



**TESTIMONY OF JODI SMITH  
COMMISSIONER  
North Dakota Department of Trust Lands**

**Senate Bill 2282**

**Judiciary Committee  
August 11, 2021**

Chairman Koppelman and members of the Interim Judiciary Committee, I am Jodi Smith, the Commissioner and Secretary for the Board of University and School Lands (Board). I am here to testify regarding Senate Bill 2282.

The Department of Trust Lands (Department) is the administrative arm of the Board, serving under the direction and authority of the Board. The Board is comprised of the Governor, Secretary of State, Attorney General, State Treasurer, and Superintendent of Public Instruction. The Department's primary responsibility is managing the Common Schools Trust Fund (CSTF) and 12 other permanent educational trust funds. The beneficiaries of the trust funds include local school districts, various colleges and universities, and other institutions in North Dakota. The Department manages five additional funds: the Strategic Investment and Improvements Fund, the Coal Development Trust Fund, the Capitol Building Fund, the Indian Cultural Education Trust, and the Theodore Roosevelt Presidential Library and Museum Endowment.

The Department also administers the responsibilities outlined in the Revised Uniform Unclaimed Property Act, N.D.C.C. ch. 47-30.2. In this role the Department collects "unclaimed property" (uncashed checks, unused bank accounts, etc.), and processes owners' claims. This property is held in permanent trust for owners to claim, with the revenue from the investment of the property benefiting the CSTF.

Additionally, the Department operates the Energy Infrastructure and Impact Office (EIIO), which provides financial support to political subdivisions that are affected by energy development. Assistance is provided through both the oil and gas impact grant program and the coal impact loan program. The EIIO also distributes energy and flood grants carried over from prior biennia.

**History**

In 1889, Congress passed the Enabling Act "to provide for the division of Dakota [Territory] into two states, and to enable the people of North Dakota, South Dakota, Montana, and Washington to form constitutions and state governments, and to be admitted into the union on an equal footing with the original states, and to make donations of public lands to such states." Act of February 22, 1889, Ch.180, 25 Statutes at Large 676. Section 10 of this Act granted sections 16 and 36 in every township to the new states "for the support of common schools." In cases where portions of sections 16 and 36 had been sold prior to statehood, indemnity or "in lieu" selections were allowed. In North Dakota, this grant of land totaled nearly 2.6 million acres.

The Enabling Act provided further land grants to the State of North Dakota for the support of colleges, universities, the state capitol, and other public institutions. Revenues are generated through the prudent

management of trust assets, which assets include approximately 706,600 surface acres and nearly 2.6 million mineral acres. With approval of the Enabling Act in 1889, Congress granted North Dakota the ability to become a state. The Enabling Act, the North Dakota Constitution, and statutes passed over the last 130 years, have defined the role of the Board and its beneficiaries.

Only once in the past 130 years has the Board changed its membership.

The Forty-ninth Legislative Assembly created a Government Reorganization Committee (Committee). This Committee was assigned three studies which were completed in 1984: (1) the methods of providing for more efficient and prompt collection of taxes by the state (under HCR 3068), (2) the study of feasibility of combining the Department of Labor, Job Service North Dakota, Workmen's Compensation Bureau, and other state agencies whose primary responsibility was related to labor and employment services (under SCR 4007), and (3) the study of the financial management and administrative services of state government including the functions and services of the State Treasurer, Office of Management and Budget, State Tax Commissioner, Bank of North Dakota, State Auditor, Board, and Director of Institutions (under SCR 4043). Among other things, the Committee determined that having the State Auditor on the Board and the Public Employees Retirement System created a conflict of interest as it related to the State Auditor's duties. Thus, the State Treasurer was recommended to fill the State Auditor's position on both the Board and the Public Employees Retirement System. The report of the committee was submitted to the Legislative Council at the biennial meeting of the Council in November 1984. The report was adopted for submission to the 49th Legislative Assembly.

Based on the report of the Government Reorganization Committee, in the 49th Legislative Assembly Senate Bill 2072 and Senate Concurrent Resolution 4005 provided for a resolution to remove the Auditor from the Board. In a primary election held on June 10, 1986 voters amended the Constitution by voting to replace the State Auditor with the State Treasurer. S. L. 1987, Ch. 187. Legislation also repealed custodial school fund duties of the State Treasurer. S. L. 1987, Ch. 189.

Until 1986, the Board had retained its original members - nearly 100 years. Board membership was only changed after thoughtful consideration through a two-year study and was not met with opposition. Additionally, the shift in membership was the result of a specific concern as it related to a conflict of interest with the State Auditor's mission and day-to-day duties.

SB 2282 directs the Legislative Management to study the membership of the Board of University and School Lands and the Industrial Commission. "The study must include consideration of potential conflicts of interest relating to the memberships, possible changes to the composition of the memberships of the board of university and school lands and the industrial commission, and possible changes to article IX of the Constitution of North Dakota." The Board is requesting additional time to provide greater insight to the potential review of Article IX Sections 2 and 6.

North Dakota Constitution, article IX, § 2 provides:

Distributions from the common schools trust fund, together with the net proceeds of all fines for violation of state laws and all other sums which may be added by law, must be faithfully used and applied each year for the benefit of the common schools of the state and no part of the fund must ever be diverted, even temporarily, from this purpose or used for any purpose other than the maintenance of common schools as provided by law. Distributions from an educational or charitable institution's trust fund must be faithfully used and applied each year for the benefit of the institution and no part of the fund may

ever be diverted, even temporarily, from this purpose or used for any purpose other than the maintenance of the institution, as provided by law.

For the biennium during which this amendment takes effect, distributions from the perpetual trust funds must be the greater of the amount distributed in the preceding biennium or ten percent of the five-year average value of trust assets, excluding the value of lands and minerals. Thereafter, biennial distributions from the perpetual trust funds must be ten percent of the five-year average value of trust assets, excluding the value of lands and minerals. The average value of trust assets is determined by using the assets' ending value for the fiscal year that ends one year before the beginning of the biennium and the assets' ending value for the four preceding fiscal years. Equal amounts must be distributed during each year of the biennium.

The Department has engaged Mineral Tracker in a Mineral Estate Valuation (Valuation) update, including the Dynamic Economic Model. The Valuation will allow the Board to determine if the distribution of "ten percent of the five-year average value of the trusts" is sustainable. A significant portion of the value of the trust assets is tied directly to oil and gas royalties paid to the Board over the previous five years, the Valuation will allow the Board to predict potential outcomes on revenue based on a decline in royalties. Additionally, over the course of the past year-and-a-half, the oil and gas industry has seen significant shifts in prices. Should the State's production sustain a long-term decline, the distribution from the trusts would still be required to continue distributing funds based on a income values of previous higher production years.

North Dakota Constitution, article IX, § 3 provides:

The superintendent of public instruction, governor, attorney general, secretary of state and state treasurer comprise a board of commissioners, to be denominated the "board of university and school lands". Subject to the provisions of this article and any law that may be passed by the legislative assembly, the board has control of the appraisement, sale, rental, and disposal of all school and university lands, and the proceeds from the sale of such lands shall be invested as provided by law.

The Board does not support amending Section 3 of Article IX of the North Dakota Constitution. Amending the membership of the Board to include all three members of the North Dakota Industrial Commission (NDIC) will create a conflict of interest.

The NDIC was created by Legislature in 1919 to conduct and manage, on behalf of the State, certain utilities, industries, enterprises and business projects established by state law. The members of the NDIC are the Governor, the Attorney General, and the Agriculture Commissioner. The NDIC Oil and Gas Division regulates the drilling and production of oil and gas in North Dakota and the mission is to encourage and promote the development, production, and utilization of oil and gas in the state in such a manner as will prevent waste, maximize economic recovery, and fully protect the correlative rights of all owners to the end that the landowners, the royalty owners, the producers, and the general public realize the greatest possible good from these vital natural resources.

There are significant overlaps in topics and information relating to the NDIC Oil and Gas Division that will pose sincere conflicts of interest between the Board and the NDIC. Placing the Agriculture Commissioner, and subsequently nesting the NDIC within the Board, creates both the appearance and the opportunity to have Board members influenced by conflicting responsibilities.

Additionally, the NDIC oversees the Bank of North Dakota (BND). The Board has the fiduciary responsibility of administering five loan programs. For each of these separate loan programs, there is an agreement with BND to manage the applications and day-to-day functions of the loans. There are currently 71 loans managed through BND and funded by the Board. The separation in duties of the NDIC and Board ensure that there are checks and balances in place relating to these loan programs. Plus, the Board has several cash accounts at BND, held at a minimum to meet our distribution obligations, and 309 escrow accounts. Again, ensuring there is a separation of powers and duties between the NDIC and the Board as it relates to the Board's banking minimizes both the appearance of and the opportunity for the conflict of interest that can occur.

Decisions made by the NDIC could be in direct conflict of the Board's mission to protect the assets of the trusts.

North Dakota Constitution, article IX, § 6 provides:

No original grant school or institutional land shall be sold for less than the fair market value thereof, and in no case for less than ten dollars (\$10.00) per acre, provided that when lands have been sold on contract and the contract has been canceled, such lands may be resold without reappraisal by the board of appraisal. The purchaser shall pay twenty (20) percent of the purchase price at the time the contract is executed; thereafter annual payments shall be made of not less than six (6) percent of the original purchase price. An amount equal to not less than three (3) percent per annum of the unpaid principal shall be credited to interest and the balance shall be applied as payment on principal as credit on purchase price. The purchaser may pay all or any installment or installments not yet due to any interest paying date. If the purchaser so desires, he may pay the entire balance due on his contract with interest to date of payment at any time and he will then be entitled to proper conveyance.

All sales shall be held at the county seat of the county in which the land to be sold is situated, and shall be at public auction and to the highest bidder, and notice of such sale shall be published once each week for a period of three weeks prior to the day of sale in a legal newspaper published nearest the land and in the newspaper designated for the publication of the official proceedings and legal notices within the county in which said land is situated.

No grant or patent for such lands shall issue until payment is made for the same; provided that the land contracted to be sold by the state shall be subject to taxation from the date of the contract. In case the taxes assessed against any of said lands for any year remain unpaid until the first Monday in October of the following year, the contract of sale for such land shall, if the board of university and school lands so determine, by it, be declared null and void. No contract of sale heretofore made under the provisions of this section of the constitution as then providing shall be affected by this amendment, except prepayment of principal may be made as herein provided.

Any of said lands that may be required for townsite purposes, schoolhouse sites, church sites, cemetery sites, sites for other educational or charitable institutions, public parks, airplane landing fields, fairgrounds, public highways, railroad right of way, or other railroad uses and purposes, reservoirs for the storage of water for irrigation, irrigation canals, and ditches, drainage ditches, or for any of the purposes for which private lands may be taken under the right of eminent domain under the constitution and laws of this

state, may be sold under the provisions of this article, and shall be paid for in full at the time of sale, or at any time thereafter as herein provided. Any of said lands and any other lands controlled by the board of university and school lands, including state coal mineral interests, may, with the approval of said board, be exchanged for lands and coal mineral interests of the United States, the state of North Dakota or any county or municipality thereof as the legislature may provide, and the lands so acquired shall be subject to the trust to which the lands exchanged therefor were subject, and the state shall reserve all mineral and water power rights in land so transferred, except coal mineral interests approved for exchange by the board of university and school lands under this section.

When any of said lands have been heretofore or may be hereafter sold on contract, and the purchaser or his heirs or assigns is unable to pay in full for the land purchased within twenty years after the date of purchase and such contract is in default and subject to being declared null and void as by law provided, the board of university and school lands may, after declaring such contract null and void, resell the land described in such contract to such purchaser, his heirs or assigns, for the amount of the unpaid principal, together with interest thereon reckoned to the date of such resale at the rate of not less than three (3%) percent, but in no case shall the resale price be more than the original sale price; such contract of resale shall be upon the terms herein provided, provided this section shall be deemed self-executing insofar as the provisions for resale herein made are concerned.

The Board is requesting review of Section 6 in two areas.

First, in Paragraph 2, "in a legal newspaper published nearest the land" should be omitted as it can cause confusion. Per Section 6, the Board must already publish "in the newspaper designated for the publication of the official proceedings and legal notices within the county in which said land is situated." The addition of "nearest the land" is un-necessary and may create confusion for constituents.

Second, in its current form, Paragraph 3 permits the exchange of lands and coal mineral interests with the United States. However, Section 6 requires that the State reserve all mineral interests (except coal) and water power rights in any state-owned lands transferred to the United States. Allowing the State to exchange state-owned mineral interests with like-value interests belonging to the United States would promote geographical cohesion of both state-owned and federal owned land and minerals

The Board and the Department respectfully request the Judiciary Committee review Sections 2 and 6 of Article IX of the North Dakota Constitution.

I look forward to working with the committee on this issue and would be happy to answer any questions.