

House Bill 1221
Testimony of Jack Dwyer

Dear Chairperson Unruh-Bell and Members of the Senate Energy and Natural Resources Committee:

I am here to testify on behalf of my immediate and extended family members in support of HB 1221. If you recall, the North Dakota legislature prohibited the severance of hunting rights from the surface estate after August 1, 2007 (See 2007 HB 1146, which created NDCC § 47-05-17). I have pulled the legislative history for this bill, and the committee discussed not impacting existing rights at length. As a result, this statute has a grandfather clause that indicates that this *"provision does not apply to deeds, instruments, or interests in property recorded before Aug. 1, 2007."* While the legislature did not intend on impacting or taking any existing rights, the language of the bill and corresponding statute has impacted some of those rights that pre-existed August 1, 2007.

My grandfather, Tim Dwyer deeded his ranch to a trust in 2004, which trust is governed by a trust agreement. He passed away in 2005. The trust agreement in question provides a right of access to his grandkids (my siblings and cousins) to recreate and hunt on this very beautiful, 7,200 acre ranch. The trust agreement requires the trustees reserve access to Tim Dwyer's grandkids for recreation and hunting in any conveyance to a third party, if the trustees decide to sell the farm and ranch. In addition, the trust agreement grants my uncle Tim Jr., who is a full-time farmer and rancher, a right of first refusal to purchase the farm and ranch. The co-trustees are currently contemplating a sale of the property, and a lawsuit was commenced by Tim Jr. regarding the terms of the right of first refusal. **Despite a number of different claims that were made by a number of my family members regarding the financial aspects of the sale, all of the parties agreed that the provision reserving hunting rights should be valid.** Despite the agreement of all parties on this issue, and despite the language creating the hunting reservation pre-dated the 2007 prohibition set forth in NDCC § 47-05-17, Judge El-Dweek opined that validating the hunting rights provision would violate NDCC § 47-05-17 because the trust agreement was not recorded, even though it was fully enforceable between the subject parties.

As you are aware, a number of documents that are legally binding are not routinely recorded. Farm leases and trust agreements are good examples of this. See NDCC § 47-19-16 (unrecorded instrument valid between parties with knowledge).

If the grandfather clause in NDCC § 47-05-17 was expanded to include those documents that are executed prior to the August 1, 2007, date that is found in statute, the grandfather clause in NDCC § 47-05-17 would be expanded to include all rights that existed when 2007 HB 1146 was passed—which would correspond with the legislature's stated intention to grandfather existing rights.

Please note, I have worked as a real estate and water attorney for over 10 years, and I have testified in court as an expert title examiner. I am knowledgeable in the area of real estate law. In my opinion, HB 1221 does not impact our laws relating to bona fide purchasers of property. Those laws would still apply. See NDCC § 47-19-41 (unrecorded conveyance is void against any subsequent purchaser in good faith for valuable consideration). For instance, a buyer who pays value for a piece of land without actual or constructive notice of any prior encumbrance or conveyance buys free and clear of any such encumbrance. HB 1221's sole purpose is to expand the grandfather clause in NDCC 47-05-17; it couldn't be used to subject a bona fide purchaser's title to any unrecorded hunting right, if the bona fide purchaser did not have notice of any such unrecorded hunting right.

I know the 2007 legislature did not intend on impacting existing rights, yet my siblings and cousins are in jeopardy of losing our right to hunt family land, which is irreplaceable.