

Testimony of Derrick Braaten on behalf of
Red River Valley Water Supply Project impacted landowners
in favor of
SENATE BILL NO. 2364
Senate Energy and Natural Resources Committee
February 3, 2023

Chairman Patten and members of the committee, thank you for taking my testimony into consideration today.

My name is Derrick Braaten and I am both legal counsel and a registered lobbyist for a group of landowners whose property is being taken for the Red River Valley Water Supply Project.

We support SB 2364 with the proposed amended language requiring the state of North Dakota to accept liability for this pipeline. It is unfair that the landowners are being asked to sign easements or have their property condemned when they do not even know who will be liable for the pipeline on their property or who will be responsible for it if and when it is completed. The compensation for the easements being demanded for this project was also set over a decade ago and has never changed, and Garrison Diversion has indicated that the landowners must sign at that compensation level and it will not negotiate. We would also ask that any future funding for this project be contingent on Garrison Diversion ceasing the use of eminent domain actions. It has filed eminent domain lawsuits against at least one of our members and has indicated it is trying to serve one other landowner at present.

I am attaching a copy of the testimony and attachments we presented to an interim committee on this issue, which indicates that the compensation has never changed and represents a fraction of the overall funding being requested.

Thank you,

Derrick Braaten

For Red River Valley Water Supply Project impacted landowners

Interim Water Topics Committee

September 20, 2022

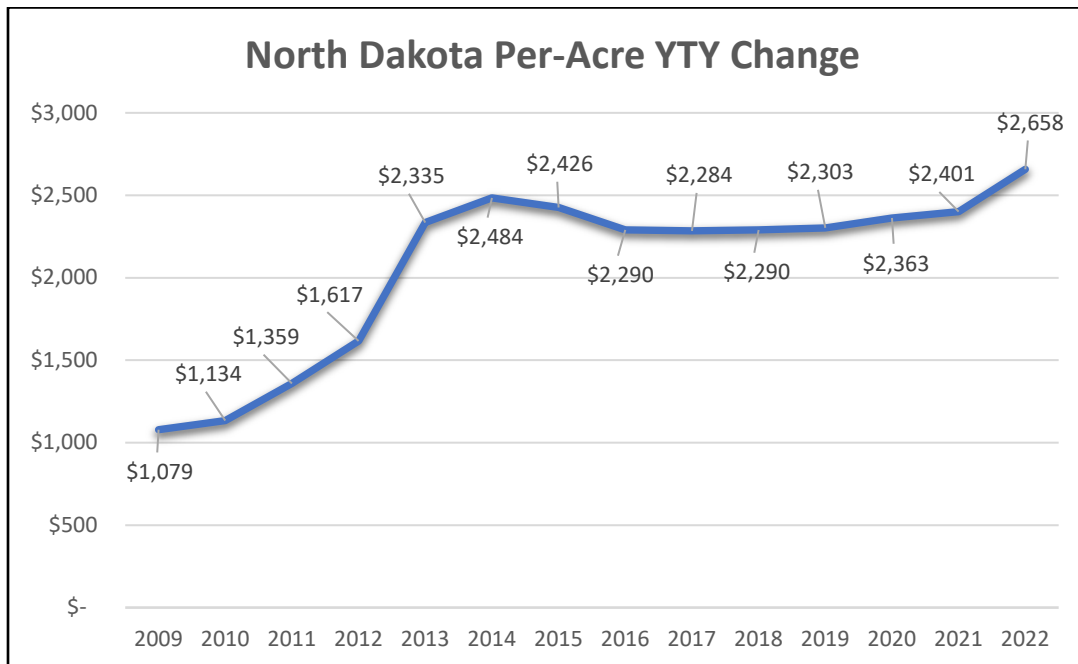
Testimony of Derrick Braaten

Red River Valley Water Supply Project Landowners

Chairman Schmidt and members of the committee, my name is Derrick Braaten and I am here to briefly discuss the Red River Valley Water Supply Project. I represent a group of landowners whose land is affected by the project and the pipeline is crossing these landowners' property.

The best way to protect landowners in this project is to have the State of North Dakota own the pipeline. If the State of North Dakota owns the pipeline, landowners will be assured an entity will protect and indemnify them. There is no plan known to landowners as to what happens when the pipeline is abandoned on their property, or if it will be removed.

The Garrison Diversion first started acquiring options in 2009 based on land values at that time. (See 2009 Garrison Easement Pricing Memorandum). Consultants for landowners put together the following graph to illustrate the rise in average land values since that time.



The appraiser who consulted with Garrison Diversion in 2009 was recently quoted in Agweek, which wrote: “When premium farmland is coming up for sale, Kyle Nelson says the bids these days can be ‘astronomical.’ Nelson of Farmers National Company said he underestimated the momentum that was building in farmland sales in 2021 that has continued to roll in 2022.” (<https://www.agweek.com/news/farmland-sees-some-astronomical-sales-results>).

Since 2009, the Garrison Diversion has refused to negotiate compensation despite an overall value increase in average land values of 146.34% based on surveys (and according to Landowner’s consultants). Rather than acknowledge the astronomical markets, in June of 2022 Garrison Diversion sent landowners a letter threatening to file eminent domain actions if landowners did not sign an agreement at its 2009 compensation offer by July 8, 2022. It indicated last week that it is initiating those eminent domain actions now.

Agricultural-use land values and the “before and after approach” are also not the only way to value pipeline easements and this is a common misconception. The federal court in North Dakota recently agreed in a case brought by a ND pipeline developer to condemn pipeline easements. The federal court agreed that other pipeline easements and the amounts paid per rod were relevant comparable sales and admissible evidence. *WBI Energy Transmission, Inc. v. Easement & Right-Of-Way Across*, No. 1:18-cv-078, 2021 U.S. Dist. LEXIS 63744, at *24 (D.N.D. Apr. 1, 2021). The RRVWSP is also not a typical pipeline project, and requires a double lift of soil and subsoil similar to what is done when strip mining for coal.

Garrison Diversion has obtained less than 10% of the funding needed for the project. Currently, Garrison Diversion has appropriated less than a quarter of 1% of its 1.3 billion-dollar-budget to compensate the hosts of the project (included as part of my testimony is a fact sheet regarding the project budget and project progress). At the current rate of funding, the project will not be completed for another 36-37 years, but Garrison Diversion is paying 2009 prices, which were insufficient even then.

The North Dakota Legislature has the power to authorize additional compensation for the hosts of this project and bring Garrison Diversion to the table to negotiate with landowners and take eminent domain off the table.



RRVWSP FACT SHEET

The Red River Valley Water Supply Project developer, Garrison Diversion Conservancy District, has instructed its attorneys to use eminent domain on landowners and refuses to even negotiate with landowners on compensation.

PROJECT BUDGET

- Total project cost started at \$1,220,000,000¹ and is now projected to be \$1,356,000,000.²
- Only about **0.22%** of that \$1.356 billion has been set aside for compensating landowners, less than a quarter of a percent.³
- While project costs have increased by \$1.36M, the compensation level of \$1,350/acre was set in 2009 and has never changed.³
- Despite a \$1.356 billion budget "water would not be affordable at all" if Garrison Diversion had to pay more for easements.⁴

PROJECT PROGRESS

- Funds have been appropriated during six legislative sessions going back to 2009.⁵
- After 11 years, less than 10% of the funding required has been achieved¹ and the project is "barely affordable now."⁴
- At its current rate, the project is on a 36- to 37-year build.⁴
- Please stop the use of eminent domain for this project. Tell Garrison Diversion it will not receive funding if it uses eminent domain.

Costs⁶

Transmission Pipeline	\$1 B	82%
Intake, Pumps, Supply	\$70 M	6%
Pump Stations, etc.	\$71 M	6%
Practical Treatment-WTP	\$66 M	5%
Discharge Structure	\$10 M	1%
Landowners (ROW)	\$ 3 M	0.22%

State Funding⁵

2009	HB1020	\$3,000,000
2013	HB1020	\$11,000,000
2015	SB2020	\$5,000,000
2017	HB1020	\$30,000,000
2019	SB2020	\$17,000,000
2021	HB1020	\$50,000,000

¹ Water Topics Overview Committee Presentation March 22, 2022.

² "That's just inflation. Every year we are somewhere presently in a three and six percent inflation factor and the jump from \$1.2 to \$1.356 is just inflation." - Duane DeKrey, <https://www.kxnet.com/news/answers-to-your-questions-revolving-red-river-valley-water-supply-project/>

³ "The total easement cost...\$3,019,000" Easement Pricing File Memorandum 7-7-09. \$3,019,000 / \$1.365B = 0.223%

⁴ Pates, Mikkel. "Red River Water Supply pipe project will sue if landowners don't sign by July 8, 2022" Ag Week, June 27, 2022

⁵ Red River Valley Water Supply Project Study – Background Memorandum; Prepared for the Water Topics Overview Committee July 2021

⁶ HB 1020 State Water Commission Budget Presentation, Senate Appropriations Committee, March 22, 2021.

June 6, 2022

Derrick Braaten
Braaten Law Firm
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Bismarck, ND 58501

Sent via email only:
derrick@braatenlawfirm.com

**Re: Garrison Diversion Conservancy District – initiation of eminent domain litigation
Our File No.: 027145.22014**

Derrick:

You have informed me that you represent the following landowners who own property along the easement route of the Red River Valley Water Supply Project:

Company/Trust	Name
Albeana Haluska Life Estate	Albeana Haluska, Kevin and DianeBaumbach
	David Richter
Schaubert Family Partnership	David Schaubert
	Elaine Schaack (Jewel Bittner - Power of Attorney)
	Fred & Debra Richter
	Gary Widicker (Hans & Heathe Widicker)
	James W.Seil
	John & Pamela Kutz
	John Roller
	Judy Winandy
	Karen A & The Estate of Jim Neumiller
	Larry Rexine
Merle Radke & Co.	Merle Radke
	Mike Flick (on behalf of himself, Steven and David Flick)
Marcotte Family Land Trust	Robert J.Marcotte
Leo Widicker Family Trust and Virginia A Widicker	Rod Widicker

Winandy Family Testamentary Trust	Ryan Winandy
Sandra Kunz Life Estate	Sandra Kunz & Toni Rae Yow
	Steven & Kristen Jones
	Timothy & Debra Soma
	Todd & Jackie Jones
	Troy & Erica Jones

Could you please confirm whether you represent all of the owners of the SE/4 of T146, R 69, S27 (Richard and Helga Winandy, Suzanne Heath, Merle J. Radke, and Grant S. and Judith Ann Nelson)?

I understand you previously represented Tom and Ardys Dahl, but that an agreement has been reached to move the easement route across the road from their property.

As you know, Garrison Diversion Conservancy District has not yet received signed easements from any of the above-named parties.

I write to inform you that Garrison Diversion has instructed Vogel Law Firm to initiate eminent domain litigation on or after **July 8 2022** to obtain easements it is unable to obtain through voluntary negotiations. From now until July 8, 2022, Garrison Diversion is willing to negotiate modified easement terms (other than compensation). As you and I have discussed, Garrison Diversion is open to reasonable modifications to the language of the form easement that has been previously shared with owners. However, Garrison Diversion will only agree to modified terms with owners who agree to sign easements prior to July 8, 2022. Once Garrison Diversion initiates litigation, it will not negotiate on easement language. Instead, it will seek a bare, court ordered easement that allows Garrison Diversion to construct, operate, maintain, and remove the buried pipeline on the property, with no additional terms.

As you are aware, during condemnation litigation, the value of an easement will be determined by the Judge or jury, which may be less than, or more than, Garrison Diversion's offer. North Dakota law dictates that the value of an easement is determined in a condemnation litigation by calculating the fair market value of the overall property before and after an easement is taken. The difference between the two, which is the level of devaluation, is deemed the value of the easement. Overall parcel valuation can be impacted by things like property use, amount of tillable acreage versus wetlands, size of the parcel, etc.

If eminent domain litigation is commenced, both parties will likely hire their own appraisers to determine how much the addition of the easement will devalue the parcel of land. Each appraiser's job will be to look at the value of the parcel before the easement is in place and a hypothetical value

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after the easement is in place, with the difference in these two numbers being the value of an easement. This is the formula for valuation of an easement dictated by North Dakota law. The Judge or jury will make a determination of the value of the easement; i.e., how much the property reduced in value due to the easement, based upon the testimony of each party's appraiser.

Once Garrison Diversion initiates litigation and obtains an appraisal, it will modify its compensation offer to match the amount of the appraisal. Be advised that if the appraiser identifies an easement value that is less than the offer by Garrison Diversion, Garrison Diversion will only pay the lesser amount after litigation starts. Be advised that past appraisals obtained for this Project have been lower than the amounts offered by Garrison Diversion for easements. If you have an appraisal on the easement value for any of your clients, please feel free to share that with Garrison Diversion for consideration.

I am hopeful your clients will wish to pursue the advantages of a voluntary pre-litigation agreement on easement language and compensation. I know you are working on some proposed modifications to the form easement, which I look forward to receiving.

Sincerely,

A handwritten signature in black ink, appearing to read 'R.J. Pathroff', with a stylized, overlapping flourish at the end.

R.J. Pathroff

RJP:jd

Red River Valley Water Supply Project

Easement Pricing File Memorandum

7-7-09

The Red River Valley Water Supply Project (RRVWSP) consists of 123 miles of 66 inch pipeline that stretches from the McClusky Canal to the Sheyenne River, crossing four counties. Staff will negotiate with approximately 192 land owners for pipeline options and easements. This white paper outlines Garrison Diversion's general analysis of easement valuation and offers to land owners. The process described herein is an internal reference document and is not otherwise binding or committing Garrison Diversion to a particular course of action or valuation for a specific property.

The process of setting a price to offer for a pipeline easement is difficult since the pipeline will be underground, will traverse four counties and a variety of types and values of land. In order to establish an easement offer price, Garrison Diversion consulted with Kyle Nelson, of Alerus Appraisals to discuss valuation of pipeline easements and/or general valuation of agricultural properties in the affected counties. The difficulty of proposing an offer for an easement stems from the fact that a pipeline easement really has minimal impact on the long-term value of the land traversed. Typically, the value of an easement is calculated by subtracting the pre-easement value minus the post-easement value of the land. The difference in the before/after land value constitutes the easement value. With an underground pipeline, Alerus Appraisals finds little to no difference in the pre/post-easement value of agricultural land due to the existence of an underground pipeline. There would be no higher payment justified by tilled land versus pasture land, since the underground pipeline does not change the fair market value of either type of property; so the value of the easement is the same regardless of the type of land crossed. Simply put, if Garrison Diversion were required to pay 'fair market value' to landowners as their offer for a pipeline easement, Garrison Diversion may not be paying much, if anything at all based upon the before/after valuation methodology. That said, landowners would receive varying levels of compensation depending on the type and extent of crop damage occasioned as a payment.

Under this scenario, few landowners would voluntarily give an easement to their property without some level of compensation for the easement. As such, Garrison Diversion analyzed payments made to landowners in other pipeline projects as a reference for calculating an attractive price to offer for voluntarily entering into option and easement agreements with Garrison Diversion. It is important to Garrison Diversion to be fair and cordial to the landowners, fostering a strong working relationship that will benefit the RRVWSP as operation and maintenance activities occur in the future.

Garrison Diversion is mindful of the political controversy created by constructing, but not ultimately using the canal systems. Garrison Diversion plans to only purchase options for easement at this stage, so as not to tie up land permanently at this stage. In order to accomplish the goal and gain the trust

level with the landowners, it was decided to complete the negotiations early in the design process and using a three step approach.

The first step is to notify landowners about the project, providing basic information and asking them to return an Access Agreement that would allow our design team to access and investigate the property. The information collected during these investigations will be used to refine the pipeline alignment and to make sure that the alignment meets environmental and cultural resource guidelines while limiting the impact on the landowners.

The second step is to obtain an option for an easement. During this step, an offer of (\$1,350/acre) was conveyed for the easement. Ten percent of the offer would be paid up front for an Option, with the remaining 90% to be paid if/when the option is exercised and the permanent easement taken. During the Option period, Garrison Diversion will talk to the landowners to identify specific concerns that can be addressed during the design. By obtaining an option for an easement, the easement acquisition process should be fairly quick and without controversy or surprise.

The third step is to exercise the option and obtain the permanent easement. This step will be primarily administrative. Landowners will be advised that the easement is being exercised. Final paperwork and the final easement payment will be exchanged and documents recorded. Landowners will also be notified if/when the project construction will begin in their area and on what time schedule.

Based on the input from Alerus Appraisals, along with anecdotal information from other pipeline projects, it was decided that the price offered for the right of way would be one price per acre for all of the cooperating land owners. The price of agricultural land does not vary significantly with or without an underground pipeline, which supports the conclusion that the easements should be uniformly priced regardless of the type of land traversed. If Garrison Diversion only offered the true change in fair market value for the easement, there would be few, if any, property owners who would be willing to sell an easement at such a minimal price (plus a payment of crop loss). Garrison Diversion intends to offer a reasonable amount of compensation to make the offer attractive to property owners. Otherwise, much of the entire pipeline route would have to be taken by eminent domain, which would be a costly and time consuming endeavor that Garrison Diversion certainly hopes to avoid.

As one factor in devising a reasonable amount to offer landowners for voluntarily entering into an option agreement for a pipeline easement, Garrison Diversion asked Alerus Appraisals (based on sales) to advise Garrison Diversion of the general land prices in the counties that are included along the pipeline alignment. In addition, Garrison Diversion consulted with project managers for the NAWS pipeline and the City of Devils Lake to discuss their methodology in setting easement offers. With NAWS, the state typically offered 80% of the fee value of the land as the easement offer price. But in the case of the transmission line they made an offer that equated to approximately 100% of the land value in exchange for a permanent easement. In the case of the Devils Lake water line, the City took the average of the land values, increased them by 50% because of the small tract size compared to average sale size, and added 10 years of potential impacts costs because the soil could not be replaced exactly like it was before.

Alerus Appraisals identified a range of land prices for crop and pasture land in each of the impacted counties. If Garrison Diversion were to follow the methodology for voluntary acquisition followed by NAWS, using the higher property value numbers in the Alerus Appraisals report and 100% of land value offered for transmission lines, the corresponding offer to landowners would be approximately \$1,200 per acre. If Garrison Diversion offered the 80% of land value otherwise offered by NAWS, the corresponding offer would be approximately \$960 per acre. If the Devils Lake methodology is applied to the County Tax Assessor data, the corresponding voluntary acquisition offer would be \$1,350 per acre. The total easement cost for the project using these methodologies range from \$2,146,000 to \$3,019,000.

The losses of agricultural crops will be paid for based on the actual losses. Higher producing lands will be paid more when actual construction occurs.

This document does not ascribe a value to any easement properties, but merely outlines the process and research used to determine an attractive price to offer to landowners for easements. If there is litigation over easement prices, it is likely that an appraiser could find little to no value to the actual easements using a before and after fair market value approach. Nothing in this document impacts the ascribed fair market value of the easements or claims to constitute actual 'fair market value' of a pipeline easement.