

Testimony on SB 2357

Before the Natural Resources Committee

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My thanks to the committee for the opportunity today to bring a modest professional analysis, based on a review of recent events, before the committee as it considers this bill providing for an orderly survey of cultural resources on state trust lands.

There has been considerable public notice of the process whereby the state has leased certain lands adjacent to Killdeer Mountain for petroleum development. A key concern has been the status of Killdeer Mountain as a significant historical and archeological site. This caused me, as a scholar concerned with the conservation of heritage resources, not only to pay attention to the process in progress but also to inquire as to its customary mode of operation.

The question is, how do we ensure the conservation of irreplaceable historical and archeological resources located on our state lands when those lands are under development for mineral extraction, or for other purposes? More specifically, how do we know what is out there, so that we do not destroy it with the footprint of development, unawares?

The answer is, we don't know what is out there. On federal lands, there is a process, somewhat flawed but established and functioning, for survey prior to development. On state lands, we have a sort of informal process, but it has palpable deficiencies.

I am grateful to many parties for helping me to understand the process as it stands now. These people, such as Lance Gaebe at the Land Board and Fern Swenson at the State Historical Society of North Dakota, are good public servants. They struggle to do what needs to be done under statute—to cooperate in the preservation of historical and archeological resources—with a process that is flawed.

Having investigated the process, I described it earlier this week, on Tuesday, in a guest editorial for the *Bismarck Tribune*. A copy of that piece is attached to my testimony, but let me quote from it here in order to show the problem with our current process.

The process with reference to heritage resources on the state lands works this way. Before the land department lists tracts for potential leasing, it calls for the Historic Preservation Department of the State Historical Society to provide its records of historic and archeological resources known to be present. Land Commissioner Lance Gaebe takes these records into account as leases are bid and negotiated, and again, especially, when the land board negotiates with an oil company the surface damage agreement that will govern how development proceeds and collateral damage is compensated. The land board has considerable leverage at this point in the process.

Agreements with the land board in hand, the oil company still has to go through the well permitting process with the State Industrial Commission Oil and Gas Division. The O & G Division has a hearing (done last October for the Killdeer Mountain lands) and makes a recommendation to the industrial commission. . . .

[However], there is a hole in the process at the leasing stage. The information that the land board gets from the state historical society is incomplete to nonexistent. This is not the fault of either the land board or the historical society. Information exists only if some previous, likely federal, development has generated earlier cultural resource survey work. There is no provision in the process, as there should be, for physically going over the ground to determine what heritage resources are there. Consequently, leases and agreements can be concluded which directly threaten significant heritage resources. This happened, despite technical adherence to law by all parties involved, in the matter of Killdeer Mountain.

SB 2357 seeks to get ahead of this problem by providing for an orderly survey of state trust lands to discover their historical and archeological resources. The purpose is to guide and facilitate prudent and profitable development of our lands, while safeguarding our heritage resources. In my professional opinion, this is a timely, indeed overdue, measure, and so I commend the bill to you with informed enthusiasm. Thank you, again.



Killdeer Mountains threatened by process

By TOM ISERN Fargo

It is time for more light and less heat on the issue of petroleum development in northern Dunn County.

The leasing by the state of certain school trust lands in the Killdeer Mountains locality for petroleum development has sounded alarms among historians, archaeologists and all friends of antiquities.

Those questioning the development make three points:

First, the Killdeer Mountains area is a site of religious and cultural importance to several native peoples of the region. Second, it was the site, in 1864, of one of the most significant military engagements in the history of Indian-white conflict on the northern plains. Third, the Killdeer Mountains environs are known to be rich in archeological material. Heedless development, thus, may imperil irreplaceable heritage resources.

Is this, then, heedless development? It is not, but neither is it well considered. Public scrutiny prompted by the proximity of development to such a noteworthy site as the Killdeer Mountains has exposed problems with the processes for conserving our heritage.

The state trust lands at issue are school lands, a legacy of federal frontier land policy, granted to the state for the support of public schools. The Department of Trust Lands, under direction of the Board of University and School Lands, manages them for revenue that the Legislature then appropriates for education. We are fortunate to have these lands. We have been wise to retain them.

The process with reference to heritage resources on the state lands works this way: Before the land board lists tracts for potential leasing, it calls for the Historic Preservation Office of the State Historical Society to provide records of historic and archeological resources known to be present. Land Commissioner Lance Gaebe takes these records into account as leases are bid and negotiated, and again, especially, when the Land Board negotiates with an oil company the surface damage agreement that will govern how development proceeds and collateral damage is compensated. The Land Board has considerable leverage at this point in the process.

Agreements with the Land Board in hand, the oil company still has to go through the well-permitting process with the state. The Department of Mineral Resources' Oil and Gas Division has a hearing (done last October for the Killdeer Mountains land) and makes a recommendation to the state Industrial Commission. On Jan. 24, the commission adopted the recommendation by Mineral Resources Director Lynn Helms to proceed with permitting on the state trust lands in the Killdeer Mountains.

In addressing the issue of heritage resources on state trust lands, there is a need for reasonable good will by state officials and by the public. We, the public, need to want to solve these problems, not exploit them for some perceived advantage.

There are two obvious issues illustrated by how the Killdeer Mountains situation has unfolded.

First, Helms, in public statements and personal communications, does not take cognizance of state law (55-10-09 of the state Century Code), which requires all state agencies to cooperate with the state Historical Society in the preservation of historic and archeological sites. The law is imperative, and it is crystalline. It is qualified somewhat by a 1988 opinion of Attorney General Nick Spaeth, but that opinion by no means absolves any agency of its obligations under the law

Second, and in the long run more important, there is a hole in the process at the leasing stage. The information that the Land Board gets from the State Historical Society is incomplete to nonexistent. This is not the fault of either the Land Board or the Historical Society. Information exists only if some previous, likely federal, development has generated earlier cultural resource survey work. There is no provision in the process, as there should be, for physically going over the ground to determine what heritage resources are there. Consequently, leases and agreements can be concluded that directly threaten significant heritage resources. This happened, despite technical adherence to law by all parties involved, in the matter of the Killdeer Mountains.

With respect to a heritage site as profoundly significant as the Killdeer Mountains, we should move deliberately, reset if necessary, and address public concerns. As for the general process _ that wants reform, which requires legislative attention.

(Tom Isern is professor of history, university distinguished professor, and director of the Center for Heritage Renewal at North Dakota State University. Opinions here expressed are not necessarily those of NDSU.)

http://bismarcktribune.com/news/columnists/killdeer-mountains-threatened-by-process/article_1797841e-6ed9-11e2-ab42-0019bb2963f4.html

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