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EXECUTIVE SUMMARY

North Dakota has a long history of tobacco-related legislation dating back to the late 1800's, well before the formal organization of health advocates for tobacco control. Citizens of North Dakota recognized the negative health effects of tobacco smoke before most of the nation and made attempts to regulate the sale and use of tobacco products throughout the early 1900's. In 1913, the North Dakota legislature went as far as prohibiting the use of tobacco products in the state. However, all this early tobacco control legislation has since been repealed.

From 1975-1983, clean indoor air legislation was introduced by legislators in North Dakota due to constituent requests and personal dislike of secondhand smoke exposure by some legislators. This legislation was consistently supported by GASP and the American Lung Association of North Dakota. These organizations were unable to pass strong clean indoor air legislation on their own.

The mobilization of health advocates for tobacco control policy did not begin until the late 1980's when Dr. Stephen McDonough joined the State Health Department as the Head of the Preventive Health Section and Director of Maternal and Child Health. In 1985, Dr. McDonough joined forces with Marcie Andre of the North Dakota Lung Association to form the first tobacco control coalition in the state, Tobacco Free North Dakota. Tobacco Free North Dakota successfully brought together the State Health Department, voluntary health agencies, and other health organizations to work for tobacco control policy in the state. Tobacco Free North Dakota was in existence throughout the 1990's but became progressively less effective in promoting state level tobacco control policy due to increased tobacco industry involvement in state level politics.

Through the efforts of Dr. McDonough and Tobacco Free North Dakota the first North Dakota state tobacco plan, "Tobacco, Health, and the Bottom Line" was developed in 1986. At the time the plan was one of only six that had been developed in the country. Through the leadership provided by McDonough, the active coalition of Tobacco Free North Dakota, and the well-developed plan tobacco control advocates were able to strengthen clean indoor air legislation (HB 1272) and pass a tobacco tax increase in 1987. The passage of clean indoor air legislation which required the designation of a smoking area in places of public assembly was similar to the 1975 Minnesota Clean Indoor Air Act which had been passed 12 years earlier. Although weak by 2004 standards and well behind Minnesota, HB 1272 strengthened clear indoor air law in North Dakota.

The mobilization of health advocates for tobacco control led to an increase in tobacco industry involvement in state politics and subsequent decrease in state level tobacco control policy. The tobacco industry has built and strengthened networks of third party allies, including the Tobacco Wholesalers Association, North Dakota Grocers Association, ND Petroleum Marketers Association, North Dakota Retail Association, and the Greater North Dakota Association to fight the public battles against tobacco control policy allowing the tobacco industry to remain behind the scenes.

Although the path of tobacco industry money in North Dakota is difficult to trace due to poor reporting requirements, piecing together reported political contributions, tobacco industry

budgets, and media reports provides evidence that tobacco industry funds have influenced the political process in North Dakota. The tobacco industry successfully halted the passage of tobacco control policy at the state level. The only state level legislative successes for health advocates beyond the 1987 legislative session was the prevention of the passage of preemptive legislation supported by the tobacco industry.

In the early 1990's tobacco control advocates recognized the stall in state level tobacco control policy due to the infiltration of the political process by the tobacco industry. Wisely, tobacco control leadership at the State Health Department including Dr. McDonough and Jeanne Prom, State Health Department Tobacco Prevention and Control Administrator (1992-2001), shifted the focus to local level politics where the force of the tobacco industry was less powerful. In 1992, the State Health Department began funding local public health units for coalition building and the passage of youth access ordinances. Local tobacco control policy flourished throughout the 1990's with a total of 38 youth access ordinances enacted.

The most significant local policy success in North Dakota was the passage of a smoke-free restaurant ordinance in Minot, North Dakota on April 2, 2001. The STAMP coalition with the leadership of Kelly Buettner-Schmidt working in collaboration with City Council members Andy Bertsch and Stephan Podrygula secured the passage of the ordinance by the Minot City Council. As has happened in many other states following first passage of a smoke-free restaurant ordinance (with undisclosed backing from the tobacco industry), four days after the passage of the ordinance a referendum was forced and the smoke-free ordinance was subsequently brought to a vote of the people. Due to the efforts of the STAMP coalition the ordinance was successfully upheld by a vote of the people and became effective January 1, 2002.

On the state level, State Health Officer Murray Sagsveen, under the direction of Republican Governor Edward Schafer, set the stage for the allocation of minimal Master Settlement Agreement funds to tobacco control in North Dakota. Prior to the 1999 legislative session health advocates failed to effectively advocate for the allocation of the funds to tobacco control. Therefore, the Governor and legislature determined that only 10% of the funds would be directed to a Community Health Trust Fund. Prior to the 2001 legislative session health advocates lost the leadership previously provided by Dr. Stephen McDonough and Attorney General Heidi Heitkamp and did not unify behind a plan for the allocation of the funds in the Community Health Trust Fund. The determination of the implementing legislation was largely left to the legislature. However, health advocates did play a role in shaping the Community Health Grants Program. The Community Health Grants Program directed the funds in the Community Health Trust Fund to the local public health units where tobacco control advocates have traditionally been the most successful in North Dakota.

In the late 1990's the tobacco control infrastructure built by Tobacco Free North Dakota in the late 1980's crumbled due to loss of leadership and an adverse environment for tobacco control within the State Health Department. In 2003, health advocates in North Dakota were in the process of rebuilding this infrastructure in order to move forward with state level tobacco control policy.

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INTRODUCTION

North Dakota is a rural, upper midwestern state with a population of 642,200 (2000 census). The population of North Dakota is homogenous, with over 90% of the population identified as white, non-hispanic. Native Americans are the largest minority group, comprising approximately 5% of the population. In 2000, approximately 15% of the population was 65 years of age or greater.¹ Agriculture is the top industry in the state, comprising 25% of the economy with about 24% of the population employed in the agricultural industry.² North Dakota became the 39th state in the Union on November 2, 1889 and has a history of tobacco-related legislation since its early days.³ This report presents a history of tobacco control in North Dakota between 1889 and 2003.

Officially recorded anti-tobacco sentiment began in North Dakota on November 7, 1889 with a statement in the *Grand Forks Herald* which read

the legislature would do an Act meeting the approval of the people to prohibit the sale of death-dealing cigarettes. It is killing moyre 'kids' in North Dakota today than 'spiritous or malt liquors' and killing a rising generation—that may amount to something⁴.

The extensive history of early tobacco-related legislation began in the late 1800's prior the formal organization of health advocates for tobacco control. The mobilization of health advocates for tobacco control in the late 1980's led to an increase in tobacco industry involvement in state politics and subsequent decrease in state level tobacco control policy. In the early 1990's tobacco control advocates shifted their focus to local level politics where the force of the tobacco industry was weaker. Local tobacco control policy flourished throughout the 1990's with a total of 38 ordinances enacted.

The tobacco industry emphasizes its economic role in North Dakota as a tool to further its interests. In 1982, the Tobacco Institute, then the tobacco industry's Washington, DC-based lobbying organization, published a pamphlet titled "Tobacco in North Dakota" which contained information from a 1979 study conducted for the Tobacco Institute by the University of Pennsylvania's Wharton Applied Research Center titled "A Study of the US. Tobacco Industry's Economic Contribution to the Nation, Its Fifty States and the District of Columbia". The pamphlet stated

When explorers and fur traders entered the North Dakota territory, they found sedentary, agricultural Indian tribes - Mandans and Arikaras - cultivating tobacco. The Lewis and Clark Expedition, which spent the winter of 1805 along the Missouri River with these Indians, sent their sponsor President Thomas Jefferson, a twist of tobacco cultivated by the Arikaras. But the Indian's interest in white man's tobacco also was strong. So much of this leaf was given away in the interest of diplomacy that Lewis and Clark had to deny its use to their own men.

Today North Dakota farmers leave leaf cultivation to the traditional tobacco-growing states to their east and south, but busy tobacco wholesale and retail operations in the Sioux State are dynamic forces in the economy.⁵

A 1994 advertisement sponsored by Philip Morris titled "Thanks, North Dakota. If you

didn't do what you do, we couldn't do what we do" was located in internal tobacco industry documents. The advertisement stated

Many of the fine products you find in your supermarket come from the Philip Morris family of companies which include Philip Morris USA, Kraft General Foods and Miller Brewing Company. To make these products, we buy \$100.5 million worth of agricultural products a year in North Dakota.

We purchase North Dakota wheat, cheese, corn, barley and sunflower seeds for many of these products.

North Dakota contributes to the high quality of our products, and in turn we generate nearly \$125 million a year for North Dakota's economy. That includes almost \$24 million in salaries, taxes and utilities.⁶

As with other such reports by the tobacco industry, these claims ignore the medical and disability costs that the tobacco industry imposes on society through disease and death, as well as removing people from the workforce during productive years. These claims also ignore the fact that if people did not spend money on cigarettes, they would spend the same money on other products, where the money would tend to stay in the local economy rather than being exported to out-of-state tobacco companies.^{7,8}

The use of tobacco products is a major public health issue in North Dakota. Tobacco use is the number one cause of preventable morbidity and mortality.⁹ The leading disease causes of death in North Dakota are heart disease and cancer, both caused by smoking. Lung cancer – almost all of which is caused by smoking – is the fourth most common type of cancer diagnosis in the state and is the number one cancer related death.

Data from the Behavioral Risk Factor Surveillance System (BRFSS) provides a picture of the trends in adult smoking. The adult smoking rates in North Dakota fluctuated around 21.5% between 1990 to 2000, remaining slightly below the US national average rate (Figure 1). Adult smoking prevalence in North Dakota is slightly below the national average of 23% in 2002, twice the rate of the US Department of Health and Human Services Healthy People 2010 goal of 12%.^{9,10} Per capita consumption of cigarettes in North Dakota is, however, higher than the national average (Figure 2), indicating that those people who smoke are relatively heavy smokers. In 1999, the smokeless tobacco use prevalence for adults was 13.9%.¹¹

In North Dakota disparities in smoking rates are evident when the population is categorized by race, age, and socioeconomic status. The smoking prevalence in the Native American population is 45 percent, twice the non-Native American smoking prevalence.⁹ In 2002 the smoking prevalence breakdown by racial category was white 19.3%, black 26.7%, hispanic 31.8%, other 55.6%, and multiracial 51.3%. In 2002 the age groups with the highest smoking rate in North Dakota were 18-24 year olds at 25.4% and 25-34 year olds at 26.5% with subsequent rates declining as age increases. In 2002 people with income less than \$15,000 had the highest smoking rates with rates decreasing as income increased.¹²

Figure 1: Smoking prevalence in US and ND, 1990-2002 (Source: Centers for Disease Control, BRFSS)

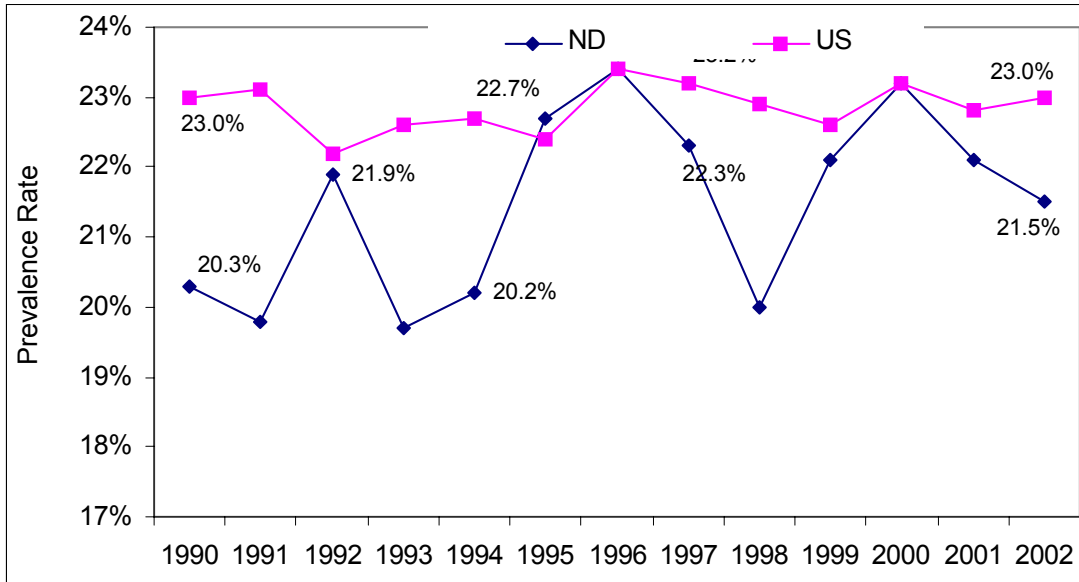
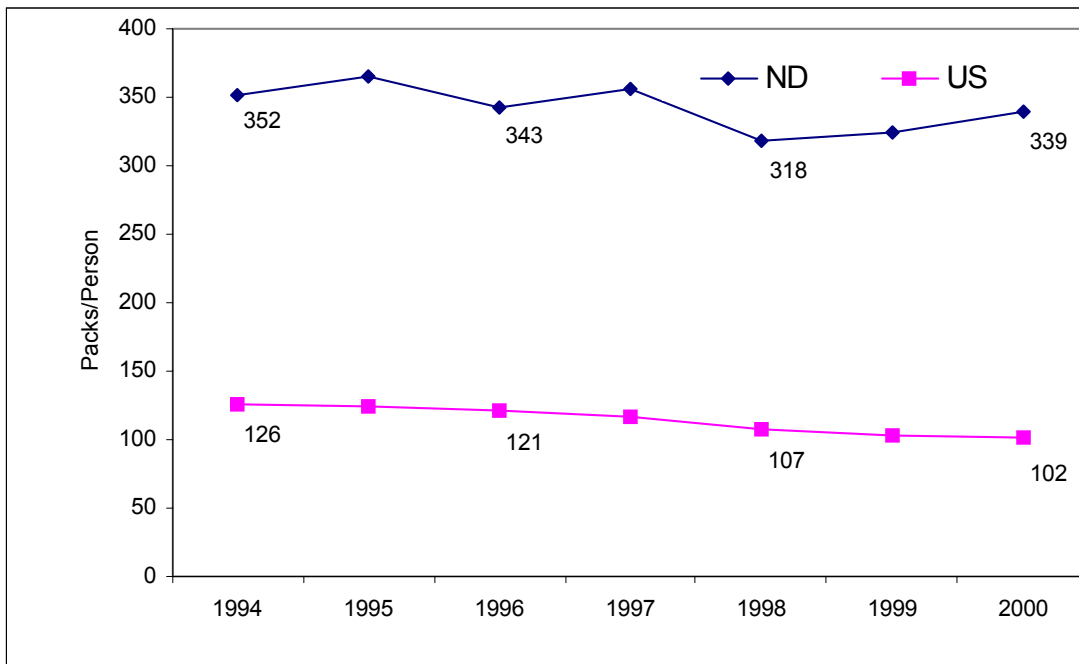


Figure 2: Per Capita Cigarette Consumption in US and ND, 1994-2000 (Source: Tobacco Tax Burden 2002)



The monetary cost of tobacco use in North Dakota is indicated by the 1999 US Centers for Disease Control Adult Smoking Attributable Morbidity and Mortality Economic Costs (SAMMEC) data. The data estimate that the cost of smoking in North Dakota is \$193 million annually from direct medical cost and \$158 million annually due to lost productivity. Medicaid expenditures due to smoking related illness and disease totaled \$37 million or 11 percent of all

expenditures. The smoking-attributable mortality rate in 1999 was 224/100,000 with 860 smoking-attributable deaths. The years of potential life lost rate was 6,619 per 100,000 in 1999 with 13,531 years of potential life lost.^{9, 13}

The youth cigarette smoking and smokeless tobacco use prevalence rates in North Dakota rank near the highest in the nation. The North Dakota Youth Risk Behavior Survey indicated that in 1999 41 percent of youth were current smokers (smoked on one or more of the past 30 days) and in 2001 35 percent of youth were current smokers. The national youth smoking rate in 2001 was 29 percent.^{14, 15} The use of tobacco products is still a socially acceptable behavior in North Dakota.⁹ Although, the 2001 North Dakota Youth Risk Behavior Survey data illustrated a downward trend in tobacco use in the high school and middle school age range the rates remain high. Approximately one quarter of children in North Dakota began smoking before age thirteen. Quit attempts had been made by 58% of youth smokers in North Dakota during 2001. In 2001, the smokeless tobacco use on at least one of the last 30 days rates were 13% for students in grades nine through twelve and 6% for students in grades seven through eight.⁹

OVERVIEW OF NORTH DAKOTA DEPARTMENT OF HEALTH AND THE TOBACCO PREVENTION AND CONTROL PROGRAM

The North Dakota state Department of Health is composed of a health council, a state health officer, section chiefs, directors of divisions, and staff. The state health department in North Dakota has five sections and approximately 300 employees. The five sections are Administrative Support, Medical Services, Community Health, Health Resources, and Environmental Health.¹⁶

The state health officer is appointed by the governor and serves a four year term. The role of the state health officer is as state health department administrative officer. If the governor appoints a non-physician as state health officer, an advisory committee composed of three physicians chosen by the North Dakota Medical Association must be created.¹⁷

The Division of Tobacco Prevention and Control is housed within the Community Health Section of the North Dakota Department of Health. In 2003, the Division of Tobacco Prevention and Control at the state level had 5.4 full time employees supported by CDC funding. Staff working on a contract basis supported by CDC funds included a Youth Tobacco Survey consultant, Native American Training and Technical Assistance contractor, evaluation contractor, media contractor for quitline promotion, and a policy planning contractor. Funding for additional contractors for policy planning, policy technical assistance and training, and program evaluation is provided by the Community Health Grant Program funds (from the money paid to the state as part of the Master Settlement Agreement [MSA] that settled litigation by the states against the tobacco industry in 1999).^{9, 18}

Local public health in North Dakota functions separately from the state department of health. There are 28 local public health units in North Dakota covering 53 counties, 4 tribal health units, and one Indian service area. The division of the local public health units is population based and therefore there are county specific, city specific, and multi-county public health units. The western part of the state has 4 local public health units while the more populous eastern part of the state has 24 local public health units¹⁶ (Appendix 1). In 1999,

legislation (SB 2045) was passed that mandated that all North Dakota counties be covered by one of the 28 public health units.¹⁹ Each local public health unit has a board of health with a minimum of five members. The role of the boards of health is budget preparation, financial management, appointment of local health officer, staffing of local public health units, and enforcement of public health regulations. The boards of health for the local public health units are appointed by the city or county commissions. The administrators and staff of the local public health units are employed by the local board of health. The role of the State Health Officer and health department is to fund, assist and advise the local public health units.^{20,21}

THE CREATION OF TOBACCO FREE NORTH DAKOTA AND ESTABLISHMENT OF THE TOBACCO PREVENTION AND CONTROL PROGRAM: HISTORY AND POLITICAL CLIMATE

Governor George Sinner (D) served two terms as North Dakota governor between 1984-1992. Dr. Robert Wentz was the State Health Officer during Sinner's time in office. Prior to 1984, there had been no tobacco control program at the State Department of Health or any private coalitions organized for tobacco control.

Dr. Stephen McDonough, a pediatrician, joined the State Department of Health in 1985 as Head of the Preventive Health Section and Director of Maternal and Child Health. In an interview with the authors in 2003, McDonough stated

I came there with a couple of interests I wanted to work on. One was tobacco and the other was overweight children. After a while, I figured I couldn't do a lot to help overweight children at that point, but the Surgeon General C. Everett Koop was talking about that tobacco is the biggest public health problem in the country, and I'd always been interested in working on reducing tobacco use and exposure to children, that was my practice in Grand Forks, and the state hadn't done much in that area, so what had been done was pretty ineffective, so I felt there was an opportunity to work on that.²²

Dr. McDonough was described by Jeanne Prom, Tobacco Prevention and Control Program administrator (1992-2001) as "a very outspoken Stan Glantz kind of spokesperson for the cause."²³

In 1985, Marcie Andre, Executive Director North Dakota Lung Association, and McDonough agreed to join forces to develop North Dakota's first tobacco control coalition to facilitate an effective collaboration between the health organizations in North Dakota. The impetus for the creation of the coalition was the desire to pass state-wide clean indoor air legislation. The State Health Department's first role was to present prevalence statistics, and health and economic data on smoking in North Dakota, then to use the data to develop the first state tobacco control plan.

On December 13, 1985 the coalition officially announced itself as Smoke-free North Dakota. Initial coalition membership is listed in Table 1. The coalition's leadership was provided by a Board of Directors with each member organization receiving one vote on the board. A press conference was held to announce the coalition's and member organizations' support of clean indoor air legislation.²⁴

Smoke-free North Dakota established by-laws, elected officers, and created an annual budget with funding from a federal Maternal and Child Health grant (federal grant for funding to

Table 1: Tobacco Free North Dakota Original Membership, 1985

| | |
|---|--|
| Treasurer Ed Sypnieski <i>North Dakota Public Health Association</i> | Barb Sand <i>American Heart Association</i> |
| Bill Erwin <i>American Cancer Society</i> | President Dr. Steve McDonough <i>North Dakota State Department of Health</i> |
| Mary Ann Sullivan <i>American Cancer Society</i> | Jim Carter <i>March of Dimes Birth Defects Foundation</i> |
| Vice President for Education Marcie Andre <i>American Lung Association of North Dakota</i> | Vice President for Legislation Dave Peske <i>North Dakota Medical Association</i> |
| Dr. William Riecke <i>American Academy of Pediatrics</i> | Reverend Don Knudson-at-large directors to the Board of Directors |
| Dr. Paul Knudson <i>North Dakota Academy of Family Physicians</i> | Mike Burckhard-at-large directors to the Board of Directors |
| Sandi Doll <i>North Dakota Academy of Health Practitioners</i> | Source: ²⁴ |

states for improvement of maternal and child health) and coalition member dues. The total budget was approximately \$5000 annually with approximately 55% provided by Maternal and Child Health grant funding. The diverse coalition (see Table 1) provided expertise in various areas with Dave Peske, North Dakota Medical Association and Marcie Andre specifically providing extensive lobbying experience. The initial goals of the newly formed coalition were to increase and further diversify membership, contribute to tobacco use prevention education in schools, and draft clean indoor air legislation.^{24, 25}

The official coalition name was modified to Tobacco Free North Dakota on January 17, 1986 in order to include smokeless tobacco in the agenda of the coalition.²⁴

The North Dakota State Tobacco Plan

The first state tobacco plan in North Dakota, titled *Tobacco, Health, and the Bottom Line: The North Dakota Plan for a Tobacco Free State*,²⁶ was created through the collaboration employees of the Preventive Health Section of the State Department of Health in 1986. McDonough explained “the tobacco plan was actually put together to convince people of a need to do something in the state.”²² He saw the plan as an aid to achieve Tobacco Free North Dakota’s agendas of clean indoor air legislation and tobacco tax increases during the 1987 legislative session. McDonough stated “the plan was very helpful in that it provided justification to get others involved, such as legislators and other coalition efforts.”²²

The coordinated effort required contributions from employees who held full time commitments to other projects. The project coordinator for the plan was JuLann Wiseman, Division of Health Education, who was assisted by Kathleen Mangskau, Dental Health Program, with historical data provided by Ed Sypnieski, Division of Local health Services Director. The North Dakota state tobacco plan was one of only six tobacco plans in the country at the time and was comparable with reports produced by larger state health departments. The state tobacco plan contained a controversial policy that gave hiring preference to individuals who did not smoke during work hours.²⁴

For inclusion in the plan, the Preventive Health Section of the State Department of Health collected statistics on tobacco use through the North Dakota Youth Alcohol and Drug Survey (North Dakota junior and senior high school students) and the Behavioral Risk Factor Survey (North Dakota adults). A picture of the tobacco use rates in North Dakota was obtained through this data. In 1986, approximately 12% of North Dakota youth smoked daily and 17.2% used smokeless tobacco. Approximately 25.6% of North Dakota adults smoked daily in 1986, which was slightly below the national average of 26.8%.²⁶

With the assistance of the state of Minnesota, North Dakota became the second state to combine mortality data with smoking prevalence statistics to approximate the overall health and economic impact of tobacco in the state through a computer program developed by James Schultz of Minnesota.²⁴ A picture of the economic impact of tobacco use in North Dakota was obtained with these data. In 1986 total health care expenditures in North Dakota for tobacco related disease was estimated to be \$63.7 million. Total lost income and productivity due to tobacco use was estimated to be \$60.2 million and total economic costs due to tobacco related disease was estimated to be \$123.9 million. In 1985, 969 premature deaths were estimated to be directly attributable to the effects of tobacco use. Cardiovascular disease attributable to smoking accounted for 46.5 percent (451 deaths) of the premature deaths, cancers accounted for 30.3 percent (294 deaths) and lung disease accounted for 21.1 percent (163 deaths).²⁶

The needs/problem statement of the plan announced

Nationally, health goals have been outlined in Healthy People - The Surgeon General's Report on Health Promotion and Disease Prevention. This report states that of the major risk factors responsible for premature morbidity and mortality in this country, cigarette smoking is the single most important preventable cause of death. Progress in limiting the use of tobacco in the United States prompted a statement by U.S. Surgeon General, C. Everett Koop, requesting that the nation achieve 'a smoke-free society by the year 2000.'

In order to achieve a tobacco-free society, North Dakota has adopted the national goals and incorporated them into existing state goals. A task force of organizations and agencies concerned with the adverse effects of smoking has been formed. This task force called Tobacco-Free North Dakota, is dedicated to encouraging the elimination of smoking and smokeless tobacco usage by North Dakota residents.

Surveys to analyze the prevalence of smoking among various populations in North Dakota have and will continue to be conducted. Current smokers will be encouraged to quit smoking by increasing the availability of smoking cessation support programs in North Dakota. Businesses will be encouraged to adopt smoking policies as a

means of reducing exposure of nonsmokers to secondhand smoke. Legislative efforts to increase cigarette excise taxes, taxes on other tobacco products, and the banning of cigarette advertising will be promoted.

Advancement and improvement in the status of the health of North Dakotans will be achieved as a result of changes which occur in our homes, our schools, and our businesses. The responsibility for these changes lies with individuals, families, health professionals, health institutions, schools, businesses, the community, and government. To achieve a ‘tobacco-free society by the year 2000,’ North Dakotans must be willing to adopt lifestyles to protect and promote their health.²⁶

In addition, the state tobacco plan contained a series of recommendations to achieve the goals it set for North Dakota. See Table 2.

| Table 2: Goals and Objectives of the North Dakota State Tobacco Plan |
|---|
| <ol style="list-style-type: none"> 1. By 1990, the overall prevalence of cigarette smoking will be reduced to less than 21 percent among adults. 2. By 1990, the overall prevalence of smokeless tobacco usage will be reduced to less than 4 percent among North Dakota adults 3. By 1990, the overall prevalence of cigarette smoking will be reduced to 8 percent among North Dakota individuals ages 12-18. 4. By 1990, the overall prevalence of smokeless tobacco usage will be reduced to 14 percent among individuals ages 12-18. 5. By 1990, the proportion of women in North Dakota who smoke throughout their pregnancy will be reduced to 15 percent. |
| <p><u>Youth and Schools</u></p> <ol style="list-style-type: none"> 1. Local school districts should adopt tobacco usage policies which will ultimately achieve tobacco-free schools by the year 1990. 2. Local school districts should implement a comprehensive health education program by 1990 for Kindergarten through Grade 12 which includes a tobacco education component. 3. Local school districts should offer cessation programs to all tobacco users, students, and/or faculty. 4. Surveys to determine attitudes and prevalence of tobacco use should be conducted at least every two years. 5. The North Dakota State Department of Health and the North Dakota Department of Public Instruction should work cooperatively to assist local school districts in achieving tobacco-free schools. |
| <p><u>Legislation</u></p> <ol style="list-style-type: none"> 1. The current North Dakota Century Code should be amended to designate “smoking” rather than “nonsmoking” areas in public places. 2. The North Dakota cigarette tax should be increased by 5 mills per cigarette [\$0.10 per package] during the 1987 legislative session. 3. Other tobacco products should be taxed at an equal or greater rate than cigarettes. 4. Verification of adult status should be mandatory to prohibit the free distribution of tobacco products to minors. |

Public Information/Education

1. The mass media should be utilized to emphasize the health consequences of tobacco use.
2. Survey should be conducted periodically to measure the prevalence of tobacco usage in North Dakota, to determine public knowledge and opinion, and to assess the general impact and effectiveness of prevention and cessation efforts.
3. The availability of tobacco cessation programs should be increased statewide.
4. Organizers of public events should reject sponsorship or contributions which require promotion of tobacco products.
5. Role models, peers, etc. should be encouraged to promote the benefits of remaining tobacco-free.

Business Community

1. Businesses should establish tobacco usage policies which will ultimately achieve tobacco-free worksites by the year 1990.
2. Employees should sponsor and/or support cessation programs for tobacco users.
3. Insurance companies should offer health insurance discounts to businesses with tobacco-free worksites and/or home and life insurance discounts to tobacco-free families.
4. The North Dakota print media and billboard advertisers should voluntarily decrease their tobacco advertising to ultimately achieve publications and billboards free of tobacco ads by 1990.

Governmental Agencies

1. The North Dakota State Department of Health should be utilized as a role model for successful nonsmoking policies at the worksite.
2. Worksite policies should be established which eliminate the use of tobacco products in all public agencies by 1990.
3. Employer/employee sponsored or supported tobacco cessation programs should be offered.

Health Care Providers

1. Health care professionals should develop educational programs which address the risks of tobacco use.
2. Health care providers should become role models as non-tobacco users.
3. Health care providers should incorporate counseling on tobacco use into their routine clinical practice and provide appropriate referrals for cessation programs.
4. Health care providers should act as local resources in tobacco prevention programs.
5. Health care facilities should adopt policies to eliminate the use of tobacco products by 1990.
6. Health care providers and ancillary health agencies should increase the availability an use of tobacco cessation programs.

Source: ²⁶

The *Grand Forks Herald* reviewed the draft recommendations from the state tobacco plan.²⁶ The state tobacco plan contained a draft recommendation that newspapers in North Dakota voluntarily refuse to run tobacco advertisements which sparked a response from the North Dakota Newspaper Association. The *Kulm Newspaper* on October 22, 1986 reported that the North Dakota Newspaper Association on October 10, 1986 had voted to stand in opposition to the state tobacco plan's draft recommendation on tobacco advertisements in newspapers. The President of the North Dakota Newspaper Association later denied this position, but Jill Denning, Executive Vice President of the North Dakota Newspaper Association, confirmed that the Association had agreed to stand in opposition to the recommendation. The North Dakota State Health Department made several attempts to debate the recommendation at the North Dakota Newspaper Association's annual conference but the attempts were denied.²⁴

A press conference was held on November 19, 1986 at which the State Department of Health officially released the state tobacco plan's recommendations. At the press conference the State Department of Health openly criticized the North Dakota Newspaper Association's position on the recommendation to voluntarily refuse tobacco advertising insinuating that the revenue from tobacco advertisements was the cause of the newspaper's objections to the plan.²⁴

Although the state tobacco plan was officially released on November 19, the tobacco industry had been able to preview the plan in advance. In a 2003 interview, McDonough explained

this tobacco lobbyist wanted to see a draft copy of the plan. He knew were doing it because he was also the Hospital Association lobbyist. I didn't want to give it to him. I didn't want to help the tobacco industry know six months ahead of time what was coming to them. I'd rather they knew maybe a month ahead of time. Well, he wanted a copy of the draft plan and I wouldn't give it to him, *so he asked the Medical Association, who he was good buds with, to get a copy of the draft plan and they gave it to him, despite my concern.* So they sent a copy of the draft plan down to regional corporate headquarters and had it studied. But way back then, there was a little sign to me about the conflicting relationships with healthcare and the tobacco lobby. And I was very disappointed when the Medical Association did what they did. But it wasn't the last time I would be disappointed by them. The rationale was that the Medical Association wasn't giving the draft plan to tobacco lobbyists, they were giving it to the hospital lobbyist. But he was the same person.²² [emphasis added]

A draft copy of *Tobacco, Health, and the Bottom Line* was located in internal tobacco industry documents with Tobacco Institute lobbyist Harold Anderson's name on the cover page.²⁶

Five days after the press conference the *Bismarck Tribune* attacked McDonough, Chief of the Preventive Health Section, in an editorial on Sunday November 24, 1986. In *The Golden Ounce*, McDonough's book on the history of public health in North Dakota, McDonough stated "So mad that they abandoned reason, the editorial staff added problems in reading to those of their limited vocabulary. In a distortion and inaccuracy, the editorial began with 'Among the Department's 27 recommendations is a ban on tobacco advertising. This will come presumably right after the Department repeals the first amendment.'²⁴ The state plan's recommendation explicitly stated that the ban on tobacco advertisements in newspapers was voluntary.²⁴

Success of Tobacco Free North Dakota

Through Tobacco Free North Dakota (TFND) and the state tobacco plan health advocates were successful in passing clean indoor air legislation and a tobacco products tax increase in 1987. These two achievements, in addition to an adult smoking prevalence below 21%, establishment of routine surveying of tobacco use prevalence, public opinion and tobacco control evaluation, and a smoke-free workplace policy at the State Department of Health were the goals of the state tobacco plan that were met by 1990. North Dakota was a leader in tobacco control in the late 1980's and was recognized both nationally and regionally. In 1988, Tobacco Free North Dakota received The Secretary's Award for Excellence from the US Department of

Health and Human Services for the tobacco control activity in the state. The department was one of only 24 organizations in the country to receive the distinction. Tobacco Free North Dakota had only existed for 2½ years at the time of the award and functioned on a very small budget without full or part time staff.²⁴

In addition, The Rocky Mountain Tobacco-Free Challenge (RMTFC) was started by the governors of the states of Arizona, Colorado, Montana, New Mexico, North Dakota, South Dakota, Utah, and Wyoming in February 1988, in response to the Surgeon General's 1984 goal of a SmokeFree Society by the year 2000. The purpose of the RMTFC was a “regional effort to reduce the prevalence of tobacco use and chronic diseases associated with tobacco use.” The program consisted of a yearly evaluation of tobacco reduction efforts for each state which resulted in one state being named the annual challenge leader.²⁷

An evaluation was conducted in May 1989 and North Dakota was named the most successful in meeting the goals of the RMTFC. The RMTFC had two main areas of evaluation for the first year of 1988-1989: 1) designating areas for intervention including: coalition building and networking; community information and education; counter-advertising; economic incentives and disincentives; higher education; legislation; policy; professional education; program planning and evaluation; schools; special populations; and miscellaneous 2) recording baseline data on tobacco-use surveillance, health department policies and programs, legislative activities, coalitions, school activities, demographics, and state government activities to evaluate overall tobacco control in each state through the United States Center for Disease Control & Prevention Office on Smoking and Health (OSH) and the participating states. Through these two areas of evaluation North Dakota was named the challenge leader in 1989.²⁷

Although TFND had been active for several years, the Tobacco Prevention and Control Program at the North Dakota State Department of Health was not formed until 1989, when the first full-time tobacco coordinator, Eric Solberg, was hired. The Tobacco Prevention and Control Program focused its efforts primarily on state level policy from 1989-1992. During this time period the program worked closely with Tobacco Free North Dakota. The small policy successes achieved from 1989-1992 were the defeat of preemptive legislation and the signing of an executive order by Governor Sinner (D) in 1990 to adopt a smoke-free policy in all state buildings.

Preemptive vending machine restriction legislation was introduced by the tobacco industry in 1991, but defeated. Preemption is a key tobacco industry strategy to prevent local communities from passing tobacco control policies. Statewide preemptive legislation prevents local governments from regulating tobacco. The tobacco industry is more powerful at the state level and more likely to win battles, therefore keeping tobacco policy at the state level is highly advantageous to tobacco industry interests. Tina Walls, Philip Morris head of US Government Affairs, stated “By introducing preemptive statewide legislation we can shift the battle away from the community level and back to state legislatures where we are on stronger ground.”^{28, 29}

In 1990, independent of the state health department the Grand Forks City Council passed the first local tobacco control ordinance in North Dakota which restricted the placement of cigarette vending machines to establishments that were not accessible to minors (to be discussed

in more depth in the Local Section). The passage of the first local ordinance signified to tobacco control advocates that local governments were an avenue for the passage of tobacco control policy. According to Kathleen Mangskau, Tobacco Prevention and Control administrator (2001-present), “Tobacco control leaders interpreted this as acceptance of local jurisdiction over tobacco, and the State Legislature and other state officials were no longer the exclusive gatekeepers of tobacco law in North Dakota.”⁹

As a result of this success and understanding, the Tobacco Prevention and Control program shifted the focus from state to local policy. After the success of health advocates during the 1987 legislative session, the tobacco industry had intensified their efforts to defeat tobacco control policy at the state level. McDonough explained “I saw us in the early nineties being forestalled at the legislature level so I directed that our efforts go out to the communities ... We started to fund local coalitions because I didn’t think we were going to make any progress on the state level so I was hoping we could do things at the local level.”²²

The role of the Tobacco Prevention and Control Program from 1993 through 2003 was as a funding and training agency for local public health units and local coalitions advocating for city tobacco control ordinances and policies.⁹ Kathleen Mangskau, Tobacco Prevention and Control administrator (2001-present) explained that the funding to local public health units was “primarily to support local infrastructure, so that we had a tobacco coordinator at the local level ... Then we also used it to promote coalition activity because we recognized that to really drive policy change, it’s not one person working alone, it’s an effort of many individuals in the community.”³⁰ Local coalitions have passed 38 local ordinances that restrict youth access to tobacco products covering in excess of half of the population of the state and half of the state’s Native American population since 1990.⁹ Jeanne Prom, State Health Department Tobacco Prevention and Control administrator (1992-2001), explained that while youth access was the focus of the ordinances during the 1990’s, education on smoke-free environments was simultaneously being done. The Tobacco Prevention and Control Program provided direction to the local public health units based upon the four CDC goal areas.³¹

In an interview in 2003, Kathleen Mangskau explained the role of the state health department: “In tobacco control, the state department of health functions as a policy promotion area and we function primarily in working toward broad areas of policy that would impact the state as a whole.”³⁰ She went on to explain,

Our approach to policy change is that we work in a coordinated effort with our local public health departments. We try to support their efforts by giving them technical assistance, helping them to find resources, helping to advise them on policy change efforts in their local communities. At the state level, we ask their assistance in helping us to promote state policy change because we believe that grass-roots effort is extremely important to helping us make those policy changes.”³⁰

TFND was in existence throughout the 1990’s with approximately \$5000 in funding from the Maternal and Child Health grant and member dues. TFND played a large role in the fight for tobacco control policy at that state level with Dr. McDonough as the key player. TFND had lobbyists only during the 1995 and 1997 legislative sessions. The health department played the

largest role in TFND providing housing and administrative support to the coalition, in addition to direction. Throughout the 1990's TFND member organizations testified at legislative hearings, in addition to mobilizing phone calls and letter to legislators and newspapers in support or opposition to tobacco-related legislation.²⁵

Maternal and child health funding was ended for TFND the late 1990's because the health department reassessed funding sources and determined that available CDC tobacco control funds would be a more appropriate funding source. The loss of funding led to a reorganization for TFND and subsequent decision to become a privately funded organization independent of the health department. The decision was based upon the climate towards tobacco control at the state health department under the direction of State Health Officer, Murray Sagsveen and the desire to focus exclusively on policy independent of the direction of the health department.³²

Without financial and administrative support from the Department of Health, TFND faltered. Member organizations in the coalition including the American Heart Association and American Lung Association were not able to allocate the resources necessary to sustain the operation. Prom explained “our voluntaries weren’t as strong then as they are now on this [the tobacco] issue, or experienced, so nobody really picked up staffing, because no one had the time or the budget or the money or the space or the location in Bismarck or cared about it enough.”³¹ TFND was not able to sustain itself without the support previously provided by the health department. As of 2004, TFND still existed on paper as a nonprofit 501(c)3 but did not function as an active coalition.

Therefore the North Dakota Medical Association took the lead role in re-establishing a tobacco control coalition in North Dakota. The North Dakota Tobacco Policy Initiative was created in 2001 through a capacity-building SmokeLess States grant from the Robert Wood Johnson Foundation to the North Dakota Medical Association. According to Prom “the purpose of forming NDTPI was to start from scratch on a brand new tobacco control organization that was based in the private (not government) sector, represented statewide groups and associations and didn’t have the baggage or history of Tobacco Free North Dakota. Its purpose was to focus on statewide policy advocacy: tax, clean indoor air, cessation coverage – issues based on the Smokeless States goals.”³² NDTPI member organizations include American Cancer Society, American Heart Association, American Lung Association, North Dakota Medical Association, North Dakota Nurses Association, North Dakota Public Health Association, and Blue Cross/Blue Shield of North Dakota. In addition to the original SmokeLess States grant, NDTPI was awarded a Special Opportunities Grant from the Robert Wood Johnson Foundation in January 2003 to promote policy change including a statewide tobacco excise tax increase during the 2003 legislative session and local clean indoor air ordinances, in addition to enhancing implementation of and compliance with the Minot smoke-free restaurant ordinance.^{9, 33}

North Dakota’s Second State Tobacco Plan

A steering committee formed in December 2002 by the Tobacco Control and Prevention Program at the State Department of Health was composed of representatives from local public health units, American Heart Association, American Cancer Society, American Lung Association, North Dakota Medical Association, and the North Dakota Public Health

Association to develop the second North Dakota state tobacco control plan. The purpose of the development of a state plan was to create a framework for collaboration between health advocates for tobacco control policy and to engage the public and politicians. Invitations for participation in the development of the plan were sent to over 100 organizations. Three strategic planning sessions were held on January 30, 2003, April 24, 2003, and May 8, 2003. As of May 2004, the plan had not been officially released.⁹

Funding for State Health Department Tobacco Prevention and Control Program

Between 1989 and 1992, funding for the state tobacco program came exclusively from the CDC Preventive Health Block Grant funds.⁹ In January 1992 funding from the Preventive Health Block Grant was allocated for the creation of the first grant program to local communities. Six local public health units received \$5,000 grants to use for local coalition building and to promote the passage youth access ordinances. CDC IMPACT (Initiative to Mobilize for the Prevention and Control of Tobacco Use) funding received in 1993 was also directed towards the growth of local tobacco control programs.⁹ The IMPACT funding allowed the Tobacco Control and Prevention Program to fund eleven local public health units through a local grants program which continued from 1993 through 2003.³⁰ The CDC IMPACT funding was approximately \$230,000 per year from 1993-1998 and \$1 million per year from 1998 to 2003.³¹ As of 2004, CDC funding had continued at \$1.1 million annually.

The CDC funding covered the local grant program and state level activities. Approximately ½ to ¾ of CDC federal funding for tobacco control was directed towards the local public health units from 1993-2001.³⁴ From 1998 to 2003, two-thirds of the CDC funding (\$670,000 of a \$1 million budget) was distributed to local public health units through the local grants program. The majority of the local funding was distributed to the larger communities in North Dakota because the focus was population-based tobacco prevention. The local public health units had to apply for the grant funding but the allocation was not determined on a competitive basis, but rather on a population basis.³⁰

In 1999, the Tobacco Prevention and Control Program used CDC funding to grant its first funds to North Dakota's four Indian reservations and one Indian Service area to address the disproportionately high smoking prevalence rates in the Native American population. The smoking rate for Native Americans in North Dakota is 45% which is twice the non-native smoking rate.⁹ The grants to the five North Dakota Indian tribes ranged from \$15,000 to \$30,000 for the passage of tribal tobacco control policy and to promote compacting with the state. The Standing Rock Sioux Tribe is the only tribe with a tobacco excise tax compact with the state. Two clean indoor air policies have been passed by the tribes.⁹ Kathleen Mangskau explained “We have a very high smoking prevalence among our Native Americans. It’s almost twice that of non-natives. Native Americans are our largest minority population in the state. That is one of the reasons we started the grants program to the tribes. Tobacco use is a significant cause of death and disability for Native Americans.”³⁰

In 2003, the local grants program was made a competitive process for all local public health units and tribes.³⁰ The state tobacco control program with a total of \$1 million in CDC funding, supported 11 local public health units with grants ranging from \$50,000 to \$80,000.⁹

Prior to the Master Settlement Agreement (MSA) between the state attorneys general and the tobacco industry, which made substantial funds available to the states (although not necessarily for tobacco control, as discussed below), tobacco control in North Dakota was funded through federal CDC funds; after the MSA it has been funded through a combination of federal CDC funds and MSA funds.³⁰

Political Climate

The climate for tobacco control in North Dakota has varied from the mid-1980's through the present, reflecting the attitudes of the different administrations in power. Dr. Stephen McDonough explained

When I worked under Dr. Wentz, who was the State Health Officer in 1985, under [Democratic] Governor George Sinner, we were allowed to speak our minds, to work for tobacco control. There was a steady decrease in tobacco usage documented by decreased tobacco sales. We knew we had problems with kids and were starting to work on that, but the climate was supportive for tobacco control.²²

The tobacco industry also noted Governor Sinner's pro-tobacco control policy. In a letter dated March 28, 1991 from Albert Wolf, Tobacco Institute lobbyist of Wheeler Wolf attorneys of Bismarck, North Dakota to Patrick Donoho, Vice President Tobacco Institute, Wolf recognized that the attitude of State Health Officer, Dr. Robert Wentz, warranted action by the industry:

we also recognize that we have a very aggressive health officer who pursues anti-smoking issues with a passion, who will have the ingenuity to generate tremendous support for those positions over the next two years. It would be well for us to begin now to elevate our positive programs in anticipation of that onslaught.³⁵

Governor Ed Schafer (R) took office in 1993 and served two terms through 2000. Dr. Jon Rice was the State Health Officer under Schafer from 1993 to 1997. McDonough explained

the Republican view of government and the Democratic view of government are fundamentally different as far as the role of government in supporting social change. And Dr. Rice, who was appointed by Governor Schafer to be the health officer, was not as supportive and not much of a risk taker, so a lot of the things that we normally would have done, we weren't able to do. We were very aggressive in trying to continue to make the tobacco industry look bad, we took every opportunity to do so, and that we lost when Schafer came along.²²

McDonough cited a specific example:

So Dr. Rice and I, we would have conflicts on what I wanted to do. In fact there was a study that came out in the mid-nineties that I went through and did some calculations that showed that North Dakota had more tobacco lobbyists per capita, lobbying our legislature, than any other state in the country, with the exception of New Hampshire. And I thought that made great news release. Why North Dakota? ... I put together a news release and gave it to him [Rice] and it got trashed. Didn't want to offend the

legislators.²²

According to McDonough, Schafer was on the side of the tobacco industry. In an interview in 2003, he explained “Schafer really was in lock step with the tobacco industry. He was aligned with the tobacco industry. If he wanted to get some information about tobacco issues in our state, he’d call the Denver office or the Minneapolis office of Philip Morris or R.J. Reynolds to find out what to do.”²²

In contrast, Heidi Heitkamp (D), North Dakota Attorney General (1993-2000) cited an example of Dr. Rice advocating a tobacco control position that differed from the governor:

An example of Dr. Rice’s courage on this is the Governor signed a letter, Schafer signed a letter basically opposing FDA jurisdiction [over cigarettes as drug delivery devices for nicotine] ... So, Schafer signed a letter which most Republican governors did saying, you know, they shouldn’t do this, and Dr. Rice signed a letter encouraging it [FDA regulation]. He basically said I don’t care what the Governor says, this is almost a moral issue with me and was willing to be politically contrary.²²

In 1997, Rice resigned to take a position at Blue Cross and Blue Shield of North Dakota and the governor appointed Murray Sagsveen, an attorney, as State Health Officer.

Murray Sagsveen was the North Dakota State Health Officer from February 1998 to December 2000. Sagsveen had previously served as the Director of Legal Services for the State Water Commission. From 1986-1997 Sagsveen worked as General Counsel for the North Dakota Medical Association. Sagsveen also served as counsel for the North Dakota Medical Group Management Association and as a lobbyist for the North Dakota Anesthesiologists Association. In June 1997 Sagsveen was appointed by Governor Ed Schafer to serve as State Flood Recovery Coordinator during the flood recovery efforts in Grand Forks and other affected communities³⁶ after the Red River flooded the Grand Forks area forcing 60,000 (90% of the population) residents from their homes.³⁷ Most significantly for issues related to tobacco control, he was a partner in the Zuger Kirmis & Smith law firm beginning in 1980. Tom Smith, Tobacco Institute lobbyist, and Brenda Blazer, Brown and Williamson lobbyist, were also partners in the Zuger Kirmis & Smith law firm.³⁸

When Sagsveen became health officer, he created a position for Dr. McDonough called Chief Medical Officer. McDonough had previously been the Head of the Maternal and Child Health and Preventive Health Section at the State Department of Health. In an interview in 2003, McDonough described the arrangement:

He moved me out of the administrative capacity that I had and I ended up being an advisor to a lot of different programs in the health department. So I didn’t have any administrative authority, budgetary authority, supervisory authority of staff.

The tobacco control environment deteriorated. McDonough continued:

Well, having a Republican governor and Democratic senators, any time the Democratic senators ask the health department to get involved in a project, and we did, we got

reprimanded for that. So definitely there wasn't a supportive environment and it was getting a little bit worse, but under Rice, it wasn't anywhere near as much of a problem or as stressful as it was under Sagsveen -- it was more frustrating [under Rice]. We couldn't advocate like we would like, but under Sagsveen, it was much worse. People were fearful over their jobs. It was a very intimidating atmosphere.

...
*The health department, I think, did a couple terrible things during that time period. One, tried to intimidate the local health departments in policy control areas... I saw the health department become an intimidator and there was certainly a very vindictive management style with this operation and not only was there announcements from the health department, that local health departments shouldn't do much. When some of the local health departments resisted, there were all sorts of stories flying about how the health department was out there threatening to cut people's grants and stuff like that. So it became not only divisive, but very intimidating. And I think at the local level they're still [in 2003] suffering the effects of that because there were a few health departments that didn't mind that, but they didn't like tobacco control and they kind of sided with the health officer, and there were others that thought this was the worst thing they'd ever seen. And I think some of those fractures still exist out there.*²² [emphasis added]

During Sagsveen's term the Health Department came under great scrutiny due to employee criticism of his management style. McDonough, in his own words, was "escorted out of the health department with some fanfare"²² in 2000.

A several-month investigation of the Health Department was conducted by the *Bismarck Tribune* followed by a official investigation conducted by a committee appointed by Governor Schafer based on allegations of state health department employees (discussed further in MSA section).

Governor John Hoeven (R) took office in 2001 and appointed Dr. Terry Dwelle, a pediatrician, as State Health Officer. Hoeven's 2003 budget included funding for the Community Health Grant Program (grants to local public health units for tobacco control, city-county and state employee smoking cessation programs, and tobacco advisory committee), funding for a state-wide quitline, and a proposal for a \$0.35 tobacco tax increase.³⁹ Hoeven's action illustrated that he was more supportive of tobacco control than the previous administration.

POLITICAL EXPENDITURES BY THE TOBACCO INDUSTRY IN NORTH DAKOTA

The tobacco industry exerts influence in state politics through lobbying and campaign contributions to elected officials. An attempt was made to track lobbying expenditures and contributions to elected officials in North Dakota. However, due to difficulties in the North Dakota reporting requirements a complete picture of the tobacco industry's financial input into the state was not obtained. Secondary sources such as media and personal testimony of health advocates were investigated to provide further insight into the financial role of the tobacco industry in North Dakota politics.

Lobbying

Chapter 45-05.1-01 through 45-05.1-07 of the North Dakota Century Code (NDCC) outlines the definition of and the requirements of a lobbyist in North Dakota. According to the Code, a lobbyist is defined as a person who

attempts to secure the passage, amendment, or defeat of any legislation by the legislative assembly or the approval or veto of any legislation by the governor of the states attempts to influence decisions made by the legislative council or by an interim committee of the legislative council.⁴⁰

Lobbyists in North Dakota are required by law to register with the Secretary of State. Registered lobbyists are required to file annual expenditure reports on August 1 detailing each single expenditure over \$50 during the legislative session for the purposes of lobbying. If the lobbyist has no single expenditures over \$50, a statement claiming no reportable expenditures must be filed with the Secretary of State. The NDCC states “A state official or agency may not require reporting of lobbyist expenditures other than is required under this subsection.” A lobbyist's registration may be revoked if the lobbyist fails to file expenditure reports with the Secretary of State.⁴⁰ Due to the fact that lobbying expenditures are not reported in the aggregate, but simply on the basis of each separate expenditure, the disclosure of lobbying expenditures in North Dakota is minimal.

We contacted the North Dakota Secretary of State's office regarding the reporting of lobbying expenditures. The office was provided with a list of 20 lobbyists from the late 1980's through 2003 who represented the tobacco industry or their allies identified through lobbyist registration and internal tobacco industry documents and asked to provide any expenditure reports filed by the lobbyists. Only two of the lobbyists had ever filed a report with the Secretary of State: Bob Fackler (1997-1998) and Calvin N Rolfson (1995).

Overlap of individuals lobbying for the tobacco industry and health organizations is occurs in North Dakota. For example, former Republican legislator John Olson is the attorney for the North Dakota Board of Medical Examiner and simultaneously a lobbyist representing Philip Morris.^{23, 41} In a Philip Morris internal document dated January 2001 noted that “the Director of the State Health Department [Murray Sagsveen] is a very close friend of John's.”⁴¹ This type of unofficial relationship provides a means for the tobacco industry to work behind the scenes to ensure tobacco policy is favorable to their interests.

Although the monetary path of tobacco lobbyists is difficult to trace, health advocates have first hand experience of the influence lobbyists exert over the legislature. McDonough explained “there's the influence peddlers, you know, the people who have access, the former legislators, but there's all sorts of stories I've heard about legislators coming in from other regional areas that are of a certain gender, a certain attractiveness, who kept people warm at night, so it's not just been food and drink and money, it's been other things that may have been provided. I don't have any direct information of that, but that's what I've heard from knowledgeable people on the inside. So there are all sorts of enticements.”²²

McDonough illustrated the power of the tobacco lobby in the North Dakota legislature:

It took me a little while before I figured this out, there'd be a bill that would be coming up ... and it would come out of committee and it should be up in a day or two to be voted on. Well, it wouldn't be there. Well, what was going on was, John Olson was going around, with the Senate majority leader, House majority leader, they were counting their votes ... they waited until they had it all figured out who was going to vote and it would come out and get killed by one. So you'd think Oh, golly, we were so darn close. Well in reality you never had control of the situation. It was always controlled by the industry.²²

Campaign Finance and Disclosure

Campaign finance and disclosure laws are outlined in Chapter 16.1-08.1-01 through 16.1-08.1-06 of the North Dakota Century Code.

As of August 1999, all political candidates for statewide offices and the state legislature that receive campaign contributions over \$200 in the aggregate during the reporting period must file a campaign contribution statement with the North Dakota Secretary of State. Candidates are also required to file reports with the Secretary of State if they did not receive contributions over \$200. The penalty for late report (in excess of 11 days) is a maximum of \$100 and not reporting is an infraction. All campaign contributions are kept by the Secretary of State for four years from the date of filing for public viewing after which they are transferred to the state archives for permanent storage. Beginning in 1998, campaign contributions were made available online through the Secretary of State's web page. As of 2004, campaign contributions for the years of 2000, 2001, 2002, and 2003 were available online.⁴²

Prior to 1999, Chapter 16.1-08.1-02 of the North Dakota Century Code required that campaign contributions for candidates for the state legislature be filed with the county auditor's office in their county of residence and candidates for statewide office file with the Secretary of State. There are 53 counties in North Dakota and each determines its own retention cycle for state legislative campaign contributions.⁴² Therefore comprehensive tracking campaign of contributions to state legislators prior to 1999 is problematic.

All political parties that receive campaign contributions over \$200 in the aggregate during the reporting period must file a campaign contribution statement with the Secretary of State. Political parties are also required to file reports with the Secretary of State if they did not receive contributions over \$200. All state political action committees (PACs) must file reports with the Secretary of State listing all contributors who contributed over \$200 in the aggregate and listing all political contributions over \$200 made by the PAC during the reporting period. Politican action committees (PACS) are also required to file reports with the Secretary of State if they did not receive or make contributions over \$200. Federal PACs that make political contributions over \$200 during the reporting period must file a statement with the North Dakota Secretary of State.⁴³

Due to the poor North Dakota reporting requirements, tracking tobacco industry contributions to state legislators prior to 1999 was not feasible. Although federal PACs are

required to report contributions to the Secretary of State, there is no way to ensure that all contribution information was reported by the tobacco industry. The reported contributions were located at the North Dakota Historical Society (state archives), however were stored in an unorganized manner. Contributions for the 1980's were not available as lack of storage space had led to their disposal. The process of locating the campaign contributions was tedious and time consuming because it involved searching through loose pieces of paper filed in cardboard boxes. Small contributions between \$50 and \$100 to various legislators were reported by Philip Morris in 1993, 1994, , 1996, 1997, 1998, and 2002. The total amount contributed to state legislators by Philip Morris ranged from \$850 to \$1400. No campaign contributions by other tobacco industry companies were located.⁴⁴

Campaign contributions to politicians in statewide office were also located at the state historical society and searched in a similar manner. Contributions to candidates for governor from tobacco companies and their lobbyists were located for the years of 1984, 1992, 1993, 1994, 1996, 1999, 2001, 2002. The contributions ranged from \$100 to \$2000. A single contribution of \$1,000 from Philip Morris to Wayne Stenehjem, Republican candidate for North Dakota Attorney General, was reported in 2000. Otherwise no contributions to statewide elected officials were reported.⁴⁴

Due to the reporting and storage requirements in North Dakota, it is impossible to obtain a clear and complete picture of the contributions made by the tobacco industry and their allies.

Financial Support of Political Officials by the Tobacco Industry

While the official reporting system for political expenditures in North Dakota is not comprehensive, thereby making it impossible to collect a complete record of political expenditures by the tobacco industry, internal tobacco industry documents help to fill in some of the blanks. There are several internal tobacco industry letters, memos, and budgets that recount conversations, agreements and transactions between the tobacco industry and political candidates or elected officials in North Dakota.

Tobacco Industry Budgets

In a Tobacco Institute Budget document dated September 18, 1985, the budgets for individuals providing services to the tobacco industry from 1982 to 1986 were recorded. The budgets included Harold Sands, legislative counsel, Ernie Sands, legislative counsel, Paul Sicula, consultant, North Dakota Tobacco Wholesaler Association and an Honoraria Program. . There was \$0 allocated for state campaign contributions and local campaign contributions from 1982 to 1986. The Tobacco Institute total North Dakota budget for 1982 was \$14,000, 1983 was \$16,000, 1984 was \$16,000, 1985 was \$27,000, 1986 was \$26,000⁴⁵ (Table 3).

Although tobacco industry lobbyist expenditure reporting is limited due to the system in North Dakota, Tobacco Institute budgets provide insight into the amount of money the tobacco industry was providing its lobbyists. The budget for Tobacco Institute lobbyist, Al Wolf of Wolf Wheeler Attorneys, Bismarck, North Dakota was \$32,000 in 1992 and \$32,000 in 1993. The 1993 budget for legislative mobilization was \$10,000.⁴⁶ In an R.J. Reynolds memorandum of

expenses for product liability reform dated September 2, 1994, prepared by the Washington, DC-based law firm of Covington & Burling, noted that Kelsch, Kelsch, Ruff & Austin of Mandan, North Dakota, law firm of Thomas Kelsch tobacco industry lobbyist, were paid \$1,116.25 by R.J. Reynolds and a total of \$5,581.24 from all five tobacco companies for services rendered from March through August of 1994.⁴⁷ In 1993, the Greater North Dakota Association (GNDA), state chamber of commerce, headed an extensive campaign for the passage of tort reform law in North Dakota. Although challenged by Representative Jennifer Ring (D-Grand Forks) and Attorney General Heidi Heitkamp (D), GNDA refused to disclose the source of its funds for the campaign.

The tobacco industry has low public credibility and it is often difficult for politicians to be seen as supporting the tobacco industry. As a result, the industry often employs (often with payments from the industry) third party allies to fight the public battles with health advocates so that the tobacco industry can remain behind the scenes. In North Dakota, the tobacco industry collaborated with third party allies including the North Dakota Grocers Association, North Dakota Retail Association, and Greater North Dakota Association (GNDA) state chamber of commerce. Tobacco Institute budget's provide insight into the amount of money contributed to these organizations (Table 4).

A Philip Morris field action coalition summit meeting report dated May 27, 1999 for North Dakota listed Bob Hanson, former state treasurer and Philip Morris lobbyist, as the tobacco company's state coordinator. The attendance of the meeting illustrates the extensive network of tobacco industry allies in North Dakota. The organizations in attendance included the North Dakota Grocers Association, Greater North Dakota Association (State Chamber of Commerce), North Dakota Association of Wholesalers, North Dakota Hospitality Association, North Dakota State Council of Clubs, North Dakota Petroleum Marketers Association, North Dakota Retail Association, North Dakota State Commander AMVETS, North Dakota Tobacco Wholesalers Association, Bismarck-Mandan Council of Clubs, Philip Morris State Government Affairs lobbyist, and the National Federation of Independent Businesses-North Dakota. The document stated "the group was extremely supportive and enthusiastic in its opposition to the lawsuit and excise taxes. Members said they were glad to be invited to participate, and happy someone was taking on these issues."⁵⁰

In an interview in 2004, June Herman, Director of Advocacy American Heart Association, explained why the tobacco industry's use of third party allies is effective in North Dakota: "They [the public] don't see it as the tobacco industry being here. They see it as a local business 'hey, we're struggling, we're trying to make a go, the whole state's focus on how can we keep businesses successful so people don't leave the state and the typical arguments we hear, don't pass policy that's going to lose us more jobs."⁵¹

In 1996, the magazine *Mother Jones*⁵² reported that according to an anonymous North Dakota spokesperson, tobacco lobbyists had a strong presence at the November 1995 Republic Governors Association meeting in Nashua, New Hampshire. The lobbyists' agenda at the event was to convince the governors to send letters to the Food and Drug Administration (FDA) opposing the proposed FDA regulation of the tobacco industry using the argument that such regulation was an infringement upon the right's of states. The FDA proposal included

regulations of tobacco marketing and promotion, in addition to more stringent regulations of the sales of tobacco products. The North Dakota spokesperson was informed by tobacco lobbyists for US Tobacco (maker of spit tobacco) Kerry Paulson that his company had in the past supported Governor Ed Schafer (R) and that an election year was approaching.⁵² The North Dakota spokesperson asked Paulsen if he was proposing that campaign contributions would be withheld if Schafer did not sign the letter. Paulsen was reported as saying, “I’d never do that,” but adding that “You know we have PAC money, we like the governor, and we want him to be reelected.” In the end, a letter in opposition to the FDA regulations composed by a North Dakota tobacco industry lawyer was signed by Schafer.⁵²

Dr. Stephen McDonough, former Chief Medical Officer State Department of Health whose resignation was forced in 2000, wrote an op-ed in the *Fargo Forum* on February 12, 2001, criticized the North Dakota legislature’s willingness to be bought by the tobacco industry. McDonough stated, “During the 1990’s, many North Dakota political leaders fell comfortably into the back pocket of the tobacco industry. The age old enticements of money, flattery and sensual pleasures found their mark and the tobacco industry was able to do what it pleased.” McDonough also criticized the health care establishment for their unwillingness to stand up to the tobacco industry for fear of hurting themselves politically.⁵³

Although the path of tobacco industry money in North Dakota is difficult to trace, piecing together reported political contributions, tobacco industry budgets, and media reports provides evidence that tobacco industry funds have found their way into North Dakota. The limited success of health advocates at that state level in passing tobacco control policy suggests tobacco industry money and political power is influencing policy makers.

| Table 3: Political Expenditures in North Dakota Recorded in Tobacco Institute Budgets | | | | | |
|--|-----------------|-----------------|-----------------|-----------------|-----------------|
| | 1982 | 1983 | 1984 | 1985 | 1986 |
| Harold Sands | \$14,000 | \$16,000 | \$15,000 | \$15,000 | \$15,000 |
| Ernie Sands | \$0 | \$0 | \$0 | \$7,500 | \$7,500 |
| Paul Sicula | \$0 | \$0 | \$0 | \$2,500 | \$0 |
| Wholesaler Association | \$0 | \$0 | \$1,000 | \$1,000 | \$1,000 |
| Campaign Contributions | \$0 | \$0 | \$0 | \$0 | \$0 |
| Honoraria Program | | | | \$1,000 | \$1,000 |
| TOTAL | \$14,000 | \$16,000 | \$16,000 | \$27,000 | \$26,000 |
| Source: ⁴ | | | | | |

| Table 4: Tobacco Institute Contributions to Third Party Allies | | | | | |
|---|-------|-------|--------|--------|--------|
| | 1992 | 1993 | 1995 | 1998 | 1999 |
| ND Grocers Association | \$300 | \$300 | \$500 | \$500 | \$500 |
| ND Retail Association | | | | \$1000 | \$1000 |
| GNDA | | | \$1000 | \$1000 | \$1000 |
| Source ^{46, 48, 49} | | | | | |

NORTH DAKOTA LEGISLATION

The political system in North Dakota consists of a legislature that meets biannually composed of 47 Senators serving four year terms and 94 Representatives serving two year terms. The North Dakota legislature is a citizen legislature with a small, skeletal staff working for each party. The legislative session begins in January and may last for up to 80 days, but usually ends earlier.⁵⁴ After the introduction, a bill is referred to the appropriate standing committee. Every bill referred to committee is scheduled for a public hearing. After the public hearing the committee makes a recommendation and the bill is reported to the floor for a vote. Every piece of legislation referred to a committee must be reported back to the floor for a vote. If the bill is passed via floor vote, it is delivered to the other house where the same steps are followed. If legislation is passed in both house in the same form, it is sent to the governor for final approval or veto.⁵⁵

The following section discusses tobacco-related policy from 1890 through 2003 with a focus on the strategy of the health advocates and tobacco industry. Legislation is discussed by three major topic areas including restrictions on sales of tobacco products, tobacco products tax, and smoking restrictions.

RESTRICTIONS ON SALES OF TOBACCO PRODUCTS

On February 13, 1890 anti-tobacco legislation in North Dakota was passed during the first state legislative session. The intent of the legislation was to prevent children under age 16 years from purchasing tobacco products. The legislation stated

Any person who sells or gives to a minor under the age of sixteen years any cigar or cigarette of any kind or form, except on the written order of a parent or guardian, or tobacco in any form, shall be deemed guilty of a misdemeanor, and shall be punished by imprisonment in a county jail for not more than thirty days or by a fine of not more than fifty dollars or by both such fine and imprisonment.⁵⁶

The bill was described as “one of the most wholesome laws passed by the late legislature” by the *Mayville Tribune* on July 3, 1890.⁴ With the passage of this legislation North Dakota established the concept that youth should not have access to tobacco products and that those who sell tobacco to minors should be penalized. In spite of this early realization of the need, the struggle

to prevent youth access to tobacco products continued for over 100 years, to the present day.

The first bill in 1890 was followed by the introduction of tobacco control legislation in nine out of thirteen legislative sessions between 1895 and 1913. The string of tobacco control legislation climaxed in 1913 when legislation was passed which sought to completely eliminate tobacco use in the state. House Bill 39 was passed on February 9, 1895 declaring it

unlawful for any person or persons in this state to sell or expose for sale any cigarettes of any kind or form.⁵⁷

On March 21, 1895, Senate Bill 141 was passed

to prohibit the manufacture, sale or use of adulterated cigarettes and the sale of cigarettes, cigars, and tobacco to minors.⁵⁸

Adulterated cigarettes were defined as “any cigarette containing any substance foreign to tobacco and deleterious to health.”⁵⁸ SB 141 defined minors as persons under the age of 17 years. HB 39 and SB 141 both imposed penalties of fines and/or imprisonment in the county jail for anyone violating the law.⁵⁸

On February 26, 1913 House Bill 67 passed which created a law

prohibiting the sale, manufacture, bartering, or giving away of any cigarettes, or cigarette papers and providing a penalty for the violation thereof.⁵⁹

House Bill 67 included snuff as a prohibited tobacco product. On March 9, 1921 HB 67 was made more stringent with an amendment to the law which declared it unlawful for any person to

directly or indirectly to solicit, receive, or procure from or aid in soliciting or procuring from any person within this state any order, directions, or instructions providing for or in any manner relating to the delivery, purchase, or sale either within or from without the State of North Dakota for any cigarettes, cigarette papers or cigarette wrappers, or any paper made for the purpose of being filled with tobacco for smoking.⁶⁰

Possessing cigarettes and cigarette papers in small quantities for personal use was exempted from the law.⁴

The 1913 cigarette prohibition law was not effective according to a front page editorial on March 11, 1920 in the *Wells County Farmer* which stated

it is admitted that the cigarette habit is a most harmful one for the youth of the land. There is no argument from our side on that point. But does the present anti-cigarette law safeguard our young boys in that respect? Does the law now on our statute books prevent the youth of our state from obtaining cigarettes? No one will say it does. Millions of cigarettes are sold and smoked every year in North Dakota in spite of the law prohibiting the sale of them in the state. Attempts have been made here and there to enforce the law, but the fact remains, and boys and men in all walks of life and in every community all over the state are still smoking cigarettes every day in the week and more on Sunday. What good then is a law that cannot be enforced and does not prohibit? True, the law gives employment to certain ‘reform’ fanatics labeled as ‘enforcement

officers' who roam over the state drawing 'salary and expense' for stirring up a neighborhood row now and then, but outside of that, the law is absolutely no good for the purpose for which it was supposedly passed.⁴

The points made in the *Wells County Farmer* article are still relevant in 2004. Illegal sales of tobacco products to minors have been and continue to be a problem in North Dakota. The article provides evidence that as early as 1920 the tactic of characterizing tobacco control advocates as fanatics and zealots was in place.

In 2003, legislation similar to HB 67 of 1913 was introduced by Representative Mike Grosz (R-Grand Forks). HB 1174 proposed to prohibit the sales and use of tobacco products in North Dakota. In addition, the legislation eliminated that state tobacco control program. The health advocates took a position of opposition to the bill because prohibition has not been proven as an effective means of tobacco use prevention or reduction. However, the 1920 argument that tobacco control advocates sustain employment and salary through the use of tobacco products was repeated in 2003 when health advocates were criticized for their opposition to prohibition legislation. (Discussed in detail in smoking restrictions section)

The general public was involved in the controversy surrounding the use of tobacco products in early North Dakota history. A debate arose among community members regarding the merits of cigarette legislation which was captured in the *Wells County Farmer*, a weekly newspaper published in Fessenden, between February, 5 and March 25, 1920.⁴ On February 5, an article by North Dakota resident Oscar M. Mehus was published that expressed strong opposition to cigarette smoking. Oscar Mehus cited well-known persons of the time that were opponents of cigarette smoking in his article including John Burroughs, naturalist, Andrew Carnegie, industrialist and philanthropist, David Starr Jordan, former president of Leland Stanford University, and Philander P. Claxton, US Commissioner of Education.⁴ On February 12, the anti-tobacco position was challenged by North Dakota resident Peter Kunnanz in an editorial where he stated that he

smoked cigarettes for the last 27 years and my lungs are as sound as any man's in this state. I think the cigarette is the only smoke a poor man can afford these days.⁴

Kunnanz also argued that cigarette smoking did not affect the achievement of people such as businessmen, lawyers, and doctors because successful people and places of business often smelled of cigarette smoke. Oscar Mehus answered the challenge by stating that

the records of Harvard University for the past 50 years show that not a single student who used tobacco has been graduated at the head of his class, although on the average, five out of six used tobacco. This is significant and shows that there is a close relationship between smoking and inferior scholarship⁴

A.W. West, Department of Athletics at Fessenden High School, also responded to Peter Kunnanz on February 26 with an editorial titled "Come On, Mr. Smoker – Call It!" stating that if

his lungs are as sound as any man's in the city of Fessenden and that his blood will stand the color test and come up to the standard that his heart action is not irregular and that his

nerves are not somewhat shot and that these four symptoms are not directly the results of the use of cigarettes.⁴

he would purchase Mr. Kunnanz a box of cigars and pay for his physical exam. These arguments are a representation of the dialogue between North Dakota smokers and non-smokers in 1920.⁴ Apparently, North Dakotans were ahead of their time as the debate over the health effects of tobacco smoking was occurring in the 1920's, 40 years prior to the first Surgeon General's report on the negative health effects of smoking in 1964.

After 9 years of cigarette prohibition, on January 7, 1925, Governor A.G. Sorley started the effort to repeal the 1913 cigarette prohibition legislation by addressing the joint session of the legislative assembly stating

the taking of snuff and the smoking of cigarettes are habits. While to some of us these habits may appear undesirable, unhealthful, and filthy, yet, there is nothing inherently vicious in either which should be inhibited by law. And these statutes are not supported by an enlightened public opinion.⁴

Governor Sorley's argument against the law regulating the use of tobacco products is very similar to the 2003 tobacco industry arguments against smoking restrictions. The tobacco industry continues to strive to lead the public to believe that smoking is an individual choice that does not affect the health of nonsmokers.

On February 20, 1925, the legislature passed Senate Bill 61 which repealed the tobacco prohibition law of 1913, but declared it unlawful to

directly or indirectly, upon any pretense or by any device, to sell, exchange, barter, dispose of or give away to, or furnish to, or buy or procure for, any person under the age of twenty-one years, any cigarette, cigarette paper or cigarette wrapper, prepared or designed to be used for filling with tobacco for smoking.⁶¹

Violation of SB 61 was a misdemeanor with the first offense resulting in a fine of between \$50 and \$100, additional offenses resulting in fines of between \$100 and \$300 and/or imprisonment in county jail.⁶¹ Adjusting for inflation a \$100 fine in 1925 would equal \$1,051 in 2003.⁶² In 2003, tobacco sales to minors is an infraction which places the crime at the level of a minor traffic violation indicating that the attitude toward the severity of the crime of tobacco product sales to youth at the state level has decreased over time.⁶³ Locally, North Dakota law allows cities and counties to adopt stricter regulations which has prompted numerous battles at the local level between tobacco control advocates and tobacco industry allies regarding penalties for illegal sales to minors.

Senate Bill 62 was passed following the repeal of the cigarette prohibition law which included provisions for the sale of cigarettes such as licensing and taxation. The legislation mandated that in order to sell cigarettes, a \$500 bond had to be obtained to receive a permit for cigarette sales from the Attorney General. The seller also had to pay an annual \$10 license fee. A first tax on cigarettes of \$0.03 per pack and \$0.01 per tube of 50 paid to the State Treasurer was also enacted with the legislation.⁶⁴ In 1927, legislation passed to increase the annual license

fee to \$12.50, but subsequently in 1935 the fee was reduced to \$5.00.⁴ In 1987, the license fee for tobacco retailers was increased to \$15.00 and has remained at that level through 2003. Adjusting for inflation the \$10.00 license fee instated in 1925 would equal \$106 in 2003, so in real terms, the cost of a license has dropped dramatically.

On March 14, 1953, Senate bill 153 was passed to

Prevent confusion and deception in connection with the sale of candy or confectionary products, and the packaging and labeling thereof which are designed and manufactured to imitate and resemble cigarettes; to prohibit the manufacture, sale, exchange, or to knowingly transport, possess, display, or the offering for sale or exchange of such candy or confectionary products; and to prescribe penalties for violation⁶⁵

The legislation stated that the use of candy cigarettes by minors enticed children to use actual cigarettes and tobacco products. The legislation included a penalty of a maximum fine of \$1,000 and maximum imprisonment of 90 days.⁶⁵ North Dakota recognized the harm in marketing tobacco products to youth in the early 1950's well before the marketing strategy of the tobacco industry was fully understood.

Beginning in 1955, the tobacco industry enjoyed a relative lull in the introduction of legislation that proposed to restrict the sales of tobacco products until the late 1970's. The inactivity can be attributed to the absence of a state tobacco control program and statewide coalition. However, the limited legislation that was introduced motivated the tobacco industry to take action to strengthen its presence in the state.

In 1979, Representatives Tom Kuchera (R-Grand Forks) and Elaine Vig (R-Grand Forks) introduced House Bill 1689 which proposed to strengthen North Dakota's youth access laws. HB 1689 included provisions

to limit purchase of tobacco products, to prohibit misrepresentation of age in purchasing tobacco products, to prohibit delivery of tobacco products to certain persons, to require local licenses for the sale of tobacco products, to provide procedures for license revocation; and providing penalties.⁶⁶

The main intent of HB 1689 was to raise the age for legal purchase of tobacco from 18 to 19 and also limit the type of retailers that would be allowed to sell tobacco products. Kuchera also sponsored a separate bill that proposed to lower the legal drinking age to 19. The inclusion of local licensing for tobacco retailers was consistent with the traditional emphasis on local control in North Dakota.

An article in the *Fargo Forum* on January 9, 1979 stated that under state law if a retailer had a tobacco license, almost anyone, regardless of age, was able to purchase tobacco. Kuchera, a smoker himself, stated "the main thrust would be to restrict the sale of tobacco products to a limited number of outlets and only those outlets to which people at least 19 years old could be admitted,"⁶⁷ meaning that cigarettes would no longer be sold in grocery stores, drug stores, and vending machines. Kuchera also justified his legislation by recognizing that "it's probably true that our kids do more damage to themselves through the habitual use of tobacco than they do

using alcohol or marijuana.”⁶⁷

The tobacco industry was watching HB 1689; a letter dated February 2, 1979 from Bill Cannell, Tobacco Institute Vice President, to Lonnie Fay, President of Smokers Imports and International Products of Moorhead, Minnesota (located on the westernmost edge of Minnesota separated from Fargo, North Dakota by the Red River) referenced an earlier conversation with Fay and thanked him for the early alert on HB 1689 and reported that “as I mentioned to you”⁶⁸, our Public Affairs Manager covering North Dakota has been alerted about the proposal.”⁶⁹

Cannell subsequently wrote Alex King, Tobacco Institute Vice President, which stated that Lonnie Fay would be a prime candidate for the Tobacco Action Network (TAN) because his employees were all located in the upper mid-West.⁷⁰ TAN was a tobacco industry organization created to form a network of tobacco industry employees that could be mobilized in opposition to tobacco control activity. The Philip Morris’ TAN employee participation manual stated “TAN is an umbrella organization formed by the member companies of the Tobacco Institute (TI). Its purpose is to bring together and coordinate all segments of the tobacco family - growers, manufacturers, wholesalers, retailers, and vendors - as well as our allies.”⁷¹ The tobacco industry was beginning to create their network of third party allies in North Dakota that would prove to be very influential in state and local politics.

Although internal tobacco industry documents did not provide further information on HB 1689, the legislation was defeated in the House by a 2-21 vote.⁷² The early alert of the legislation may have aided the tobacco industry in killing it.

After the creation of a tobacco control program at the state department of health and the formation of Tobacco Free North Dakota (TFND) in the late 1980's, there was an increase in tobacco industry presence in state level policy during the 1990's. The passage of clean indoor air legislation in 1987 spurred increased tobacco industry interest in North Dakota policy making. Dr. Stephen McDonough, head of the state health department Preventive Health Section from 1985 to 2000, explained that the tobacco industry’s involvement in state level politics “increased exponentially” after 1987. McDonough explained that although tobacco industry activity had been magnified the public’s and health advocates’ support of tobacco control policy did not match tobacco industry efforts.²²

A second attempt to raise the age for legal purchase of tobacco products occurred in 1991. At this point the tobacco industry was alerted to tobacco-related legislation through their network of lobbyists. Prior to the beginning of the legislative session, Bob Fackler, a tobacco industry lobbyist, in his weekly report to R.J. Reynolds on September 19, 1990, warned of Senate Bill 2427 which proposed to increase the legal purchase age for tobacco from 18 to 21.⁷³ Bob Fackler, Grass Roots Consulting based in Plymouth Minnesota, was a presence behind the scenes in North Dakota tobacco policy making throughout the 1990's at both the state and local level.

Senate Bill 2427 was introduced by Senators Jayson Graba (D-District 43), Larry Robinson (D-District 24), and Don Moore (R- District 28) on January 21, 1991. M. Hurst Marshall, Tobacco Institute Vice President, was monitoring the progress of the bill from its

introduction to defeat.⁷⁴ SB 2427 was defeated by a vote of 37-14 in the Senate on February 5, 1991.⁷⁴

The tobacco industry was active in the defeat of the legislation as evidenced by a letter from Albert Wolf, Tobacco Institute lobbyist from Wheeler Wolf Attorneys, Bismark, North Dakota, to Patrick Donoho, Tobacco Institute Vice President, dated March 28, 1991 which discussed SB 2427. Wolf noted that the deployment of National Guard Troops from North Dakota to the Persian Gulf which included many eighteen to twenty-one year old individuals helped in the defeat of the legislation.³⁵ Although raising the legal age to purchase tobacco from 18 to 21 has not been proven to be effective in reducing youth access to tobacco products, the tobacco industry considered the defeat of this legislation a success.

The first large, coordinated effort by the tobacco industry to pass legislation occurred in 1991. Grand Forks, North Dakota passed the first cigarette vending machine restriction in the state with a local ordinance on September 4, 1990 (to be discussed in further detail in the Local Ordinance section). The ordinance restricted the placement of cigarette vending machines to licensed on and off-sale liquor establishments.⁷⁵ In response to the passage of the Grand Forks ordinance, the Tobacco Institute sought statewide vending machine legislation with preemption in 1991 to prevent the passage of additional local ordinances or a complete statewide cigarette vending machine ban. The Tobacco Institute outlined their strategy in a “Pro-Active Proposal”⁷⁶ created prior to the beginning of the 1991 legislative session. The Tobacco Institute planned to introduce their preemptive vending machine restriction legislation during the first week of the session. (Preemption removes the authority of local government bodies to pass tobacco control legislation.) At the time the proposal was written a legislative sponsor had not been identified. The creation of the proposal indicates that the tobacco industry was aware of their weakness at the local level in North Dakota as early as 1990. The passage of preemptive legislation would have kept the tobacco policy battles at the state level where the tobacco industry had a stronghold.

Tobacco Institute’s Pro-Active Proposal

The Tobacco Institute's proposal outlines the strategy for mobilizing tobacco industry allies behind a preemptive bill. The tobacco industry wanted to remain behind the scenes while its allies fought the public battle. The proposal had nine categories which included industry action, resources needed, economic analysis/factsheet, legal memorandum, expert witnesses, coalition allies, Tobacco Institute grassroots mobilization, company resources, public affairs/media resources, and additional needs. In 1991, the North Dakota Tobacco and Candy Distributors, a tobacco industry ally, had control over almost all of the cigarette vending machines in North Dakota. The North Dakota Tobacco and Candy Distributors had traditionally been supportive of the tobacco industry position therefore the Tobacco Institute viewed their monopoly of cigarette vending machines as a benefit to the tobacco industry. Under the category of industry action the proposal noted that the Tobacco Institute had informed the North Dakota Tobacco and Candy Distributors of the need for preemptive vending legislation. According to the Tobacco Institute

The tobacco wholesalers have expressed some interest in pushing for a state-wide

preemptive bill. Discussions are underway regarding sponsors, language and strategy.⁷⁶

The Tobacco Institute planned to create an economic analysis/factsheet which included a count of vending machines, a collection of jobs and wages from vending machine sales, and sales data from cigarette vending machine companies. Assistance with the collection of this information was to be provided by the National Automatic Merchandisers or the Amusement and Music Operators Association. The deadline for the compilation of the information was November 15, 1990.⁷⁶

The Tobacco Institute planned to use North Dakota vending machine operators and customers for expert witness testimony rather than appearing itself during the legislative hearings in January 1991.⁷⁶ Another example of the tobacco industry attempting to keep their public presence to a minimum and also an example of the tobacco industry's awareness of the environment in North Dakota in which people would not be receptive to pressure from outside the state. The Tobacco Institute also recognized the value of the existing network of vending machine sales representatives to monitor attitudes of vending machine customers and relay legislative news to customers.

The Tobacco Institute strategized to have member companies ensure that the preemptive vending machine legislation would have the support of tobacco industry allies including the North Dakota Tobacco and Candy Wholesalers and the North Dakota Hospitality Association.⁷⁶ The North Dakota Hospitality Association represents the food, beverage and lodging industries in North Dakota. The origins of the organization date back to 1955 and in 1983 the organization had 495 members.⁷⁷ While hospitality associations are traditionally tobacco industry allies,⁷⁸ the proposal is the first evidence of a direct link between the North Dakota Hospitality Association and the tobacco industry. Beginning in the late 1980's, the tobacco industry began its nationwide campaign to mobilize the hospitality industry to fight the public battle's against smoke-free indoor environments. The use of the hospitality industry as a front group allowed the tobacco industry to remain behind the scenes and out of the public eye. The tobacco industry has used the false claim that smoking restrictions have negative economic effects on the hospitality industry to recruit the support of hospitality associations.⁷⁸

A grassroots mobilization campaign proposed to use bars and taverns to target key legislative votes that were undecided or only slightly supportive of the industry position, if necessary.⁷⁶ The estimated cost of the grassroots campaign was between \$10,000 to \$20,000. The plan noted that passing preemptive vending machine legislation would require the assistance of the Tobacco Institute Public Affairs division for press releases, white papers, and media contacts.⁷⁹

The tobacco industry's prediction that statewide vending restrictions would be introduced during the 1991 legislative session was correct. Senate Bill 2087 was introduced by Senators Don Moore (R-District 28), Duane Dekrey (R-District 30), Barb Evanson (R-District 49), Orlin Hanson (R-District 3), and Jack Ingstad (R-District 17-18) on January 7, 1991. The legislation stated

It is a class B misdemeanor for a person to sell or furnish cigarettes or tobacco in any

form through a vending machine except on premises in an where minors are prohibited⁸⁰

Health advocates including the North Dakota Lung Association, North Dakota Medical Association, and Dr. Stephen McDonough, chief of ND Department of Health Preventive Health Section, mobilized in the support of the legislation. Al Wolf, Tobacco Institute lobbyist, John Olson, Philip Morris lobbyist, Lawrence Bender, R.J. Reynolds lobbyist, North Dakota Hospitality Association, FM Vending, and the North Dakota Candy and Tobacco Wholesalers testified in opposition to the legislation, but in support of a tobacco industry supported bill that was soon to be introduced by Senator Wayne Stenehjem (R-District 42).

Following the standard tobacco industry strategy of predicting that tobacco control measures would hurt the economy, Dave Schwann, president of Schwann Wholesale (vending machine dealer), Devils Lake, provided loss of business statistics including “56 vending machines would be lost, 21% of the total [Devil’s Lake]. \$45,000 would be lost in gross profit, and one job would be lost in Devil’s Lake.”⁸¹ He went on to support Stenehjem’s bill with the statements “There’s another bill [the tobacco industry bill, which included preemption] being introduced by Wayne Stenehjem of Grand Forks that requires cigarette vending machines be supervised. We feel this is a much more honest approach to the situation, one the vending industry can live with.”⁸¹ Senate Bill 2087 which would have limited the placement of vending machines to bars and liquor stores was defeated with a 30-18 vote on February 15, 1991.⁸⁰

SB 2087 was followed by tobacco industry-supported Senate Bill 2446 introduced by Senators Wayne Stenehjem (R-District 42), Evan Lips (R-District 47), and Erwin Hason (D-District 2), and Representatives Lee Kaldor (D-District 20) and LeRoy Bernstein (R-District 45) on January 21, 1991. Stenehjem received a \$100 contribution from Philip Morris in 1996.⁴⁴ Stenehjem was elected North Dakota Attorney General in 2000 and received a \$1,000 campaign contribution from Philip Morris.⁴⁴

SB 2446 implemented the legislation the Tobacco Industry specified in their proactive proposal.⁷⁶ It had weak vending machine restrictions and contained a preemption clause as well as language that allowed vending machines anywhere that they were in view of “an attendant,” which effectively meant that vending machines could be located in any business establishment:

Section 1

3. Tobacco products sold through vending machines may only be sold in vending machines located in:
 - a. Factories, businesses, offices, and other places not open to the general public;
 - b. Places open to the general public to which person under the age of eighteen are not permitted access;
 - c. Places where alcoholic beverages are offered for sale; and
 - d. Business places where the vending machine is in full view of an attendant of the establishment assigned to work at that location
4. It is a class B misdemeanor for the owner of the establishment in which a tobacco product vending machine is located, or for any employee or agent of the owner of that establishment who is made responsible by the owner for supervising a tobacco product vending machine, or an attendant as is described in subsection 3, to permit or allow any person under the age of eighteen to purchase any tobacco product through the vending

machine. The owner of the establishment shall ensure that each tobacco product vending machine located in the establishment carries a conspicuous notice as follows: “Persons under eighteen are forbidden to purchase tobacco products. A violation is punishable as a class B misdemeanor.”

...

Section 3

Preemption. No city or other political subdivision of the state may impose any requirement or prohibition concerning the sale of tobacco products through vending machines in addition to the requirements and prohibitions imposed by this Act. All ordinances, bylaws, regulations, and other measures adopted after January 1, 1991, by a city or other political subdivision of the state concerning the sale of tobacco products through vending machines are void.⁸²

Senate Bill 2446 was heard in the Senate Judiciary Committee on February 12, 1991. Amendments to the penalty section were proposed by Judiciary Committee members.⁸³ Albert Wolf, Tobacco Institute lobbyist Wheeler Wolf Attorneys, Bismarck, North Dakota, in a letter to Pat Donoho, Tobacco Institute Vice President, stated that the health advocates were able to attach amendments to SB 2446 including

civil penalties obtainable in Small Claims Court proceedings by parents of youngsters who were sold cigarettes illegally by vending machines or over the counter³⁵

The portion of SB 2446 relating to local preemption for vending machine restrictions was also amended out of the legislation in the Senate Judiciary Committee. The Senate passed an amended version of SB 2446 which restricted the placement of vending machines to locations where minors were either prohibited or under adult supervision with a 27-22 vote.⁸⁴ These amendments removed the two key provisions that the tobacco industry sought, particularly preemption, so the tobacco industry worked successfully to defeat the legislation³⁵ (in the House with a 42 to 64 vote on March 13, 1991⁸⁴). Although, the tobacco industry was not successful in passing its own preemptive legislation, they were successful through the use of their allies to defeat the vending machine restrictions advocated by the public health advocates.

Health advocates were successful in removing the preemption clause from the legislation. In a 2003 interview, Jeanne Prom, Tobacco Control and Prevention administrator (1992-2001), explained “There’s always been, I think in North Dakota in general, in all cases, a real emphasis on local control, which can be a very good thing for tobacco control because we don’t like preemption. Even tobacco-friendly legislators will not be in favor of preemption, simply on the philosophy that local control is very important.”²³

Local Retailer Licensing

Although tobacco industry vending machine restriction legislation was not reintroduced in 1993, the tobacco industry was faced with legislation regarding local tobacco control policy. On January 18, 1993, House Bill 1430 was introduced by Representatives Art Goffe (D-District 24), Eliot Glassheim (D-District 18), and Audrey Cleary (D-District 49) and Senator Kit Scherber (D-District 44). HB 1430 proposed to require tobacco retailers to have both a state and local tobacco sales license.^{85, 86} The legislation was supported by health advocates including Dr.

McDonough and the Barnes County Anti-Tobacco Coalition. McDonough testified before the House Political Subdivision Committee, “Our Department feels that HB 1430 is one of the more important pieces of public health legislation before the 53rd Legislative Assembly... HB 1430 will provide cities and counties the opportunity to locally license tobacco retailers. HB 1430 will allow local enforcement. Local enforcement can significantly reduce tobacco use by minors by curtailing the wide open access to tobacco.”⁸⁷ In a press released dated February 3, 1992 Dr. McDonough cited the statistic that in 1992 66% percent of youth smokers purchased their cigarettes at grocery and convenience stores in comparison to 69% in 1990. McDonough stated “Obviously, many grocery and convenience stores have done nothing meaningful in the past two years to stem the tide of illegal tobacco sales to minors.”⁸⁸ McDonough recognized that reducing youth access to tobacco was not going to be achieved at the state level and that the best strategy was to promote greater opportunity for tobacco control at the local level.

The North Dakota Grocers Association, North Dakota Retail and Petroleum Marketers Association, the North Dakota Hospitality Association testified in opposition to the legislation. HB 1430 was defeated in the House with a 44 to 54 vote.⁸⁹ The tobacco industry was able to establish new allies which were critical in the defeat of the legislation. In his weekly report to R. J. Reynolds, Robert Fackler, tobacco industry lobbyist explained

We worked with our new coalition partners, the grocers, and they turned up the heat on the Reps in their district.⁹⁰

Thomas L. Ogburn Jr., Vice President of Tobacco Institute Public Issues, in a memo to Thomas C. Griscom, R.J. Reynolds Executive VP of External Relations, stated that

Bob Fackler worked with the ND Grocers Association, a coalition partner, to help defeat this bill ⁸⁵.

A Tobacco Institute budget documented contributions of \$300 to the North Dakota Grocers Association in 1992 and 1993.⁴⁶ Apparently, it did not take a significant amount of money to win the Grocers Association support.

1995 Youth Access Legislation

The issue of youth access to tobacco products was again the topic of tobacco control legislation in the 1995 session. The state law in North Dakota in 1995 allowed law enforcement to charge an individual clerk with a misdemeanor for selling tobacco to minors, but there were no penalties in place for retailers. On January 10, 1995, HB 1316 was introduced by Representatives Catherine Rydell (R-District 47), Mary Mutzenberger (D-District 32), Andrew Hagle (R-Cooperstown) and Senators Ed Kringstad (R-District 49), Layton Freborg (R-District 8), and Judy DeMers (D-District).⁹¹ Rydell was a champion of tobacco control policy dating back to the passage of clean indoor air legislation in 1987. Andrew Hagle was suffering from a smoking-related cancer.⁹² HB 1316 proposed to hold the owner of a retail establishment responsible if an employee of the establishment sold tobacco products to minors. The penalty included fines and suspension of retailer licenses for illegal sales to minors. The legislation declared sale of tobacco to minors and use of tobacco by minors infractions rather than

misdeemeanors. Compliance monitoring by the State Department of Health and local authority to counties or cities to pass stricter youth access ordinances was included in the legislation.⁹³ According to Dr. Jon Rice, State Health Officer (1993-1997), the smoking rate for minors in North Dakota had increased by 49 percent since 1982 which was the motivation for the introduction of the legislation.⁹¹

Bonnie Staiger, TFND lobbyist, Dave Peske, North Dakota Medical Association, and Dr. Jon Rice, State Health Officer, testified in support of the legislation. Tom Woodmansee, North Dakota Grocers Association, and Art Wheeler, North Dakota Petroleum Marketers Association, in addition to various representatives of specific grocery and convenience stores testified in opposition.⁹⁴ According to Jeanne Prom, “Art [Wheeler] could sit up at the table, right next to the legislator. Art would have the chair, you know, call on him during discussion. Art was just right there all the time. He was very effective... It was one of those situations where you think, my gosh, there’s no intellectual argument here, what’s happening? I think it wasn’t the logic of the argument, it was the relationship built over years and years.”³¹ The opposition arguments were that the retailer penalties were too severe and gave too much power to the State Health Department. Representative Frank Wald (R-Dickinson) stated in opposition “Whatever happened to parental responsibility? Whatever happened to individual responsibility?”⁹⁵

Senate Bill 2498 was introduced by Senators Byron Langley (D-District 12), Meyer Kinnoin (D-District 4), and Ed Kringstad (R-District 49) on January 23, 1995 and carried the tobacco industry trademark. SB 2498 was a youth access bill which included vending machine restrictions very similar to SB 2446 in addition to the standard tobacco industry preemption clause. The legislation was supported by the Petroleum Marketers and Retail Association and opposed by health advocates, including Bismarck Youth Tobacco Coalition, Bonnie Staiger, TFND, and Dr. Rice. In her testimony before the Senate Human Services Committee Staiger stated “TFND sees HB 1316 as the preferred vehicle... However, special interests have initiated SB 2498 to dilute these efforts to create a mechanism to effectively reduce tobacco sales to minors.”⁹⁶ SB 2498 was defeated in the Senate with a 0 to 47 vote.⁹⁷ In an interview in 2004, Jeanne Prom attributed the failure of the bill to the general support of local control regardless of the subject, not a particularly pro-tobacco control position.³¹

HB 1316 was narrowly defeated in the House with a 48-45 vote on February 15. Two key supporters of the legislation were absent due to smoking-related illness (Representative Andrew Hagle [R-Cooperstown], Representative Dale Henegar [R-Bismarck]) Rydell told *Bismarck Tribune* reporters that legislators in opposition to the bill were doing the bidding of nine lobbyists representing the tobacco industry and their interests. She stated “This bill has been hijacked, big time.”⁹²

Health advocates were reprimanded regarding their support of HB 1316 because an action alert was sent out from the fax machine of State Health Officer Dr. Jon Rice. Staiger requested that an alert be sent out to generate support for the legislation but none of the voluntaries in TFND were able to fulfill the request due to limited staff and resources therefore, it was sent out with the health officer’s fax number on top. Consistent with the tobacco industry’s longstanding strategy of accusing health officials of “illegal lobbying,”⁹⁸ House Majority Leader John Dorso and Representative Wesley Belter (R-Leonard) criticized the state

Health Department for misuse of public funds.⁹² Dorso told reporters “What do we have, when we have agencies of government using taxpayers’ dollars to set up phone trees to lobby legislators about bill? I’m wondering what kind of an agency we’ve got going here.”⁹⁵

This criticism could have been avoided had one or more of the voluntary health agencies been able to send the fax. In the 1990's national voluntaries had not identified advocacy as a priority therefore local voluntaries were limited in their efforts. This situation is unlikely to be repeated in 2004, due to voluntaries being equipped with staff and funding for advocacy.⁹⁹

Minimum age for legal tobacco purchase

Legislation to raise the legal age for purchase of tobacco products resurfaced again in 1999. Senate Bill 2125 which proposed to raise the minimum age for the purchase of cigarettes to 19 and change the penalty for sales to minors from a misdemeanor to an infraction was requested by Dr. Stephen McDonough, Chief Medical Officer, and Murray Sagsveen, State Health Officer.¹⁰⁰ Governor Ed Schafer had outlined the legislation in the 1999 State of the State address as his solution to reducing youth access to tobacco products. McDonough stated in testimony before the Senate Judiciary Committee on January 18, 1999 “changing the penalty from a misdemeanor to an infraction will help with enforcement. Getting tobacco out of high schools with the age 19 will also help.”¹⁰¹ The North Dakota Petroleum Marketers Association supported the penalty change, but was in opposition to the age increase. The age increase was amended out of the legislation in the Senate Judiciary Committee and subsequently with the support of the Petroleum Marketers Association the penalty change was passed.^{102, 103} Senator Wayne Stenehjem was the chair of the Senate Judiciary Committee.

Conclusion

Legislation to restrict the sales of tobacco products in North Dakota dates back to the late 1800's. Prior to the general acceptance of the negative health effects of tobacco products, North Dakota citizens had public debates regarding the issue. From the beginning of the 20th Century , the North Dakota legislature had determined that youth should not have access to tobacco products. Due to an absence of the tobacco industry influence in state politics before the early 1980s, early tobacco sales restriction legislation became law. Beginning in the early 1980's the tobacco industry increased their lobbying efforts and began to build a network of third party allies that included associations representing Wholesale, Retail, and Hospitality interests. Throughout the 1990's health advocates (other than defeating preemption) did not devote the resources necessary to pass sales restriction legislation. North Dakota has one of the highest youth smoking rates in the nation which provides evidence of tobacco industry success and health advocate failure.

EVOLUTION OF TOBACCO TAX IN NORTH DAKOTA

The Early Evolution of the Tobacco Excise Tax

North Dakota has an extensive history of tobacco products tax increases dating back to the beginning of the 20th Century. Due to the lack of an organized tobacco control movement in

the state until the late 1980's, it is likely that the early tobacco products tax increases were passed for fiscal reasons (Appendix 6). The first cigarette excise tax was passed by the legislature after the repeal of the 1913 prohibition on the sale of cigarettes in 1925. The tax was 1 ½ mills per cigarette or \$0.03 per pack of 20, and \$0.01 on tubes of 50. North Dakota was one of only eight states to have a tax on cigarettes in 1925.¹⁰⁴ In 1927, a snuff tax of \$0.02 for each 1 ¼ ounce of snuff was passed by the legislature. The snuff tax was subsequently repealed in 1931. In 1933, a reinstatement of the snuff tax was vetoed by Governor William Langer. The \$0.02 snuff tax was reimposed in 1935.¹⁰⁵

In 1941, the tax on tubes of cigarettes from the 1925 legislation was repealed. In 1949, the cigarette excise tax was increased by \$0.02 per pack which made the excise tax \$0.05 per pack of 20. In 1951, a \$0.01 increase in the tax per pack with the revenue allocated to city and village governments was passed by the legislature. The total cigarette excise tax was \$0.06 per pack with \$0.05 dedicated to the state general fund and \$0.01 dedicated to cities and villages. In 1951, 41 states had a tax on cigarettes with the lowest rates at \$0.01 per pack in Washington, D.C and Wisconsin and the highest in Louisiana at \$0.08 per pack.¹⁰⁴

An excise tax of 10% of the wholesale price of cigars, snuff, and other tobacco products for distributors was effective on July 1, 1963 and remained effective until June 30, 1965. From July 1, 1963 through June 30, 1965 the \$0.02 tax per 1 ¼ ounce snuff and the 10% excise tax on tobacco and snuff were simultaneously effective through June 30, 1965. On July 1, 1965 legislation was passed to tax tobacco and snuff at 11% of the wholesale price. In 1965 only 17 states taxed cigars, snuff, and other tobacco products.¹⁰⁴

In 1963, the cigarette excise tax was again increased by \$0.01 per pack of 20, raising the cigarette excise tax to \$0.07 per pack of 20. The \$0.01 increase was again allocated to the city and village government which doubled the amount of money allocated to the local governments. In 1965, a \$0.01 increase per pack of 20 in the cigarette excise tax was enacted. The additional \$0.01 was allocated to the general fund raising the total tax to \$0.08 per pack. The total revenue to the state from the \$0.08 cigarette excise tax was \$5,148,318. Nationally, in 1965 the lowest cigarette tax was \$0.02 per pack in Arizona and Washington, D.C and the highest was \$0.11 per pack in Washington.¹⁰⁴ In 1969, the excise tax was increased \$0.03 per pack of 20, which raised the total excise tax to \$0.11. The allocation was \$0.08 to the state general fund and \$0.03 to the city and village governments. The total revenue to the state was \$6,278,766 with the \$0.11 cigarette excise tax. In 1979, the cigarette tax was increased by \$0.01 per pack of 20 to provide funding for grants to public libraries from the Grant Library Commission. The \$0.12 excise tax was in effect for four years and the \$0.01 dedicated to the Grant Library Commission provided approximately \$3,335,392 to the public library system during that time period. Nationally, in 1979 the lowest cigarette tax was \$0.02 per pack in North Carolina and the highest was \$0.19 per pack in New Jersey.¹⁰⁴

In summary, the first cigarette excise tax in North Dakota was enacted at \$0.03 per pack of 20 after the repeal of the prohibition of sales in 1925. From 1925 to 1983 the cigarette excise tax changed seven times and increased from \$0.03 to \$0.18 per pack of 20 cigarettes. Between the dates of 1925 and June 30, 1951 the revenues from the excise tax were allocated to the state general fund, and beginning on July 1, 1951 and continuing through 1979 a portion of the

revenue was allocated to city and village governments at \$0.01 through 1963, \$0.02 through 1969, \$0.03 through 1979.¹⁰⁵ These many tobacco products tax increases from the 1920's through the 1970's provide evidence that the tobacco industry did not yet play a significant role in North Dakota politics.

North Dakota's Tobacco Tax after 1980

Beginning in the 1980's, the tobacco industry role in the North Dakota legislative process began to intensify. Cigarette tax increases decrease cigarette consumption,¹⁰⁶ therefore the tobacco industry is motivated to fight tobacco tax increases. During the 1983 legislative session, internal tobacco industry documents provide the first evidence that the tobacco industry was using a network of third party allies to address tobacco tax increases.

In 1983 House Bill 1712, which proposed to increase the cigarette tax by \$0.06 from \$0.12/pack to \$0.18/pack, was introduced by House Majority Leader Richard Bakes (D, District 3), and House Minority Leader Earl Strinden (R, District 18). The bill was read in the House Taxation Committee on February 2, 1983 with Bakes and Strinden testifying in support while Harold Anderson, Tobacco Institute lobbyist, and Todd Ellig, President of the North Dakota Association of Tobacco and Candy Distributors, testified in opposition.¹⁰⁷ In 1982, Harold Anderson of North Dakota Candy and Tobacco Wholesalers (NDCTW) was a lobbyist representing candy and tobacco wholesalers and the Tobacco Institute.¹⁰⁸ Until the late 1980's, Harold Anderson was the only tobacco lobbyist in North Dakota.

On February 24, 1983 Jack Kelly of the Tobacco Action Network (TAN), the tobacco industry's grassroots political action network based in Washington DC, sent a memo to W. Eugene Ainsworth, Jr., R.J. Reynolds Vice President of Government Relations, James Cherry, Lorillard Vice-President, and J. Kendrick Wells, Attorney for Brown & Williamson, requesting permission for a TAN mobilization in North Dakota while HB 1712 was in the Senate Finance and Taxation Committee.¹⁰⁷ The memo included a sample of a letter to be sent to every TAN volunteer, a sample letter for each volunteer to send to their representative or senator plus a return card to indicate that the letter had been sent. A telephone follow-up was also suggested and Kelly indicated that this would be accomplished with the assistance of the North Dakota Tobacco Distributors Association. Kelly explained that the mobilization strategy would be more forcefully targeted towards the Senate districts with members on the Finance and Taxation Committee. Jack Kelly outlined the atmosphere for the legislation:

the State of North Dakota is faced with a projected revenue short-fall of more than \$200 million. To offset this problem, a variety of tax increases are being considered. They range from cigarette and alcohol tax increases to gasoline, sales and income tax increases. Recently, a move has been considered to increase the sales tax by 2% and drop many of the smaller proposed increases because of the huge amount of money that must be raised.¹⁰⁷

Handwritten on the request letter was the comment "W - O.K. to Jack Kelly" which indicates that the request for the TAN mobilization was granted.¹⁰⁷

The TAN mobilization was unsuccessful in trumping the state's budget deficit and defeating the \$0.06 tax increase. HB 1712 passed the Senate with a 51-1 vote on March 17, 1983 raising the cigarette excise tax to \$0.18.¹⁰⁹ In 1983 the lowest cigarette tax was in North Carolina with a tax of \$0.02 per pack and the highest was in Wisconsin at \$0.25 per pack.¹⁰⁴ The allocation of the revenue was restructured removing the \$0.01 distribution to the Grant Library Commission and dedicating \$0.15 to the state general fund and \$0.03 to city and village governments. For the year ending June 30, 1985, \$12,043,271 in revenue was generated from the excise tax.⁴

The tobacco industry was forced to remain on the defensive when the next tax increase was introduced in 1985. HB 1421 proposed to increase the cigarette excise tax by \$0.08/pack (\$0.26 per pack). A March 25, 1985 "After Action Analysis North Dakota" from Michael Brozek, Tobacco Institute Regional Vice President, to Bill Buckley, Tobacco Institute Vice President, detailed the legislative history of House Bill 1421. The bill passed by the House with a 96-6 vote but was defeated in the Senate by an 18 to 34 vote. The bill was introduced by House majority leader Earl Strinden (R-District 17 & 18) and Senator Majority Leader David Nething (R-District 48) on January 21, 1985. Brozek reported that due to economic problems in North Dakota and the intense support by the leadership of both houses for the legislation, a difficult battle had been anticipated to kill the bill.¹¹⁰ Brozek explained Harold Anderson's, Tobacco Institute lobbyist, view of the situation

after a particularly bitter albeit successful battle against a new Clean Indoor Air Act, [Anderson] was extremely pessimistic concerning our industry's chances in defeating this legislation.¹¹¹

Anderson thought that the bill would definitely pass if leadership maintained control of the votes. Brozek admitted that he, too, was concerned that the industry would be defeated after speaking with several legislators regarding their support of the bill. Brozek summarized the tobacco industry's response to the situation with the statement

representing an industry that epitomizes the old adage 'the difficult we do right away ... the impossible takes a little bit longer,' it was clear that we had no choice but to meet the issue head on and, if necessary, augment our lobbying profile in the state.¹¹¹

The House Committee on Taxation approved House Bill 1421 and the bill was sent to the House floor with a positive recommendation from the committee. Brozek stated "realizing that changing leadership's preconceived notions on legislative matters require finesse and skill" the tobacco industry solicited recently defeated Lieutenant Governor, Ernie Sands (R) for lobbying backup.¹¹¹ Sands had been in the North Dakota legislature for twelve years serving the previous four years as Lieutenant Governor. Although Sands did not feel the prospects were promising for the defeat of the legislation, he agreed to assist the tobacco industry.¹¹¹ The tobacco industry has continued the strategy of using politically connected, well-respected figures as lobbyists in North Dakota through 2003 including John Olson, former Republican legislator, and Bob Hanson, former state treasurer.

A major setback for the industry occurred when within 24 hours of requesting the

services of Mr. Sands the North Dakota House approved HB1421 with a 96 to 6 vote. Sands and Anderson believed that the bill was passed by the House due to the legislative strength of House Majority Leader Earl Strinden.¹¹¹

On February 27, 1985 at a meeting of the Senate Taxation Committee, Anderson and Sands spoke directly with legislators and reported back to Buckley that the outlook was bleak.¹¹¹ Again, the industry took steps to strengthen its opposition to the legislation. The immediate goal was to defeat the legislation in the Senate Taxation Committee. Anderson met with committee Chairman Senator Stan Wright (R-District 4) in an effort to postpone committee action on the bill. Although Wright was supportive of the industry position he stated "if Nething (David Nething - R-Jamestown, Senate Majority Leader) wants the bill he's going to get it."¹¹¹ Anderson explained to Wright, as he had done in his testimony before the Senate Taxation Committee, that he needed more time to talk to Senate members.¹¹¹

Lobbying efforts on the part of Anderson and Sands continued with Senate members; according to Brozek

Mr. Anderson and Sands continued to plug away at, what can now be observed as, the soft underbelly in Senator Nething's support base in the upper House.¹¹¹

Anderson and Sands became more optimistic as they discovered that the support for the bill in the Senate was not as strong as they had anticipated and that they were able to exert influence. Focusing lobbying efforts entirely on the Senate Taxation committee, Anderson and Sands felt the first hint of success when on March 12 Senator Wright conveyed to Senator Nething that the Senate Taxation committee would not recommend HB 1421 for passage by the full Senate. Senator Nething replied that he would fight for the legislation on the floor regardless of the committee's recommendation. On March 12, 1985 the Senate Taxation Committee recommended HB 1421 not be passed by a vote of 5 to 2. Brozek suggested that Sands meet with Senator Nething and Sands reported that Nething was still fully in support of the legislation.¹¹¹

Anderson took a vote count and then met with Assistant Majority Leader Senator Gary Nelson (R-District 22) to share the results of the count. Nelson was surprised by the lack of support for the bill and stated that he would speak with Senator Nething. Brozek noted

Senator Nething, upon meeting Mr. Anderson at a social function on March 21, 1985, smiled and said that a vote on this matter 'would not be held for quite some time' but Nething still expressed his support for the measure.¹¹¹

Brozek reported a conversation with Anderson on March 21, 1985 in which Anderson expressed that Senator Nething would be forced to take action due to the weak support for the bill. Anderson felt that Senator Nething would attempt to gain a majority of the votes by Wednesday March 27, 1985. A conference call between Buckley, Brozek, Roger Mozingo, Vice-President Tobacco Institute State Activities Division, Anderson, and Sands occurred on March 22, 1985 in which further action was deemed necessary.

On Monday March 25, 1985 Senator Nething addressed the Senate floor on HB 1421. According to Brozek

To our amazement the good Senator from Jamestown [Nething] felt that this legislation would be of 'no use' to the state of North Dakota due to the fact that Congress will most likely not sunset the federal excise tax on cigarettes.¹¹¹

On Monday March 25, 1985 HB 1421 was defeated by the Senate with a vote of 34 to 18.¹¹¹ The tobacco industry was employing well-developed strategy to fight tobacco tax increases even before an organized tobacco control movement entered the picture.

Health Advocate Involvement in Tobacco Tax Legislation

After the formation of Tobacco Free North Dakota, health advocates became involved in the push for tax increases to decrease cigarette consumption. In 1987 Tobacco Free North Dakota was successful in obtaining a \$0.09 cigarette tax which increased the tax from \$0.18 to \$0.27 per pack of 20 and a 9% wholesale tax increase from 11% to 20% with SB 2103 introduced by Senator Tim Mathern (D-District 51) and SB 2216 introduced by the Committee on Finance and Taxation. With the combination of an active coalition, strong leadership, and a well-developed plan, TFND obtained their objective of a tax increase.

A portion of the revenue was originally earmarked for the State Health Department for tobacco control programs, however in the final versions of the legislation all revenue was dedicated to the general fund. Al Wolf and Tom Woodmansee, President of North Dakota Grocers Association testified in opposition to the tax increases, while Dr. Stephen McDonough, Preventive Health Section Chief, Dr. Robert Wentz, State Health Officer, and Marcie Andre, Tobacco Free North Dakota President, testified in support.

The tobacco control momentum continued with Representative Cathy Rydell (R-District 47), who had become a champion of tobacco control policy in 1987 with her sponsorship of clean indoor air legislation, co-sponsoring a tobacco products tax during the 1989 legislative session. Senate Bill 2475 was introduced by Senators Jim Maxson (D-District 41) and Donna Nalewaja (R-District 45) and Representatives Catherine Rydell (R-District 47) and Janet Wentz R-District 41 in 1989.¹¹² SB 2475 increased the cigarette excise tax \$0.03 from \$0.27 to \$0.30 and increased the wholesale tax on cigars, snuff, and other tobacco products by 5% from 20% to 25%. SB 2475 also included a sunset provision effective on July 1, 1991 which would reduce the cigarette tax and wholesale tax on cigars, snuff, and other tobacco products to the 1987 level. The North Dakota Tobacco Wholesale Association, representative of Stop N Go Stores, and Al Wolf testified in opposition to the tax increase. The opposition arguments included increased cigarette smuggling due to the tax increase and loss of business due to consumers purchasing cigarettes outside of the state. The legislation passed during the session.

Tobacco Institute Pro-Active Tax Proposal

The Tobacco Institute created a legislative analysis in anticipation of the 1991 legislative session which included a small synopsis of activity of the 1989 session and strategy for the

upcoming 1991 session.⁷⁶ In 1989 several legislative measures were referred to a vote of the people which resulted in the repeal of five taxes measures by popular vote: increases in income tax, gas tax, and sales tax. The Tobacco Institute had been concerned that the failed referendum measures could force a special legislative session with “sin taxes” on the agenda, but Governor Sinner (D) chose not to call a special legislative session to pass additional tax increases. The Governor's choice resulted in major cutbacks in state programs and employees.

The North Dakota economy was in a slump. Three drought years had been particularly hard on the agricultural economy. Three years of depressed oil prices had also damaged the economy because petroleum was a major component. In 1991, the rainfall increased and oil prices were slightly elevated due to Gulf War I. Although the economic outlook was more positive, the tobacco industry felt the public was still wary of government spending. The industry's 1991 analysis stated,

The lobbyists for TI [Tobacco Institute] and member companies in this state agree that the individual legislators advocating government consolidation and retrenchment are the ones with the message voters want to hear.⁷⁶

The analysis described the climate for the passage of tax bills in the legislature as one of reluctance due to fear of a referral to a vote of the people and subsequent rejection. The tobacco industry felt that a cigarette tax would be most likely to pass a vote of the people.¹¹³

A scheduled sunset of \$0.03 of the \$0.30 cigarette tax and 5% of the 25% wholesale tax on cigars, snuff, and other tobacco products was to become effective on July 1, 1991. The Tobacco Institute saw the prospects for preserving the sunset as unfavorable, but felt it was possible to prevent an additional tax increase in 1991. The Tobacco Institute anticipated that the 1991 legislative session would include bills to repeal the sunset provision and/or increase the cigarette excise tax by up to \$0.10.⁷⁶

The Tobacco Institute developed a state tax plan in a format identical to the proactive vending proposal (discussed in previous section). The initial goal of the Tobacco Institute was to save the sunset provision through direct lobbying and then be prepared to fight additional tax increases if necessary. The tobacco industry action plan outlined the resources needed to achieve their goals. The Tobacco Institute action plan was divided into seven major categories of action: economic analysis/factsheet, legal memorandum, expert witness, coalition allies, TI grassroots mobilization, company resources, public affairs/media resources and additional needs.¹¹³

The plan documented that a meeting had occurred on September 9, 1990 at which tobacco industry lobbyists and personnel had discussed strategy. The state of North Dakota's economy would be the centerpiece of any discussion on tax increases. The plan stated “among the taxes that North Dakota could pass, a cigarette tax would be the least objectionable to the majority of citizenry. However, the theme of this legislature may be retrenchment and consolidation. In this light, it is possible to prevent an increase in North Dakota's current cigarette excise tax.”¹¹³

The Tobacco Institute set a deadline of January 1, 1991 for the creation of an economic analysis of cigarette trade with North Dakota's border states. Minnesota had a higher cigarette tax

of \$0.38 per pack of 20 and South Dakota had a lower cigarette tax of \$0.23 per pack of 20. North Dakota tobacco lobbyists also requested an analysis of projected revenue that would be generated from a \$0.03, \$0.05, \$0.08, \$0.10 cigarette tax increase.¹¹³ The industry was in the process of obtaining information on excise tax arrangements between the state and Native American tribes through the Department of Revenue. The tobacco industry concluded that Native American tribes without cigarette excise tax compacts with the state had increased incentive to sell cigarettes because of a \$3.00 per carton lower cost than North Dakota retailers.¹¹³ The tobacco industry's motivation for obtaining this information was for the claim that the cost differential between cigarettes sold on reservations versus those sold in North Dakota retail establishments (due to untaxed cigarettes on reservations) would encourage consumers to purchase cigarettes exclusively on reservations, therefore causing a loss of revenue generated from cigarette excise tax in North Dakota. This argument could be used in opposition to the removal of the sunset provision and further cigarette tax increases. The tobacco industry understands the extreme negative impact of state cigarette excise tax increases and therefore often resorts to exaggerated claims of lost state revenue through smuggling or other means in order to prevent tax increases. Independent economic studies conducted in the United States have shown the tobacco industry claims to be false.¹⁰⁶

The industry analysis¹¹³ noted that expert witnesses from outside the state were not looked upon favorably in North Dakota, but that tobacco industry lobbyists have proven to be effective in North Dakota. The North Dakota Candy and Tobacco Wholesalers and North Dakota Grocers Association are named as allies of the tobacco industry who had previously lobbied and testified on behalf of the industry. Tobacco Wholesalers Association and Grocers Association are traditional tobacco industry allies. The Tobacco Institute stressed the power of money to encourage their allies:

A contribution of between \$500 and \$1000 to the ND Grocers may stimulate their cooperation on the excise tax issue.¹¹³

The Tobacco Institute planned a grassroots campaign to target House and Senate Finance Committee members prior any hearings on legislation that proposed to increase the tobacco excise tax. The plan explained

Our strategy would entail generating significant constituent contact from those involved in convenience stores, gas stations, and grocery stores.¹¹³

The Tobacco Institute estimated the cost of the grass roots campaign to be between \$15,000 and \$25,000.¹¹³ The Tobacco Institute planned to use company resources such as lists of smokers from R.J. Reynolds and Philip Morris plus names from petitions R.J. Reynolds had collected for opposition to federal excise taxes to solicit citizen support.¹¹³

The tobacco industry's bill was introduced as Senate Bill 2085 by Senator Meyer (D-District 36) on January 7, 1991.¹¹⁴ SB 2085 proposed to reduce the cigarette tax by \$0.03 in accordance with the sunset provision in SB 2475 effective July 1, 1991 and also further decrease the state cigarette tax by the amount of any federal tax increase.¹¹⁵ Dr. McDonough and TFND testified in opposition to the legislation on the premise that higher cigarette taxes reduce

consumption, while the tobacco lobby testified in favor of the legislation.¹¹⁴ The legislation was defeated in the Senate with a 24-29 vote on January 31, 1991.¹¹⁴

Partial Sunset of 1989 Tobacco Tax

House Bill 1509 introduced by Representatives August Ritter (D- District 47) and Barbara Pyle (D- District 13), which proposed to retain the \$0.30 cigarette excise tax and 25% wholesale tax on cigars, snuff, and other tobacco products increase that were scheduled to sunset on July 1, was heard in the Finance and Tax Committee on February 8, 1991.⁷⁴ Representatives Ritter and Pyle cited the fact that tobacco tax increases decrease tobacco consumption as their basis for introducing the legislation. Pyle stated “There are some people who have said this is a discriminatory tax, and that it is nobody else’s business. However, insurance companies will tell you that the rate of health insurance has gone up in the last century because of cancer. You know that if you are a non-smoker, you get a cut in your premium. When society is affected, in general, with their health, it affects the whole citizenry. People who do this even when it affects their health, I believe they can afford to pay this tax.”¹¹⁶

Health advocates represented by Dr. Stephen McDonough, Dave Peske, North Dakota Medical Association, Nadine Kranz, American Lung Association testified in support of the legislation on February 5, 1991 before the House Finance and Taxation Committee.¹¹⁶ Health advocates argued that the tobacco tax in North Dakota was not sufficient to adequately compensate for the increased health care costs due to smoking related morbidity and mortality and therefore should not be allowed to sunset. McDonough cited public support for the elimination of the sunset provision, he explained “In January, 1991, a telephone survey was conducted of 508 North Dakota men and women 18 years and older. They were asked if the present state tax on cigarettes of 30 cents per pack should be increased, decreased, or stay the same. The results showed that 40 percent felt that the cigarette tax should be increased, 34 percent thought the tax should be the same, while only 13 percent thought the tax should be decreased. The rest (13 percent) had no opinion. Thus, it would appear that the vast majority of North Dakotans would prefer that the cigarette tax remain at 30 cents per pack or even be increased.”¹¹⁶

John Olson, Philip Morris lobbyist, Dave Maier, North Dakota Candy and Tobacco Wholesalers, Tom Kelsch, Smokeless Tobacco lobbyist, Al Wolf, Tobacco Institute lobbyist, testified in opposition. Olson defended the tobacco industry by citing their contribution to the North Dakota economy, he explained, “This company has more interest in North Dakota than just in cigarettes. They are the largest consumer package goods company in the country. They derive most of their business from three primary lines of business, which are tobacco, food and beer... Miller Brewing Company is the second largest brewery in the world, they operate in North Dakota. They spend about one hundred and nineteen million dollars in North Dakota. I point this out to not just to tell you that because they do business in North Dakota, you should look at the tax issues. I point this out because they are a good company, a good citizen, and all they are asking is that they be treated fairly.” This is an example of the tobacco industry using its non-tobacco entities for protection.

Al Wolf’s testimony indicated that the tobacco industry felt an agreement between the legislature and the tobacco industry was being violated with HB 1509, he stated “this history is

that in 1985, cigarette tax went from \$0.15 to \$0.18 a pack. In 1987 it went from \$0.18 to \$0.27. At that time the discussion was, we will never see a big crunch like this again. In 1989, things seemed to look pretty good and we seemed to be able to balance the budget until the last three days, all of a sudden with everything coming together, there was a need for three million dollars, they looked at the industry again, and there it was another increase. It was suggested that this type of crunch would not happen again, that is why it was sunsetted, the economy has been better, we are here, and that is why the governor did not include it in his budget. We do feel it is important to let the thing sunset.”¹¹⁶

Dave Maier argued against the legislation on the premise that the tax burdened the segment of the population with the lowest income in addition to increasing bootlegging of tobacco products. In 1991, South Dakota did not tax smokeless tobacco and other tobacco products. In addition Maier stated “I would like to say that this bill can only be described as an attempt to fill the paternalistic desire of a few to guide the behavior of others. To use the tax system as a means of exerting social and political control over our private choices is a dangerous precedent in a society based on free choice and mutual tolerance among our citizen’s life styles.”¹¹⁶

According to Dr. McDonough the intense tobacco industry effort to fight the tax increase was not unusual; he explained “It would always be interesting to see even a five or ten cent. The conference committee toward the end of the session, that place would be packed with lobbyists. They’d fly them in from Denver and Minneapolis. You’d go in and you couldn’t find a seat. It was amazing. For a piddly little state, for a piddly little cent increase, they’d wine and dine them.”²² The arguments of the tobacco industry were successful in influencing the committee members and HB 1509 was given a do not pass recommendation by the House Finance and Tax Committee with a 9-6 vote.¹¹⁷

Despite this failure in committee, the House passed HB 1509 with a 55-43 vote and declined a motion to reconsider the passage. HB1509 moved to the Senate floor. HB1509 was passed by the Senate with a 38-14 vote and sent back to the House for approval of the Senate’s changes. The House version of the bill held excise taxes at \$0.30 per pack and 25% of wholesale for cigars, snuff, and other tobacco products while the Senate version reduced excise taxes to \$0.29 and 22%.^{118, 119} The amended version of the bill which reduced the cigarette tax to \$0.29 and the wholesale tax to 22% was passed by the House with a 66 to 35 vote on April 6.¹²⁰

Albert Wolf, Tobacco Institute lobbyist from Wheeler Wolf attorneys, Bismarck, North Dakota, sent a letter to Patrick Donoho, Tobacco Institute Vice President, dated March 28, 1991 regarding tobacco related activity in the North Dakota legislature for the 1991 session. Wolf reported success in the area of excise tax by the passage of a \$0.01 reduction in the cigarette tax and a 3% reduction in the smokeless tobacco tax by a 38-14 vote of the Senate rather than the proposed total elimination of the sunset provision in the original version of HB 1509. Wolf stated

I am attaching one of the series of weekly summaries provided on the fiscal status of the North Dakota legislature for your information. It does contain reference to the three cent cigarette tax as a potential income to the state and the Governor’s Office of Management and Budget had projected that \$3,200,000 expenditure as additional revenue beyond the Governor’s budget throughout the legislative session thus far.³⁵

In correspondence between M. B. Oglesby, Jr., R.J.R. Executive V.P. of Government Relations to James Johnston, CEO of R.J.R. domestic, dated April 12, 1991 Oglesby made the following statement regarding the passage of HB 1509

The decrease represents a partial sunset of a \$0.03 increase enacted in 1989; and although states frequently enact temporary taxes, this is one of the few times that even a portion of a cigarette excise tax increase has been permitted to expire.¹²¹

The partial sunset of the tobacco products tax is evidence of the growing power of the tobacco lobby in North Dakota. The Tobacco Institute's creation of a well-developed plan and availability of sufficient resources including allies and financial resources allowed the tobacco industry to partially obtain their goals. This was a significant success for the industry.

Largest Tobacco Products Tax Increase in North Dakota History

The last cigarette tax increase through 2003 occurred in 1993. HB 1516 contained provisions to increase the tax on the sale of charitable gaming tickets in addition to a \$0.15 increase in the cigarette tax and 6% increase in the cigars, snuff, and other tobacco products wholesale tax. The legislation raised the cigarette tax to \$0.44 per pack of 20 and the other tobacco products tax to 28%. Health advocates were not involved in the fight for this tax increase. Jeanne Prom described the tax increase as "a total 11th hour back door balance the budget thing, it had nothing to do with us."³¹ However, regarding the tobacco lobby she stated "Oh, they were in huge opposition. They were in huge opposition to anything even as little as five cents. They were in major opposition to that. They flew in people from everywhere."³¹

An article in the *Valley City Times-Record* on June 6, 1995 analyzed the economic costs of smoking in North Dakota. The economic costs of smoking in North Dakota increased from \$131 million to \$133 million from 1992 to 1993 according to the North Dakota State Department of Health and State Health Officer Dr. Jon Rice. The cost amounted to \$2.54 for every pack of cigarettes sold in North Dakota annually which in turn equaled \$1774 for every resident of North Dakota.¹²² In contrast, in 1995 the state cigarette tax was only \$0.44 per pack.

Despite the barrage of tobacco tax increase proposals in the legislative sessions between 1983 and 1993, the tobacco industry escaped any further damage during the 1995 legislative session. An R.J. Reynolds Nabisco interoffice memorandum from M. B. Oglesby, Jr. to Charles M. Harper, CEO R.J. Nabisco Holdings Corp, dated April 21, 1995 documented that the North Dakota legislature had adjourned with no legislation that would have adversely affected the tobacco industry being enacted.¹²³

Tobacco Products Tax Legislation 1999-2003

The quiet legislative session in 1995 was the beginning of a four year stretch of relief for the tobacco industry. It was not until 1999 that the North Dakota legislature would once again take up the issue of the tobacco tax. The North Dakota House of Representatives defeated a bill with a 65-33 vote which proposed to increase the cigarette tax by \$0.01 from \$0.44 to \$0.45 and generate

\$1 million in revenue to fund a program for nurses in public schools. The legislation was introduced by Representatives Wanda Rose (D-District 32), Roxanne Jensen (R-District 17), George Keiser (R-District 47), Lonny Winrich (D-District 18) and Senators Judy DeMers (D-District 18), Jerome Kelsch (D-District 26). Representative Byron Clark, (R-Fargo), stood in opposition to the bill because he felt it unfairly targeted smokers. Clark stated “If having school nurses helps all of us, the tax should be on all of us, not some group of North Dakotans who are currently easy to pick on.”¹²⁴ Representatives of the North Dakota Grocers Association, North Dakota Retail and Petroleum Marketers Association, and the Greater North Dakota Association testified in opposition to the legislation, while representatives of nursing and education testified in support at a House Finance and Taxation Committee hearing on February 8, 1999. The legislation was given a "do not pass" recommendation in the House Finance and Taxation Committee. Tobacco control advocates were not involved in the lobbying for the tax increase.¹²⁵

2003 Failed Cigarette Tax Increase

The North Dakota Tobacco Policy Initiative (NDTPI) was awarded a Special Opportunities Grant (SOG) from the Robert Wood Johnson Foundation in January 2003. One goal of the grant was to increase the state’s tobacco tax with an earmark of funds for tobacco prevention. Membership in the Tobacco Policy Initiative included American Cancer Society, American Heart Association, American Lung Association of North Dakota, North Dakota Medical Association Alliance, North Dakota Nurse’s Association, North Dakota Pharmaceutical Association, and North Dakota Society for Respiratory Care.

NDTPI advocated for the the Governor to propose a \$1 tobacco tax increase in his budget recommendations. NDTPI was successful; Hoeven introduced a \$0.35 tax increase increase as part of his budget recommendations to the legislature.¹²⁶ Subsequently, Senate Bill 2076 sponsored by the Committee on Finance and Taxation per the request of the Office of Management and Budget was introduced which proposed a \$0.35 per pack of 20 increase in the cigarette tax. The last cigarette tax increase had occurred in 1993 when the tax was raised from \$0.29 to \$0.44. The proposed tax increase would have generated \$29.7 million in revenue.¹²⁶ SB 2076 did not earmark any revenue for tobacco control, the tax increase revenue was exclusively for fiscal reasons due to expected budget shortfalls for the Human Services Department.¹²⁷

After the Governor’s proposal, the American Heart Association released a press release in support of the \$0.35 tax increase which urged legislative leadership to support the tax increase. Herman was quoted in the release “The American Heart Association, along with other health related organizations, will be seeking a much greater increase in the tobacco tax in order to achieve even higher quit rates and to provide much needed additional funding for public health efforts in our state.”¹²⁸

Before and after the Governor’s proposal NDTPI advocated for a \$1.00 tax increase for the 2003 legislative session and mounted a substantial public campaign to push the idea. Despite this effort, no legislation to implement this proposal was introduced. NDTPI was not in opposition to the \$0.35 tax increase. In a 2004 interview, June Herman, Vice President of Advocacy at the American Heart Association explained, “As a health group we knew that there was a need for the revenue out there in the state...and we all knew what the benefit of a huge increase was, so we felt

there was still a need to advocate for the larger amount, it wasn't that we disagreed with the lower amount of the governor's proposal. I think we just saw a need to set the sights a little higher."⁵¹

NDTPI had a coordinated campaign to push for the \$1.00 cigarette tax increase. A public opinion survey on the tobacco tax increase was commissioned by NDTPI and conducted by Harstad Strategic Research of Boulder, Colorado in February 2003. The poll found that 65 percent of the 403 North Dakota voters surveyed favored a \$1.00 tobacco tax increase with a portion of the revenue earmarked for tobacco cessation programs. The support for the tax increase was non-partisan.¹²⁹ NDTPI formed Keep Kids Tobacco Free for use during the public campaign which included a website (www.keepkidstobaccofree.com). The coalition used both earned and paid media to build support for the tobacco tax increase. A direct mail piece regarding the tax was sent to approximately 20,000 potential tobacco control advocates.¹²⁷

Herman composed an op-ed that was published in the *Jamestown Sun* on Jan 17, 2003 advocating for the \$1.00 tax increase proposed by the North Dakota Tobacco Policy Initiative. Herman explained that the \$1.00 increase would cover only 18 percent of the costs associated with tobacco use in North Dakota. Herman stated "Every state that has increased its tobacco tax has experience increased revenues, even with smokers quitting their habit. Lower income groups have the highest quit rates and, with the \$1 increase, can receive much more cessation support."¹³⁰ The Tobacco Policy Initiative wanted \$10 million of the annual revenue from the tax increase earmarked to fund the Tobacco Prevention and Control Program at levels recommended by the CDC.¹³⁰

On March 12, 2003 a "Tobacco Smoke-Out" policy forum organized by the American Heart Association was held at the request of Senators Tom Fischer and Judy Lee and Representatives Clara Sue Price and Bill Devlin. The legislators were all members of the Senate and House Human Services Committees and were instrumental in the 2001 implementing legislation for the Master Settlement Funds. The event was sponsored by members of the NDTPI including American Cancer Society, American Heart Association, American Lung Association of North Dakota, North Dakota Medical Association, North Dakota Nurses Association, North Dakota Public Health Association, and North Dakota Society for Respiratory Care. Beverly May, Campaign for Tobacco Free Kids, and Janet Collins, PhD, Centers for Disease Control, presented at the forum.³³

Senate majority leader Bob Stenehjem (R-District 30) was a strong opponent of SB 2076, Governor Hoeven's \$0.35 cigarette excise tax increase. He defended his position of opposition to the \$0.35 tax increase in an op-ed published in the *Fargo Forum* on April 4, 2003. Stenehjem's had been accused that his opposition stemmed from the his own smoking habit. Stenehjem stated

I wasn't chosen by my peers to be the leader of the Senate by building my political career on such shallow principles. It's easy to assume that politicians are all short-sighted and self-serving enough to base their votes on purely personal reasons like that. However, that kind of assumption is rarely true and does a real disservice to the need to debate issues on facts. The reason I oppose the tobacco tax is because tobacco taxes are a declining revenue source. I don't think it is smart or prudent public policy for this state to increase spending based on an unreliable, declining source of revenues such as tobacco taxes.¹³¹

Keith Rau, MD, member of the North Dakota Medical Association, responded to Stenehjem's op-ed on April 18, 2003:

Stenehjem believes that a tobacco tax is a declining source of revenue. However study after study in state that have increased their tobacco tax have shown that this is not the case. We know that increases in the cost of tobacco reduce tobacco use. And in every state that has increased its tobacco tax that increase in the tax has made up for the decline in packs sold. In North Dakota, a one dollar increase would yield \$34.6 million even while it would reduce cigarette sales by 6.7 million packs per year.¹³²

Rau listed the monetary benefits of a \$1.00 increase in the tobacco tax: medical spending on tobacco related cardiovascular illness reduced by \$1.9 million over a 5 year period; expenses from smoking affected pregnancies reduced by \$1.7 million over a 5 year period; \$116.4 million saved on medical expenses due to adults deterred from smoking; \$49.5 million saved on medical expenses due to adults that quit smoking. Therefore Rau estimated a dollar tax increase would result in \$165 million in savings from reduced medical expenses¹³². Rau stated

I'm a physician and my interest in preventing North Dakota kids from smoking and helping North Dakota adults isn't about dollars and cents; it's about lives. More than 20,000 North Dakota kids smoke. Increasing our cigarette tax by one dollar means that 9,700 North Dakota kids won't take up smoking. If we pass on the opportunity this session to increase our cigarette tax more than 3,000 of those kids will someday die of tobacco related diseases. When we're dealing with the lives of our children we need to look long term and not just through the end of the 2003-2005 biennium.¹³²

Vicki Voldal Rosenau, Valley City local tobacco prevention coordinator, composed an op-ed published in the *Fargo Forum* on April 9, 2003. Rosenau criticized Senator Bob Stenehjem's opposition to the tobacco tax increase. Rosenau responded that the purpose of the tax increase was not to generate revenue for necessary services, but rather reducing tobacco use in the state. Rosenau stated "I don't claim to know the real reasons, but for weeks I've been hearing that Majority Leader Stenehjem has decreed there will be no tobacco tax increase in North Dakota this year. Could it have anything at all to do with the fact that I've also been told there are 11 (yes, 11) full-time, (nattily dressed, no doubt) tobacco-company lobbyists working the legislative halls in Bismarck."¹³³

The campaign succeeded in forcing the tobacco industry out into the open. The tobacco industry publicly battled the tobacco tax increase proposed in SB 2076 rather than working exclusively through front groups. Maura Payne, R.J. Reynolds Vice President Corporate Communications, composed an op-ed published in the *Minot Daily News* and *Bismarck Tribune* in April which argued that the proposed cigarette tax increase unfairly burdened smokers with the duty to provide the funding for state programs. Payne stated "Increases in smoker taxes are nothing more than tax profiling. These excessive tax increases impose an unfair and selective tax burden on primarily lower- and moderate- income Americans engaging in legal behavior." She cited that smoker's contributed \$54 million to the North Dakota economy in 2002.^{134, 135}

R. J. Reynolds ran a print ad titled "Straight Talk" in the *Grand Forks Herald* on May 4,

2003 which attacked Governor Hoeven's proposed tobacco tax increase.¹³⁶

Tommy J Payne, R.J. Reynolds Vice President External Relations, wrote an op-ed published in the *Grand Forks Herald* on April 8, 2003, *Minot Daily News* on April 6, 2003 which echoed the sentiments of Maura Payne's pieces. Payne again stated “Increases in smoker taxes are nothing more than tax profiling. These increases impose an unfair and selective tax burden on lower and moderate income Americans engaging in legal behavior. They also cause job losses (particularly in the retail/wholesale industry) and encourage Internet sales and other tax avoidance behaviors, which lead to decreased tax revenue and poor enforcement of minimum wages.”^{137, 138}

The power of the tobacco lobby prevailed; SB 2076 was defeated. After the failure of the initial \$0.35 per pack cigarette tax increase, an editorial in the *Fargo Forum* on April 25, 2003 stated that Senator John Andrist (R-Crosby) had requested that colleagues support a revived cigarette tax increase to provide revenue for the Human Services Department budget. The Forum suggested that the legislature go a step beyond this and raise the cigarette tax by an amount sufficient to fund other programs in addition to Human Services. The editorial stated “the Legislature’s resistance to a tobacco tax increase makes no sense”.¹³⁹

A special legislative session was called by Governor John Hoeven (R) after his veto of 3 budget bills (education, corrections, information technology) passed during the 76 day regular session.¹⁴⁰ An editorial in the *Fargo Forum* stated “when North Dakota lawmakers gather Monday for a historic special session, their challenge will be to minimize political rifts and maximize compromise. It is, after all, the Republic super-majority in the Legislature that has been at loggerheads with Republican Gov. John Hoeven. The minority Democrats sat on their hands for most of the session, preferring to carp from sidelines rather than work with the governor to advance his initiatives. They apparently could not bring themselves to give Hoeven credit for anything, even proposals with which they agreed.”¹⁴¹ The *Forum* concluded that the solution to the budget dilemma and governor’s vetos was a cigarette tax increase. The Forum stated “opposition to a tobacco tax is senseless. Arguments against it are transparently phony. Anti-tax ideology as applied to a tobacco tax is so much piffle.”¹⁴¹

Hoeven again pushed for the cigarette tax increase during the special legislative session. Representatives Mike Timm (R-Minot) and Al Carlson (R-Fargo) both told reporters that there was no support in the legislature for the tax increase. Democratic floor leaders, Senator David O’Connell (D-Lansford) and Representative Merle Boucher (D-Rolette) offered to gather Democratic support for the increase if Hoeven could work the Republican wing. Hoeven stated that he would be willing to accept a \$0.15 tax increase as a compromise. A tobacco tax increase was not passed during the special legislative session.¹²⁶

In an interview in 2003, Dr. McDonough commented on the failed tobacco tax increase:

when you look at the fact that the governor had budgeted a significant increase in tax for tobacco in the budget, that should have gone through, and that fact that it didn’t, I think indicates that things are in absolute shambles here. Because when you have a governor actually put something in their base budget, it’s very difficult for special interests to move it around. The tobacco industry, they own the legislature, in my opinion. Lock, stock, and

barrel, and there are a number of examples over the years, things I've heard about or witnessed that indicate that that's still in place, and the control folks are so unwilling to lay that out to the public that it will continue for a long time, with the current players in place.²²

Conclusion

Early in North Dakota history prior to tobacco industry involvement in state politics, tobacco tax increases were passed for fiscal reasons. Through the late 1980's, tobacco tax increases were passed even without a concerted effort by health advocates. In 1987, Tobacco Free North Dakota attempted to pass the first tobacco tax with a portion of the revenue earmarked for tobacco control. TFND was successful in obtaining a tax increase, but without revenue allocated to tobacco control. Although TFND and health advocates continued throughout the 1990's to push for tobacco tax increases, the increased lobbying efforts of the tobacco industry after 1987 made the battles more difficult. The efforts and resources of the health advocates were not sufficient to counter the tobacco industry. All tobacco tax increases throughout the 1990's can be attributed to budgetary needs rather than tobacco consumption reduction. The largest cigarette tax passed in the 1990's occurred independent of health advocate efforts for fiscal reasons only. In 2003, Governor Hoeven proposed a \$0.35 tax increase in his budget, but even with the combination of administration and health advocate support the tobacco lobby was able to prevent the increase. The tobacco tax increase history in North Dakota illustrates the gradual increase of tobacco industry influence in North Dakota state politics throughout the 1990's.

DIVESTMENT OF TOBACCO RELATED INVESTMENTS

In addition to a long history of working to increase the tobacco tax for the purpose of revenue, the state of North Dakota also recognized the conflict of investing state funds in tobacco companies. During the early 1990s, there was an attempt for the North Dakota Public Employees Retirement System (NDPERS) to divest from tobacco-related investments led by Dr. Stephen McDonough, then Director of Preventive Health Services for the state health department.

A memo from the Phillip Morris USA Denver Regional Office dated August 20, 1990 from Mary Cramer, US Regional Government Affairs Director for Philip Morris, to Tina Walls, Vice President of State Government Affairs for Philip Morris, detailed the tobacco industry's response to McDonough's divestment proposal. On Monday August 20 1990, the North Dakota Public Employees Retirement System Board of Trustees heard a request from McDonough to divest tobacco funds. A motion was passed by a 5 to 1 vote to refer the subject to the Investment Subcommittee of NDPERS for consideration. The Investment Subcommittee had three members from the Board of Trustees that were also members of the State Investment Board. The State Investment Board invested the money of NDPERS, Teachers Fund for Retirement (TFFR), Workers Compensation Fund, Fire and Tornado Fund, and Veteran's Fund. Each of these funds had the option of determining their own investment policies.¹⁴²

McDonough presented the Board of Trustees multiple arguments for divestment including the social and health related costs of smoking. McDonough related 400 deaths yearly in North Dakota directly to Phillip Morris.¹⁴² Ginny Corwin, Philip Morris lobbyist, represented Philip

Morris before the Trustees. Cramer stated “The executive director commented that the Trustees could not ‘socially invest’ but could adopt a ‘socially sensitive’ policy.”¹⁴² Cramer outlined an intensive Philip Morris strategy for the prevention of divestment of the NDPERS fund. Corwin was scheduled to meet with the NDPERS Executive Director regarding the time frame for consideration of divestment by the Investment Subcommittee and to offer Philip Morris's assistance in the process therefore directly involving Philip Morris in the decision making process. Tobacco industry lobbyists in North Dakota were scheduled to hold individual meetings with those members of the sub-committee with whom they had the strongest relationships to determine the best method to target each member of the subcommittee.¹⁴²

Cramer requested the assistance of David Laufer and Josh Slavitt, Philip Morris regional employees. She instructed them to

tear Dr. McDonough's letter apart. I want every fact and figure he quotes refuted... I want to have the information available if I need to discredit his propaganda ¹⁴²

This is a common tobacco industry strategy to discredit the science and shift the arguments away from what they could not argue to what they could argue or distort.¹⁴³

She instructed them to calculate the total amount of revenue generated from the less than one percent of total NDPERS money that is invested in tobacco stocks. She stated “It is my understanding that NDPERS was found to be significantly underfunded recently.”¹⁴² Cramer was attempting to build a case for the financial importance of the tobacco investment to the NDPERS fund.

Cramer stated that she had met with Dean Harens, staff representative for the North Dakota Public Employees Association, affiliated with the Federation of State Employees, AFT, and AFL-CIO. Cramer requested the drafting of a white paper outlining Philip Morris's association with the union. She stated that Harens first stated a neutral stance on the issue but stated that after she explained

our strong union affiliation and that this issue affected more than tobacco, he seemed to become more interested. He indicated that we could make a presentation to his board at their next meeting.¹⁴²

Cramer instructed Slavitt to continue working on agricultural statistics for North Dakota including the amount of sugar beet crop purchased by Philip Morris. This was a tactic used to emphasize the contribution of Philip Morris to the North Dakota economy as an argument against divestment. Cramer indicated that she had been in contact with Miller Brewing, a subsidiary of Philip Morris, and had the support of several barley producers. She suggested working with these individuals as well as agricultural associations including the Barley Council and the Dairy Association.¹⁴² Philip Morris was again using their standard strategy of calling on third party allies to be on the front line in their battles. This strategy is an important example of how the tobacco industry uses its non-tobacco units to protect tobacco.¹⁴⁴

Cramer reported that NDPERS had refused to divest South African funds approximately three months earlier. She was gathering transcribed minutes of the meeting relating to South

African divestment to obtain information to use in the industry argument, specifically quotes from Trustees opposed to the divestment of South African funds. Cramer asked Laufer and Slavitt for clarification on other American companies that were profiting as a result of Philip Morris tobacco production, such as Kimberly Clark-paper. She wanted a clear picture of other industries that benefit from tobacco to strengthen her case against divestment. Cramer ended with an announcement of a meeting in Bismarck on September 5, 1990 to strategize with all parties opposed to tobacco stock divestment.¹⁴²

A Philip Morris internal document from Jack Nelson, Philip Morris Vice President Corporate Affairs, to Derek L. Crawford, Philip Morris Director of State Government Affairs Planning, titled “Divestment Overview” summarized activity through February 29, 1992 for twelve divestment proposals that were pending nationwide, including NDPERS. Nelson reported that the Investment Subcommittee had taken no action on the issue and reported that press released and editorials had been opposed to divestment of socially irresponsible funds.¹⁴⁵ The NDPERS tobacco stocks were never divested.²²

In an interview in 2003, McDonough observed “that was never a real serious one. That never went very far... There was never a big effort to do that.”²² The NDPERS divestment attempt illustrates that tobacco control advocates need to be aware of the money, time, and resources that the tobacco industry invests in their campaigns. Tobacco control advocates need to be prepared to match the efforts put forth by the tobacco industry or their proposals will quickly be annihilated. The mobilization of Philip Morris to employ their local and national resources to fight the proposal quickly blocked McDonough’s divestment attempt.¹⁴⁶

RESTRICTIONS OF SMOKING IN PUBLIC PLACES

Smoking restriction legislation in North Dakota dates to the early 1900's. The state saw its first clean indoor air legislation in March 1921. HB 51 prohibited smoking in restaurants and on public transportation, with a maximum penalty of \$25.00 for violation. The legislation was passed on March 1, 1921. The legislation stated

it shall be unlawful for any person within this state to use tobacco by smoking in cigars, cigarettes, pipes, or in any other form in the dining room of any hotel, or in any café, restaurant or eating room in which both men and women are being served, or on any street car, or railway coach except in rooms, coaches, and compartments specially provided for that purpose; or for the proprietor of any hotel, café, restaurant or eating room, or the conductor of any street car, or railway coach to knowingly permit any such act in any such place. Any person violating any provision of this Act shall upon conviction thereof be punished by a fine in any sum not less than \$5.00 and not more than \$25.00.¹⁴⁷

The legislation was repealed in 1937. The Legislature would not revisit this topic until 1975, when it passed HB 1429, the first of a series of bills on clean indoor air over the next 20 years in attempts to improve the air and the health of the citizens in North Dakota.

Clean Indoor Air Legislation Prior to Tobacco Free North Dakota

In a Tobacco Institute report dated June 15, 1987 titled “Trends & Highlights of the 1987

State & Local Legislative Sessions” it was noted that there had not been such a high volume of smoking restriction legislation since 1975 after the first Surgeon General's report documenting the negative health effects of passive smoking (issued in 1972).¹⁴⁸ In 1975, neighboring Minnesota passed the first comprehensive clean indoor air legislation in the United States. Although Arizona had passed legislation in 1973 which restricted smoking in some limited places such as elevators,¹⁴⁹ the legislation in Minnesota was stronger in that it prohibited smoking in all public places with the exception of designated smoking areas. The Minnesota Clean Indoor Air Act became the model for other clean indoor air legislation across the country in the mid-1970s.¹⁴³

North Dakota was part of this trend and in 1975 HB 1429 was passed, authorizing the creation of smoking and nonsmoking areas in public places. Individual smokers not complying with the regulations were guilty of an infraction. House bill 1429 was introduced by Representatives Theodore Lang (R-District 31) and Orville Schindler (R-District 31) and passed the House with a 53-22 vote and the Senate with a 32-17 vote in 1975. Although it was a step in the right direction, this legislation paled in comparison to the Clean Indoor Air Act passed in Minnesota which prohibited smoking in all public places with the exception of designated smoking areas.

In 1977, Senate Bill 2328 was introduced by Senators Shirley Lee (R-District 8), Russell Thane (R-District 25), S. F. Hoffner (D-District 12), Charles Orange (D- District 42), and Frank Wenstrom (R-District 1) The purpose of the bill was

separating persons who smoke from persons who do not smoke for the comfort and health of the persons not smoking, in every place of public assembly there shall be an area where smoking is not permitted, which shall be designated a no-smoking area. The designation shall be made by the person with general supervisory responsibility over the place of public assembly before the place of public assembly is next or first made available to the public after the effective data of this Act.¹⁵⁰

Places of public assembly included theaters, auditoriums, elevators, health care institutions, state government buildings, buildings open to the public with seating capacity for 50 or more people including restaurants.¹⁵⁰ Individual smokers and building proprietors could be fined up to \$100 for noncompliance.

Before the Committee on Social Welfare and Veteran’s Affairs Lee cited non-smoking constituent request as her motivation for co-sponsoring the bill, while Wenstrom cited his own personal dislike of secondhand smoke exposure as his motivation.

Although in 1977, no state tobacco control program or coalition existed health advocates including GASP (Group against Smokers Pollution), a small grass roots organization devoted at that time to creating nonsmoking areas, and the North Dakota Lung Association mobilized to support SB 2328 while the North Dakota Hospitality Association and North Dakota Tobacco Wholesalers testified in opposition.¹⁵¹ Harold Anderson, North Dakota Tobacco Wholesalers lobbyist testified before the Committee on Social Welfare and Veteran’s Affairs in opposition to the legislation, he stated

Anti-smoking laws or probably more aptly termed restrictive smoking laws, seem to be more in vogue these days under the guise of protecting the non-smoker's health. It is often stated by the proponents of this legislation that there is evidence to support the contention that inhaling second hand smoke by a non-smoker is injurious to the non-smoker's health. To our knowledge there is no definitive scientific study or any other basis in fact to substantiate this contention. In fact, to the contrary, what little statistical work that has been done in the field would indicate that a non-smoker's health is not injured unless and until he would spend many thousands of hours in a poorly ventilated room where there is a high concentration of smoke.¹⁵¹

Additional, opposition to the legislation argued that smoking restrictions were not enforceable. Although the legislation proposed in North Dakota was significantly weaker than what had been previously passed in Minnesota, the tobacco industry had since realized the impact of clean indoor air legislation and were actively in opposition.

The legislation passed the Senate with a 26 to 24 vote and the House with a 79 to 19 vote. SB 2328 replaced and strengthened HB 1429. The legislation was an improvement to the clean indoor air law in North Dakota due to its requirement of a non-smoking area in public buildings, however the legislation was weaker than Minnesota's clean indoor air law passed in 1975 which required the designation of a smoking area rather than a non-smoking area.¹⁴³ It would take 10 years for North Dakota to pass clean indoor air legislation that was comparable to the 1975 Clean Indoor Air Act in Minnesota.

In 1981, SB 2405 was introduced by Senators Hal Christensen (R-District 5) and Shirley Lee (D-District 8), to amend and strengthen SB 2328 to include grocery stores in places of public assembly and require that signage be posted to signify smoking and nonsmoking areas as there were no signage requirements in SB 2328. The bill also required that the nonsmoking area of restaurants and other food service establishments include at least 35 percent of the seating capacity of the establishment. The legislation designated the state laboratories department as the enforcement agency.¹⁵² It was defeated in the Senate with 17 to 32 vote in 1981.

In 1983 Senate Bill 2393 was introduced by Senator Tom Matchie (D-District 45) and Representative Glenn Pomeroy (D-District 24) to amend SB 2328 to expand the definition of places of public assembly to include the lobby of theaters, patient rooms in health care facilities and student residence halls rooms. The legislation modified the language of the existing law to mandate the establishment of a smoking area rather than a nonsmoking area. The bill stated that a bar was the only place of public assembly that could designate the entire area of the establishment as a smoking area.¹⁵³ Matchie cited constituent request as his motivation for co-sponsoring the legislation.¹⁵⁴ SB 2393 had the support of GASP, American Lung Association and North Dakota Medical Association, while the bill was opposed by a single Tobacco Institute lobbyist, Harold Anderson, and the North Dakota Hospitality Association.¹⁵⁴ It was defeated in the Senate with a 15 to 37 vote.

From 1975-1983, clean indoor air legislation was introduced by legislators in North Dakota due to constituent requests and personal dislike of secondhand smoke exposure. The legislation was consistently supported by GASP and the American Lung Association of North Dakota. However, these organizations on their own were unable to pass strong clean indoor air legislation.

They suffered multiple defeats in their attempts to strengthen weak clean indoor air law. The tobacco industry also had a continuous representation that stood in opposition to clean indoor air legislation including the North Dakota Hospitality Association, North Dakota Tobacco Wholesalers, and a Tobacco Institute lobbyist.

Tobacco Free North Dakota

There was another attempt to pass clean indoor air legislation in the 1985 session which was ineffective.²² In 1985 Marcie Andre, Program Coordinator of the North Dakota American Lung Association, approached McDonough regarding the passage of clean indoor air legislation. The Lung Association of North Dakota had previously attempted to pass clean indoor air legislation. In 1988 R.J. Reynolds state field staff and lobbyists had provided information to the company regarding the climate in the state for the passage of preemption, expressing concern that North Dakota had “one of the strongest lung associations, for a state its size, in the country”.¹⁵⁵ Although, the American Lung Association was strong, it did not have adequate resources to obtain effective clean indoor air legislation.

Rather than taking the lead on getting legislation passed, in 1987 Andre proposed that the State Department of Health lead the development of a coalition of health organizations including the American Lung Association, American Heart Association, and American Cancer Society to support the passage of clean indoor air legislation. Andre felt that the state health department acting as a neutral entity had the power to bring these groups together to function as an effective coalition.²⁴ Tobacco Free North Dakota was formed in 1985 with the primary goal of passing clean indoor air legislation. The coalition's leadership was provided by a Board of Directors with each member organization receiving one vote on the board.²⁴

A press conference was held to announce the coalition's and member organizations' support of clean indoor air legislation. (A tobacco industry representative was present at the press conference.)²⁴

In June 1986, a poll of 510 adults in North Dakota was conducted by the University of North Dakota Bureau of Governmental Affairs, Bismarck Meyer Television Broadcasting, *The Fargo Forum*, and *Minot Daily News* to assess public opinion of clean indoor air legislation. The survey asked “Would you favor or oppose a law that restricted smoking in public places and at public meetings to a designated area?”²⁶ The results indicated that 76.3% of those surveyed supported smoking restrictions. The support for smoking restrictions was nonpartisan, present in both rural and urban areas, and present in all age groups.^{24, 26}

A Hostile Media Environment

The announcement of public support for clean indoor air instigated a backlash from opponents. The *Bismarck Tribune* emerged as the strongest champion for the tobacco industry. Only two days after the survey results were released to the public an editorial was published in the *Tribune* attacking tobacco control advocates. According to McDonough in *The Golden Ounce*, book on the history of public health in North Dakota, “Rhetoric typical of the tobacco industry punctuated the *Tribune* statement. For years the tobacco industry had tried to portray tobacco free

advocates as weirdos and unreasonable fanatics as opposed to the clear thinking and level-headed tobacco company executive.”²⁴ For example on June 18, 1986 a *Tribune* editorial stated “It’s one thing when the State Health Department clears the air, we all expect them to be zealots... In a peaceful land few things are as disruptive as an attack of zeal. A lot of nonsmokers, their passion fueled by self righteousness, have all the making of good abolitionists... We fear a lot of real people are going to be steamrolled by unflinching zealots... A pledge that even in the face of runaway zeal, we will all try to be civil and understanding.”²⁴ McDonough noted that “The last use of the word zeal was so typical of the tobacco industry’s rhetoric that one wonders if the editorial was written in Bismarck or in tobacco industry headquarters in New York City.”²⁴ Although there is no direct evidence of tobacco industry contact with the *Bismarck Tribune*, similar strategies have been employed by the tobacco industry in other states.

Despite the attacks of the tobacco control movement by the *Tribune*, it seems the climate towards smoking restrictions in North Dakota was changing. City governments, hospitals, and clinics began to adopt smoking restrictions. Cessation programs were made available to employees as the new smoking restrictions became effective. The Grand Forks Clinic became the first health care institution in the state to adopt a smoke-free policy.²⁴

The *Bismarck Tribune* continued to stand in opposition to tobacco control policy and clean indoor air. A full page feature on Scott Stapf, Tobacco Institute Director of Media Relations, ran in the Sunday “Perspective” section of the *Bismarck Tribune* on September 7, 1986.²⁴ The *Tribune* boasted that Stapf was the *Tribune* reporter for the North Dakota legislature, politics, and congressional races from 1982-1983. In the article Stapf recited industry propaganda regarding clean indoor air legislation with statements such as “these type of people have always wrinkled me, the moralists, the preachers, the blue noses. I am not saying they aren’t sincere, but it’s the way they operate that I find objectionable, the idea that they don’t like something, so it should be a point of law, that no one else should be able to do something they object to... that sort of preaching to the choir is not the kind of thing that persuades reasonable observers.”²⁴

1987 Clean Indoor Air Legislation: HB 1272

In December 1986, one month after the official release of the state tobacco plan, the Surgeon General’s Report on the health effects of second hand smoke was released. The State Department of Health’s comment in the state tobacco plan that second hand smoke was a major public health issue was now validated by the Surgeon General.¹⁵⁶

Dave Peske, North Dakota Medical Association, drafted clean indoor air legislation in the form of HB 1272 and obtained legislative sponsorship. The legislation expanded the definition of place of public assembly to include gymnasiums, libraries, public transportation, student residence halls, but excluded private rooms in nursing homes and bars. HB 1272 designated all places of public assembly as non-smoking but allowed the designation of a smoking area which could occupy no more than 50 percent of the total building area and required signage to be posted in the designated smoking area. The state department of health was designated as the enforcement agency. The legislation stated that building proprietors could be fined up to \$100 for failure to comply with the regulations. The main author and legislative sponsor of the Clean Indoor Air bill, House Bill 1272, was Representative Cathy Rydell (R- Bismarck).²⁴ Rydell was a freshman

legislator whose deceased father had been a smoker. In an interview in 2003, Jeanne Prom, Tobacco Prevention and Control Program administrator 1992-2001, described Rydell's role as legislative champion, "I know she has said, in very public settings, that she was told that supporting the issue like she did was going to be a legislative career ender for her, and it was not."²³ At the same time, Lieutenant Governor Ruth Meiers (D) suffered a public battle with lung cancer and died on March 19, 1987. Ruth Meier had been a smoker and openly expressed the view that her lung cancer was caused by smoking and encouraged others to quit smoking.²⁴ The struggle of Ruth Meier with lung cancer personalized the health consequences of smoking for the North Dakota public.

House Bill 1272 was introduced on January 12, 1987 by Representatives Cathy Rydell (R-District 47), Lyle Hanson (D-District 48), Dave Koland (R-District 5), and Senators Bruce Bakewell (R-District 2), Floyd Stromme (D-District 15), and R. V. Shea (D-District 43).

HB1272 was modified to accommodate the protests of the hospitality industry during the legislative process. The hospitality industry is a traditional tobacco industry ally.⁷⁸ Bill Shalhoob, Kirkwood Motor Inn and future president of the North Dakota Hospitality Association, and Dave Maier, North Dakota Hospitality Association, testified in opposition to the legislation. Peter W.H. Binnie, Vice President ACVA Atlantic Inc, a Washington, D.C.-based consulting firm built up by the tobacco industry that purports to be experts on indoor air,¹⁵⁷ testified in opposition to the legislation.¹⁵⁸

The tobacco industry also openly opposed the bill. Al Wolf, Tobacco Institute lobbyist also testified against the legislation:

the tobacco industry is concerned about assisting in the judgement between smokers and non smokers. The Institute has personnel and expertise to employers who work with non smoking and smoking employees to adjust the work place to accommodate the smokers as well as the businesses that need to accommodate the public. It is not true that we oppose the concept, because the concept is part of what we hope to achieve on a voluntary basis.¹⁵⁸

Repeating the standard tobacco industry rhetoric, Wolf also claimed that the claims of the health advocates that secondhand tobacco smoke were not scientifically substantiated.¹⁵⁸

The North Dakota Medical Association, Dr. Robert Wentz, State Health Officer, Dr. Stephen McDonough, and Marcie Anderson, President of Tobacco Free North were some of the health advocates who testified in support of the legislation.²⁴ During the legislative session, Tobacco Free North Dakota hosted a telephone education campaign targeting legislators with information regarding the negative effect of the tobacco industry on the state of North Dakota.²⁴

Representative Judy DeMers, (D-Grand Forks), pushed through an amendment to alter the wording of the bill to state that places of public assembly "must" rather than "may" designate a smoking area. The amendment to the legislation was a significant step back in that it prevented the adoption of smoke-free policies due to the required smoking area.

In an editorial on January 13, 1987 the *Bismark Tribune* softened its opposition slightly: "The scope and vehemence of the anti-smoking crusade may be surprising to some smokers and

irritating to others, but only a few of the non-smoker activists are save-the-whale type fanatics.”²⁴ The slight change in the *Tribune's* views of tobacco control advocates may be attributed to the sponsorship of the bill by Representative Cathy Rydell (R-Bismarck), who was a respected Republican legislator.²⁴ On February 17, 1987 the *Tribune* requested that readers express written opinions of the clean indoor air legislation. A total of 26 readers responded to the request with 24 of the responses expressing support for the bill. After the opinion poll the *Bismarck Tribune* expressed no further views on the clean indoor air legislation.²⁴ Although the *Tribune* had expressed opposition to the clean indoor air legislation, other newspapers in North Dakota expressed differing opinions. The *Grand Forks Herald* and the *Devils Lake Journal* expressed support for HB 1272 during the legislative session.²⁴

HB 1272 was passed by the House, amended and passed in the Senate, and passed by the House with a 85 to 17 vote on March 30, 1987. HB 1272 was signed into law by Governor George Sinner (D). The final version of the legislation expanded the definition of “place of public assembly” to include gymnasiums, libraries, public transportation, student residence hall rooms. The bill required designated smoking areas in places of public assembly and required signage to be posted. The legislation mandated that the designated smoking area could not cover more than 50 percent of the total public area, but the proprietor of the food establishment was allowed the authority to expand the smoking area beyond 50 percent if the designated smoking area was fully occupied and additional space was necessary. The State Department of Health was designated as the enforcement authority. The penalty for noncompliance was a maximum fine of \$100 per violation for the proprietor of a place of public assembly. Although, the legislation is weak by 2004 standards and 12 years behind the 1975 Clean Indoor Air Act in Minnesota, HB 1272 strengthened the clean indoor air law in North Dakota.

In 1989 the editorial staff at the *Bismarck Tribune* experienced a turnover which altered the opinion of the *Tribune* towards the tobacco free movement in North Dakota. Ted Quanrud was the new editorial page editor. On February 5, 1989 the *Tribune* published an editorial thanking Ruth Meier, Cathy Rydell, and Dr. Stephen McDonough for the passage of HB 1272. In addition the *Tribune* adopted a smoke-free workplace policy.²⁴

Smoke-free State Capitol

After the passage of clean indoor air legislation in 1987, an internal R.J. Reynolds document labeled “extremely confidential” which discussed the potential for the passage of clean indoor air legislation with preemption in various states indicated that the tobacco industry was confident that the North Dakota legislature felt that the issue of smoking was dealt with in 1987. Therefore the tobacco industry predicted little activity in the next legislative session.¹⁵⁵ The tobacco industry was correct; no additional smoking restriction legislation was passed until 1993.

Although, the legislature was satisfied that the clean indoor air issue had been solved, Governor George Sinner (D) continued the progress in creating smoke-free indoor environments. In 1990, Governor Sinner issued an executive order prohibiting smoking in the state capitol building in Bismarck effective October 1. Governor Sinner’s smoke-free state capitol policy was motivated by his personal experiences, including Ruth Meier’s death and his own heart attack, in addition to a good relationship between the health department and the governor.³¹

Smokers' Rights

The tobacco industry used local and statewide smoker's rights groups to fight the tobacco industry's battle against the smokefree capitol policy. The tobacco industry started forming smoker's rights groups to combat the growth the non-smoker's grassroots movement for smoking restrictions after the release of the 1986 Surgeon's General's Report on passive smoking.¹⁵⁹ The smoker's rights groups gave the appearance of local grassroots organization, while allowing the tobacco industry to anonymously work behind the scenes against tobacco control policy.¹⁵⁹ In an internal RJR weekly field memo dated July 27, 1990 the work of the Minot Smoker's Rights group in opposing the smokefree capitol policy was commended. The group had a float in the North Dakota State Fair opening day parade that directly followed Governor Sinner's Float. Two weeks previously, Minot Smoker's Rights had presented the Governor with a petition containing over five thousand signatures of individuals opposed to the ban. The weekly field memo stated "Now picture those very same folks riding in their Smokers' Rights float right on the governor's heels!"¹⁶⁰ Minot Smoker's Rights also had a booth at the State Fair from which they distributed smoker's rights information and collected over 3,200 signatures on petitions opposing the proposed federal cigarette excise tax increase then pending in Congress. The group received media coverage through interviews with various television stations across the state and an interview with the Minot Daily News.¹⁶⁰

Arlys Fowler of Bismarck, was the spokeswoman for the North Dakota Smoker's Rights group in their effort to get Governor Sinner to reverse the state capital smokefree policy. She was featured in the *RJR Caravan* newsletter as an example of effective use of the media in opposition to smoking restrictions. The first step taken by the group was to circulate petitions to collect signatures of those in opposition of which they had claimed to have collected 10,000 by January 1991. North Dakota Smoker's Rights claimed that a subsequent request for a meeting with Governor Sinner was denied, so the group went to the media to make their case. The Smoker's Rights group emphasized to the media that the smokefree capitol policy was not complete because legislators were allowed to use a smoking lounge while staff and visitors were required to smoke outside of the building. North Dakota Smoker's Rights believed that this position worked to their advantage because the media emphasized the unfairness of the smoking ban in news articles and editorials. In May 1991, North Dakota Smoker's Rights met with Governor Sinner to push for him to rescind the capitol smoking policy. He did not.

Smoke-free North Dakota University Campus Buildings

In 1990 progress in smoke-free policy was also made outside of the state capitol. Effective June 12, 1990 all North Dakota University System campus buildings were designated completely smokefree with the exception of residential buildings. Individual institutions had the authority to designate smoking and nonsmoking sections in residential buildings of the 11-campus North Dakota University System by the state board of higher education. Enforcement of the restriction was determined by the individual institutions according to the employee discipline and student conduct code provisions.¹⁶¹

Failed Attempts by Health Advocates to Strengthen Clean Indoor Air Legislation

House Bill 1299 was introduced by William Kretschmar (R-District 30) in 1991. The legislation proposed to strengthen existing clean indoor air laws passed in 1987 through declaration of the designation of smoking areas in public buildings optional. The legislation proposed to allow the building proprietor to designate a building as entirely smoke-free. During the 1989 legislative session, the same bill was passed by the Senate but defeated upon reconsideration in the House. HB 1299 was supported by Tobacco Free North Dakota and the State Health Department. The tobacco industry's ACVA Atlantic, now renamed Healthy Buildings International,^{157, 162} testified in opposition to the legislation.¹⁶³ Arlys Fowlers of North Dakota Smoker's Rights, testified in opposition on the premise that smokers were being treated unfairly and government was infringing upon individual rights. Albert Wolf, Tobacco Institute lobbyist, also testified in opposition stating that the legislation passed in 1987 sufficiently dealt with the clean indoor air issue. The tobacco industry was successful in defeating HB 1299.¹⁶³

Albert Wolf sent a letter to Pat Donoho, Tobacco Institute Vice President, dated March 28, 1991 regarding tobacco-related activity in the North Dakota legislature for the 1991 session. Wolf stated that the industry defeated smoking restriction legislation that "would have clearly affirmed the Governor's position to ban all smoking in public buildings and the ban by the Board of Higher Education for smoking on college premises."³⁵ Although both smokefree policies were still in effect, Wolf argued that there was no legal basis for them if challenged. He also felt that there would be groups on campus challenging the legality of the bill which on the surface looked positive for the industry but could possibly increase the perseverance by the Governor to pass smoking restriction legislation in the 1993 session.³⁵

In 1991, the Tobacco Institute appeared to be aware of the growing concern over passive smoke in North Dakota and attempted to strengthen their case for accommodation. "Accomodation" is the industry program to encourage restaurants and bars and other public spaces to "accomodate" both smokers and nonsmokers by having smoking sections.⁷⁸ Wolf reported to Donoho,

As you know, the Tobacco Institute paid for the installation of a very effectively operating exhaust fan in the smoke room of the legislative wing of the Capital building during this legislative session. That was a good investment of \$1,100.00 since it has produced tremendous good will, understanding, and a demonstration pilot program on behalf of ventilation of smoke areas rather than banning smoking as a remedy for indoor air quality problems elsewhere. Hopefully we can somehow have that room or the relocation of the fan facilitate further demonstration of ventilation and as a means of accommodating smoking in the Capitol building after the legislative session.³⁵

A New Pro-Tobacco Governor

Republican Ed Schafer during his campaign for governor in October 1992 composed a letter promising to rescind the smoking ban in the state capitol if elected to Ellen Rose-Auyong, a North Dakota Smoker's Rights member. The letter stated

Thank you for inquiring about my smoking policy. Maybe you have seen some the letters

to the editor criticizing my earlier comments regarding smoker's rights? If so, then you know that I agree 100 percent with your statement that the smoking ban imposed by Gov. George Sinner has hurt productivity at the State Capitol and on the state campuses.

I also believe this smoking ban - which basically has forced faculty, staff, students, visitors, and state employees outdoors - has had an impact on employee morale. It singles out smokers as if they are bad people.

I do not smoke. Nonetheless, I believe every person who does smoke should be treated the same as those who don't.

Yes, I will lift the smoking ban across the state if elected governor. I also will work toward the establishment of designated indoor smoking areas in all state-operated facilities. This will not be easy and there are many obstacles, but it can be done.

Again, thank you for inviting me to address the Smoker's Rights in North Dakota organization via this letter. If you or anyone in your organization has any questions, feel free to contact my campaign headquarters in Bismarck.¹⁶⁴

Schafer was elected governor in 1992 and so began a new era in tobacco control. The North Dakota governor was no longer pushing for smoking restrictions, but rather repeating tobacco industry rhetoric.

In an R.J. Reynolds internal weekly report dated February 10, 1993, Robert Fackler stated "our groups are continuing to keep up the friendly pressure while it is still freezing outside, on the new Governor to honor his pledge and rescind the smoking ban."⁹⁰ North Dakota Smoker's Rights continued to push for the lifting of the smoking ban.

Smoke-free Daycare Facilities

In 1993, House Bill 1246 was introduced by William Kretschmar (R-District 30) and Janet Wentz (R-District 3) which as, previously-defeated HB 1299, proposed to strengthen clean indoor air legislation by allowing proprietors of buildings to choose a smoke-free policy. In addition, the legislation prohibited smoking in day-care facilities when children were present.

Al Wolf, Tobacco Institute lobbyist, offered amendments to the initial bill which created vague language regarding who had authority to designate a smoke-free policy in private businesses. In testimony before the House Industry Business and Labor Committee on January 20, 1993, Wolf stated

the effect of the amendments is to clearly establish language to allow proprietors of businesses to designate or not designate smoking areas in their buildings as they wish. It also clearly authorizes public officials who have general supervisory responsibility for government buildings to designate or not designate smoking areas in buildings under their control. ... by these amendments, the [tobacco] industry has conceded to the designation of smoking areas in government buildings so that the State of North Dakota, for this capitol building, and the cities, counties and school districts may determine on their own whether to designate smoking areas within their government building or not.... This state law will

govern the right of private owners of buildings to determine whether to have their buildings smoke-free or designate smoking areas.¹⁶⁵

The amendments, which the tobacco industry felt would preempt localities from passing ordinances which required smoke-free policies in private businesses, were accepted. The specific language of the bill read as follows “Smoking areas may be designated only by proprietors of privately owned buildings or by public officials having general supervisory responsibility for government buildings.” The amended legislation was passed to allow a completely smoke-free policy in public building and required a smoke-free policy in daycare facilities. Although, similar legislation had been introduced since 1989, the tobacco industry’s support of HB 1246 made the difference in 1993. HB 1246 was passed unanimously in the House and Senate.

In contrast to HB 1246, House bill 1517 which was supported by the State Health Department and opposed by the tobacco industry did not have the same legislative success. HB 1517 proposed to prohibit smoking in all state-owned buildings. John Olson, Philip Morris lobbyist, testified in opposition to the legislation. The legislation was defeated.¹⁶⁵

The tobacco industry’s interpretation of the language of HB 1246 was that it preempted local governments from imposing smoking restrictions in private business.¹⁶⁵ In an April 1993 internal tobacco industry document titled “Philip Morris USA Monthly Financial Report” which included brief highlights of legislative activity composed by William I. Campbell, president and CEO of Philip Morris, he documented that “on April 1st, legislation was enacted in North Dakota which preempts local governments from imposing smoking bans in private businesses.”¹⁶⁶ The tobacco industry was confident that preemptive legislation had been passed in North Dakota. However, the language was vague and North Dakota chose not to interpret the bill as preemptive, as evidenced by Minot’s smoke-free restaurant ordinance passed in 2001 (discussed below).

With the passage of HB1246 the legality of the smoke-free policy in the State Capitol was no longer questionable. Although Shafer never rescinded the smoke-free policy, the pressure from North Dakota Smoker’s Rights apparently spurred the construction of a partially enclosed outdoor smoking area on the North Dakota State Capitol grounds in 1995. The estimated cost of the construction was \$23,000 and the funds were made available through a grant from the Capitol Grounds Planning Commission and the maintenance budget of the Capitol. An indoor smoking lounge was designated for the use of legislators only.¹⁶⁷

The passage of HB 1246 allowed businesses to adopt smoke-free building policies in response to public demand. The language in HB 1272 which required the designation of a smoking area had previously prevented the adoption of smoke-free policies. On May 1, 1991 several North Dakota malls adopted a completely smoke-free policy. The policy was developed in response to customers and employees concerns about the negative health effects of secondhand smoke according to Ross Wegener, general manager of Columbia Mall in Grand Forks. The three other major malls in the state located in Bismarck, Fargo, and Minot all also adopted the smoke-free policy. Smaller malls across the state had plans to adopt similar policies.¹⁶⁸

Smoke-free Workplace Legislation

In 1995, House Bill 1367 which proposed to prohibit smoking in all child care facilities including educational institutions and private workplaces was proposed by Representatives Marv Mutzenberger (D-Bismarck), Sally Sandvig (D-District 32), William E. Gorder (R-District 16), Andy Hagle (R-District 23) and Senator Donna Nalewaja (R-District 45). Mutzenberger had been requested to sponsor the bill by constituents who were exposed to secondhand smoke in the workplace, but were afraid to complain publicly for fear of their job security. The legislation was supported by Dr. Jon Rice, State Health Officer, North Dakota Nurses Association, and the American Lung Association. The North Dakota Hospitality Association was in opposition to the legislation.^{169, 170} The bill was passed by the House in February with a vote of 97 to 0 after all references to workplaces were amended out of the legislation.

Despite the fact that the bill was now limited to child care facilities, the tobacco lobby used eleven lobbyists to work the Republican majority to ensure the defeat of the bill in the Senate by a 42-52 vote. The House Democrats were unhappy with the fate of the bill. Representative Mutzenberger stated “It's a sad day when we think local non-home rule authorities will make unreasonable regulations regarding smoking. It is unfortunate that, instead of passing important child protection legislation, this assembly submits to powerful lobbying efforts by the tobacco industry. Here is an example of why we need some sort of meaningful lobbyist reform in this state.”¹⁷¹ After the fumble in 1993, when the tobacco industry supported legislation which strengthened clean indoor air law, the industry was back in familiar form defeating reasonable tobacco control legislation.

Tobacco Industry Efforts to Mobilize North Dakota Restaurants against Federal Smoking Regulations

The tobacco industry was well aware that the smoking restriction issue was not going to go away as clean indoor air legislation had been introduced every legislative session since 1987. Therefore, in 1997 the tobacco industry continued to strengthen ties with the North Dakota Hospitality Industry and build the argument of economic loss due to smoking restrictions. A press conference was held on Friday January 3, 1997 at the Doublewood Inn, Bismarck to announce the results of the North Dakota Roper study.¹⁷² The Roper Starch Worldwide survey was conducted in October 1996 by telephone interview with owners or managers of 151 restaurants and 150 bars in North Dakota paid for with an “unrestricted research grant from the Philip Morris Cos.” The results were presented by Bill Shalhoob, North Dakota Hospitality Association (NDHA) board member and chair of legislative committee. Shalhoob presented on behalf of the North Dakota Hospitality Association which, in 1997, had a membership of approximately 500 restaurants, bars, and hotels in North Dakota. According to Shalhoob, the purpose of the survey was to collect the opinions of North Dakota restaurant and bar owners/managers on the effect that the proposed Occupational Safety and Health Administration (OSHA) nationwide workplace smoke-free policy would have on business.¹⁷² In April 1994 OSHA had proposed regulations that required either a smoke-free workplace policy or the restriction of smoking to enclosed separately ventilated rooms, which was bitterly opposed by the tobacco industry. This study was one of many similar efforts by the tobacco industry, working through the hospitality industry, to oppose the proposed OSHA regulation.¹⁷³

Like other tobacco industry funded surveys,¹⁷⁴ the survey reported that 79 percent of bar owners/managers and 40 percent of restaurant owner/managers foresaw loss of business if the proposed regulation became effective. Shalhoob placed emphasis on the survey finding that 76 percent of bar owners/managers and 36 percent of restaurant owner/managers predicted economic loss in excess of 15 percent of present revenue. Shalhoob stated that six out of ten bars and two thirds of restaurants that foreshadowed economic losses predicted they would have to cut down on staff as a result. Shalhoob's statement presented standard tobacco industry rhetoric

it is important to note that these percentages are based on all North Dakota bars and restaurants, even those that are currently smoke-free! ... Here in North Dakota, we don't want or need the federal government to impose OSHA's over-burdensome and over-restrictive, Washington-knows-best policy. This one-size-fits-all approach may well 'size' many people right out of a job. OSHA's proposal may look good to bureaucrats, but outside the Washington beltway, this proposal will be ruinous to many small businesses that are struggling now just to make payroll.¹⁷²

Shalhoob stated that the OSHA policy would have the most detrimental effect on the waitstaff, bartenders and other service industry staff because staff would be downsized due to economic losses. Shalhoob also stated that the economic losses in the hospitality industry would have subsequent effects on companies in business with the hospitality industry.¹⁷²

Don Shields, Grand Forks Health Department director told Grand Forks Herald reporters that city administrators were not directly lobbying for the regulation he stated, "I can't agree more with the intent of it."¹⁷⁵ Shields also emphasized the fact that 60 percent of restaurant owners felt a smoke-free policy would not have a negative effect on business. Shields noted that Columbia Mall in Grand Forks had a smoke-free policy and did not experience a decline in business due to the policy.¹⁷⁵

The *Bismarck Tribune* and an NBC television affiliate were present at the press conference. Print media coverage included *Grand Forks Herald* January 4 "Restuarants, Bars May Have to Quit Cold Turkey"; *Fargo Forum* January 4 "Bar, Restaurant Owners Against Smoking Rule"; *Bismarck Tribune* January 4 "Bar Owners Oppose Smoking Ban"; *Bismarck Tribune* January 10 "OSHA Pushing to Extinguish Public Smoking".¹⁷⁶

1997 Workplace Smoking Restriction Legislation

In 1997, House bill 1198 was introduced due to the efforts of Karen Walkin, a self-employed interior designer and owner of Design Unlimited in Fargo. The legislation proposed to strengthen the existing clean indoor air legislation by expanding the definition of public place and requiring smoking restrictions in non-public workplaces. Walkin suffered from asthma and was frustrated by her frequent exposure to secondhand smoke in restaurants and hotels across North Dakota. Walkin's initiative resulted in the drafting of a smoke-free bill modeled after a bill introduced in Utah that was based upon Americans with Disabilities Act (ADA) regulations for breathing-disabled individuals. HB 1198 was introduced by Representatives Sally Sandvig (D-District 21), Wanda Rose (D-District 32), William Gorder (R-District 16) and Senators John Andrist (R-District 2), Marv Mutzenberger (D-District 32), Russel Thane (R-District 25).

Tobacco control advocates did not become involved in the push for the smoke-free legislation until January 1997. Representative Eliot Glassheim (D-District 18) was a champion of the legislation even though he was not a sponsor. Due to mobilization by health advocates, the bill was supported by North Dakota residents who contacted legislators via phone, fax, and mail requesting their support of the bill. According to an interview with Jeanne Prom, Tobacco Control and Prevention Administrator (1992-2001) in 2004, there was “phenomenal” grassroots mobilization by local tobacco control coordinators for this legislation.³¹ The tobacco industry recognized how hard the public health advocates were working: In an internal R. J. Reynolds February 14, 1997 weekly status report from R. L. Mozingo, R.J. Reynolds President, to T. C. Griscom, R.J. Reynolds Executive Vice-President External Relations, while the legislation was in the House Industry, Business and Labor Committee, Mozingo stated “the anti's have mounted a massive phone bank in support of the bill, countered by our own phone bank to 48 members of the House of Representatives.”¹⁷⁷

Despite this effort by public health advocates, the legislation was defeated on February 17, 1997 with a 48 in favor to 46 in opposition vote. A vote of 49 was needed for a constitutional majority. A motion to reconsider HB 1198 failed by one vote (50 against - 43 for) on February 18. During the February 18 vote, the electronic voting board was not lit up so the votes of individual legislators were not recorded, allowing legislators to vote with the tobacco industry without having their vote publicly recorded. Glassheim sent a thank-you letter to Vicki Voldal-Rosenau, Valley City City-County Health Board Tobacco Prevention Coordinator, on February 28, 1997 for her participation in the fight for the smoke-free legislation. Glassheim stated “I’m glad we fought the fight. I still wish the board had been lit. We had a shot at it. I’m sure the outlawing of second-hand smoke in the workplace and in mass public places will happen in two to four years.”¹⁷⁸ Glassheim’s prediction was not correct, in 2004 North Dakota still did not have statewide smoke-free policy.

2003 Workplace Smoking Restriction Legislation

Representative Joyce Kingsbury (R-Grafton) introduced HB 1408 in 2003 which proposed to eliminate smoking in most public places and private workplaces with the exception of bars and private clubs. Kingsbury stated that she introduced HB 1408 due to constituent request. Kingsbury stated “I think it’s coming because there are restaurants that go smoke-free by themselves.”¹⁷⁹ Kingsbury also had introduced the failed HB 1256 in 2001 which was very similar legislation.¹⁷⁹ HB 1256 had been supported by health groups including the Minot Stop Tobacco Access to Minors coalition, North Dakota American Heart Association, North Dakota Society for Respiratory Care, American Lung Association of North Dakota. The North Dakota Hospitality Association testified in opposition.¹⁸⁰ Tobacco retailer Perry Getzlaff of Tobacco Row in Minot summarized the arguments against the legislation with the statement “It should be left up to each individual owner of their establishments. Why is the government running their business and telling them what they can do and can’t?”¹⁸¹ The House Industry, Business and Labor Committee at the first hearing for HB 1408 was interested in the effects of the smoking ban in Minot (discussed in later section). Bill Hixson, owner of Peacock Alley Bar & Grill in Bismarck, testified against the legislation. The state Health Department took a neutral position on the bill stating that the exemption for separately ventilated smoking rooms in restaurants was too vague.¹⁸² HB 1408 was defeated. Tobacco control advocates had witnessed the problems caused by a

similar exemption in Minot's local ordinance (discussed below) and wisely chose not to support a potentially problematic bill.

The Spread of Smokefree Workplaces Despite the Lack of State Legislation

In 2002, a School Health Education Profile in North Dakota determined that 57 percent of schools did not permit the use of tobacco by students, staff, and visitors in school buildings, on school property, or in buses. Of the schools that provided cessation education to students and staff, they reported referrals to outside tobacco cessation programs 31 percent of the time for students and 14 percent of the time for faculty and staff. In 2001, a Worksite Wellness Study was conducted by the North Dakota Department of Health that determined that 15 percent of North Dakota workplaces had completely eliminated smoking and 57 percent only allow smoking on the outdoor property. Therefore, a total of 72 percent of workplaces in North Dakota were voluntarily smoke-free.³⁹ In addition, the 2002 North Dakota Behavioral Risk Factor Survey indicated that 81 percent of employees in North Dakota reported a smoke-free policy at their place of employment.³⁹ A survey by the Public Education Task Force conducted in 2002 indicated that 53 percent of people in North Dakota supported the elimination of smoking in restaurants, 54 percent supported the prohibition of smoking in private businesses and non-governmental work sites, 82 percent supported no smoking policies in public places, and 95 percent supported no smoking policies in schools and daycare centers.⁹

Conclusion

The Lung Association began the modern fight to protect the health of non-smokers in North Dakota through attempts at clean indoor air legislation in the late 1970's and early 1980's. Although unsuccessful on their own, the Lung Association advocated for the formation of a coalition of health advocates to fight for the legislation. The greatest success in state tobacco control policy was the successful passage of clean indoor air legislation in 1987. Health advocates mobilized through an effective coalition, strong leadership and a well-developed plan. However, health advocates did not build a sufficient infrastructure to sustain this momentum throughout the 1990's. Therefore, health advocates had very limited success in strengthening the clean indoor air legislation. A combination of weak health advocacy and a strong tobacco lobby has maintained very mild clean indoor air law in North Dakota. Throughout the 1990's the tobacco industry built and strengthened its network of third party allies including the hospitality association and smoker's rights groups in order to fight smoking restrictions. In contrast, the tobacco control movement did not effectively mobilize its network of local tobacco control coalitions for smoke-free legislation. Eventually tobacco control advocates in North Dakota recognized that clean indoor air could best be pursued at the local level (see below).

PRO-ACTIVE PRIVACY PROPOSAL-ANTI-DISCRIMINATION "SMOKERS' RIGHTS" LEGISLATION

In 1991, the Tobacco Institute created a "Pro-Active Privacy Proposal" which was identical in format to the 1991 vending machine and tax proposals, as part of its nationwide effort to redefine smoking in the workplace as a rights issue.¹⁸³ On September 5, 1990 tobacco industry lobbyists and government affairs personnel strategized on the passage of an anti-discrimination bill

that would make it illegal for employers to not hire a person based on their smoking status. The legislation would not protect smokers right to smoke at work. The proposal stated “it was agreed that it would be advantageous to the industry to attempt to pass a bill preventing hiring discrimination against smokers.” Due to the North Dakota legislation system the Tobacco Institute members felt it would be most effective to attempt to pass a “free standing bill”. The wording used in the Colorado anti-discrimination bill was the centerpiece of the discussion. Al Wolf, the Tobacco Institute lobbyist, was assigned to draft the text of the bill by October 1, 1990. The industry planned to compile material for counter arguments against claims that smokers have lower productivity rates and more loss of work than nonsmokers. The Tobacco Institute was also in search of court cases against employers for discrimination based on legal lifestyle choices outside of the workplace.¹⁸³

The Tobacco Institute planned to target government employees and teachers organizations for support of the bill. The proposal stated “By and large, a successful effort in ND would play to the prairie individualism that is prevalent in this state. The premise is simple. Employers cannot control the legal activities of their employees away from work”.¹⁸³

The proposal stated “All attempts will be made to keep the efforts to pass this legislation low profile.” The Tobacco Institute planned to only use the strategy of having individual smokers contact their legislators if the bill gathers too much attention. The Tobacco Institute was concerned that the American Cancer Society, American Lung Association, “or even the Chamber of Commerce” could use their local influence to prevent the passage of the bill. The proposal stated “If and when this effort on the part of the industry is covered by the media, an appropriate industry response will be needed. If the agreed upon amendment addresses more issues than smoking, then perhaps media spokespeople could soft-pedal industry involvement.”¹⁸³

The Senate passed SB 2498, the anti-discrimination bill, was passed and signed by the Governor.¹²⁰ Deliberately working behind the scenes, the tobacco industry quietly passed their smokers rights bill. As of 2003, 30 states had passed such legislation, mostly as a result of similar efforts by the tobacco industry around the same time.¹⁸⁴

TOBACCO PROHIBITION

In 2003, Representative Mike Grosz (R-Grand Forks) introduced HB 1174 which proposed to prohibit tobacco use and sales in North Dakota. The legislation imposed a penalty of up to one year in jail and a \$2,000 fine for the sales of tobacco. The bill was defeated with an 88 to 4 vote. Grosz told *Grand Forks Herald* reporters that he was disappointed the bill was defeated, but “it did get a fair day in the sun and generated a lot of discussion.” Grosz stated he sponsored the bill because \$350 million in health care expenses annually in North Dakota can be attributed to tobacco-related illness. Tobacco causes 1,000 deaths yearly in North Dakota. Grosz stated “If we believe the statistics that have been provided by our government it is criminal to allow so many of our citizens to die needlessly.”¹⁸⁵ Grosz stated that he would vote against the proposed \$0.35 cigarette tax increase because it is equivalent to “putting a bandage on a severed leg.”¹⁸⁵

Tobacco control advocates chose not to support the legislation, which generated a significant amount of bad press for the health advocates. Representative Wes Belter (R-Leonard),

Chairman of the Finance and Taxation Committee, told *Grand Forks Herald* reporters that he and other committee members had been frustrated by the tobacco control advocates' (North Dakota Medical Association, American Heart Association, American Cancer Society, American Lung Association, North Dakota Public Health Association and North Dakota Nurses Association) testimony against the legislation. Tobacco controls advocates defended their position based upon the fact that there is no scientific evidence that prohibition reduces tobacco use. The health department took a neutral stance on the legislation.¹⁸⁶ Bruce Levi, of the North Dakota Medical Association stated that the legislation was “novel [but] introduces an approach tobacco control that has not been proven effective, or even implemented in any other state.”¹⁸⁷ Levi also stated “Our goal is to prevent and reduce tobacco use. There is scientific evidence to support the programs that are beginning to move forward in North Dakota. Prohibition has not been shown to prevent tobacco use.”¹⁸⁷ Health advocates were suspicious that the legislation could have been a vehicle for the tobacco industry to pass preemption.⁵¹

The House Finance and Taxation Committee gave the bill a “do pass” recommendation with a 9 to 4 vote which Belter attributed to the committee's frustration with the tobacco control advocates. Belter stated “A number of the legislators were extremely frustrated with the testimony. Consequently, I think that gave us some reason just to be a little bit of a terrorist down there in the committee.”¹⁸⁸ Although, Belter voted against the legislation on the floor he stated “It is time for us to think about just how hooked we are on tobacco, whether we smoke or not.” Grosz stated “We need people to smoke in order to get tax monies to take care of the current smokers, and then a new batch of smokers to take care of them.”¹⁸⁷

Tom Woodmansee, North Dakota Grocers Association President, had advocated for the legislation. He supported the legislation because of the high cost to retailers to educate clerks on prevention of sales to minors.^{188, 189} Woodmansee stated “I ask you, who is carrying most of the burden of the smoking issue? Basically it's the retailer not the individual attempting to purchase the product.”¹⁸⁷

A *Bismarck Tribune* editorial on January 17, 2003 titled “What were they smoking?” provided commentary on the circus surrounding HB 1174.¹⁹⁰ The editorial begins with the statement “There is nothing like the subject of tobacco to make otherwise-sensible people a little crazy” and emphasizes that everyone involved seemed to be out of character.” Regarding the health groups the editorial stated

The health groups, which hold tobacco in a regard normally reserved for sexually transmitted disease, were the moderates, trying to gently point out that, with a ban, North Dakota would be boldly going where nobody in his right mind has tried to go since the Prohibition decade. Okay, it may have sounded odd when one spokeswoman said in effect, If you quash tobacco, you may endanger our federal grant to, uh, quash tobacco. Or maybe not so odd, when you consider that with no tobacco to fight, a lot of these people would be looking for jobs.¹⁹⁰

The editorial clarified that the health groups were entirely logical in supporting programs that have been proven effective rather than entering the great unknown. The editorial states

There was more headscratchers, including a claim that grocers are the most cruelly imposed upon of all by tobacco, so the state should help them out by banning it. (If tobacco really isn't worth the grief, why don't grocers just agree among themselves to drop it? Do they think everybody would start buying their groceries at the convenience store?)¹⁹⁰

The North Dakota Grocers Association has a long history as a tobacco industry ally, their support of this legislation would lead one to believe that the introduction of this legislation was a tobacco industry tactic to generate bad press for tobacco control advocates and distract the public and legislators from the tobacco products tax increase that Governor John Hoeven (R) had included in his budget proposal.

June Herman, Director of Advocacy American Heart Association, characterized the legislation as a “setup”. She explained “There was a reason it came up first.[Before SB 2076] I think it’s disappointing to go into something like that and you see the tobacco lobbyists sitting right behind the bill’s author, and it’s in, it’s coming up in committee where the chair of the committee had a number of tobacco related bills that came forward where he turned over testimony on the bill to the tobacco lobbyists... So I’d say the prohibition bill was definitely queued up to go first and cause problems.”⁵¹ Health advocates felt the prohibition bill effectively distracted the public and legislators from the tobacco tax increase (discussed in previous section) due to the bad press health advocates received for speaking out against the legislation.

GREATER NORTH DAKOTA ASSOCIATION AND TORT REFORM

The Greater North Dakota Association (GNDA) is the State Chamber of Commerce in North Dakota. The GNDA website describes the organization as “the largest, most influential business organization in North Dakota. We are the voice of business - the only organization that speaks for all types and sizes of companies throughout the state.” GNDA was established in 1924. In 2003, the organization had approximately 650 members.¹⁹¹ In 1993 the GNDA was the sponsor of “tort reform” legislation that would have protected the tobacco industry from product liability lawsuits.

In 1993 Senate Bill 2351 was sponsored by Senators Harvey Tallackson (D-District 16), Jim Dotzenrod (D-District 27), and William Goetz (R-District 37), and Representatives Rick Berg (R-District 45), John Hokana (D-District 26), and Doug Payne (R-District 11)¹⁹² to enact “tort reform” that would insulate the tobacco industry and others (silicone breast implant manufacturers, and asbestos manufacturers) from product liability lawsuits. Provisions in the bill: if any inherent risk of injury or death with use of the product prohibits recovery in negligence or product liability lawsuit, prevents use of circumstantial evidence in product liability cases (eliminates recovery for implied malice), sets limit for punitive damages compensation at \$250,000, 3 year limit to recover personal injury damages and six year limit for property damage.¹⁹³

In the *Grand Forks Herald*, Dan Rylance reported that “Out-of-state corporations are trying to fool North Dakota lawmakers into passing a major rewrite of the state’s product liability law.”¹⁹³ The bill was described as “14 pages of highly technical language [that] protects national manufactures from being sued by North Dakota residents.” A bill with the same purpose had also been recently introduced in Pennsylvania. In order to create the impression of a “homegrown”

bill, the Greater North Dakota Association named SB 2351 as its highest legislative priority. An organization titled the North Dakota Coalition for Liability Reform was the lobbying force behind the legislation which was strikingly similar to the Pennsylvania Task Force on Product Liability. However, the Pennsylvania coalition was unsuccessful in enacting legislation to protect the tobacco industry due to the opposition of health advocates.¹⁹⁴ In contrast, in 1993 the tobacco industry through the Texas Civil Justice League was able to enact tort reform legislation.¹⁹⁵ The *Grand Forks Herald* requested to examine the Coalition's financial records, but were denied. The bill was being publicly characterized by its front groups as an anti-lawyer bill. Rylance reported "It's a good political strategy. Don't believe it."¹⁹³

Thomas Dickson, Bismarck attorney and president of the North Dakota Trial Lawyers Association, published an opinion-editorial in the *Bismarck Tribune* on March 6, 1993 titled "GNDA sells out Main Street." Dickson stated that Senate Bill 2351 was the product of a Washington, D.C. tobacco industry law firm, Covington & Burling¹⁹⁶. The Greater North Dakota Association was using the services of a telemarketing firm for the price of \$2,600 per day to run phone banks in Fargo and Denver in support of the legislation. Dickson stated "Using the membership lists of the state coalition members, GNDA has been able to create the false impression of popular support. The well-financed telephone banks are using scare tactics to generate hundreds of telephone messages to our state legislators." Legislative testimony given by local manufacturers and businesses indicated that North Dakota residents did not file unnecessary lawsuits. Dickson stated "GNDA is operating a sophisticated and well-financed lobbying effort to tout a solution to a problem that does not exist in North Dakota." Dickson called for GNDA to stand up and admit the source of the tort reform campaign funds.¹⁹⁶

Dickson also composed a memo to the North Dakota House Judiciary Committee on March 10, 1993 regarding "1. Washington, D.C. origins of S.B 2351 2. Funding of GNDA's Propaganda Campaign 3. False Impression of Grassroots Support."¹⁹⁷ The memo provided evidence to support his claim that the campaign by GNDA to pass SB 2351 was funded by the tobacco industry. Dickson stated "I began to investigate the resources behind the lobbying effort of the proponents of S.B. 2351 when it became evident that there was a well-financed propaganda campaign far in excess of the known financial health of GNDA." Dickson noted that he had previously publicly accused GNDA of financing the tort reform lobby with tobacco industry contributions. The *Grand Forks Herald* and Darrel Dorgan of *Prairie News Journal* had also requested that GNDA open its records¹⁹⁷. GNDA ignored all accusations and requests which Dickson felt implied guilt.

The North Dakota Trial Lawyers Association had provided information regarding recent product liability legislation in other states which led Dickson to the Pennsylvania Trial Lawyers Association and Smokefree Pennsylvania. Dickson was informed by both of these organizations that product liability legislation introduced in Pennsylvania had been drafted by Covington & Burling, a Washington, D.C. law firm which represents the the tobacco industry, particularly on issues with heavy political content. The Pennsylvania Trial Lawyers Association informed Dickson that New Jersey, Washington, Texas, and California had also had product liability legislation introduced with the backing of the tobacco industry. Dickson obtained copies of the introduced legislation in each of the above states and found striking similarities to the North Dakota legislation. Dickson reported that GNDA had used Flint Communications, a telemarketing firm, to operate a phone bank for two weeks in February at a total cost of \$26,200. Several North

Dakota Senators reported to Dickson that the lobbying campaign behind SB 2351 was one of the most professional efforts they had seen. Senators were receiving voice messages simply to vote yes on the bill, which was odd since it was highly unlikely that the average North Dakota resident understood the technical language of the legislation. Jim Karley, resident of Gilby, North Dakota, informed Dickson that he received a questionnaire which asked “Do you object to frivolous lawsuits and high judgement? If so, sign your name and send it to the GNDA.” Karley’s name was subsequently added to a list of members of the North Dakota Coalition for Liability Reform. Members of the coalition had reported that they had agreed to be listed as members but had not contributed any funds or been invited to any meetings.¹⁹⁷

Representative Jennifer Ring (D-Grand Forks), a University of North Dakota law student, became involved with the efforts to prove that the tobacco industry was financing GNDA’s tort reform campaign because she opposed SB 2351.¹⁹⁸ In March 1993, Attorney General Heidi Heitkamp (D) wrote to Jennifer Ring expressing the legal opinion that the GNDA was required to publicly disclose its financial records due to the state funding of the organization. Both Heitkamp and Ring argued that the financial records of the GNDA must be open to the public because the organization accepts public funds¹⁹⁹. The GNDA had taken between \$75,000 to \$100,000 in state funding for North Dakota *Horizons* magazine (tourism), North Dakota Vision 2000 (job training), and a Dickinson State University education program. Heitkamp’s opinion had the force of law until challenged in court. After the release of the opinion, the GNDA President Dale Anderson denied Ring access to GNDA’s financial records. Anderson argued that Heitkamp’s letter to Ring was simply a letter and not the official opinion of the Attorney General. Although Heitkamp stated “Any written opinion, whether signed by me or one of my assistant attorneys general, has the same legal effect.”¹⁹⁹ Anderson was willing to disclose the financial records for only the publicly funded programs. Anderson stated, “I have to say that we believe if the records are not maintained, the private nature of them, it’s going to destroy the private-public partnerships that could grow and bring this state to a new tomorrow.” Ring stated that the issue would be brought to court.¹⁹⁹

An editorial by the *Grand Forks Herald* on March 18, 1993 stated that SB 2351 had easily passed the Senate would soon to be passed by the House and would be signed by a supportive Republican Governor Ed Schafer. The editorial argued that SB 2351 should not be passed until the GNDA fully disclosed the source of funding for the North Dakota Coalition for Liability Reform. The editorial stated “The open records issue isn’t a partisan sideshow. It’s not one Democratic legislator pitted against the state’s most powerful Republican lobby. It’s not an unfair request, and Ring should stick to her guns. This is an important bill about to become law, and nobody except GNDA officials know who’s paying for it.”²⁰⁰

On Friday March 19, the *Bismarck Tribune* requested that the GNDA disclose its financial records. The *Bismarck Tribune* is a member of GNDA and therefore under North Dakota state law should have been allowed access to the organization’s records. Kerry Paulson, GNDA Vice President for Governmental Affairs, and Dale Anderson, GNDA President, ignored the request, claiming they were out of the office.²⁰¹

SB 2351 was passed by the House with a 82 to 12 vote on March 19 and on April, 2 1993 was signed by Governor Schafer without the disclosure of GNDA’s campaign funds.²⁰²

On September 1, 1993 Judge William Hodny ordered the GNDA to defend its refusal to disclose financial records to Ring, *The Adams County Record*, *Ashley Tribune*, *Walsh County Record*, and *Walsh County Press* (weekly newspapers) in South Central District Court, Bismarck. A hearing was scheduled for September 13 with Dale Anderson required to report three days prior for questioning by Tom Dickson, President of North Dakota Trial Lawyers Association.²⁰³

Nicholas Spaeth (D), former North Dakota Attorney General, represented the GNDA in the open records suit. (In 1992, Spaeth received a \$2,000 contribution for his campaign for governor from R.J. Reynolds⁴⁴.) Spaeth argued, “Will the private sector be willing to participate with state government if it means their entire business operations can be laid bare to their competitors?”²⁰⁴

In January 1994, the open records lawsuit against the GNDA was dismissed by Judge Benny Graff, South Central District Court. Jennifer Ring and Tom Dickson stated they would seek an appeal of the ruling to the North Dakota Supreme Court. Tom Kelsch, an attorney and tobacco industry lobbyist, and Nick Spaeth represented the GNDA. Graf agreed with the GNDA's position that only the programs which used public funding should be open financially to public scrutiny.²⁰⁵ In March 1995, the North Dakota Supreme Court ordered Graf to investigate if the GNDA provided sufficient services with its public funding. Graf upheld his original ruling.²⁰⁶

The North Dakota Office of Management and Budget reported that GNDA funding was to be cut in half for the 1997-1999 biennium, although Governor Schafer had requested \$60,000 for the biennium. At the time of the article a ruling from the North Dakota Supreme Court was pending.²⁰⁷

In June 1997 the North Dakota Supreme Court unanimously ruled in favor of the Greater North Dakota Association and agreed with Graf that GNDA has provided sufficient services in exchange for the amount of public funding the organization received. The 1997 legislature passed open records legislation which included a clause to address situations similar to the GNDA experience. The clause stated that organizations which receive public funds are not required to disclose all financial records unless the public money exceeds the value of the goods or services rendered. Ring was up for re-election in 1994, but was defeated and also was defeated in a run for state senator in 1996.²⁰⁶

Tobacco Industry Involvement

A 1994 Lorillard “Memo to the Tort Reform Policy Committee,” authored by Covington & Burling, outlined the Greater North Dakota Association (GNDA) saga. Covington & Burling predicted that the case would be appealed to the North Dakota Supreme Court. Handwritten in the margins of the document was written “[Lorillard] will contribute up to \$5,000 for legal defense.”²⁰⁸

The continued story of the GNDA's open records lawsuit was reported in the *Adams County Record* on May 19, 1997. The lawsuit had been active for four years. The article opened with the statements, “After a marathon tapdance around questions about their link to tobacco companies, North Dakota's chamber of commerce has been exposed by a smoking gun. Make that a cigarette.”²⁰⁷ In September 1994, Kerry Paulson, Vice President of Governmental Affairs for

GNDA, was hired by U.S. Tobacco in Minneapolis. A former GNDA employee, Regina Buccholz, disclosed that R.J. Reynolds had provided funds to GNDA. She specifically remembered a check for \$25,000.²⁰⁷ She confirmed that R.J. Reynolds had contributed to the tort reform lobby. The article stated “The bill affects tobacco companies in that, in the event a cancer patient law suit would be brought in North Dakota, it increases the defenses available to the tobacco company, limits the punitive damages that can be awarded, and allows the tobacco company to lay blame elsewhere in order to limit their own liability.” Dickson stated that the tobacco industry had conducted focus groups and the results indicated that lawsuits were imminent.

There have been no individual lawsuits against the tobacco industry in North Dakota.

Public health advocates in North Dakota sat on the sidelines during this debate.

STATE LITIGATION AGAINST THE TOBACCO INDUSTRY

The “Global Settlement” and Surrounding Controversy

On June 20, 1997 it was announced that the tobacco companies had agreed to settle with states attorneys general and private lawyers that had sued the tobacco industry for damages incurred due to smoking-related illness. The terms of the Global Settlement granted the tobacco industry immunity from further private and public litigation in exchange for payments to the states and private parties, federal regulations of marketing and advertising, Food and Drug Administration regulation of tobacco products, and tobacco control education funding. The immunity provisions in the settlement required changes to federal law, therefore legislation was necessary to implement the settlement.²⁰⁹

In September 1997, McDonough, told *Grand Forks Herald* reporters that he was opposed to the Global Settlement Agreement. McDonough stated

The settlement gives unprecedented legal protection to an industry that annually kills 1,000 North Dakota adults, addicts 2,000 North Dakota children and conspires to hide the health effects of their deadly drug.²¹⁰

McDonough was opposed to the immunity provisions. He wanted a complete ban on tobacco advertising and stricter standards for reducing youth tobacco use.²¹⁰ Senator Kent Conrad (D-ND) was also in opposition to the Global Settlement. He was quoted in the *Grand Forks Herald* “While the tobacco industry would like to smoke this one through, I think we owe it to the American public to wait until these facts are out and until Congress has had time to adequately consider what is one of the most complex important issues in recent history.”²¹¹

McDonough and Conrad shared the same view of the Global Settlement, therefore McDonough chose to support a national Democratic plan for litigation against the tobacco industry. He explained, “It was going through the Senate, and Senator [Kent] Conrad, who’s never been real gung ho about tobacco control, was on board. I thought our state, particularly in my observation in seeing how things had gone over the years, was that we’d be better - our kids, the

citizens - would be better off if we plugged into the national settlement that came out of the Democratic Senate. So I went out and publically supported Senator Conrad.”²²

Governor Ed Schafer was not pleased with McDonough’s support of Conrad. McDonough explained, “I think he heard my comments on the radio. I was reprimanded for doing my opinions out there. Heidi Heitkamp, who was the Democratic attorney general, was the attorney general working on what ended up being the tobacco settlement [Master Settlement Agreement] and there was a conflict. But I was very concerned about the tobacco settlement because I felt that what would happen in our state was that very few of the dollars ended up going for tobacco control. So I got cross-hairs with her on that one. And State Health Officer Dr. Jon Rice ended up supporting Heitkamp. And those two were together and again had shackles put on me to articulate what we though was best public policy.”²² This situation exemplifies a tobacco control leader being prevented from articulating his position on tobacco control policy due to the political position he held within the health department under the Schafer administration. This scenario reappeared as a consistent theme throughout the process of determining the allocation and implementation of the Master Settlement Funds under the Schafer administration.

According to Heitkamp North Dakota did not participate in the early lawsuits due to the expense involved, but joined the negotiating team when a settlement became the most likely outcome. In an interview in 2003, Heitkamp stated

We, North Dakota, did not participate in those early initiations of lawsuits because they were very expensive and the tobacco industry was very, I wouldn’t say critical, but they were very litigious. They did not come to this process very easily, so they were being very, very difficult and it was very difficult for the states who had sued, so North Dakota didn’t get involved in the early stages. However, when it was clear that the tobacco industry was going to settle, North Dakota participated in a number of activities regarding settlement of state cases, and eventually became part of the negotiating team for the 1998 [Master Settlement [Agreement]].²¹²

THE MASTER SETTLEMENT AGREEMENT

In 1998, after the failure of the Global Settlement, Heitkamp , in conjunction with fifty-one states attorneys general from forty-five states, five territories and the District of Columbia negotiated a more limited Master Settlement Agreement (MSA) that settled only the state cases with the major tobacco companies. North Dakota's case against the tobacco industry was

based on violations of state consumer protection and anti-trust laws. The suit claimed that the tobacco companies had used deceptive practices in the advertising and marketing of their products, resulting in damages to residents of North Dakota. The damages included health problems and life-long addictions that have resulted in costs to the state for medical payments, workers compensation payments, and other direct and indirect state assistance.²¹³

Heitkamp negotiated on behalf of the smaller population states for a larger portion of the settlement funds. Heitkamp stated

A number of small states were not happy with how the money had been allocated and a

great deal of concern was that we wouldn't have the resources that we would need to do tobacco control. So, with that in mind, I think it was 13 states eventually banded together to try and secure enough resources so that we could do tobacco control in our states. What my job was was to negotiate on behalf of the small states, but also to make the argument successfully that the small states needed additional resources so that we could do CDC based anti-tobacco programming... So, we all along during the negotiating process, we were very interested in pursuing a CDC-based program, because we knew from experiences that Massachusetts and California had had, and Florida in the early stages of their program, that the CDC-based model was showing a great deal of success.²¹²

As a result of the negotiated settlement with the tobacco industry North Dakota's award was projected to be \$866 million over the first twenty-five years of the agreement, approximately \$23 million was payed in 2000.²¹³ While the MSA did not require that any of this money be allocated to tobacco control, there was the widespread expectation among the public health community and attorneys general that negotiated it that a substantial amount of money from the MSA would be allocated to tobacco control programs run by the settling states.

The Office of the Attorney General was very involved with the writing and negotiation of the Master Settlement Agreement, but during this process was not in open communication with the State Department of Health regarding the subsequent allocation of the funds. In an interview in 2003, Heitkamp stated "Because we were so involved in writing and negotiating this settlement, my office had not done a lot of leg work with the public health community in terms of, you know, this is what we want to do with the money, and this is what we are going to lobby the legislature for, and we just assumed that the public health community was going to participate in that way, and we would have their assistance."²¹² The case against the tobacco industry was settled in November 1998 prior to the 1999 legislative session which began in January. The short time span between the settlement and the legislative session did not allow sufficient time for collaboration between Heitkamp and tobacco control advocates to develop a plan for the allocation of the settlement dollars. Therefore, Heitkamp stated that the Office of the Attorney General

relied on the person who was the head of the health department, who at the time was not a physician, was a lawyer [Murray Sagsveen], to take the lead in negotiating with the Governor and negotiating with the legislature, a CDC-based program.²¹²

Jeanne Prom further explained

Health Department employees who were also tobacco control advocates (namely Dr. McDonough and me) did not so much "rely" on Sagsveen as much as we were under his directive: Sagsveen determined that he [Sagsveen] was the only one from the State Health Department who could speak or advocate on the issue of the Master Settlement Agreement funding to legislators, press, local health departments, the public -- he told us that. I think in some cases when Sagsveen was unavailable to attend hearings or speak to the press or local health units on this issue, he assigned other State Health Department employees to the task. However, it was never Dr. McDonough or me, as it had been during past legislative sessions.³⁴

As discussed earlier, before being appointed to head the health department, Sagsveen had been a partner in the law firm Zuger Kirmis & Smith, where Tom Smith, Tobacco Institute lobbyist, and

Brenda Blazer, Brown and Williamson lobbyist, were also partners.

In November 1998, Tobacco Free North Dakota sponsored a survey of 603 North Dakota adults on the use of tobacco settlement funds that indicated that 70 percent of respondents strongly favored the use of tobacco settlement funds for the reduction of tobacco use among youth and that 60 percent of respondents wanted at least half of the settlement money to be spent on the reduction of tobacco use among youth.²¹⁴

On December 24, 1998 the Fargo Forum reported that Sagsveen had presented several options to Governor Schafer regarding the allocation of the settlement funds.²¹⁵ Heitkamp explained “When he [Sagsveen] put together his initial ideas, which was right after the settlement was decided... he had three things that he was looking at in terms of utilization of the money, and what he had told me at the time was that one of those three would be what the Governor would propose, and as it turns out, they weren’t at all what the Governor proposed. And so we ended up in a situation, at least politically I ended up in a situation where I had relied on the public health officers to do the right thing, in the end, the Governor made the decision.”²¹² Governor Schafer outlined his plan for the allocation of the settlement dollars in the 1999 State of the State address, delivered on January 5, 1999.

I want to discuss the tobacco settlement and what it means for North Dakota. Over the life of the 25-year agreement, North Dakota could receive more than \$700 million - \$30 million in this biennium alone.

I stress “could”. Considerable uncertainty remains about when, if and how much money North Dakota will receive. I argue - I believe - spending dollars we do not yet have would be fiscally irresponsible.

We should have two goals for all potential settlement money: public health and fiscal responsibility. We can address both of these with the following plan.

First, I am proposing we devote 10 percent of any tobacco settlement dollars to public health programs, including important initiatives on diabetes, drug and alcohol abuse, and tobacco prevention and cessation. This will fund programs primarily driven at the local level, and will provide a six hundred percent increase over current state spending for local public health.

To further enhance prevention efforts, we should make our laws more effective in our fight. I urge the Legislature to raise the state’s minimum age for possession of tobacco from 18 to 19. At the same time we should reduce the penalty for possession from a rarely prosecuted misdemeanor to a more appropriate infraction that police are willing to enforce.

These measures would give educators and law enforcement the tools to keep tobacco out of schools. We must stop sending a mixed message - that tobacco is bad for kids, while turning a blind eye to smoking on high school campuses.

Then, we should place 45 percent of any dollars from the tobacco settlement in the Common Schools Trust Fund. How often have we looked back a decade or two after a new revenue source starts flowing and said, “We should have set that money aside, let it build,

and used the interest”?

We can show foresight by allocating this new, potentially great and still uncertain source of revenue for the education of future generations of North Dakota’s children - money that simultaneously relieves the burden on local property tax payers.

The remaining 45 percent of settlement dollars should be returned to the pockets of North Dakota taxpayers. Our tax payers have borne the burden of the tobacco-related health care costs for many years. The tobacco settlement compensates states for their costs, so it is only appropriate that the state compensates the taxpayers.

I am proposing that the money be delivered as an annual property tax rebate. In comparison to other states in the region, North Dakota’s tax system is well balanced and generally fair. Yet there is a growing sense that property taxes should be scaled back, and tobacco settlement dollars could help us achieve this goal.

I am also asking the legislature to send a constitutional amendment to the state’s voters asking them to make this funding allocation permanent. Even with the best of intention, the millions of dollars that will come to North Dakota in the next 25 years might tempt less fiscally conservative leaders to grow government, launch new programs, or bail us out of a fiscal mistake.²¹⁶ [emphasis in original]

The health groups did not take any steps to promote a specific plan for the use of MSA funds for tobacco control, but rather operated in a reactive mode to proposals developed elsewhere. Health advocates lack of mobilization behind a proposal for the allocation of the settlement funds was a missed opportunity. The reliance of the Attorney General and tobacco control advocates on Sagsveen for a proposal for the allocation resulted in pro-tobacco Governor Ed Schafer creating the only plan for the allocation of the settlement funds to be presented before the 1999 legislative session.

Initial Implementing Legislation

During the 1999 legislative session, 9 bills, including 5 constitutional amendments, were introduced as proposals for the allocations of the tobacco settlement funds. House bill 1475 sponsored by Representative Jack Dalrymple (R-Fargo) and Senator David Nething (R-Jamestown) proposed to establish a tobacco settlement trust fund with 10% of principal and interest dedicated to tobacco use prevention and reduction and the remainder of the funds allocated to a Resources Trust Fund for long-term water development and management. Governor Schafer’s proposal was introduced as a constitutional amendment (HCR 3042) by Representative Jane Gunter (R-Towner).²¹⁷

Due to lack of health advocate mobilization behind a proposal, the legislature took over. It became clear to health advocates and Sagsveen that HB 1475 was going to be the vehicle for the allocation of the settlement funds. The Heart Association proposed an amendment to HB 1475 which would have allowed the legislature to allocate a maximum of 45% of the settlement funds annually to water projects (maximum of \$84.8 million to water projects), and required further study of North Dakota’s needs for tobacco use reduction and prevention programs before allocating the remainder of the settlement funds. In testimony before the Senate Appropriations

Committee on March 9, 1999 Herman stated

The water problems of North Dakota are well documented, as well as the specific actions needed to successfully address those problems. The tobacco usage rates of North Dakota, especially among our young, are also well documented... Due to the tobacco settlement, an unprecedented opportunity exists to address both of these major problems. We ask that as you proceed with the urgent business of addressing the most critical water issues facing North Dakota, that you also take the step to study the use of the remaining tobacco settlement funds. While an urgency exists to address both of these issues, you do not have to determine an allocation formula this session beyond critical water problems of the state...You can take the opportunity to discuss through interim committee the extent of the tobacco health issues of the state and what needs to be done about it.²¹⁸

The amendment proposed that a committee composed of ten legislators, state health officer, attorney general, and a member of each of the following organizations Tobacco Free North Dakota, American Cancer Society, American Heart Association, American Lung Association, North Dakota Public Health Association, North Dakota Nurses Association and North Dakota Medical Association be created to determine the further allocation of the settlement funds.

The amendment was supported by health advocates including the Attorney General Heidi Heitkamp,²¹⁹ North Dakota Society for Respiratory Care, North Dakota Nurses Association, and the American Lung Association of North Dakota.²¹⁸ The amendment prevented all of the settlement funds from being allocated to water issues and also bought time for the health advocates. The amendment would have allowed health advocates to create a proposal for the allocation of the settlement funds which had not been created prior to the 1999 legislative session. The amendment was not adopted by the legislature.

Sagsveen testified in support of HB 1475, but did not support the amendment proposed by the Heart Association. He proposed his own amendment in which he requested that 10% of the funds be allocated to the public health trust fund without the requirement for use on tobacco use reduction and prevention programs.²²⁰ Sagsveen's support of HB 1475 was in line with Schafer's original proposal, in his testimony Sagsveen stated, "at least 10% of the annual payments should be allocated to public health purposes, such as a Community Health Grant Program, to address community-prioritized public health issues. This would be consistent with Governor Schafer's request in his State of the State Message."²²⁰

After modification of HB 1475 by the legislature, the legislation was passed and signed in to law on April 22, 1999. HB 1475 determined that the principal and interest of the tobacco settlement dollars would be allocated as follows: 45 percent of the funds to the Common Schools Trust Fund, (constitutional endowment fund) 45 percent to the Water Development Trust Fund, and 10 percent to the Community Health Trust Fund. The allotment for the 2001-2003 biennium was \$23,805,000 for Water Development Trust Fund, \$23,805,000 for Common Schools Trust Fund (constitutional endowment fund), and \$5,344,755 for Community Health Trust Fund.⁹

The legislation stated "Transfers to a community health trust fund to be administered by the state department of health. The state department of health may use funds as appropriated for community-based public health programs and other public health programs, including programs

with an emphasis on preventing or reducing tobacco usage in the this state. Transfers under this subsection must equal ten percent of the total annual transfers from the tobacco settlement trust fund.”²²¹ In 1999, the legislature allocated the dollars into the three trust funds, but did not authorize any of the money in the Community Health Trust Fund to be spent nor was a plan created for the specific allocation of the funds. Therefore, the dollars in the Community Health Trust Fund were not accessible for tobacco control during the 1999-2001 biennium.³⁰ The development of implementing legislation for the allocation of the funds in the Community Health Trust Fund was assigned to an interim legislative committee.

As the specific use of the settlement funds in the Community Health Trust Fund had not been determined during the 1999 legislative session, Governor Schafer continued to publicly express his opinion that the settlement funds should not be used for tobacco control programs. Governor Schafer reiterated his position on an August 26, 1999 when he stated

I don't want to see a statewide tobacco prevention program, but certainly we have the money available to support communities that want to add one or enhance the ones they have. We hate it when the Feds tell us what to do and I think we shouldn't as a state tell our communities what to do.

...

When we say we're going to commit 10 percent of our tobacco money to public health, that may not sound like much, but that's actually six times more than we're spending now in terms of gross dollars.²²² [emphasis added]

Blue Ribbon Tobacco Panel

Unhappy with the 1999 allocation of the settlement funds by the Governor and the legislature in January 2000, Attorney General Heitkamp appointed a panel to create a statewide tobacco use prevention and cessation plan (Table 5) to be submitted to the legislature for the allocation of the funds in the Community Health Trust Fund.

In January 2000 in a Fargo Forum article that announced the creation of the panel, Heitkamp told *Fargo Forum* reporters that she had invited Murray Sagsveen to participate in the Blue Ribbon Tobacco Panel. A spokesperson for Governor Schafer office rebutted this stating that Sagsveen had not been invited to participate and that the Governor's office was unaware of the panel. Heitkamp referred to Schafer's comments as “unfortunate turf protection”. Schafer stated that the panel was part of Heitkamp's campaign strategy as she was campaigning for governor. Heitkamp stated that purpose of the panel was to ensure that the 10% of the tobacco settlement funds allocated to the Community Health Grant Program are used for tobacco use prevention and reduction. Schafer stated that the purpose of the tobacco settlement was to repay the state for health care costs due to tobacco use that have already been incurred. He stated that the state has no obligation to any of the settlement funds for tobacco control.²²³

Mississippi Attorney General Michael Moore, the first attorney general to file a lawsuit against the tobacco industry²²⁴ and Washington Attorney General Chris Gregoire, who had led the negotiations that led to the MSA, spoke at the first meeting of the Blue Ribbon Tobacco Panel in January 1999. Moore stated at a news conference in Fargo that “The state should be spending the

money on what the fight was about. The proceeds... are supposed to be spent on improving the public health of America and protecting our children.”²²⁵ Gregoire gave Washington state as an example of proper allocation of funds with 1/3 dedicated to tobacco cessation and prevention with the remainder of the funds dedicated to health programs. She stated that the settlement funds were not intended for use on water and flood-control programs.²²⁵

Governor Schafer stated that the allocation of 10 percent to public health was sufficient and that the creation of the Blue Ribbon Tobacco Panel by Heitkamp was a political strategy for her campaign for governor. In response, Heitkamp stated “I invested 212 years of my life in this case. I want to see the money spent appropriately.”²²⁵

In December 2000, the Blue Ribbon Tobacco Panel's North Dakota Tobacco Use Prevention and Dependence Treatment Plan²¹³ was released. It presented three major goals:

- 1) Prevent initiation of tobacco use by youth
- 2) Promote dependence treatment
- 3) Eliminate exposure to secondhand smoke

The plan outlined seven program areas to achieve these major goals: community programs, school programs, counter-marketing and public education, tobacco dependence treatment, statewide programs, enforcement, and chronic disease programs. The plan provided recommendations for funding based upon the CDC Best Practices low and high funding guidelines.

In any event, the effort failed. In an interview in 2003, Heitkamp observed that the plan was basically ignored by the legislature. Partly, because there has also been political conflict about the sentiment as a result of my participation, but you know understand this, that for all of these small states, and I'll say this anywhere, who got the bonus, [small-states adjustment in MSA] they almost have an obligation to do a CDC-based program because that's why they got the money.²¹²

In addition to Heitkamp, The American Lung Association of North Dakota expressed their opposition to the allocation of the settlement funds at a community forum led by Sagsveen in Bismarck on March 21, 2000 for community input on the allocation of the funds in the Community Health Trust Fund. Susan Kahler, Executive Director of the North Dakota American Lung Association, stated “When our youth are ranked third in the United States for smoking, something's got to be done. The money was given to the states to address those issues.”²²⁶

Table 5: 2000 Blue Ribbon Tobacco Panel

| | |
|--|---|
| Susan Bosak <i>Meritcare Health Systems</i> | Sharon Leet <i>CDU Nurse Manager UniMed Medical Center So.</i> |
| Sharon E. Buhr <i>Chair, Valley City School Board Young People's Healthy Heart Program Mercy Hospital Valley City, ND</i> | Bruce Levi <i>ND Medical Assn</i> |
| Logan Davis <i>Coordinator, Tobacco Coalition</i> | Arlette Preston <i>Fargo City Commissioner</i> |
| Paula Flanders <i>Director of Bismarck-Burleigh Nursing Services</i> | Dr. Keith Rau <i>Dakota Clinic</i> |
| Mary C. Hall <i>Director, Juvenile Court Services East Central Judicial District</i> | Dr. Jon Rice <i>Director of Managed Care Blue Cross Blue Shield</i> |
| Heidi Heitkamp <i>Attorney General</i> | Elizabeth Sorensen <i>University of North Dakota</i> |
| June Herman <i>Vice President of Advocacy American Heart Assn</i> | Glenn Thom <i>President, ND Society of Respiratory Care</i> |
| Mary Hill <i>Assistant Principal Bismarck High School</i> | H. David Wilson <i>M.D. Dean and Professor of Pediatrics University of North Dakota School of Medicine and Health Sciences</i> |
| Sue Kahler <i>Executive Director American Lung Assn of ND</i> | Dr. Kathy Wood <i>Clinical Director Belcourt IHS Hospital</i> |
| Dr. Dale Klein <i>Chairman of the Board ND Academy of Family Physicians</i> | Dustin Zahursky <i>University of Mary</i> |
| Linda Kohls <i>American Cancer Society</i> | Karen Zotz <i>North Dakota State University Extension Service</i> |
| Butch Knittel <i>Owner Gas Stop</i> | Ellie Rezabek-Turner <i>Drug-Free Schools</i> |
| | Source: ²¹³ |

The Lung Association gave the statement to reporters that "...the Governor and Health Officer now share in the responsibility of... not utilizing the tobacco settlement funds for preventing or reducing the addiction of our youth and adults to the most powerful and addicting and killing drug that exists."²²⁶ Kahler stated that the community forums were just a showpiece for the health officer and governor because they had already determined how the settlement dollars would be allocated. Sagsveen responded, "They want me to ignore what the Legislature and the governor are telling me... I'm playing with the cards that are dealt."²²⁶

Interim Budget Committee on Health Care

The Interim Budget Committee on Health Care was assigned with the task of preparing a proposal for implementing legislation for Community Health Trust Fund dollars for the 2001 legislative session. The committee was chaired by Representative Clara Sue Price (R-District 40). In October 1999 the City-County Health Board (Barnes County) provided a letter of testimony to the interim committee requesting a re-allocation of the settlement funds. The testimony stated

Of the approximately \$50 million estimated to arrive in North Dakota's general fund this biennium, only 10% has been earmarked for health and tobacco prevention has been identified as only of eleven choices where this money could be allocated.

We, the Barnes County Health Board, feel that this is an outrage. We ask the members of the Budget Committee on Health Care to

- 1) look at the facts regarding tobacco,
- 2) use the Center for Disease Control's (CDC) recommendations for Comprehensive Tobacco Control Programs (August 1999),
- 3) For the current biennium, allocate the entire 10% HB 1475 appropriated for public health to tobacco prevention
- 4) work to change HB 1475 in the next session so that a minimum of \$8.16 million (\$12.73 per capita) will be used in North Dakota to prevent smoking, thereby saving lives and millions of tax dollars²²⁷

The City-County Health Board proposal was in direct opposition to Sagsveen's 10% proposal.

Other health advocates' failure to mobilize against the Administration's proposed allocation of the settlement dollars may have been due to fear of loss of any funding at all, perhaps because they were afraid that there would be retaliation from the State Health Department based on an incident involving the Red River Health Protection Coalition.

The Red River Health Promotion Coalition (RRHPC) of Fargo was a non-profit organization. In 1999, RRHPC applied for a SmokeLess States Special Opportunity Grant from the Robert Wood Johnson Foundation to develop a plan for the allocation of the settlement funds to a comprehensive program for tobacco use reduction in North Dakota. To support this application, they obtained a letter dated May 18, 1999 from Jeanne Prom, North Dakota State Department of Health Tobacco Prevention and Control Coordinator, to the American Medical Association. Prom stated "The Red River Health Promotion Coalition and its member organizations and individuals have taken the strongest positions on the tobacco settlement of any North Dakota organization.

The coalition has been unwavering, continuing to call for all tobacco settlement funds to be invested in a comprehensive program to prevent, control and treat tobacco addiction in our state.²²⁸

A month later, on June 23, 1999, the Department withdrew its support for the grant. Sandra D. Adams, North Dakota State Department of Health Division of Health Promotion and Education, wrote to the American Medical Association Smokeless States office (which administered the SmokeLess States program for the Robert Wood Johnson Foundation) to inform them that Murray Sagsveen had reviewed the letter previously composed by Jeanne Prom and that the North Dakota Health Department was withdrawing support for the Red River Health Promotion Coalition's grant application "because 100 percent allocation of state settlement funds to long-term comprehensive programs to reduce tobacco use is inconsistent with both the governor's policy and legislation passed by the 56th Legislative Assembly of the state of North Dakota."²²⁹

In Murray Sagsveen's February 24, 2000 testimony before the Interim Budget Committee on Health Care regarding the Community Health Trust Fund, he stated that he was operating under the proposal outlined in Governor Schafer's State of the State on January 5, 1999. In that address, Schafer outlined allocating 10 percent of MSA dollars to public health programs with an emphasis on community-based public health. Sagsveen proposed to the committee a Community Health Grant Program funded by the settlement dollars allocated to the Community Health Trust Fund. The proposed Community Health Grant Program had three components Healthy Schools, Healthy Families, and Healthy Communities. The Community Health Trust Fund was expected to receive \$5 million per biennium, therefore under Sagsveen's proposal Healthy Schools would be funded at \$2 million per biennium, Healthy Families \$2 million per biennium, and Healthy Communities \$1 million per biennium.

The Healthy Schools program was a grant program which proposed to provide approximately \$9 per student annually. Sagsveen's proposal stated "the grant would be released when the local board of health and the local school board sign a memorandum of agreement (MOA) concerning the preventive health programs that would be funded... The MOA must include a plan to reduce tobacco use by students, but may include other issues that the boards consider a priority." The Healthy Families program was a grant program which proposed to provide approximately \$1.50 per capita annually. Sagsveen's proposal stated "the grant would be released when the local boards of health and all interested parties in a community health region... develop a plan that identifies the priority needs of the region, the programs that will be funded, and the method of evaluating the program... The plan must address tobacco-related issues (such as cessation programs for current smokers), but may include other issues that are a priority for the region." The Healthy Communities program provided annual funding to three areas: increased state aid to counties from \$3000 to \$7000 per year, provided \$25,000 annual grant to each region to supplement CDC funding for tobacco control programs, and \$88,000 for statewide trainings, data management improvement, and evaluation of the Community Health Grant Program. Tobacco prevention and use reduction was a very small component of the Community Health Grant Program proposed by Sagsveen and communities were granted much flexibility in the use of the funds.²³⁰

In his testimony, Sagsveen stated that he did not support CDC guidelines for tobacco control funding because the CDC recommended spending a minimum of \$16.3 million (of the \$46 million received by North Dakota from the MSA during the same period) per biennium for tobacco control programs which was more than the total general fund budget for all North Dakota Department of Health programs.²³⁰ Sagsveen stated that he was not supporting the funding of a statewide media campaign because all of North Dakota would benefit from the American Legacy Foundation's national media campaign and eastern North Dakota would benefit from the Minnesota media campaign. Matt Meyers, president of the Washington, DC-based Campaign for Tobacco Free Kids, noted that the Sagsveen had neglected to mention that the

[American] Legacy Foundation sent a letter to Governor Schafer last winter letting him know that their media campaign will not be an adequate substitute for a state campaign in North Dakota.²³¹

Sagsveen was not proposing funding for cessation programs because he stated that cessation programs could be funded through insurance companies or employers. According to Sagsveen, smokers would save money from smoking cessation and therefore should bear the burden of smoking cessation costs. He also stated that smokers have to want to quit for cessation programs to be effective.²³⁰

Sagsveen concluded his testimony with the statement “The concept in this testimony has evolved for more than one year, beginning with the governor’s State of the State message in January 1999 and the legislature’s additional statutory guidance in House Bill 1475. I’ve also solicited input from the general public interest groups, the Health Council, and from Department of Health Staff in intervening months.”²³⁰ However, Sagsveen had not solicited input from tobacco control advocates.

North Dakota’s allocation of the tobacco settlement funds and the testimony of Sagsveen were scrutinized nationally. On March 28, 2000 Murray Sagsveen sent an email to Tobacco Free Kids complaining that an incorrect statement appeared on Tobacco Free Kids’ website stating that tobacco settlement funds allocated to public health in North Dakota would be used for a new state morgue rather than tobacco prevention programs.²³² Meyers responded on April 21, 2000 that the report produced by Campaign for Tobacco Free Kids was based upon statements made by Sagsveen and Governor Ed Schafer and upon legislation passed in North Dakota. Meyers cited Sagsveen’s speech to the North Dakota Public Health Association’s annual conference on March 17, 1999 at which Sagsveen did not mention tobacco prevention, but instead focused on funding a state morgue.²³¹ Meyers also cited Sagsveen’s testimony to the interim Budget Committee on Health Care on October 18, 1999 in which he stated that the Department of Health would receive \$5.5 to \$6 million annually from the MSA and that he was requesting \$3.26 million for the 1999-2001 biennium for the construction of a state morgue and improvements for state laboratories.

At the same hearing Sagsveen requested \$2.5 million for the Community Health Grant program for the 2001-2003 biennium, but gave no specifics on the use of this money. Meyers stated in his response, “Mr. Sagsveen, while your testimony on the 18th included a presentation of the CDC model, it is very clear that you were not advocating that model. Instead, it is clear that you were advocating for funds for a new morgue.”²³¹ Meyers acknowledged that Sagsveen’s

testimony before the Interim Budget Committee on Health Care on February 24, 2000 included tobacco prevention as part of the funding plan but expressed concern because Sagsveen testified against the CDC model for tobacco prevention funding.²³⁰ Meyers stated “It is distressing to us that the individual charged with protecting the public health in North Dakota would actually campaign against trying to meet the CDC model for tobacco prevention.”²³¹

June Herman, American Heart Association Director of Advocacy, composed a letter to all local public health units board of health members dated May 4, 2000 in an attempt to build a consensus among tobacco control advocates for the allocation of the settlement dollars to tobacco control. She wrote

Soon your Board of Health may be asked to take a position in regard to the proposed funding mechanism for the “Health Trust Fund” established last year as part of the tobacco settlement appropriation process. We urge you to join with the Stutsman County and Valley City local health boards in strongly advocating that the state address the critical public health needs of the state by: 1) Allocating the entire 10% of the settlement to tobacco prevention and cessation, and 2) Re-addressing the legislative appropriation of the settlement.... It is deplorable that state leadership on the public health needs of the state was non-existent last legislative session. And now there is an appearance of a strategic intent to encourage the public health community to pit itself against one another in the division of a woefully inadequate allocation to public health from a settlement that was based on the health damages of tobacco. By standing with these first two local health boards, your board can make a significant impact in encouraging legislative leadership to better serve the public health needs of the state.²³³

Sagsveen responded with a memo to North Dakota Public Health Administrators and Board of Health Members on June 6, 2000 about “advocacy organizations” contact with the local public health units regarding MSA settlement dollars allocation and the proposed Community Health Grants Program. He wrote “It is my understanding that advocacy organizations have recently contacted the public health units concerning the legislature’s allocation of the tobacco settlement funds and my February recommendation to the interim Budget Committee on Health Care concerning the proposed Community Health Grant Program. I believe it is necessary to respond to the threatening correspondence from the American Heart Association to the public health units.”²³⁴ Sagsveen proceeded to address “allegations” made primarily by June Herman of the American Heart Association and refute them with “fact”. There were 27 allegations and refutations. Sagsveen ended with the following comment “The purpose of this memorandum is to specifically address the numerous misleading allegations against the Schafer Administration and the Department of Health. I plan to periodically update this memorandum if this practice, by the American Heart Association and others, continues.”²³⁴ Sagsveen’s memo is an example of an attempt to prevent tobacco control advocates, including local public health units and voluntary health agencies, from mobilizing behind a plan for the implementation of the settlement dollars in the Community Health Trust Fund.

The Heart Association chose not to respond to Sagsveen after consultation with the national American Heart Association legal department. There was no mass mobilization of local tobacco control advocates behind Herman’s proposal.^{51, 99}

Prior to the 1999 legislative session, health advocates failed to create and mobilize behind a proposal for the allocation of the Master Settlement dollars. Unfortunately, a pro-tobacco governor and a health officer out of a law firm with close ties to the tobacco industry developed the only proposal for the allocation of the settlement funds. Schafer's proposal to dedicate only 10% of the Master Settlement funds to public health was implemented by the legislature in 1999.

McDonough Driven Out of Health Department

On June 21, 2000 Dr. Stephen McDonough, who had worked at the State Health Department for 15 years, decided to "go public" with his growing dissatisfaction with Sagsveen's management of the North Dakota Department of Health in an opinion-editorial in the *Bismarck Tribune*. The article opened with the statement "The problems at the North Dakota Department of Health stem from questionable public policies and management."²³⁵ He cited examples of poor public policy including the tobacco settlement fund allocation, proposed and withdrawn alteration of the Public Employees Retirement System health benefits, and the proposed and withdrawn alteration of the phenylketonuria (PKU) program. He cited examples of poor management such as low morale within the Health Department, staff reassignments, and the potential for large loss of staff. Regarding the public health community's reaction toward the allocation MSA funds McDonough stated that "the local public health community is divided with some local health departments feeling intimidated for opposing the NDDH plan. The NDDH has had an ongoing adverse relationship with several organizations within Tobacco Free North Dakota."²³⁵ McDonough who had been a fixture at the state legislative level throughout the 1990's testifying for tobacco control policy was not visible during the 1999 allocation of the settlement funds by the legislature. Sagsveen represented the health department at legislative hearings which was a distinct change from what had traditionally occurred in North Dakota.

The following day, June 22, 2000, a *Bismarck Tribune* article reported McDonough's departure from the North Dakota Department of Health. The article stated "The health department's Chief Medical Officer left office under the watchful eye of a state trooper Wednesday, shortly after he criticized the department's management – led by State Health Officer Murray Sagsveen – in a letter to the Bismarck Tribune."²³⁶ McDonough stated that he was told in a memo from Murray Sagsveen that the department had accepted his letter to the *Tribune* – which noted that he "began a process to return to the practice of pediatrics," and "I hope to be able to announce my plans in the near future"²³⁶ – as a resignation effective immediately. McDonough had not intended the letter as resignation.

With the removal of Dr. McDonough from the Health Department North Dakota tobacco control had lost its major advocate and leader. Tobacco control advocates failed to publicly mobilize in support of Dr. McDonough.

Following McDonough's departure from the Health Department, the *Bismarck Tribune* ran a series of articles investigating the situation at the Health Department. An article on June 25, 2000 outlining the problems at the State Health Department opened with the statement "community members and current and former employees say they have felt intimidated by, and fearful of retribution from, State Health Officer Murray Sagsveen and members of his management

team.”²³⁷ Ten current and former Health Department employees both named and anonymously supported claims that the working environment was one of tension and fear created by Sagsveen’s management.²³⁷ McDonough explained “Governor Schafer unsuccessfully tried to blame morale problems on communication problems within the Preventive Health Section. I had formerly headed the Preventive Health Section, but was removed from that position over a year earlier by Sagsveen. The communication problems were attributed to my successor, a young and inexperienced research analyst, hired by Sagsveen to the surprise of many. This person was removed from her position when the turmoil began in the Health Department.”²³⁸

The article documented that Sagsveen had composed an email to Health Department employees on Thursday June 22 requesting that they “not speak to any media representatives about working conditions at the department, the departure of McDonough or department reorganizations.” Sagsveen quickly followed this with an email on Friday June 23 where he stated “I understand that some of you may have misinterpreted my e-mail of (Thursday) concerning media contacts. My intention was not to muzzle any Health Department employees, rather to encourage anyone who feels uncomfortable talking to the press about issues regarding internal Health Department matters to forward calls to my office.” Regarding the claims of mismanagement Sagsveen stated that this view was shared by only a minority of employees. Sagsveen was quoted “I feel bad that people think they can’t walk in the door and ask me for a cup of tea, because I’d give it to them.”²³⁷ Sagsveen attempts to prevent health department from speaking out against his policies was finally exposed by the *Tribune*.

Governor Schafer blamed the complaints surrounding Murray Sagsveen’s management style on “election-year partisanship” and announced that there were no plans for an investigation of the State Health Department.²³⁹ Schafer stood in support of the Health Officer who was implementing the governor’s pro-tobacco policies regarding the allocation of the settlement funds.

The Valley City City-County Health Board sent a letter on June 27 to Governor Schafer officially protesting the management practices of State Health Officer Murray Sagsveen. Board member Sharon Buhr stated “We feel the health of the state and the citizens is at risk here and particularly in the city of Valley City.” Sagsveen responded that he had never been contacted by the Valley City public health unit board of health regarding any problems. He responded, to Bismarck Tribune reporters, “I’m perplexed by the suggestion that I can intimidate someone in the local public health unit because I have no control over that administrative process...I have never reduced the funding of any public health unit over anything that they said ... I don’t have any supervisory or fiscal control over those people.”²⁴⁰

In a memo to legislators dated July 3, 2000, Sagsveen stated that the Valley City board of health was angry because he did not advocate for a greater allocation of MSA settlement funds to the Community Health Trust Fund. Sagsveen responded

Governor Schafer established administration policy in his State of the State message and the legislature adopted Governor Schafer’s recommendation in House Bill 1475. It would be totally inappropriate for a state health officer to directly or indirectly attack or undermine the guidance of the governor and the laws governing the Department of Health.²⁰

The Valley City Board of Health was the only board of health to publicly make a complaint regarding Sagsveen's management. The voluntaries did not take an active role in the investigation.

On July 15, 2000, in response to the controversy at the Health Department, 49 North Dakota physicians signed a letter to the editor of the *Tribune* stating the need for the State Health Department to be led by a physician.²⁴¹ The controversy led Governor Schafer to set up a review of the State Health Department Preventive Health Section by a team which included Dr. Jon Rice, former state health officer; Weldee Baetsch, former human services personnel officer; and Francis Schmidt, North Dakota Health Department Environmental Health Division section chief, in November 2000.²⁴² The review identified poor communication within the Preventive Health Section and that Sagsveen's management style was not appreciated by those in the department. Over 50 current and former Health Department employees contacted the *Bismarck Tribune* during May to November 2000 to complain about the conditions at the Health Department under Sagsveen's management²⁴³

Governor Schafer had originally blamed the conflict in the department on election-year politics, but later modified his position to assert that the problems were only within the Preventive Health Section led by McDonough, who he said was unhappy with the allocation of settlement dollars by Governor Schafer and the legislature.

After his departure from the Health Department, McDonough made an attempt to remain active in the allocation of the tobacco settlement funds in the Community Health Trust Fund. In an interview in 2003, he explained "As I was leaving the health department, I was interested in continuing to work in this area and was proposing kind of getting together another coalition because when I left the government I would have been free to work as a citizen and try to get Blue Cross-Blue Shield and the Medical Association to be part of a coalition to basically revise how the tobacco dollars were going to be spent... Neither one wanted to work with each other on it and I saw that there was no interest, so I just kind of walked away."²² Without the support of the local public health units or the voluntaries Dr. McDonough chose to completely leave tobacco control.

In September 2000 at the annual North Dakota Medical Association (NDMA) meeting a resolution was adopted to support the establishment of a comprehensive CDC-based tobacco prevention and use reduction program created with 1/3 of the tobacco settlement funds. In addition, the NDMA resolved to develop and advocate for legislation during the 2001 legislative session that was consistent with the above goals. The NDMA's resolution was consistent with the Blue Ribbon Tobacco Panel recommendations.²⁴⁴

2001 Legislative Session

In January 2001, the North Dakota Office of the Attorney General sponsored a statewide survey of 801 North Dakota adults on the use of tobacco settlement funds²⁴⁵ to identify opinions on the allocation of the tobacco settlement funds and to determine if opinions have changed since the 1998 survey.²¹⁴ The new survey indicated that 80 percent of those surveyed strongly favored the use of tobacco settlement funds for the reduction of tobacco use among youth and 70 percent wanted at least half of the funds to be used for the reduction of tobacco use among youth. The

favorable responses were a significant increase from the 1998 survey.²⁴⁵

Tobacco control entered the 2001 legislative session without the leadership that had been provided by McDonough for the past decade and without the leadership of Attorney General Heidi Heitkamp. (Heitkamp had been defeated in her bid for Governor in 2000.) However, prior to the 2001 legislative session at a post-Blue Ribbon Tobacco Panel meeting, the North Dakota Medical Association agreed to take the lead in advocating for a comprehensive tobacco control program funded with 1/3 of the tobacco settlement funds. A plan for the allocation of the funds in the Community Health Trust Fund was not developed by the Medical Association or other health advocates.

In a 2004 interview, June Herman explained that a health advocates had not reached a consensus as to the strategy for the 2001 legislation regarding the allocation of the settlement funds in the Community Health Trust Fund. She explained

Tobacco control groups were still opposed to the original 45, 45, 10 split of the tobacco settlement, and feeling that it was wrong, that we should have more than 10% for health. We were still looking at how to deal with the whole issue of how the tobacco settlement was divided. So the settlement percentages was still an issue going forward. Our coalition, and with leadership of the medical association, continued to propose language to legislators to split the settlement differently. Some tobacco control advocates felt if the full CDC recommended level for tobacco prevention wasn't funded, why fuss over just the 10% - it wasn't adequate enough. So there are a lot of people very disillusioned by what the state had done before, and really wanted to stay focused on trying to reallocate the settlement dollars.⁵¹

However, the legislature's primary focus was not increasing funding for tobacco control, but allocating the funds in the Community Health Trust Fund created by HB 1475. Although Sagsveen had been working with the interim Budget Committee on Health Care on the development of his *Healthy Schools, Families, and Communities* proposal between the 1999 and 2001 legislative session, the tobacco control advocates did not develop a proposal for the allocation of the funds in the Community Health Trust Fund. Therefore the Senate and House Human Services Committees were left with the task of developing legislation. The Senate and House Human Services Committees were chaired by Senator Judy Lee and Representative Clara Sue Price (R-District 40), vice-chairs Senator Tom Fischer (R-District 46) and Representative William Devlin (R-District 23). Two different bills for the allocation of the funds in the Community Health Trust Fund were competing in the Senate Human Services Committee early in the legislative session, Senate Bill 2380 allocated all the funds in the Community Health Trust Fund to youth tobacco use prevention and Senate bill 2399 allocated the funds to local public health units through a grant program to local communities (described below) SB 2380 was based upon the recommendations made by the Blue Ribbon Tobacco Panel in 2000, while SB 2399 was based upon Sagsveen's *Healthy Schools, Families, and Communities* proposal developed with the interim Budget Committee on Health Care. Clara Sue Price (R-District 40), House Human Services committee chair, was a co-sponsor of both pieces of legislation indicating that even among those who developed the legislation a consensus did not exist as to the best vehicle for the implementation.

On January 26, 2001, SB 2380 was introduced by Senators Ray Holmberg (R-District 17), Joel Heitkamp (D-District 27), Randy Schobinger (R-District 13) and Representatives Lois Delmore (D-District 43), William Devlin (R-District 23), and Clara Sue Price (R-District 40). The legislation proposed to use \$5.2 million of the settlement funds for youth smoking prevention. In an attempt to insulate the program from the political problems in the Department of Health it also created a youth smoking prevention commission to exist as a separate entity from the state health department. The legislation required the development of a youth smoking prevention plan that was “a sustainable long-term, comprehensive program that integrates science-based, comprehensive, and effective programs including countermarketing and public education programs, community-based programs, chronic disease programs, treatment of tobacco dependence, school-based programs, enforcement programs, and statewide programs which includes a mechanism for ongoing monitoring and evaluation of the program.”²⁴⁶ The plan required by the legislation contained the seven program areas outlined in the *Blue Ribbon Tobacco Panel* report including community programs, school programs, counter-marketing and public education, tobacco dependence treatment, statewide programs, enforcement, and chronic disease programs.²¹³ Regarding health advocates role, Bruce Levi explained, “NDMA, Heart, Cancer and Lung Associations were attempting to fit the NDMA resolution/Blue Ribbon panel report into a vehicle, which ultimately was identified in SB 2380 very close to the bill introduction deadline. I recall this as a particularly long and difficult process of discussion with key legislators, through which we distributed a copy of the Blue Ribbon report to every legislator.”²⁴⁴

On January 29, 2001 SB 2399 was introduced by Senator Tom Fischer (R-District 46) and Representative Clara Sue Price (R-District 40). SB 2399 proposed to allocate \$7 million in settlement funds as follows: \$1 million for public health emergencies, \$1 million for state aid to local public health units, \$2 million for healthy schools grant program, \$2 million for healthy communities grant program, \$750,000 for statewide tobacco counter marketing media campaign, and \$250,000 for public anti-tobacco education. SB 2399 was the result of the work done by the interim Budget Committee on Health Care which included Sagsveen’s *Healthy School, Communities, and Families* grant program.²⁴⁷

In early February 2001, American Heart Association director of advocacy June Herman was approached by Governor Hoeven’s (R) health policy advisor regarding his intention to propose that the funds in the Community Health Trust Fund be allocated to tobacco prevention and control programs. On February 8, 2001 Governor Hoeven announced his proposal for a statewide tobacco control plan. Hoeven proposed \$7.3 million for the 2001-2003 biennium dedicated to tobacco control to implement programs at the state and local level based on the CDC’s Best Practices for Comprehensive Tobacco Control Programs.²⁴⁸ \$5 million of the funding was slated to be drawn from the 10% of tobacco settlement funds allocated to public health by the 1999 legislature. The remaining \$2.3 million was to come from federal CDC funding. \$7.3 million was three times the amount allocated to tobacco control for the 1999-2001 biennium via CDC federal funds. The governor’s proposal recommended that the funds would be distributed to local public health units through a grant program.²⁴⁹ The CDC minimum recommendations for funding of tobacco control programs in North Dakota was \$8.2 million.

The governor wanted to gauge the interest of the health advocates in his proposal.⁵¹ American Heart Association and American Lung Association felt it was necessary to move

forward on the Governor's proposal which would secure the 10% of the settlement funds allocated to the Community Health Trust Fund for tobacco control.

After the governor announced his proposal, SB 2380 became the chosen vehicle for the allocation of the dollars in the Community Health Trust Fund. SB 2399 was given a do not pass recommendation by the committee and subsequently failed by a unanimous vote on the Senate floor on February 15, 2001. It failed simply because SB 2380 was chosen as the preferred implementation vehicle by the legislature. There was no strong testimony either in favor or opposition to SB 2399. However, portions of Sagsveen's proposal were carried over into SB 2380 including community-based funding through a local grants program, school health funding, and state aid to local public health units. SB 2380 received a favorable recommendation from the committee on February 13, 2001.

Senator Joel Heitkamp (D- Hankinson), Senate assistant minority leader and co-sponsor of SB 2380, was critical of Hoeven's proposal because it neglected the recommendations of the Blue Ribbon Tobacco Panel and was too vague.²¹³ Joel Heitkamp was quoted "They've got a blueprint already. It's people from all over North Dakota, not looking at what political party they are, who did a bunch of work, and it seems to be dismissed." While June Herman, American Heart Association, and Susan Kahler, American Lung Association of North Dakota supported Hoeven's proposal as a starting point for the allocation of the funds in the Community Health Grant Program to tobacco control and prevention.²⁵⁰

In testimony before the House Human Services Committee Joel Heitkamp, cosponsor of the bill, stated "SB 2380 really is a work in progress. Unfortunately for your committee, you're going to have to mold it into something that works. People walking around those hallways up there fall into two categories: the category of 'look that was 10% of the settlement what was part of the law settlement and we've got to put the money into it but I don't believe tobacco cessation works'. Then there are those people who say 'tobacco cessation works' North Dakota is one of the few states where tobacco youth is on the rise. Part of that reason is that we don't have a comprehensive tobacco cessation program."²⁵¹ Senate Majority Leader Gary Nelson (R) fell into the earlier category described by Heitkamp. He told reporters "For years we've been getting federal grants – in the \$1.5 million range – for school districts for smoking, drugs, and alcohol programs, and yet I keep seeing the figures that North Dakota's teen-agers are smoking at higher rates. I have a hard time spending (the settlement money) on a program that hasn't been effective."²⁵² Nelson was repeating tobacco industry rhetoric that tobacco control programs had not been shown to work which is countered by the actual evidence as summarized in Surgeon General report on the subject, CDC Guidelines, and an IOM report on the subject.^{248, 253, 254}

On January 31, 2001 Bruce Levi, Executive Director of the North Dakota Medical Association, testified before the Senate Human Services Committee on Senate Bill 2380. Levi stated "We encourage the committee to take steps to begin development in North Dakota of a *comprehensive* approach to tobacco prevention. While the language in SB 2380 supports a comprehensive approach, the implementation language is devoted entirely to 'youth smoking' prevention, including the composition of the proposed commission, the scope of the ongoing planning process, and the grants that would be made available."²⁵¹ The NDMA proposed amendments to SB 2380 "revise the provisions of the bill, including the commission structure and

scope of grant authority, to recognize a more comprehensive approach.”²⁵¹

SB 2380 was modified throughout the legislative session to incorporate portions of SB 2399, Hoeven’s proposal, and recommendations of health advocates. Health advocates, led by the North Dakota Medical Association, were involved with the modifications to SB 2380.

On March 6, 2001 Bruce Levi, North Dakota Medical Association Executive Director, testified before the House Human Services Committee on Senate Bill 2380. Levi stated “The North Dakota Medical Association supports the forward steps represented by Reengrossed SB 2380 in establishing a mechanism within the ND Health Department for developing an adequately funded, comprehensive tobacco prevention and treatment dependency program in our state.” Levi further stated “Using the CDC *Best Practices* as a guidance as to minimum recommendations for an effective tobacco prevention program, the Medical Association proposes the following amendments to Reengrossed SB 2380: The proposed amendments would allocate in the future one-third of the tobacco settlement funds to a state tobacco prevention fund for the purpose of implementing the tobacco use prevention and dependence treatment plan, subject to future appropriation by the Legislative Assembly... The proposed amendments would ensure that the CDC *Best Practices* form the basis for the state plan.” Throughout the evolution of SB 2380 the NDMA continued to advocate for a reallocation of the tobacco settlement funds.

After a series of amendments (Table 6) SB 2380 was passed by legislators in April with the bulk of the funds in the Community Health Trust Fund allocated to the local public health units through a grant program administered by the state department of health for tobacco use prevention and reduction programs.

Health advocates approached the 2001 legislative session disillusioned due to the minimal amount of settlement funds allocated to public health during the 1999 legislative session and discouraged with the situation at the State Health Department under Sagsveen’s management. Health advocates were disjointed due to Sagsveen’s management style and their own loss of leadership, therefore advocates did not effectively move beyond the 1999 legislative session to develop legislation for the allocation of the funds in the Community Health Trust Fund. Although Sagsveen had worked with the interim Budget Committee on Health Care to develop a legislative proposal which was introduced as SB 2399, health advocates had not prepared a counter proposal. Sagsveen was successful in laying the groundwork for the Community Health Grants Program, however the legislature due to the presence of health advocates led by the NDMA placed a larger emphasis on tobacco control than Sagsveen had outlined in his proposal. In the end, the governor and the legislature allocated the funds in the community health grant program in a manner that was favorable to tobacco control at the local level even without full mobilization of health advocates behind any specific plan. However, health advocates played a role in the shaping of the final version of SB 2380.

Table 6: Evolution of Senate Bill 2380

| | |
|--------------------|---|
| SB 2380 | Community Health Trust Fund: Introduced as an act to establish youth smoking prevention commission, youth prevention fund, state plan for youth smoking prevention |
| First engrossment | Amended to tobacco prevention commission, tobacco prevention fund; allocated first \$1 million for public health emergencies,\$1 million for state aid to local public health units, \$2 million to fund healthy schools grant program, \$2 million to fund health communities grant program, \$750,000 for statewide tobacco counter marketing program, \$250,000 for anti-tobacco educational materials to schools |
| Second engrossment | Added state plan for tobacco prevention and dependency, amended allocation to \$1 million for state aid for local public health units, \$4 million for healthy schools and healthy communities grant program, \$1 million for statewide tobacco counter marketing program, remainder of funds for public health emergencies and for tobacco prevention grants program |
| Enrollment | Community Health Trust Fund: Establish Community Health Grants Program with primary purpose to prevent or reduce tobacco usage in the state by strengthening community-based public health programs and by providing assistance to local public health units and communities throughout the state, grants awarded on a non-competitive basis, program must, to the extent of funding available, follow guidelines established by the centers for disease control and prevention, not more than 5% of funds for surveillance and evaluation, 40% of funds to public health programs with an agreement with school board for preventative health programs, 40% of funds to public health program programs developed in cooperation with local elected officials, 20% to public health units to supplement existing state aid, established community health grant program advisory committee |

Structure of the Community Health Grant Program

Senate Bill 2380 as passed called for the creation of a Community Health Grant Program. The legislation allocated \$4.7 million per biennium to local public health units with an emphasis on the reduction of tobacco use in the state.⁹ The legislation stated “The state department of health shall establish a community health grant program. The primary purpose of the program is to prevent or reduce tobacco usage in the state by strengthening community-based public health programs and by providing assistance to public health units and communities throughout the state.”²⁵⁵ The breakdown for the funds was 40% of all funds to be granted to public health units that have agreements with school boards regarding preventive health programs, 40% of all funds to be granted to public health units that have developed preventive health plans in conjunction with local elected officials, 20% of all funds to be granted to public health units in the form of state aid to be used at their own discretion to meet their health needs.²⁵⁶ The legislation also mandated the creation of a Community Health Grant Program Advisory Committee. In 2002, the allocation of MSA funds to tobacco control in North Dakota was at 31 percent of the CDC's Best Practices lower estimate for a comprehensive tobacco control program.⁹

SB 2380 outlined specific guidelines for the Community Health Grant Program. The

Community Health grants are awarded by the State Department of Health on a non-competitive basis using a per capita allocation system. The legislation stated “the program must, to the extent funding is available follow guidelines concerning tobacco prevention programs recommended by the centers for disease control and prevention.”²⁵⁵ In an interview in 2003, Kathleen Mangskau, State Health Department Tobacco Prevention and Control Program administrator, observed “According to the law, the money had to be spent to the extent possible based on CDC Best Practices for Comprehensive Tobacco Control Programs. We felt this was a distinct advantage to be able to focus our community efforts on tobacco control. If those requirements had not been in the law, the money could have been used for almost anything. This requirement helped to focus the spending on tobacco control.”^{30, 39} The key to the focus of the Community Health Grant program on tobacco control is that all grants are screened and implemented by the State Department of Health Tobacco Control and Prevention program and the Community Health Advisory Committee (discussed below). The Tobacco Control and Prevention Program administrator and Community Health Advisory Committee play a very central role in ensuring that the funds are used for tobacco control and prevention programs.

The law required that the school grant program develop preventive health plans in conjunction with students and contain a plan for the reduction of student tobacco use. The school preventive health program is required to include tobacco-free policies, evidence-based curricula, teacher training, involvement from parents, and cessation services for students and staff.²⁵⁵ The law required that the community grant program develop preventive health plans in conjunction with elected officials in the jurisdiction of the local public health unit and the plan must include strategies for the reduction of tobacco use by residents covered by the public health unit, but may also include other programs for chronic disease. The guidelines encourage the plans to develop and implement interventions in conjunction with youth, build partnerships with local organizations, conduct local educational programs, promote tobacco control policies such as clean indoor air and youth access, restrict youth access to tobacco, and promote smoking restrictions in public places.²⁵⁵

The role of the Community Health Grant Program Advisory Committee was also outlined in SB 2380. The State Health Officer is the chair of the committee and is charged with appointing members to the committee in conjunction with the Governor. The State Health Officer is required to appoint the State Health Department Tobacco Control and Prevention administrator, one high school student, one college student at a North Dakota institution, one representative of a non-governmental tobacco control organization, and a law enforcement officer. The committee’s membership was required to include a representative of the North Dakota Indian Affairs Commission, a representative of the North Dakota Public Health Association, the superintendent of public instruction or superintendent’s designee, an academic researcher with expertise in tobacco control, and a physician appointed by the North Dakota Medical Association. (See Table 7)

Table 7: Membership of Community Health Grant Program Advisory Committee, 2001

| | |
|--|---|
| State Health Officer | Individual Appointed by the North Dakota Public Health Association |
| State Tobacco Control Administrator | Superintendent of Public Instruction or the |
| High School Student | Superintendent's Designee |
| College Student | Academic Researcher with Tobacco Control Experience Appointed by the University of North Dakota School of Medicine Dean |
| Representative of a Nongovernmental Tobacco Control Organization | Physician Appointed by the North Dakota Medical Association |
| Law Enforcement Officer | Individual Appointed by the North Dakota Indian Affairs Commission |

Source: ²⁵⁵

The state Department of Health, in conjunction with the Community Health Grant Program Advisory Committee, is required to provide assistance to the local public health units with their implementation of program evaluation, provide assistance with media programs, provide assistance with the implementation of smoke-free policies and youth access policies, provide assistance with program coordination at the local level, provide assistance with involving state agencies, law enforcement, and local government in the program, and provide full oversight of the Community Health grants including the screening and implementation of grants. The State Health Officer is charged with the implementation of the Community Health Grant Program and required to report to the legislature on the status of the CHGP when requested.²⁵⁶

A statewide media campaign with a focus on secondhand smoke also was the result of the Community Health Grant Program's first year in operation in 2001. The media campaign was not mandated in SB 2380, however countermarketing is a component of the CDC "Best Practices"²⁴⁸ upon which SB 2380 is based. The media campaign was a joint effort between the state health department and the local public health units with a goal of public education on secondhand smoke for the purpose of creating smoke-free environments. The state and local public health departments saw the collaboration as an important step towards a comprehensive tobacco control program in North Dakota. The campaign was funded with CDC and Community Health Grant Program funds from all 28 local public health units. In 2003 the budget for the media campaign was \$375,000. The media campaign was administered by the Statewide Public Education Task Force composed of representatives of the state and local public health departments.^{18, 30, 39}

In October 2001 prior to the local public health units receiving their funds, meetings were hosted by the Department of Health Tobacco Prevention and Control Program for the local public

health units as informational sessions on the Community Health Grant Program and to provide assistance on determining how the money should be spent. Training was sponsored by the Tobacco Prevention and Control Program in conjunction with the Centers for Disease Control, Office on Smoking and Health, and the American Cancer Society for local public health units on the implementation of community assessments and the development of strategies and plans for tobacco control and prevention based on CDC Best Practices and the American Cancer Society's "Communities of Excellence"^{248, 257} model.⁹

By Spring 2002, the Community Health Grant Program (CHGP) was in operation and all of the 28 local public health units in North Dakota had received funding for tobacco control.⁹ Due to the administrative time necessary to set up the CHGP during the first biennium of funding, local public health units did not receive their funds from the 2001 budget until 2002. The Community Health Grants Program allowed the state tobacco control program to expand its local grant program funding from 11 public health units to all 28 plus all tribes in the state.

The State Department of Health Tobacco Control and Prevention Program administered the Community Health Grant Program without any additional resources appropriated to the Department for this function. Mangskau explained "the dilemma for the state tobacco control program was that they were asked to administer the \$4.7 million grant program, but received no additional resources or staff to carry it out. The mandate stressed the current staff, as the program was adequately staffed to administer the \$1.1 million CDC grant, not the additional funds in the Community Health Grant Program."^{30, 39} In 2001, Community Health Grant Advisory Committee funds were appropriated to the state health department and the Advisory Committee determined the funds would be used for consultants for technical assistance to the local grantees and to assist in the Community Health Grant Program evaluation.

Regarding the effectiveness of the CHGP in addressing tobacco control Mangskau stated, "Part of what I think has really helped us is the language in the law and secondly the fact that we have an advisory committee that has really interpreted the law very strictly. And that has been a real positive for the community in terms of trying to assure that the dollars are going to tobacco control."¹⁸

Community Health Grant Program Budget

The distribution of the \$4.7 million per biennium was as follows: \$1,880,000 for school preventive health programs, \$1,880,000 for community preventive health programs, and \$940,000 for state aid for local public health units. The remainder of the settlement funds in the Community Health Trust Fund were allocated as follows: \$100,000 was allocated for a Community Health Grant Program Advisory Committee, \$250,000 for pilot city and county cessation, \$114,755 for medical assistance for breast and cervical cancer, and \$180,000 for a dental loan repayment program.⁹ The Tobacco Control and Prevention Program also received \$2.2 million in CDC funding with approximately \$220,000 in local matching funds for the 2001-2003 biennium.³⁰

The \$1,880,000 for school preventive health programs was allocated to the public health units based on enrollment in public, nonpublic, and home schools. The \$1,880,000 for the community preventive health programs is allocated based on population. If the area covered by a

public health unit had a population of less than 10,000, they receive a base of \$5,000 and for any additional population over 10,000 the money is allocated on a per capita basis. Public health units with populations over 10,000 are allocated funds on a per capita basis. With the \$940,000 in state aid, all public health units receive a \$9,400 base with the remainder of the funds distributed on a per capita basis.³⁰

The Master Settlement Agreement funds increased the money in the tobacco prevention and control local grants program from \$670,000 to over \$3 million per year in 2001.⁹ The \$3 million was a combination of settlement funds allocated to the Community Health Grant Program and CDC funds allocated to the Tobacco Prevention and Control local grants program.

Conclusion

The lack of support for tobacco control by the governor and state health officer set the stage for the allocation of the Master Settlement Agreement funds. Health advocates failed to mobilize behind a plan for the allocation of the fund to tobacco control during the 1999 legislative session. Therefore the allocation was primarily determined by the administration and the legislators which resulted in only 10% of the funds in the Community Health Trust Fund. However, health advocates had a second opportunity to advocate for the allocation of the Community Health Trust Fund dollars to tobacco control and prevention during the 2001 legislative session. Although health advocates did not develop legislation prior to the legislative session, health advocates influenced the Governor's (Hoeven) proposal and shaped the final version of SB 2380. Fortunately, the legislature allocated the majority of the funds to local public health units with an emphasis on tobacco control in the Community Health Grant Program. Through the administration of the Community Health Grants program the State Department of Health Tobacco Prevention and Control Program has been able to ensure that the funds are being utilized exclusively for tobacco control. Although disappointed by the level of funding, health advocates should recognize that the direction of the money to the local public health units is an advantage. Local tobacco control policy has a successful history in North Dakota, while the tobacco industry has completely thwarted state level tobacco control policy. Tobacco control advocates can defeat the tobacco industry through grassroots advocacy at the local level in North Dakota. The infusion of the Master Settlement funds into the local communities provided additional resources to achieve this goal.

TOBACCO CONTROL AT THE LOCAL LEVEL

In the early 1990's, tobacco control leadership including Dr. Stephen McDonough, chief of the Preventive Health Section of the State Department of Health, and Jeanne Prom, State Department of Health Tobacco Prevention and Control administrator (1992-2001), realized efforts to pass state-level tobacco control policy were being thwarted by a powerful tobacco lobby. Wisely, the advocates chose to shift the focus from state to local politics where the tobacco industry has much less influence. The tobacco industry's superior financial resources are not as effective in exerting influence over politicians at the local level. Local politicians are directly responsible to their constituents who are often times their colleagues and neighborhoods, which attenuates the effect of the tobacco lobby. Passage of local tobacco control policy is primarily dependent upon the magnitude of the efforts of health advocates to mobilize in support of

policy.¹⁵⁹

The first local tobacco control ordinance was passed by the Grand Forks City Council in 1990 without funding from the State Health Department. The ordinance restricted the placement of vending machines to locations that were not accessible to minors. According to Kathleen Mangskau, Tobacco Prevention and Control administrator at the State Health Department (2001-time of this report), “Tobacco control leaders interpreted this as acceptance of local jurisdiction over tobacco, and the State Legislature and other state officials were no longer the exclusive gatekeepers of tobacco law in North Dakota.”⁹ The State Health Department began providing grants to local public health units for tobacco control in 1992 (funding has continued through the time of this report). The State Health Department entered contractual agreements with the local public health units for the passage of tobacco vending machine restriction ordinances. After the passage of five vending machine restriction ordinances in 1992, the State Health Department changed the funding focus to local tobacco retailer licensing ordinances in 1993. Jeanne Prom explained that in 1995 “the grants to locals evolved into very open-ended contracts that required they pursue activities that would lead to one or more of the CDC tobacco grant goals.”³⁴ Prom went on to explain the relationship between the State Health Department and the local public health units, “My philosophy and practice as the state program director at that time was to respect local autonomy, lead by example and be quite “hands off” bureaucratically speaking (e.g., reporting to the state was kept as a minimum – simple 6-month and one year reports).”³⁴ Local public health units participated in Tobacco Free North Dakota meetings in addition to attending CDC sponsored training (Tobacco Use Prevention Training Institute) and the national tobacco conference. Prom explained “During the course of my 10 years at the health department, I didn’t have any staff except a part-time secretary. The program was very decentralized. So, I had to rely on locals going to out-of-state training to get some of the necessary training; I couldn’t do it all myself in North Dakota.”³⁴

The role of the Tobacco Prevention and Control Program from 1992 through 2003 was as a funding and training agency for local public health units and local coalitions advocating for city tobacco control ordinances and policies.⁹ Kathleen Mangskau, State Department of Health Tobacco Prevention and Control administrator explained, “The funding allocated to local public health units was used primarily to support local infrastructure, so that we had a tobacco coordinator at each local site. The funding was also used to support local coalitions because we recognized that to drive policy change, it’s not one person working alone, but rather an effort of many individuals in the community.”^{30, 39} Jeanne Prom explained that while youth access was the focus of the ordinances during the 1990’s, education on smoke-free environments was simultaneously being done. The Tobacco Prevention and Control Program provided direction to the local public health units based upon the four CDC goal areas, however the primary role of the State Health Department was training and technical assistance.³¹

Throughout the 1990’s, the primary focus of local ordinances was youth access, however the focus evolved into smoke-free indoor environments due to guidance from the State Health Department and national trends. A total of 38 local youth access ordinances were passed through the end of 2003, in addition to a smoke-free restaurant ordinance in Minot.

The concept of local control is embodied in Chapter 40-05.1 of the North Dakota Century

Code, which is law allowing home rule in cities. The code states “Any city may frame, adopt, amend, or repeal home rule charters.”²⁵⁸ Therefore, North Dakota state law allows local communities to adopt tobacco control policy which is stricter than what has been adopted at the state level. The allowance of home rule charters and the strong sense of local control in North Dakota has greatly contributed to the success of tobacco control policy at the local level.

In an interview in 2003, Jeanne Prom explained

There’s always been, I think, in North Dakota in general in all cases a real emphasis on local control which can be a very good thing for tobacco control because we don’t like preemption. Even tobacco-friendly legislators will not be in favor of preemption simply on the philosophy that local control is very important. That’s the up side. The down side is that not everything is best handled locally. It’s hard to push a statewide agenda and get major impact on any health problem if you don’t have everyone across that state doing the same thing, working toward the same goal.²³

The Tobacco Industry’s Response

In a Tobacco Institute internal general strategy document titled “Industry Programs to Achieve Local Objectives” the industry strategy for combating local anti-tobacco policy was detailed. The strategy had five main objectives: 1) Create timely monitoring systems to alert the industry of the introduction of anti-tobacco proposals 2) Hire local advocates 3) Have necessary resources available 4) Maintain regular communication with industry management 5) Make campaign contributions to local candidates.²⁵⁹ The tobacco industry used these strategies to combat local ordinances in North Dakota throughout the 1990’s.²⁵⁹

GRAND FORKS, NORTH DAKOTA

Grand Forks with a population of approximately 50,000 is located in northeastern North Dakota.

Sales Restrictions

Grand Forks passed the first local tobacco ordinance in the state prior to the allocation of Health Department funds to local communities for tobacco control. City council member Doug Carpenter was the champion of a cigarette vending machine restriction ordinance that restricted vending machines to establishments with liquor licenses. Carpenter was the key to the introduction and successful passage of the ordinance. At this time there were no resources at the Grand Forks Public Health Department allocated to tobacco control and there was not a local tobacco control coalition in existence.²⁶⁰ Debbie Swanson at the Grand Forks Health Department provided technical assistance and information to Carpenter in his efforts to pass the vending machine restriction ordinance.²⁶¹ Swanson explained that a survey conducted by the Grand Forks City Attorney had found a local youth was able to purchase cigarettes from vending machines at 15 out of 16 locations surveyed. The ordinance drafted by the City Attorney was first discussed in a Grand Forks City Council Public Safety Committee meeting on July 23, 1990. The Public Safety Committee had three members: chairman Gwen Crawford, and members Bruce Hanson and Jerome Hepner. The full city council had 14 members. During the Public Safety Committee

meeting a motion was passed to recommend that the ordinance be heard and passed by the full City Council.^{262, 263}

The tobacco industry was very closely monitoring the proposed ordinance. Only three days after the passage of the ordinance by the Public Safety Committee the Washington, DC-based Tobacco Institute noted on July 26, 1990 that the Grand Forks Public Safety Committee passed a vending machine ordinance on July 23, 1990 and that the ordinance was sent to the full city council.²⁶³

In addition to monitoring, the tobacco industry was actively involved in mobilizing opposition to the proposed ordinance. Albert Wolf, Tobacco Institute lobbyist at Wheeler Wolf Attorneys in Bismarck, composed a letter to Hurst Marshall, Tobacco Institute Vice President dated July 26, 1990. The letter included a detailed analysis of the Grand Forks vending ordinance. City Council member Doug Carpenter, a loan officer at First National Bank, was named as the main proponent of the ordinance. Larry Kraft, Professor of Law at University Law School in Grand Forks, was named as a proponent of legislation restricting access to cigarettes across North Dakota. Wolf reported that he visited directly with Howard Swanson, Grand Forks City Attorney, twice after the ordinance was passed by the committee. He was informed by Swanson that the ordinance had been in the development process for six months and that other ordinances from the area (Minnesota) were studied before the final Grand Forks ordinance was proposed.²⁶² In a 2004 interview, Jeanne Prom explained that Carpenter's motivation to introduce the ordinance was the result of similar ordinances being enacted in Minnesota.³¹

Wolf reported visiting with Morley Waltman, of Continental Vending Grand Forks, who owned 60 cigarette vending machines in the area five of which were in bars. He also visited with Jim Carlson, A & H Vending, Grand Forks. Waltman and Carlson had also attended the meeting of the Public Safety Committee on July 23, 1990. Wolf stated that he would be providing Waltman and Carlson with information to use when talking with council members and "alternate language that could be used to seek a compromise with the proponents of the City Commission."²⁶²

Wolf also reported to the Tobacco Institute that he had also been in contact with R.J. Reynolds lobbyist, Lawrence Bender, and Phillip Morris lobbyists, Ginny Corwin and Gerridee Wheeler, concerning the proposed ordinance. Wolf asked if he could

provide proposed language for possible city ordinance enactments to persons in the Grand Forks area to be provided to the City Commissioners between the August 20th meeting when the full city council will be considering this proposal. At that time if they wish to pursue it further, they would set a public hearing and a time to act upon the city ordinance.²⁶²

Wolf also reported that there are

a couple of Grand Forks legislators who could deal with the Grand Forks situation, as well as becoming sponsors and giving notice in advance of the intended legislation on a state level that would pre-empt local ordinances and create a uniform statewide situation [i.e., preemption].²⁶²

On August 20, 1990, the city council approved the vending restriction ordinance with a 13 to 1 vote on first reading. Due to the opposition of Grand Forks tobacco vendors to the ordinance five city council members switched positions to support a reduction in the severity of the cigarette vending machine restrictions on second reading on September 3, 1990. Two council members were absent, therefore the council vote was at 6 to 6 for the proposal to go back to the Public Safety Committee for reconsideration. Mayor Michael Polovitz was responsible for the deciding vote to pass the original ordinance. In an effort to stall the ordinance Councilman Frank Coe proposed that the ordinance not become effective until January 1, 1991. The vote on the proposal was again 6 to 6 with the deciding vote of the mayor going in favor of the ordinance becoming effective October 1.²⁶⁴ According to Swanson “the dramatic way that the City Attorney and City Council member provided testimony at the City Council meeting (i.e., having a 13 year old display the packs of cigarettes he purchased) was instrumental in gaining support from Council members to pass this ordinance.”²⁶¹

The final ordinance prohibited sales of cigarettes through vending machines except for machines located in bars and liquor stores. The ordinance became effective October 1, 1990.²⁶⁴ The ordinance included a penalty of a \$500 per day fine for anyone selling cigarettes illegally through vending machines.

Although tobacco control leaders chose to shift their focus from state to local politics in the early 1990's due to the tobacco industry's dominance at the state level, the situation in Grand Forks indicates that the tobacco industry was one step ahead and closely monitoring activity at the local level. The cigarette vending machine restriction ordinance narrowly passed due to the tobacco industry's rapid mobilization of its local allies. The passage of the vending ordinance in Grand Forks provides evidence that although the tobacco industry was active at the local level, their influence over local elected officials was not strong enough to prevent tobacco control policy.

The passage of the 1990 Grand Forks vending machine restriction ordinance contributed to the shift in the focus of tobacco control policy from the state to the local level. In 1992, under the direction of Dr. Stephen McDonough and Jeanne Prom from the State Department of Health Tobacco Prevention and Control Program began funding local public health units for tobacco control, specifically coalition building and the passage of youth access ordinances. Through the funding received from the State Health Department, the Grand Forks Tobacco and Youth Coalition was formed in 1992. The name was later modified to the Grand Forks Tobacco Free Coalition. The coalition received direction from the Grand Forks Public Health Department and leadership was provided by Grand Forks Public Health Department tobacco program coordinators. The early focus of the coalition was public education and the passage of youth access ordinances.²⁶⁰

As discussed earlier, during the 1993 legislative session health advocates made an unsuccessful attempt to pass state-wide local licensing requirements. Although unsuccessful at the state level, local tobacco control advocates took on the issue of local licensing. R. J. Reynolds and Philip Morris were tracking the situation when the Grand Forks Public Safety Committee scheduled a May 22 hearing for a proposed local licensing ordinance with self-service display restriction supported by the Grand Forks Tobacco Free Coalition.²⁶⁵ A self-service display restriction limits the placement of tobacco products to areas behind the counter that require the assistance of the clerk for purchase.

Bob Fackler, Grassroots Consulting Plymouth, Minnesota, had alerted tobacco retailers of the proposed local licensing and self-service display restriction ordinance and hosted a briefing and strategy meeting with approximately 35 retailers on May 19. The activity in Grand Forks was also being monitored by Thomas C Griscom, R.J. Reynolds Executive Vice President of External Relations.²⁶⁶ The industry mobilization was effective. On June 12 the Grand Forks Public Safety Committee voted to remove the self-service display restriction from the ordinance. The ordinance was scheduled to be heard in front of the full city council on June 19.²⁶⁷ In a report to Thomas C Griscom, R. J. Reynolds Executive Vice President of External Relations, T. Hyde reported to Griscom that “Before making its decision, the committee heard very strong testimony from many constituencies, including school children, health officials, doctors and those from the retail trade.” Hyde also reported that local retailers had been notified of the city council meeting and encouraged to attend by the tobacco industry.²⁶⁷ R.J. Reynolds and Philip Morris both tracked the progress of the ordinance within days of the decision of the Grand Forks Public Safety Committee.²⁶⁷

At the first reading of the ordinance the full Council accepted the recommendation of the Public Safety Committee and eliminated all mention of self-service display restrictions in the proposed ordinance. The City Council also eliminated the requirement for clerks selling cigarettes to be 18 years of age. The amended ordinance passed on first reading with a 12 to 2 vote. After the amendments the ordinance contained provisions for local licensing of tobacco retailers and retailer penalties for sales to minors including license suspension for multiple offenses. The licensing provisions required all tobacco retailers, dealers, wholesalers, and distributors to obtain a retail tobacco dealer license from the City Auditor for the sales of tobacco products. In addition, the ordinance required warning signage to be posted regarding the legal age to purchase tobacco products.²⁶⁸

The attendance for the city council meeting was approximately 25 with a half and half split of opinion on the ordinance. The Grand Forks Tobacco Free Coalition was encouraged by the city council to work voluntarily with retailers to prevent youth access to tobacco. R. J. Reynolds had again informed retailers of the City Council meeting and encouraged the support of the Public Safety Committee's recommendation to eliminate the provision that restricted self-service displays.²⁶⁹

An R. J. Reynolds Public Issues Update for July 24 - 28, 1995 by Hyde to Griscom stated that the Grand Forks City Council passed the amended version of the ordinance which did not include a self-service display restriction. Hyde attributed the tobacco industry's success to the fact that “a strong group of retailers testified at the hearings and negotiated with the city staff in order to bring about a compromise.” Bob Fackler, Grassroots Consulting, Plymouth, Minnesota, was credited with mobilizing the retailers which improved retailer turnout at the hearings for the ordinance.²⁷⁰ Swanson stated that the opposition to the ordinance was retailers, grocers and the Petroleum Marketers Association.²⁶¹ An Associated Press article on July 19, 1995 documented that the ordinance was opposed by retailers and subsequently the ordinance was adjusted to address their concerns; it did not mention the tobacco industry, despite its role in organizing the opposition.²⁷¹ The ordinance was became effective on January 1996.²⁷² The tobacco industry was able to effectively mobilize retailers in opposition to the ordinance and subsequently obtained an ordinance slightly more favorable to their interests. However, Grand Forks health advocates were

successful in securing the passage of an ordinance that further strengthened the power of local government in tobacco regulation through local licensing requirements.

The history of local tobacco control policy in Grand Forks documents the evolution of tobacco industry involvement in local politics in North Dakota. In 1990, although the tobacco industry attempted to defeat the vending machine restriction ordinance they did not have a sufficient network in place to adequately mobilize retailers in opposition. By 1995, the tobacco industry had refined its strategy and was successful in mobilizing retailers to obtain a watered down version of the original ordinance proposed by health advocates. However, health advocates were able to match the resources of the tobacco industry at the grassroots level and retain the local licensing portion of the ordinance.

BISMARCK, NORTH DAKOTA

Bismarck, located in western North Dakota, is the state capitol. With a population of approximately 55,000, Bismarck is the most populous city in the western half of the state.

The Bismarck Youth Tobacco Coalition was formed in 1992 through the first funding to local public health units for tobacco control from the State Health Department. In 1998, the name of the coalition was changed to Bismarck Tobacco Free Coalition to expand the emphasis of the coalition beyond youth. Pat McGeary, RN served as coalition coordinator from 1992 through the time of this report (2004).²⁷³ The coalition is funded by the state Community Health Grants Program, community contributions, and private foundation grants. In 2003, the coalition had approximately 40 active members which included representatives of business, representatives of government, health groups including American Cancer Society and North Dakota School of Respiratory Care, and local physicians. The coalition has assisted with the passage of three local tobacco control ordinances regarding the sales and marketing of tobacco products: 1) tobacco vending machine restrictions (1992), 2) self-service display restrictions (1996), and 3) penalties for repeat illegal sales of tobacco products (1999).²⁷⁴

Table 8: Bismarck Tobacco Free Coalition Board Members (2003)

Wanda Belgarde, School Tobacco Prevention Coordinator, Bismarck Burleigh Public Health
Beth Hughes, ND School of Respiratory Care, St. Alexius Medical Center
Pat McGeary, Community Tobacco Prevention Coordinator, Bismarck Burleigh Public Health
Deb Knuth, American Cancer Society
Jeanne Prom, Center for Health Promotion, UND School of Medicine
Tim Kingstad, 920 Arthur Dr. Bismarck
Source:²⁷³

Sales Restrictions

In 1992, a vending machine restriction ordinance that limited the placement of cigarette vending machines to establishments licensed to sell alcoholic beverages was passed in Bismarck. Similar ordinances were passed in Devils Lake, Fargo, Jamestown, Minot, Valley City, and

Williston around the same time, with help from funding provided by the state health department to local communities for coalition building and the passage of youth access ordinances. According to Pat McGeary the mission to pass vending restriction ordinances was directed by the state health department “but the local coalition immediately embraced the mission.”²⁷³ The ordinance was passed with the unanimous support of the Bismarck city commission and the mayor. Regarding the presence of opposition McGeary recalled “No, that was an easy one. Opposition showed, but not like at all what you experience now.”²⁷³ Opposition to the ordinance consisted of a local vending machine company, Delmar Vending Machines, and Al Wolf, the Tobacco Institute lobbyist. As in Grand Forks, the tobacco industry did not yet have the network in place to mobilize retailers in opposition to the vending restriction ordinance.

A Philip Morris Government Affairs Weekly Report dated December 8, 1995 documented that an ordinance was proposed in the Bismarck City Commission that would mandate local licensing for tobacco retailers.²⁷⁵

In December 1995 the Bismarck City Commission accepted the introduction of an ordinance proposed by the Bismarck Youth Tobacco Coalition regarding local licensing for tobacco retailers. The coalition wanted an ordinance that required local licensing for retailers because of their concern over increasing rates of tobacco use among Bismarck junior high and high school students and due to direction of the state health department. According to McGeary compliance checks in 1993 had indicated that 88% of tobacco retailers sold tobacco products to minors.²⁷³ The coalition did retailer education through the STORM (Stop Tobacco Over the Counter Retailing to Minors) Program through the next three years, which helped reduce the percent of retailers illegally selling to minors to 25%. Despite this progress, the coalition felt that an ordinance was necessary to address the 1 in 4 retailers still providing tobacco products to minor in 1995.²⁷³

The ordinance was introduced and sponsored by City Commissioner Bryce Hill. The proposed ordinance included strict penalties for retailers who sold tobacco products to minors. First time retail offenders of tobacco sales to minors were penalized with a \$250 fine. If a retailer committed a second offense within two years of the first offense he/she faced license suspension of up to 30 days. Violations in excess of two within a two year period would be penalized with “indefinite suspension or revocation” of the retailer’s license.

Mike Hinman, Bismarck City Commissioner, stated that the punishment should be placed with the clerks making the sales rather than the retailers. He stated that the sentiment behind the ordinance was that clerks are typically in low paying positions and therefore should not lose their job over an error, but questioned “why is it fair to go after their employers?”²⁷⁶

The North Dakota Petroleum Marketers Association, which represented convenience stores, opposed the ordinance as proposed. A memo from Pam Inmann, Philip Morris Government Affairs Regional Director, to Ginny Corwin, Philip Morris lobbyist, dated November 16, 1995 links Art Wheeler, Executive Director Petroleum Marketers Association directly to the tobacco industry. Inman reported that the proposed local licensing ordinance in Fargo (discussed in later section) was set to be discussed in the Mayor’s committee and that she “met with Art Wheeler [Petroleum Marketers Association], Olson [Philip Morris lobbyist] and Kelsch [tobacco industry

lobbyist] today to review and lay strategy for Art's guy on the committee."²⁷⁷ The memo indicates that Wheeler worked directly with tobacco industry lobbyists to develop strategies to defeat local tobacco control policy while at city council hearings it appeared to city council members and the general public that the Petroleum Marketers Association was representing local retailers rather than the tobacco industry.

The *Bismarck Tribune* reported on December 8, 1995 that Art Wheeler, executive director of the Petroleum Marketers Association, proposed a compromise to the Bismarck Youth Tobacco Coalition that eliminated local licensing and required that the city was to grant "permission" to retailers for the sale of tobacco. The Marketers' plan would automatically grant permission to retailers with a state license, but permission could be revoked for violations of the minor sales ordinance. The City Attorney, Charles Whitman, told reporters that revocation of a license "might be easier to challenge, because 'permission' is a nebulous concept beside a physical license that is issued by the city."²⁷⁸ Wheeler cited a survey conducted by the Petroleum Marketers Association that found only 23 percent of Bismarck tobacco retailers in violation of the 1992 ordinance that prohibited that sale of tobacco to minors in contrast to 83 percent in violation in 1992. Following standard tobacco industry rhetoric, the Petroleum Marketers Association described the ordinance proposed by the Bismarck Youth Tobacco Coalition as oppressive. Wheeler stated "We're not trying to be blase about the problem - this has been a major thing with us. We've committed a lot of time and effort in training. Now we're throwing out a challenge to (others) to be just as responsible." Wheeler placed responsibility in the hands of parents, peers or adults who buy for minors, and youth.²⁷⁸

An alternative ordinance was proposed that health advocates described as "full of so many loopholes it was really protection for stores that sold to minors".²⁷³ The proposal of this weak ordinance energized Connie Sprynczynatyk, city commissioner, who became a champion in helping the coalition defeat it by proposing an alternative that required that cigarettes be located behind the counter where a clerk would have to assist in the sale.²⁷³

An editorial in the *Bismarck Tribune* on January 18, 1996 opened with the sentiment "Some people would say that, in an age of cultural rot, tobacco is one of the more benign temptations lying in ambush for young people. They might also politely doubt we will every succeed in banishing the excitement, the rite of passage, represented by that first snuck smoke. Nevertheless, outfits such as the Bismarck Youth Tobacco Coalition are bound to try, and the City Commission has been wrestling for two months now with a coalition ordinance to punish tobacco sales to minors."²⁷⁹ At the time of the editorial the Bismarck Youth Tobacco Coalition's proposal for municipal licensing for tobacco retailers had been denied by the Bismarck City Commission. The self-service display ban required that single pack of cigarettes, snuff cans, pouches of chewing tobacco and other tobacco products that could be easily shoplifted be placed on or behind the counter.²⁷⁹

The Bismarck City Commission adopted an amended version of the ordinance on January 23, 1996 which included only Sprynczynatyk's self-service display restriction that required single pack of cigarettes, snuff cans, pouches of chewing tobacco and other tobacco products that could be easily shoplifted be placed on or behind the counter. The ordinance was passed with a 3 to 2 vote with Connie Sprynczynatyk, David Jensen, and Bryce Hill voting yes. Mayor Bill Sorenson

was in opposition to the ordinance because in his opinion “the new ordinance punishes retailers who have been conscientious about selling to minors by making them incur expensive remodeling costs.”²⁸⁰ The tobacco industry effectively mobilized to weaken the local licensing ordinance as proposed by the Bismarck Youth Tobacco Coalition, however city commission champion Sprynczynatyk salvaged the ordinance therefore health advocates were able to obtain a self-service display restriction. The evolution of this ordinance provides an example of how health advocates strong connections with politicians at the local level can be utilized to counter tobacco industry attacks on local tobacco control policy.

On July 22, 1996, the Bismarck Youth Tobacco Coalition held a press conference at Northbrook Amoco convenience gas station to announce that the self-service restriction ordinance had gone into effect. Dave Froelich, Northbrook Amoco owner, along with other local retailers eliminated self-service of tobacco products shortly after the passage of the ordinance on January 22, and supported the ordinance after it’s passage. Bismarck was the first city in North Dakota to pass a self-service display restriction ordinance.

Compliance Plus

On Tuesday August 24, 1999 a City Commission meeting was attended by representatives of tobacco control, tobacco retailers, grocers, and the hospitality industry. The Bismarck city commission had assigned the Petroleum Marketers Association, Grocers Association, Hospitality Association, and the Bismarck Tobacco Free Coalition to work together on the development of an ordinance. Internal tobacco industry strategy documents provide direct evidence of collaboration between the tobacco industry and Petroleum Marketers Association.²⁷⁷ Internal tobacco industry budget documents provide evidence of financial compensation to the Grocers Association and Retail Association from the tobacco industry.^{46, 48, 281} The Bismarck Tobacco Free coalition presented City Commissioners with several ordinance options to reduce youth tobacco use rates. The coalition was concerned that the law in Bismarck prohibited minors from purchasing or possessing tobacco with penalties of up to a \$70 fine. The clerk selling the tobacco could also be fined up to \$500 for the sale. There was no penalty for the retailer. The ordinance options included: 1) “Civil-administrative hearing with a tobacco licensing system for retailers. Includes fines up to \$500 for the first violation, \$500 to \$1000 for a second violation and a 30-day license suspension for a third violation. An appeals process is included in this option.” The opposition to the proposal was the ND Hospitality Association, ND Retailers Association, and ND Grocers Association. 2) “Municipal option. Fine up to \$500 for the first violation. A fine up to \$1000 for the second violation with a hearing by a municipal judge and an appeal process.” The opposition to the proposal was the ND Hospitality Association, ND Retailers Association, and ND Grocers Association. 3) “Civil-Administrative Hearing. Involves a city commission-administrative hearing officer. The first violation would bring a warning and the cost and time spent at retailer education. The second violation would bring a fine of \$100 to \$400. The first violation consequence was supported by the retailers, grocers, hospitality industry and the tobacco-free group. The second violation consequence was opposed by the tobacco-free group but supported by the retailers, grocers, and hospitality industry.”²⁸²

Ron Ness of the North Dakota Retailers Association stated that retailers were interested in preventing sales to minors and provided the fact that a push by retailers caused the state legislature

to change the driver's license colors to distinguish between minors and adults as evidence. The color change was effective August 1, 1999. Ron Ness stated "We will accept responsibility as long as it is a fair system. We're pushing for credit for education the retailer is putting forth to get clerks to ask for identification."²⁸² The tobacco industry never openly took a position on the issue.

Regarding the collaboration between health advocates and retailers McGeary stated "It was not followed by the media unless we called the media, so we didn't have a reporter, which would have been nice for each meeting. So there was no accountability to the people because it was kind of behind closed doors."²⁷³ Keeping discussions behind closed doors is a typical tobacco industry strategy to prevent the public from becoming aware of tobacco industry involvement in the political process.

In November 1999, an ordinance was unanimously passed by the Bismarck City Commission that was very similar to the compromise originally proposed by Art Wheeler of the Petroleum Marketers Association in 1996. The ordinance automatically granted retailers authority to sell tobacco products by the City of Bismarck if the retailers possessed a North Dakota State Tobacco Dealers License, however retailers would be fined up to \$1000 for the first offense of sales of tobacco products to minors with repeated violations penalized with license suspension. The ordinance stated "a person or business charged with a violation of this section who is a member participant in good standing of Compliance Plus or other Commission approved compliance program may assert such membership as an affirmative defense and upon proof of membership in good standing be entitled to a dismissal of the complaint. This affirmative defense may be asserted only one time for each license or location."²⁸³ The Compliance Plus portion of the ordinance was only effective for one year. The authority to sell could also be suspended or revoked by the Board of City Commissioners if retailers sold tobacco to minors more than once within a two year period. Pat McGeary, Bismarck Tobacco Free Coalition, and Ron Ness, Retailer's Association, both supported the ordinance.

On August 22, 1999, just before the ordinance first appeared at the City Council, the *Bismarck Tribune* reported that Compliance Plus was "a private company hired by store owners to check their carding procedures... the brainchild of Minneapolis public relations consultant Bob Feckler". Internal tobacco industry documents provide evidence that Bob Fackler of Grassroots Consulting in Plymouth, MN worked for the tobacco industry in North Dakota on state and local policy.^{73, 90, 284} Fackler was also a registered lobbyist in North Dakota for the Smokeless Tobacco Council in 2000 through 2001.²⁸⁵ The Compliance Plus program was a voluntary program that conducted identification checks with 18 to 22 year olds attempting to purchase tobacco products. Retailers were charged \$20 per check and the number of checks was determined by the retailer. Clerks were given a green card if they checked identification and a red card if they did not. The North Dakota Retail-Petroleum Marketers Association worked with Compliance Plus to promote the program throughout North Dakota. The creation of its own youth access and retailer education programs is a standard tobacco industry ploy. Tobacco industry youth access programs such as "It's the Law", "We Card" and "Action Against Access" are several examples. The tobacco industry sponsored programs have weak enforcement provisions which make these programs less effective than youth access programs sponsored by health advocates. However, the general public is unable to distinguish between the programs. In addition the tobacco industry sponsored programs give the public the impression that the tobacco industry is working to prevent youth

access to tobacco. Therefore the tobacco industry is able to use its own youth access programs to defeat more effective tobacco control policy while building a positive public image.^{286, 287}

Surprisingly, this pro-tobacco program was endorsed by the Bismarck Tobacco Free Coalition. In an interview in 2004, McGeary explained this decision: “There was one piece that we felt we were compromising on, it stated that during the first year of ordinance enactment, tobacco retailers would be excused from a violation if they could prove they were signed up for the Compliance Plus Program. We did some research and we were sure that the program was an R.J. Reynolds program, but couldn’t find solid proof from a document until months after the hearing. When we questioned the Retailers Association, they denied that Bob Fackler had any present connections with the tobacco industry. If the provision would have extended past the first year of enactment, we would have opposed it.”²⁷³

In 1999, the tobacco industry was successful in preventing a meaningful local licensing ordinance from being enacted in Bismarck, in addition to inserting their own Compliance Plus program into the ordinance. With the exception of the \$1000 fine and license suspension for illegal sales to minors which was obtained by health advocates, this ordinance was a solid victory for the tobacco industry. As in Grand Forks, tobacco industry involvement in local politics in Bismarck intensified throughout the 1990’s. In 1999, the tobacco industry was able to take control of an ordinance and restrict negotiations to behind closed doors. As tobacco industry involvement at the local level intensified local tobacco control advocates were unable to match the efforts of the tobacco industry.

Smoking Restrictions

Clean indoor air efforts in Bismarck primarily focused on public education. In November 1997, The Bismarck Tobacco Free Coalition began to sponsor the “Smoke Out Restaurant Program for the Great American Smoke Out” which promoted restaurants adopting a smoke-free policy for the day of the American Cancer Society’s Great American Smoke Out with the goal of a permanent smoke-free policy. The concept for the program was borrowed from Grand Forks who had started a similar program in 1995 prior to the 1997 flood. The number of smoke-free eating establishments in Bismarck increased from 28 in 1997 to 73 in 2000.

The Bismarck Tobacco Free Coalition established a billboard counter-advertising campaign in 1996 which grew into the statewide Power Against Secondhand Smoke (PASS) program. The program, originally called “What’s in a Cigarette”, was a billboard design contest for youth. McGeary stated “we listed the chemical ingredients of cigarettes on billboards. There was a situation where our billboard was placed right next to a tobacco industry billboard and the industry took their billboard down in a couple of days.”²⁷³ McGeary explained why the program shifted to a focus on secondhand smoke “in Bismarck, we had done “What’s in a Cigarette” for four years before the state took it on, and we were wearing out our ingredients. We wanted to see more policy on secondhand smoke, and we thought this would be a good shift to the secondhand smoke theme. Other coordinators in the state felt the same way, to open it up statewide.”²⁷³

The coalition was also involved with the passage of a clean indoor air city policy on February 2, 2000 that created a smoke-free policy for all city buildings, entryways, and vehicles.

The policy was put on the city council agenda due to complaints from employees of the Public Works Department. McGeary stated that four health advocates testified in support of the smoke-free policy and that she witnessed no opposition to the policy. McGeary explained “It’s worked very very well. This city is very happy with it. As a matter of fact our airport is smoke-free and they are remodeling, expanding and putting in a bar, lounge, restaurant. There are no intentions of opening smoking anyplace in this facility.”²⁷³

The public education on secondhand smoke and smoke-free indoor environments which occurred in Bismarck through the Great American Smoke-out and the Pass program exemplifies the collaboration which has occurred between the local public health units in North Dakota. Local tobacco control programs collaborate to share and borrow successful programs, in addition to incorporating successful local programs on a statewide level.

FARGO, NORTH DAKOTA

Fargo is the largest city in North Dakota with a population of 74,111. The city borders Moorhead, Minnesota and is the most urban city in the state. Therefore, it is surprising that Fargo has not been a leader in local tobacco control. Fargo has only passed three youth access ordinances (1992) vending restriction ordinance which limited the placement of vending machines to establishments licensed to sell alcoholic beverages (1996) authority to sell ordinance (1999) ordinance which prohibited the sale to and purchase, possession, and use of tobacco by minors.

An underage smoking task force led by Mayor Bruce Furness was organized in early September 1995 to address tobacco use by minors because compliance surveys conducted by the Red River Health Promotion Coalition, in November 1994, May 1995, and November 1995 provided evidence that approximately 1/3 of tobacco retailers in Fargo had made illegal sales to minors. Dawn Hoffner, Red River Health Promotion Coalition and task force member, was in favor of a local licensing ordinance. Other members of the task force represented tobacco retailers: Kyle Anderson of Stop-N-Go and Jim Rader of F-M Vending.²⁸⁸ Dave Rogness, the deputy chief of police and another task force member, recognized that retailers and the mayor did not want increasing government involvement in tobacco sales, but recognized that “if we’re going to regulate access, it appears we have to have some sort of licensing. We’re looking for something that is the least burdensome.”²⁸⁸

The tobacco industry was tracking the issue and was actively working to influence the task force. A memo from Pam Inmann, Philip Morris Government Affairs Regional Director, to Ginny Corwin, North Dakota Philip Morris lobbyist, dated November 16, 1995 reported that the proposed local licensing ordinance in Fargo was set to be discussed in the Mayor’s committee and that she “met with Art Wheeler [Petroleum Marketers Association], Olson [Philip Morris lobbyist] and Kelsch [tobacco industry lobbyist] today to review and lay strategy for Art’s guy on the committee.”²⁷⁷ The memo does not specify who was “Art’s guy on the committee” however it indicates that there was a person sympathetic to the tobacco industry position on the committee.

Art Wheeler, of the North Dakota Petroleum Marketers Association was happy with the ordinance proposed by the task force, which he represented as a “compromise.”²⁸⁹ Rather than local licensing, the ordinance granted the authority to sell tobacco products to any retailer that

possessed a state tobacco sales license in addition to mild retailer penalties for sales to minors.²⁹⁰ The penalty for violation of the ordinance for retailers was a warning for the first offense, 3 day suspension of tobacco sales for the second offense, 10 day suspension of tobacco sales for the third offense, and a 30 day suspension of tobacco sales for the fourth violation.²⁸⁹ The City Council unanimously passed the ordinance in January 1996. The ordinance was supported by representatives of public health and education, despite the fact that there was little reason to expect that it would be effective. A very similar “compromise” ordinance created by a similar task force was supported by both the Petroleum Marketers Association and health advocates in Bismarck in 1999. The tobacco industry was able to employ the same strategy effectively in multiple communities throughout North Dakota.

An October 1997 compliance check in Fargo resulted in 11 out of 36 retailers in Fargo being cited for illegal sales of tobacco products to minors. A previous compliance check was conducted in September of 1996. The 1997 check yielded illegal sales rates 2 ½ times higher than the 1996 check.²⁹¹, therefore it can be concluded that the authority to sell ordinance was ineffective. Over the next several years there were a series of compliance checks that consistently found about 25% of stores would sell cigarettes to children (including Wal Mart, where, after the clerk entered a teen’s birth date and the cash register screen flashed a message that said he was under age, the clerk sold the cigarettes anyway.²⁹¹, with no change in policy.

JAMESTOWN, NORTH DAKOTA

Sales Restrictions

The Jamestown city council passed a vending restriction ordinance in 1992 and the first local tobacco retailer licensing ordinance in the state in 1993.²⁹² In respect to the passage of local ordinances in the early 1990's, June Herman attributed the success to the direction of Dr. McDonough and Jeanne Prom at the state health department.⁵¹ As evidenced in other North Dakota communities such as Grand Forks and Bismarck, this was the case in the early 1990's, however the passage of tobacco control policy became more difficult as tobacco industry involvement in local politics intensified throughout the 1990's.

Smoking Restrictions

On July 15, 1997, Jamestown became the first community in North Dakota to introduce a smoke-free ordinance. The Jamestown Tobacco-Free coalition had polling which indicated community support for a smoke-free policy. A statewide survey conducted in 1997 indicated that 86 percent of the state population would be highly likely to eat at a smoke-free establishment. The survey also indicated that 77 percent of people in North Dakota would be in support of a smoke-free restaurant policy that only allowed smoking in a completely enclosed, separately ventilated room. Of the smokers surveyed in the 1997 poll, 59 percent were likely to eat in a smoke-free restaurant, 41 percent were in support of smoke-free restaurants that only allowed smoking in fully enclosed separately ventilated rooms, and 76% were in support of policies for hotels that restricted smoking to specific rooms and areas.²⁹³ The coalition worked with a subcommittee of the city council to develop ordinance language and assess city council member support.⁵¹ The ordinance proposed to prohibit smoking in public places including elevators, restrooms, lobbies, public

transportation, all public areas in private businesses and non-profit organizations, libraries, museums, theaters, sports arenas, convention halls, and restaurants. Restaurants were allowed to have a separately enclosed and ventilated smoking area that did not exceed 50 percent of the seating capacity of the establishment. Bars, clubs, and bowling alleys were not included as public places. Violation of the ordinance was punishable by a fine of up to \$500.²⁹⁴ The fine was applicable to the owner of the establishment and the smoker. The ordinance if passed would have basically eliminated smoking in public places and have been the most stringent smoking restriction in the state. The ordinance had strong similarities with statewide indoor smoking restriction legislation that was narrowly defeated in the House in 1997. The sponsor and champion of the ordinance was Councilman Gordon Christianson who was also the only supporter of the ordinance during the final vote.

An R. J. Reynolds Daily Bulletin from Marjorie P. Wasson two days later dated July 17, 1997 documented that the Jamestown city council heard a proposed smoking restriction ordinance.²⁹⁵ The opposition was represented by retailers and the hospitality industry. The North Dakota Petroleum Marketers Association was present in Jamestown mobilizing opposition and meeting with city leaders, making the usual arguments that the ordinance would hurt their businesses. (The tobacco industry did not appear.) However, an internal R. J. Reynolds document titled "Morning Team Notes 7/10" noted Bob Fackler "requests call to retailers, smokers, and restaurants. He will advise on a mailing to restaurant in smokers" in response to the proposed ordinance.²⁹⁶

Despite the fact that the ordinance was mild in comparison to those passed outside North Dakota – by then California had passed its smokefree workplace, restaurant, and bar legislation several years earlier – the ordinance was defeated by the City Council in August 4, 1997 with a 4 to 1 vote by the Jamestown City Council as too extreme.²⁹⁷ Jamestown Tobacco Free Coalition had not secured the city council support necessary to defend the ordinance against tobacco industry mobilization of retailers and hospitality.

Annette Niemeier, Jamestown Tobacco Free Coalition coordinator, and Sharon Unruh, administrator of the Central Valley Health Unit which covered Stutsman and Logan counties, were supporters of the ordinance. Niemeier felt City Council put fear of economic loss over the community's health when voting on the ordinance. Sharon Unruh stated "Money can buy a lot of things, but unfortunately, it can't always buy our health." Niemeier stated "One of the things you hear from state legislators is that this should be done on the local level, this should be a grass-roots effort, which this truly was. Then when we went to the local community to do it, then we began to hear the business owners saying, this should be a state effort, or this should be federal."²⁹⁷

VALLEY CITY, NORTH DAKOTA

The City-County Health and Home Care Department (CCHD) is the local public health unit that serves Barnes County, located in Eastern North Dakota with a total population of 11, 245 in 2002, 98% white. Valley City is the only major population area in the county with 6,826 residents. The staff of CCHD's tobacco control program and supporting network includes a part-time coordinator, the executive director of CCHD, a part-time tobacco control administrative assistant, an accountant, several Registered Nurses, WIC and Health Tracks coordinators, Barnes

County Tobacco-Free Network volunteers and President James B. Buhr, M.D., one member from both the City and County Commissions that sit on the City-County Board of Health.²⁹⁸

Four tobacco control ordinances have been passed in Barnes County. In 1992 ordinances which prohibited the sale of tobacco products to minors and restricted the placement of vending machines were passed. An ordinance passed in 1994 mandated local licensing of tobacco retailers including penalties for sale of tobacco products to minors with the first offense resulting in a three-day license suspension, second offense resulting in a maximum six month suspension of license, and additional offenses resulted in “indefinite suspension or revocation of license”. An ordinance which prohibited the purchase, possession, and use of tobacco products by minors was passed in 2000 (health advocates did not support the criminalization of youth). In addition, in 2000 an ordinance was passed which eliminated the self-service of tobacco products.²⁹⁸

Barnes County has several clean indoor air policies. In 1997 smoking was prohibited in the Valley City City Hall, Fire Hall, Recreation Center, City Auditorium, and Public Works Department buildings. In 1997, smoking was also prohibited in the Barnes County Courthouse, Highway Department, and Sheriff's Department buildings. Valley City State University has a smoke-free building policy. In 2000, the Sheyenne Care Center which is Barnes County's largest employer enacted a smoke-free policy. In 2002 the Valley City and Barnes County Commissions “adopted resolutions supporting the preservation of the right of local levels of government to adopt more restrictive measures to protect citizens from secondhand smoke, and calling on the North Dakota Legislature to strengthen protections from secondhand smoke by adopting legislation that creates smoke-free workplaces.”²⁹⁸

Vending Machine Restrictions

In 1992, the North Dakota State Department of Health assessed the rates of teenage smoking statewide and determined the state average to be 12.4 percent and the Barnes County average to be 14 percent. Fifty counties were surveyed and Barnes county ranked 12th highest for teenage smoking rates. The survey indicated that one out of every ten kids who are smokers in Barnes County obtain their cigarettes from vending machines which was higher than the statewide average. One-third of seventh grade students who smoked daily purchased their cigarettes from vending machines while the majority of kids in the state purchased their cigarettes at convenience stores. The smokeless tobacco use rate among male youth in Barnes County was 17.6 percent, lower than the state average of 20 percent.²⁹⁹ The Valley City Youth Tobacco coalition was developed after a survey conducted by the Department of Public Instruction and published by the Department of Health in 1992 indicated that Barnes county had higher than average rates of youth smoking.³⁰⁰ The City-County Health department took the lead in the formation of the coalition through grant money received from the state health department. The coalition's initial goals were to eliminate use access to tobacco products through vending machines and curb illegal sales to minors.³⁰¹

An article in the *Valley City Times-Record* on February 25, 1992 opened with the statement “High speed car chases, undercover cops and Coast Guard cutters are the usual images associated with the war on drugs. Restricting a junior high student's easy access to cigarette vending machines may pale in comparison, but it's just as important in battling drug abuse, say local health

officials.”³⁰² The article coincided with the proposal of a vending machine restriction ordinance by the Valley City Youth Tobacco Coalition. A city council meeting occurred on February 27, 1992 in which City-County Health Department officials pushed for a vending machine restriction ordinance that would restrict vending machines to establishments with alcohol licenses. Sharon Buhr, City County Health Board member, stated “We want to send a message to our kids that tobacco is a serious drug. We don’t sell other serious drugs from unattended machines and we should not sell tobacco that way.”³⁰²

The Valley City School Board, Mercy Hospital, Valley City physicians, Valley City Youth Tobacco Coalition and City-County Health Board all supported the ordinance. The cigarette vending machine restriction ordinance in Valley City was passed on first reading with a four to one vote in March 1992. Similar ordinances had previously been passed in Bismarck and Grand Forks. The City-County Health Board and the public school system testified in support of the ordinance. Commissioner Art Goffe cast the only vote in opposition to the ordinance.

Since the cigarette vending machine in the Valley City Town and Country Club was moved to a lounge area from the front hallway to make it less accessible to youth in response to the proposal of the ordinance, the only vending machine that would be affected by the ordinance was located at Reub's Auto Service. The ordinance was passed on a second reading, on a three to one vote with commissioner Art Goffe in opposition and commissioner Mick Pytlick not present on final reading.³⁰³ Mayor Dale Olson was quoted as stating “We had a request from the city-county health board to consider this ordinance. They were concerned about the easy access to these machines available to our junior and senior high school students.”³⁰⁴

Retailer Education

June 1992 was designated as STORM (“Stop Tobacco Over-the-Counter Retailing to Minors”) month in Valley City. The STORM concept originated in Bismarck and retailer education materials were subsequently shared with all local tobacco control coordinators. The month of June featured education for retailers by the Valley City Youth Tobacco Coalition. In 1990 a youth tobacco use survey was conducted in Barnes County which indicated that 76 percent of youth who smoke purchase cigarettes over the counter. Each retailer received a packet that included the proclamation for STORM month, a letter supporting the reduction of youth access from Jack Ladbury, Chief of Police, a copy of the state law that prohibits the sale of tobacco to minors, a notice to employees of tobacco retail locations, and a sign that read "Tobacco: If you are under 18, we can't sell it, you can't buy it." Follow-up visits to tobacco retailers were to be conducted by Dean Ross, assistant police chief and detective lieutenant, to further the educational process.³⁰⁰

Local tobacco retailer licensing

The first reading of a Valley City ordinance that would require local licensing for tobacco retailers was passed in February 1994. The ordinance mandated that all tobacco retailers be licensed through the city auditor which required an application and a one time fee of \$25. The ordinance also included penalties including suspension and revocation of licenses for sales to minors. The ordinance was scheduled to take effect on July 1, 1994 if passed on second reading.

Members of the Valley City Youth Tobacco Coalition appeared at the meeting in support of the ordinance. Under the Valley City ordinance selling tobacco products without a license would be a criminal offense.³⁰⁵ The ordinance was subsequently passed by the City Council on May 2, 1994 and effective on July 1, 1994. Todd Heck, assistant manager at Leever's Super Valu, agreed with the new ordinance passed by the Valley City Commission because he felt there was no need to be selling tobacco to minors. A retailer's license could be suspended or revoked if the retailer violated the law by selling tobacco products to a minor. For a first offense, the license suspension or revocation period ranged from three to thirty days. For a second offense within a year's period the license suspension/revocation period could be up to six months.³⁰⁶

In January 1995, poor results of a December 1994 compliance check in Valley City raised concern among city commission members. Eleven out of seventeen tobacco retailers sold tobacco products to a sixteen year old youth during the compliance check. Under the 1994 ordinance, the city commission had the right to have a formal hearing which could then result in the suspension of the retailer's licenses. Dean Ross, Valley City Police department detective, made the recommendation that the eleven retailers be issued letters of warning indicating that subsequent violations would result in license suspension. The Valley City tobacco coalition supported the issuance of warning letters to give retailers the opportunity to train employees and prevent negative publicity for retailers. The city commission had a debate over whether to issue warning letters or to suspend licenses and chose to follow Ross' recommendation and issue warning letters.³⁰⁷

In August 1996, Valley City Commission voted unanimously to alter an existing local licensing tobacco ordinance to decriminalize tobacco use and possession by minors. The local licensing portion of the ordinance was not affected by the amendment. A 1996 survey conducted by the North Dakota Department of Health indicated that communities with local licensing ordinances were most effective in preventing sales of tobacco products to minors. The statewide average for illegal sales was 51.3 percent, while the average for the communities of Valley City and Jamestown both of which have local licensing ordinances was 4.2 percent. Vicki Voldal Rosenau, member of Valley City Youth Tobacco Coalition attributed the low illegal sales rate to the municipal retailer licensing ordinance, effective enforcement, and retailer education. For cities with no youth access ordinance the illegal sales rate was 65.3 percent, but dropped to 35 percent for communities with vending restriction ordinances.³⁰⁸

Smoking Restrictions

As in Bismarck, the smoke-free indoor environment efforts in Valley City have focused primarily on public education. In 2003, the CCHD tobacco control program instigated a collaboration with four other counties to develop the "Multi-County Smoke-Free Worksites Project." This is a multi-faceted effort to encourage more workplace owners and managers to enact tobacco-free policies. As part of that project, CCHD spearheaded the collaboration's creation of video testimonies of owners and managers of workplaces across the state of North Dakota that had adopted voluntary smoke-free policies. The Multi-County Smoke-Free Workplaces task force conducted a survey of owners and managers to assess their workplace tobacco policies and attitudes towards tobacco use in the workplace. The survey results indicated that over half of the workplaces in the five county region covered by the task force have either an

unofficial policy regarding smoking or no policy at all. One quarter of the workplaces surveyed permitted indoor smoking.³⁰⁹ Ultimately, this project was renamed “Project Tobacco Free,” the state tobacco program joined as a partner, and its scope became statewide. CCHD in collaboration with the North Dakota Department of Health's regional restaurant inspector is working to create a “Blue Ribbon Restaurants” program in Barnes County based on the model developed in Minot.²⁹⁸ The premise of the program is to reward restaurants with free publicity and promotion for passing an environmental health inspection and being completely smoke-free.^{301, 309}

There was no attempt at clean indoor air legislation in Valley City.

Conclusion

The examination of local tobacco control policy in these four North Dakota communities of varying size illustrates the keys to successful passage of tobacco control policy as well as the pitfalls experienced by tobacco control advocates. The experiences of local health advocates in North Dakota indicate that a strong tobacco control coalition prepared to dedicate sufficient time and resources to the cause is necessary for the successful passage of tobacco control policy. Health advocates in North Dakota have successfully used their connections with local politicians to pass tobacco control policy. As the tobacco industry strengthened their networks of local retailers throughout the 1990's, the industry became more effective in defeating local tobacco control policy. Unfortunately, health advocates in some instances could not match increased industry efforts which led to the passage of weak and ineffective ordinances in Fargo and Bismarck. Health advocates must recognize and expose tobacco industry third party allies including retail and hospitality associations employed by the tobacco industry at the local level to fight their public battles. Health advocates in North Dakota failed to make the tobacco industry connections with these organizations known to the public and allowed negotiations to occur behind closed doors. As a result, retailers doing the bidding of the tobacco industry were not held accountable for their actions. The public in North Dakota views the issue as tobacco control advocates versus local retailers rather than tobacco control advocates versus the tobacco industry. Although the tobacco industry has progressively grown stronger at the local level throughout the 1990's, local tobacco control policy has been vastly more successful than state level policy.

MINOT, NORTH DAKOTA

Minot is the fourth largest city in North Dakota with a population of 36,567³¹⁰ and the first community in North Dakota to enact a local smoke-free restaurant ordinance. The road to the passage of the first smoke-free restaurant ordinance in North Dakota began with the creation of a tobacco control and prevention program at the First District Health Unit (FDHU) in October 1992. The First District Health Unit (FDHU) based in Minot provides public health services to central North Dakota including Minot/Ward County, Mclean County, Bottineau County, McHenry County, Renville County, Burke County, and Sheridan County.³¹¹ In 2000 Minot plus the seven county surrounding area served by the FDHU had a total population of 87,804.³¹²

Sales Restrictions

In 1992, a \$5000 grant from the North Dakota Department of Health was funded to pay salaries and project costs for tobacco prevention in central North Dakota. The STAMP (Stop Tobacco's Access to Minors Program) Coalition was created in 1993 with some of this money (Table 9). The first meeting of the coalition was held on May 10, 1993 after a baseline compliance check for youth sales was conducted by the Minot Police Department in conjunction with the First District Health Unit. The baseline compliance checks, led by Sgt Scott Weston, found the illegal sales rates of tobacco products to a fourteen year old Minot male to be 82% for vending machines, 69% for self-service and behind the counter displays, and 100% in bars with vending machines³¹³.

A roundtable discussion on youth access to tobacco with six local high school students was the centerpiece of the second coalition meeting on May 17, 1993. The coalition was informed by the youth that the high rate of illegal sales to the 14 year old youth was not a surprise.³¹³ In order to curb the problem of youth access, the students suggested restricting self-service of tobacco products and requiring identification checks prior to the purchase of tobacco products. In June 1993, in response to the baseline compliance checks and the discussions with youth, the STAMP Coalition established two goals: 1) to create and strengthen local ordinances that prevent youth access to tobacco 2) to provide for education on tobacco to minors, retailers, law enforcement, and the public.³¹³

Retailer education on youth tobacco use prevention was a component of the STAMP coalition's strategy and success in the passage of youth access ordinances. On January 30, 1995, retailer education packets containing a letter from the Minot Chief of Police Carroll Erickson requesting that tobacco retailers talk to clerks about the sale of tobacco products were distributed by the STAMP coalition. In February 1995, Key Club and Connection youth distributed packets of free materials and information on prevention of illegal sales of tobacco to minors to local retailers. In November 1995, every tobacco retailer in the First District Health Unit's seven county area received information on reducing illegal sales to minors and an order form for free materials. In April 1997, the Tobacco Retailer Education Seminar in Minot was hosted by STAMP in collaboration with the Minot Police Department³¹³.

Public education on youth tobacco use prevention was also a component of the STAMP coalition's strategy and success in the passage of youth access ordinances. The local media was the main tool used for public education and included press conferences, public service announcements, billboards throughout FDHU's seven county area, and paid advertisements in *Minot Daily News* and rural papers.³¹³ Media messages were focused on the negative health effects of tobacco use.³¹⁵

On July 1, 1996, an ordinance was enacted by city council which prohibited the possession or use of tobacco products by minors. According to Kelly Buettner-Schmidt, retailers pushed for this ordinance to transfer blame for illegal sales from retailers to minors, a standard tobacco industry tactic. The STAMP coalition did not support this ordinance, however failed to actively oppose the ordinance.³¹⁷

Table 9: Charter Members of STAMP Coalition

| |
|--|
| Keith Bjornson, Individual Member |
| Dr. Dale Dohms, Individual Member |
| Arlyn Marquardt, Minot Public Schools |
| Cyndy Skorick, Individual Member |
| Nancy Sommers, Individual Member |
| Boyde Galgerud, Minot Police Department |
| Carolyn Bodell, Individual Member |
| Cal Asendorf, Ward County Juvenile Court |
| Penny Hamilton, First District Health Unit |
| Kelly Schmidt, First District Health Unit |

Source: ³¹³

On August 5, 1996 the city council passed a municipal tobacco retailer local licensing ordinance. The ordinance mandated that any person required by state law to hold a state tobacco retailer dealer’s license was also required to hold a City of Minot tobacco retailer’s license. The ordinance included penalties for illegal sales to minors with a maximum fine of \$300 for multiple offenses within a one year period.³¹⁸ In 1996, internal R. J. Reynolds “Morning Team Notes” indicate that the tobacco industry was monitoring youth access ordinances in Minot in addition to the mobilization of retailers in opposition by Robert Fackler as had been done in other North Dakota cities.³¹⁹⁻³²¹

On October 4, 1999 due to the efforts of the STAMP Coalition a youth access ordinance was enacted (effective January 1, 2000) by the Minot city council that was the strongest in the state at the time. The ordinance included restrictions on vending machine sales, restrictions on self-service of tobacco products, license requirements, license fee requirements to help pay for compliance checks, store accountability for compliance, identification requirements for purchase, civil graduated penalties for illegal sales, suspension/revocation for repeated illegal sales, regular compliance checks (four times per year), signage requirements, and incentives for responsible retailing.³¹³ According to Kelly Buettner-Schmidt, opposition to youth access ordinances throughout the 1990's was represented by local retailers, the Petroleum Marketers Association, and a tobacco industry lobbyist. The opposition to the ordinance was represented by local tobacco retailers, tobacco industry lobbyist, Art Perdue, general manager of Cenex convenience store, and Art Wheeler of ND Petroleum Marketers Association.³¹⁵

In January 2000, a celebration was hosted by the STAMP coalition to celebrate the passage of the 1999 youth access ordinance. A database of invitees was created which would subsequently become valuable in the passage of the smoke-free restaurant ordinance. The database included all

known previous and current supporters of the STAMP coalition including persons and organizations that by their type of profession or the nature of their organization would be assumed to be supporters of the STAMP coalition.³¹⁴

Laying the Groundwork for a Smoke-Free Ordinance

In addition to youth access, a focus of the STAMP coalition's campaign became the creation of smoke-free indoor environments. According to Kelly-Buettner Schmidt the focus was shifted from youth access to clean indoor air because it was a recommended focus area in a grant the STAMP coalition received from the State Health Department. The shift in focus was also part of a national trend in tobacco control.³¹⁷ In 1996, STAMP partnered with First District Health Unit's (FDHU) Environmental Health Division to distribute educational and resource packets on smoke-free restaurants to all restaurants in First District Health Unit's seven county area.³¹³ In November 1996, Jim Hill Middle School Connection Youth surveyed Minot area restaurants to assess the number of smoke-free restaurants in Minot.³¹³

Youth involvement was an integral part of the STAMP coalitions strategy and success in the passage of youth access ordinances and setting the stage for smoke-free policy. In January 1996, a "KICK BUTTS" training on youth advocacy was sponsored by STAMP. Thirty-nine youth from Minot public and private schools and twenty-four youth from rural area schools attended the event. In 1996, STAMP in conjunction with the American Cancer Society, used the Great American Smokeout (GASO) to emphasize smoke-free restaurants rather than individual quit attempts³¹⁴ The concept of emphasizing smoke-free restaurants for the Great American Smokeout originated in Grand Forks in 1995, however after the 1997 floods the program was not continued in Grand Forks.²⁷³ In April 1997, the Red River flooded the Grand Forks area forcing 60,000 (90% of the population) residents from their homes. A fire in downtown Grand Forks destroyed 11 buildings including the offices of the *Grand Forks Herald's* newspaper. The flood and fire caused approximately \$2 billion in damage.³⁷

In 1996, local youth called each restaurant in the Minot area requesting that the establishment become smoke-free for the day of the Great American Smoke Out and consider a permanent smoke-free status. In 1996 participating restaurants included thirteen restaurants that were completely smoke-free and fifteen additional restaurants that became smoke-free for the day. In 1997, STAMP Coalition members called individual restaurants and asked for their participation. In 1998, youth visited restaurant owners [two youth to one restaurant owner] and requested participation in person. In 1999, a letter was sent to restaurant owners requesting that they participate which resulted in a poor turnout with only twelve restaurants participating for the day. The decline in restaurant participation in 1999 can be attributed to a letter being sent to restaurant owners rather than the more aggressive strategy used by STAMP coalition in previous years. Intensity was increased in 2000 in anticipation of the smoke-free restaurant ordinance (to be discussed in detail later). Youth visited restaurant owners and requested participation in person. In 2000, participating restaurants included thirty-four restaurants that were permanently smoke-free and two that became smoke-free for the day³¹⁴. As a reference in January 2000, Minot had 96 full service restaurants and 39 limited restaurants.³¹³ Kelly Buettner-Schmidt explained why the coalition focused on smoke-free restaurants rather than workplaces, "The community education focused on restaurants at first most likely from a patron point of view and exposure to

nonsmokers. We did not have major industry that we were aware of that allowed smoking. Again, I believe it was part of a national trend at the time.”³¹⁷

| Table 10: Number of Restaurants Participating in the Minot Great American Smoke Out | | | |
|--|-----------------|------------------------|---------------------|
| Source: ³¹⁴ | | | |
| Year | 100% Smoke-free | Smoke-free for the day | Total Participation |
| 1996 | 13 | 15 | 28 |
| 1997 | 25 | 15 | 40 |
| 1998 | 33 | 11 | 44 |
| 1999 | 9 | 3 | 12 |
| 2000 | 34 | 2 | 36 |

In 1998, the Magic City (Minot) DECA Club (youth organization) also developed a smoke-free environment campaign at the request of the STAMP coalition. Beginning in 1998, middle school students in the First District Health Unit's seven county area participated in the PASS (Power Against Secondhand Smoke) program. The PASS program originated in Bismarck in 1996, but was expanded to a statewide program. Fifteen-hundred students participated in 1998. The annual PASS program consisted of a secondhand smoke curriculum for teachers and an anti-smoking billboard contest for students. The winning billboard design was posted on ten billboards throughout the FDHU seven county area.³¹⁴

A smoke-free city building policy that included the Minot International Airport had been passed by city council on February 2, 1998.³¹³ City council President Andy Bertsch led the effort to end smoking in city owned buildings due to the death of his father due to complications from smoking and the birth of his daughter in 1997. Bertsch told Minot *Daily News* reporters “The smoke cessation in city-owned buildings has been very effective. It has reduced the number of employees who were smokers and it has helped on lowering our insurance rates.”³²² The STAMP coalition had mobilized behind the ordinance speaking in front of the city council and recruiting an elderly woman to provide personal testimony. Buettner-Schmidt explained “Katie Hanson had had to sit outside the airport in North Dakota winter weather because her airplane was later and smoke exacerbated her Adult Respiratory Distress Syndrome. Her testimony was impactful.”³¹⁵ After the passage of the ordinance the STAMP coalition collaborated with the city administration to develop a tobacco cessation program for employees implemented prior to the effective date of the ordinance.³¹⁵ Opposition to the policy was represented primarily by owners of restaurants located in the airport.

To continue to educate the public and build awareness of the secondhand smoke issue, in May 1998, STAMP invited James Repace, former EPA scientist and international second-hand smoke expert, Heidi Heitkamp, North Dakota Attorney General, Murray Sagsveen, North Dakota Health Officer, and Mike Deloherty, owner of Dagwood's restaurant in Grand Forks to Minot to present three free seminars to city council members, restaurateurs, and the general public on

“Tobacco Smoke in the Workplace: What Employers Need to Know.”³¹³

In January 1999 the STAMP coalition collaborated with the Environmental Health division of the First District Health Unit to push for smoke-free restaurants. The Blue Ribbon Restaurant Recognition Program which was unique to the Minot area was developed as a result of the collaboration. Through the program restaurants were recognized if they were voluntarily 100% smoke-free and simultaneously compliant with Environmental Health Standards such as such as temperature controls, personal cleanliness, employee practices, hair restraints and hand washing. Restaurants that passed the Blue Ribbon inspection received a plaque and media attention through press conferences, press releases, and billboards. The Blue Ribbon Restaurant Campaign combined the concept of clean and safe food services with a clean and safe indoor air environment.³¹⁴

Restaurant inspections were conducted every six months in the Minot area, therefore restaurants had to qualify twice yearly for the award. The number of qualifying restaurants increased steadily throughout the length of the program with twenty restaurants qualifying in 1999 and forty-four restaurants qualifying in 2001.³¹⁴ By 2001, about one third of 135 (96 full service and 39 limited service) restaurants won Blue Ribbon Awards.³¹³

| Table 11: Restaurants Qualifying for Blue Ribbon Restaurant Award³¹⁴ | |
|--|------------------------|
| Dates | Qualifying restaurants |
| January-June 1999 | 20 |
| July-December 2000 | 30 |
| January-June 2000 | 30 |
| July-December 2000 | 45 |
| January-June 2001 | 44 |

Building Public Support for the Ordinance

In March 2000, City Council President Andy Bertsch expressed interest in a smoke-free restaurant ordinance because of two personal events, as he said later, “I have fought against the invasive nature of government into business, but two events in my life changed my thinking on this issue” referring to the death of his father and birth of his daughter in 1997.³²²

With Bertch’s expression of interest, the STAMP coalition began to increase momentum for the passage of the ordinance. STAMP contacted experts in the area of second-hand smoke including Tim Filler of Americans for Nonsmoker's Rights, the leading national grassroots advocacy organization in the area, Elva Yanez of American Medical Association Smokeless States Initiative, Aaron Doeppers of the National Center for Tobacco Free Kids and Jim Repace, International Environmental Tobacco Smoke Consultant for consultation of the passage of smoke-free restaurant ordinances.³²³

In March 2000, the First District Health Unit allocated \$2,500 of its own money to be combined with funds from grants from the American Cancer Society (\$12,500), and North Dakota Department of Health (\$7,800) to conduct a second-hand smoke public opinion survey designed to evaluate a media campaign on secondhand smoke. The timing of the secondhand smoke campaign with Bertsch's interest in a smoke-free restaurant ordinance was a coincidence. The First District Health Unit was unaware of Bertsch's interest when an application for funding was submitted. The campaign was conducted in three phases: 1) assessment of public opinion 2) media campaign 3) assessment of change in public opinion. The purpose of the public opinion surveys were to evaluate the public's attitude toward second-hand smoke and actions to reduce exposure to second-hand smoke with a comparison of rural vs. urban populations.³²⁴ The pre-media campaign survey was designed to help establish the message and the target audience for the media campaign. The post-media campaign survey was to assess changes in public opinion as a result of the media campaign.³²⁵

While the study was being prepared, in May 2000, STAMP sent a direct mail newsletter focused on second hand smoke to everyone on the database created for the celebration of the 1999 youth access ordinance. The mailing included a postcard requesting that people volunteer to support smoke-free restaurants, but did not contain any information about a smoke-free restaurant ordinance.³¹⁴

The pre-media campaign survey was conducted in the July 2000 followed by the media campaign in January 2001 and the follow-up survey in the spring of 2001. In the pre and post-media survey 500 (250 rural, 250 urban) randomly selected individuals from Minot and the seven county surrounding area were questioned via telephone. The questions in the pre and post-media survey were exactly the same³²⁶ and developed primarily from questions in the Center for Disease Control's Behavioral Risk Factor Survey.³²⁴ The media campaign ran from February 19, 2001 through May 13, 2001. The media campaign conducted by the STAMP coalition included television and radio ads from the CDC's Media Campaign Resource Center.

The survey showed widespread concern about the dangers of secondhand smoke and support for smoke-free areas (Table 12) The results mirror similar polls done throughout the United States.

The most relevant questions with regard to the ordinance were questions related to restaurants. 95% of Minot area respondents in the pre-media survey stated that they would eat out at the same rate or more often if restaurants were smoke-free (Table 13). Approximately 16% of respondents stated they would eat in restaurants more frequently if smoking was eliminated. Three percent stated that they would eat out less frequently, while 80% of those surveyed indicated restaurant smoking restrictions would not affect their use of restaurants.³²⁴ The most important change in attitudes in the post-media survey were a decrease in respondents willingness to sit in or near the smoking section of a restaurant for a meal and an increased frequency of dining out if restaurants became completely smoke-free (Table 14). The majority of the respondents were nonsmokers and expressed dislike of secondhand smoke in their survey responses but were surprisingly very hesitant to express their distaste of secondhand smoke to smokers and coworkers.³²⁶

The results of the pre-media campaign survey were released to the public in the Minot Daily News on December 19, 2000. Kelly Schmidt, RN, coordinator for the survey at FDHU, stated that the goal of the STAMP coalition for the past several years had been encouraging restaurants to adopt smoke-free policies. Schmidt stated, “The response from restaurant owners typically is that they are going to lose business. This survey pretty much dispels that... We see an opportunity to provide education to the restaurant owners so they are aware of this.” She also stated “I just think that people in North Dakota are probably hesitant to speak up. This will give us a good opportunity to speak for those people.”³²⁷

Table 12: Minot Pre and Post Media Campaign Survey 2000-2001 Source: ³²⁶

| Do you think that exposure to tobacco smoke is harmful or not harmful to the nonsmoker's health? | Pre-media | Post-media |
|--|-----------|------------|
| Yes | 430/86.3% | 415/83.2% |
| No | 41/8.2% | 46/9.2% |

Table 13: Minot Pre and Post Media Campaign Survey 2000-2001 Source: ³²⁶

| If restaurants were completely smoke-free, how often would you eat out? | Pre-media | Post-media |
|---|-----------|------------|
| More often | 15.6% | 23.8% |
| Less often | 3.2% | 5.2% |
| About the same | 79.6% | 68.6% |

Table 14: Minot Pre and Post Media Campaign Survey 2000-2001 Source: ³²⁶

| Which best describes your reaction if your nonsmoking table in a restaurant was next to a designated smoking area? | Pre-media | Post-media |
|--|-----------|------------|
| Table would be fine | 38.4% | 26.8% |
| Not preferred but would not ask for table change | 37.0% | 39.5% |
| Refuse to sit next to smoking section | 23.2% | 30.2% |

Table 15: Active STAMP Members in 2000

| | |
|--|--|
| Margaret Fleck, <i>Minot Education Association</i> | Steve Joyal, <i>Minot Public Schools</i> |
| Jeri Grant, <i>Individual Member</i> | Mary Muhlbradt, <i>Trinity Health</i> |
| Carolyn Bodell, <i>Individual Member</i> | Kelly Schmidt, <i>First District Health Unit</i> |
| Bob Clementich, <i>American Cancer Society</i> | Jim Vitko, <i>Kids Council</i> |
| Deb Vangness, <i>American Heart Association</i> | Pauline Wahl, <i>Individual Member</i> |
| Penny Hamilton, <i>First District Health Unit</i> | Scott Weston, <i>Minot Police Department</i> |
| Chris Helgeson, <i>First District Health Unit</i> | Sue Kahler, <i>American Lung Association</i> |
| Sharon Leet, <i>UniMed Medical Center</i> | Jane Bieri, <i>Individual Member</i> |

Source: ³¹³

Table 16: Supporting STAMP Members in 2000

| | |
|---|---|
| Boyd Strand, <i>Minot Family YMCA</i> | Nancy Sommers, <i>Individual Member</i> |
| Clyde Eisenbeis, <i>Individual Member</i> | Janet Maxson, <i>American Heart Association</i> |
| Becky Esades, <i>Minot Public Schools</i> | James Vachal, <i>Dist. #2 Pharmaceutical Assoc.</i> |
| Jim Fuller, <i>American Lung Association</i> | Kieth Bjornson, <i>Central Campus East</i> |
| Stan Henderson, <i>Bishop Ryan High School</i> | Phyllis Seier, <i>Minot City PTA council</i> |
| Dr. Steve Mattson, <i>NW District Medical Society</i> | Mary Smith, <i>District #2 Nurses' Association</i> |

Source: ³¹³

Enacting the Ordinance

On February 23, 2001 the “Smoke-Free Family Dining” ordinance was announced in the *Minot Daily News*. The Minot Smoke-Free Family Dining Committee that drafted the ordinance was composed of representatives from both Minot hospitals, the American Cancer Society, First District Health Unit, the STAMP coalition, city council member Andy Bertsch and city council member Stephen Podrygula. Essentially the Committee was the STAMP coalition in addition to the two city council members. City council members Bertsch and Podrygula had attended STAMP coalition meetings to work on the ordinance, in addition to working with the city attorney on the language of the ordinance. In February 2001 there were 57 restaurants in Minot with smoke-free policies which would increase to 104 if the smoke-free restaurant ordinance was passed by City Council. From the time the smoke-free restaurant ordinance was introduced to the time it was passed there were a total of six city council meetings where the ordinance was discussed between February 26, 2001 and April 2, 2001.³²⁷

Andy Bertsch, City Council President, stated “It was in late 1999 or early 2000 that we started receiving some feedback from restaurants and many of them felt it was a good idea. I want

to stress that , the main focus of this ordinance is the smoke-free family dining. It’s difficult to impose government regulations on local businesses, but we want to provide a variety for families that many of them don’t have; the way the situation is presently.”³²⁷ Kelly Schmidt, tobacco prevention coordinator at First District Health Unit and coordinator STAMP, stated “We feel, we’ve heard from restaurants, that they want to go to a smoke-free environment and that it’s OK, as long as everyone is doing the same thing.”³²⁷ Dr. Stephan Podrygula, City Council member, stated support for the ordinance “Cigarettes kill more than a thousand people each year in North Dakota. That’s a town like Mohall disappearing from our state. As a time when we’re concerned about low growth or people leaving the state, we want to ignore this issue?” Mary Muhlbradt, STAMP coalition member, stated “Some may feel this is an infringement, but smoking is an infringement upon others and the ordinance is a good compromise on restaurants against that infringement.”³²⁷

Table 17: 2001 Finance & Improvement Committee Members

Chuck Barney
 Andy Bertsch
 Larry Frey
 Ron Garcia
 Jim Hatelid
 Neil Leigh
 Curt Zimbelman

Source: ³²⁸

Table 18: 2001 Public Works & Safety Committee Members

Allen Butz
 Sandra Collins-Roggenbuck
 Blake Krabseth
 Ed Kuhn
 Ernie Medalen
 Stephan Podrygula
 Lee Snyder

Source: ³²⁹

Restaurant owners had mixed opinions on the ordinance. Dean Aberle, Homesteaders Restaurant owner, Randy Brown, manager of Charlie’s Café, Mike Neubauer, Roll-n-Pin owner, and Dawn Klien, manager of Ground Round, stated that if all restaurants are required to comply with the ordinance they have no problem with the ordinance. Barb Field, manager of L&B Lucky Strike stated opposition “Fifty percent or more of my business is from the bowling crowd, and a lot of those are smokers. If this goes through, I’d lose a lot of business. I’d probably have to lock up the doors, because I depend on that crowd for business.”³²⁷

The smoke-free restaurant ordinance was introduced on February 26, 2001 in a meeting of the Finance and Improvements Committee of the Minot City Council by committee member Andy Bertsch. The original ordinance was written by the STAMP coalition and the Minot Smoke-Free Family Dining Committee based on the Americans for Nonsmoker’s Rights model ordinance.³²³ The proposed ordinance allowed restaurants to construct fully enclosed separately ventilated smoking area. Bertsch motioned to pass and place on first reading the smoke-free restaurant ordinance which proposed to eliminate smoking in all restaurants licensed by the First District Health Unit except for: bars, fraternal organizations not open to the public, banquet/convention center space rented for specific functions, bingo parlors, and bowling alleys, and self-contained smoking sections including walls extending from the floor the ceiling with

separate ventilation.

At the first meeting of the Finance and Improvements Committee supporters of the ordinance far outweighed the opposition. Michael Duke spoke as a representative of Applebee's Grill and Bar and stated that his establishment does not oppose the ordinance but felt that the exceptions in the ordinance created an unequal playing field for restaurants.

Proponents of the ordinance were well-represented and included: Mary Muhlbradt, STAMP Coalition; Bob Clementich, American Cancer Society; Kelly Schmidt, FDHU; Randy Schwan, Trinity Health; Donna Amundson, UniMed Medical Center; Penny Hamilton, FDHU; Karen Barnett, American Heart Association; Mary Smith, District No. 2 Nurses Association; Carolyn Bodell, District No. 2 Pharmacy Association; Jim Vitko, Kids Council; Margaret Fleck, Minot Education Association; Steve Joyal, Minot Public Schools Safe and Drug Free Schools Coordinator; Dr. Kevin Collins, Trinity Health Cancer Center; Jim Fuller, Lung Association of North Dakota.³²⁸

The motion to pass the ordinance on first reading by Bertsch was seconded by Hatelid and approved unanimously.³²⁸

On February 27, 2001 at the meeting of the Public Works and Safety Committee Bertsch introduced the proposed smoke-free restaurant ordinance.

At this committee meeting proponents of the ordinance were again well-represented, while opposition representation had only increased slightly. Proponents included: Mary Muhlbradt, STAMP Coalition; Dr. Maher Dass, Trinity Health; Dr. Kevin Collins, Trinity Health Cancer Center; Dr. Kim Krohn, family practice physician; Rhonda Bugbee, registered nurse; Bob Clementich, American Cancer Society; Kelly Schmidt, FDHU; Donna Amundson, UniMed Medical Center; Margaret Fleck, Minot Education Association; Amanda Wagner, mother; Karen Barnett, American Heart Association; Jim Fuller, American Lung Association; Mary Smith, District No. 2 Nurses Association; Penny Hamilton, FDHU; Steve Joyal, Minot Public Schools Prevention Council; Carolyn Bodell, District No. 2 Pharmacy Association. Opposition included: Gladys Hayes, restaurant owner; Dick Dahl, city resident; Danny Schatz, restaurant owner; Anthony Bauer, Grizzly's Grill N' Saloon restaurant; Lucy Tuttle, restaurant worker; Marilyn Olson, restaurant worker.³²⁹

The committee unanimously passed it on to the full city council for first reading.³²⁹

City Council member Chuck Barney was quoted in the *Minot Daily News* on February 27, 2001 as stating that he would like the exemption for the enclosed, separately ventilated smoking area in restaurants removed from the ordinance because it would give some restaurants an unfair advantage over others. Barney stated "If we're going to do something this drastic and severe, it ought to be done on a level playing field."³³⁰ Dr. Kevin Collins, radiation oncology specialist at Trinity CancerCare Center, also stated his support for the removal of the exemption for different reasons. Collins stated that restaurant employees are exposed to twice as much secondhand smoke throughout the work day as persons in other professions. Collins also stated that female waitresses in restaurants that permit smoking are four time more likely to suffer from lung cancer and two

and a half time more like to suffer from heart disease than their counterparts in other professions.³³⁰ Various restaurant owners in Minot also spoke out against the exemptions stating that the smoke-free policy should be consistent in all restaurants. The cost of the construction of the separately ventilated smoking room would be prohibitive for some restaurants and therefore would give the restaurants who could afford the construction a business advantage.³³¹ Representatives of the Minot city council, restaurant owners, and the public were in support of smoking restrictions more comprehensive than what had been proposed by health advocates.

The week prior to the first full council reading of the smoke-free restaurant ordinance the STAMP coalition had an editorial board meeting with the *Minot Daily News* to inform them of the introduction of the smoke-free restaurant ordinance. The meeting was attended by Andy Bertsch, Stephan Podrygula, Kelly Schmidt, Mary Muhlbradt, and Bob Clementich. In addition a meeting was held with the Chamber of Commerce at which it was requested that the Chamber of Commerce remain neutral on the ordinance. The meeting was attended by Andy Bertsch, Mary Muhlbradt, and Kelly Schmidt.^{314, 315} John MacMartin, Chamber of Commerce President, stated that a survey of chamber members indicated that members were not interested in taking a position on the issue.³³² The STAMP coalition did not request that the Convention and Visitors Bureau remain neutral. In a 2003 interview, Kelly Schmidt reported that, although the Convention and Visitors Bureau publicly declared a neutral stance, they were a large part of the opposition testimony at city council hearings.³¹⁴

On March 5, 2001 a full city council meeting was held with Mayor Carroll Erickson presiding in which the City Council passed the smoke-free restaurant ordinance on first reading with only Neil Leigh voting against it.³³³ Leigh stated that he had voted no on the ordinance due to telephone calls he had received from restaurant owners. Leigh stated “I have had restaurant owners tell me this is going to put them out of business. If I wanted to mandate something like this I would have run for the Legislature, because I think if it is done it should be done by the state.” Podrygula stated that he would prefer a complete smoking ban in all public places in Minot but voted yes on the ordinance “partly out of loyalty to Andy Bertsch, who has done a lot of work to get almost unanimous support for the proposal.”³³⁴ Health advocates had done the leg work to ensure that the ordinance had city council support prior to first reading.

Again proponents far outnumbered opponents at the full city council meeting, supporters included Mary Muhlbradt, STAMP Coalition; Dr. Kevin Collins, Trinity Cancer Care; Dr. Curt Moynahan, UniMed Medical Center; Dr. Mark Bradley, Medical Arts Clinic and the American Lung Association; Everett Ballman, resident; Phil Hundley, resident; Amanda Wagner, mother; David Leonard, student; Danny Carlson, student; Herb Wanner, resident; Will Eelkema, Trinity Medical Group Physician; Kinley Lund, student; Martin Ethridgehill, resident; Dr. Maher Daas, Trinity Medical Group lung physician.

Opposition was represented by: Chuck Woods, business owner; Jake Mathis, Jake's Spice 'N Spirit restaurant; Ame Sundby, Kenny Collins, resident; Dan Clementich, business owner; George Thomason, resident; Wayne Zwak, restaurant owner, Mike DuPaul, resident; Glen Balerud, Harvey resident.³³³

Diane Schatz, owner of Schatz Crossroads and Econostop who would come to lead the

opposition to the ordinance, composed a letter to the Minot City Council on March 16, 2001 regarding the proposed smoke-free restaurant over which the city council at the time was deliberating. She laid out the economic harm argument in her first paragraph by repeating well-worn and inaccurate¹⁷⁴ arguments promoted by the tobacco industry:

This ordinance was proposed to the City Council without research as to the economical impact of on the restaurants or the community as a whole. We are receiving written documentation from Perkins restaurants where this ordinance has been enforced and the owner of the Mesa, Az location said it was like turning the lights off. Sales have dropped 30%. None of use in the restaurant business in Minot could afford this decline in sales and continue operating.³³⁵

In reality the Mesa smoke-free restaurant ordinance had no effect on restaurant revenues when calculated using sales tax data collected over a 1 year period. It is necessary to use sales tax data because persons responsible for this data have no interest in the effect of the ordinance on the revenue outcomes. In addition, the data must be collected over a one year period to account for random and seasonal variability of restaurant revenue.¹⁴⁹

She also stated that the majority of her customers are heavy smoking truck drivers and therefore she will also loose diesel sales and service bay operations. She cited a statistic claiming that 10-50% of sales in restaurants are from smoking customers. She claimed that the ordinance will cause economic harm to restaurant suppliers such as “Farstad Oil, Wholesale Supply, Minot Restaurant Supply, Napa Auto Parts, Westlie Motor Company, Pepsi Cola Bottling, Mann’s Automotive.” Schatz also listed all of the local community organizations to which local restaurants donate including “After Prom Parties, Special Olympics, Red Cross, American Cancer Research and Society, bowling-softball-hocky-basketball tournaments, United Way, North Dakota State Fair, Hostfest, Ag Show, Home Builders show, Sport & Marine events, Police Officers Assn, Nurses Assn, Gymnastics, MAYSA.” She also stated – also inaccurately³³⁶– that “Duluth, MN is experiencing negative sales in retail trade and restaurant sales down as much as 18% already and already changing their ordinance. They have lost a lot of their Canadian traffic.” In her final statement she commented “If you are wondering why it has taken so long for the community to voice its opinion - please remember it took several weeks to find out that the City Council had been misled.”³³⁵ If Schatz’s final statement is accurate, the tobacco industry’s late notice of the ordinance may explain why retailers has not yet been fully mobilized in opposition to the ordinance.

On March 22, 2001 Jim Repace, health physicist and former policy analyst at US EPA, returned to North Dakota for the second time at STAMP’s request, to make another presentation regarding the dangers of second hand smoke. City council members and restaurant owners were primarily targeted to attend the presentation, but the event was open to the public.³¹⁴ Repace’s trip to North Dakota was funded by the American Heart Association.⁹⁹ Most Minot City Council members were in attendance, however few restaurant owners attended the event. Media coverage was provided by local television and the *Minot Daily News*.³¹⁵

On March 28, 2001 in the meeting of the Finance and Improvement Committee Leigh moved that the smoke-free restaurant ordinance be held for further study in the committee and

requested that the mayor appoint a study committee including restaurant owners, MAGIC Fund Committee, STAMP coalition, FDHU, Minot Convention and Visitors Bureau, and the Minot Area Chamber of Commerce to further examine the economic and health aspects of the proposed ordinance. This tactic had been employed previously in Bismarck and Fargo to weaken youth access ordinances introduced by health advocates. This is a standard tobacco industry tactic to keep negotiations behind closed doors and outside of public view where the tobacco industry is more effective. Leigh read a letter from Mary Muhlbradt, representing the STAMP coalition where she stated that if the ordinance were passed the STAMP Coalition would study the economic impact over the period of the next year. In order to delay the ordinance, Leigh indicated that the analysis should be conducted before the enactment of the ordinance. However, this would be impossible since the economic analysis proposed by STAMP could only be conducted after the enactment of the ordinance.

Curt Zimbelman presented a letter written by a Duluth City Council Member expressing that the Duluth smoke-free restaurant ordinance has been problematic in the areas of enforcement and equality of the ordinance. Zimbelman stated support for keeping the ordinance in committee for continued study. In reality, the tobacco industry had employed front groups in Duluth to mobilize restaurant owners to ignore the ordinance and take advantage of weak enforcement provisions.³³⁶ Marsha Dupre, representing the Convention and Visitors Bureau Board, stated that the Bureau was concerned about the effect the ordinance would have on the tourism and convention industry. She stated that if a 10% decrease in business occurred, it would result in \$5 million in economic loss annually.³³⁷ Ed Sundby, Schatz Econostop Truck Stop employee, stated that a truck stop in Oregon had lost 26 percent of restaurant business and 22 percent of diesel sales after it was forced to adopt of smoke-free policy. Sundby stated "The restaurant owner is not being given any choice. People already can choose to go to a smoke-free restaurant if they want to but the business owner isn't given a choice by the ordinance."³³⁷ Leigh stated that he had been informed that if the ordinance was passed 200 smokers planned to light cigars in restaurants, get arrested, and demand jury trials. He stated "How long is this going to tie up the courts. And I have been told that it is definitely going to happen if the ordinance passes."³³⁷ Organized defiance of smoke-free policy is a standard tobacco industry tactic to undermine clean indoor air policy.³³⁶ The motion by Leigh to hold the ordinance for further study, seconded by Barney was passed by the Finance and Improvements Committee.³²⁸ This was the first committee meeting in which restaurant owners cited standard tobacco industry rhetoric of economic harm to business due to smoke-free policies. Scientific research has proven this to be a false claim.¹⁷⁴ However restaurant owner's use of this rhetoric indicates the tobacco industry was playing a role in the opposition to the ordinance.

On March 29, 2001 in a meeting of the Public Works and Safety Committee Krabseth motioned that the smoke-free restaurant ordinance be passed on second reading and sent to the full city council for final passage. In Minot, if at least one committee approves an ordinance it is sent to the full city council. Marsha Dupre, executive director of the Minot Convention and Visitors Bureau, expressed that the Board had a neutral stand on the ordinance but was concerned about the effect the ordinance would have on the Minot tourism industry. Michael Duke stated that the Applebee's corporation would like the ordinance to be put to a vote of the people. Wayne Zwak, Perkin's Restaurant, also stated that the issue should be put to a popular vote. Butz motioned that the ordinance be held for further study in the Public Works and Safety Committee and requested

that a committee be appointed by the Mayor including restaurant owners, MAGIC Fund Committee, STAMP Coalition, FDHU, Minot Convention and Visitors Bureau, and the Minot Area Chamber of Commerce to examine the health and economic effects of the ordinance, but the motion died for lack of a second. An amendment was approved to exempt private members-only clubs from the ordinance even on occasions when the clubs are open to the public.³³⁸ The amended ordinance was passed on second reading in the Finance and Improvements Committee and sent to the full city council for second reading.

The committee hearing was the first time that people speaking in opposition to the ordinance outnumbered proponents.

An editorial in the *Minot Daily News* on April 2, 2001 declared the newspaper's support for the smoke-free restaurant ordinance and encouraged City Council to pass the ordinance.³³⁹ The earlier meeting of the STAMP coalition with the Minot Editorial Board ensured that the Smoke Free Dining Committee had the newspaper's support throughout the ordinance process.

On April 2, 2001 in a full meeting of the Minot City Council Kuhn motioned that the smoke-free restaurant ordinance be passed on the second reading; the motion was seconded by Garcia. Wayne Zwak, Perkin's Restaurant, also a leader of the opposition, presented petitions to the city council members which he stated held 4,000 signatures in opposition to the smoke-free restaurant ordinance. He expressed concern over the ventilation system exemption and expressed support for the entire city adopting a smoke-free policy rather than only restaurants. Marsha Dupre again addressed the council on behalf of the Board of the Minot Convention and Visitors Bureau indicating a neutral position but stated that the Board was concerned with the effect the ordinance would have on the Minot tourism industry. Leigh motioned to amend the ordinance to read "the ordinance shall become effective if, and only if, approved by the voters at the June 2002 Primary Election;" the amendment failed. Several other amendments were proposed and defeated: to reduce the penalty to \$25, to exempt truck stops, and to add a "hardship" provision that would permit restaurants to apply for an exemption. Both sides generated a heavy turnout at the hearing. The ordinance was passed by the city council with a 10-4 vote on April 2, 2001, with the ordinance scheduled to go into effect on January 1, 2002.

Note that documented support of the ordinance listed above includes only individuals recorded in city council minutes as formally speaking before the council. According to Kelly Buettner-Schmidt, the STAMP coalition ensured that the city council chambers was packed to overflowing with ordinance supporters at each hearing wearing stickers on their shirts signifying their support of the ordinance.³⁴⁰ The STAMP coalition's tactic of public pressure was essential for the passage of the smoke-free restaurant ordinance in Minot.

The final ordinance mandated smoke-free restaurants, but allowed restaurant owners to build fully enclosed, separately ventilated smoking rooms. Bars, fraternal organizations, banquet/convention center space for special occasions, bingo parlors, and bowling alleys are exempt from the ordinance. Violation of the ordinance is punishable by a maximum of 30 days in jail and a \$500 fine. {cite the ordinance} In an April 5, 2001 editorial the *Minot Daily News* congratulated and thanked the Minot City Council for the passage of the smoke-free restaurant ordinance.³⁴¹

The Referendum Campaign

As had happened in many other states following first passage of a smoke-free restaurant ordinance in many other states with undisclosed backing from the tobacco industry,^{143, 149, 336, 342, 343} four days after the passage of “The Smoke-Free Family Dining” ordinance the *Minot Daily News* announced that a petition was being circulated to collect signatures of those in opposition to the ordinance. A referenda campaign was a bold tobacco industry strategy employed in Arizona, California, and Minnesota to disable local clean indoor air ordinances.^{143, 149, 336, 342, 343} 1,548 signatures (10% of those who voted in the last presidential election) would have to be collected within 30 days of the passage of the ordinance for a special election to be set.

The group that began the circulation of the petitions to force a referendum included Diane Schatz, owner Schatz Crossroads and Schatz’s Café truck stops, Wayne Zwak, Perkins owner and T-Bones Steakhouse co-owner, and Gladys Hayes, Gladys’s Place owner. Ed Sundby, Schatz’s Café employee, stated that the petition drive was not initiated by one person, but rather a group of concerned residents. He stated “We were railroaded last time. One group has been working on this for a year and a half, and another group only has about two weeks to respond.” Schatz stated “Few people knew anything about it prior to that time [first reading] and a lot of work had already been done. Everyone was caught off guard except STAMP and those who had been studying the issues for over a year.” Mary Mulhbradt, STAMP coalition member, made a statement regarding the petition drive “The city council has given Minot a conservative and reasonable smoke-free family dining ordinance. It provides a minimum level of protection against chemicals found in secondhand smoke which we know causes cancer and heart disease. The council took this action after conducting an open and thorough evaluation process. Those who are trying to overturn this ordinance need to explain why they think it’s okay for us to breathe poisoned air while we dine.”³⁴⁴

In an editorial on April 21, 2001 the *Minot Daily News* supported the petition drive to force a referendum. The paper stated “Although this petition is a misdirected expression about government intrusion in business, it is nevertheless valuable. Petition promoters want to force a public vote on the new smoking ordinance or get the city council to simply drop the new rule. The latter would be a major mistake. But a public vote on the issue would not.”³⁴⁵

The petition to refer the ordinance to a vote of the people was filed on Tuesday April 24 with the Minot City Clerk. Ripplinger stated the petition contained approximately 3,000 names. The filing of the petition suspended the ordinance, but had no effect because the ordinance was not scheduled to be effective until January 1, 2002. After the certification of the signatures the City Council would have 60 days to either set a special election (estimated to cost \$10,000³⁴⁶) or rescind the ordinance.³⁴⁷ On Friday May 12, 2001 the city clerk validated 2,952 signatures on the petitions.³⁴⁶ Finance disclosure laws in Minot did not require restaurant owners to disclose the source of their funding for the referendum campaign.

The Minot City Council voted 14 to 0 to set a special election for July 10, 2001 rather than to repeal the ordinance.³⁴⁸ The referendum campaign was unsuccessful in convincing city council to rescind the ordinance.

An editorial in the *Minot Daily News* on May 11, 2001 stated that the City Council made

the correct decision in choosing to refer the ordinance to a vote of the people. The paper encouraged tobacco control advocates to educate the public on the smoke-free restaurant ordinance in order to obtain their support during the election. The paper stated “It would be a positive step forward for public health in Minot if voters supported the city council’s ordinance. However such an outcome won’t be easily achieved.”³⁴⁹

After the referendum was forced, the STAMP coalition reached out to state and national tobacco advocates and partner for technical assistance and financial support. Funds were raised quickly via local funders, state voluntaries including the American Cancer Society and American Heart Association, in addition to funding from national partners obtained with the assistance of Center for Tobacco Free Kid’s Aaron Doeppers. In addition, Elva Yanez of Smokeless States advised STAMP to write a Smokeless State Special Opportunity Grant for an educational campaign to generate support for Minot’s smoke-free restaurant ordinance in order to uphold the ordinance by a vote of the people.^{315, 323} The goal of the campaign was to expand voter support beyond STAMP’s core supporters to include the nonsmoking majority in order to ensure that the referendum would be defeated.³²³ The total requested budget for the campaign was \$64,119 with \$30,789 from the American Medical Association Smokeless States Grant and the rest from donations and volunteering of local support, Rocky Mountain Division of the American Cancer Society, Campaign for Tobacco Free Kids and Americans’ for Nonsmoker’s Rights. Efforts to get the vote out were funded by the latter organizations.³²³

The campaign lasted six weeks. A pre-vote educational campaign focused on the health benefits of the ordinance, economic impact of the ordinance, and tobacco industry interference in the passage of the ordinance. The pre-vote campaign included a Campaign Kick Off event, a random telephone survey of the local area conducted and analyzed with the assistance of Washington DC-based Tobacco Free Kids to test the levels of support for the ordinance and to test media messages, paid print, billboard, radio, and television ads.³²³

The media campaign consisted of three “man on the street” ads. One ad featured an older woman in the Minot Square Mall, another featured a physician with medical equipment in the background, and another featured a family dining in a restaurant and all expressed support of the smoke-free ordinance. On the day of the vote the STAMP coalition had 100 volunteers including poll watchers, poll runners, and phone bankers.³²³

The ultimate goal of the pre-vote educational campaign was to increase voter turnout for the special election. This was proposed to be achieved through identifying names and phone numbers of voters in the last election (15,000), polling previous voters to determine level of support for the ordinance, raising voter turnout by education on the positives of smoke-free indoor environments, and conducting community education on absentee ballots.³²³ With the polling of previous voters for level of support those who were defined as very supportive or somewhat supportive were specifically targeted for the get out the vote campaign with two direct mail pieces. The election was scheduled for July 10, falling right after the July 4 holiday weekend therefore voter turnout was a major concern for the STAMP coalition. The first direct mail piece included a reminder about the ordinance, instructions for voting in person, and an absentee voting instruction letter. The second direct mail piece was a reminder postcard that arrived in people’s mail boxes a few days prior to July 10.³¹⁴

The results of the telephone polls conducted as part of the pre-vote campaign were released to the public in the *Minot Daily News* on July 3, 2001. The survey included 400 Minot residents and asked “If the measure to restrict smoking in Minot restaurants is approved, would you eat out more often, less often, or would it not make a difference in how often you eat out in restaurants?” Bob Clementich, STAMP coalition President, stated that 20% of respondents would eat out more often, 10% would eat out less often, and 68% would not change their use of restaurants.³⁵⁰ The STAMP coalition argued that the results of the poll indicated that the ordinance will improve business for Minot restaurants. Diane Schatz stated “If they think this ordinance is so good for businesses, will STAMP take a stand and say they will reimburse me if my restaurant loses business?” Dean Aberle, Homesteaders Restaurant owner, who had established a voluntary smoke-free policy in anticipation of the ordinance taking effect and stated “Business has been better. We’ve only been smoke-free for about a month, but the increase in business is noticeable.”

An editorial in the *Minot Daily News* on July 5, 2001 encouraged voters to get out and vote on July 10.³⁵¹ An op-ed on July 9 in the *Minot Daily News* composed by members of the North Dakota Medical Association encouraged voters to support to smoke-free restaurant ordinance on July 10.³⁵² An editorial in the *Minot Daily News* on July 10, 2001 encouraged Minot residents to vote.³⁵³

According to Kelly Schmidt, the major opposition arguments included the standard tobacco industry themes of individual rights, business rights, and government interference in addition to arguments about the exemption for the separately enclosed ventilated room.³¹⁴ These arguments were evident in testimony at city council meeting and op-eds published in the local newspaper throughout the ordinance process. Although Schmidt did not observe public mobilization of restaurant owners by the Petroleum Marketers or Hospitality Associations, restaurant owners employed the same tobacco industry arguments and strategies used to combat smoke-free policies in other North Dakota localities and nationwide. The tobacco industry remained out of the public eye during the ordinance process.

The opposition to the ordinance conducted a small scale media campaign.³⁵⁴ One ad was placed in the *Minot Daily News* by “Concerned Minot Citizens” with the standard tobacco industry individual and business rights arguments.

Standard tobacco industry opposition arguments were voiced in op-ed throughout the political process. March 22 Max H Adams of Parshall stated “The vote is actually for or against private property rights, which is the cornerstone of a free society. The council is being asked to trample on the rights of others to further an anti-freedom agenda.”³⁵⁵ March 24 Roger Borkhuis of Minot stated “Let’s let the restaurant owners and the influence of their clientele determine if they will offer a smoke-free environment rather than let big government dictate away our constitutionally guaranteed right to freedom of choice. Let the people speak, not just the minority of well-meaning evangelists bend on advancing their cause regardless of the discriminatory nature of their crusade.”³⁵⁶ May 14 Bob Lillegard of Minot stated “Duluth, Minn., initiated this ordinance as of Jan. 1, 2001, and have five restaurants that have been granted exemptions because of loss of sales of 17-25 percent and even more than that have ignored the ordinance as they don’t want government running their private business. The Duluth Chamber wants the ordinance rescinded for business retention reasons.”³⁵⁷ Although, this statement is accurate the economic hardship

claim is a standard tobacco industry strategy to derail smoke-free policy. The revenue loss claims were never independently evaluated by the City of Duluth or the City Council.³⁴² He also stated “how can the small restaurant community compete with the advertising dollars that will be spent on the campaign by the same group that has orchestrated the initial ordinance. We all have seen the television ads, billboards, flyers and inserts and hear the radio announcements. The small restaurant community that has made a commitment to serve the Minot and surrounding area and have already given their clientele a choice to eat where they please. They can’t compete in advertising with the free money this coalition had obtained from federal and tobacco settlement funding.”³⁵⁷ The tobacco industry was able to maintain anonymity during the public debate surrounding the ordinance, although their standard arguments against smoke-free policy were voiced in North Dakota.

Voter turn-out for the special election was approximately 9,000 Minot residents. The ordinance was upheld by a vote of the people with 55% voting in favor and 45% voting in opposition.

After the win, Mary Muhlbradt, STAMP coalition member, stated “We know that there are some other communities watching us closely, other communities in North Dakota, so we would like to see some of the momentum created here in Minot carried to other cities.”³⁵⁸

Diane Schatz stated that restaurant owners spent \$1,800 to \$2,000 in an attempt to defeat the ordinance. She stated that she felt the election was unfair because the STAMP coalition spent a larger amount of money on their campaign than the restaurant owners.³⁵⁸

An editorial in the *Minot Daily News* on July 12, 2001 congratulated Minot voters on upholding the smoke-free restaurant ordinance. The paper suggested that the next positive step would be to eliminate the exemption for the separate smoking room so the restaurant employees will not be exposed to secondhand smoke. The paper supported a completely smoke-free policy.³⁵⁹ A July 25 op-ed in the *Minot Daily News* by members of the North Dakota Society for Respiratory Care congratulated Minot on the passage of the smoke-free ordinance.³⁶⁰

Neither the ND Department of Health nor the First District Health Unit were involved during the referendum. In fact, they were conspicuously absent, concerns related to lobbying were likely the primary reason.³¹⁵

As it played out, Kelly-Buettner Schimdt, had planned to and did resign at First District Health Unit to begin full time in the Fall at Minot State University, so Kelly remained actively involved as an independent unpaid volunteer. After the referendum was complete, she was paid from the remaining Smokeless States funds. Mary Muhlbradt was highly involved as a volunteer while actively employed at Trinity Health. Bob Clementich was involved as an Area Director of the American Cancer Society. Dollars from Smokeless States paid for an office assistant. This was the core group strategizing and mobilizing the referendum campaign.³¹⁵

Implementation of the Ordinance

An implementation campaign was conducted by the STAMP coalition for 6 weeks after the

ordinance was upheld at the polls. The campaign included television and radio ads plus table tents. The theme of the campaign was “what are you missing, nothing but smoke”.³¹⁴In a 2003 interview, response to a question regarding the public response to the restaurant ordinance Kelly Buettner Schmidt observed that

I think it has been very positive, I receive a lot of comments from people that they are taken aback when they go to other communities in North Dakota and they have to sit in a smoke filled restaurant. We've adapted and become accustomed so quickly to the smoke-free environment that it is just like you almost can't believe that it is not everywhere.³¹⁴

Regarding enforcement letters were sent to all restaurants providing notification of the law and the compliance requirement. The Minot Police Department conducted a compliance assessment and found no problems and had not registered any complaints. Minot State University's Tobacco Education, Research and Policy Project was hired by the First District Health Unit to conduct a compliance assessment. A total of 81 restaurants were visually inspected between June and September 2003. Besides minor issues with signage, overall compliance was 96%.³¹⁵

An Attempt to Weaken the Ordinance

On December 22, 2001, eleven days before the ordinance was to be effective and despite the strong support for the ordinance at the polls, the council considered an amendment to weaken the fully enclosed, separately ventilated smoking room exemption by removing the requirement that there be a door on the smoking room for a 60 day trial period to test if differences in air pressure were effective in preventing smoke from entering the nonsmoking areas. The trial period was instigated by the request of Diane and Danny Schatz due to the no-door negative air pressure system installed at their Econostop Truck Stop and Café (the system had been installed prior to the smoke-free restaurant ordinance). The Schatzs presented the Philip Morris ventilation website (www.pmoptions.com) as evidence that a door was not necessary for effective separation. The amendment was passed on first reading by the full city council on February 4, 2002 with a 8 to 6 vote.^{314,361} Restaurants were granted the 60 day trial period, however it was not a permanent change to the ordinance.

The STAMP reactivated its supporters and enlisted the support of the American Heart Association, American Lung Association, and Campaign for Tobacco Free Kids to run ads in an effort to prevent the doorless smoking room from being adopted permanently in the ordinance. The STAMP coalition based their opposition to the amendment on the premise that a fully enclosed and separately ventilated room was the most effective method for preventing second hand smoke pollution in the non-smoking area of the restaurant. STAMP used the endorsements of the National Institute of Occupational Safety and Health, US Surgeon General, Centers for Disease Control and Prevention, Occupational Safety and Health Administration, American Medical Association, American Cancer Society, American Lung Association, American Heart Association, North Dakota Department of Health, and the North Dakota Medical Association to support their position. The coalition also stressed that the Minot City Council was attempting to modify an ordinance that residents of Minot had publically supported in a referendum vote. The coalition encouraged Minot residents to contact city council members and express their opposition to the

amendment.³¹⁴ The coalition ran an edgy ad for rural North Dakota which stated that an 8 to 6 majority of the city council was supporting the tobacco industry's position that a door was not necessary on a separately enclosed and ventilated smoking area. In North Dakota this was a bold statement because local advocates have traditionally been reluctant to hold politicians publicly accountable for their actions.

On January 2, 2002, Dr. Thomas P. Houston, Director Science and Community Health Advocacy American Medical Association, composed a letter to Lori Brierley, First District Health Unit, commending Minot for the passage of the smoke-free restaurant ordinance and the subsequent upholding by a vote of the people. The letter stated "We strongly advise Minot to not fall prey to the latest tobacco industry strategy- -the claim that ventilation systems, specifically positive and negative air pressure, can control secondhand smoke."³⁶² The letter went on to state "We urge Minot to stand strong in the face of this latest attempt to undermine the city's current, solid ordinance and to continue protecting its citizens from secondhand smoke. We appreciate the action that you and the citizens of Minot have taken to protect the health of your citizens and workforce by having a strong smokefree policy."³⁶²

On February 14, 2002 Bruce Levi, Executive Director North Dakota Medical Association composed a legal brief that was key in halting the attempts to weaken the smoke-free restaurant ordinance.³⁴⁰ The brief was regarding the Minot City Home Rule Charter (art. 4, section 12) which contained a 10-year requirement that any material amendments to an ordinance which was upheld by a vote of the people after referral must be passed by 3/4 of the city council members.³⁶³ The brief stated

A concluding argument could be crafted similar to the following: Inasmuch as the proposed amendment to the Minot ordinance would introduce alternative requirements that would not work to prevent ETS from infiltrating a nonsmoking area to eliminate the health risks of ETS, the effect is clearly *significant* and a "material amendment." The people of Minot expressed their intent clearly in the ordinance that smoking areas be enclosed by full partitions or walls from floor to ceiling (which may include doors that are ordinarily kept closed), and be served by a HVAC system which is so designed, constructed, and maintained as to exchange air directly and exclusively with the outside atmosphere. The proposed amendment offers an alternative that, according to recognized health authorities, has not been shown to be effective. The proposed amendment certainly has a **logical connection with the consequential facts** surrounding the adoption of the ordinance; would **change the result** sought by Minot voters; and by its very nature would have been a significant factor, or taken into consideration, in the voters' **decisionmaking** process. Under Minot's home rule charter, a material amendment to an ordinance upheld in a referral requires a 3/4 vote of the city council to be approved.³⁶³[Emphasis in original].

City council subcommittees considered the permanent change to allow a doorless smoking room, prior to consideration by the full city council. The Minot Finance and Improvements Committee voted 4 to 2 on February 27, 2001 that a door was not necessary for the separate smoking room if there was an adequate ventilation system installed. Dr. Mark Bradley, Minot physician, testified as a representative of the American Lung Association against the amendment. He stated that he believed it may not be legal for city council to modify an ordinance that was previously upheld by a vote of the people. Ken Wangler, North Dakota State Department of

Health manager of indoor air quality regulation, stated that the system in place at the Schatz's restaurant is not a true negative air pressure system without a door on the smoking room. Wrangler testified "You cannot drop the air pressure with an opening the size of a doorway." He concluded that the system was not as effective without a solid-door for separation. Ron Garcia requested the City Engineer provide results of the test conducted during the trial period to determine the Schatz's system provided sufficient separation. The City Engineer stated that the state of North Dakota did not have the equipment to perform the tests and therefore none had been conducted. Committee members Chuck Barney, Ron Boen, Neil Leigh, and Jim Hatlelid voted in favor of the doorless room, while Ron Garcia and Larry Frey voted in opposition.^{361, 364}

The media campaign and testimony by health advocates was successful, the amendment was defeated by the full City Council on March 4, 2002. Kelly Schmidt described the separately ventilated smoking room exemption by stating that "it has caused its own headaches, we keep saying to other communities in North Dakota not to do that, you need to go 100% smoke-free"³¹⁴.

Economic Impact Study

As STAMP promised the City Council during the debate over the ordinance, Minot State University College of Business and the North Dakota Center for Persons with Disabilities conducted an economic analysis of the effect of the ordinance on the hospitality business. Data for the analysis was obtained from the Office of the North Dakota Tax Commissioner on restaurant taxable sales and purchases, and total taxable sales and purchases for the City of Minot. The data, which included all restaurants in Minot, was collected over a six year period from the first quarter of 1997 to the fourth quarter of 2002. This period included one year during which the ordinance had been in effect. Following established procedures for doing such studies, the data were analyzed using linear regression in order to adjust fluctuations in sales due to seasonal variations and economic patterns.³⁶⁵ The report, released on June 5, 2003, demonstrated that the Minot smoke-free restaurant ordinance did not have a significant effect on restaurant sales.³⁶⁶ This result was consistent with other studies of the actual effects of such ordinances done elsewhere.¹⁷⁴

Although objective statistical analysis determined no negative economic impact of the ordinance, the Schatzs continued to claim that the ordinance had caused the closing of one of their two restaurants/truck stops in Minot.³⁶⁷

Conclusion

Minot was successful in the passage of a smoke-free restaurant due to strong leadership, an active coalition and a city council champion. The STAMP coalition worked throughout the 1990's to set the stage for the smoke-free ordinance with strong grass root advocacy for youth access ordinances and educational campaigns on secondhand smoke. During the ordinance process health advocates actively engaged the public in the fight for the smoke-free policy and were prepared to deal with standard tobacco industry tactics to oppose smoke-free policies. Minot has set the stage for smoke-free policy in other localities in North Dakota.

In an interview in 2003, Kelly Schmidt, Assistant Professor of Nursing at Minot State University and former Executive Director of the Stop Tobacco Access to Minors Program

(STAMP) coalition, expected local smoke-free ordinances to spread, perhaps even to state legislation:

I am a very strong believer that we need to do those local ordinances first because we do have strong local control. The legislature is usually hesitant to force cities to do a lot of things and we have our home rule charters that say we can do beyond what the legislature says ... I can see maybe after several communities passed ordinances the legislature might take it on but I don't have much faith that the legislature would pass it without a lot of other communities having local ordinances first³¹⁴

CONCLUSION

North Dakota tobacco control advocates were successful at the state level through strong leadership, effective coalition building, and well-developed strategy in the late 1980's. The tobacco industry recognized the threat posed by the developing tobacco control infrastructure in North Dakota and subsequently increased their involvement in state politics. Tobacco control advocates retreated to the local level where they saw greater opportunity for the successful passage of policy. While there have been few victories at the state level since the late 1980's, local policy has flourished.

LESSONS LEARNED

The tobacco industry position that tobacco use is an individual choice not warranting government interference has hindered state level tobacco control policy in North Dakota.

The North Dakota legislature passed tobacco control legislation in the early 1900's, most notably a bill in 1913 which completely prohibited the sale of cigarettes. The legislation was subsequently repealed in 1925, because Governor A.G. Sorely held the above position. There was a lull in tobacco related legislation through the 1970's which could be attributed to the government's non-interference position. The limited success in the passage of tobacco control legislation at the state level through the 1990s is also a result of the tobacco industry effectively maintaining this message in North Dakota.

The passage of tobacco control legislation requires cooperation among health advocates.

The North Dakota Lung Association made multiple unsuccessful attempts to pass clean indoor air legislation from 1981-1985. In 1985, the North Dakota Lung Association joined forces with the State Health Department, American Cancer Society, American Heart Association, and other health affiliated organizations to create the Tobacco Free North Dakota Coalition. Tobacco Free North Dakota was behind the passage of HB1272, clean indoor air legislation.

The passage of tobacco control policy requires a strong leader, a well-developed plan, and organization.

The successful passage of HB 1272 in 1987 was the result of leadership provided by Dr. Stephen McDonough, Director of the North Dakota Department of Health Preventive Health Section and Cathy Rydell, a Republican legislator. The state tobacco plan, Tobacco Health and the Bottom

Line, provided a well-developed strategy for the passage of North Dakota tobacco control legislation. The essential organization for the passage of this legislation was provided by Tobacco Free North Dakota.

The successful passage of the Minot smoke-free restaurant ordinance in 2001 was the result of the strong leadership provided by Kelly Buettner-Schmidt, RN (Executive Director of the STAMP coalition). The necessary strategy and organization for the passage of this ordinance was created by the STAMP coalition.

Tobacco control efforts in the late 1980's were effective due to the lack of tobacco industry presence in the state.

Although strong leadership and organization were large contributors to the successful passage of HB 1272, the lack of a large tobacco industry presence also played a significant role. After the passage of the legislation in the late 1980's, the tobacco industry intensified their role in state level politics. The tobacco industry was able to render the health advocates ineffectual in the passage of tobacco control legislation throughout the 1990's.

When facing a roadblock to the passage of tobacco control policy, choose an alternate route.

In the early 1990's, Dr. Stephen McDonough and the Tobacco Prevention and Control Program (State Health Department) recognized that the tobacco lobby would prevent the passage of state level legislation. They also recognized the potential for success at the local level due the passage of a vending restriction ordinance in Grand Forks (first local ordinance passed) and the strong political emphasis on local policy control in North Dakota. In 1992, the Tobacco Prevention and Control Program began to provide funding and technical assistance to the local public health units for tobacco control which has continued through the present. Since 1990, 38 local tobacco control ordinances have been passed.

The tobacco industry has been successful at the state level through the use of third party allies.

In North Dakota the Hospitality Association, Grocers Association, and the Petroleum Marketers and Retail Association have been instrumental in the tobacco industry's success at the state level. These organizations fight on the front lines for tobacco interests allowing the tobacco industry to remain behind the scenes out of public view. The associations argue against tobacco control policy on the grounds that it infringes upon individual and business rights. Tobacco control advocates need to recognize the ties between the tobacco industry and these associations.

The fight against tobacco industry needs to be done publicly instead of behind the scenes.

The STAMP coalition engaged and involved the public in the passage of the Minot smoke-free restaurant ordinance through the Great American Smoke-Out, the Blue Ribbon Restaurant Program and media campaigns. The public backed the STAMP coalition's position by upholding the ordinance after a referendum was forced. The strategy used by the STAMP coalition will serve

as a model for the passage of smoke-free ordinances in other communities.

There were few state policy victories in the 1990's because battles with the tobacco industry were held out of the public's view. Health advocates did not make the general public aware of the influence of the tobacco lobby on the legislature and business associations. Legislators need to be held accountable for their actions by the tobacco control advocates and the public. Therefore, health advocates have not been able to harness the public's support in the fight against the tobacco industry.

Tobacco control advocates must not bend to political pressure in order for tobacco control to be successful.

State Health Officer Murray Sagsveen, appointed by Governor Ed Schafer, created an atmosphere unfavorable to tobacco control at the State Health Department. The forced resignation of Dr. Stephen McDonough occurred during Sagsveen's reign at the Health Department. With several exceptions, tobacco control advocates did not fight on behalf of Dr. Stephen McDonough for the fear of losing their positions. Due to this lack of support, the tobacco control community lost a key advocate and strong leadership with the removal of McDonough.

Defeating the tobacco industry requires a lasting tobacco control infrastructure.

The foundation for a solid infrastructure was established in the late 1980's through the creation of the Tobacco Free North Dakota coalition and the establishment of the Tobacco Prevention and Control Program. TFND lost steam throughout the 1990's, in addition to experiencing a loss of leadership in the late 1990's. In 2001, North Dakota tobacco control advocates chose to use the North Dakota Medical Association rather than the health department as the lead agency for the state-wide tobacco control coalition. Therefore, North Dakota is in the process of rebuilding tobacco control infrastructure at the state level. The Tobacco Prevention and Control Program does not have a comprehensive strategy for the passage of state level tobacco control policy however the second state tobacco plan is in the final stages of development.

Health advocates need to identify legislative champions

Although there has been legislative supporters of tobacco control, with the exception of Cathy Rydell, health advocates have not identified tobacco control champions that are influential within the majority party. While the tobacco industry has control of the majority leadership, this puts health advocates at a huge disadvantage.

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347. Foster C. Petition against smoking ban filed. Minot Daily News 2001 April 25.
348. Rafferty T. Voters to decide. Minot Daily News 2001 May 8.
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350. Rafferty T. Poll favors ban. Minot Daily News 2001 July 3.
351. Minot Daily News Editorial Board. Vote numbers important. Minot Daily News 2001 July 5.
352. North Dakota Medical Association. Hazards of smoking clear. Minot Daily News 2001 July 9.
353. Minot Daily News Editorial Board. Take some time to go and vote. Minot Daily News 2001 July 10.
354. Rafferty T. Voters favor ordinance. Minot Daily News 2001 July 11.
355. Adams M. Smoking and freedom. Minot Daily News 2001 March 22.
356. Borkhuis R. No-smoking crusaders. Minot Daily News 2001 March 24.
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APPENDICES

Appendix 1: North Dakota Local Public Health Units

| Multi County Health Dist. | Single County Health Dept. | City/County Health Dept. | Single County Health Dist. | City/County Health Dist. | Tribal Health Units |
|----------------------------------|-----------------------------------|---------------------------------|------------------------------------|---------------------------------------|------------------------------|
| Upper Missouri Dist. Health Unit | Pembina County Health Dept | Grand Forks Public Health Dept | Emmons County Public Health | Valley City-Barnes County Health Dept | Spirit Lake Sioux Nation |
| First Dist. Health Unit | Walsh County Health Dept | Fargo Cass Public Health | McIntosh Dist. Health Unit | | Standing Rock |
| Southwestern Dist. Health Unit | Foster County Health Dept | Bismarck | Kidder County Dist. Health Unit | | Turtle Mountain Chippewa |
| Lake Region Dist. Health Unit | Steele County Public Health Dept | Burleigh Public | Dickey County Dist. Health Unit | | Sisseton Indian Health |
| Custer Health Unit | Lamoure County Public Health Dept | | Sargent County Dist. Health Unit | | Three Affiliated Tribes |
| Nelson/Griggs Dist. Health Unit | Ransom County Public Health Dept | | Wells County Dist. Health Unit | | Trenton Indian Services Area |
| Central Valley Health Unit | Richland County Health Dept | | Rolette County Public Health Dist. | | |
| | | | Towner County Public Health Dist. | | |
| | | | Cavalier County Health Dist. | | |
| | | | Traill Dist. Health Unit | | |

Appendix 2: Multi-County District Health Units in North Dakota

| First District Health Unit | Southwestern District Health Unit | Lake Region District Health Unit | Custer Health Unit | Nelson/Griggs District Health Unit | Central Valley Health Unit |
|--|--|---|---|---|-----------------------------------|
| Butte County Ward County | Adams County Billings County Golden Valley County | Pierce County Benson County | Mercer County Oliver County | Nelson County Griggs County | Stutsman County Logan County |
| Renville County Bottineau County Ward County McHenry County McLean County Sheridan County | Bowman County Slope County Dunn County Hettinger County Stark County | Ramsey County Eddy County | Morton County Grant County Sioux County | | |

Appendix 3: North Dakota State Health Department Tobacco Prevention and Control Program Biennium Budget, 2001-2003 & 2003-2005

| Biennium | 2001-2003 | | 2003-2005 | |
|-----------------------------|-------------|-------------|-------------|-------------|
| CDC funds | \$2,200,000 | | \$2,200,000 | |
| *CHGP Advisory Cmte | \$100,000 | | \$100,000 | |
| City/County Cessation | \$250,000 | | \$250,000 | |
| State Employee Cessation | | | \$250,000 | |
| Cessation Carryover | | | \$202,000 | |
| Statewide Quitline | | | \$680,000 | |
| Comm. Health Grants Program | \$4,700,000 | | \$4,700,000 | |
| CHGP-School | | \$1,880,000 | | \$1,880,000 |
| CHGP-Community | | \$1,880,000 | | \$1,880,000 |
| CHGP-State aid | | \$940,000 | | \$940,000 |
| Total funds | \$7,250,000 | | \$8,280,000 | |

*Community Health Grant Program

Appendix 4: North Dakota State Health Department Tobacco Prevention and Control Program Annual Budget, 2001-2005

| Fiscal Year | 2001-2002 | | 2002-2003 | | 2003-2004 | | 2004-2005 | |
|--------------------------|-------------|-----------|-------------|-----------|-------------|-----------|-------------|-----------|
| CDC funds | \$1,100,000 | | \$1,100,000 | | \$1,100,000 | | \$1,100,000 | |
| *CHGP Advisory Cmte | \$50,000 | | \$50,000 | | \$50,000 | | \$50,000 | |
| City/County Cessation | \$125,000 | | \$125,000 | | \$125,000 | | \$125,000 | |
| State Employee Cessation | | | | | \$125,000 | | \$125,000 | |
| Cessation Carryover | | | | | \$101,000 | | \$101,000 | |
| Statewide Quitline | | | | | \$340,000 | | \$340,000 | |
| Comm. Health Grants | \$2,350,000 | | \$2,350,000 | | \$2,350,000 | | \$2,350,000 | |
| CHGP-School | | \$940,000 | | \$940,000 | | \$940,000 | | \$940,000 |
| CHGP-Community | | \$940,000 | | \$940,000 | | \$940,000 | | \$940,000 |
| CHGP-State aid | | \$470,000 | | \$470,000 | | \$470,000 | | \$470,000 |
| Total funds | \$3,625,000 | | \$3,625,000 | | \$4,140,000 | | \$4,140,000 | |

*Community Health Grant Program

Appendix 5: History of Sales Restriction Legislation

| Year | Bill | Sponsor | Status | Summary | Penalty |
|------|-----------------------------------|--|--------|--|--------------------------|
| 1890 | Preventing sale of cigs to minors | | Pass | Sales of tobacco products to children under 16 illegal | Fine and/or imprisonment |
| 1895 | HB 39 | | Pass | Sales of cigarettes illegal | Fine and/or imprisonment |
| 1895 | SB141 | | Pass | Sales of adulterated cigs and sales of tob products to children under 17 illegal | Fine and/or imprisonment |
| 1889 | Prohibit minors from using cigs | | Fail | Use of cigarettes by minors illegal | Unknown |
| 1913 | HB 67 | Northrop | Pass | Prohibited sale, manufacture, bartering, or giving away of cigarettes | Fine and/or imprisonment |
| 1921 | HB 154 | Halcrow | Pass | Amendment to HB 67, prohibited soliciting instructions for the purchase of cigarettes both within and outside ND | Fine and/or imprisonment |
| 1925 | SB 61 | Hamilton | Pass | Repealed HB 67, declared selling or providing cigarettes to persons under 21 illegal | Fine and/or imprisonment |
| 1925 | SB 62 | Hamilton | Pass | Provisions for the sales of cigarettes including licensing and taxation | Fine and/or imprisonment |
| 1925 | SB 62 | Hamilton | Pass | License fee for cigarettes sales \$10 | Fine and/or imprisonment |
| 1927 | HB 52 | Hauge | Pass | Increased license fee for cigarette sales from \$10 to \$12.50 | Fine and/or imprisonment |
| 1935 | SB 189 | Committee on Taxes and Tax Laws | Pass | Reduced license fee for cigarette sales from \$12.50 to \$5.00 | Fine and/or imprisonment |
| 1953 | SB 153 | Geelan, Stucke | Pass | Prohibited sale of candy cigarettes | Fine and/or imprisonment |
| 1977 | HB 1593 | Corliss Mushik D-34 | Fail | Sale of tobacco products to certain persons | |
| 1979 | HB 1689 | Tom Kuchera R-18, Elaine Vig R-17 | Fail | Prohibit tobacco sales to persons under age 19 and require local licensing for tobacco retailers | Yes |
| 1985 | HB 1323 | Thomas Lautenschlager D-District 40 & 50, Kenneth Frey D-District 41 | Fail | Prohibited possession of tobacco by minors | Class B Misdemeanor |
| 1987 | HB 1176 | Committee on Industry, Business, and Labor | Pass | License fee for retail sale of tobacco products increased from \$5.00 to \$15.00 | |

| | | | | | | |
|------|----------|---|---|------|--|------------------------|
| 1989 | HB 1219 | Committee on Industry, Business, and Labor | | Fail | Relating to the transfer of the payment of various license fees collected by attorney general to state tax commissioner | |
| 1991 | SB 2087 | Don Moore R-District 28, Duane DeKrey R District 30, Barb Evanson R-District 30 Orlin Hanson R District 3, Jack Ingstad R-District 17 & 18 | | Fail | Restricted cigarette vending machines to areas where minor prohibited | Class B Misdemeanor |
| 1991 | SB 2446 | Wayne Stenehjelm R-District 42, Evan Lips R-District 47, Erwin Hanson D-District 2 | Lee Kaldor D-District 20, LeRoy G. Bernstein R-District 45 | Fail | Industry supported vending bill with preemption, allowed cigarette vending machines in factories, businesses and offices not open to the general public, public places that prohibit minors, places that sell alcoholic beverages, and business places where the vending machine is in view of an employee, preemption provision stated no city or other political subdivision of the state may impose any requirement or prohibition concerning the sale of tobacco products through vending machines in addition to the requirements and prohibitions imposed by this Act. | Class B Misdemeanor |
| 1991 | SB 2174 | Committee on Industry, Business, and Labor | | Pass | | |
| 1991 | SB 2427 | Jayson Graba D-43, Larry J. Robinson D-24, Don Moore R-28 | | Fail | Age for purchase of tobacco products increase from 18 to 21 | |
| 1993 | HB 1430 | Art Goffe D-24, Eliot Glassheim D-18, Audrey Cleary D-49 | Kit Scherber D-44 | Fail | | |
| 1995 | SB 2498 | Byron J. Langley D-12, Meyer Kinnoin D-4, Ed Kringstad R-49 | | Fail | Regulate sale & distribution of tobacco to minors, relating to the sale & use of tobacco by minors, preemption | Class B Misdemeanor |
| 1995 | HB 1316 | Catherine Rydell R-47, Marv Mutzenberger D-32 | Kringstad R-49, Freborg R-8, DeMers D-18 | Fail | Compliance checks, local authority, penalties for sales to minors including license suspension/revocation, infraction for sales of tobacco to minors, infraction for minors to purchase, smoke or use tobacco | Infraction |
| 1997 | SB 2193 | Russell Thane R-District 25, David Nething R-District 48, Larry Robinson D-District 24, John Traynor R-District 15 | Roxanne Jensen R-District 17, Clara Sue Price R-District 40 | Fail | Changed penalty for sales of tobacco products to minors from class B misdemeanor to infraction, declared it unlawful for minor to possess tobacco, changed penalty for minors smoking or using tobacco from a class B misdemeanor to unlawful with the exception of religious ceremonies and compliance checks, gave city, county or board of health the authority to impose stricter regulations for tobacco control to supersede state law | |
| 1999 | SB 2173* | Harvey Sand R-10 | | Fail | Prohibit tobacco, alcohol, gambling, advertisements on government vehicles | |
| 1999 | SB 2125* | Russell Thane R-25, Ralph Kilzer R-47, Karen Krebsbach R-40 | Roxanne Jensen R-17, Wanda Rose D-32 | Pass | Changed penalty for sales to tobacco products to minors from Class B misdemeanor to infraction | Infraction |
| 1999 | HB 1321 | Stacey Mickelson R-38, Andrew Maragos R-3 | | Fail | To provide for the regulation of cigarette marketing | |
| 1999 | HB 1082* | Political Subdivisions Committee | | Pass | Increased minimum cigarette package size from five to twenty | |
| 1999 | HB 1192 | Serenus Hoffner D-32 | | Fail | Attorney's conflict of interest/prevent attorney's from representing tobacco and schools | |

Appendix 6: Early History of Efforts to Increase Tobacco Excise Taxes in North Dakota

| Year | Bill | Tax (per pack of 20) | Tax (per tube of 50) | Snuff | State General Fund | Local Govt | Libraries | Revenues |
|-------------|-------------|-----------------------------|-----------------------------|------------------------------|---------------------------|-------------------|------------------|-----------------|
| 1925 | HB 62 | \$0.03 | \$0.01 | | | | | |
| 1927 | HB 52 | | | \$0.02 per 1 1/4 oz | | | | |
| 1931 | | | | 1927 tax repealed | | | | |
| 1935 | SB 189 | | | \$0.02 per 1 1/4 oz | | | | |
| 1941 | HB 98 | | | 1925 tax repealed | | | | |
| 1949 | HB 47 | \$0.05 | | | | | | |
| 1951 | | \$0.06 | | | \$0.05 | \$0.01 | | |
| 1963 | SB 103 | \$0.07 | | 10% of wholesale tax +\$0.02 | \$0.05 | \$0.02 | | |
| 1965 | HB 671 | \$0.08 | | 11% of wholesale tax | \$0.06 | \$0.02 | | \$5,148,318 |
| 1969 | SB 231 | \$0.11 | | | \$0.08 | \$0.03 | | \$6,278,766 |
| 1979 | | \$0.12 | | | \$0.08 | \$0.03 | \$0.01 | |
| 1983 | | \$0.18 | | | \$0.15 | \$0.03 | \$0.00 | |
| 1985 | | | | | | | | \$12,043,271 |

Appendix 7: History of Tobacco Tax Legislation

| Year | Bill | Sponsor | Status | Summary | |
|------|----------|--|---|--|---|
| 1925 | HB 62 | Hamilton | Pass | \$0.03 per pack of 20, \$0.01 per tube of 50 | |
| 1927 | HB 52 | Hauge | Pass | \$0.02 per 1 1/4 oz snuff | |
| 1931 | | | Pass | 1927 tax repealed | |
| 1935 | SB 189 | Cmte on Taxes and Tax Laws | Pass | \$0.02 per 1 1/4 oz snuff | |
| 1941 | HB 98 | Dalzell, Crockett, Bolmeier, Carlson, Wolf, Nelson | Pass | 1925 tax repealed | |
| 1949 | HB 47 | Legislative Research Cmte per request of State Tax Commissioner | Pass | \$0.05 per pack of 20 | |
| 1951 | | | Pass | \$0.06 per pack of 20 | |
| 1963 | SB 103 | Wadeson, Solberg, George, Tuff | Pass | \$0.07 per pack of 20, 10% of wholesale tax +\$0.02 per 1 1/4 oz snuff | |
| 1965 | HB 695 | Giffey, Hoffner, Backes | Pass | \$0.08 per pack of 20, \$0.01 increase | |
| 1965 | HB 671 | | Pass | 11% of wholesale tax on cigars, snuff, and other tobacco products | |
| 1969 | SB 231 | Nething, Redline, Unruh, Lowe | Pass | \$0.11 per pack of 20, \$0.03 increase | |
| 1975 | SB 2458 | Melland | Fail | tax on cigs, snuff, and other tobacco products, and to provide a penalty | |
| 1975 | HB 1373 | Hilleboe | Fail | amend section 57-36-06 & subsection 1 of section 57-36-27 of NDCC, cig tax | |
| 1979 | | | Pass | \$0.12 per pack of 20, \$0.01 increase | |
| 1983 | HB 1449 | Michael Unhjem R-District 48, Orlin Hanson R-District 3, Serenus Hoffner D-District 32 | William Parker R-District 7, Harvey Tallackson D-District 16, Gary Nelson R-District 22 | Fail | \$0.02 per pack of 20 cigarette tax increase for parks and recreation development fund |
| 1983 | HB 1712 | Earl Strinden R-District 17 & 18, Richard Backes D-District 3 | | Pass | \$0.18 per pack of 20 (\$0.06 increase) |
| 1985 | HB 1421 | Earl Strinden R-District 17 & 18, Charles Mertens R-District 15 | David Nething R-District 48, William Heigaard D-District 10 | Fail | \$0.08 per pack of 20 cigarette tax increase |
| 1987 | SB 2216 | Committee on Finance and Taxation | | Pass | \$0.27 per pack of 20, \$0.09 per pack of 20 increase |
| 1987 | SB 2103 | Tim Mathern D-District 51 | | Pass | 20% of wholesale tax on cigars, snuff, and other tobacco products (9% increase) |
| 1989 | SB 2475 | R. James Maxson D-District 41, Donna Nalewaja R-District 45 | Catherine Rydell R-District 47, Janet Wentz R-District 41 | Pass | \$0.30 per pack of 20 (\$0.03 increase) & 25% (5% increase) of wholesale tax with sunset on 7/1/1991, tax stamp discounts for distributors |
| 1991 | HB 1509 | August Ritter D- District 47, Barbara Pyle D-District 13 | | Pass | Partial sunset of tax increase in SB 2475, \$0.29 per pack of 20 (\$0.01 of \$0.03 sunset observed), 22% of wholesale tax (3% of 5% sunset observed) |
| 1991 | SB 2085 | Dean Meyer D-District 36 | | Fail | Reduced cigarette and wholesale tax in accordance with sunset provision in SB 2475 and further reduced tax by potential federal tax increases |
| 1993 | SB 2539 | Dan Wogsland D- District 23 | | Fail | Increased wholesale tax on cigars, snuff, and other tobacco products from 22% to 38% (16% increase), increased cigarette tax from \$0.29 to \$0.50 per pack of 20 (\$0.21 increase) |
| 1993 | HB 1516 | William Kretschmar R- District 30 | Traynor, Krebsbach, Maxson | Pass | \$0.15 cigarette tax increase from \$0.29 to \$0.44 |
| 1997 | SB 2263 | Tim Mathern D-District 11 | Gerald O. Sveen R-District 6 | Fail | Increased wholesale tax on cigars, snuff, and other tobacco products from 28% to 32% |
| 1999 | HB 1345* | Wanda Rose D- 32, Roxanne Jensen R-17, George Keiser R-47, Lonny Winrich D-18 | Judy DeMers D-18, Jerome Kelsch D-26 | Fail | \$0.01 per pack of 20 increase for school nursing projects grant |

Appendix 8: History of Smoking Restriction Legislation in North Dakota

| Year | Bill | Sponsor | Status | Summary | |
|------|---------|--|--|--|---|
| 1921 | HB 51 | McLarty | Pass | Prohibited smoking in restaurants and on public transportation | |
| 1975 | HB 1492 | Lang, Schindler | Pass | Authorized the designation of smoking and nonsmoking areas in public buildings | |
| 1977 | SB 2328 | Shirley Lee R-District 8, Russell Thane-District 25 | Pass | Required the designation of a nonsmoking area in all places of public assembly, replaced HB 1492, places of public assembly included theaters except lobby, auditoriums, elevators, health care institutions except patient rooms, all state buildings except for rooms in student residence halls, buildings open to the public with seating capacity for greater than 50 including food service establishments | |
| 1981 | SB 2405 | Hal Christensen R-District 3, Shirley Lee R-District 8 | Fail | Amendment to SB 2328, required at least 35 percent of the seating capacity of all food service establishment be designated nonsmoking, included grocery stores as places of public assembly, enforcement by state laboratories department | |
| 1983 | SB 2393 | Tom Matchie D-District 45 | Glenn Pomeroy D-District 42 | Fail | Amendment to SB 2328, Required the designation of a smoking area in all places of public assembly, included patient rooms in health care institutions, student rooms in residence halls and theater lobbies as places of public assembly, allowed bars to designate entire area as a smoking area, required signage posting for smoking areas |
| 1987 | HB 1272 | Catherine Rydell R-District 47, Orlin Hanson R-District 3, Dave Koland R-District 5 | Bruce Bakewell R-District 2, Floyd Stromme D-District 15, R. V. Shea D-District 43 | Pass | Amendment to SB 2328, Expanded definition of places of public assembly to include theater lobbies, gymnasiums, libraries, public transportation, patient rooms in health care institutions, waiting areas in public transit terminals, state owned or leased buildings, exempted private residences, bars, private and fraternal organizations, areas used for alcohol service that are physically separate rooms in food service establishments, Required the designation of smoking areas in all places of public assembly and required signage, Smoking areas cannot occupy over 50 percent of the total public area unless smoking area becomes fully occupied and more space is required, Enforcement agency is State Department of Health |
| 1989 | SB 2066 | Legislative Counsel (Interim Legislative Procedure and Arrangements Committee) | Fail | Amendment to HB 1272, made the designation of smoking areas optional | |
| 1989 | HB 1383 | Richard Solberg D-District 4, Kenneth Thompson R-District 39, Jack Dalrymple R-District 22 | Fail | Prohibited the designation of smoking areas in public elementary and secondary schools | |
| 1991 | HB 1299 | William E. Kretschmar R-30 | Fail | Amendment to HB 1272, made the designation of smoking areas optional | |
| 1993 | HB 1517 | Holm, Brodshaug, Svedjan? | Fail | Amendment to HB 1272, Prohibited smoking in state-owned buildings | |
| 1993 | HB 1246 | William E. Kretschmar R-30, Janet Wentz R-3 | Pass | Amendment to HB 1272, made the designation of smoking areas optional, prohibited smoking in early childhood facilities when children are present | |
| 1995 | SB 2046 | Legislative Counsel | Fail | Tobacco use cessation education program for public schools | |
| 1995 | HB 1367 | Marv Mutzenberger (D-32), Sally Sandvig D-32, William E. Gorder R-16, Andy Hagle R | Scherber, Donna Nalewaja R-45 | Fail | Amendment to HB 1272, prohibited smoking in children's services facilities including health, library, kindergarten, elementary, and secondary education facilities, prohibited smoking in places of employment unless in a separately, ventilated fully enclosed room |
| 1997 | HB 1198 | Sally Sandvig D-District 21, Wanda Rose D-District 32, William E. Gorder R-District 16 | John Andrist R-District 2, Marv Mutzenberger D-District 32, Russell T. Thane R-District 25 | Fail | Amendment to HB 1272, replaced places of public assembly with places of public access and nonpublic workplaces, place of public access included any enclosed indoor place of business, commerce, banking, financial service, or other service related activity, both public and privately owned, nonpublic workplaces required to have a written smoking policy to either prohibit smoking in the workplace or restrict smoking to designated enclosed smoking areas or permit smoking in unenclosed rooms if smoke does not enter the work space of nonsmoking employees |

Appendix 9: History of MSA Legislation 1999-2001

| Year | Bill No. | Sponsor | | Status | Summary |
|------|----------|---|--|--------|---|
| 1999 | HCR3042 | G. Jane Gunter R-7 | | Fail | MSA fund allocation, 10% to public health programs, 45% to common schools trust fund. 45% to property tax rebate |
| 1999 | SCR4008 | Gary J. Nelson R-22 | John Dorso R-46 | Pass | Concurrent resolution urging Congress and the Clinton administration to recognize state interests and enact legislation that would prohibit the federal Department of Health and Human Services from recouping the tobacco settlement funds as third party recoveries under Medicaid law. |
| 1999 | SCR4013 | Harvey Sand R-10, Meyer Kinnoin D-4 | William Gorder R-16, Shirley Meyer D-36, Dorvan Solberg D-2 | Fail | MSA fund allocation, health care trust fund |
| 1999 | SCR4012 | Marv Mutzenberger D-32, Judy DeMers D-18, Tim Mathern D-11 | | Fail | MSA fund allocation, 90% to health care programs trust fund, 10% to department of health for programs with an emphasis on prevention |
| 1999 | SB 2250 | Marv Mutzenberger D-32, Judy DeMers D-18, Tim Mathern D-11 | | Fail | MSA fund allocation, 90% to health care programs trust fund, 10% to department of health for programs with an emphasis on prevention |
| 1999 | HB 1436 | Merle Boucher D-9, Ole Aarsvold D-20, James Kerzman D-35, Wanda Rose D-32, Gerald Sveen R-6 | Rich Wardner R-37 | Fail | MSA fund allocation, health and education trust fund |
| 1999 | HB 1475 | Jack Dalrymple R-22 | David Nething R-48 | Pass | Establishment of the tobacco settlement trust fund, all monies received by the state from the settlement must be deposited in the trust fund, the principal and interest on the fund allocated to: 10% to community health trust fund to be administered by the state health department for community based public-health programs including programs with emphasis on preventing or reducing tobacco usage in the state; 45% to common schools trust fund; 45% to water development trust fund |
| 1999 | HB 1153 | Committee on Finance and Taxation | | Pass | Reserve fund for the consequences of the sale of cigarettes in ND |
| 2001 | HB 1376 | Audrey Cleary D-49, Pam Gulleon D-26, Roxanne Jensen R-17, Nancy Johnson R-37, George Keiser R-47 | Rich Wardner R-37 | Fail | Transfer \$200,000 from tobacco settlement fund to school nursing grant fund |
| 2001 | HB 1454 | Eliot Glassheim D-18, Roxanne Jensen R-17, George Keiser R-47, John Mahoney D-33 | Judy Lee R-13, Deb Mathern D-45 | Fail | \$500,000 from tobacco settlement trust fund invested in state investment fund if state investment fund raises at least \$5 million in private investments |
| 2001 | SB 2380 | Ray Holmberg R-17, Joel Heitkamp D-27, Randy Schobinger R-13 | Lois Delmore D-43, William Devlin R-23, Clara Sue Price R-40 | Pass | Community Health Trust Fund: Establish Community Health Grants Program with primary purpose to prevent or reduce tobacco usage in the state by strengthening community-based public health programs and by providing assistance to local public health units and communities throughout the state, grants awarded on a non-competitive basis, program must, to the extent of funding available, follow guidelines established by the centers for disease control and prevention, not more than 5% of funds for surveillance and evaluation, 40% of funds to public health programs with an agreement with school board for preventative health programs, 40% of funds to public health program programs developed in cooperation with local elected officials, 20% to public health units to supplement existing state aid, established community health grant program advisory committee |
| 2001 | SB 2029 | Legislative Counsel | | Fail | All interest on water development trust fund must be deposited in community health trust fund |
| 2001 | SB 2448 | Bob Stenehjem R-30, Randell Christmann R-33, Tom Fischer R-46 | Al Carlson R-41, Jon O. Nelson R-7 | Pass | legislative council study of compliance and jurisdictional issues under tobacco tax laws |
| 2001 | SB 2399 | Tom Fischer R-46 | Clara Sue Price R-40 | Fail | Community health trust fund; first \$1 million for public health emergencies, \$1 million for state aid to local public health units, \$2 million to fund healthy schools grant program, \$2 million to fund health communities grant program, \$750,000 for statewide tobacco counter marketing program, \$250,000 for anti-tobacco educational materials to schools |
| 2001 | SB 2028 | Legislative Counsel | | Fail | Community health trust fund - changed "funds" to "monies deposited in the fund, along with all interest on those funds" |
| 2001 | SB 2024 | Legislative Counsel | | Fail | Community health trust fund - changed "funds" to "monies deposited in the fund, along with all interest on those funds", allow state health department to use a portion of the funds for tobacco education and cessation services, all interest earned on monies in the water development trust fund must be deposited in community health trust fund |

Appendix 10: 2001-2003 Tobacco-Related Legislation

| Year | Bill No. | Sponsor | Status | Summary |
|-----------------------------|----------|--|--------|---|
| TAX | | | | |
| 2001 | SB 2367 | Duaine Espegard R-43, Joel Heitkamp D-27, Carolyn Nelson D-21, Russell Thane R-25 | Fail | \$0.02 per pack of 20 tax increase for school nursing project |
| 2001 | SB 2408 | Bob Stenhjem R-30, Steven Tomac D-31, Rich Wardner R-37 | Pass | Tax on snuff (\$0.06 per ounce), chewing tobacco(\$0.15 per ounce), and pipe tobacco(\$0.40 per ounce) |
| 2001 | SB 2401 | Judy Lee R-13, Duaine Espegard R-43 | Fail | \$0.02 per pack of 20 tax increase for community health trust fund |
| 2003 | HB 1300 | Mark Dosch R-32, Byron Clark R-44 | Fail | Relating to consumer use tax on cigarettes on which tobacco products taxes have not been paid |
| 2003 | HB 1449 | Al Carlson R-41, Jeff Delzer R-8, Bob Skarphol R-2, Ken Svedjan R-17, Mike Timm R-5 | Fail | Relating to retailer reimbursement for collecting sales and use taxes |
| 2003 | SB 2159 | Committee on Finance and Taxation | Pass | Relating to collection of tobacco products tax |
| 2003 | SB 2315 | Bob Stenhjem R-30, Ray Holmberg R-17, Rich Wardner R-37 | Fail | Relating to the rate of interest on under payments of tobacco products tax |
| 2003 | SB 2307 | Larry J. Robinson D-24, Tom Seymour D-5, Rich Wardner R-37 | Fail | \$0.05 per pack of 20 tax increase for school nursing programs |
| 2003 | SB 2076 | Committee on Finance & Taxation | Fail | Increase wholesale tax on cigars and pipe tobacco from 28% to 50%. \$0.35 per pack of 20 tax increase |
| 2003 | HB 1431 | Wesley Belter R-22 | Fail | Rich Wardner R-37 Relating to tobacco tax idicia, relating to deductions for licensed distributors for tobacco products tax administrative expenses |
| SALES RESTRICTIONS | | | | |
| 2001 | SB 2116 | Judiciary Committee | Pass | Changed penalty for sales to minors from infraction to noncriminal offense |
| 2003 | HB 1171 | Duane DeKrey R-14, C. B. Haas R-36 | Fail | Sales to minors from 18 to 21 |
| 2003 | HB 1174 | Mike Grosz R-42 | Fail | Prohibition of tobacco sales |
| 2003 | SB 2332 | Linda Christenson D-18, Dwight Cook R-34 | Pass | Relating to law enforcements reports to schools of minor's tobacco citations |
| 2003 | HB 1434 | Bette Grande R-41, Bruce Eckre D-25 | Fail | Restricting internet sales of tobacco products |
| 2003 | HB 1301 | Mark Dosch R-32, Joyce Kingsbury R-16, Clara Sue Price R-40 | Pass | Prohibit sales of bidis |
| 2001 | HB 1475 | Joe Kroeber D-48, April Fairfield D-29 | Fail | Larry J. Robinson D-24, Rich Wardner R-37 Possession of tobacco by inmates illegal, if correctional facility has a policy prohibiting tobacco use |
| SMOKING RESTRICTIONS | | | | |
| 2001 | HB 1256 | Joyce Kingsbury R-16, Byron Clark R-44, Gil Herbel R-16, Myron Koppang R-25, Lisa Meier R-32 | Fail | John Andrist R-2 Amendment to HB 1272, smoking restrictions in places of public access and nonpublic workplaces, similar to HB 1198 introduced in 1997 |
| 2003 | HB 1408 | Joyce Kingsbury R-16, Gil Herbel R-16 | Fail | Ronald Nichols D-4 Similar to HB 1256 introduced in 2001 |
| MSA | | | | |
| 2003 | HB 1432 | Bette Grande R-41, Mike Grosz R-42, C. B. Haas R-36 | Fail | Layton Freborg R-8, Larry J. Robinson D-24, Ben Tollefson R-38 Restrictions of sale of tobacco products by non-MSA manufacturers |
| 2003 | SB 2297 | Tom Fischer R-46, Dick Dever R-32, Judy Lee R-13 | Pass | Lois Delmore D-43, Kathy Hawken R-46, Clara Sue Price R-40 Community Health Grant Program - changing wording |
| 2003 | SCR 4031 | David Nething R-12, Joel Heitkamp D-27, Aaron Krauter D-31 | Fail | Wesley Belter R-22, Lois Delmore D-43, Mike Timm R-5 Concurrent resolution to put allocation of 45% of MSA funds to water development trust fund in state constitution |
| 2003 | HB 1269 | Todd Porter R-34, Clara Sue Price R-40, Gerald Uglem R-19 | Pass | Tom Fischer R-46 Restrictions of sale of tobacco products by non-MSA manufacturers |

Appendix 11: Local Youth Access Ordinances in North Dakota

| Ordinance # | City | Population (1990) | Date | Home Rule | Authority to sell | Licensing | Self-service restriction | Vending restriction | Minor purchase prohibited | Minor possession prohibited | Minor use prohibited | Warning Signs | Prohibited Sales | Penalty |
|----------------|-------------|-------------------|----------|-----------|-------------------|-----------|---------------------------|---------------------|---------------------------|-----------------------------|----------------------|---------------|------------------|-----------|
| 4418 | Bismarck | 49,256 | 2/25/92 | | | | | X | X | X | X | | X | |
| 4741 | Bismarck | | 1/23/96 | | | | X | | X | X | X | | | |
| 4826 | Bismarck | | 2/25/97 | | | | X-amended (cigar humidor) | | | | | | | |
| 5017 | Bismarck | | 11/23/99 | | X | | | | X | X | X | | | X |
| | Bismarck | | 2/8/00 | | | | | | | | | | | |
| 777 | Devils Lake | 7,782 | 6/7/93 | X | | | | X | X | | | | X | X |
| 807 | Devils Lake | | 3/17/97 | | | | X | X | | | | | | X |
| 505 | Devils Lake | | 4/5/99 | | | | | | | | | | | |
| 1234 | Dickinson | 16,097 | 11/19/01 | | | X | | | X | X | X | | X | X |
| 2621 | Fargo | 74,111 | 7/27/92 | X | | | | X | | | | | | X |
| 2777 | Fargo | | 1/15/96 | X | X | | | | | | | | | X |
| 3021 | Fargo | | 6/1/99 | | | | | | | X | X | | X | |
| 3057 | Grand Forks | 49,425 | 9/4/90 | X | | | | X | X | | | | X | X |
| 3530 | Grand Forks | | 7/17/95 | X | | X | | X | X | X | X | X | X | X |
| 3538 | Grand Forks | | 8/21/95 | X | | | | X | X | X | X | | X | X |
| 3546 | Grand Forks | | 9/18/95 | | | | | X | X | X | X | | X | X |
| 3589 | Grand Forks | | 5/20/96 | X | | | | X | X | X | X | | X | X-amended |
| 3711 | Grand Forks | | 5/4/98 | | | X | | X | X | X | X | X | X | X |
| 1045 | Jamestown | 15,571 | 5/4/92 | | | | | X | X | X | X | | X | X |
| 1060 | Jamestown | | 5/3/93 | | | X | | | | | | | X | X |
| Ch. 3, art. 12 | Langdon | 2,241 | 8/26/96 | | | | X | X | | | | | | X |
| 794 | Mandan | 15,177 | 3/3/92 | | | | | X | | | X | | X | X |
| 824 | Mandan | | 8/16/94 | | | | | | | X | | | X | X |
| 913 | Mandan | | 7/18/00 | | | X | X | | X | X | X | | X | X |
| 3197 | Minot | 34,544 | 5/2/94 | | | | | X | | | X | | X | |
| 3377 | Minot | | 7/1/96 | | | | | | | X | X | | | |
| 3384 | Minot | | 8/5/96 | | | X | | | | | | | | X |
| by council | Minot | | 2/2/98 | | | | | | | | | | | |
| 3625 | Minot | | 10/4/99 | | | | | X | X | X | X | | X | X |
| 3679 | Minot | | 4/2/01 | | | | | | | | | | | |
| 3715 | Minot | | 12/3/01 | | | | | | | | | | | |
| 3716 | Minot | | 12/3/01 | | | | | | | | | | | X |
| 101-6994 | Pembina Co | 9,238 | 5/10/99 | | | | | | | | | | | |
| 756 | Valley City | 7,163 | 3/30/92 | X | | | | X | X | | X | | X | X |
| 772 | Valley City | | 5/2/94 | X | | X | | | | | | | X | X |
| 788 | Valley City | | 8/5/96 | X | | | | | X | X | X | | X | X |
| 831 | Valley City | | 2/7/00 | X | | | X | | X | X | X | | X | X |
| 752 | Wahpeton | 8,751 | 10/7/96 | X | | X | X | X | X | X | X | X | X | X |
| 502 | West Fargo | 12,287 | 4/10/96 | X | | X | | X | | | X | | X | X |
| 16 | Williston | 13,131 | 8/21/95 | | | X | | | | | | | | X |

Appendix 12: Local Smoking Restriction Ordinances in North Dakota

| Ordinance # | City | Population (1990) | Date | Smoking areas in public places | Smoke-free county buildings | Smoke-free city buildings | Smoke-free restaurant |
|-------------------|-------------|-------------------|----------|--------------------------------|-----------------------------|---------------------------|-----------------------|
| 4418 | Bismarck | 49,256 | 2/25/92 | | | | |
| 4741 | Bismarck | | 1/23/96 | | | | |
| 4826 | Bismarck | | 2/25/97 | | | | |
| 5017 | Bismarck | | 11/23/99 | | | | |
| | Bismarck | | 2/8/00 | | | X | |
| | Bismarck | | 10/1/00 | | X | | |
| 777 | Devils Lake | 7,782 | 6/7/93 | | | | |
| 807 | Devils Lake | | 3/17/97 | | | | |
| 505 | Devils Lake | | 4/5/99 | | | X | |
| 1234 | Dickinson | 16,097 | 11/19/01 | | | | |
| 2621 | Fargo | 74,111 | 7/27/92 | | | | |
| 3021 | Fargo | | 6/1/99 | | | | |
| 3057 | Grand Forks | 49,425 | 9/4/90 | | | | |
| 3530 | Grand Forks | | 7/17/95 | | | | |
| 3538 | Grand Forks | | 8/21/95 | | | | |
| 3546 | Grand Forks | | 9/18/95 | X | | | |
| 3589 | Grand Forks | | 5/20/96 | X | | | |
| 3711 | Grand Forks | | 5/4/98 | X | | | |
| 1045 | Jamestown | 15,571 | 5/4/92 | | | | |
| 1060 | Jamestown | | 5/3/93 | | | | |
| Ch. 3, article 12 | Langdon | 2,241 | 8/26/96 | | | | |
| 794 | Mandan | 15,177 | 3/3/92 | | | | |
| 824 | Mandan | | 8/16/94 | | | | |
| 913 | Mandan | | 7/18/00 | | | | |
| 3197 | Minot | 34,544 | 5/2/94 | | | | |
| 3377 | Minot | | 7/1/96 | | | | |
| 3384 | Minot | | 8/5/96 | | | | |
| by council action | Minot | | 2/2/98 | | | X | |
| 3625 | Minot | | 10/4/99 | | | | |
| 3679 | Minot | | 4/2/01 | | | | X |
| 3715 | Minot | | 12/3/01 | | | | |
| 3716 | Minot | | 12/3/01 | | | | X |
| 101-6994 | Pembina Co | 9,238 | 5/10/99 | | X | | |
| 756 | Valley City | 7,163 | 3/30/92 | | | | |
| 772 | Valley City | | 5/2/94 | | | | |
| 788 | Valley City | | 8/5/96 | | | | |
| 831 | Valley City | | 2/7/00 | | | | |
| 752 | Wahpeton | 8,751 | 10/7/96 | | | | |
| 502 | West Fargo | 12,287 | 4/10/96 | | | | |
| 782 | Williston | 13,131 | 8/21/95 | | | | |

