2009 HOUSE NATURAL RESOURCES

HB 1380

2009 HOUSE STANDING COMMITTEE MINUTES

Bill/Resolution No. 1380

House Natural Resources Committee

☐ Check here for Conference Committee

Hearing Date: 1-29-09

Recorder Job Number: 8134

Committee Clerk Signature Nancy L. Gerhardt

Minutes:

Chairman Porter – Open the hearing on HB 1380,

Rep. Kenton Onstad – See **Attachment # 1**. I would like to read an email I received yesterday. This person is unable to attend, but she gave me permission to read this. Her name is Misty Steek. I'm a landowner in SW North Dakota. I've not been paid for land damages for 6 oil wells that have been drilled since 2006. We've been trying to negotiate something other than their settlement. No one from the top of the company down will communicate with me. The only other alternative is to get a lawyer involved and that will take too much money. HB 1380 as it has been amended is exactly what we as landowners need. She questions whether she will be able to come and testify. She planned to come, but weather has held her back. I hope you look favorably towards this. Questions

Rep. DeKrey- What kind of money are we talking about? They get paid for the well site right? And then if they pipe off it then they get a payment for that too? What kind of money they give for that 1 time payment for the well sitting?

Rep. Onstad – That varies from company to company. I know of onetime payment - $ 6,000 total for that site. I know of some that are probably $ 7,000 with $ 1,000 annual payment to that. Now, the production company comes in and they deal their settlement. The pipeline

company settles their damages. The difference between the pipeline companies, they bury that pipe, but they look to come back and maintain that property. The well site and is there, and there are instances that land isn't even a well at that point, but it is taking up ground. That varies from company to company.

Rep. DeKrey – Do the wells take up an acre?

Rep. Onstad – They are based on 5 to 6 acres. The initial disruption. Once it becomes a producer they'll take some of the top soil, some of the clay and they'll fill in their salt water disposal area and it might get reduced another acre or so. That property still isn't the same.

Rep. DeKrey – I'm wondering, if in some instances, if it bad for them. One time initial, pretty hefty payment. I'm guessing oil companies pay rent for x number of years, or anticipated years up front.

Rep. Onstad – There isn't any values put into the bill. They come to an agreeable formula how they are going to arrive at this. That doesn't mean that this landowner will accept this situation, maybe he is a royalty owner. It is a little easier to deal with that. If you are a royalty owner and Rep. Myxter isn't. I'm going to go to you first because you'll probably be a little easier to deal with. This has nothing to do with royalties. It is proper compensation for taking surface area. We are asking the two outfits come together and be reasonable and negotiate an agreeable formula at that point. It isn't 1 size fits all. One production company said nationwide they are charging the current rate. They sent me information from Montana. Land values are quite a bit different in Montana than in Mountrail County. It is different if you purchase land, an entire section or 460 acres a little different. You are really selling your property. I know they call it a lease, but they are taking ownership of that land.

Rep. Keiser – As I read the bill it requires an annual payment. It is not an option to be negotiated, a single payment vs. annual.

Rep. Onstad – That is correct. The 2 payments, a onetime payment for damages and exploration and the 2nd portion for loss of production which would be annual payments.

Rep. Keiser - You made the comment that when the owner goes to sell the property they have to take a loss on that. They were already compensated in the original payment so there should be a lower payment shouldn't there?

Rep. Onstad – We come in and let's say there was a 1 time payment of $ 10,000. Twenty years from now that site is still there. You're going to sell the whole 160 acres, 5 acres is tied out of that. That buyer says I'm only buying 155 acres. Maybe he only buys 155. Now you have 5 acres that's tied up with you and your family. The point is, up front, it looks good initially. 50 years from now and it is still there, that's the consideration that has to be taken.

Rep. Keiser – The current surface owner has an agreement and everyone is happy with it. They died and their children get it, or they want to sell it. Does that require a new agreement be written at that time?

Rep. Onstad – No it does not. The contract will continue to carry over. Just like easements – 99 years – they carry over to the next landowner. If it is a 1 time payment and the surface owner ends there will be no further compensation for anyone who takes on that property. It does change the landscape. It does change the livelihood of those individuals. Every situation is different.

Daryl Dukart – Dunn Co. Energy Development Organization - See **Attachment # 2**. You asked about the length of leases. The agreements offered to me in February & March of 2007 actually do not state date or time or period. It states until the well is abandoned and the site is reclaimed. Is that 100 years, 10 years, is it 1 year? That is undefined. I think that is probably very standard in most leases. You will more on that later on. The loss of value, is a personal thing. My family, as of June, be able to pay off the contract for deed we had on the land

decided we were going to look at the next generation, that's my son and 2 daughters. We had an appraisal done, and I am going to use actual numbers. They appraised our 1766 acres at $525 an acre. We have mostly highly erodible land and it is mostly native grass lands. We live along spring creek and we are only 1 mile from Dun center. After this was all done, I went back to the appraiser and I asked them, if I lease, or sign this lease of 5 or 6 acres, what will this do to my appraisal? He said it drops your appraisal, because it's non productive land to the purchaser. It's non income bearing land. It has no value. As far as the production values they talked about and they are trying to establish, I don't think we can put into the bill a set number of dollars. In my situation the six acres they approached me on was high land, very sandy, native grass, and when I looked at the income off my farm that property produced me about $ 120 to $ 150 per acre for each cow I raised off that operation. Where it would be my neighbor's land where another site sits at, and he is getting 50 bushel of wheat an acre at $ 7 a bushel, that annual amount should be entirely different. I think that shows you can't put a set amount here. Every situation will be different. The last thing is – if you own a house and it's worth $ 80,000 and it sits on 5th Ave. & 7th St., and I bring in my ranch PU with a bashed in left side and the right side is messed up and it starts at a value of $ 2400 and with it messed up like this is worth a -$2400, but I want to set this PU on the corner of your lot. I want to set up a million dollar online business, and a walk-through business, and you're going to have to settle for a $ 9,000 onetime payment. It's not the way it's done. Questions

Rep. Keiser – When you lease that 6 acres does it remain taxable to you?

Mr. Dukart – Yes it does.

Don Nelson – We have been surface owners in the oil patch since it began in ND. We've been fighting for these sorts of rights since the beginning. I can show you well sights that have been on our property for over 50 years. They are not reclaimed yet. This is something that should

have been dealt with a long time ago. Two years ago there was land for sale close to me, it was up on bids. One fellow had made an offer and it was supposedly sold, but at that point the oil boom was going in our area with 1 staked and was ready to be drilled and there was talk of more. It actually made that land deal fall through. The landowner had been compensated for that site and the fellow buying it said I think it was 7 acres and I shouldn't have to pay for that or I should get that payment. It ended up falling apart. I was able to make a deal and get the land, but since then there has been 4 more sites put on that land. It adds up in a hurry. I support this bill. I do have a couple suggestions for it. The bill language refers to 38.1; drilling operations; the definition for drilling operations is the drilling of an oil and gas well and the production and completion operations ensuing from the drilling which require entry upon the surface estate in which are commenced after June 30, 1979, an oil and gas geophysical and sysemegraphic exploration activities commence after June 30, 1983. If you were to pass this I think you should go back and redefine that those dates should be taken out. I would also recommend if mediation doesn't work the mediation board should think about would think about onsite bonding. That is something we have been pushing for a while. If you could not come to an agreement, that bond should be set on that site, if there is problems in the future that bond should take care of it. Also the annual payment makes it an incentive for them to ???? and abandon these wells instead of paying that every year. I've never seen mediation panel where only one side gets to put people on there, and that's the oil company. They get to appoint 1 mediator, the county board, county commissioners, but I don't understand why the county extension agent would be one. I don't think many of your county extension agents would want to be on there. I know they could provide information with the crop land value to pasture values and so on, but that should be the mediation board that goes to them and gets that information. Why doesn't the landowner, surface owner, get to appoint one? Questions

Chairman Porter – One the other 4 sites that were put in on your land, how many acres were those and how much were you paid?

Mr. Nelson – Between 5 & 7, they all vary a little bit, usually they all are a little over 7. Usually when they get done they will reclaim a little of that, between 1 & 2 acres. It isn't really usable.

Chairman Porter – How much were you paid for those sites?

Mr. Nelson – I got about $ 10,000 a site, it depends, it was a 1 time payment for the site, and then they measure it out how many acres, and then they negotiate a price for that. It is a onetime shot. However, I now have gotten so that if the well site is there in 10 years they will come with another payment. I didn't get that with all of them, but you learn over time how to negotiate with this.

Chairman Porter – When you bought that land, how much per acre did you pay for it?

Mr. Nelson – On the cropland, it was $ 480 and for the pasture it was $ 375 I believe. It also a home and buildings that were extra.

Rep. Shirley Meyer – Did not sign in – Just for your information this is one section of the code that I am asked to look up repeatedly. This bill was an attempt to clarify language so we know what we are talking about. The problem this is trying to address is the surface owner that does not own any mineral acres interest, or a very small portion. If you are a royalty owner you tend to be a little more accepting if you know there is going to be some financial reward for you down the road. One gentleman showed me what was being paid for surface damages in 1983 and what was being offered in 2007. The surface owner payments was identical. Everything else had quadrupled. One other issue is where they have come in where the wells are up and running they are operating. They didn't agree to a surface settlement and those moneys are being held in escrow. I have been asked in the last month "What happens now?" I don't know. I don't believe this addresses this either. There is concern currently of moneys being held in

escrow and if there is a time limit or if it stays there forever or if they cash a check what happens. Concerning sect 3 – the mediation panel, Rep Onsted and I, just made that up to be quite frank. We were trying to get a mediation panel that was fair, neutral, if you have any other suggestions what would make a mediation panel that would be fine. The problem we are trying to address here is the negotiations in good faith. Your mineral acres is the dominant state. They have the right to get their property. We're trying to make this a little more user friendly for the surface owners. Questions

Rep. Keiser – You got a 1 time payment on your property for the wells, operational or not, it has been on your property for 50 years or more. Have there been any winners on the 1 time lease, in that they came in, they drilled, and if for whatever reason, and they are out of there, is there any positive on the other end?

Rep. Meyer – It's not one size fits all. The problem is confusion for everybody. Oil companies, and surface owners alike. We're trying to make this a little more user friendly for the surface owner. The oil companies were reading it as we have to pay you a one time, up front, lump sum settlement for damages. The surface owners were reading that and saying – from the same exact language – we get paid for our damages, but then we have loss of production on this land. We are talking surface up front damages and then loss of production for years. Just the dust, and it has been dry, just the dust – the cattle won't eat the grass. They have not only the 3 to 6 acres the well pad sits on but also the dust from the constant truck traffic may take half your pasture covered with the dust and you are going to see a late production in your calves.

Rep. Keiser – So you're telling us that farmers/ranchers could actually get two payments – they can get the up front, 1 time loss for the damage, and then they can get annual payments for the loss of production.

Rep. Meyer – Up until this Attorney General's opinion this wasn't happening. That was the trigger that caused this fight. After this Attorney General's opinion came out then when the landowners reviewed the Attorney General's opinion they are saying we are entitled. Before the oil companies we're telling the surface owners came in to negioate "We are prohibited by code to give you two payments". This bill attempts to clarify that. It attempts to go in and straighten out, we're talking about surface damages upfront and then the loss of production from your land.

Vice Chairman Damschen – Further testimony in support of HB 1380?

Robert Kleemann – Dunn County Commissioner – We are in favor of HB 1380. I worked the oil fields for 13 years. If they come in and pay $ 10,000 for a location and the well is dry, they move off and reclaim it, yes, you made a profit. I'm a mineral owner. We just recently had 2 wells drilled. On our upfront payment it was $ 10,000 for both of them. They pay us $ 1,500 a year. It takes 3 to 5 years back to growing grass after they reclaim it. You have salt water, oil, chemicals and all that stuff on it.

Rep. Keiser – Are you telling me sir that right now, today, you can actually determine with the company a 1 time payment and an annual payment?

Mr. Kleemann – There are some companies that don't want to do it.

Vice Chairman Damschen – Further testimony in favor of HB 1380? Opposition?

Ron Ness – N.D. Petroleum Council - See **Attachment # 3**. Questions

Rep. Keiser – The law currently allows for a 1 time payment for damages to the property and/or an annual payment for loss of production. If I listen to these folks who came in and some of the other testimony, the law allows it, but the producing company comes in and makes an offer, doesn't really negate, says I'll give you $ 10,000 or $6,500 for the loss of value of the land and that's our offer. If they could come back and counter, but if they do counter or don't

accept the offer, the drilling can still proceed on their land and some money is put into escrow. How do we bring resolution so the parties can move toward finalizing? Does it stay in escrow for 20 or more years?

Mr. Ness – I'm going to defer that question to John Morrison. One operator from one of the hot areas told me. We pay $8,000 per cap. One of the complaints is, why don't you negotiate it if it is in somebody's pasture, wheat field, alfalfa field? He said "We have picked the highest value any of those halves is worth on any piece of property. We picked all of them. As soon as we start paying a different amount, they all know each other, and we get into a situation – You paid Joe down the road $5,500 and I got $9,500 so they pick an amount they think is about standard. Those range from $5,000 to $20,000 across the basin as reported to me.

Rep. Hunskor – You talked about the annual payment is $100 to $200 dollars, yet I've heard other folks prior to you who've talked about much larger numbers for annual payments. Apparently there are exceptions.

Mr. Ness – I took the annual value of ???? payment. It is going to depend solely on what the value is. That is the crop damage payment

David Klym – Land Supervisor for Marathon Oil Company out of Dickinson – didn't sign in. – See **Attachment # 4.** Questions

Rep. Hofstad – Does the 7 acres have an impact on the value or use of the land.

Mr. Klym – It certainly does. We try to set down with the owner and try to put the location in a location where it does the least damage yet is the best site for us.

James Crom – We have a different stance on this bill. Our feelings is strictly Do Not Pass.

- First – there is the ability to negotiate – In the long run, we are left with laws that don't give us the same relationships we have with landowners we had originally.

- Second – when we reclaim that land we have to do it to the states standards. We have no control over that standard.

We see the remediation board as being flawed. Cost is one item, the resources is another, and impartiality is questionable. This diminishes our rights to negioate.

Jim ???? – Didn't sign in – As a surface owner I don't want to be stopped from negating with the oil companies. Watch what you wish for in this bill.

Jeff Herman – I am strongly opposed to the language in this bill. In particular the mediation. The extension agents list values every year for different types of land in every county. We take those values from the surface owner. I don't think this bill's necessary and I think the current system works right now.

Robert Harms – President of the Northern Alliance of Independent Producers – We are also in opposition of HB 1380.

- The rights between the mineral owner and the surface owner have been glossed over this morning. Some have suggested it's sort of a take it or leave it basis and there's no other remedy the surface owner has. The surface owner is what that term suggests. He owns that property. He can't be subjected to mineral development without being compensated. He has the legal right to be compensated for having the mineral developer come in and access his soil and develop that well. The bill you have in front of you right now is an attempt of previous legislative sessions to try to define how that compensation should take place. I think the language that is currently in this bill is confusing. I thought when I read the bill initially it would clarify it, but as I heard the testimony this morning it is as confused as the current one.

- Part of the confusion is, when that payment is made to the surface owner. Payments are made on a ?????? basis, 4, 5, 6, 7 times the value of the property. The surface owner remains the owner of that property. If I am the surface owner and I am paid $ 10,000 I still own that 5 to 7 acres. Part of the confusion is: the attempt to inject annual payments beyond that. If you have an interest in retaining a part of this bill, you should keep sect. 1, but make it clear, between the mineral owner and the surface owner they can do what they want. If they want to have 1 payment – do that. If they want annual payments – do that. Make that clear.
- Sect. 2 – the only part of that section that might make sense is lines 14 through 17. It helps identify the rights between the surface owner and his tenant. I have trouble with the state coming between those relationships, between landlords and tenants.
- On line 12, in sect. 2 – compensation to the surface owner for loss of production. Any reservation or consignment of compensation apart from the surface estate exception to a tenant of the surface estate is prohibited. If I am the landlord, the surface owner, and I want to mortgage that 160 acres does that language prohibit me from assigning that to my bank?
- Also in sect. 2 – landowners and the mineral developers have the ability to negotiate in good faith right now. It works 99% of the time quite well. For the state to inject itself into and dictate how those negotiations should take place.
- Sect. 3 – mediation – the comments made are right on the mark. I don't think you should complicate things further by creating a mediation board that we think

is tilted. We don't like the idea that remediation provides a 1 way street for payment of attorney's fees.

- The landowner still owns the land, he can negotiate severance damage, damages with respect to how other parts of his property is affected. That is all available to negotiate.
- We think Do Not Pass is the appropriate treatment of this bill, but if you decide this bill has some components to retain, this would be my suggestion. Keep sect. 1, but do what it is trying to do. Clarify to the companies and to the surface owner that you can have an annual payment or you can have a lump sum. Make that clear and put it into the code. The rest I would amend out.

Rep. Drovdal – You mentioned line 11, you said that cases confusion, and to me it seems quite plain. If I as a surface owner sell that surface, that payment goes with it. If I want to mortgage that land it has nothing to do with the title unless I default on the mortgage then they take the surface then that payment would go with it. Is that a wrong interpretation on my part?

Mr. Harms – The way I read that language it creates confusion as to what the surface owner can and can't do. I think it injects the state into relationships between the surface owner and the tenant, the surface owner and his potential lender.

Chairman Porter – Further opposition to HB 1380. We will close the hearing on HB 1380.

2009 HOUSE STANDING COMMITTEE MINUTES

Bill/Resolution No. 1380

House Natural Resources Committee

☐ Check here for Conference Committee

Hearing Date: 1-29-09

Recorder Job Number 8175

Committee Clerk Signature Nancy L. Gerhardt

Minutes:

Chairman Porter – Pull out HB 1380

Rep. Keiser – Do Not Pass

Chairman Porter – We have a motion from Rep. Keiser for a Do Not Pass – do we have a 2nd?

Vice Chairman Damschen – 2nd

Chairman Porter – We have a 2nd from Vice Chairman Damschen – discussion? Seeing none the clerk will call the roll on HB 1380.

Yes 10 No 2 Absent 1 Carrier Rep. Clark

Date: 1-29-09
Roll Call Vote #:

2009 HOUSE STANDING COMMITTEE ROLL CALL VOTES
BILL/RESOLUTION NO. 1380

House Natural Resources Committee

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Legislative Council Amendment Number

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

Motion Made By Keiser Seconded By Damschen

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

Total (Yes) 10 No 2

Absent 1

Floor Assignment Clark

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

REPORT OF STANDING COMMITTEE

HB 1380: Natural Resources Committee (Rep. Porter, Chairman) recommends **DO NOT PASS** (10 YEAS, 2 NAYS, 1 ABSENT AND NOT VOTING). HB 1380 was placed on the Eleventh order on the calendar.

2009 TESTIMONY

HB 1380

Attachment #1

HB 1380 Testimony

Mr. Chairman and members of the Natural Resources Committee

Rep. Kenton Onstad, District 4, Parshall

HB 1380 deals with Surface owners and damages occurred as the result of Oil and gas production. The changes in HB 1380 corrects and improves relationships between the surface owner, mineral owner and the Oil and Gas production company.

Attached is a copy of an Attorney General's opinion on payments for damages and loss of production and is the basis for some of the changes in HB 1380.

As we discuss this bill, you need to remember the Mineral Owner has superior rights over the Surface Owner. That basically means, a surface owner is unable to stop the production to develop an oil or gas well on their property. For that reason, it further moves the need for HB 1380 to provide necessary and fair compensation to the Surface Owner for damages and loss of production.

In many situations the current land owner has no idea who the mineral owner is. The current landowner might be the 2nd or 3rd owner since the minerals were originally severed. When the landowner is severed from the minerals, he or she may have no idea if the minerals have been leased. When the landman shows up, Surprise!

Section 1 deals with damages and disruption. It is current law and requires a one time payment for damages. There is no change to this section.

Section 2 is a new section which requires an annual payment for loss of production. We have to make it very clear, section 2 is for loss of production. As you are well aware, if you are unable to farm or graze this property, a loss of production will occur as long as the well site is present.

You have no guarantees for length of time that location will be used. It could be 5 years or 50 years. The length of time is one of the problems and creates several situations for the landowner.

1) Currently, there is very little negotiations between the land owner and production company.
2) The landowner has only 20 days to appeal the decision to occupy a space on one's property
3) The Land owner has very little time to accept of reject an offer to the land owner.
4) Without annual payments for loss of production, If a landowner wants to sell the property that this well site sits on, the value of that land is devalued.

Section 3 is a new section and sets up a mediation board to addresses any differences between the Oil and Gas production company and the landowner. Currently there is very little negotiations and many times no negotiations to discuss payment to the landowner. Current law says good faith negotiations should be present. Disputes have no where to go except to court.

Landowners here comments like:

" Your neighbor accepted this amount and that is all we are going to offer"

" Go ahead and take us to court, you will lose"

Mr. Chairman and members of the committee. You have to understand the landowners concern and hope you will look favorably to HB 1380

I stand for any questions.

LETTER OPINION
2007-L-07

March 13, 2007

Mr. Lynn D. Helms
Director, Oil and Gas Division
North Dakota Industrial Commission
600 East Boulevard Avenue
Bismarck, ND 58505

Dear Mr. Helms:

Thank you for your letter in which you ask about N.D.C.C. § 38-11.1-04. Chapter 38-11.1, N.D.C.C., provides protections to the surface owners of land burdened by oil and gas exploration and development activities. It is my opinion that damages related to drilling a well must be paid in a single payment; damages incurred thereafter may be compensated by annual payments. It is my further opinion that the law does not require that damage payments be the same to every surface owner in a unit; rather, it requires just compensation. Differing circumstances from tract to tract may require "non-uniform" payments.

Your questions concern N.D.C.C. § 38-11.1-04, which requires oil and gas companies to compensate surface owners for damage and disruptions caused by oil and gas activities. The statute provides in part:

> When determining damages, consideration must be given to the period of time during which the loss occurs and the surface owner may elect to be paid damages in annual installments over a period of time; except that the surface owner must be compensated for harm caused by exploration only by a single sum payment.

You state that oil and gas companies typically refuse to make annual payments, telling landowners that the law requires a single payment. You ask whether N.D.C.C. § 38-11.1-04 requires a single payment in all situations.[1]

The statute provides that when damages are assessed, consideration must be given to the time period during which the loss occurs, "and the surface owner may elect to be paid damages in annual installments." Clearly, the statute does not restrict

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[1] Chapter 38-11.1, N.D.C.C., has been challenged, but the attack failed. Murphy v. Amoco Prod. Co., 729 F.2d 552 (8th Cir. 1984) (addressing the due process, equal protection, contract, and taking clauses of the United States Constitution and article I, sections 21 (privileges and immunities) and 22 (special laws) of the North Dakota Constitution).

compensation to one-time payments. It expressly recognizes annual payments and expressly allows the landowner to "elect . . . annual installments."

The statute, after expressing the possibility of annual payments, adds: "except that the surface owner must be compensated for harm caused by exploration only by a single sum payment." The Legislature did not define "exploration," but I understand from your agency that in the oil and gas industry "exploration" typically refers to drilling a well. If minerals are not discovered in paying quantities, the well is plugged. But if drilling is successful, the well is completed and mineral production can continue for decades. In light of the language that "the surface owner must be compensated for harm caused by exploration only by a single sum payment," damages related to exploration, that is, drilling, must be paid in a single payment. Damages that will be incurred thereafter, however, could be compensated by annual payments. Of course, the landowner could choose to accept a single payment for post-exploration damages.

Even though the statute's express language does not require resorting to a secondary source, the legislative history supports the above analysis. A conference committee report states that "except for exploration operations, the bill gives the surface owner the option to receive compensation in annual installments over the life of a well."[2] This distinguishes damages incurred during exploration -- compensable only with a one-time payment -- from post-exploration damages -- compensable by annual payments at the landowner's option. A memorandum in the legislative history states that the bill "gives the surface owner the option to demand annual installments," but that "damages caused by exploration will be compensated for by a lump sum payment."[3]

Dissatisfaction about one-time payments was a reason the bill was introduced.

> [The oil and gas company] usually but not always . . . makes a one time offer to the surface owner for actual surface damage. In the event of a dry hole the compensation may be fair . . . but in the event of production, which may be for 20 or 30 years of (sic) more, the surface owner gets no consideration unless the producer volunteers or the surface owner has to sue in each instance and prove his claim. . . .
>
> We are reluctant to be operating under present practices where the surface owner has to sue in every instance where he feels he has been damaged, and must prove his claim. . . .
>
> The trouble with a one time settlement is that there is no way to determine years in advance what actual damage, let alone intangible damages might

[2] Conference Committee Report, HB 1198, 1979 N.D. Leg. (undated).
[3] Memo from Owen Anderson to Sen. Garvin Jacobson, 1979 N.D. Leg. (undated).

> be. For instance, odor in the air, management practices, working around oil equipment, danger to health of humans and livestock, loss of water wells and springs. Then too, salt and oil spills, corrosion on metal buildings, machinery and wire by hydrogen sulfide gas, loss of use of surface, cattle passes, roads, pipelines and traffic, flair (sic) outs, fires, pollution, trespassing and depreciated value of surface.[4]

Your second question concerns payments for damage caused by unit activities. According to your agency, units are not usually established until some years after a field has been producing and the reservoir pressure, and hence mineral production, has decreased but can be revitalized by artificially re-pressuring the reservoir. Injecting water is often used to re-pressure a reservoir and stimulate production. Units, which can cover tens of thousands of acres, provide for the joint operation of all wells and other facilities in the unit area.

You ask whether N.D.C.C. § 38-11.1-04 requires unit operators to pay the same damages to each surface owner in the unit. For example, the operator might conclude that a certain sum is adequate compensation for the presence of a well and propose that each person owning land burdened by a well should be paid that sum. Or the operator might calculate road damages on a per-rod basis and offer compensation on this basis to all landowners. Such a method assumes that all landowners suffer the same injuries, that the characteristics and circumstances of each parcel and each landowner are the same, or nearly so. While such an approach to compensation could theoretically satisfy the statute, it is possible, and even likely that, from parcel to parcel, there are differences in the land and the uses to which it is put. I understand that the Cedar Hills South Unit in Bowman County covers about 55,000 acres and currently has 121 producing wells and 128 water injection wells. It would seem unlikely that all unit wells and other facilities have the same consequences for the tracts they burden.

Nothing in N.D.C.C. § 38-11.1-04, or any other part of N.D.C.C. ch. 38-11.1, requires that a unit operator make the same damage payments to all landowners. The statute requires operators to pay a sum "equal to the amount of damages sustained," an amount to be determined "by any formula mutually agreeable" to the operator and landowner. How the operator carries out the duty to pay "damages sustained" is initially its prerogative. Uniform payments could be acceptable provided each landowner receives adequate compensation for whatever damage he sustains. But the law does not require that damage payments to every surface owner in a unit be the same. What is required is that they be "justly compensated."[5]

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[4] Hearing on H.B. 1198 Before the House Comm. on Natural Resources, 1979 N.D. Leg. (Jan. 18) (Statement of Rep. Murphy). See also id. (Statement of Joyce Byerly, McKenzie County Grazing Association).

[5] N.D.C.C. § 38-11.1-01(3).

Sincerely,

Wayne Stenehjem
Attorney General

cmc/pg

This opinion is issued pursuant to N.D.C.C. § 54-12-01. It governs the actions of public officials until such time as the question presented is decided by the courts.[6]

[6] See State ex rel. Johnson v. Baker, 21 N.W.2d 355 (N.D. 1946).

Attachment #2-B

Testimony for HB1380:

Presenter:

Daryl Dukart

470 96th Ave SW

Dunn Center, North Dakota 58626

I am present to day to encourage a do pass on HB1380 and as a surface owner of 1770 acres of land in Dunn County with no ownership to any minerals acres.

On August 30, 2007 we had been offered an agreement by a mineral developer for each well site. The site agreement amount offered is for an estimated 6 acres of land and a total one time payment in the amount of $9000.00. The land man who made the offer told us we can figure about twenty to twenty five years of possible use for the well site at this time. We never signed the agreement and as of today we do not have an oil well site on any of our surface ownership acreage. They located wells on surface lands adjoining our property to develop the minerals under our surface acreage. I am on aware of the true settlements made by the mineral developer to these adjoining surface owners.

Point and case I would like to present today is: If you own a house that is worth $80,000.00 and I would come to you as a business developer and offer you a long term lease agreement with a one time payment of $9000.00 for the dinning room in your house. I will set up my new found business which will generate me roughly 1 million dollars of sales annually online and with customers coming into your front door to purchase the products I have for sale. You may say well that is about as far fetched of story to compare as I have ever heard. Better yet allow me to set up my Ice fishing house in your yard so I can run my new found business. I believe by now your understanding my point. The reason I used the one million dollar number is if a well produces 60 barrels a day at $50 for 365 days that is over one million in total sales of oil and gas production. This is big business operating off of a very small amount of investment into fees for operational rights to surface ownership during the next twenty plus years of production and this is wrong. I have visited with surface owners who have signed 99 year lease agreements with power companies for wind towers sites and they receive annual payments for these types of leases/agreements. With in our operation we started to look to the future as to the sale of the land to one of our children or to another party we went and visited with a land appraiser from the Dickinson area. We asked him what he would do if I was to except this lease agreement and want to sell the land within the time frame the mineral developer held the oil well site lease agreement. He said the (appraised per acre value times the acres the site takes in would be deducted from the total amount for this land is non income producing lands which hold no value to the new purchasing owner at this time).

38-11.1-04 **(Damages and Disruption payments)**: can and should be made in one lump sum payments for the well site. The amount agreed on between surface owner and mineral developer can be any dollar number the surface owner is negotiating for and the mineral developer is willing to pay.

Attachment #2-A

Section 2: (**Loss of Production Payment**): I agree with this section of this bill and these payments need to be in annual lease agreement payments made between the mineral developer and surface owner. The present use of the land needs to be the determining factor and not what potential possible use for deciding a loss of income to agriculture. Example of this would be: The acreage being developed is high quality hay land at present and the surface owner operator uses a ration practice that returns this land every five years to cereal crop production than the determined annual loss of income would be greater than if it was lands used for just livestock grazing. Areas with in a county will or could vary by fairly large amounts of annual loss of production payments. I would suggest average annual production income history for the past five years reported by surface owner per acre times an additional 20% would compensate loss of production adequately. Example would be surface land acres five year gross income history average is an estimated at $200 gross cash income per acre times an additional 20% would bring the annually lease for loss of production to $240 annually per acre for the settlement. The 20 % is to adjust for increased inflation cost over the period of described time. Some mineral developers already do offer annual lease payments for loss of production. I just heard of one here the other day which the rig is just moving into the site and the surface owner was paid a sum of $7000 for the site damage payment and $1000 per year annual for loss of production settlement in the agreement. I also understand the Surface owner owned a fair share of the minerals as well.

(**Rejection-Mediation-legal action-fees and Costs**);

I support this section of the bill as well for I believe all parties are represented fairly in Mediation and if legal action is taken it describes fees and cost and who is liable.

Thank you,

Daryl Dukart

Attachment #3

NORTH DAKOTA PETROLEUM COUNCIL

Ron Ness
President

Marsha Reimnitz
Office Manager

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House Bill 1380

House Natural Resources Committee

January 29, 2009

Chairman Porter and Members of the Committee. My name is Ron Ness. I am the President of the North Dakota Petroleum Council. The North Dakota Petroleum Council represents 160 companies involved in all aspects of the oil and gas industry and has been representing the industry since 1952. I appear before you today in opposition to HB 1380.

Last year there were 600 oil and gas wells drilled in North Dakota and there have been nearly 16,000 wells drilled since 1951. Certainly, when dealing with the hundreds, or thousands, of surface owners each year, problems do exist; but, if the problems were significant, there would be hundreds of complaints being heard. That has not been the case. Our companies indicate that 98% of the surface owner damages are settled without dispute. Yes, there are occurrences where parties are not happy; but, generally, the land owners are compensated extremely well. In fact, in most cases, are paid three to five times what the land would be sold for and most of them want a lump-sum payment up front.

HB 1380 makes substantial changes in the way operators would conduct their business in the state and likely lead to more problems than it resolves. HB 1380 does not ensure that more will be paid for damages, it restricts the ability of the parties to agree on terms without state interference in private matters. We do not support this bill.

Below are some of our concerns with HB 1380.

- Current law allows the surface owner to elect to be paid in annual payments.
- Operators report that most landowners want lump-sum payments. Do the math. Would you rather be paid a lump-sum of $5,000-$20,000 or receive between $100-$200 a year for 20-30 years.

- Oil companies pay extremely well for surface impacts. There are many separate entities that pay for surface use, impacts, damage, as well as easements for pipelines, electricity, road access, and many other items.
- Administratively, companies would rather pay the lump-sum amount rather than carry forward small payments for 20-30 years. Surface owners will be paid less if companies are forced to pay annually.
- If you use three to five acres for a well, the annual payment would be tied to rental payment and the landowner will likely receive less. Getting a large lump-sum payment for the size of the original pad is like buying the location, except, when the well is plugged, the landowner gets to use the land again.
- The mediation provisions of the bill would create no incentive for the landowner to agree to a settlement, which occurs 98% or more of the time. If you create a no risk mediation option that the operators pay for regardless of the outcome, why would they agree to any offer?
- If the mediation proceeds, the surface owner should be required to pay for the costs if they receive less than offered.

To enter into a contract is a major infringement upon private rights, and would cause more problems than it resolves. We urge you to defeat this bill.

Attachment #4

N.D. House Bill 1380
Testimony – January 29, 2009
David Klym, Land Supervisor
Marathon Oil Company, Dickinson, ND

Chairman Todd Porter, and members of the House Natural Resources Committee, I thank you for this opportunity to present comment on HB 1380. My name is David Klym, Land Supervisor for Marathon Oil Company, in our Dickinson, ND office with an address of 3172 Highway 22 North. Marathon has two (2) offices in North Dakota. We have been in Dickinson since June 2006, and then we added the Killdeer office in October of 2007. Both offices combined employ over 55 full-time positions responsible for field operations on almost 100 producing oil and gas wells in Billings, Dunn, and Mountrail Counties, North Dakota. We also direct five (5) drilling rigs and four (4) completion rigs in Western North Dakota.

With regard to HB 1380, Marathon suggests the Bill is not necessary and therefore should not be passed. This Bill proposes amendments to an existing Act that has effectively protected Surface Owners and mineral developers in North Dakota for over 20 years. Over the last two and one-half years, Marathon entered into 118 Surface Use Agreements for wellsite locations, of which 99 are completed as producing oil and gas wells with landowners in North Dakota. In these 99 wells, we only have three (3) landowners in which Surface Use Agreements are unsigned pending further negotiations. In addition, Marathon has also entered into Right-of-Way Access Agreements with other landowners on over half of the 99 producing wells, which compliment the wellsite agreements. This many successful landowner agreements provide evidence the current

Oil and Gas Production Damage Compensation Act more than serves the intended purpose to provide landowners the "...maximum amount of constitutionally permissible protection...". The current Compensation Act is reasonable and is a proven approach to settling exploration and production surface activities. We maintain you will not be able to say the same for the proposed HB 1380. It includes significant amendments to the current Act, which will bring negative impacts to an Act that already works real well with the vast majority of the landowners in oil and gas producing counties.

Currently, the Compensation Act provides Surface Owners with an "option" to take a lump sum payment or annual installments for surface damages associated with oil and gas activity. HB 1380, as proposed, will take the one-time payment option away from North Dakota Surface Owners. Marathon's 118 SUA's most strongly suggests this would be a mistake, inasmuch 100% of our landowner SUA's have "elected" the single sum payment. Landowners prefer to get there money "up front", which provides them more financial flexibility with this larger compensation. Marathon has not had one (1) landowner elect to take annual installments over a single sum payment.

We have though had nine (9) landowners ask Marathon for both compensation offers pursuant to the current Compensation Act, being the aforementioned single sum payment, and annual installments. In six (6) of the nine (9) SUA cases, the landowners elected to take the single sum payment – not one landowner took the annual installment when provided with both options. The other three (3) landowners are the pending cases

discussed earlier. But here again, it is our experience the single sum payment is the exclusive choice of the landowners.

HB 1380 also proposes mediation as an alternative to settle surface damages when the landowner and mineral developer are unable to reach an agreement. The mediation process will add more costs and delay to the permitting process of drilling wells. As this Bill is written, the mediation costs are assigned to which parties? Is the mineral developer expected to carry the burden of these costs? Or are the Counties and/or the State of North Dakota expected to share in these mediation costs as well? This Bill asks the County Extension Agent to be one of the mediators. In that event the County and/or State are providing the manpower of a mediator, which will definitely add more time and expense to the affected County. Further, this Bill does not mention the landowners paying for any of the mediation. If landowners are not subject to any of the mediation costs, they have no cost exposure in the process and may well take advantage of the intended purpose of this legislation. The mediation process can not be a free ride to the "plaintiff party", which is not too dissimilar to legal action they would bring to court, where they expect to pay court costs and attorney fees.

In summary, we believe the current Compensation Act has served ND Surface Owners and Mineral Developers fairly and in a successful manner for over two (2) decades. Today, we have provided the Committee with Marathon's actual experience in negotiating 118 Surface Use Agreements, pursuant to the terms of the current Compensation Act, with only three (3) landowner agreements being outstanding. We

maintain you would find the other oil and gas Operators in this State have had similar success ratios in being able to obtain Surface Agreements in accordance with the existing Act.

Again, we thank the Committee for this opportunity to share our thoughts on HB 1380. We feel this legislation is simply not warranted when the existing process continues to serve landowners and industry most effectively.