

2011 SENATE NATURAL RESOURCES

SB 2274

# 2011 SENATE STANDING COMMITTEE MINUTES

## Senate Natural Resources Committee Fort Lincoln Room, State Capitol

SB 2274  
February 3, 2011  
13933

☐ Conference Committee

Committee Clerk Signature

*Monica Spaulding*

### Explanation or reason for introduction of bill/resolution:

A Bill for an Act to establish a surface rights board to mediate disputes involving damages caused by oil and gas exploration and production; relating to determination of oil and gas surface damages

### Minutes:

Testimony Attached

**Chairman Lyson** opened the hearing on SB 2274.

**Senator John Warner** introduced the bill. See **Attachment #1**.

**Senator Burckhart:** Would there be a lot of surface owners appealing for this?

**Senator John Warner:** The landowners and the board members agreed that there was an initial flush of litigation but it mostly involved establishing value. Once you establish a few cases then it died down. The board now only meets three or four times per year in Manitoba. They have three levels and they rarely get to the third level which is the hearing.

**Senator O'Connell,** District 6, spoke in favor of the bill. 99% of the oil people are good neighbors, yet there are instances of them not replacing the black dirt, just grading it from the road. There are problems. There has to be some way to solve the problems.

**Representative Kenton Onstad,** District 4, spoke in favor of the bill because it gives the surface owners a place to go without going to court. See **Attachment #2**. The service rights group has used this in Manitoba. It has worked very well. Initially there were many times it was used, now it is just a handful. It holds both parties responsible. Mediation works, whereas court is lengthy and costly. This bill will expand the speed of the oil and gas development. People right now are hesitant to sign on to contracts with oil companies because they feel they have no recourse. This would fix that problem and be good for our state.

**Senator Triplett:** Have you tried to integrate this proposed bill with the damage and disruption law we now have in place?

**Representative Onstad:** There is legislation on the House side that talks about damage and disruption payments. They are saying there are two payments: one for the original damage and then an annual payment. The annual payment has to be mutually agreed upon by the parties.

**Senator Triplett** expressed concern about the existing law and this proposed law overlapping and yet being different. She asked if it would cause confusion if these laws are not reconciled. (21:20 to 22:25 on the audio.)

**Galen Peterson**, a farmer from Maxbass, presented written testimony in favor of SB 2274. See **Attachment #3**.

**Ashley Lauth**, with the Dakota Resource Council presented written testimony in favor of the bill. See **Attachment #4**.

**Greggory Tank** from Keene, ND, spoke in favor of the bill. If the claim is under \$10,000 there is not time or money for litigation. We need a board to help determine the value of the property and the loss of income, etc. Many times we settle for less just to settle, a lot of damages are overlooked. There is a lot of time involved, high legal fees, and then no response. We need an impartial board.

## **Opposition**

**Ron Ness**, President of the ND Petroleum Council, presented written testimony in opposition to the bill. See **Attachment #5**. HB 1462 is the bill he would back. SB 2274 overlaps the existing laws. HB 1324 would have 2 payments, one for the damages up front and then an annual payment for loss of production. This is best left between the 2 parties without government interference. We are working on a notice provision so the siting could be done with surface owner involvement. SB 2274 would create a new bureaucracy.

**Lynn Helms**, Director of the Industrial Commissions Department of Mineral Resources, presented written testimony in opposition to SB 2274. See **Attachment #6** and **Attachment #7**. Page 6, line 30 has a 6 month sunset. You would be back to the board every 6 months. That is a lot of hearings.

**Senator Schneider:** Landowners would rather pay the fee for mediation than legal fees.

**Lynn Helms:** If you would take the burden off the Industrial Commission and put it on a mediation group, the Industrial Commission would not object. It is not good policy but there does need to be some provision for mediation.

**Senator Schneider:** So it is not just the fees, you just wouldn't want this responsibility.

**Lynn Helms:** That is correct; this is so far outside of what we do except for the small part that deals with reclamation. In 2010 we implemented a plan that the surface owner would consent to the reclamation plan.

**Senator Hogue:** Expanding the mediation in the Ag Dept. has been suggested as a solution. Have you had discussions with the Ag Commissioner?

**Lynn Helms:** Yes, It will only work if it is mandated for the other party to show up. Yes, we do support that. An oil company can pay a lawyer to settle a number of cases; a surface owner would be hiring a lawyer to settle one. That is not as cost effective.

**Senator Triplett:** If we did approve a mediation service, would you have fewer complaints for your office to deal with?

**Lynn Helms:** Yes, I think we would.

**Bill Shalhoob,** representing the ND Chamber of Commerce, spoke in opposition to the bill. We need to find a mediation process. Everyone should have an opportunity to negotiate separately and yet keep it outside the courts. We support the efforts of the other bills that are out there..

**Senator Schneider:** Does the Ag of Dept embrace this mediation role?

**Bill Shalhoob:** They do; and it belongs in Ag rather than in oil and gas.

**Senator Warner** made a comment on the fiscal impact. This is intended to be a self financing program.

**Chairman Lyson** closed the hearing on SB 2274.

# 2011 SENATE STANDING COMMITTEE MINUTES

Senate Natural Resources Committee  
Fort Lincoln Room, State Capitol

SB 2274  
February 3, 2011  
13972

☐ Conference Committee

Committee Clerk Signature	<i>Jerome Spaulding</i>
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## Explanation or reason for introduction of bill/resolution:

A BILL for an Act to establish a surface rights board to mediate disputes involving damages caused by oil and gas exploration and production; relating to determination of oil and gas surface damages

## Minutes:

No Attachments
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**Chairman Lyson** opened the discussion on SB 2274.

**Senator Triplett:** Comment on the fiscal note. It appears that Director Helms feels strongly that he does not want to be saddled with this obligation. He would not mind the bill passing if it would not be put in his court. The language of the bill is that it will be self supporting. I called the sponsor of the bill and asked for a new fiscal note. It should be a fee based self supporting program. There is work needed on bill, but if the fiscal note were changed, we wouldn't have the pressure to get the bill out.

**Senator Freborg:** If we plan to give this to the Ag Dept. they would need a new fiscal note and they won't have it in time to get it out anyway. That would take the obligation away from getting it out.

**Senator Hogue:** My primary opposition to bill is creating a new governmental entity that would adjudicate these claims. There is a House bill that would bolster the mediation services of the Ag Commission. It would be nice to know the status of that before we vote on this bill. This is the wrong direction to go, and I can't support it.

**Senator Triplett:** I don't agree with the present form but I would rather leave it alive and merge it with the other bill in case the other bill would happen to die. If we could get past the fiscal note, we could sit on it for a week. It seems to fit better with the Ag Commission than with oil and gas.

There was discussion about having to get it out of committee in time for the deadline on fiscal note bills.

**Senator Schneider:** Does anyone remember where in this bill it spells out the levying of fees?

**Senator Triplett:** The language may have to be beefed up to make it clear that it is self supporting since that was the intent of the sponsor. That would take care of the fiscal note.

**Senator Schneider:** Motion to amend the wording "to cover the full cost of this service"

**Senator Triplett:** Second

**Senator Hogue:** The bill should be killed. Even if we take the fiscal impact off, this is the wrong approach. I think there should be some adjustments between the rights of the surface owners and the developers but I don't want to do it in this bill. This bill has too much baggage. I'd rather defeat this bill and wait for something more manageable to work with. This bill would create a new board with new full time employees.

**Senator Triplett:** The motion is only to neutralize the fiscal note. This is intended as a stop gap to get past the deadline.

**Roll Call Vote** (to adopt the proposed amendment): 2-5-0

**Senator Hogue:** Do Not Pass motion.

**Senator Burckhart:** Second

**Roll Call Vote:** 5-2-0

**Carrier:** Senator Hogue

**Senator Freborg:** I hope we would have a chance to do something to get some relief, whether through the Ag Dept. or somewhere.

## FISCAL NOTE

Requested by Legislative Council  
01/21/2011

Bill/Resolution No.: SB 2274

**1A. State fiscal effect:** *Identify the state fiscal effect and the fiscal effect on agency appropriations compared to funding levels and appropriations anticipated under current law.*

	2009-2011 Biennium		2011-2013 Biennium		2013-2015 Biennium	
	General Fund	Other Funds	General Fund	Other Funds	General Fund	Other Funds
Revenues	\$0	\$0	\$0	\$0	\$0	\$0
Expenditures	\$0	\$0	\$1,400,000	\$0	\$1,456,000	\$0
Appropriations	\$0	\$0	\$1,400,000	\$0	\$1,456,000	\$0

**1B. County, city, and school district fiscal effect:** *Identify the fiscal effect on the appropriate political subdivision.*

2009-2011 Biennium			2011-2013 Biennium			2013-2015 Biennium		
Counties	Cities	School Districts	Counties	Cities	School Districts	Counties	Cities	School Districts
\$0	\$0	\$0	\$0	\$0	\$0	\$0	\$0	\$0

**2A. Bill and fiscal impact summary:** *Provide a brief summary of the measure, including description of the provisions having fiscal impact (limited to 300 characters).*

This bill establishes the surface rights board to mediate disputes involving surface damage caused by oil and gas exploration and production. The board consists of at a minimum 3 members appointed by the Governor with staff services provided by the Dept. of Mineral Resources.

**B. Fiscal impact sections:** *Identify and provide a brief description of the sections of the measure which have fiscal impact. Include any assumptions and comments relevant to the analysis.*

Fiscal impacts relate to board member compensation and expense reimbursements and staff services provided by the Dept. of Mineral Resources. The Dept. of Mineral Resources estimates that, based on the costs that another state agency experiences with a reclamation program and the costs of the Manitoba Surface Rights Board in 2010, there will be a need for 9 additional employees at costs between \$1,200,000 and \$1,400,000.

**3. State fiscal effect detail:** *For information shown under state fiscal effect in 1A, please:*

**A. Revenues:** *Explain the revenue amounts. Provide detail, when appropriate, for each revenue type and fund affected and any amounts included in the executive budget.*

The legislation does not provide for reimbursement to the State for its expenses in administering this program.

**B. Expenditures:** *Explain the expenditure amounts. Provide detail, when appropriate, for each agency, line item, and fund affected and the number of FTE positions affected.*

To prepare an estimate we obtained information on the Manitoba Surface Rights Board (MSRB) 2010 activity. Board member compensation was \$46,000; registration fees for filing and posting freely negotiated agreements were 736 agreements x \$100 = \$73,600; agreements settled through mediation or hearing were 313 x \$1,600 average cost = \$500,800. Total MSRB costs for one year were \$620,400. We believe an additional field inspector would also be needed at a cost of \$90,000. Total annual costs of \$710,400. Biennial costs of \$1,420,800. We also looked at the costs of one of the Public Service Commission's reclamation programs and their costs were \$1.2 million. We anticipate the need for 9 additional FTEs.

**C. Appropriations:** *Explain the appropriation amounts. Provide detail, when appropriate, for each agency*

*and fund affected. Explain the relationship between the amounts shown for expenditures and appropriations. Indicate whether the appropriation is also included in the executive budget or relates to a continuing appropriation.*

The bill does not include an appropriation to pay expenses incurred by the board or does it include an appropriation for the expenses of the Department of Mineral Resources. Funding for this program has not been included in the Executive budget.

<b>Name:</b>	Karlene Fine	<b>Agency:</b>	Industrial Commission
<b>Phone Number:</b>	328-3722	<b>Date Prepared:</b>	02/01/2011



Date: 2-3-11  
Roll Call Vote # 1

2011 SENATE STANDING COMMITTEE ROLL CALL VOTES  
BILL/RESOLUTION NO. 2274

Senate Natural Resources Committee

Legislative Council Amendment Number \_\_\_\_\_

Action Taken: ☐ Do Pass ☐ Do Not Pass ☐ Amended ☒ Adopt Amendment  
☐ Rerefer to Appropriations ☐ Reconsider

Motion Made By Schneider Seconded By Triplett

Senators	Yes	No	Senators	Yes	No
Chairman Lyson		✓	Senator Schneider	✓	
Vice-Chair Hogue		✓	Senator Triplett	✓	
Senator Burckhard		✓			
Senator Freborg		✓			
Senator Uglem		✓			

Total (Yes) 2 No 5

Absent 0

Floor Assignment \_\_\_\_\_

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

Page 4 line 23 after word board,  
insert that will cover the  
full cost of this  
service

Date: 2-3-11  
Roll Call Vote # 2

2011 SENATE STANDING COMMITTEE ROLL CALL VOTES  
BILL/RESOLUTION NO. 2274

Senate Natural Resources Committee

Legislative Council Amendment Number \_\_\_\_\_

Action Taken: ☐ Do Pass ☒ Do Not Pass ☐ Amended ☐ Adopt Amendment  
☐ Rerefer to Appropriations ☐ Reconsider

Motion Made By Hogue Seconded By Burckhard

Senators	Yes	No	Senators	Yes	No
Chairman Lyson	✓		Senator Schneider		✓
Vice-Chair Hogue	✓		Senator Triplett		✓
Senator Burckhard	✓				
Senator Freborg	✓				
Senator Uglem	✓				

Total (Yes) 5 No 2

Absent 0

Floor Assignment Hogue

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

**REPORT OF STANDING COMMITTEE**

**SB 2274: Natural Resources Committee (Sen. Lyson, Chairman)** recommends **DO NOT PASS** (5 YEAS, 2 NAYS, 0 ABSENT AND NOT VOTING). SB 2274 was placed on the Eleventh order on the calendar.

2011 TESTIMONY

SB 2274

Testimony on SB 2274  
Surface Rights Mediation Board Bill  
Senator John Warner  
Senate Natural Resources Committee  
3 February 2011

Mr. Chairman, Members of the Committee,

SB 2274 would create an independent, free standing mediation board, housed within the Oil and Gas Division of the Industrial Commission. It would provide an avenue for surface owners to engage in fair and equitable dialogue with oil and gas companies and mineral interests.

This bill is based on Manitoba law but all three of the Canadian provinces which produce oil have similar board to mediate disputes and determine valuations in cases involving disputes between surface and mineral owners. Since most of the oil companies operating in North Dakota are also active across the border they are accustomed to its provisions and are already working within the parameters of this bill, just in another geographical location. Although at eleven pages the bill looks formidable I hope that you will allow me to go through each section briefly to lay out the proposed process.

Section 1 is definitions, most of them straightforward but I want to point out subsection 13. "Surface Rights". For the purpose of this bill this does not refer to the traditional definition of surface rights, the right to inhabit, the right to farm, the right to build a farmstead, instead it refers to specific surface rights necessary for the mineral interest to access his property and it is a 'takings', a diminishment of the traditional surface rights of the owner of the land.

Section 2 defines the board to be created as a minimum of three members appointed by the governor. Although the bill doesn't lay out requirements for membership on the board, I would envision that most of the members would have a background in land valuation- assessors, appraisers, auctioneers, perhaps agriculture economists or county commissioners.

Section 3 lays out the powers of the board, which include:

- Conduct surveys
- Research programs
- Obtain statistics for the purposes of the board
- Conduct hearings and investigations
- Provide mediation services when asked

Section 4 establishes that the surface owner is entitled to compensation for those surface rights, as defined in Section 1, that were taken from him by the operator, to provide the mineral owner with access to his property.

Section 5 establishes that the operator, not the mineral owner is responsible for compensating the surface owner for the taking of surface rights. This is current practice. It also lays out the process for establishing that there is a dispute between the operator and the surface owner.

Section 6 establishes the hearing process and the powers of the board following the hearing

Section 7 very importantly lists some of the things that the board may use to establish value:

1. The value of the land in its present use
2. The loss production on the land
3. The area of land damaged by the operator
4. Increased costs accrued by the surface owner
5. Any damages caused by limiting access to the remaining land
6. Nuisance, inconvenience, disturbance, noise or loss of crops or livestock
7. Where applicable, interest payable in addition to the amount
8. Any other relevant matter including other, comparable settlements

Section 8 provides for a balanced division of the costs of the mediation

Section 9 allows the board to establish costs and to create penalties to discourage frivolous complaints and use of the hearing process.

Section 10 lays out the process of bringing closure to the process at the end of the operation

Section 11 allows that judgments of the board may be appealed to a district court

Section 12 operator is responsible for controlling weeds on the site

Section 13 operator to remove, preserve and replace all topsoil at closure

Section 14 the board may adopt rules

Section 15 amends current law to allow for the intermediary process set forth in the bill rather than requiring litigation in district court as the only remedy.

Mr. Chairman, Members of the Committee,

I know that there is an initiative elsewhere in the legislature which would expand the duties of the Ag Mediation Service to cover the issues set forth in this bill. I do not have a particular preference as to whether this service is housed in the Agriculture Department or in the Oil and Gas Division, frankly, there are advantages to both sides.

If it is housed in the oil and gas division it would have access to the data and technical expertise of the division. But while the division has a good reputation balancing the interests of mineral owners and operators it is often seen as dismissive of the rights and needs of surface owners.

If it is housed in Agriculture I think that the relevant committee needs to ask some serious questions about difficulties in separating the federal funding which is dedicated to Ag Mediation from the additional work load and in training its staff in the specifics of land valuation and its relationship to mineral development.

Finally, I think there is a qualitative difference between the work that Ag Mediation has traditionally done and the task that lies ahead in resolving conflicts between surface owners and mineral interests. Ag Mediation deals with transactions which have been openly entered into by mutual agreement. At some time one or the other of the parties has found that they are no longer in a position to honor the commitment and need to renegotiate the terms.

Surface rights mediation is needed when the surface owner has no desire to enter into agreement with the mineral interest but the rights of the mineral owner require a 'takings' of surface rights from the surface owner. The surface rights mediation board then becomes more of a price discovery mechanism; a method of determining just compensation. The distinction is similar to the difference between marriage counseling and negotiating rent with a squatter in your living room.

Mr. Chairman, Members of the Committee, I urge your favorable consideration of SB 2274 and I hope that its concepts will find a place in whichever home this board finally resides.

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.<sup>1</sup>

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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<sup>1</sup> 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).



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March 13, 2007

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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."<sup>2</sup> 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."<sup>3</sup>

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

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<sup>2</sup> Conference Committee Report, HB 1198, 1979 N.D. Leg. (undated).

<sup>3</sup> Memo from Owen Anderson to Sen. Garvin Jacobson, 1979 N.D. Leg. (undated).

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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.<sup>4</sup>

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."<sup>5</sup>

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<sup>4</sup> 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).

<sup>5</sup> N.D.C.C. § 38-11.1-01(3).

LETTER OPINION 2007-L-07

March 13, 2007

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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.<sup>6</sup>

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<sup>6</sup> See State ex rel. Johnson v. Baker, 21 N.W.2d 355 (N.D. 1946).

Testimony in support of SB2274

Mr. Chairman and members of the committee.

I am Galen Peterson from Maxbass, and I farm in western Bottineau County.

I support this bill because it creates a mediation board that is specific to oil and gas issues. The bill also addresses issues such as abandonment, reclamation, top soil being stockpiled and preserved, and control of weeds on well sites. These are all issues that are not currently being adequately addressed.

The existence of this board will establish what compensation to the surface owner is fair and just. Once precedent is set, I believe cases needing to enter mediation will be reduced over time.

According to the fiscal note attached to this bill, the department of mineral resources would have 9 additional employees. With the ever increasing oil activity in the state, these are employees the department needs.

My name is Ashley Lauth; I am the oil and gas organizer for Dakota Resource Council. I work with farmers, ranchers, landowners, and mineral owners on responsible oil and gas development issues.

Dakota Resource Council urges a 'Do Pass' recommendation on SB 2274 because it creates responsible oil and gas development behavior and practices in the form of surface rights equity.

Currently, the only viable option for landowners to address oil and gas related problems is litigation. While laws exist that address surface damages, because of the low number of Oil and Gas Division staff for enforcement, and no clear punitive measures to ensure compliance, surface owners are often forced to litigate to resolve surface disagreements. Landowners need more choices than either accepting an insufficient offer or filing a lawsuit. It is unjust for landowners to be forced into years of litigation, at their own expense, simply to recover the damage compensation to which they're legally entitled.

Average cost of litigation is \$50,000-\$100,000, and the average time 3-5 years. Averages like these indicate that for most North Dakota farmers and ranchers, litigation is financially prohibitive because of the upfront cost and the time spent in court. This puts undue burden on people who depend on good faith offers and honest compensation for damages. Industry has the capacity to cover large legal fees and has the manpower for long-term litigation. It is clear that drawing out court cases is advantageous for oil and gas companies, because there is a higher rate of settlement or dropped lawsuits. The current procedure for settling disputes is therefore inherently anti-farmer and anti-rancher.

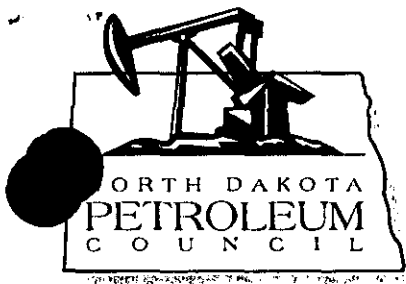
The Surface Rights Board bill, SB 2274, establishes a surface rights Board to mediate disputes involving damages caused by oil and gas exploration and production. It provides landowners a choice to mediate, serving as an alternative to litigation for surface-related disagreements. All parties involved, surface owners and companies alike, have the ability to bring cases to the Board, and all parties have the capacity to appeal decisions through the legal system. It creates an avenue for surface owners to engage in equitable dialogue with oil and gas companies.

The current oil and gas boom is an unprecedented size, and hence, deserve proportional attention. Our state must meet impacts of development with adequate measures. As oil and gas activity exponentially increases, disputes will increase as well. At the current rate of development, within 10 years, nearly every constituent in oil and gas producing counties will have an 'interest' in development through its direct and indirect impact on the land. In order to be prepared to address the grievances, a Board that *exclusively* handles surface-related disagreements is necessary. It is only appropriate for a Board specifically designated for that purpose to handle surface-related cases.

Surface rights mediation is needed when the surface owner has no desire to enter into agreement with the mineral interest, but the rights of the mineral developer allow a 'takings' of surface rights from the surface owner. The surface rights mediation Board then becomes more of a price discovery mechanism; a method of determining just compensation. In this manner, it behooves the industry to actively participate in a Board in order to engage in open dialogue to determine prices, and to engender smoother surface owner relations.

DRC members have called on the state to establish a comprehensive vehicle for mediation to proactively resolve increasing surface disagreements. There is a tangible need for and specific Board with regard to surface disagreements, committed to equitable and reasonable dialogue.

Dakota Resource Council therefore urges a 'Do Pass' recommendation on SB 2274.



Ron Ness  
President

Marsha Reimnitz  
Office Manager

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### **Senate Bill 2274**

### **Senate Natural Resources Committee**

**February 3, 2011**

Chairman Lyson and Members of the Committee. My name is Ron Ness and I am the president of the North Dakota Petroleum Council. The North Dakota Petroleum Council represents more than 260 companies involved in all aspects of the oil and gas industry and has been representing the industry since 1952. Our members produced nearly 95% of the 100 million barrels of oil produced in North Dakota in 2010. I appear before you today in opposition to SB 2274.

This bill creates a new level of bureaucracy for North Dakota government that will cost more than a million dollars. I think we could resolve nearly all of the disputes if the state would simply put a million four on the table each biennium. I might take the task upon myself! The Petroleum Council thinks this is the wrong approach to addressing disputes relating to surface damages. The appointment of the Board could become a political issue and the bill states nothing in regard to qualifications or credentials of the Board members and has extremely unique provisions for substitutes. The Department of Mineral Resources has the task of providing staff services. They already have their hands full and don't need extra responsibilities outside their scope of work. The other provisions of the bill are major changes in policy and are unnecessary regulatory burdens duplicating what the Industrial Commission has in place. This bill is just the wrong approach.

The Petroleum Council and our members are committed to "doing it right" and working toward positive solutions on key issues. Our Oil Can! Program is an example of our efforts to listen to the public and work to provide education and identify solutions. We plan to support three main target

areas to reasonably address these concerns. There are four bills which contain provisions that with some small changes we may support – three in the House and one in the Senate. They include:

- Better communication between the person on the ground and the surface owner (remember -- not all surface owners live in ND or are easy to locate.) HB 1324 with modification.
- A mediation option to bring the parties together. HB 1462 ND Mediation Service in the Department of Agriculture.
- Clarification of the law on damages clearly indicating the surface owner can have annual damage payments for loss of future production income. HB 1387.
- A financial benefit to the surface owner to off-set expenses. SB 2368 - provides an income tax credit to the surface owner for each wellhead, the typical well pad uses five acres – surface owners still pay property tax on those acres.

In summary, oil companies and their employees do not want to have a dispute with a landowner that they will be engaging with for potentially the next 20+ years. Many times, the amount being disputed is not that great; it's the emotions and the communications that result in the dispute.

We urge you to defeat this bill because it could cause more problems than it resolves and it will cost the state more than one million dollars to administer. There are better solutions.

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## SENATE BILL NO. 2274

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Testimony of Lynn D. Helms, Director

The Industrial Commission's Department of Mineral Resources currently does not have jurisdiction over matters governed by North Dakota Century Code 38-11.1 although the notice of drilling operations under 38-11.1-05 must include a form prepared by the director of the oil and gas division advising the surface owner of the surface owner's rights and options under the chapter, including the right to request the state department of health to inspect and monitor the well site for the presence of hydrogen sulfide.

**Staff Services** – Page 3 Line 31 through Page 4 Line 1 of Senate Bill 2274 states “The department of mineral resources shall provide staff services to the board.” In order to determine what would be required to provide such services my staff looked for similar programs. We discovered that the Public Service Commission's Reclamation Division runs the ND Permanent Program which provides the legal and technical services to the Public Service Commission for permitting new surface access and abandonment / reclamation of coal mining lands. They permitted access to approximately 5,400 acres and abandonment / reclamation of approximately 3,400 acres for a total of approximately 8,800 acres during the 2007-2009 biennium.



The oil and industry is expected to permit new surface access to approximately 10,000 acres per year and abandonment / reclamation of approximately 750 acres per year for a total of approximately 21,500 acres per biennium. This represents approximately two and one-half times the acres on which the ND Permanent Program provided staff services with a staff of 9 FTE and a budget of \$1,198,781 for the 2011-2013 biennium.

As a second reference we reviewed the Manitoba Surface Rights Board's 2010 activity and fee structure. Board member compensation was \$46,000, they filed and posted 736 freely negotiated agreements with a fee of \$100 each = \$73,600, and they settled 313 agreements through mediation or hearing with a total fee of \$1,600 each = \$500,800. The total expenses and fees for the year 2010 are estimated at \$620,400 or \$1,240,800 for a biennium. It is likely that the Department of Mineral Resources would also need a field inspector dedicated to this program for \$90,000 per year. This would increase the program cost to \$710,400 per year or \$1,420,800 for a biennium.

The Manitoba Surface Rights Board appears to collect fees equal to 96% of expenses, but this is not anticipated anywhere in Senate Bill 2274 and could not take place without a continuing appropriation and promulgation of rules by the board, which is a minimum 10 month process under North Dakota's current Administrative Practices Act.

# Manitoba Surface Compensation Agreements <sup>April 1,</sup>

