Testimony of Derrick Braaten
in opposition to
HOUSE BILL NO. 1510
House Judiciary Committee
February 8, 2023

Chairman Klemin and members of the committee, my name is Derrick Braaten, and I am an attorney in Bismarck, ND. I was one of the attorneys who represented Rick and Rosella Fisher in the litigation brought against them by Continental Resources, Inc. I am here to speak on my own behalf as an attorney who represents surface owners under this law, and also to use the experience the Fisher's had over the past several years as an illustration of why the law should not be changed.

The Fishers first sued Continental in 2013 over a saltwater disposal well constructed on their property. Their litigation was settled in 2016 as to the surface damages, and they and Continental agreed to reserve their dispute about compensation for pore space for if and when Continental ever began using the disposal well. Before that settlement, however, the courts had ruled that Continental had a legal obligation under NDCC chapter 38-11.1 to pay compensation for use of pore space to the Fishers if it used the well.

In fall of 2018, Continental began using the disposal well, and it sued Rick and Rosella Fisher. Continental's lawsuit asked for a declaration from the court that it had no legal obligation to pay the Fishers compensation for use of their pore space for the disposal well. This was confusing since the court had already ruled, and when asked how Continental could take this position the Fishers were assured the law would change.

Shortly after that in 2019 Senate Bill 2344 was passed and it appeared it would remove the Fisher's right to compensation. The Northwest Landowners Association brought a legal challenge to the newly enacted law, and the federal court in the Fisher case was forced to address how the new law impacted the case, as well as how the initial district court ruling from the state courts impacted the case.

Compounding all of this complexity, Continental pushed argument after argument, filing serial motions for summary judgment. The court pointed out that Continental "could have agreed that some compensation was owed and only contested the compensation evidence. Finally, even in contesting liability, it could have limited the arguments to those made based on the facts it claimed could not be disputed and not made other arguments with respect to liability that were non-starters and/or simply a re-argument of what had the court had already decided in Fisher I."

The court went on to call Continental's characterization of an earlier order of the court "absurd on its face."

The ultimate jury award in the Fisher case was low, but this is not the entire story. As the court explained:

> First, the resources expended by both parties in terms attorney time and experts appears at first glance to be inordinate given the jury award and what was Continental's maximum exposure when the case was submitted to the jury. As recounted earlier, the jury returned a verdict of $22,440.25, which appears to be an award of $.05 per barrel of injected saltwater. Also, the high end of the evidence and the most the Fishers stated during the trial that they were seeking was $.10 per barrel, which, if awarded by the jury, would have been a verdict of just under $45,000. **What is important to understand, however, is the complexity of this case, both legally and factually, and the lack of any relevant precedent**. Further, neither party at the commencement of the case argued for it being limited to compensation for injections of saltwater up to the date of trial with the Fishers being entitled to bring successive actions for future injections of saltwater that used and occupied their subsurface. Rather, Continental in initiating the case sought a declaration the Fishers were entitled to not one penny for use of the subsurface. The Fishers, who were concerned they might have one shot at seeking compensation, sought to recover for future injections. Here, **in considering the degree of success as a factor, the court concludes it is appropriate to consider not only that the Fishers obtained an award but also the court's conclusion that they could bring successive action for future injections contrary to Continental's initial claim that the court should declare that nothing was owed—ever.**

Continental also had the option of setting the litigation at any point and refused. The Fishers were seeking $0.10/bbl, which by the time of trial equated to around $40,000. The Fishers offered to settle for that amount and even half that amount, which is what they ultimately recovered. Continental refused to settle at that amount with the Fishers unless they waived any and all claims for attorneys' fees. Remember that it was Continental that sued the Fishers. And it was Continental who refused to settle and demanded that the case be tried to a jury. As the federal court noted, "while Continental complains that the Fishers' requested fees and costs are excessive in relation to the size of the jury verdict, it had the option of offering compensation in an amount that would have completely voided any request by the Fishers for fees and costs."

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Additionally, I represented the Fishers on a contingency basis because I was representing the Northwest Landowners Association in its challenge to SB 2344, and because all of those issues and the very litigation itself overlapped with the Fisher litigation, I agreed to take on the Fisher litigation. I took it on using the same fee agreement as their prior attorneys to help smooth out the transition. Because it is a contingency agreement by which I agreed to take 33% and the Fishers 67% of the total pot, the way it works out in this case is that I get 33% of the $22,000 award the Fishers obtained and they receive 67% of the fee recovery we obtained. And I think that's fair, because the Fishers were put through a massive amount of stress as Continental's test case and it was not fair to them that their property became ground zero for a massive legal fight over pore space ownership and compensation. But they stood up for their land and for themselves and in the end, I am totally confident that if you read the court's opinions and look at the same evidence the jury considered, you would reach the same conclusions that our judge and jury in the litigation reached. And if you do, you will agree that we do not need to make the changes embodied in HB 1510 and for that reason I ask you to vote do not pass.

Thank you,

Derrick Braaten