PERFORMANCE AUDITS OF THE HEALTH DEPARTMENT AND THE OIL AND GAS DIVISION

Lynn Helms won’t have a witch hunt!

Build Upon NWLA, DRC and Our Successful April 8 Hearing in Minot before Senator Rich Wardner’s Energy Development and Transportation Committee

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**Why A Performance Audit?**

1. ***Because petitions for improvement of health and property protection have failed surface, mineral owners and citizens.***
2. ***Because detailing failures of the Health Department in Oil and Gas Division, hereafter called Agencies, to the NDIC has failed.***
3. ***Because the Governor has instructed agency leaders to present no growth budgets.***

The request for two performance audits is an attempt to resort to the Legislature. If that fails the last resort to the Courts . Performance audits can tell whether the Agencies are adequately funded, determined and properly staffed to enforce existing statutes and rules. A related question is whether the existing statutes and rules are sufficient to accomplish the protections the citizens want. Do the statutes and rules go far enough in the direction of the stated statutory policies and actually protect public citizens’ historic and cultural values, water and air? Do the statutes and rules as written engage all the lawful powers available to protect private citizens’ surface and mineral estates?

**What Are The Sources Of State Governmental Powers?**

There are two, the Police Power and the Public Trust Doctrine. Enforcement responsibilities are fractured, assigned to state agencies and political subdivisions. The North Dakota Water Conservation Commission is primarily concerned with fresh water. By statute, case law and attorney general’s opinions it also must act as Trustee protecting the Public Trust, that is protect public citizens’ water. The ND Health Department and Oil and Gas Division have been assigned police powers. Both the latter appear unaware of their Public Trust Duties.

North Dakota has a strong body of statutory, case law, and Atty. Gen.’s opinions which make it clear that the Courts will receive and consider citizen complaints against both the legislative and the executive departments which breach their Public Trust Duties. Citizens have standing to challenge acts and omissions of elected and appointed officials. The citizens’ right to sue is based upon their ownership of beneficial interests in the state’s Trust Property. For purposes of this memo think of not only fresh water, but also historic and cultural sites. All water in the state of North Dakota used in or generated by the oil industry is trust property.

**Produced water, the saltwater generated as a result of state authorized industrial activity in the oil patch, is also state property**. The state has a duty to manage that produced water so that it does not damage private property. For clarity, please understand the last sentence does not in any way excuse private industry from liability for their breaches of duties of care under statute, rule, contract, or the common-law, The duty to refrain from causing injury to others is not negated because the state ignores or colludes with private industry . Private industry can be liable under nuisance law, negligence, or strict liability where the character of the operations is shown to be innately and unreasonably dangerous. I contend that State liability for all salt contaminated land is arguable base upon ND Constitution Article I , Section 16 .

Why? Because State Action is initiating cause of **produced water.** Permitting of Oil wells requires governmental action which temporarily takes, damages, or permanently destroys private property. Think of **Eminent Domain** or more precisely **Inverse Condemnation.** We do want to go to court but not yet. We want to talk to our neighbors and our legislators.

To summarize, as conceived here, the performance audits to be requested should be finessed out of the Republican majority so that there can be no accusation the audits are prompted by witch hunters.

**Background**

In the run up to the Minot, North Dakota April 8, 2014 Energy Development and Transportation Committee hearing on salt contaminated, at least to me, Coordinator Dooley, the following suspicions and/or conclusions about the agencies became clear:

1. The Oil and Gas Division and Health Department, hereafter Agencies, do not use the *same playbook.*
2. Lack of clarity in each agencies playbook allows the agencies to perform their duties later not at all.
3. The agencies exercise discretion and cannot be shown to have exceeded their discretion based upon existing case law, statutes, rules and policies.
4. There appears to be at least two different entrenched cultures, one more recent for the Bakken- this prompted by Federal involvement and media coverage of spills- and another culture for the very old and minimally productive conventional wells that date back to the 50s or 60s.
5. Citizens or agency staff who report spills or agency failures suffer reprimands demotions or are ostracized.
6. Jurisdiction of salt water spills begets delay an in-decision: on-site engages the Oil and Gas Division; off-site salt water spills, the Health Department.
7. The Oil and Gas Division indulges industry requests for delaying remediation of spills.

**The Statutes on Audits: See Email String for Cites**

North Dakota law appears to require biennial audits. Performance audits require legislative mandate or agency consent. Lynn Helms is unlikely to consent. When the question came up in the last legislative session he reportedly declared, “I won’t have a witch hunt!”

**Strategy**

The interviews of the Audit Committee, which are summarized hereafter, were undertaken by the Coordinator Dooley. Representative Marvin Hansen, NWLA, DRC’s Council’s Oil and Gas Task Force have contributed ideas and expressed fears. My view is that time is of essence in order to build upon the successful April 8 hearing and be ready for the June 17 or possibly the July 2, 2014 hearing by the Legislative Audit and Fiscal Review Committee.

Exchanges of emails and conversations have occurred between the task force, Dooley, Senator Wardner and Republican Representative John Andrist of Crosby. Rep. Andrist is a former newsman. He is at the end of his career and appears disposed to do one more service for loved ones in ND. He is weak by reason of a serious health p.roblems. As long as he can stay in step with Sen. Rich Wardner he declares himself willing to help finessed the Republican Party approves performance audits of both Agencies  **.**

Sen. Rich Wardner continues to engage in discussion on these matters. He has candidly declared it his concern that the Oil & Gas Division has enough staff to do its job. Apparently he has fewer doubts about the Health Department’s ability to do its job. Coordinator Dooley concludes that Sen. Wardner’s Energy Development Committee, with one exception, Mr. Porter of Mandan, essentially recognizes that the State of North Dakota must do something about the **legacy salt contaminated lands**. Some acknowledge the **taking**. Some cannot think about it right now. If they do, they will crazy or table the matter.

The question Sen. Wardner raised is whether during this interim there remain any funds for studying any aspect of the Salt Contaminated Land Legacy. Sen. Wardner said to me he suspects that the $400K allotted for interim studies is likely to have been fully committed by now. “$125K of it was dedicated to our Energy Development Committee’s engagement of KLJ Study which is intended to determine what the future financial needs of the state will be as a consequence of **future Bakken activity.”**

Sen. Wardner candidly acknowledged that the April 8 hearing convinced him that remediation, or simply confining salt contamination of the past and addressing unresolved recent Bakken salt contamination, from broken pipelines will cost plenty. He declared, “I’m not sure what (to do) but I want to do something about it!”

Vice Chair, Representative Porter bluntly says,

“In my present view, the state has no responsibility at all.”

However, because Todd Streich and Ed Murphy testified that in wet conditions, the zones of death by salt or growing, even Porter acknowledged need of another hearing on the state’s duties about expansion of legacy salt . Mr. Porter said “I want to revisit the question of doing a count of the damaged acres in another hearing.”

Everyone else on the committee, at least at this moment, acknowledges the need to honestly assess the size of the salted lands legacy and acknowledges a state obligation to remediate. We must be aware. The KLJ study was proposed in hope of justifying reduction of the oil extraction tax. A sober assessment of the cost of even the low ball cost of confining salt or the higher number, superficially, as in Oklahoma’s wink and nod remediations, doing anything with salted lands left by 63 years of conventional oil field, will knock the ***oil extraction tax beys an’ girls back a step.***

On a May 9 conversation, Sen. Wardner declared he is going to check with Ed Murphy again about how to survey a sample of salted lands. He clearly understands that the Contamination Counsel wants to develop a model to guide a comprehensive assessment of all lands damaged by produced water.

Sen. Rich Wardner declare that the key person who will know about how much money is left for any immediate salted lands count is Senator Ray Holmberg of Grand Forks North Dakota.

Please reread the text of representative and soil scientist Marvin Nelson’s advice on Performance Audit. Also read the four key criticisms of the Oil and Gas Division. Finally, at least scan the Michigan, Montana, and Texas Oil and Gas Division performance audits and the Coordinator Dooley’s summary of their successful and failed approaches. You’ll find that summary in the email string.

1. North Dakota: An excellent independent performance audit was done on the ND Water Conservation Commission on the demand of Representative Robert J. Skarphol.
2. Michigan: the recent performance audit of their Oil & Gas Division is very similar to the audit done by the ND State Auditor on the Oil & Gas Division. Without too much sarcasm, it focuses on whether or not Michigan has kept track of coffee money. Michigan does not have anywhere near the degradation that ND has and the audit included little or no discussion of the adequacy or inadequacy of Oil & Gas division staff to manage the environmental challenges of fracking.
3. Montana: The audit of the Montana Oil & Gas Division is more useful. It does address deficiencies in the Plentywood District of NE Montana, but does not address the massive failure of conventional Montana’s salt water disposal regime. The state permitted use of shallow saltwater disposal wells. The USGS study completed in the fall of 2013 presented the bad news. That conventional oil field disposal of salt water in zones close to freshwater has corrupted fresh water supplies, wetlands, streams, wells and is impacting rivers. The Montana performance audit does not appear to have considered any of the Bakken challenges.
4. Texas: The Texas Oil & Gas Division performance audit is the most useful of the four performance audits available to me prior to preparation this memo. It addresses deficiencies in the Division; in particular insufficient resources, incomplete reports, deliberate avoidance of protocols. It does not seem to directly address ethical lapses or political interference with administration of statutes and rules designed to enforce police power and protect the water, land and health of the people of Texas.

Summary Phone Conversations with Members of the Legislative Audit and Fiscal Review Committee

Representative Marvin Nelson suggested we consider meeting with North Dakota Petroleum Council President Ron Ness. By that method we might preempt oil industry opposition to well-tailored performance audits. As I understand Rep. Nelson, he is suggesting that if Ron Ness sees a performance audit as likely to be supported by Sen. Rich Wardner’s Energy Development Committee and if it appears a significant number of the Audit Committee are receptive he might well agree to non-confrontive performance audits to enhance governance.

**Legislative Audit and Fiscal Review Committee Members Committee Responses**

Preliminaries: I identified myself as Coordinator of the SCL council and asked if they had read the record or heard about the April 8th Hearing. Many had heard of it and some had looked at part of the record, some had no knowledge whatsoever about salted lands .

My goal, and I made it clear, was to alert them to a long-standing set of concerns about the capability and willingness of the Health Department/Oil & Gas Division to enforce existing statutes and rules. The second preliminary communication I emphasized was that North Dakota is suffering from an expanding zone of salt poisoned land. I mentioned that several witnesses confirmed that fact. I told him that, in the perception of Sen. Rich Wardner the Minot witness who made the most effective demonstration of just how that expanding zone of salt poisoned land happens to be occurring was Sen. Marvin Nelson. His testimony was basically seconded by State Geologist Ed Murphy.

Some of them did not know saltwater or produced water damage can be serious or permanent. Some knew that conventional oil field salt damage land legacy is particularly obvious in Bottineau County. I forgot to ask if they had heard of the communications between the Bottineau County Commissioners and the North Dakota Industrial Commission.

I made specific reference to Sen. Rich Wardner and Representative John Andrist stating that they express guarded interest in performance audits that are non-confrontive and most respectful to the public servants who face and accelerating in changing oil patch.

I relayed that when they reach Sen. Rich Wardner they are likely to hear what he has told us, that he is concerned that minute by minute he intends to be aware of needs of the two Agencies. I made it clear we agree we all must know whether the system is or is not working and how it might be improved. I again spoke of non-confrontation and Sen. Wardner’s determination that we acknowledge that the fault lies in the rapid pace of change which has overwhelmed of state government.

With at least one who thought the Agencies were doing fine I asked if he was aware that neither Agency has a soil scientist on staff? Recall that at the Minot hearing Ed Murphy declared that he is not a soil scientist.

**Individual Responses:**

1. Committee Chair and Sen. Gary Kreidt, New Salem, nursing home administrator and farmer. We have a mutual friend in machinery manufacturer Ray Olin. He expects audit committees hearing date originally set for June 17th will be moved to July 2nd. After listening to my introduction to the topic he declared “Yes, I am very interested in what you are talking about. We should have no trouble giving you and your people time to explain yourself.”
2. Representative Robert Skarphol, Tioga, key person in Association of Oil & Gas Producing Counties, may be ready for another performance audit of the key set of agencies involved in the Bakken. Actually the seemed a little embarrassed that he had criticized the Water Commission. I told him I thought that the water commission’s response to the performance audit was perfect. They accepted the criticisms made.
3. Representative Keith Kempenich, in the far southwest corner of North Dakota near the fall and winter salt spills of 2013. He is rancher, owns trucking company, hauled produced water in the early 80’s when he said, “We loaded it and drove off with the valves open. It does suppress dust, but too much in one spot kills vegetation. We have sterilized ground by doing this.”

He agrees, “The oil field culture of the 80’s was bad and yet, today between midnight and 3 am the culture is still bad.” He welcomes a performance audit. He wants to make sure we respect the Health Departments Supervisor, Dave Glatt. He points out, “A performance of the Health Department ought to consider the adequacy of its staff and resources to deal with sewage.”

1. Sen. David O’Connell, Bottineau County farmer, engineer, has engaged in significant international travel. He noted,

“Government actions are now taking property by flooding, 40,000 to 42,000 of McHenry County land have been flooded by government decisions.”

When I asked about salt contamination, he answered,

“I have one piece with 30 acres out of 120 poisoned. That happened because of violation of rules. They used to drain the diked area into my land when they knew the state was not looking. They didn’t care that I knew. Nothing ever changed despite lots of complaints until Daryl Peterson made them change. I complained about a ***Bur (SP) Energy*** andthe old Chevron Saltwater disposal site now owned by ***BUR ENERGY (SP***).

“My complaints about the treater site were ineffective. They put a berm around it, then when no one was looking, or they thought no one was looking, they would drain it out in the lowest corner. The Oil & Gas Division didn’t work for me. I bought once a quarter with a pit on it.

“When they were done, the oil company pushed in the pit they overflowed the brine. In the past they actually pumped the brines right into the creek.

“Call Mike O’Keefe who heads of Farm Credit in Bismarck/Mandan. He is managing a piece of O’Connell land owned by a cousin. He knows a lot about how worthless some of our land is. He and we have to consider changing our rents.

“Of course we need a Performance Audit!!”

1. Representative Wayne Trottier, Northwood ND, Cass County, banker, auctioneer, Viet Nam Era veteran who correlates the damage done to soldiers and the people of Viet Nam by Agent Orange to the damage done to farm land and the sustainable future prosperity of the state by produced water. He is involved in promoting state benefits for victims of Agent Orange. He regards himself as blessed because he never served in Viet Nam but he has a close friend whose health was damaged by Agent Orange. He served as a loader of the poison on U.S. Air Force airplanes used to spray the jungles of Viet Nam. He says, “Yes for sure! I will support you and a lot of people will. I agree with you. Your project involves our responsibility as stewards.”
2. Representative Jeff Delzer, Underwood farmer with knowledge of the standards for reclamation of coal mined farmland. He took curious position.

“It’s too early to do a performance audit on the Health Department or Oil & Gas Division. We don’t have standards for their work. We need standards for their work. Nobody knows what their duties are in the saltwater reclamation problem. Standards are not as clearly written as they should be.”

1. Jerry Kelsch, Fullerton, south of Edgeley, retired farmer fully supports a performance audit of both agencies but, “Democrats requesting performance audit will get nowhere. Republicans will kill the project unless we divide them.” I forgot to ask whether he lives close to the zone affected by the Keystone Pipeline break caused in southeastern North Dakota.
2. Judy Lee, Fargo, exhibited great curiosity which I initially thought was resistance to the idea of a Performance Audit. She promised to read and respond.
3. Sen. Ralph Kilzer, Bismarck, retired surgeon, grew up in the Bentley/Mott area, Hettinger, Adams County , Catholic farm family. Has a nephew who is a monk at Richardton Abby is a friend. I knew kills her from my work in workers comp cases. He is quiet and brilliant, studious. He said, “I welcome the discussion, it’s important. I thank you that the subject will now come before us.”
4. Patrick Hatlestad, Williston, asked,

“What is Lynn Helms’ view? The Oil and Gas And Health Department’s performance audits will have to be separate.”

I responded,

“The performance audits need to be coordinated because three agencies work together to protect our water in our soil. He asked for more information.

1. Andrew G. Maragos, Minot, said he remembered my testimony from 30 years ago, Viet Nam veteran, says, “Your requests for performance audit are very well reasoned.”

He is a friend of State Legislator Kretchmar and friend Federal Judge Patrick Conmy. Maragos declares,

“I am in favor of protecting voters’ property and local business. You should talk to Skarphol who talked us into the performance audit on the ND Water Conservation Commission. Skarphol will influence the performance audit decision you ask for. I look forward to hearing much more about your proposals.”

1. Terry M. Wanzek, Jamestown rancher, member of Wheat Growers, very concerned that the two agencies be adequately staffed, suggests,

“Talk to Ray Homberg about what money might be left for more studies. I see lots of saline problems on my land during these wet years. I understand that the combination of natural and manmade salt, produced salt water destroys land. The problem is real. I believe the acres of salt poisoned land in Western North Dakota are increasing.”

Wanzek expects and agrees with John Andrist who specifically declares,

“If Sen. Rich Warner is not opposed then I want a calm non-confrontational approach to both performance audits. You should get to know Gordy Smith at the Auditor’s Office. I expect Gordy will manage both performance audits.”

**The Following Have Not Yet Called Back**

1. Scot Kelsch, Fargo fire fighter, architect, song writer, support of PPB, historic preservation, and injured workers.
2. Ron Guggisberg, Fargo, Capt. of Fire Department, concerned about disabled vets and campaign contributions.
3. Dan Ruby, Minot, owns one or two sanitation companies and possibly a landfill at Noonan, ND.
4. Chet Pollert, Carrington, owns a grain and feed company.
5. Corey Mock, Grand Forks, assistant minority leader, concerned about ethics of state officials and employees.
6. Wesley R. Belter, Fargo farmer, studied Agricultural Economics, retired from US Air National Guard, life member of NRA, Corn, Soybean and Grain Growers Assoc., author of a petition to the EPA regarding carbon rules and urged them not to impose unreasonable burdens on rural electric users.
7. Jim Schmidt, Huff, retired U.S.D.A employee and farmer, president of ND Association of Resource Conservation and Development Councils, Morton County Resource Board, Missouri West Water Systems, Soil Conservation Committee, he is a professional soil classifier.
8. Bob Martinson, Bismarck, attended BSC with him, he was the Tourism Director under Gov. Eddie Shafer, Viet Nam veteran, independent landman, wants to reform the ND State Board of Higher Education.