

2009 HOUSE NATURAL RESOURCES

HB 1045

2009 HOUSE STANDING COMMITTEE MINUTES

Bill/Resolution No. 1045

House Natural Resources Committee

☐ Check here for Conference Committee

Hearing Date: 01-15-2009

Recorder Job Number: 7071

Committee Clerk Signature

Nancy L. Gerhardt

Minutes:

Vice Chairman Damschen: Jeff Nelson

Jeff Nelson: Staff attorney with the Legislative Council & committee council with the Natural Resources committee. In favor of the bill and review the bill. Sections 1 & 2 cross reference Changes to the property title. Sect. 3 on page 2 what the Natural Resources committee is recommending is the expiration date be removed and the severance of the right of access for hunting access become ????. This section provides the right of access to land for hunting may not be severed from the surface extreme. August 2, 2007 the official effective date of the proposal. One additional item was the concern of the Game & Fish Dept. that this prohibition might adversely impact their private land habitat and access improvement program so the committee also put in an exception that this section does not apply to private land habitat.

Vice Chairman Damschen: On pg. 2 at the very end of the bill it tends to question our confidence in the bill itself. The leasing of those access rights doesn't constitute severance. In your opinion does that addition to this bill kind of say we are questioning our own confidence in what we are doing here?

Mr. Nelson: No I don't believe so.

Vice Chairman Damschen: Questions

Rep. Keiser: In simple language tell me what the bill does.

Mr. Nelson: It prohibits the landowner from selling or transferring a hunting access by a bill property transfer.

Vice Chairman Damschen: Questions

Rep. Drovdal: We know Federal law supersedes state law in most cases. We also know federal agencies currently hold separate hunting rights on land they don't own the surface rights on -- if we pass this law does this have any influence on federal agencies in the future in severing hunting rights in ND?

Mr. Nelson: You are correct that federal law supersedes state law. However in the normal course of business federal agencies will follow state laws.

Rep. Drovdal: I still don't understand, if the federal government has land now they had acquired and they don't have any use of the surface would they be able to sell that land surface rights off it after the effective date of this bill?

Mr. Nelson – The federal act or law that is authorizing that federal agency to sell or dispose of that land what the requirements of that act provide.

Rep. Keiser: This last sentence will then say in effect the state can sell the land toward the Plots program - that would be legal.

Mr. Nelson: yes

Vice Chairman Damschen: Rep. Hofstad

Rep. Hofstad: When we talk about severing the right of access. is that what it says or are we too broad? There are several instances where we would sever or sell access. Does this in any prohibit that?

Mr. Nelson: No It only applies to hunting.

Rep. Keiser: Does this in any effect the private game ranches?

Mr. Nelson: Not familiar with how private game ranches operate – I suppose there are situations where it could affect them depending upon the property transaction involved.

Vice Chairman Damschen: Rep. Pinkerton

Rep. Pinkerton: This law would not affect the ability to lease the hunting rights; it only affects the severance which is essentially a permanent kind of change. The severance would have a greater negative impact on them than the granting of the lease would be.

Mr. Nelson: Yes

Rep. Pinkerton: There is also all the other issues of excess where minerals & the oil business it is a onetime thing, while in hunting it is really difficult to make that work.

Vice Chairman Damschen: Rep. Keiser

Rep. Keiser: With this bill can an owner sign a 100 year lease?

Mr. Nelson: yes - a lease yes.

Vice Chairman Damschen: Any other testimony in favor of HB 1045?

Foster Ray Hager – Cass Co. Wildlife Club – See Attachment #1.

Vice Chairman Damschen: Questions for Mr. Hager? Further Testimony in favor of HB 1045?

Roger Kaseman – See Attachment #2 Questions

Vice Chairman Damschen: Further testimony in favor of HB 1045?

Julie Ellingson: ND Stockman's Association – See Attachment #3

Vice Chairman Damschen: Questions -- Rep. Keiser

Rep. Keiser: You said you support short term leases what about long term leases like 99 year leases?

Julie Ellingson: Our association has Recognition on the length of time on leases such as easements prefers the shorter term. So the people on the land have the opportunity to use the land as they see fit and not be dictated over the courses of multiple generations.

Vice Chairman Damschen: Further questions? Further in favor of HB 1045?

Brian Kramer – ND Farm Bureau – Our policy is the same at the Stockmen's association – we support the concept of keeping the hunting rights, if they are a right, with the surface owner. We should continue to support the property owner's right to control all types of hunting on their property. Property owners or leases shall decide who hunts their land and if they prefer to charge a fee to that hunter for that privilege. We further believe that hunting and recreational uses are land uses, not property title, and therefore cannot be severed from the land. We certainly support fee hunting if the landowner chooses to do that. Now, is that fee for a day, a season, or for several seasons? I don't know it doesn't say in our policy. We do have a couple concerns with the bill as written. The last line on the bill that gives Plots properties exemption to this law. If it becomes law. Our concern is the exemption put in there is there something wrong with the way it is written? If so should we be giving the government agency more privileges than rights than we do the individual land owner? Also are we severing a surface right here or are we talking about a land use. Our position will be that will be that this is a land use.

Vice Chairman Damschen: Questions? Further testimony in favor of HB 1045?

Claus Lembke: ND Association of Realtors – We support the concept of this bill even though it does take a right away. It puts a limitation on. It works in favor of the owner if not today the future owner. We want to error always on the side of the property owners and their rights. We would prefer a limitation of some sort. Leases under the ND law go with the land. If someone

leases hunting rights for a number of years and you purchase the land you have to honor it, you don't have a choice as the new owner. Therefore limitation would be nice. If one party dies that signed the lease that lease should be no longer valid. That would perhaps be a resolution.

Vice Chairman Damschen: Are you aware of any instances or areas of the law in ND leases are limited?

Mr. Limbke: On mineral rights Yes

Vice Chairman Damschen: Questions for Mr. Limbke?

Rep. Kelsh: Are there any cases where it has been done? Has anyone placed a value on that bundle of rights?

Mr. Limbke: I do believe they have been sold.

Vice Chairman Damschen: Further Questions? Any more testimony in favor of HB 1045?

John Valanger:—cutting of CRP land

Vice Chairman Damschen: Further testimony in favor of HB 1045? Any testimony opposed to HB 1045?

Rep. Rod Froelich: Neutral to negative

Mike McEnroe: ND Chapter of the Wildlife Society – Opposition HB 1045 – We support private property rights. We support a landowner's right to sell the hunting rights on his or her property. We support the sale of wet land, grass land and conservation easements. We suspect we would allow the sale or lease of hunting rights for a 99 year period.

Vice Chairman Damschen: Any questions for Mr. McEnroe? How do you address the rights of the future landowners?

Mr. McEnroe: We already have easements for roads, water lines, wetland easements, power lines etc.

Vice Chairman Damschen: Further questions.

Rep. Hanson: If your organization buys the hunting rights you have a place to hunt forever and pays no taxes while the guy that owns the property has to pay the taxes. It is cheaper to get hunting taxes and never pay taxes again, than owning and buying the property and having to pay taxes on it. That is why this bill.

Rep. Nottestad: Do you know of areas where land rights have been sold have you heard of any problems in those areas at all either taxation or ????

Mr. McEnroe: This has been legal an awful long time. In regard to hunting rights came in discussion last session Rep. Hanson such an occurred in Stutsman Co. where a landowner purchased land retained hunting rights and then tried to resell the land.

Vice Chairman Damschen: Has there been an increase of outside interest of individuals pursuing land for hunting purposes or even coming into the state wanting access for hunting?

Mr. McEnroe: Yes land is being sold in ND strictly for recreational purposes.

Rep. Keiser: Whether we lease or sever for hunting it's a real-estate contractual thing that falls under contract sanction. If I sever the hunting rights can I retain anything? Can I sever the hunting rights to an individual with the provision that my immediate family and myself could hunt on that land in addition to severing it.

Mr. McEnroe: My understanding would be that you could sell something less complete hunting rights.

Vice Chairman Damschen: If I retain 50% and then will 50% in equal portions to my 3 kids would there be any hunting rights left? How would that battle play out?

Mr. McEnroe: If you are going to hunt on someone else's hunting right you have to bring proof of that.

Rep. Clark: You have to be care what you wish for. Would you be in favor of selling these hunting rights to a group like Nature Conservancy or PETA who would gather them all and then forbid hunting entirely?

Mr. McEnroe: Nature Conservancy doesn't forbid hunting. PETA doesn't have the money to do that.

Vice Chairman Damschen: Further questions? Opposition?

Rep. Rod Froelich – This law takes away from the property owner. We don't have the right to do with our land what we want to. You can write anything you want to in a lease. Whether it is mineral lease or hunting lease. Willing buyer willing seller. See Attachment #4.

Vice Chairman Damschen – Does the buyer of hunting rights have the right to say who gets these hunting rights after he doesn't want to hunt anymore?

Rep. Froelich – His immediate family.

Vice Chairman Damschen – If you want to do this put this down as you do the mineral rights. After 20 years you can go back and get your hunting rights back. That would alleviate you saying what is going to happen generations down the road. These people who don't work agreement with the surface owner they would lose their hunting rights or right to access.

Vice Chairman Damschen – I'm not convinced that had this law been in place it would have prohibited you from doing what you have done in the past. You basically made a conditional sale. You didn't sever the rights to in the future design your hunting rights. You forfeited your hunting rights temporarily it sounds like to me.

Rep. Froelich – With the contract we have our family has the right to hunt. It is not an exclusive hunting right to the parties we bought the property from. We don't have a problem because it is written properly. That is why I say it is between the seller and the buyer. You can put anything you want into the purchase contract when you buy a piece of land – if it is written properly. However, we are eliminating it right here.

Vice Chairman Damschen – Further testimony in favor, or excuse me was that in favor or opposed? Any further testimony in opposition?

Rodger Rofstad – Game & Fish – Discreptnies in the way the bill is written that brings into question our Plott program. They are access agreements. Line 18 this section applies to deeds or instruments. The word instruments could refer to a variety of things. The Attorney General has corrected us if we have any agreements over 5 years. Most are 10 years. These are recorded with the clerk of court.

Rep. Hofstad – Wouldn't that same issue apply to any landowner who has an agreement with that same verbiage in this contract.

Mr. Rofstad – I have only looked with what our contracts look like and the advice of the Attorney General and that we should record them with the clerk of court. I'm not sure of individuals who have leases if they file those instruments.

Vice Chairman Damschen – Any further questions? Do you file all those agreements or just certain ones?

Mr. Rofstad – Only the ones that are for duration for more than 5 years.

Vice Chairman Damschen – Any further questions? Any further Testimony? Close the hearing on HB 1045.

2009 HOUSE STANDING COMMITTEE MINUTES

Bill/Resolution No. 1045

House Natural Resources Committee

☐ Check here for Conference Committee

Hearing Date: 1-15-09 Part 2

Recorder Job Number: 7073

Committee Clerk Signature

Nancy L. Gerhardt

Minutes:

Chairman Porter – Vice Chairman Damschen

Vice Chairman Damschen – A lot of mixed feelings on this.

Chairman Porter – This bill will not stop any kind of leasing activity. It stops permanent severance of the ability to trespass. I don't know if having the word hunt in the title is really accurate. What you are giving someone by severing that off is you are giving them the ability to trespass forever. To make it a sellable item so that if PETA wants to come in and buy up this severable right they can and put a sign up that says NO HUNTING forever and ever and the person who own the surface on that could end up with a situation with 400 deer are living there. Coming over and eating all of their grazing and their production agricultural situations. You have a very big difference between the use of the land and the severable part of the land. What it won't stop, the situation where I own a piece of land and I want to give someone a lease for 30 years to hunt on it or I have a piece of land and I want to sell it to a willing buyer but I want to retain the ability to hunt on that for 30 years that that can't be of the buy sell agreement. What I couldn't do is to sever that and maintain it as a separate interest on that particular piece of property. I've heard the testimony on it twice now, last session and then on

the interim on the Natural Resources Committee, we are certainly open to more discussion on it as we look at this. Rep. Nottestad

Rep. Nottestad – I look at this list in particular to the right to fishing. I don't see the problem with something that hasn't been a problem over all the years. If this would have been a problem it would have been a problem 5 years ago, 10 years ago, 2 years ago. To me it is a bill that probably should have never been put into place in the first place. My concern is that as we sit here are we arbitrarily reducing the value of land any of us may own. It stops us from selling a product and I think that is wrong. I have opposed it in the past and I will oppose it again.

Chairman Porter – Rep. Hofstad

Rep. Hofstad – The problem I have is the exception we make to the Plotts program. If it is a problem for that entity is it not also a problem for landowner who have contractual arrangements - deeds – or easements – or some kind of instrument that is attached to that deed. I can get buy the property rights thing. In general it probably is a good thing for the landowner, it preserves our right to do what we want with our land as we buy it or sell it. Especially when we buy it. I do have a problem with that exception with regards to the Plotts program.

Chairman Porter – The game & fish came in and they didn't have a legal opinion one way or another that it was necessary. They felt more comfortable with the language of the bill by having that because they were exempted from it. It still goes back to they aren't any different than me having a lease of that land for an extended period of time. Then if I decide to record that lease in the court house I can do that. If this bill would pass with that line 18 & 19 out of there I can still do that. That lease is a legal, valid document. Even if I don't record that at the court house they would have a hard time challenging the legal lease of that particular provision

of the land. There are a lot of people that have mixed emotions on the right to sever minerals and gravel off from the rest of the land. One of the reasons it is important the legislative assembly will get this is exactly the same reason why Rep. Nottestad thinks we shouldn't. We wouldn't a bill to fly through the legislative body that stops the severance of mineral rights today. It is a problem that is way too far gone. Vice Chairman Damschen

Vice Chairman Damschen – I would like to address the issue of not being a problem in the past. I don't think we have ever been in quite the same situation we are now with the interest in hunting and the purchase of land and the purchase of hunting rights. I think that has become a lot more intense in the last couple years. I think we are in a different situation. If I have mineral rights and surface rights, I don't know how you divide them. After another generation down the road and these rights are split up again and again and trying to decide who has access.

Chairman Porter – If I would own the hunting rights to a quarter of land that Rep. Hofstad owns and he has standing corn on it that isn't ready to be harvested and I have a deer permit and I have a legal right to be on that land I have a legal right to go through his corn field and hunt deer. Should I be able to do that?

Rep. DeKray – Your right to own easement or hunt on that land does not allow you to violate game and fish law. If the game and fish law doesn't allow you to hunt in unharvested crops it doesn't matter what your ownership status is you are not going to be able to hunt on any unharvested crops.

Rep. Drovdal – A lot of this hunting issues are a private negotiation. State and Federal are the two biggest entities that are severing hunting rights now. There is a value to this.

Rep. Keiser – We are treating the Plotts program different than the private owner. If the private landowner is the leaseor severed their hunting rights it is lubricous action. The Plotts

program is a public access for the citizens of the state is a public good. We allow the states and federal government to take land for public good.

Rep. Hanson – The surface owner pays the property taxes on their land, but if he severs the hunting rights and bought it outright he is free forever. He doesn't pay any taxes.

Rep. Keiser – So does the mineral property owner pay taxes?

Rep. Hanson – Yes, once they start harvesting the minerals they pay taxes on the minerals they harvest. But if you harvest a pheasant there is no tax then.

Rep. Keiser – There is the hunting license.

Chairman Porter – Adjourn for lunch.

2009 HOUSE STANDING COMMITTEE MINUTES

Bill/Resolution No. 1045

House Natural Resources Committee

☐ Check here for Conference Committee

Hearing Date: 1-15-09

Recorder Job Number: 7109

Committee Clerk Signature

Nancy L. Gerhardt

Minutes:

Chairman Porter – Reopen HB 1045. Vice Chairman Damschen

Vice Chairman Damschen – Propose on page 2 -- remove all the underscored language, and on line 19 remove the underscored language.

Chairman Porter – I have a motion from Vice Chairman Damschen and a 2ne from Rep.

Hanson. Any discussion. Unison voice vote. Motion carries. We now have an amended bill in front of you.

Rep. Hanson – Move Do Pass As Amended.

Rep. Hofstad – 2nd.

Chairman Porter – Any discussion? Roll Call

Yes 8 No 4 Absent 1 Carrier Rep. Hofstad

January 16, 2009

VK
1/19/09

PROPOSED AMENDMENTS TO HOUSE BILL NO. 1045

Page 2, line 18, remove ", nor to"

Page 2, line 19, remove "the private land habitat and access improvement program under
title 20.1"

Renumber accordingly

Date: 1-15-09
Roll Call Vote #: _____

2009 HOUSE STANDING COMMITTEE ROLL CALL VOTES
BILL/RESOLUTION NO. 1045

House Natural Resources Committee

☐ Check here for Conference Committee

Legislative Council Amendment Number _____

Action Taken ☒ Do Pass ☐ Do Not Pass ☒ As Amended

Motion Made By Hanson Seconded By Hofstad

Representatives	Yes	No	Representatives	Yes	No
Chairman Porter	✓		Rep Hanson	✓	
Vice Chairman Damschen	✓		Rep Hunsakor	✓	
Rep Clark	✓		Rep Kelsh		✓
Rep DeKrey		✓	Rep Myxter	✓	
Rep Drovdal		✓	Rep Pinkerton		
Rep Hofstad	✓				
Rep Keiser	✓				
Rep Nottestad		✓			

Total (Yes) 8 No 4

Absent 1

Floor Assignment Hofstad

If the vote is on an amendment, briefly indicate intent:

REPORT OF STANDING COMMITTEE

HB 1045: Natural Resources Committee (Rep. Porter, Chairman) recommends AMENDMENTS AS FOLLOWS and when so amended, recommends **DO PASS** (8 YEAS, 4 NAYS, 1 ABSENT AND NOT VOTING). HB 1045 was placed on the Sixth order on the calendar.

Page 2, line 18, remove ", nor to"

Page 2, line 19, remove "the private land habitat and access improvement program under title 20.1"

Renumber accordingly

2009 SENATE NATURAL RESOURCES

HB 1045

2009 SENATE STANDING COMMITTEE MINUTES

Bill/Resolution No. 1045

Senate Natural Resources Committee

☐ Check here for Conference Committee

Hearing Date: March 12, 2009

Recorder Job Number: 10788

Committee Clerk Signature



Minutes:

Senator Lyson opens the hearing on HB 1045, relating to severance of the right of access for hunting access from the surface estate.

Senator Flakoll introduces the bill (see attached handout #1). I served as the chair for the Interim Natural Resources Committee. I have also supplied you the excerpts that came out from eh report from that committee. This bill was heard last session and was put as a sunset at the end of this biennium. As such the interim committee is asking that the sunset be removed and as such that people would not be permitted to sever hunting from land owner rights. On one hand we have those that are opposed to the bill because of landowner rights and people should be able to do whatever they want on their own land. The committee decided that there should be a prohibition of severance of hunting rights from the land rights. There are other options for land owners to give hunting rights to someone else. It could be in terms of long term lease of hunting land. There are instances that we have heard of where more than 600 people owned a track of land and that could certainly be expanded to hunting rights as generation after generation go and the family continues to grow and divide the hunting rights.

Senator Hogue I noticed that the right of fishing is still present. I would have thought they went together can you explain what the interim committee thought about that?

Senator Flakoll it wasn't actually part of the study.

Senator Freborg do you know the amount of hunting rights that are severed now?

Senator Flakoll Not in terms of acres. We didn't get a good response from the counties. Only 22 out of the 50 counties responded.

Senator Freborg Out of the 22 responses was there a large amount or just a few?

Senator Flakoll Many of them only have 1 such instance recorded where they have severed the hunting rights.

Jeff Nelson, Legislative Council, I served as committee council for the Interim Natural Resources committee. I am speaking in a neutral position and my purpose is to answer any questions the committee might have. North Dakota Century Code section 47-05-17 which was enacted last session by the legislative assembly prohibits the severance of the right of access for hunting access. The legislative assembly put a sunset clause on it and also a section in the bill that directs the legislative council to conduct a study on whether the sunset should be removed and the provision should be allowed to become permanent. Page 2 section 3 of the bill essentially amends section 47-05-17 to remove July 31, 2009 sunset date and allowing this to become part of the law. The right of access to land to hunt may not be severed from the surface estate. The section does not apply to deeds instruments, or interests in property recorded before August 1, 2007. Most of the cases were reservation of the hunting rights.

Senator Freborg What if I wanted to retain the hunting rights until I die?

Jeff Nelson I would think that would be a life estate and that would be a property interest and something that is recordable and is probably prohibited under this law. You might be able to enter into some type of contract or lease, but to retain a property interest is prohibited under this section.

Representative Damschen, I am in support of HB 1045. I was on the Interim Natural Resources committee. I want to discuss this analogy of property rights being a bundle of sticks. The rights are sticks but half of those sticks is responsibilities as well. As a land owner you have rights, but also responsibilities attached to those rights. I feel that if you sell off the rights such as easements, hunting access, you sell the rights without the responsibility. Eventually you sell out all the rights and someone is left holding a bundle of broken sticks that is just responsibility which is just the stewardship and taxes.

Representative Lyle Hanson, I was also on the interim committee and I am in support of the bill. The price of land is getting very expensive and this an avenue for hunters to buy the hunting rights cheaper than the land. Then you would find someone going around buying the hunting rights, as if they were mineral rights, and turning around and selling them. The land owner would not know who was on their land. Once the hunting rights are severed the landowner still pays the taxes and the person who bought the rights has no obligation.

Claus Lembke, North Dakota Realtors, We were very concerned at first because you might take away a little bit of the rights, but in all reality you don't. You might put some limitation on it. Since the Attorney General has ruled on this issue that leases are not a severance of property you are not really taking anything away by passing this bill. I think it favors the land owner. The leases go with the land. So if you have a lease and then the land is sold the new owner has to honor that lease.

Brian Kramer, North Dakota Farm Bureau, we stand in support of this bill. We agree that the severing of hunting rights should not be allowed. We have policy that states access is not a right it is a land use.

Woody Barth, North Dakota Farmers Union, spoke in favor of the bill (see attached testimony #3).

Dennis Miller I am a past president of the Landowners Association. They have a policy that would support this bill. The question is asked how a property rights association could support the restriction of the right to sell hunting rights. The language we have addressed for this bill is if the sale of the property rights restricts the property rights of future generations we recommend the retaining of those property rights with the land.

Julie Ellingson, North Dakota Stockmen's Association, spoke in favor of the bill (see attached testimony #4).

Roger Kaseman, ND Wildlife Federation, spoke in favor of the bill (see attachment #5).

Clarence Bina, United Sportsmen of North Dakota, testified in favor of the bill (see attached testimony #6).

Vice Chair Hogue closed the hearing on HB 1045.

2009 SENATE STANDING COMMITTEE MINUTES

Bill/Resolution No. HB1045

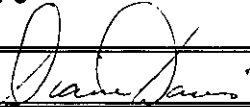
Senate Natural Resources Committee

☐ Check here for Conference Committee

Hearing Date: 4/2/09

Recorder Job Number: 11670

Committee Clerk Signature



Minutes: **Senator Lyson, Chairman**

Committee work

The committee discusses there was no opposition to this bill.

Senator Hogue motions for a do pass

Senator Freborg seconds

Vote – 7- 0

Senator Schneider will carry

Date: 4/2/09Roll Call Vote #: 1**2009 SENATE STANDING COMMITTEE ROLL CALL VOTES**

Senate _____ Natural Resources _____ Committee

☐ Check here for Conference Committee Bill Number: 1045

Legislative Council Amendment Number _____

Action Taken ☒ Do Pass ☐ Do Not Pass ☐ Amended ☐ AmendmentMotion Made By Sen. Hogue Seconded By Sen. Freborg

Senators	Yes	No	Senators	Yes	No
Senator Stanley W. Lyson, Chairman	✓		Senator Jim Pomeroy	✓	
Senator David Hogue, Vice Chairman	✓		Senator Mac Schneider	✓	
Senator Robert S. Erbele	✓		Senator Constance Triplett	✓	
Senator Layton W. Freborg	✓				

Total (Yes) 7 No 0Absent 0Floor Assignment Sen. Schneider

If the vote is on an amendment, briefly indicate intent:

REPORT OF STANDING COMMITTEE (410)
April 2, 2009 1:46 p.m.

Module No: SR-56-6005
Carrier: Schneider
Insert LC: . Title: .

REPORT OF STANDING COMMITTEE

HB 1045, as engrossed: Natural Resources Committee (Sen. Lyson, Chairman)
recommends **DO PASS** (7 YEAS, 0 NAYS, 0 ABSENT AND NOT VOTING).
Engrossed HB 1045 was placed on the Fourteenth order on the calendar.

2009 TESTIMONY

HB 1045



#1

Cass County
WILDLIFE CLUB
Box 336
Casselton, ND 58012



TESTIMONY OF FOSTER RAY HAGER
CASS COUNTY WILDLIFE CLUB
PRESENTED TO THE HOUSE NATURAL RESOURCES COMMITTEE
on
HB 1045
January 15, 2009

Mr. Chairman and Members of the Committee:

I am Foster Ray Hager speaking on behalf of the Cass County Wildlife Club, an organization of over 200 sportspeople organized to promote conservation of wildlife, to promote sportsmanship in hunting and fishing and to support the proper management of these resources. We support HB 1045.

Too many people are buying land, then reselling the land and trying to keep the hunting rights.

Hunting rights should stay with the owner and not the seller



#2

Testimony In Support of Passage of HB 1045

Roger Kaseman
223 Ashlee Avenue
Bismarck, North Dakota 58504
710-751-8002

Mister Chairman, members of the committee. My name is Roger Kaseman. I ask each member of this committee vote to recommend passing HB 1045.

Article 1, Section 1, of the North Dakota Constitution, titled Declaration of Rights, spells out specific rights the citizens of North Dakota have. Among the enumerated rights, is the right to acquire, possess, and protect property. I count two rights and a responsibility in that passage, the right to acquire and possess, and the responsibility to protect.

The people that oppose this bill argue that they have a right to do with their property what they please, including chopping it into hamburger and passing out the pieces as they see fit. The people that hold this view confuse phantom property rights with the right to acquire and possess property. They want you as legislators to ignore the responsibility to protect property.

Long before the right to own property came into existence on this continent, John Locke, the philosopher who most influenced our Declaration of

Independence, wrote, that a property owner must have "left enough and as good" a value in property for those who come after him.

We have a common law rule against perpetuities, sometimes called the dead hand rule. We cannot specify how future owners of land we now own will use that land after we are dead. Under our legal system, we can pass ownership in a will, but we cannot dictate how the new owners will use the land we pass on.

The rule against perpetuities is a rule of law in property, trusts, estate, and contract law. The rule prevents a property owner from controlling assets after death. When a will violates the rule, the courts declare that portion of the will invalid as a matter of law.

Although this rule revolves around wills, the rule applies to the disposition of property by sale.

The property owners that want to separate hunting rights from the surface estate won't live forever. Because they won't live forever, they don't have the moral, legal or constitutional authority to bind the people that will eventually own the property they own today with a legal burden that is nothing but a monument to the present owner's greed and whim.

In July of 2008, I spoke with a farmer that leased the hunting rights to several thousand acres of farm land he owns. The people that leased the hunting rights posted the farmer's land, as agreed to in the lease. The first fall the lease was in effect, the farmer went out to prepare some of his fields for spring planting. The hunting lease operators stopped him and ran him off his own land. Cultivating the land interfered with their hunting and they leased those rights. He hired an attorney to sort out the legalities. He wasn't sure what the outcome would be.

If you think that situation is over the top, wait until the next generation attempts to sort hunting rights from the right of a farmer to work land that he owns but can't hunt because a few greedy people in our generation sold out the next generation based on a twisted view of property rights that says the present owner can do with property they will without regard to future generations.

The North Dakota constitution clearly states a responsibility to protect property. HB 1045 places that constitutional responsibility in your hands. Voting for this bill doesn't trample on land owner rights; by passing HB 1045, you and your legislative colleagues will protect the rights of property owners that haven't been born.

#3

HB 1045

Good morning, Mr. Chairman and members of the House Natural Resources Committee members. For the record, my name is Julie Ellingson, and I represent the North Dakota Stockmen's Association.

The North Dakota Stockmen's Association supports HB 1045. Our beef producer members began contemplating the issue of severed hunting rights after the legislative body adopted the two-year moratorium and called for a resolution studying the idea back in 2007. We surveyed our members for nearly a year-and-a-half about this issue, and they responded by adopting an Access Rights resolution at our recent convention in Minot in September.

The resolution points to the long-term negative impact on landowners' ability to properly manage their operations if hunting rights are severed from the surface of the land. Separating hunting rights from the ownership of the land has numerous practical implications for the use of the property. For instance, what works for a farmer's or rancher's economic model may not be what works for the hunting rights owner. The opportunity for conflict, confusion and legal entanglements seems apparent, and they are things the North Dakota Stockmen's Association wants to avoid.

The Stockmen's Association's resolution also points out that hunting and recreational rights are merely land uses, not property that can be given title to.

This bill still provides for leasing options and other shorter-term contractual agreements, which the NDSA supports.

Please consider the complexities and challenges associated with severed hunting rights and support keeping those rights tied to the surface of the land as you make your recommendation.

#4

Comments on Attorney General's Opinion on Prohibition of Severing Hunting Rights from the Surface Estate.

Comment [r1]:

The wording in the century code (NDCC 47-05-17) states that the right of access to land to hunt (paraphrasing the term hunt as the code contains a long description of the types of activities that would fall under the act of hunting) may not be severed from the surface estate.

1. Given the wording of the right of access to land and that this right may not be severed from the surface estate would seem to mean that the owner of the surface estate retains that right of access to land to hunt. Accordingly, the state cannot convey the right to access to land to hunt by saying if it is not posted or not posted properly, citizens can access that land to hunt. The state of ND has defined hunting, has established that the act of hunting is an entity under law and that the right to access that land to hunt stays with the surface estate. If you own the surface estate, you cannot sever access to that land to hunt. But that implies the owner of the surface estate owns the right to access to land to hunt. With owning that right to access, it would seem that all who wish to hunt would have to be granted permission from the person (owner of the surface estate) to access that land.
2. The statute as written does not clarify what constitutes a severance. Would not a long term lease by a third party for the exclusive right to access to land to hunt be a severance? The statute does not state sale, just that the right to access to hunt may not be severed. If a third party held a correctly worded 20 year lease and the land was sold, wouldn't the new owner of the surface estate have to honor that lease and wouldn't that be a severance? How can a sale be a severance and a lease (whether long term or short term) not be a severance under this statute? If the state is going to make this statute permanent, it should include leasing. Otherwise it leaves a loophole you could drive a truck through. For example, my brother and I are selling our family farm. We want to retain hunting rights and the new owner doesn't care about hunting. In the purchase agreement, we put in a lease clause that states the new owner will lease us family members the right to access the land to hunt for the next 30 years for \$1. Or on clarification that a lease is considered a severance, that would do away with leasing of land for hunting purposes.
3. Again with the wording the right of access to land to, this would seem to fall under the category of an easement of some type. The state is saying the landowner cannot sever this classification of easement yet the state allows landowners to convey many types of easements. Again inconsistency. As a landowner, I can grant a utility an easement to bury an electrical line which the next owner will have to deal with but I can't retain an easement (the right of access to land) to hunt after I sell the land.

NATURAL RESOURCES COMMITTEE

The Natural Resources Committee was assigned three studies. Section 2 of House Bill No. 1146 (2007) directed a study of issues related to the severance of hunting access from the surface estate. House Concurrent Resolution No. 3026 (2007) directed a study of the feasibility and desirability of establishing legislation for the enforcement and assessment of civil penalties for violation of the one-call excavation notice system. House Concurrent Resolution No. 3044 (2007) directed a study of how the state might pursue additional uses of Lake Sakakawea and Missouri River waters for such beneficial purposes as domestic and industrial uses, recreation, fish and wildlife, and irrigation, and how the state, to enhance its use of the lake and river, might promote congressional review of the 1944 Flood Control Act and a reexamination by the Corps of Engineers of the way in which it manages the Missouri River system.

The Legislative Council also assigned to the committee responsibility for overview of the Garrison Diversion Project and related matters and any necessary discussions with adjacent states on water-related topics, to receive a report from the Game and Fish Department by July 1, 2008, regarding the department's findings and recommendations resulting from its study of hunter safety education requirements and hunter safety for all ages of hunters, and to receive a report from the State Water Commission by July 1, 2008, regarding the commission's findings and recommendations resulting from its assessment of the impact of tile drainage on the beneficial use of water by prior water appropriators.

The chairman of the Legislative Council also assigned to the committee responsibility to review State Water Commission operation and procedures; to receive periodic reports from the State Water Commission relating to the implementation of 2007 Session Laws Chapter 559, authorizing the State Water Commission to issue bonds for the Red River Valley Water Supply Project; and to receive periodic reports on the development of a digital elevation model for the Red River Basin.

Committee members were Senators Tim Flakoll (Chairman), Arden C. Anderson, Tom Fischer, Joel C. Heitkamp, and Stanley W. Lyson and Representatives Ole Aarsvold, Chuck Damschen, Duane L. DeKrey, Donald D. Dietrich, C. B. Haas, Lyle Hanson, Brenda Heller, Darrell D. Nottestad, Louis Pinkerton, and Todd Porter.

The committee submitted this report to the Legislative Council at the biennial meeting of the Council in November 2008. The Council accepted the report for submission to the 61st Legislative Assembly.

SEVERANCE OF HUNTING ACCESS FROM SURFACE ESTATE STUDY

Background

North Dakota Century Code (NDCC) Section 47-05-17--Section 1 of House Bill No. 1146--prohibits severance of the right of access for hunting access. This section provides that the right of access to land to

shoot, shoot at, pursue, take, attempt to take, or kill any game animals or game birds; search for or attempt to locate or flush any game animals and game birds; lure, call, or attempt to attract game animals or game birds; hide for the purpose of taking or attempting to take game animals or game birds; and walk, crawl, or advance toward wildlife while possessing implements or equipment useful in the taking of game animals or game birds may not be severed from the surface estate. The prohibition does not apply to deeds, instruments, or interests in property recorded before the effective date of the Act (August 1, 2007). Section 2 directed a study of issues related to the severance of hunting access from the surface estate. Section 3 provided an effective date through July 31, 2009, and after that date the Act is ineffective. The legislative history reflects the concern of the Legislative Assembly with the severance of hunting rights.

Generally, property may be viewed as a bundle of sticks with each stick in the bundle representing a separate property interest. If one owns all the sticks or interests in a piece of property and, thus, all of the interests in that piece of property, that person is said to own the property in fee simple absolute. The terms "fee simple" and "fee" are synonymous with fee simple absolute, the largest quantum of interest that a landowner can possess. There are two other kinds of fees simple--the fee simple determinable and the fee simple subject to a condition subsequent. These are defeasible fees or determinable fees and also are referred to as base or qualified fees. Another type of property interest is the life estate. Life estates are generally measured or operative during a lifetime.

The right of fishing and taking game or hunting is an interest in property or one of the sticks that comprises a property interest. This right may be severed from the remaining interests or sticks comprising a property interest and is transferable. North Dakota Century Code Section 47-05-17, however, prohibits the severance of the right of access for hunting access from August 1, 2007, until July 31, 2009.

Research has not revealed any other state that has enacted a similar provision prohibiting or restricting the severance of the right of access for hunting access.

In an attempt to determine the extent of the practice of severing the right of access for hunting access from the surface estate, the Legislative Council staff conducted a survey of the state's county recorders. Twenty-two of the 53 county recorders responded--Adams, Barnes, Burke, Burleigh, Cass, Dickey, Divide, Grant, Kidder, McHenry, McIntosh, McKenzie, McLean, Nelson, Oliver, Ramsey, Renville, Slope, Stark, Towner, Walsh, and Wells Counties. The county recorders of Adams, Barnes, Burke, Dickey, Divide, Grant, McIntosh, McKenzie, Oliver, Ramsey, Slope, Stark, Towner, Walsh, and Wells Counties reported that to the best of their knowledge they had not recorded any documents severing the right of access for hunting access. The remaining seven counties that responded reported that

they had each recorded one or several but not a great number of documents severing the right of access for hunting access.

Testimony and Committee Activities

Representatives of the Game and Fish Department testified that the department will spend approximately \$12 million this biennium in securing access for hunters in North Dakota. The Attorney General has advised the department that easements obtained for the private land habitat and access improvement program, especially long-term easements, should be recorded. A question concerning NDCC Section 47-05-17, however, is whether such interests may be severed and whether an instrument granting an easement for the private land habitat and access improvement program may be recorded.

The committee considered a bill draft to remove the July 31, 2009, expiration date from NDCC Section 47-05-17, in effect making the prohibition on the severance of the right of access for hunting access permanent. The committee received testimony from representatives of the North Dakota Stockmen's Association that the association has a great deal of concern with severing certain land use rights and that the association opposes the sale of hunting, recreational, and access rights that effectively severs those rights from the surface of the land. Representatives of the North Dakota Farmer's Union also testified in support of the bill draft.

Representatives of the Game and Fish Department testified that if NDCC Section 47-05-17 is made permanent, the committee should consider an amendment that the provision does not apply to the private land habitat and access improvement program under Title 20.1. The committee received testimony from a landowner that the bill draft relating to severance of the right of access for hunting access from the surface estate infringes on the rights of private property owners and Section 47-05-17 should be allowed to expire.

Recommendation

The committee recommends House Bill No. 1045 to remove the July 31, 2009, expiration date from NDCC Section 47-05-17 and to provide that the prohibition on the severance of the right of access for hunting access does not apply to the private land habitat and access improvement program under NDCC Title 20.1.

ONE-CALL EXCAVATION NOTICE SYSTEM CIVIL PENALTY STUDY

Background

House Concurrent Resolution No. 3026 directed a study of the feasibility and desirability of establishing legislation for the enforcement and assessment of civil penalties for violation of the one-call excavation notice system. Proponents of the study noted that the provisions of the North Dakota one-call excavation notice system do not include a civil process for the enforcement of the one-call excavation notice system or for any civil penalty assessment for violation of the system.

Proponents of the study noted that stakeholders had been working on a bill to provide for a civil process for enforcement and provisions for the assessment of a civil penalty to present to the 60th Legislative Assembly. However, complications arose from not being able to determine how to carry out a penalty phase and what entity would be responsible for administering a penalty provision. Representatives of North Dakota One Call testified that it has been studying penalties and enforcement provisions specific to the one-call excavation notice system because the Public Service Commission has encouraged North Dakota One Call to initiate enforcement legislation and the Public Service Commission suffers federal grant fund reductions due to the absence of state one-call enforcement provisions; Northern Border Pipeline and Alliance Pipeline have requested such legislation in response to "near miss" excavations adjacent to their buried facilities; and recently enacted federal legislation includes language encouraging state one-call systems to provide enforcement of their statutes to protect pipelines and other utilities.

North Dakota One-Call Excavation Notice System

The North Dakota one-call excavation notice system is governed by NDCC Chapter 49-23. The notification center is governed by a nonprofit corporation. Section 49-23-04 provides that, except in an emergency, an excavator must contact the notification center and provide an excavation or location notice at least 48 hours before beginning any excavation, excluding Saturdays, Sundays, and holidays, unless otherwise agreed between the excavator and operator. The notification center is required to provide a toll-free telephone number, assign an inquiry identification number to each excavation notice, and retain a record of all excavation notices received for at least six years. The notification center is required to immediately transmit the information contained in an excavation notice to every operator that has an underground facility in the area of the proposed excavation. The notification center is required to inform persons giving notice of intent to engage in an excavation activity the names of participating operators of underground facilities to whom the notice will be given and to establish procedures for assuring positive response from the affected operator and all emergency excavation notices. An operator, within 48 hours or any extension of that period, after receiving excavation notice from the center, excluding Saturdays, Sundays, and holidays, unless otherwise agreed between the excavator and operator, is required to locate and mark or otherwise provide the approximate horizontal location of the underground facilities of the operator.

As used in NDCC Chapter 49-23, "excavator" means a person who conducts excavation, and "operator" means a person who owns or operates an underground facility, including a master meter operator with underground facilities or a state or local governmental entity. An underground facility is an underground line, facility, system, and its appurtenances used to produce, store, convey, transmit, or distribute communications, data, electricity, power, television signals, heat, gas, oil,

The following support HB 1045:

NORTH DAKOTA STOCKMEN'S ASSOCIATION

NORTH DAKOTA FARM BUREAU

NORTH DAKOTA FARMERS UNION

NORTH DAKOTA REALTY ASSOCIATION

NORTH DAKOTA FARM CREDIT

A NUMBER OF WILDLIFE CLUBS

PLEASE SUPPORT HB 1045

#3



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800-366-8331 • 701-252-2341
www.ndfu.org

March 12, 2009

Senator Stan Lyson, Chairman
House Natural Resources Committee

Chairman Lyson,

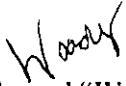
This letter is to express North Dakota Farmers Union's support for House Bill 1045, a bill that prohibits the severability of hunting rights from land. Thank you for the work you do in the Senate Natural Resources Committee.

North Dakota Farmers Union has long standing policy on severability of rights from land. NDFU believes land ownership should not be severed with rights associated with the surface, and our organization is opposed to landowners retaining hunting rights after selling land.

We strongly urge a do pass on House Bill 1045.

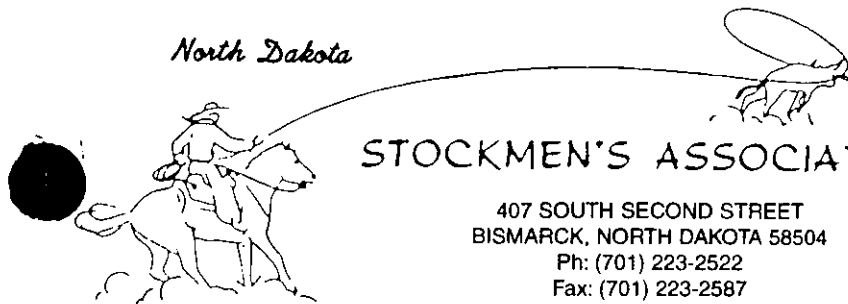
Sincerely,

North Dakota Farmers Union


Elwood "Woody" Barth
Vice President



North Dakota



STOCKMEN'S ASSOCIATION

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HB 1045

The North Dakota Stockmen's Association supports HB 1045. Our producer members began contemplating the issue of severed hunting rights after the legislative body adopted the two-year moratorium and called for a resolution studying the idea back in 2007. We surveyed our members for nearly a year-and-a-half about this issue, and they responded by adopting an Access Rights resolution at our recent convention in Minot.

The resolution points to the long-term negative impact on landowners' ability to properly manage their operations if hunting rights are severed from the surface of the land. What works for a farmer's or rancher's economic model, for instance, may not be what works for the hunting rights owner. If hunting rights are severed from the land, confusion, conflict and even legal entanglements seem apparent, and they are things the North Dakota Stockmen's Association wants to avoid. The Stockmen's Association's resolution also points out that hunting and recreational rights are merely land uses, not property that can be given title to.

This bill still provides for leasing options and other shorter-term contractual agreements, which the NDSA supports.

Please consider the complexities and challenges associated with severed hunting rights and support keeping those rights tied to the surface of the land as you make your recommendation.

Roger Kaseman, for the North Dakota Wildlife Federation
751-0882

Mister Chairman, members of the committee, Article 1, Section 1, of the North Dakota Constitution, titled Declaration of Rights, spells out specific rights the citizens of North Dakota have. Among the enumerated rights, is the right to acquire, possess, and protect property. I count two rights and a responsibility in that passage, the right to acquire and possess, and the responsibility to protect.

The people that oppose this bill argue that they have a right to do with their property what they please, including chopping it into hamburger and passing out the pieces as they see fit. The people that hold this view confuse a phantom right with the right to acquire and possess property. They want you to ignore the constitutional responsibility to protect property.

Long before the right to own property came into existence on this continent, John Locke, the philosopher who most influenced our Declaration of Independence, wrote, that a property owner must have "left enough and as good" a value in property for those who come after him.

We have a common law rule against perpetuities, sometimes called the dead hand rule. We cannot specify how future owners of land we now own will use that land after we are dead. Under our legal system, we can pass ownership in a will, but we cannot dictate how the new owners will use the land we pass on.

The rule against perpetuities is a rule of law in property, trusts, estate, and contract law. The rule prevents a property owner from controlling assets after death. When a will violates the rule, the courts declare that portion of the will invalid as a matter of law. Although this rule revolves around wills, the rule applies to the disposition of property by sale.

The property owners that want to separate hunting rights from the surface estate won't live forever. Because they won't live forever, they don't have the moral, legal or constitutional authority to bind the people that will eventually own the property they own today with a legal burden that is nothing but a monument to the present owner's greed and whim.

In July of 2008, I spoke with a farmer that leased the hunting rights to several thousand acres of farm land he owns. The people that leased the hunting rights posted the farmer's land, as agreed to in the lease. The first fall the lease was in effect, the farmer went out to prepare some of his fields for spring planting. The hunting lease operators stopped him and ran him off his own land. Cultivating the land interfered with their hunting rights. He hired an attorney to sort out the legalities of farming his own land. He wasn't sure what the outcome would be but he knew he made a very expensive mistake.

That situation is over the top. Should this bill fail, wait until the next generation attempts to sort hunting rights from the right of a farmer to work land that he owns but can't hunt because our generation sold out the next generation based on a twisted view of property rights that say the present owner can do with property what they will without regard to future generations.

The North Dakota constitution clearly states a responsibility to protect property. HB 1045 places that responsibility in your hands. Voting for this bill doesn't trample on a present land owner's right. By passing HB 1045, you and your legislative colleagues, will protect the rights of property owners that haven't been born.



United Sportsmen of North Dakota

#6

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TESTIMONY OF CLARENCE A. BINA UNITED SPORTSMEN OF NORTH DAKOTA PRESENTED TO THE SENATE NATURAL RESOURCES COMMITTEE

House Bill 1045

Chairman Lyson and Committee Members:

My name is Clarence A. Bina, representing 655 members of the United Sportsmen of North Dakota (USND). The USND supports HB 1045--the continuance of the prohibition of severance of hunting rights from the surface estate.

While North Dakotans have lived with the separation of surface land rights with other rights, the separation of the hunting access from the surface estate would be unique and dilatory to all citizens' Constitutional right to hunt where leased easements could deny hunting access for all current and future hunters. The current North Dakota Century Code 47-05-01 language should remain the law of our hunting land.

USND urges the Committee a Do Pass on HB 1045.