. Congress was not willing to allow long combination vehicles on the federal interstate highway system. Stakeholders indicated they were not interested in participating in a long combination vehicle pilot program unless they had access to the national network. Due to the absence of participating trucking firms, a pilot long combination vehicle study was not completed. The current regulatory framework was discussed, noting variations between North Dakota and surrounding states and provinces in addition to the overarching federal regulations on the national network. The federal regulations on the national network restricting the potential routes in the state were cited as a limiting factor for participation in the pilot study. If Congressional action were to alter existing truck size and weight regulations on the national network, a pilot study could proceed with a greater likelihood of participation from the trucking industry. Throughout the planning and advisory committee meeting process, interest in a double 53-foot trailer configuration was expressed on multiple occasions. This configuration is legal on limited routes in Manitoba and Saskatchewan, and it is assumed the configuration would result in cost savings for shipping companies. Specific impacts to highways and bridges are unknown because of a lack of detailed information on axle spacing and weights. The Department of Transportation is considering options to allow double 53-foot trailers on the national network. Department of Transportation representatives are attempting to work with the Secretary of Transportation, Pete Buttigieg, and North Dakota's federal delegation to include the national highway system in future pilot projects.