# HOUSE BILL 1510
# Testimony of Todd D. Kranda
# House Judiciary Committee

- February 8, 2023 -

Chairman Klemin and members of the House Judiciary Committee, for the record, my name is Todd D. Kranda, I am an attorney with the law firm of Kelsch Ruff Kranda Nagle & Ludwig in Mandan, ND. I am appearing before you as a lobbyist on behalf of the North Dakota Petroleum Council.

The North Dakota Petroleum Council represents more than 600 companies in all aspects of the oil and gas industry, including oil and gas production, refining, pipeline, transportation, mineral leasing, consulting, legal work, and oilfield service activities in North Dakota.

The North Dakota Petroleum Council is in support of HB 1510, as amended, which is the version that I will address, and which is currently before the committee. 1510 as amended is being introduced to clarify the language of the original Bill without changing the ultimate effect, which is to establish reasonable and fair guardrails on how attorneys' fees and court costs are awarded in litigation matters under the Oil and Gas Production Damage Compensation Act, Chapter 38-11.1 of the North Dakota Century Code. References in my testimony to HB 1510 shall, in all instances, be a reference to HB 1510 as amended.

HB 1510 specifically amends Section 38-11.1-09 which addresses the surface owner's rejection of the settlement offer made by the mineral developer, the commencement of a legal action and the award of legal fees and costs, as well as interest.

This statute being updated was enacted in 1979, forty-four (44) years ago. Since the enactment of this statute, not only has there been no legislative changes but there hasn't been a single case heard by the North Dakota Supreme Court involving a dispute of damages between a surface owner and an oil company. The purpose of the statute was to require a mineral developer to make an offer of settlement for damages caused by oil and gas drilling and exploration operations which disrupted the surface estate.

The statute encouraged settlement by requiring the operator to make a settlement offer to the surface owner at the same time when the notice of operations was provided which was twenty-days before commencement of drilling operations. If the settlement offer was unacceptable to the surface owner, then the surface owner could reject the offer and sue for damages. If the court awarded the surface owner greater damages than the offer made by the mineral developer, then the surface owner also was entitled to reasonable attorney's fees and costs, but the surface owner would not be awarded attorney's fees if the compensation determined by the court was less than the mineral developer's offer.

The North Dakota Supreme Court has subsequently ruled that this surface compensation statute, namely Section 38-11.1-09, also applies to claims involving pore space issues, pore space being a surface interest. However, the statute, when enacted 44 years ago, did not contemplate claims for anything but above ground or actual surface disturbance relating to drilling operations.

The issue with pore space claims is there may never have been an express offer for pore space alone, or there may be situations where the operator does not believe there is a pore space claim for damages. For example, under the statute as originally enacted, an adjacent pore space owner could sue claiming trespass or other claims without an opportunity for the operator to consider making an offer before such a lawsuit is commenced. Once the lawsuit is commenced, and no offer was made, then the pore space owner could be entitled to their attorney's fees and costs even if the Court only awarded $1 in nominal damages since no offer had been presented.

The proposed amendment in HB 1510 for Section 38-11.1-09 retains the original intent and purpose, the operator must still make an offer for surface damages, and if the surface owner rejects the offer, sues, and receives an award greater than the offer, then the surface owner still is entitled to attorney's fees. Likewise, if the award is less than the offer, then the surface owner still is not entitled to attorney's fees.

What the amendment in HB 1510 changes for Section 38-11.1-09 is twofold. First, it limits the attorney's fees to no greater amount than the total damages awarded to the surface owner.

Second, it provides that if the surface owner rejects an offer of settlement made by the mineral developer after the commencement of litigation, and the compensation awarded by the court to the surface owner is greater than such offer, then the surface owner is entitled to attorney's fees and costs; but if the compensation awarded by the court to the surface owner is less than such offer of settlement, then the surface owner is not entitled to attorney's fees and costs.

These amendments in HB 1510 attempt to level the playing field, especially after litigation is commenced, and HB 1510 will encourage settlements rather than encourage litigation. As currently is in effect under Section 38-11.1-09, there is no incentive for a surface (or pore space) owner or their attorneys to settle during litigation if the mineral developer never made an offer prior to the surface owner commencing a lawsuit. The attorneys for the surface owner could run up several hundred thousand dollars in legal fees and only get an award of a few thousand dollars for the surface owner damages, and yet still be entitled to recover all of their legal fees from the mineral developer.

The changes requested under HB 1510 are reasonable, appropriate, and necessary for the damage compensation statute with the changes that have occurred since Section 38-11.1-09 was enacted in 1979, 44 years ago.

The North Dakota Petroleum Council strongly supports the passage of HB 1510, as amended, and urges a **Do Pass Recommendation**. Thank you for the opportunity to provide this information. I would be happy to answer any questions.

# HOUSE BILL 1510 (AS AMENDED) ATTORNEY'S FEES SCENARIOS

(NOTE: The dollar numbers in the following hypotheticals are purely for illustrative purposes, actual numbers could be much higher or lower depending upon the facts and circumstances of each case.)

**I. Company tenders offer for surface damages prior to litigation, mineral owner rejects offer and sues for increased damages award:**

- Assume Company offers $40,000 for damages. Surface owner rejects offer and sues Company. Company does not counteroffer during litigation. Court awards surface owner $50,000 in damages. **Surface owner is entitled to attorney's fees and costs up to $50,000, in addition to the $50,000 in damages, plus interest on damages from day drilling is commenced.**

- Assume Company offers $40,000 for damages. Surface owner rejects offer and sues Company. Company does not counteroffer during litigation. Court awards surface owner $30,000 in damages, $10,000 less than Company's offer**. Surface owner is not entitled to attorney's fees or costs, but does get $30,000 in damages, plus interest on damages from day drilling is commenced.**

**II. Surface Owner claims a subsurface pore space trespass has occurred. Company either denies a trespass has occurred and refuses to provide an offer or Company tenders offer for surface damages after litigation has commenced, mineral owner rejects offer and has sued for increased damages.**

- Surface owner sues for subsurface pore space trespass. Company either (1) does not make a settlement offer during litigation, or (2) made a settlement offer during litigation of $10,000. Court awards surface owner $20,000. **Surface owner is entitled up to $20,000 in attorney's fees and costs, in addition to the $20,000 in damages, plus interest on damages from day drilling is commenced.**

- Surface owner sues for subsurface pore space trespass. During litigation, Company tenders a settlement offer of $25,000. Court awards surface owner $15,000. **Surface owner is not entitled to attorney's fees or costs, but does get $15,000 in damages, plus interest incurred on damages from day drilling is commenced.**