2011 SENATE NATURAL RESOURCES

SB 2362

2011 SENATE STANDING COMMITTEE MINUTES

Senate Natural Resources Committee
Fort Lincoln Room, State Capitol

SB 2362
February 4, 2011
14055

☐ Conference Committee

Committee Clerk Signature Veronica Sparling

Explanation or reason for introduction of bill/resolution:

Relating to the Uniform Conservation Easement Act; relating to requirements for easements, servitudes, and nonappurtenant restrictions

Minutes: Testimony Attached

Chairman Lyson opened the hearing on SB 2362.

Senator Erbele introduced SB 2362. See **Attachment #1**. He gave his background of being a grass manager. This bill does not address cropland or wetland areas, just native grasslands and cropland re seeded to grass. He is in conflict with three groups he belongs to. He is opposed to nonprofit groups owning property.

Senator Connie Triplett, District 18, spoke as the prime sponsor of the bill. She presented written testimony on SB 2362. See **Attachment # 2** and **Attachment #3**. She asked permission to add something to the record next week and obtained permission.

Senator Hogue: I would like to know why the 99 years would not be enough for a conservation easement. Are there more advantages than the tax advantage to go for perpetual rather than 99 years?

Senator Triplett: The conservation groups are simply not interested in a time limited easement and the tax credits are only available on permanent easements, so it is both of those things.

Rod Backman gave his background and stressed he is not an environmentalist. He presented written testimony in favor of SB 2362. See **Attachment #4**.

Mike McEnroe, representing the ND chapter of the Wildlife Society, presented testimony in favor of SB 2362. See **Attachment #5**.

Opposition

James Schmidt, a farmer/ rancher from Bismarck, spoke in opposition to SB 2362: Ten years ago I had the opportunity to a grassland easement that came around and they

offered me $40/acre. It sounded like a good deal, $7000.00 upfront money, but if you look at it I would have to live to be 140 years old before I lived to my commitment on that. That is 40 cents/acre when you break it down over that many years. How do you tie the hands of the people many generations out? If my grandfather would have done this, my hands would be tied as far as building a machine shed, etc. I am absolutely opposed to it unless you limit it to 25 years and you get paid every year. I also had the opportunity in the last two years to sit on the state policy action for the ND Farmers Union. We had people come in and discuss these easements and people were adamantly opposed. It came to the convention and it was unanimously opposed.

Senator Triplett: Did anyone force you to sign that easement?

James Schmidt: No, and I did not sign it, but there are neighbors that did sign it. Now they are sitting there with their hands tied.

Daryl Lies from Douglas, ND spoke in opposition to SB 2362. He feels perpetual easements tie the hands of our future generations. He wants to leave a legacy to the future generations. These decisions are made sometimes in a time of crisis. They need dollars for the short term. They end up being bailed out of a short term problem with a long term nuisance. Just because we have perpetual easements for USDA Fish and Wildlife, does not make it right to have more easements. We are one of only a few states that are operating in the black. To compare to what other states are doing is a weak argument when you see the debt they are carrying.

Past President of the Landowners Association testified on his own behalf. A 30 year limit would be better. Senator Erbele said the easements can be negotiated. On the news this last week there was a case. Alvin Peterson was found guilty of violating his easement. I saw the original easement that he had signed that Mr. Peterson had negotiated with the signers of the easement saying that he had the right to do what he did. He had the paper signed and the wording was crossed out. It said not available, it was signed by both the US Fish and Wildlife and Mr. Peterson, and he was found guilty of violating that easement because there is a new manager in the office. I was at the court and the judge did not recognize that piece of paper. Hence Mr. Peterson is out probably over $50,000.00 of his money defending himself. It goes to show that you cannot fight city hall. I have a few other gripes with this bill. Page 2 line 26-29 it speaks of enforcement. Who will be enforcing these easements? That is a large uncertainty that makes this bill unpalatable. He cited a case along the Red River where someone applied for a decrease in their taxes because an easement on their land had devalued their property. There are a lot of easements up and down the Missouri River basin. In a1977 law review there were 11,685 perpetual waterfowl easements encompassing 4 ½ million acres. The state has spent countless hours filing friend of the court briefs to defend people around the state who have been found in violation of these easements. When I was president of the Land Board, I would get numerous questions from people in the western part of the state about grassland people who were having trouble with their easements. Perpetual easements are a problem on grassland just as they are on wetlands.

Senator Hogue: You mentioned the CRP program. What % of the land that goes into CRP eventually comes back out and goes back into tillable acreage?

Past President of the Landowners Association: I don't have official numbers, but in my area I would guess 75%.

Chairman Lyson: We will continue this hearing next Thursday at 9:00.

2011 SENATE STANDING COMMITTEE MINUTES

Senate Natural Resources Committee
Fort Lincoln Room, State Capitol

SB 2362
February 10, 2011
Job # 14387

☐ Conference Committee

Committee Clerk Signature

Explanation or reason for introduction of bill/resolution:

Relating to the Uniform Conservation Easement Act: relating to requirements for easements, servitudes, and nonappurtenant.

Minutes: "Attached Testimony"

Senator Lyson re opened the hearing on SB 2362.

Keith Trago, Executive Director of ND Natural Resources Trust, supports SB 2362. (See Attached Testimony #1).

Mike Donahue, ND Wildlife Federation, and we support SB 2362 and ask for a DO PASS.

Cloise Hetletved, Grand Forks, supports SB 2362, and it is a step in the right direction for landowner's rights. I believe strongly that some of these perpetual easements save and conserve the land that should not be plowed up and anything else done with it.

Senator Ryan Taylor, District 7, co-sponsor with Senator Triplett. I wanted to look at things "anew" since I once opposed "perpetual easements". Lots of my friends in the Ag group are going to oppose this bill and have for a long time. I looked at this bill again when they removed the crop land from the perpetual easement bill. We do have "perpetual easements" in ND. There is only one entity that can do that and that is the federal government. We had 2 offers on the "perpetual easement" from the US Fish and Wildlife Service. We have turned them down. They were generous offers but we had the decision to take it or leave it. And we "left it". Other states' needs are different than ours. A lot of it has to do with "urban encroachment". ND will not be immune to "urban encroachment" forever. They see it as a way for generations to come into their piece of property that has been in their family for generations rather than it being paved over and becoming a strip mall. We can look at things "anew" and give some options to our producers that are valuable.

Eric Ausmundstad, President of ND Farm Bureau, opposes SB 2362.
I am here to talk about "perpetuity" and that being an awful long time. What Senator Taylor speaks about with 'conservation easement' is true. A lot of Ag groups in other states have embraced them. They are used primarily to devalue a piece of property so it can be passed at less cost to the next generation. For example, I will sell off my development rights so the piece of property can never be developed, keeps the value down, which reduces the inheritance tax and I can pass it along at a reduced cost to future generations. If I as a landowner and parent that is coming to age and having to deal with my estate, how am I going to pass that to the next generation so they can retain use of it? If I as an owner of that property and have legal counsel on this were to put a clause in my will that said that the property could never be developed, a future generation of my kin could challenge that and the court would look at it in a very dim light. Why would this body want to create or put me as a private property owner who wants to handle my own affairs in my own way be at a disadvantage to non-profit groups or government entities? I can't do it myself but I can sell off and let someone else prevent that from happening. "Perpetual" is a long time. I don't know what is best for 2-3 generations from now, for whoever has that land.

Senator Hogue asks Mr. Ausmundstad if he knows in the Devils Lake area, how many acres are out of production due to the rising waters.

Eric Ausmundstad states that by the end of this spring we are estimating there it will be 220,000 to 230,000 acres.

Senator Hogue asks if there are offers in Devils Lake region by conservation groups, Ducks Unlimited or others, that are soliciting easements from that property and to take it out of production and make it a waterfowl production area.

Eric Ausmundstad states he knows of land owners that are trying to sell "fee title" to the US Fish and Wildlife Service. I don't know of any other 'easement programs' other than the revamp Wetlands Reserve Program and they made special provisions for that area for 30 year easements. I am not aware of any special group that has made offers to landowners.

Julie Ellingson, represent the ND Stockmen's Association. Our association opposes SB 2362. Our organization has a long-standing policy to opposing "perpetual easements". Our members consider these easements as impediments to the long term private property rights, property rights that our long standing organization was founded upon. While the "perpetual conservation easements" outlined in this bill would not apply to recently used crop land, they would absolutely apply to pasture land, which allow our beef producing members to raise their herds and to make their living. (See **Attached Testimony #2**). **We ask for a DO NOT PASS ON SB 2362.**

Kayla Pulvermacher, representing member of the ND Farmers Union. (See **Attached Testimony #3**).

Jason Schmidt, Beef Producer from Central ND. I am not opposed to conservation easements but the "perpetual" part ties the hands of the next generation. It appears to me if you tied those "easements" to the surface owner it would make more sense. Instead of

one time and one person being able to cash in on it; the people that were surface owners, living on the land and dealing with the issues, would benefit from it over time. It should be handled much like the wind farms are being approached. I oppose SB 2362.

Senator Lyson closed the hearing on SB 2362.

2011 SENATE STANDING COMMITTEE MINUTES

Senate Natural Resources Committee
Fort Lincoln Room, State Capitol

SB 2362
February 17, 2011
Job # 14700

☐ Conference Committee

Committee Clerk Signature Veronica Sparling

Explanation or reason for introduction of bill/resolution:

Relating to the Uniform Conservation Easement Act; relating to requirements for easements, servitudes, and nonappurtenant restrictions

Minutes: Testimony Attached

Chairman Lyson opened the discussion on SB 2362.

Senator Triplett: See **Attachment #1**. She referred to Table 1.4 and explained that there are not a high number of acres that are protected by easements. The two areas to possibly be affected are near Theodore Roosevelt National Park and maybe along the Missouri River. Table 2.1 shows that North Dakota is the only state that has no permanent easements. UCEA stands for the Uniform Conservation Easement Act. She explained how that Act works. Oklahoma has just a common law situation where they allow them by common easement law. The charts show for what purposes the different states allow easements. The three North Dakota farm groups are opposed to easements and she wants this committee to know that it is not her intention nor the intention of others interested in conservation easements to do anything that would be harmful to agriculture or to grazing. That is absolutely not the purpose. They do not want to take land out of production. The purpose of this is to prevent land from being taken out of production for other purposes like development, particularly the areas around the Little Missouri and the North Dakota Badlands. Her concern was that the land would be broken into such small parcels that it could no longer be used for grazing and would be developed for various industries, compromising the beauty of the roadside areas. This bill would allow the ranch families to take some of the value out of their land and give it to the children who don't want to stay on the property and then can give what is left to the land with the conservation easement attached to it which now has a reduced value can be passed on to the one who wants to be on the land and use it for grazing. This is intended as a tool. It is a voluntary act. If we put this into legislation there is nothing that says that any single person ever has to use it. It is just being offered as a tool if someone wants to make use of it so there is no suggestion that the state is trying to take anyone's land rights away from them. The state is just saying if you want to use this kind of tool, it would be available for you. Unlike the federal easements that people are aware of in this state, the wetlands easements where the federal government says if you want the money sign here, the easements proposed by this

legislation and by the Uniform Conservation Easement Act are negotiable easements. People can make choices; if they have a 3000 acre parcel of land and they might want to save out 5 acre plots for development but preserve the rest of it, if there is a conservation group that is willing to pay for that, they can do that. If they want to put provisions in they can do that. These are negotiable in every respect and no one is forced to participate. The last argument we hear from people is that perpetual is a long time and therefore we ought not to do something that is perpetual. My argument is so simple about that. A decision to sell the land is also perpetual. If someone is forced by a high debt load or by the fact that they want to split their assets up among multiple children, or if they just want to retire and take the equity out of their property, if they sell their property to someone else outside the family that is as perpetual as it gets. If land gets broken into small parcels and built upon, and lots of roads and streets get built upon it, that is a perpetual change of the land from its' natural state. So other things that we do are also perpetual.

She explained why she added the language from the Uniform Conservation Easement Act. She also explained that there is the possibility to "buy it back" out of the easement if someone wishes to. She **moved a Do Pass on SB 2362**.

Senator Schneider: Second

Senator Hogue opposed the Do Pass motion and suggested the bill be amended. The farm groups are not opposed to conservation easements, they are just concerned about the duration of those easements. The only reason that the out of state groups want it to be perpetual is that is makes it tax deductible. Our state legislature has wisely decided that we do not want land use policy in this state to be dictated by federal tax law. The legislature has always rejected these. I think perpetual easements are wrong for a lot of important long-term reasons for the state. Selling to a non-profit for perpetuity would take land out of production and off the tax rolls. That is not good for our state.

Senator Uglem: These are voluntarily entered into therefore they are not as bad as the wetland easements that many farmers have disliked for so long. Those wetland easements were also entered voluntarily but they affect us many generations down the line.

Roll Call Vote: 2-5-0 Motion failed.

Senator Hogue offered amendments to the bill. See **Attachment #2**. He felt the limit of 40 years was important. He made a **motion to adopt the amendment**.

Senator Uglem: Second

Senator Triplett: There was some discussion about the content of the amendment.

Motion carried by voice vote.

Senator Triplett asked for clarification on the definition and asked if the whole of the Uniform Conservation Easement Act language could still be included.

Senator Hogue: I did consider that. The North Dakota Uniform Law Commission has not recommended this to the state of North Dakota. I think although it is a uniform act there are good reasons for us not to recommend it. The most troublesome to me is Page 3, Section 4 of the bill that talks about judicial actions. I happen to be a member of the Uniform Law Commission for North Dakota and one of the troubling things is providing third parties with a right of enforcement. My concern on that standpoint is if I am a landowner and I give an easement to someone and a third party that has a conservation mission doesn't like the way I am handling my private easement agreement with the person I gave it to, then this gives them the right to come in and have some lawful right to initiate a lawsuit to enforce. You see that in the definition. On Page 2 at the bottom, Line 26 third party rights of enforcement means a right provided in a conservation easement to enforce any of its terms granted to a governmental body, charitable corporation, charitable association, or charitable trust which although eligible to be a holder is not a holder. So that is very troubling. What the amendment does is gets rid of all that. I don't think we want to open it up to third parties to start litigating these conservation easements. That should be something between the grantor and the grantee. North Dakota hasn't gone down the road of permanent easements nor has the North Dakota Law Commission recommended this act. I would have trouble leaving the Uniform Act language in when our Uniform Laws Commission doesn't seem to support it.

Senator Triplett: Has the Uniform Laws Commission actually considered it? Representative Klemin who is also on the Commission led me to believe that it had not been voted on; it had not even been brought up for consideration.

Senator Hogue described the process of how the model acts are studied by the Uniform Laws Commission.

There was discussion about how the Uniform Laws Commission operates and whether the legislature could direct them to study this particular language.

Senator Hogue explained the reason for setting a limit on the length of the easement. There are presently time restrictions on waterfowl production easements and wetlands easements of 30 and 50 years. See **Attachment #3**.There is nothing for the people near the national and state parks. I think we ought to do that. If we don't do it, it will be a 99 year easement. If you don't support perpetual easements, you should not support 99 year easements that are able to fall outside the parameters of these wetlands and waterfowl production easements. That is why I think we should pass the bill as amended. He made a **Do Pass as Amended Motion.**

Senator Uglem: Second

Roll Call Vote: 4-3-0

Carrier: Senator Hogue

#2

11.0703.02001
Title.

Prepared by the Legislative Council staff for
Senator Hogue
February 10, 2011

PROPOSED AMENDMENTS TO SENATE BILL NO. 2362

Page 1, line 1, remove "sections 47-05-18, 47-05-19, 47-05-20, 47-05-21, and"

Page 1, line 2, replace "47-05-22" with "section 47-05-02.2 "

Page 1, line 2, remove "Uniform Conservation Easement"

Page 1, line 3, replace "Act" with "conservation easements"

Page 1, line 20, remove "for"

Page 1, remove line 21

Page 1, line 22, remove "years before the created interest"

Page 2, line 3, after the period insert "The duration of a conservation easement as defined in section 47-05-02.2 may not exceed forty years."

Page 2, line 8, replace "47-05-18" with "47-05-02.2"

Page 2, line 10, replace "**47-05-18.**" with "**47-05-02.2.**"

Page 2, line 11, replace "sections 47-05-18 through 47-05-22" with "section 47-05-02.1"

Page 2, remove lines 26 through 31

Page 3, remove lines 1 through 31

Page 4, remove lines 1 through 19

Renumber accordingly

SB 2362 #2

Meter: 14:08
18:08

Date: 2-17-11
Roll Call Vote # 1

2011 SENATE STANDING COMMITTEE ROLL CALL VOTES
BILL/RESOLUTION NO. 2362

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 Sen. Triplett Seconded By Sen. Schneider

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

MOTION FAILED

Total (Yes) 2 No 5

Absent _____

Floor Assignment _____

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

* Hogue is opposed to motion
* She has amendmts to bill to offer.

Meter: 21:07

Date: 2-17-11
Roll Call Vote # 2

2011 SENATE STANDING COMMITTEE ROLL CALL VOTES
BILL/RESOLUTION NO. 2362

Senate Natural Resources Committee

Legislative Council Amendment Number 11.0173.02001

Action Taken: ☐ Do Pass ☐ Do Not Pass ☐ Amended ☒ Adopt Amendment

☐ Rerefer to Appropriations ☐ Reconsider

Motion Made By Sen. Hogue Seconded By Senator Uglem

Voice Vote - Motion Carried

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

Total (Yes) _____ No _____

Absent carried by Voice Vote

Floor Assignment _____

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

For amendment .02001

Meter: 31:00

Date: 2-17-11
Roll Call Vote # 3

2011 SENATE STANDING COMMITTEE ROLL CALL VOTES
BILL/RESOLUTION NO. 2362

Senate Natural Resources Committee

Legislative Council Amendment Number 11.0703 .02001

Action Taken: ☒ Do Pass ☐ Do Not Pass ☒ As Amended ☐ Adopt Amendment

☐ Rerefer to Appropriations ☐ Reconsider

Motion Made By Sen. Hogue Seconded By Sen. Uglem

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

Total (Yes) 4 No 3

Absent 0

Floor Assignment Senator Hogue

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

Motion Carried

REPORT OF STANDING COMMITTEE

SB 2362: Natural Resources Committee (Sen. Lyson, Chairman) recommends **AMENDMENTS AS FOLLOWS** and when so amended, recommends **DO PASS** (4 YEAS, 3 NAYS, 0 ABSENT AND NOT VOTING). SB 2362 was placed on the Sixth order on the calendar.

Page 1, line 1, remove "to create and enact sections 47-05-18, 47-05-19, 47-05-20, 47-05-21, and"

Page 1, remove line 2

Page 1, line 3, remove "Act; and"

Page 1, line 20, remove "for"

Page 1, remove line 21

Page 1, line 22, remove "years before the created interest"

Page 2, line 3, after the period insert "The duration of a conservation easement as defined in section 47-05-02.2 may not exceed forty years."

Page 2, replace lines 8 through 10 with:

"3."

Page 2, line 11, replace "sections 47-05-18 through 47-05-22" with "this section"

Page 2, line 12, replace "1." with "a."

Page 2, line 18, replace "2." with "b."

Page 2, remove lines 26 through 31

Page 3, remove lines 1 through 31

Page 4, remove lines 1 through 19

Renumber accordingly

2011 HOUSE ENERGY AND NATURAL RESOURCES

SB 2362

2011 HOUSE STANDING COMMITTEE MINUTES

House Energy and Natural Resources Committee
Pioneer Room, State Capitol

SB 2362
3/11/2011
15322

☐ Conference Committee

Committee Clerk Signature

Minutes: 2 "attached testimony."

Rep. Porter: We open the hearing on SB 2362.

Senator Triplett: I represent district 18. I am not happy with what the senate did to my bill. It was a bill to provide perpetual easements in grasslands areas only. Because of the opposition from all of the major agricultural groups across the state I limited it to a grasslands area or areas that come out of CRP then that would be planted to grasslands in the last 15 years, you can't see that in the bill because it is gone. I also added the whole uniform conservation easement act to development with the idea that would provide some sort of comfort level to those that are concerned about what an easement does. Given what the senate did to this bill I am here today to ask you to kill the bill.

Keith Trego: From the North Dakota Natural Resources Trust. The study was done in April 2010 which was joint study that was commissioned by the Natural Recourses Trust, Ducks Unlimited, and the Nature Conservancy. The groups that commissioned the study were interested in assessing the overall attitudes of the North Dakota citizens about a variety of conservation issues. The study covered a number of issues besides the easement issue. The polling was done by a bipartisan research team; one of the companies was Public Opinion strategies which is a republican political and public affairs research firm. The other firm is the Fairbanks Museum and Mellum and Mets and Associates which characterizes themselves as a democratic research and polling firm. These two companies work all over the country on a variety of public issues. The reason they were hired to work together was because many public issues are influenced by how the studies are conducted and by the bend of the firms and there is always the danger of being a suspect. We think it is less of a suspect by having this kind of a partnership. (See attachments 1&2) The North Dakota voters support conservation in general, and approve of expending current efforts to better protect the state's natural areas which are water and wildlife habit.

The long term and permanent easements, three in five North Dakota voters supported allowing conservation organizations to use permanent easements as a statuary for conserving natural areas, water and wildlife in the state. Permanent easements are misunderstood in North Dakota the survey design also tested some alternative language, the language tested was that they described the voluntary land agreements and conservation easements and about half of the survey respondents were asked using those

various sets of terminology to try and see if there was a difference in response based on that terminology. There was no significant difference in response based on the alternate language and of additional interest the majority of respondents all geographic demographic and political spectrums supported the use of conservation easements in North Dakota.

Rep. Porter: In the current Century Code with conservation easements what is the current length of time that they are allowed?

Keith Trego: Right North Dakota has two specific limitations on easements. Overall all easements are limited to 99 years. Wetlands reserve programs under the farm bill are 30 years. Those restrictions only apply to North Dakota based entities or NGO's. The Federal Government does permanent easements as part of the grassland and protections programs and they have the right to do so, based on prior court actions. The Wildlife and Fish programs also do permanent easements. The rest of the entities are restricted.

Rep. Porter: Under the existing laws can your organization write an easement for 99 years?

Keith Trego: Yes we can.

Rep. Damschen: On you know what percentage of the people surveyed were landowners that would be the ones that own the land that would be taken on?

Keith Trego: I don't have that number, I can provide that data from the survey, (see attachment 3) I can assure you every group that was surveyed supported the use of permanent easements.

Rep. Damschen: I would appreciate knowing how many were landowners that would be affected by the easement.

Rep. Porter: Could you break them out like a pie chart of the various aspects of the group that were surveyed?

Keith Trego: We can do that.

Julie Ellingson: I represent the North Dakota Stockmen's Association. (See attachment 4)

Rep. Damschen: Would you agree to 30 years instead of 40?

Julie Ellingson: We didn't discuss specifically 30 years. We indentified that 20 years would be closer to one generation that is the reason we centered on that amount of years.

Rep. Damschen: I was thinking that would be in line with the other 30 year limitations. Do you find that between your group and the conservation group there might be a difference of definition of conservation and should that be considered to be defined somewhere?

Julie Ellingson: I can't say that I can speak to the individual differences. I do know that we share many goals and preserving our natural resources is at the crocks of making a living as livestock producers in the State of North Dakota. I know that goals from other

organizations help support that as well. This may be an opportunity to build on some of those energies that we have in common.

Sandy Clark: I represent the North Dakota Farm Bureau. We stand in support of SB 2362. We are adamantly opposed to perpetual easements and a number of other provisions in the original SB 2362. The senate amended this to 40 year conservation easement. We took a look at it and decided that a 40 year easement is better than a 99 year easement. We still have concerns that 40 years represents 2 generations and that encumbers that second generation with compliance of rules and regulations. We heard comment about 20 year easements from the previous speaker and we like 20 years even better than 40 years.

You asked about the definition of conservation I think there are some real shared goals and we have some differences. On page 2 on line 8 there is a definition of a conservation easement and I think may not necessarily be a new class but it is a new class because would be outside the lines of the Federal Government, but you notice it says "we are not only talking about conservation of soil" we are talking about protecting natural, scenic or open space values. We would also like to point out that this bill still allows 99 year easements for things like pipelines and public works type things.

Rep. Damschen: Sometimes assuring to the availability for agricultural, or forest recreation or open space use some groups would interrupt that as not ever using it for that purpose so you would be sure that is available.

Sandy Clark: I believe you are right about that. On the senate side there was some talk that in the original bill we would be looking at putting on easements along rivers so that could not be used for other purposes.

Rep. Keiser: Conditions change why don't we do a 5 or 10 year easement?

Sandy Clark: Yes we would support that. We have 5-10 year CRP type leases to provide for conservation of land and provide land for habit and that sort of thing.

Rep. Porter: Is there any opposition to SB 2362?

Woody Barth: Vice President of the North Dakota Farmers Union. We are here today to ask for a Do Not Pass on SB 2362 as it came over from the senate. This bill as amended only seeks to restrict one type of easement. We as family farmers and ranchers can now utilize current statute as it is written to do. We can work with many groups now to form the easements that are best for our own family operations. We believe easements can be a tool for family ranches and farmers to utilize there as they see fit. We are against perpetual easements and the way it affects family farming and ranching operations here in North Dakota.

Rep. Keiser: Your group would not support a 5 year easement then?

Woody Barth: We wouldn't be opposed to that 5-10 year easement but under the current statute we can do that now.

Rep. Keiser: The current law gives lots of flexibility you as a farmer and rancher can do whatever you want in a contract, if we would pass it at 5 years we would not be able to do a 10 year.

Woody Barth: You are right.

Rep. Keiser: Is it the organizations position that the landowner should have the right to make that decision?

Woody Barth: It is the Position that the family farmers and ranchers should control the destiny of their land?

Rep. Porter: From the organization stand point how does the organization view this type of restrictive legislation?

Woody Barth: We debated at our convention about this issue and the long standing policy against perpetual easements of an 85 year old farm organization. It is very clear that they want control of the destiny of their land and that somebody of a past generation should not control the land of the present generation.

Rep. Hofstad: We as individual land owners do not always have the option to do as we want. The Governor has tried very hard to work with the Department of Agriculture to lower that easement period. There answer to us is because you have a state statute of a 30 year period we have no ability to reduce it to lesser years.

Woody Barth: I think that is another reason why we oppose this bill as it is written because it does restrict conservation easements and as I stated groups need to get together to see what kind of easement is best for that situation.

Rep. Damschen: If an easement is limited to 5 years you always have the option to renew that after 5 years.

Woody Barth: yes I agree.

Rep. Damschen: If it is a 30 year easement and something arises that puts a farmer at a disadvantage after 5 years he has no recourse.

Woody Barth: I agree.

Rep. Damschen: Do you see a problem that easements divide ownership and responsibility?

Woody Barth: Yes we have had that discussion one example that came out as we examined this bill and talked about easements is that we severed the ground below us with the severed mineral acres and know what kind of issues that has brought to this committee and other committees. If we would take control of that land with the easements we would then have only the responsibility that of maintaining those acres.

Mike McEnroe: Representing the North Dakota Chapter of the Wildlife Society. As the bill was introduced the chapter supported SB 2362 but as it was passed by the senate it has gone 180 from its original intend. Current state laws restrict all of the easement opportunities except those of the US Fish and Wildlife and a couple of the alter easement programs. Current law prohibits the state or state based agriculture entities from developing their own perpetual conservation or agricultural land protection easements. The state law makes the federal government the only game in town or the only game in the state. Perpetual easements can be used by farm and ranch families to stay on the farm as a ranch or agriculture business. They can be used to provide financial through federal income tax benefits and a state management. This bill has none of those financial benefits. We urge a Do Not Pass on SB 2362 in its current form. (See attachment 5)

Mike Donahue: Representing North Dakota Wildlife Federation we concur with the Farmers Union and North Dakota Chapter of the Wildlife Society.

Rep. Porter: Rep. Hofstad does it say there is not negotiation between 0 and 30?

Rep. Hofstad: The federal government says that because we are restricted to 30 years that cannot reduce the length of that easement. We are restricted to 30 years.

Rep. Porter: In the Century Code it says "may not exceed" so it really is from 0 to 30 in the Century Code.

Rep. Hofstad: I will provide that letter to the committee so that you can see it.

Rep. Keiser: You need to read all of it on the bottom of the page It says "the duration of the wetlands reserve program acquired by the federal government pursuing to the food, agriculture, conservation, and trade act of 1990". That is not a state law as far as I know.

Rep. Damschen: I think it is a federal program but the limitation is a state limitation.

Rep. Porter: At this time we will close the hearing on SB 2362.

2011 HOUSE STANDING COMMITTEE MINUTES

House Energy and Natural Resources Committee
Pioneer Room, State Capitol

SB 2362
3/24/2011
15957

☐ Conference Committee

Committee Clerk Signature J Smith

Minutes: no "attached testimony."

Rep. Porter: We will open the hearing on SB 2362.

Rep. Hofstad: I had some discussions with the governor in relation to the wetlands reserve program trying to make this bill fit that program so that it would be more flexible. That didn't happen and I don't see any way to redo that so I move a Do Not Pass on SB 2362.

Rep. DeKrey: Second.

Rep. Porter: Discussion.

Rep. Damschen: I am going to support the Do Not Pass motion but I want to go on record and remind everybody that I am a strong opponent of 99 year and perpetual easements. I have thoughts of legislation that doesn't fit here and properly won't fit until the next session if I am back.

Rep. Porter: Roll call taken Motion carried. Carrier: Rep. Hofstad

YES 11 No2 Absent2 Carrier: Rep. Hofstad

Date: 3-24-11
Roll Call Vote #: 1

2011 HOUSE STANDING COMMITTEE ROLL CALL VOTES
BILL/RESOLUTION NO. 2362

House House Energy and Natural Resources Committee

Legislative Council Amendment Number

Action Taken: ☐ Do Pass ☒ Do Not Pass ☐ Amended ☐ Adopt Amendment

☐ Rerefer to Appropriations ☐ Reconsider

Motion Made By Rep Hofstad Seconded By Rep DeKrey

Representatives	Yes	No	Representatives	Yes	No
Chairman Porter	✓		Rep. Hanson		✓
Vice Chairman Damschen	✓		Rep. Hunskor	✓	
Rep. Brabandt	✓		Rep. Kelsh	✓	
Rep. Clark	✓		Rep. Nelson		✓
Rep. DeKrey	✓				
Rep. Hofstad	✓				
Rep. Kasper	AB				
Rep. Keiser	AB				
Rep. Kreun	✓				
Rep. Nathe	✓				
Rep. Anderson	✓				

Total (Yes) 11 No 2

Absent 2

Floor Assignment Hofstad

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

REPORT OF STANDING COMMITTEE

SB 2362, as engrossed: Energy and Natural Resources Committee (Rep. Porter, Chairman) recommends **DO NOT PASS** (11 YEAS, 2 NAYS, 2 ABSENT AND NOT VOTING). Engrossed SB 2362 was placed on the Fourteenth order on the calendar.

2011 TESTIMONY

SB 2362

#1

SB 2362

Natural Resources Committee

Chairman Lyson and members of the Senate Natural Resources Committee. I want to briefly state my support for SB2362 and offer some points for your consideration.

This bill will allow for conservation groups to purchase a perpetual easement on grasslands only; either native grasslands or seeded grasslands that have been in grass for at least 15 years. Cropland acres and wetland acres are not being considered in this bill.

First of all I would mention that perpetual easements have existed in this state for many years. They are allowed by federal law and the US Fish and Wildlife Service has been doing wetland easements for many years and more recently have been doing grassland easements.

I believe the big push back for perpetual easements come from crop farmers who have wetland easements on their property. Many are in conflict now because of wetter years and the original wetland has grown and they are having difficulty in draining it even if they only want to go back to its original size.

This bill ignores that discussion and instead I would like to switch the focus from the word perpetual to conservation of our remaining grasslands. All good land available to us in this state has already been taken out of its native state and been converted to cropland. Our remaining grasslands tend to be poor or too rugged to farm which means our remaining lands have fragile ecosystem that make them

vulnerable to scarring that can affect their highest and best use. To me that highest and best use is livestock production. As I mentioned earlier there are federal easements that encompass grass land easements but they exsist largely east of the Missouri as they prefer that area because of the potholes in the grassland that are necessary for waterfowl production. Their program does not fit most of the grasslands west of the Missouri.

What does a grassland easement do? First and foremost it does not displace the rancher but rather gives him an extra tool to manage his land and keep his heirs on the ranch. Conservation groups interest in the land is to keep it whole and free from development such as roads and breaking down beautiful little scenic spots into 40 acre ranchetts which ultimately force the cowman off the range. Typically a grassland conservation easement has the following restrictions. 1. It can never be tilled. (As I said the tillable land in this state is already established, so not tilling grassland is not onerous for the land that is left.) 2. It can't be drained. (this also is not onerous to livestock producers as they need water for their livestock and in many cases some conservation groups will actually help with the development of water systems, as that water is important for wildlife as well.) 3. Most easements don't allow for haying until after July 15th. (This is also not issue to most ranchers as native grasses aren't ready to hay until after that date, and it compliments the nesting goals of the conservation groups.) Conservation groups I have looked into typically allow for gravel pit development if they are reclaimed after there useful life, and most are willing to do carve outs of specific requests of the landowner. For example I know of one case where allowing for windtowers was a part

of the agreement, and in another several potential homesites were negotiated out of the contract.

Grassland easements are quite popular in some of our western states and the case of Wyoming and Colorado their Stockmen's Associations are supportive of grassland conservation easements to the point of assisting with the funding of some of them.

Easements are voluntary and should be a property right we can honor. Many of the marks we place upon our landscape are perpetual and succeeding generations have little they can do about it except build upon it. Selling the ranch because there may not be enough cash funds to equitably distribute an estate among non ranching siblings with the one who wants to remain on the ranch is a perpetual effect as well.

Please give your thoughtful consideration to this bill, as I know you will, to give ranchers another tool to preserve their ranch and keep our grasslands intact for future generations. I firmly believe that ranching, wildlife, and tourism can survive on the same piece of ground. The problems arise when we push for one at the expense of the other that things get out of balance and cause conflict among the groups.

Thank you.

Sen. Erbele

#2

Testimony of Senator Constance Triplett
District 18, Grand Forks
SB 2362 re conservation easements
Senate Natural Resources Committee
February 4, 2011

Chairman Lyson and members of the Natural Resources Committee. SB 2362 concerns conservation easements. It differs in significant ways from the conservation easement bill that we introduced in the 2009 session. That was a very simple bill which just proposed to remove the 99-year limitation on easements. Some of you may recall that it received a favorable vote from the Senate Finance and Tax Committee, but failed on the Senate floor.

Albert Einstein said that the definition of insanity is to do the same thing over and over again while expecting a different result. In an effort to take the great man's advice, we have made some significant changes to the bill this time around.

First, and most significantly, this bill only applies to grasslands: native grasslands and land that has been replanted to grass for at least 15 years, which means it would apply to lands coming out of the Conservation Reserve Program (CRP). We decided to leave agricultural crop land subject to the 99-year limitation.

Senator Erbele and I made that decision because of the continuing opposition of the major farm groups to conservation easements. I do not expect the representatives of the farm groups to stand up today in support of this bill. All three of the major farm groups have standing policies against conservation easements and I fully expect that their respective representatives will tell you that today.

But I trust that you will listen carefully to the testimony of the supporters of this bill and if you do, I believe that you will realize that what we are proposing is *not* a threat to agriculture. Indeed, my vision of this legislation is that it will allow North Dakota's ranching families an option to stay on the land that they love.

During the interim, four groups which support conservation easements jointly conducted a survey of the attitudes of North Dakotans regarding this issue. The

survey sponsors were the Nature Conservancy, the Audubon Society, Ducks Unlimited, and the ND Resources Trust. The results of that survey, which was overwhelmingly positive toward conservation easements, will be presented as part of the testimony today.

The second way in which this bill is different from the last version is that it incorporates the language of the Uniform Conservation Easement Act. In the last session, there were many questions about how these easements would be managed, how negotiable they might be, how a landowner could get out from under an easement, etc. I'm sure the committee will look carefully at the model language and may consider some changes, but it provides a place to start the conversation. [Agriculture example.] As an aid in that process, I have attached the comments to the model law for your reference.

North Dakota is the only state in the nation that attempts to forbid perpetual easements. Conservation easements are widely used in some states, lightly used in others, but available as an option in some form in all other states. [Summary of other state laws to be provided]. The current law is a paternalistic bit of legislation which implies that our rural landowners are not sufficiently sophisticated to understand how to protect their own interests.

The basic point of a conservation easement is to protect and maintain land in its current state. That includes preserving native grasslands which are becoming increasingly scarce. It could include preserving historic sites located on private property. You will hear in later testimony about the idea of using conservation easements to protect the view shed of our most significant tourist attractions in North Dakota. Conservation easements *could* include preserving the agricultural heritage that we value in North Dakota, except that we are leaving that out of the bill in deference to the positions of the farm groups.

There are very generous federal tax credits associated with conservation easements, which Rod Backman will describe in some detail. With our present law, North Dakota landowners are not able to take advantage of those tax credits. The federal tax credits are only available to landowners who can legally grant perpetual easements.

Conservation easements can be used to protect the productive nature of grazing land (and crop land if it were included) while reducing debt load for current producers and their children or grandchildren who want to work the land or simply to live on the land.

I want to close by reminding you that this bill does not require any landowner to use a conservation easement. *This is an entirely voluntary process.* It is simply one more tool in the toolbox. Finally, as opposed to wetlands easements offered by federal agencies which are usually quite rigid in their terms, conservation easements used by conservation-minded non-profit groups can be negotiated in virtually every detail.

I request your favorable consideration of SB 2362.

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UNIFORM CONSERVATION EASEMENT ACT
(Last Revised or Amended in 2007)

Drafted by the

NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAWS

and by it

APPROVED AND RECOMMENDED FOR ENACTMENT
IN ALL THE STATES

at its

ANNUAL CONFERENCE
MEETING IN ITS NINETIETH YEAR
IN NEW ORLEANS, LOUISIANA
JULY 31 — AUGUST 7, 1981

WITH PREFATORY NOTE AND COMMENTS

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By
NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAWS

Approved by the American Bar Association
Chicago, Illinois, January 26, 1982

March 6, 20

UNIFORM CONSERVATION EASEMENT ACT

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ON UNIFORM STATE LAWS

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UNIFORM CONSERVATION EASEMENT ACT

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UNIFORM CONSERVATION EASEMENT ACT

Commissioners' Prefatory Note

The Act enables durable restrictions and affirmative obligations to be attached to real property to protect natural ıd historic resources. Under the conditions spelled out in the Act, the restrictions and obligations are immune from certai [redacted] law impediments which might otherwise be raised. The Act maximizes the freedom of the creators of the [redacted]n to impose restrictions on the use of land and improvements in order to protect them, and it allows a similar titude to impose affirmative duties for the same purposes. In each instance, if the requirements of the Act are satisfied, e restrictions or affirmative duties are binding upon the successors and assigns of the original parties.

The Act thus makes it possible for Owner to transfer a restriction upon the use of Blackacre to Conservation, Inc., hich will be enforceable by Conservation and its successors whether or not Conservation has an interest in land benefitte / the restriction, which is assignable although unattached to any such interest in fact, and which has not arisen under rcumstances where the traditional conditions of privity of estate and "touch and concern" applicable to covenants real ar esent. So, also, the Act enables the Owner of Heritage Home to obligate himself and future owners of Heritage to aintain certain aspects of the house and to have that obligation enforceable by Preservation, Inc., even though eservation has no interest in property benefitted by the obligation. Further, Preservation may obligate itself to take ertain affirmative actions to preserve the property. In each case, under the Act, the restrictions and obligations bind ıccessors. The Act does not itself impose restrictions or affirmative duties. It merely allows the parties to do so within a ınsensual arrangement freed from common law impediments, if the conditions of the Act are complied with.

These conditions are designed to assure that protected transactions serve defined protective purposes (Section 1(1) ıd that the protected interest is in a "holder" which is either a governmental body or a charitable organization having an terest in the subject matter (Section 1(2)). The interest may be created in the same manner as other easements in land ection 2(a)). The Act also enables the parties to establish a right in a third party to enforce the terms of the transaction ection 3(a)(3)) if the possessor of that right is also a governmental unit or charity (Section 1(3)).

The interests protected by the Act are termed "easements." The terminology reflects a rejection of two alternatives [redacted] in existing state acts dealing with non-possessory conservation and preservation interests. The first removes the [redacted] law disabilities associated with covenants real and equitable servitudes in addition to those associated with ısements. As statutorily modified, these three common law interests retain their separate existence as instruments

nployable for conservation and preservation ends. The second approach seeks to create a novel additional interest which th[redacted]h unknown to the common law, is, in some ill-defined sense, a statutorily modified amalgam of the three traditiona[redacted] law interests.

The easement alternative is favored in the Act for three reasons. First, lawyers and courts are most comfortable wi ısements and easement doctrine, less so with restrictive covenants and equitable servitudes, and can be expected to ɛperience severe confusion if the Act opts for a hybrid fourth interest. Second, the easement is the basic less-than-fee .terest at common law; the restrictive covenant and the equitable servitude appeared only because of then-current, but ɔw outdated, limitations of easement doctrine. Finally, non-possessory interests satisfying the requirements of covenant al or equitable servitude doctrine will invariably meet the Act's less demanding requirements as "easements." Hence, the ct's easement orientation should not prove prejudicial to instruments drafted as real covenants or equitable servitudes, though the converse would not be true.

In assimilating these easements to conventional easements, the Act allows great latitude to the parties to the forme arrange their relationship as they see fit. The Act differs in this respect from some existing statutes, such as that in effec . Massachusetts, under which interests of this nature are subject to public planning agency review.

There are both practical and philosophical reasons for not subjecting conservation easements to a public ordering ′stem. The Act has the relatively narrow purpose of sweeping away certain common law impediments which might herwise undermine the easements' validity, particularly those held in gross. If it is the intention to facilitate private grant at serve the ends of land conservation and historic preservation, moreover, the requirement of public agency approval lds a layer of complexity which may discourage private actions. Organizations and property owners may be reluctant to ɛcome involved in the bureaucratic, and sometimes political, process which public agency participation entails. Placing ıch a requirement in the Act may dissuade a state from enacting it for the reason that the state does not wish to accept th[redacted]rative and fiscal responsibilities of such a program.

In addition, controls in the Act and in other state and federal legislation afford further assurance that the Act will ɛrve the public interest. To begin with, the very adoption of the Act by a state legislature facilitates the enforcement of ɔnservation easements serving the public interest. Other types of easements, real covenants and equitable servitudes are ıforceable, even though their myriads of purposes have seldom been expressly scrutinized by state legislative bodies. loreover, Section 1(2) of the Act restricts the entities that may hold conservation and preservation easements to ɔvernmental agencies and charitable organization, neither of which is likely to accept them on an indiscriminate basis. overnmental programs that extend benefits to private donors of these easements provide additional controls against ɔtential abuses. Federal tax statutes and regulations, for example, rigorously define the circumstances under which ısement donations qualify for favorable tax treatment. Controls relating to real estate assessment and taxation of restricte ·operties have been, or can be, imposed by state legislatures to prevent easement abuses or to limit potential loss of local ·operty tax revenues resulting from unduly favorable assessment and taxation of these properties. Finally, the American gal system generally regards private ordering of property relationships as sound public policy. Absent conflict with ɔnstitutional or statutory requirements, conveyances of fee or non-possessory interests by and among private entities is e norm, rather than the exception, in the United States. By eliminating certain outmoded easement impediments which ·e largely attributable to the absence of a land title recordation system in England centuries earlier, the Act advances the ılues implicit in this norm.

The Act does not address a number of issues which, though of conceded importance, are considered extraneous to ɜ primary objective of enabling private parties to enter into consensual arrangements with charitable organizations or ɔvernmental bodies to protect land and buildings without the encumbrance of certain potential common law impediment ɜection 4). For example, with the exception of the requirement of Section 2(b) that the acceptance of the holder be c[redacted] the formalities and effects of recordation are left to the state's registry system; an adopting state may wish to it[redacted]pecial indices for these interests, as has been done in Massachusetts.

Similarly unaddressed are the potential impacts of a state's marketable title laws upon the duration of conservation [illegible]nts. The Act provides that conservation easements have an unlimited duration unless the instruments creating them [illegible]otherwise (Section 2(c)). The relationship between this provision and the marketable title act or other statutes [illegible]ssing restrictions on real property of unlimited duration should be considered by the adopting state.

The relationship between the Act and local real property assessment and taxation practices is not dealt with; for ɛample, the effect of an easement upon the valuation of burdened real property presents issues which are left to the state ıd local taxation system. The Act enables the structuring of transactions so as to achieve tax benefits which may be ⁄ailable under the Internal Revenue Code, but parties intending to attain them must be mindful of the specific provisions : the income, estate and gift tax laws which are applicable.

~~Finally, the~~ The Act neither limits nor enlarges the power of eminent domain; such matters as the scope of that ɔwer and the entitlement of property owners to compensation upon its exercise are determined not by this Act but by the lopting state's eminent domain code and related statutes. For the reasons noted in the comment to Section 3, the Act doe: ɔt directly address the application of charitable trust principles to conservation easements. The Act leaves intact the ɛisting case and statute law of adopting states as it relates to the enforcement of charitable trusts. Such law may create anding to enforce a conservation easement in the Attorney General or other person empowered to supervise charitable usts (Section 3(4)).

mendment approved by Executive Committee on February 3, 2007

UNIFORM CONSERVATION EASEMENT ACT

An Act to be known as the Uniform Conservation Easement Act, relating to (here insert the subject matter [illegible]ents of the various states).

ɛction
Definitions.
Creation, Conveyance, Acceptance and Duration.
Judicial Actions.
Validity.
Applicability.
Uniformity of Application and Construction.

§ 1. [DEFINITIONS]. As used in this Act, unless the context otherwise requires:

(1) "Conservation easement" means a nonpossessory interest of a holder in real property imposing limitations or ɛfirmative obligations the purposes of which include retaining or protecting natural, scenic, or open-space values of real ·operty, assuring its availability for agricultural, forest, recreational, or open-space use, protecting natural resources, aintaining or enhancing air or water quality, or preserving the historical, architectural, archaeological, or cultural aspect: [illegible]pperty.

(2) "Holder" means:

(i) a governmental body empowered to hold an interest in real property under the laws of this State or the nited States; or

(ii) a charitable corporation, charitable association, or charitable trust, the purposes or powers of which clude retaining or protecting the natural, scenic, or open-space values of real property, assuring the availability of real operty for agricultural, forest, recreational, or open-space use, protecting natural resources, maintaining or enhancing ai water quality, or preserving the historical, architectural, archaeological, or cultural aspects of real property.

(3) "Third-party right of enforcement" means a right provided in a conservation easement to enforce any of its rms granted to a governmental body, charitable corporation, charitable association, or charitable trust, which, although igible to be a holder, is not a holder.

COMMENT

ection 1 defines three central elements: What is meant by a conservation easement; who can be a holder; and wh ess a "third-party right of enforcement." Only those interests held by a "holder," as defined by the Act, fall within e definitions of protected easements. Such easements are defined as interests in real property. Even if so held, the sement must serve one or more of the following purposes: Protection of natural or open-space resources; protection of a water quality; preservation of the historical aspects of property; or other similar objectives spelled out in subsection (1)

A "holder" may be a governmental unit having specified powers (subsection (2)(i)) or certain types of charitable rporations, associations, and trusts, provided that the purposes of the holder include those same purposes for which the nservation easement could have been created in the first place (subsection (2)(ii)). The word "charitable", in Section 1) and (3), describes organizations that are charities according to the common law definition regardless of their status as empt organizations under any tax law.

Recognition of a "third-party right of enforcement" enables the parties to structure into the transaction a party that not an easement "holder," but which, nonetheless, has the right to enforce the terms of the easement (Sections 1(3), 3(a))). But the possessor of the third-party enforcement right must be a governmental body or a charitable corporation, sociation, or trust. Thus, if Owner transfers a conservation easement on Blackacre to Conservation, Inc., he could grant Preservation, Inc., a charitable corporation, the right to enforce the terms of the easement, even though Preservation wa ot the holder, and Preservation would be free of the common law impediments eliminated by the Act (Section 4). Under is Act, however, Owner could not grant a similar right to Neighbor, a private person. But whether such a grant might be alid under other applicable law of the adopting state is left to the law of that state. (Section 5(c).)

2. [CREATION, CONVEYANCE, ACCEPTANCE AND DURATION].

(a) Except as otherwise provided in this Act, a conservation easement may be created, conveyed, recorded, [redacted]ed, released, modified, terminated, or otherwise altered or affected in the same manner as other easements.

(b) No right or duty in favor of or against a holder and no right in favor of a person having a third-party right of ıforcement arises under a conservation easement before its acceptance by the holder and a recordation of the acceptance.

(c) Except as provided in Section 3(b), a conservation easement is unlimited in duration unless the instrument 'eating it otherwise provides.

(d) An interest in real property in existence at the time a conservation easement is created is not impaired by it ıless the owner of the interest is a party to the conservation easement or consents to it.

COMMENT

Section 2(a) provides that, except to the extent otherwise indicated in the Act, conservation easements are distinguishable from easements recognized under the pre-Act law of the state in terms of their creation, conveyance, cordation, assignment, release, modification, termination or alteration. In this regard, subsection (a) reflects the Act's verall philosophy of bringing less-than-fee conservation interests under the formal easement rubric and of extending that [redacted]the extent necessary to effectuate the Act's purposes given the adopting state's existing common law and statutor [redacted]k. For example, the state's requirements concerning release of conventional easements apply as well to ɔnservation easements because nothing in the Act provides otherwise. On the other hand, if the state's existing law does ɔt permit easements in gross to be assigned, it will not be applicable to conservation easements because Section 4(2) 'fectively authorizes their assignment.

Conservation and preservation organizations using easement programs have indicated a concern that instruments ırporting to impose affirmative obligations on the holder may be unilaterally executed by grantors and recorded without ɔtice to or acceptance by the holder ostensibly responsible for the performance of the affirmative obligations. Subsection ›) makes clear that neither a holder nor a person having a third-party enforcement right has any rights or duties under the ısement prior to the recordation of the holder's acceptance of it.

The Act enables parties to create a conservation easement of unlimited duration subject to the power of a court to odify or terminate ~~it in states whose case or statute law accords their courts that power in the case of easement~~ the ısement in accordance with the principles of law and equity. See Section 3(b). The latitude given the parties is consistent ith the philosophical premise of the Act. However, there are additional safeguards; for example, easements may be 'eated only for certain purposes intended to serve the public interest and may be held only by certain "holders." These ınitations find their place comfortably within ~~similar~~ the limitations applicable to charitable trusts, ~~whose duration may so have no limit~~ which may be created to last in perpetuity, subject to the power of a court to modify or terminate the ust pursuant to the doctrine of *cy pres*. See comment to Section 3. Allowing the parties to create such easements also ıables them to fit within federal tax law requirements that the interest be "in perpetuity" if certain tax benefits are to be ɛrived.

[redacted]bviously, an easement cannot impair prior rights of owners of interests in the burdened property existing when th ıs [redacted]comes into being unless those owners join in the easement or consent to it. The easement property thus would b ıbject to existing liens, encumbrances and other property rights (such as subsurface mineral rights) which pre-exist the

ısement, unless the owners of those rights release them or subordinate them to the easement. (Section 2(d).)

[redacted]*ent approved by Executive Committee on February 3, 2007*

§ 3. [JUDICIAL ACTIONS].

(a) An action affecting a conservation easement may be brought by:

(1) an owner of an interest in the real property burdened by the easement;

(2) a holder of the easement;

(3) a person having a third-party right of enforcement; or

(4) a person authorized by other law.

(b) This Act does not affect the power of a court to modify or terminate a conservation easement in accordance wi

e principles of law and equity.

COMMENT

[redacted]ection 3 identifies four categories of persons who may bring actions to enforce, modify or terminate conservation ısements, quiet title to parcels burdened by conservation easements, or otherwise affect conservation easements. Owners interests in real property burdened by easements might wish to sue in cases where the easements also impose duties ɔon holders and these duties are breached by the holders. Holders and persons having third-party rights of enforcement ight obviously wish to bring suit to enforce restrictions on the owners' use of the burdened properties. In addition to thes ree categories of persons who derive their standing from the explicit terms of the easement itself, the Act also recognize at the state's other applicable law may create standing in other persons. For example, independently of the Act, the ttorney General could have standing in his capacity as supervisor of charitable trusts, either by statute or at common law

A restriction burdening real property in perpetuity or for long periods can fail of its purposes because of changed ɔnditions affecting the property or its environs, because the holder of the conservation easement may cease to exist, or fo her reasons not anticipated at the time of its creation. A variety of doctrines, including the doctrines of changed ɔnditions and *cy pres*, have been judicially developed and, in many states, legislatively sanctioned as a basis for sponding to these vagaries.

Under the changed conditions doctrine, privately created restrictions on land use may be terminated or modified if ey no longer substantially achieve their purpose due to the changed conditions. Under the statute or case law of some ates, the court's order limiting or terminating the restriction may include such terms and conditions, including monetary ljustments, as it deems necessary to protect the public interest and to assure an equitable resolution of the problem. The ɔctrine is applicable to real covenants and equitable servitudes in all states, but its application to easements is problemati . many states.

[redacted]2000, the American Law Institute published the Restatement (Third) Property: Servitudes, which recommends a[redacted]u of the traditional real property law doctrine of changed conditions, the modification and termination of ɔnservation easements held by governmental bodies or charitable organizations be governed by a special set of rules

odeled on the charitable trust doctrine of *cy pres*. In their commentary, the drafters of the Restatement explained that:

> *"[b]ecause of the public interests involved, these servitudes are afforded more stringent protection than privately held conservation servitudes..."*

The Act does not directly address the application of charitable trust principles to conservation easements because:) the Act has the relatively narrow purpose of sweeping away certain common law impediments that might otherwise ıdermine a conservation easement's validity, and researching the law relating to charitable trusts and how such law wou ɔply to conservation easements in each state was beyond the scope of the drafting committee's charge, and (ii) the Act is tended to be placed in the real property law of adopting states and states generally would not permit charitable trust law be addressed in the real property provisions of their state codes. However, because conservation easements are conveye governmental bodies and charitable organizations to be held and enforced for a specific public or charitable purpose— ., the protection of the land encumbered by the easement for one or more conservation or preservation purposes—the ɛisting case and statute law of adopting states as it relates to the enforcement of charitable trusts should apply to ɔnservation easements. This was recognized by the drafters of the Uniform Trust Code, approved by the National onference of Commissioners on Uniform State Laws in 2000, who explained in their comment to §414:

> *Even though not accompanied by the usual trappings of a trust, the creation and transfer of an easement for conservation or preservation will frequently create a charitable trust. The organization to whom the easement was conveyed will be deemed to be acting as trustee of what will ostensibly appear to be a contractual or property arrangement. Because of the fiduciary obligation imposed, the termination or substantial modification of the easement by the "trustee" could constitute a breach of trust.*

Under the doctrine of *cy pres*, if the purposes of a charitable trust cannot carried out because circumstances have after the trust came into being or, for any other reason, the settlor's charitable intentions cannot be effectuated, der their equitable powers may prescribe terms and conditions that may best enable the general charitable ɔjective to be achieved while altering specific provisions of the trust. So, also, in cases where a charitable trustee ceases exist or cannot carry out its responsibilities, the court will appoint a substitute trustee upon proper application and will ɔt allow the trust to fail.

The Act leaves intact the existing case and statute law of adopting states as it relates to the modification and rmination of easements and the enforcement of charitable trusts. Thus, while Section 2(a) provides that a conservation ısement may be modified or terminated "in the same manner as other easements," the governmental body or charitable ganization holding a conservation easement, in its capacity as trustee, may be prohibited from agreeing to terminate the ısement (or modify it in contravention of its purpose) without first obtaining court approval in a *cy pres* proceeding.

For a discussion of the application of charitable trust principles to conservation easements, see Nancy A. lcLaughlin, *Amending Perpetual Conservation Easements: A Case Study of the Myrtle Grove Controversy*, 40 U RICH. L EV. 1031 (2006); Nancy A. McLaughlin, *Rethinking the Perpetual Nature of Conservation Easements*, 29 HARV. ENVTL . REV. 421 (2005).

mendment approved by Executive Committee on February 3, 2007

§ 4. [VALIDITY]. A conservation easement is valid even though:

(1) it is not appurtenant to an interest in real property;

(2) it can be or has been assigned to another holder;

(3) it is not of a character that has been recognized traditionally at common law;

(4) it imposes a negative burden;

(5) it imposes affirmative obligations upon the owner of an interest in the burdened property or upon the holder;

(6) the benefit does not touch or concern real property; or

(7) there is no privity of estate or of contract.

COMMENT

One of the Act's basic goals is to remove outmoded common law defenses that could impede the use of easements ır conservation or preservation ends. Section 4 addresses this goal by comprehensively identifying these defenses and ɜgating their use in actions to enforce conservation or preservation easements.

Subsection (1) indicates that easements, the benefit of which is held in gross, may be enforced against the grantor · his successors or assigns. By stating that the easement need not be appurtenant to an interest in real property, it iminates the requirement in force in some states that the holder of the easement must own an interest in real property (th lominant estate") benefitted by the easement.

Subsection (2) also clarifies common law by providing that an easement may be enforced by an assignee of the ɔlder.

ubsection (3) addresses the problem posed by the common law's recognition of easements that served only a nited number of purposes and its reluctance to approve so-called "novel incidents." Easements serving the conservation ıd preservation ends enumerated in Section 1(1) might fail of enforcement under this restrictive view. Accordingly, ıbsection (3) establishes that conservation or preservation easements are not unenforceable solely because they do not ɜrve purposes or fall within the categories of easements traditionally recognized at common law.

Subsection (4) deals with a variant of the foregoing problem. The common law recognized only a limited number ː "negative easements"-those preventing the owner of the burdened land from performing acts on his land that he would ɜ privileged to perform absent the easement. Because a far wider range of negative burdens than those recognized at ɔmmon law might be imposed by conservation or preservation easements, subsection (4) modifies the common law by iminating the defense that a conservation or preservation easement imposes a "novel" negative burden.

Subsection (5) addresses the opposite problem-the unenforceability at common law of an easement that imposes ffirmative obligations upon either the owner of the burdened property or upon the holder. Neither of those interests was ewed by the common law as true easements at all. The first, in fact, was labelled a "spurious" easement because it ɔligated the owner of the burdened property to perform affirmative acts. (The spurious easement was distinguished from ı affirmative easement, illustrated by a right of way, which empowered the easement's holder to perform acts on the ırdened property that the holder would not have been privileged to perform absent the easement.)

Achievement of conservation or preservation goals may require that affirmative obligations be incurred by the ırdened property owner or by the easement holder or both. For example, the donor of a facade easement, one type of ɜservation easement, may agree to restore the facade to its original state; conversely, the holder of a facade easement a e to undertake restoration. In either case, the preservation easement would impose affirmative obligations. ıbs on (5) treats both interests as easements and establishes that neither would be unenforceable solely because it is ffirmative in nature.

Subsections (6) and (7) preclude the touch and concern and privity of estate or contract defenses, respectively. speaking, they do not belong in the Act because they have traditionally been asserted as defenses against the forcement not of easements but of real covenants and of equitable servitudes. The case law dealing with these three asses of interests, however, had become so confused and arcane over the centuries that defenses appropriate to one of ese classes may incorrectly be deemed applicable to another. The inclusion of the touch and concern and privity defense . Section 4 is a cautionary measure, intended to safeguard conservation and preservation easements from invalidation by urts that might inadvertently confuse them with real covenants or equitable servitudes.

§ 5. [APPLICABILITY].

(a) This Act applies to any interest created after its effective date which complies with this Act, whether designate

a conservation easement or as a covenant, equitable servitude, restriction, easement, or otherwise.

(b) This Act applies to any interest created before its effective date if it would have been enforceable had it been

eated after its effective date unless retroactive application contravenes the constitution or laws of this State or the Unite

ates.

(c) This Act does not invalidate any interest, whether designated as a conservation or preservation easement or as

venant, equitable servitude, restriction, easement, or otherwise, that is enforceable under other law of this State.

COMMENT

There are four classes of interests to which the Act might be made applicable: (1) those created after its passage hich comply with it in form and purpose; (2) those created before the Act's passage which comply with the Act and hich would not have been invalid under the pertinent pre-Act statutory or case law either because the latter explicitly lidated interests of the kind recognized by the Act or, at least, was silent on the issue; (3) those created either before or ter the Act which do not comply with the Act but which are valid under the state's statute or case law; and (4) those eated before the Act's passage which comply with the Act but which would have been invalid under the pertinent pre-A atutory or case law.

It is the purpose of Section 5 to establish or confirm the validity of the first three classes of interests. Subsection (a tablishes the validity of the first class of interests, whether or not they are designated as conservation or preservation sements. Subsection (b) establishes the validity under the Act of the second class. Subsection (c) confirms the validity o e third class independently of the Act by disavowing the intent to invalidate any interest that does comply with other plicable law.

Constitutional difficulties could arise, however, if the Act sought retroactively to confer blanket validity upon the urth class of interests. The owner of the land ostensibly burdened by the formerly invalid interest might well succeed in guing that his property would be "taken" without just compensation were that interest subsequently validated by the Act [redacted]n (b) addresses this difficulty by precluding retroactive application of the Act if such application "would [redacted]e the constitution or laws of (the) State or of the United States." That determination, of course, would have to be ade by a court.

§ 6. [UNIFORMITY OF APPLICATION AND CONSTRUCTION]. This Act shall be applied and construed t

fectuate its general purpose to make uniform the laws with respect to the subject of the Act among states enacting it.

#4

Senate Natural Resources Committee February 4, 2011

SB 2362

Testimony by Rod Backman

Chairman Lyson & members of the committee my name is Rod Backman, I am here today speaking for myself. I would like to give you a little background about myself and my family. I own and operate the land my grandfather homesteaded in 1907 and the land his father homesteaded in 1886. Their mailing address was Slaughter, DT. My grandfather's sister was the first white child born in Ecklund Township.

I have attached to my testimony my membership card in the ND Farm Bureau, a membership I have held for 40 years. The Backman brand, "mill iron over a B" goes back a minimum of 70 years.

I say all this to make the point; I am not some environmentalist who just got of the plane from LA.

I am not against progress, and I am not against developing land, or power plants, or wind towers, or transmission lines. These are all a part of life in today's world. But that does not mean we have to develop everything; some things are worth preserving.

It strikes me as odd that I as a land owner can permanently change my land to the point that it can never practically or economically be put back to its original state. Let's say you put a shopping mall on your land, what are the chances that land will ever be returned to its original condition. Yet if I want to preserve my land in its original state, or restrict it future use to agricultural, the State of North Dakota limits that restriction.

In addition, I am a CPA who represents clients in North Dakota on income and estate tax issues. Conservation easements are a great tool to help keep farm families on the land or to pass the land on to the next generation. From an income tax standpoint conservation easements are a tax deductible contribution or a tax free source of income for the sale of an easement. For estate taxes, once

an easement is placed on the property the valuation is lowered making it easier for farmers to pass the property on to their children and or reducing the estate tax burden upon death.

For North Dakota taxpayers there are two problems, one is in the Internal Revenue Code section 170(h), a phase that says, "easements granted in perpetuity", the other is in the NDCC 47-05-02.1 that limits such easements to "99 years". The IRS has taken the position that North Dakotan's do not qualify for the contribution deduction simply because 99 years is not perpetuity. To my knowledge North Dakota is the only state where a conservation easement does not qualify for the Federal income tax deduction.

Farm operators are almost always strapped for cash. With ever increasing land values it becomes harder and harder for young farmers to get started or for retiring farmers to pass the land to their children. Taxpayers in other states have income and estate planning tools that are being denied to our people here in North Dakota and it is time we are given these same tools.

In Colorado the Colorado Cattlemen's Association is affiliated with what is called the Colorado Cattlemen's Agricultural Land Trust to acquire and hold conservation easements because they recognize the benefits to ranchers. I'm not sure if you could even find a land trust in North Dakota to hold an easement. Some clients I have been working with recently have gone to great personal expense and sacrifice in order to preserve a portion of the badlands for future generations by adopting covenant language that does the same thing as a conservation easement. The covenants allow continued agricultural uses but restrict most other residential or commercial development. They do not restrict oil and gas production. We had to go out of state to find attorney's who were well versed in conservation easements. The client's will accomplish their goals at great cost, but without a tax deduction.

I ask that you support SB 2362, and would be happy to take questions.

Thank You.

Rod Backman

4—007.

APPLICATION No. 38909

HOMESTEAD.

Department of the Interior,

UNITED STATES LAND OFFICE,

Bismarck N.D

Aug. 12th, 1907.

I, Ole N. Backman, of Slaughter N.D.

....., do hereby apply to enter, under Section 2289, Revised Statutes of the United States, the S½ 4

..... of Section 24, in Township 142 N. of Range 78 W 5th Pm. containing — 160 — acres.

Ole N. Backman

United States Land Office,

Bismarck N.D.

Aug. 12th, 1907

I, M. H. Jewell, REGISTER OF THE LAND OFFICE, do hereby certify that the above application is for surveyed lands of the class which the applicant is legally entitled to enter under Section 2289, Revised Statutes of the United States, and that there is no prior valid adverse right to the same.

18.—P

M H Jewell

Register.

0-1

North Dakota
STOCKMEN'S ASSOCIATION

BACKMAN, RODNEY
1858 S GRANDVIEW LN
BISMARCK, ND 58503
CARD ISSUED: 01-12-11
BRAND EXPIRES 1/1/2016

This certificate may not be proof of ownership, the brand may have been transferred since it was issued.

CHIEF BRAND INSPECTOR

BRAND CERTIFICATE
State of North Dakota

lrc

Premise ID #

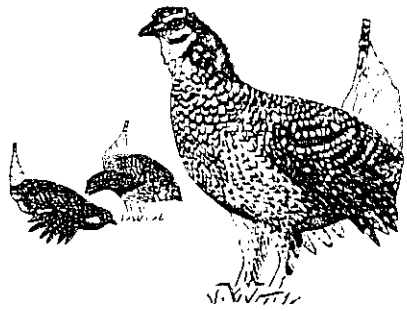
20169

#5

North Dakota Chapter

THE WILDLIFE SOCIETY

P.O. BOX 1442 • BISMARCK, ND 58502



TESTIMONY OF MIKE McENROE
NORTH DAKOTA CHAPTER OF THE WILDLIFE SOCIETY
ON SB 2362
SENATE NATURAL RESOURCES COMMITTEE
FEBRUARY 4, 2011

Chairman Lyson and members of the Senate Natural Resources Committee:

My name is Mike McEnroe and I represent the North Dakota Chapter of The Wildlife Society. The Chapter is a professional organization made up of over 320 biologists, land managers, university educators, and law enforcement officers in the wildlife and natural resource field.

The Chapter supports SB 2362 providing for perpetual easements on native prairie, tame grasslands and croplands retired for more than fifteen years. Conservation easements have great potential to assist farm and ranch families through difficult financial times, stay in grassland agricultural production, provide financial benefits through reduction of federal income, gift and estate taxes.

The Chapter supports conservation easements because they can keep grass on the landscape. Our grasslands in North Dakota provide the habitat base for most of our wildlife, provide watershed protection for our lakes and rivers, and the vistas and views for our tourism industry. Grassland agriculture is an important part of the State's economy.

Other western states have recognized the value of conservation easements for their agricultural producers and have set up their own programs. I have attached a brief brochure from the Colorado Cattlemen's Agricultural Land Trust to my testimony. The Wyoming Land Trust has similar program. I have also included the Executive Summary of a report on "purchasing development rights" (conservation easements) done by the Western Governors' Association and the National Cattlemen's Beef Association.

Most criticism in North Dakota about perpetual easements stems from controversy over the U. S. Fish and Wildlife Service wetland easements, mostly in the Devils Lake Basin. Ironically, the current laws restricting easements, spawned by the dislike for federal programs, have no effect on federal land protection programs. The Fish and Wildlife Service does extensive business in perpetual grassland easements with many farm and ranch families who see the value of both protecting their grasslands and being fairly compensated for that protection. Current State law only hinders the protection of agricultural lands by agricultural groups, nonprofit organizations and non-federal governmental entities. The current law guarantees that the federal government is the only game in town. We suggest that North Dakota landowners would be better served to have more land protection options, similar to those available in many other states. SB 2362 would provide that option.

Today you will hear opposition to perpetual easements because they allow a previous landowner to dictate land use in the future, the so-called "hand from the grave" control over future generations. We already have that; past and current landowners constantly make irreversible commitments of their land. A landowner sells his/her mineral rights, and future heirs or owners live with the oil wells or the coal mine. A landowner sells the wind rights and the future landowner lives with the turbines. A landowner sells his farm in Cass County and the finest farmland in the Nation is covered with blacktop, shopping malls, and twin homes.

We accept long time and perpetual commitments of the land resources of the State, except when they are for conservation, for the wise use of our land resources. SB 2362 would change that. It would allow landowners and other interests to protect grasslands and grassland agriculture for the future.

Thank you for the opportunity to support SB 2362. I will answer any questions the committee may have.

Colorado Cattlemen's
Agricultural Land Trust

Understanding Agricultural Conservation Easements

A Voluntary Solution to Ag Land Protection

All across the western United States urban encroachment and development pressures are taking their toll. Over the past decade, more than 1.8 million acres (548 acres/day) were converted to other uses - placing Colorado third in the nation for the amount of agricultural land lost.

To stop this crippling loss, ranchers, farmers and local communities are exploring the use of agricultural conservation easements. A conservation easement is a practical protection tool that can offer benefits to agricultural producers, their land and as well as Colorado's residents and visitors.

CCALT History & Mission

The Colorado Cattlemen's Agricultural Land Trust (CCALT) was formed in 1995 by the Colorado Cattlemen's Association (CCA) to help Colorado's ranchers and farmers protect their agricultural lands and encourage continuing agricultural production for the benefit of themselves, their families, and all of Colorado's citizens. CCA was the first state livestock association in the nation to form a land trust. More than 30 land trusts operate in Colorado and until CCALT's founding; none exclusively served the needs of the agricultural community.

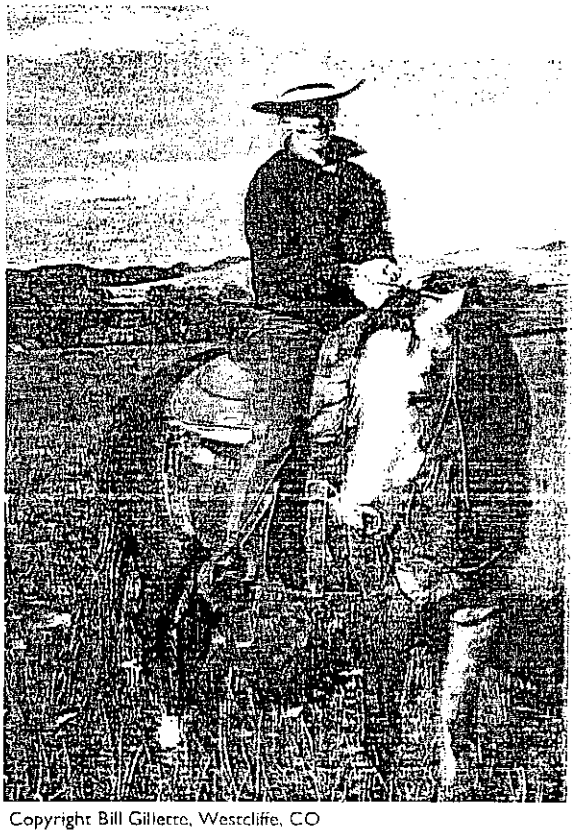
The land trust partners in protection with willing landowners on productive agricultural acres all across the state. CCALT was created with the primary interests of the landowner in mind. It is a land trust **of** landowners, **by** landowners, and **for** landowners. The land trust does **not** solicit landowners. If landowners have an interest in protecting their property, they initiate contact with us. Our primary emphasis is to increase awareness among farmers and ranchers about the use of easements. We have responded to requests by local livestock associations, community groups and others to speak at meetings and workshops. CCALT has helped landowners statewide protect more than 272,000 acres.

Understanding Agricultural Conservation Easements

What is a conservation easement?

An agricultural conservation easement is a voluntary, legally-recorded agreement between the landowner and CCALT (or another qualified conservation organization). Generally, easements permanently prohibit or severely limit any practice such as subdivision or development that would damage the land's agricultural/conservation value or productivity. Landowners sell or donate development rights on their property to the organization receiving the easement. These rights are then extinguished by the organization and cannot be sold or used in any manner - even when the property is transferred or sold.

Each conservation easement is individually tailored and written to fit the needs of the landowner and conditions of the individual property. They restrict development but let the landowner keep their land's traditional uses, i.e. haying, raising cattle, hunting, etc. While some landowners may choose to provide public access in their easement, they are **not** required to do so.



Copyright Bill Gillette, Westcliffe, CO

What are the benefits of a conservation easement?

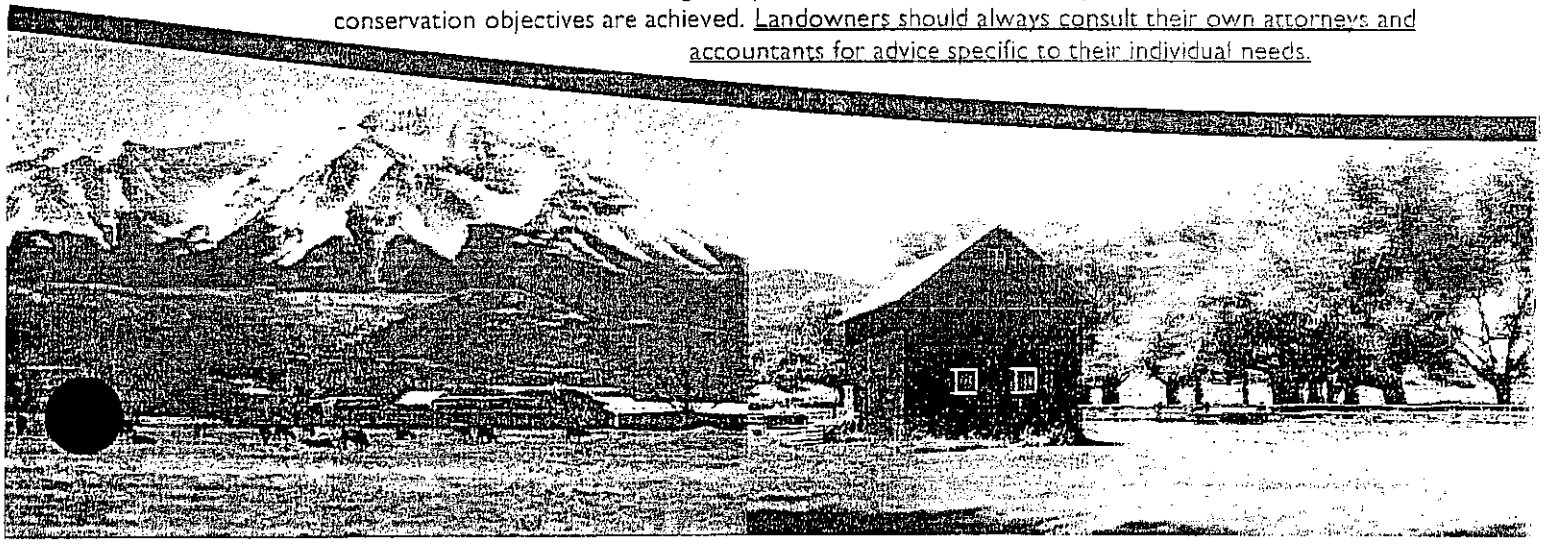
Protection of agricultural land: Profitability and economic survival are critical concerns in agriculture, as in any business. Unlike other business people, farmers and ranchers work directly with the land and, thus, have the most to gain from its proper care and management. Through a conservation easement, a landowner is able to protect his or her property to ensure that future generations have the continued opportunity to stay in production.

Tax benefits: Landowners who donate development rights through perpetual easements may be eligible for significant financial benefits through the reduction of federal income, gift, and estate taxes as well as state income tax credits in Colorado. Proceeds from the state tax credit may be used to buy out partners or to purchase land to expand the ranch business. The value of these benefits depends upon the easement's appraised value and the landowner's financial circumstances.

Additional value for the surrounding area: Protecting agricultural land through conservation easements can help maintain the viability of a region's agricultural economic base. Neighboring landowners who donate conservation easements can provide mutual protection against unplanned development, and share the benefits of protecting larger resource areas. Easements also offer a way for communities to work together to protect their scenery, natural resources, wildlife habitat and quality of life while land stays in agricultural production and on local tax rolls.

What are some of the preliminary steps a landowner should take when placing an easement on his/her property?

First, find a land trust that is compatible with your conservation goals to discuss your options. Second, hire an appraiser to determine the potential value of an easement on your property. If there is a mortgage on the property, the lender must agree to release or subordinate it to the easement. And, if any mineral rights have been severed, a geologist's report is required to determine the likelihood of surface extraction. These legal steps ensure the easement is fully enforceable, and the landowner's conservation objectives are achieved. Landowners should always consult their own attorneys and accountants for advice specific to their individual needs.



How is the value of an easement determined?

Land ownership can be viewed as owning a bundle of rights on a property: the right to plant corn, the right to cut timber, the right to graze cattle, and the right to build homes, etc. When a landowner voluntarily removes one or more of those rights from his or her bundle, the value of the land is affected.

The value of a conservation easement is the difference between the value of the land without any restrictions and the value of the land after restrictions are defined by a conservation easement. In most cases, this value is driven by the property's development potential. When the easement qualifies under IRS regulations, that amount is also usually the value of the charitable donation. Land values differ greatly throughout Colorado; in areas where there is intense development pressure the value of the easement may be greater. Easement values must be determined by a qualified appraiser.

Determining an easement's value example

John Smith decides to donate an agricultural conservation easement on his 1,000 acre ranch to CCALT. If the property's current value is $1,500/acre, its total fair market value, before an easement is in place, would be:

1,000 acres x $1,500/acre = $1,500,000

If placing an easement on the property (and removing the non-agricultural development rights) lowers the per-acre value to $800/acre, the total market value of the restricted property would be:

1,000 acres x $800/acre = $800,000

The difference between the before and after values is $700,000, and would become the value of the easement donation:

$1,500,000 - $800,000 = $700,000

**Example only—please consult your legal and financial advisors*

How are the tax benefits of an easement calculated?

Federal income tax benefits: Under federal law, a qualified conservation contribution can be treated as a charitable gift. The value of the gift can then be deducted at an amount of up to 30% of the easement donor's adjusted gross income in the year of the gift. If the easement's value exceeds 30% of the donor's income, the excess can be carried forward and deducted (subject to the 30% limit) in each of the following 5 succeeding years. If a corporation is the donor, the limit is 10% of the taxable income. *(Note: Updated January 2008. Congress approved expansion of this tax incentive for conservation easement donations made in 2006 and 2007. The new law raises the deduction to 50% of a donor's adjusted gross income; allows qualifying farmers and ranchers to deduct up to 100% of their income and extends the carry-forward period to 15 years. The law expired at the end of 2007 but may be extended permanently in the 2008 Farm Bill. Please consult with your financial advisors for updates.)*

Income tax deductions and credits example

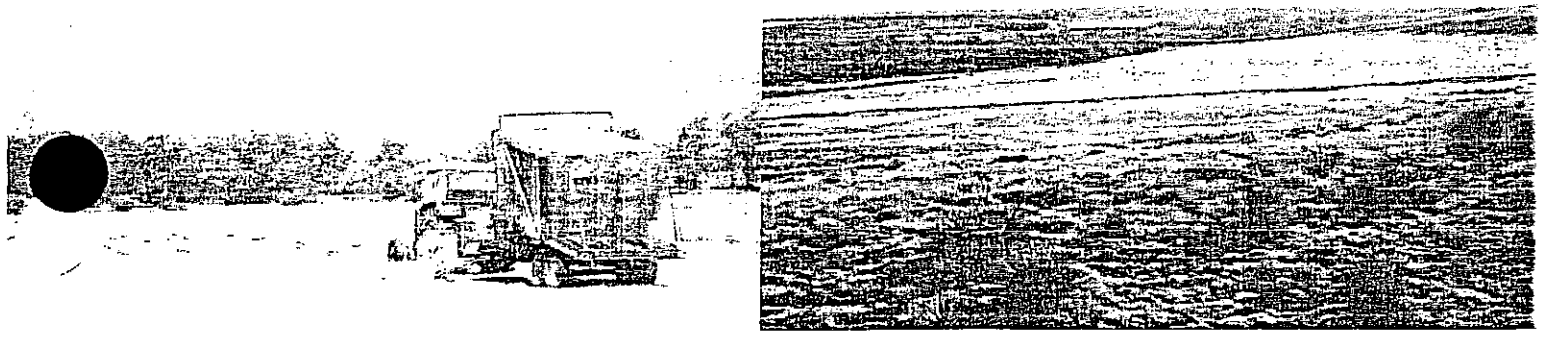
The appraised value of John Smith's easement is $700,000. If his adjusted gross income in the year of the easement donation is $60,000, he would be able to deduct the entire $60,000 in the first year because he qualifies for a 100% deduction under the new tax law. Since the value of the easement is greater than his allowable deduction, Smith also would be able to deduct $60,000 for each of the next 10 years (assuming a constant adjusted gross income from agriculture of $60,000). His total federal charitable deduction for the sixteen-year period would be $660,000.

If Smith is a Colorado taxpayer, this donation would also qualify him for a $350,000 Colorado State Income Tax Credit. Sold at 75-85% of its face value, Smith could generate $245,000 - $280,000 in cash income.

**Example only—please consult your legal and financial advisors*

State income tax benefits: In Colorado, 50% of a conservation easement's fair market value up to $750,000 is treated as a credit against state income taxes for Colorado taxpayers. Any portion of that tax credit which is not used in the year of the gift may be carried forward and used to off-set Colorado income tax for up to 20 years. Colorado State Income Tax Credits are also transferable. Colorado farmers and ranchers regularly sell their credits to other taxpayers, thus enabling easement donors to realize a cash return for their conservation action. These credits can sell at 75-85% of face value (see example on left).

Property tax benefits: In Colorado, agricultural land is assessed at a lesser rate based on production value; and this assessment is locked in by placing an easement on the land. An easement does not remove land from the local tax rolls.



Estate tax benefits: The donation of an easement, whether during a landowner's lifetime or in their will, can reduce the value of the farm or ranch upon which estate taxes are calculated. The 1997 Taxpayer Relief Act set the minimum value of an individual estate to be taxed at $2 million for 2007 with an increase to $3.5 million in 2009. Additional tax legislation set a schedule for the lowering and eventual repeal of the estate tax by 2010. However, this same legislation also provides an option for the estate tax to be fully reinstated at 2000 levels in 2011.

In addition, if the easement qualifies under certain additional provisions of the Taxpayer Relief Act (2031c), then forty percent (40%) of the value of the property remaining after the granting of an easement can be excluded from the value of the estate up to a maximum exclusion of $500,000. By reducing this tax burden through an easement donation, a landowner can help ensure that his or her family does not have to sell the farm or ranch just to pay estate taxes on it.

The situation surrounding estate taxes is in flux and current regulations may or may not apply in the future. CCALT strongly encourages all landowners to work with experienced advisors in tax and estate planning.

How does a conservation easement affect property rights?

A landowner who donates an easement retains all rights to use land for agricultural operations and for any purpose that is not prohibited by the terms of the easement. While an easement removes the development rights, the landowner still holds the title to the property, the right to restrict public access, and the right to sell, give or transfer the property – which remains subject to the easement's terms for future landowners.

Estate Tax Example

When Joe Brown passes his property on to his children, his estate could be subject to federal estate taxes. The family ranch, consisting of 2,000 acres is worth:

$8,000,000

The value of the ranch with an easement is:

$4,000,000

To calculate the total taxable estate, his family would subtract the following from the $4,000,000:

$2,000,000 (standard exclusion under federal estate tax law as of 2007)

and

$500,000 (the easement's 2031c estate tax exemption)

The total taxable estate value would then be:

$1,500,000 (ex. *$6,000,000 w/o an easement*)

Taxed at 35%, the family would be responsible for estate taxes totaling:

$525,000 (ex. *$2,100,000 w/o easement*)

The family could then choose to use the Colorado conservation easement tax credits:

$375,000 in Year 1

+$375,000 in Year 2

$750,000 (total tax credits)

If the credits were brokered at 80%, the family would receive a cash return of:

$600,000*

This would enable the family to pay for the estate taxes with the proceeds from the Colorado Tax credits.

**Example only – please consult your legal and financial advisors.*

Can some development be allowed under an easement?

Conservation easements are flexible documents. While agricultural easements generally restrict all non-agricultural use of the land, continued ranching and farming are permitted, and some very limited development may be allowed.

For example, an easement generally permits the construction of new farm buildings and can allow construction of a carefully located home for family members or the subdivision of a lot for resale. The easement may be written to apply to the entire property or only a portion of it. The flexibility of these and other restrictions will vary with the characteristics of the property, the conservation objectives, and the land trust.

What rights does the land trust have to the land?

The organization holding the easement is required to monitor and enforce the terms of the easement. To accomplish this, a representative will visit the property at least once every year to ensure that the terms of the agreement are being upheld. The visits are always scheduled with the cooperation of the landowner. This does not mean, however, that CCALT or any other group has the right to use the land, nor does it allow public access for any reason.

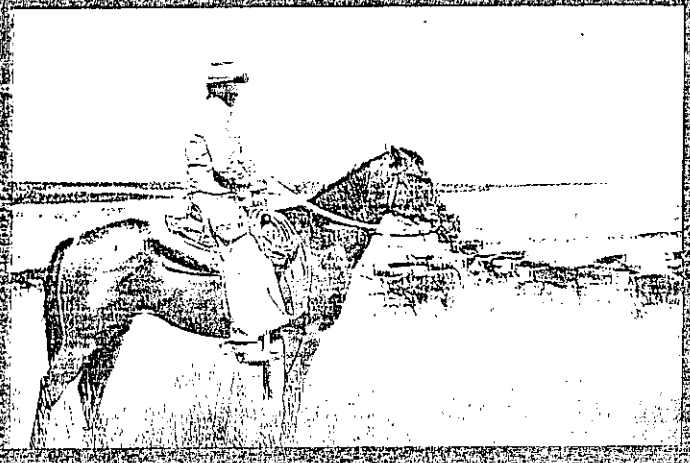
For more information contact us at:

8833 Ralston Road, Arvada, Colorado 80002
Phone: (303) 225-8677
Fax: (303) 431-6446
E-mail: info@ccalt.org

Colorado Cattlemen's Agricultural Land Trust

Farm Bill
resources

Purchase of Development Rights



Conserving Lands, Preserving Western Livelihoods

published by
Western Governors' Association
The Trust for Public Land
and National Cattlemen's Beef Association

June 2002

Dear Friend:

In 2001 Western Governors' Association, Trust for Public Land and National Cattlemen's Beef Association jointly published *Purchase of Development Rights: Conserving Lands, Preserving Western Livelihoods.*

The demand for the publication was so significant that we are republishing *Purchase of Development Rights: Preserving Western Livelihoods.*

And we are republishing it now in order to provide timely details on purchase of development rights (PDR) funding that is newly available in the historic 2002 Farm Bill. In addition, we are providing complete updates on existing state PDR programs in the West. This new information will be of great use to landowners and communities seeking to locate additional public funding for PDR.

This report focuses on the protection of our traditional agricultural economy and the protection of our glorious natural landscapes. PDR transactions continue to provide private landowners a tool in their efforts to maintain working landscapes. These voluntary incentive-based, non-regulatory techniques have helped protect prime farm and ranch lands and to limit the fragmentation of the open space we love.

Please read this short document and then pass it along to a rancher, a legislator, or a friend who cares deeply about the future of the Western landscape.

Sincerely,

Governor Judy Martz, Montana
Vice Chairman
Western Governors' Association

WESTERN GOVERNORS' ASSOCIATION

Will Rogers, California
President
The Trust for Public Land

THE TRUST FOR PUBLIC LAND
Conserving Land for People

Lynn Cornwell, Montana
President
National Cattlemen's Beef Association

BEEF USA National Cattlemen's Beef Association

Executive Summary

Dan Shaw

Agriculture is a way of life in the West. Ranching and farming are at the heart of Western culture and tradition. Working the vast, open landscapes of the West is both what brought the first wave of settlers into this region and how our communities and states came to flourish.

Today, change is evident throughout the West. In recent years, people have moved to Western states in record numbers, attracted to the stunning vistas, wide open spaces, and rural lifestyles. This trend is undercutting the very qualities that newcomers seek and that Westerners have long prized, as sprawling development consumes the unique character of Western landscapes and rural communities. The demand for rural home sites is increasing land prices, but is also threatening to fragment the large landscapes required to support agricultural livelihoods, healthy watersheds, and native plants and animals. In the last two decades alone, over one million acres of rangeland in the Greater Yellowstone area have been split into plots of 200 acres or less.[1]

Westerners are finding that they must be highly innovative in conserving working landscapes and private lands while the opportunity still exists. Landowners need flexible tools that can help protect the landscapes on which their livelihoods depend.

It is the purpose of this paper to explain one such technique—purchase of development rights (PDR) transactions—and to describe the programs that are being developed to make it more widely available to Western landowners.

A well-established means to conserve working lands. PDR programs[2] began in the 1970s when communities in the eastern United States, alarmed at the loss of the farms that supplied food and fiber locally, decided to do something to protect their remaining farmland and open space from sprawl. They instituted public finance measures that could fund the acquisition and retirement of development rights in order to preserve agricultural lands in perpetuity. Community members worked with their elected officials to establish municipal, county, state, federal, and privately-sponsored PDR programs that enabled private landowners to partner with the public in the preservation of farms for agriculture as well as to preserve scenic beauty, wildlife habitat, watershed functions, and recreational opportunities. Through PDR programs, the public provides a cash payment to a landowner for the value of the development rights associated with a land parcel. The owner still owns the land, but is compensated for relinquishing the right to develop it as real estate. Agriculture and other uses of the land continue. For the public, PDR programs enable land conservation at a much-reduced expense, as the cost of PDR is less than outright purchase of land, and costs associated with subsequent management of the land remain the responsibility of the landowner.

In the decade from 1982, more than one million acres per year of agricultural land across the greater United States were converted to residential and other development, one-third of which were classified as prime and unique farmland. From 1992 to 1997, the conversion rate doubled, with 10.5 million acres converted into developed lands.

"The Natural Resources Conservation Service *National Resources Inventory*" (September 2000)

A flexible approach that meets the unique needs of Western lands and communities. The open and semi-arid landscapes in the West are quite different from those in the East, and this has resulted in two major differences in land ownership patterns among western states, with important implications for land conservation.

- **Much larger tracts of working land are required to support a single family.** In this drought-prone region, ranchers historically needed to acquire access to large tracts of land in order to feed and water enough cattle to establish economically-viable operations. Consequently, a mixed-tenure system developed in the West that tied private lands to public. Many ranchers coupled the purchase of a base property—typically fertile bottomlands with important riparian corridors and wetlands—with forage-leasing arrangements on federal and state lands to create a single ranch operation.
    - One important implication of this practice is that deeded base properties border public lands and serve as important buffers. However, the base properties also

[1] Greater Yellowstone Coalition.

[2] Often called PACE programs in the East, for purchase of agricultural conservation easements. "PACE" is sometimes used interchangeably with "PDR," but often PACE programs have a broader set of objectives for agriculture purposes while PDR is not solely restricted to agricultural lands. PACE programs are also used to preclude the possibility of future development even if current agricultural zoning does not allow development.

become very desirable for real estate development because of their proximity to beautiful landscapes that will not be developed. And these properties that may be developed contain areas of great importance to species diversity and healthy watershed functioning.

- A second implication is that the deeded portion of the ranch is usually considerably larger than individual agricultural land holdings in other areas of the United States with more rainfall. Certainly this is true for ranches that are entirely privately-owned. As a result, outright purchase of land for conservation can be prohibitively expensive in the West. A recent PDR transaction in Arizona, for example, involved a 22,000-acre ranch in the San Rafael Valley. A transaction in Utah involved 7,300 acres.

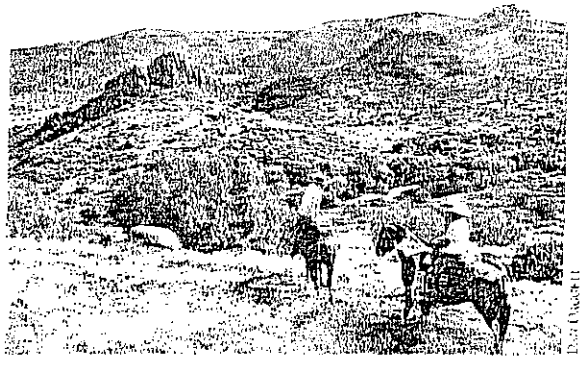
- The West boasts an abundance of majestic landscapes that have already been protected from development as national parks, forests, and other lands under federal government ownership. With a significant amount of land in the region already owned by the government, Westerners are looking for land protection alternatives that leave private lands in private hands.

PDR makes economic sense in the West: it is a compensatory approach to conservation that protects land from development pressure at prices that are more affordable for the public than outright purchase, and it helps keep farmers and ranchers on the land, providing essential stewardship and contributing to the tax base.

PDR transactions and PDR programs can serve the unique needs of the West by creating voluntary, market-based, private land conservation options.

PDR enables landowners to exercise their personal choices, and gain the satisfaction that they have made financially advantageous decisions while preserving an important legacy for future generations.

Luther Propst
Executive Director
Sonoran Institute



#1

SENATE NATURAL RESOURCES COMMITTEE

FEBRUARY 10, 2011

SB 2362

Good morning Chairman Lyson and members of the Senate Natural Resources Committee, my name is Keith Trego. I am executive director of the North Dakota Natural Resources Trust. It is my pleasure to appear before your committee this morning and present a portion of our conservation survey results.

In April 2010 the Trust, Ducks Unlimited, The Nature Conservancy and the Audubon Society joined together in a shared project to assess the current attitudes of North Dakota citizens on a variety of conservation topics. The polling was conducted by the bipartisan research team of Public Opinion Strategies, a Republican political and public affairs research firm, and Fairbank, Maslin, Maullin, Metz and Associates, a Democratic research and public policy analysis firm. (see first attachment for details of methodology, P. 2)

Among the issues explored were conservation funding, as well as use of land acquisition and long-term or perpetual easements as tools to secure and protect our state's natural resource values for future generations. This morning I will share a portion of the statewide survey results relevant to SB 2362.

SB 2362 #1

Overall, the survey results clearly demonstrated that by a wide margin **North Dakota voters support conservation** and approve of expanding current efforts to better protect the state's natural areas, water, and wildlife habitat.

Because conservation easements are both restricted in length and at times misrepresented in North Dakota, they are used less here than in other states, and the true nature of conservation easements is often poorly understood. For that reason, the survey design tested language regarding easements. The language tested was "voluntary land preservation agreements" vs. "conservation easements," with each set of terminology being asked of half of the respondents (see second attachment, P. 12).

On this specific question of long-term or perpetual conservation easements, three-in-five North Dakota voters support allowing conservation organizations to use permanent easements as a strategy for conserving natural areas, water, and wildlife habitat in the state, and there was no significant difference in responses based on the alternate language (see third attachment, P. 13). Of additional interest, the majority of survey respondents across all geographic, demographic, and political spectrums supported use of permanent conservation easements in North Dakota.

Permanent conservation easements are a voluntary landowner tool to help conserve land and provide both significant tax and estate planning options for private landowners. Citizens in

every other state have broad access to this tool. It seems reasonable and totally consistent with North Dakota's often articulated support for private property rights that our state's private landowners should have the same opportunities. Your support of SB 2362 would be much appreciated.

Methodology

- **Statistically valid telephone survey of 400 "likely" voters throughout North Dakota;**
- **Margin of error associated with a sample of this type is ± 4.9%;**
- **Interviews conducted April 6-8, 2010;**
- **Interviews distributed proportionally throughout the state and demographically representative of the electorate; and**
- **Conducted by the bi-partisan research team Public Opinion Strategies and Fairbank, Maslin, Maullin, Metz and Associates.**

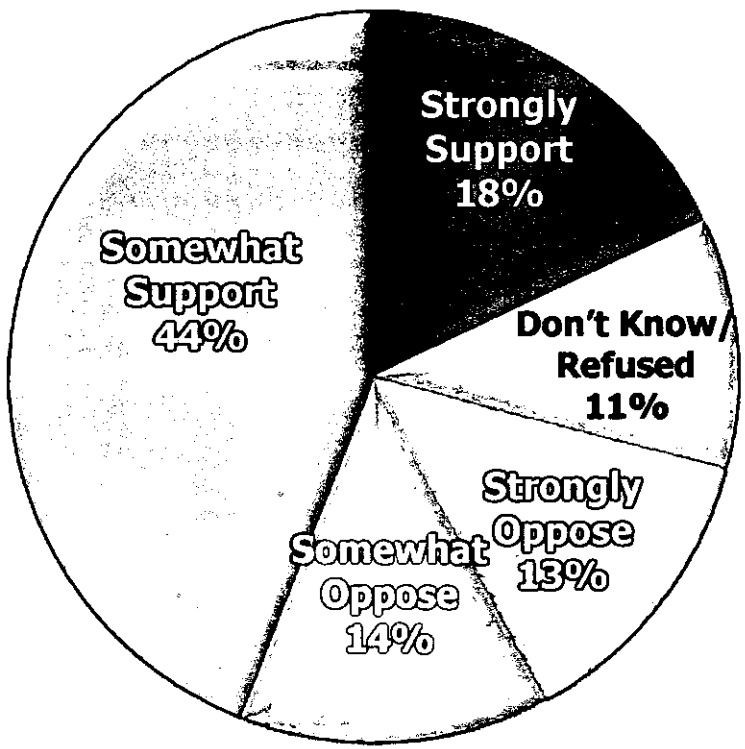
Respondents were asked about permanent easements while testing to see if a language distinction created a difference in reactions.

There are two main ways land can be preserved – One is purchasing land out right, The other is purchasing (voluntary land preservation agreements / conservation easements) from willing, private land owners. The land owner continues to work or maintain the land and pay taxes on it, but cannot develop the land, fill wetlands, or significantly alter it. In general, would you support of oppose the state allowing non-profit conservation organizations to use this strategy of purchasing permanent (voluntary land preservation agreements / conservation easements) in order to conserve natural areas, water and wildlife habitat?

No matter what name is used for the concept, three-in-five voters support allowing the use of easements.

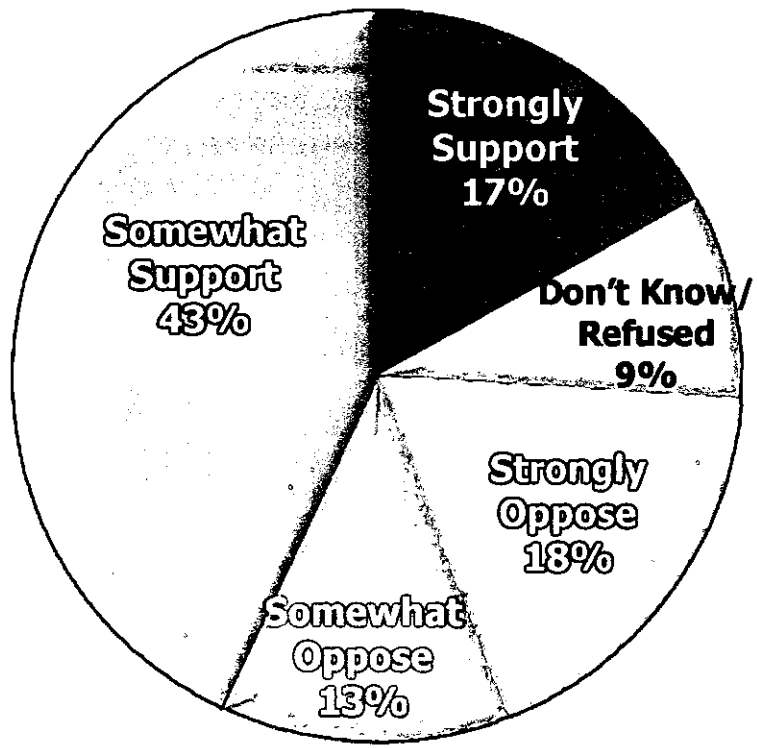
Voluntary Land Preservation Agreements

Total Support	**62%**
Total Oppose	**27%**



Conservation Easements

Total Support	**60%**
Total Oppose	**31%**



#2

North Dakota
STOCKMEN'S ASSOCIATION
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Fax: (701) 223-2587
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SB 2362

Good morning, Mr. Chairman and committee members. For the record, my name is Sheyna Strommen and I represent the North Dakota Stockmen's Association.

The North Dakota Stockmen's Association rises in opposition to SB 2362. As you know, our organization has long-standing policy opposing perpetual easements. Our members consider these easements as impediments to private property rights – rights our organization was founded on and that we hold dear. One decision by one property owner has the ability to tie the hands and impede the decisions regarding that property for perpetuity – forever – and that is counter to what we believe in.

While the perpetual conservation easements outlined in this bill would not apply to recently used cropland, they would absolutely apply to pastureland, which our beef-producing members rely upon to raise their herds and make their living.

If we are interpreting Section 4 correctly, judicial action could be brought forth to modify or terminate a conservation easement if, for instance, the easement is burdening the property owner. While that sounds great on paper, it is difficult to believe that a legitimately signed contract specifying an arrangement that will last forever could be altered by the courts. If that's the case, why would conservation groups or others even want to enter this kind of easement? Landowners are skeptical these provisions would work to undue the easement, and the chance that they wouldn't work is too much to gamble.

SB 2362 #2

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This session, you are hearing many bills related to surface owner issues where mineral rights have been severed from the surface estate. As you know, there is a lot of discussion about how to find an equitable balance between the rights of the mineral owners and the rights of the surface owners and to address the issues both are facing. While it is a different topic, there are a lot of similarities between the perpetual easement discussion and the issue of severed land interests. We've heard legislators, on several occasions, say how these problems likely could have been avoided if the mineral rights were never allowed to be severed. With that in mind, it seems ill-advised to allow pastureland in North Dakota to be enrolled in perpetual easements and create many of the same challenges we are already facing in oil country because of split interests.

It's important for us to note that beef producers are not anti-conservation. In fact, while we appear on opposing sides today, we have many similar goals as some of those who are advocating for this bill. That's because, in order to make a living, producers have to be good stewards of their land. Their livelihood depends on it. That's why many employ many conservation practices, like rotational grazing, weed control, tree planting and wildlife habitat and water development, to enhance their property and leave it in better shape than it began. Many of our members already participate in voluntary, shorter-term easements, which are allowable under current law.

The only difference between those and what is being proposed here is the timeline they are good for. We contend that if the conservation easements are positive, as I'm sure many of them are, promoters will have no trouble getting landowners to renew

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those agreements once they expire. These shorter-term easements can be the best of both worlds – providing opportunities for those who want to enter into them, but without restricting the decisions and management practices used until the end of time.

If federal tax incentives applying only to perpetual easements are the reason proponents think we should make this change, we think a better approach would be to join together to initiate changes to the federal law to expand these incentives to allowable conservation efforts and/or shorter-term easements.

We urge you to dismiss the argument that you should change the law because North Dakota is one of the only states to disallow perpetual easements. That may in fact be the case, but it is also the case that North Dakota is one of the only states running in the black with a flourishing agricultural economy. In these instances, it is nice to be different.

In summary, we respect the efforts and the discourse of the bill's sponsors and supporters, but are adamant that altering our state law regarding easements is not in the best interest of North Dakota citizens, now or in the future.

#3

NORTH DAKOTA
Farmers Union

PO Box 2136 • 1415 12th Ave SE
Jamestown ND 58401
800-366-8331 • 701-252-2341
www.ndfu.org

February 4, 2011
Senate Natural Resource Committee

NORTH DAKOTA FARMERS UNION'S STATEMENT ON SB 2362

North Dakota Farmers Union has had long-standing policy on perpetual easements. Our policy states:

"As farmers and ranchers, we reserve the right to determine the use and future use of our land. We need to explore options that will combine the best management of our land with the best economic decisions for our farms. North Dakota Farmers Union recognizes that easements are one tool farmers may employ to meet both objectives, however, we are opposed to perpetual easements."

SB 2362 #3

#1

Protecting the Land

Conservation Easements Past, Present, and Future

Foreword by Jean Hocker

SB 2362 #1

Edited by

Julie Ann Gustanski
Roderick H. Squires

Table 1.4. Continued

State	Number of Land Trusts	Total Acres	Acreage Breakdown			
			Owned	Easement	Transferred to 3rd Party	1995 Protected Other Methods
KS	2	219	0	219	0	0
KY	9	2,997	1,296	12	1,689	8,298
LA	1	15,555	651	14,604	300	0
ME	80	82,038	19,218	59,141	3,679	52,202
MD	41	93,114	6,938	79,342	6,834	2,177
MA	137	150,515	91,259	35,811	23,445	15,635
MI	38	46,929	30,338	10,648	5,943	334
MN	2	8,450	1,250	4,855	2,345	0
MS	1	2,973	1,098	1,875	0	0
MO	9	6,438	6,426	12	0	0
MT	9	296,840	261	258,416	38,163	0
NE	3	16,846	15,146	1,700	0	0
NV	4	4,843	0	118	4,725	94,111
NH	32	127,662	48,215	65,659	13,868	820,032
NJ	34	90,403	24,765	4,800	60,838	1,453
NM	7	28,986	873	28,113	0	12,317
NY	68	345,034	49,855	190,924	104,255	34,933
NC	22	37,741	6,259	26,564	4,918	23,302
ND	1	4,834	4,154	0	680	0
OH	27	10,732	7,374	2,885	473	677
OK	1	0	0	0	0	0
OR	17	11,711	386	2,654	8,671	204
PA	75	348,239	54,014	59,774	234,451	80,614
PR	1	2,131	1,176	0	415	
RI	29	12,544	8,795	3,519	230	483
SC	14	29,747	4,978	22,071	2,700	256
SD	1	9,062	0	7,760	1,302	0
TN	13	23,637	6,932	1,797	14,908	9,896
TX	20	11,531	3,244	3,823	4,464	1,275
UT	4	22,805	19,787	3,000	18	467,972
VT	26	193,061	41,647	138,769	12,645	8,668
VI	1	50	50	0	0	0
VA	16	132,953	11,368	118,402	3,183	0
WA	29	27,230	10,219	11,949	5,062	4,298
WV	9	364	289	75	0	0
WI	43	15,117	9,560	5,141	416	400
WY	2	37,752	1,467	7,585	28,700	0
TOTAL	1,218	3,184,018	827,026	1,384,963	961,445	1,763,644

Source: Land Trust Alliance; Land Trust Survey, 1995; and, Land Trust Census, 1998.

Note: The 1998 land trust census conducted by the Land Trust Alliance, unlike previous surveys, does not include land protected through other methods (deed restrictions, acquisition of mineral rights, or negotiating acquisition for other organizations or agencies). According to the Land Trust Alliance, some 1.5 million additional acres are protected using such tools.

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Table 1.5. L

Land Featur	*Protected*
Wildlife hab	
Forests	
Open space	
Watersheds	
Wetlands	
Scenic views	
Ecosystems	
Farms	
Greenways	
Recreation a	
Floodplains	
Historic and	

Source: J. A. C

Table 2.1. What Conservation Easements Protect

STATE	UCEA	HOLDER'S PURPOSES	NATURAL	SCENIC	OPEN SPACE	AGRICULTURAL	SILVICULTURAL	FOREST	RECREATIONAL	AIR QUALITY	WATER QUALITY/WATER	HISTORICAL	ARCHITECTURAL	ARCHEOLOGICAL	PALEONTOLOGICAL	CULTURAL	CONSERVATION OF LAND	PROTECTING NATURAL RESOURCES	SPECIAL NOTES
Alabama	U	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X		X	
Alaska	U	X[a]	X	X	X	X		X	X	X	X	X	X	X		X		X	[a] "Empowered to"
Arizona	U	X	X	X	X	X		X	X	X	X	X	X	X		X		X	
Arkansas	N	X	X	X	X	X		X	X	X	X	X	X	X		X		X	
California	N		X	X	X	X		X				X							
Colorado	N																		
Connecticut	N	X				X					X[b]	X							[b] Conservation of land or water area
Delaware	N	X				X					X[c]	X							[c] Conservation of land or water area
Florida	U	X	X	X	X	X		X	X	X	X	X	X	X		X		X	
Georgia	U	X	X	X	X	X		X	X	X	X	X	X	X		X		X	
Hawaii	N	[d]																	[d] whose original purpose is designed to facilitate the purpose of this chapter
Idaho	U	X	X	X	X	X		X	X	X	X	X	X	X				X	
Illinois	N		X		X						X[e]	X	X	X		X	X		[e] Primary purpose
Indiana	U	X	X	X	X	X		X	X	X	X	X	X	X		X		X	
Iowa	N																		
Kansas	U	X	X	X	X	X		X	X	X	X	X	X	X		X		X	
Kentucky	U	X	X	X	X	X		X	X	X	X	X	X	X		X		X	
Louisiana	U	X	X	X	X	X		X	X	X	X	X	X	X		X		X	Also immovable property and unimproved immovable property
Maine	U	X	X	X	X	X		X	X	X	X	X	X	X		X		X	
Maryland	N																		
Massachusetts	N	X				X					X	X						X	
Michigan	N																		
Minnesota	U	X	X	X	X	X		X	X	X	X	X	X	X		X		X	

STATE	UCEA	HOLDER'S PURPOSES	NATURAL	SCENIC	OPEN SPACE	AGRICULTURAL	SILVICULTURAL	FOREST	RECREATIONAL	AIR QUALITY	WATER QUALITY/WATER	HISTORICAL	ARCHITECTURAL	ARCHEOLOGICAL	PALEONTOLOGICAL	CULTURAL	CONSERVATION OF LAND	PROTECTING NATURAL RESOURCES	SPECIAL NOTES
Mississippi	U	X	X	X	X	X		X	X	X	X	X	X	X		X		X	Also property available for educational use
Missouri	N																		Silent; wildlife habitat
Montana	N	[f]																	[f] Original purpose designate to further purpose of this" wildlife habitat
Nebraska	N	X	X	X	X	X		X	X	X	X	X	X	X		X		X	Also wildlife habitat
Nevada	U	X	X	X	X	X		X	X	X	X	X	X	X		X		X	
New Hampshire	N	X				X					X	X						X	
New Jersey	N	X	X	X	X						X							X	
New Mexico	N	X	X		X	X		X	X									X	Also mountain production uses of real property
New York	N																	X	For conservation or preservation of real property
North Carolina	N	X	X	X	X	X		X				X	X	X					Also horticulture and farming
North Dakota	N																		
Ohio	N																		
Oklahoma																			
Oregon	U	X	X	X	X	X		X	X	X	X	X	X	X		X		X	
Pennsylvania	N																		
Rhode Island	N	X									X	X					X		
South Carolina	U	X	X	X	X	X		X	X	X	X	X	X	X		X		X	Also educational use
South Dakota	U	X		X		X	X		X	X	X	X	X	X	X	X			
Tennessee	N																		Silent
Texas	U	[g]	X	X	X	X		X	X	X	X	X	X	X		X		X	[g] Created or empowered to

(continues)

Table 2.1. Continued

STATE	UCEA	HOLDER'S PURPOSES	NATURAL	SCENIC	OPEN SPACE	AGRICULTURAL	SILVICULTURAL	FOREST	RECREATIONAL	AIR QUALITY	WATER QUALITY/WATER	HISTORICAL	ARCHITECTURAL	ARCHEOLOGICAL	PALEONTOLOGICAL	CULTURAL	CONSERVATION OF LAND	PROTECTING NATURAL RESOURCES	SPECIAL NOTES
Utah	N																		Silent
Vermont	N	X			X	X		X				X[h]							[h] One of its stated purposes
Virginia	U																		
Washington	N	X	X									X						X[i]	[i] One of the holder's principal purpose; also, scientific research.
West Virginia	U	X	X	X	X	X		X	X	X	X	X	X	X		X		X	Wildlife
Wisconsin	U	X	X	X	X	X		X	X	X	X	X	X	X		X		X	
Wyoming	N																		

U = Conservation easement legislation directly influenced by UCEA.
N = Conservation easement legislation absent or not influenced by UCEA.

for recreational use, whereas a number of nonuniform states are silent on the issue. Most states expressly allow conservation easements to preserve agricultural lands, although Hawaii, Illinois, Mississippi, Missouri, New Jersey, New York, and Washington are notable exceptions. In Colorado, Nebraska, North Carolina, and Ohio, a conservation easement may protect horticultural resources. In Arizona, Mississippi, and South Carolina, a conservation easement may protect the educational value of the property.

Delaware's statute is ambiguous regarding purpose. Although a conservation easement may be established to maintain land predominantly in its natural condition and, to that end, the easement may restrict "activities adversely affecting the fish and wildlife habitat," the easement may not "restrict or abridge . . . the rights of any present or future fee simple owner from permitting or denying the use of the land for hunting, fishing or other recreational purposes."[6] Undoubtedly, such language will lead to situations in which the landowner's ability to hunt, fish, or use the property for other recreational activities will significantly impair, if not destroy, the very conservation purposes for which the easement was created. This particular statute, unfortu-

#3

47-05-02. Servitudes not attached to land. The following land burdens or servitudes upon land may be granted and held, though not attached to land:

1. The right to pasture, and of fishing and taking game.
2. The right of a seat in church.
3. The right of burial.
4. The right of taking rents and tolls.
5. The right of way.
6. The right of taking water, wood, minerals, or other things.
7. A historic easement granted with respect to a state historic site and buildings and structures thereon, or property listed in the national register of historic places, in accordance with the provisions of section 55-10-08.

Source: Civ. C. 1877, § 245; R.C. 1895, § 3352; R.C. 1899, § 3352; R.C. 1905, § 4788; C.L. 1913, § 5331; R.C. 1943, § 47-0502; S.L. 1983, ch. 589, § 2.

Derivation: Cal. Civ. C., 802.

Executory Land Contract.
The vendee under an executory land contract obtains at law no real property nor interest in real property. The purchaser becomes the beneficial owner in equity, and the vendor retains legal title in trust for such vendee. Sox v. Miracle, 35 N.D. 458, 160 N.W. 716 (1916).

Collateral References.
Easements ⇐ 3(1, 2).
25 Am. Jur. 2d, Easements and Licenses, §§ 10-12.
28A C.J.S. Easements, § 3.

47-05-02.1. Requirements of easements, servitudes, or nonappurtenant restrictions on the use of real property. Real property easements, servitudes, or any nonappurtenant restrictions on the use of real property, which become binding after July 1, 1977, shall be subject to the requirements of this section. These requirements are deemed a part of any agreement for such interests in real property whether or not printed in a document of agreement.

1. The area of land covered by the easement, servitude, or nonappurtenant restriction on the use of real property shall be properly described and shall set out the area of land covered by the interest in real property.
2. The duration of the easement, servitude, or nonappurtenant restriction on the use of real property must be specifically set out, and in no case may the duration of any interest in real property regulated by this section exceed ninety-nine years. The duration of an easement for a waterfowl production area acquired by the federal government, and consented to by the governor or the appropriate state agency after July 1, 1985, may not exceed fifty years. The duration of a wetlands reserve program easement acquired by the federal government pursuant to the Food, Agriculture, Conservation, and Trade Act of 1990 after July 1, 1991, may not exceed thirty years.
3. No increase in the area of real property subject to the easement, servitude, or nonappurtenant restriction shall be made except by

SB 2362 #3

attachment 1

HOUSE NATURAL RESOURCES COMMITTEE

MARCH 11, 2011

SB 2362

Good morning Chairman Porter and members of the House Natural Resources Committee, my name is Keith Trego. I am executive director of the North Dakota Natural Resources Trust. It is my pleasure to appear before your committee this morning and present a portion of our conservation survey results.

In April 2010 the Trust, Ducks Unlimited, The Nature Conservancy and the Audubon Society joined together in a shared project to assess the current attitudes of North Dakota citizens on a variety of conservation topics. The polling was conducted by the bipartisan research team of Public Opinion Strategies, a Republican political and public affairs research firm, and Fairbank, Maslin, Maullin, Metz and Associates, a Democratic research and public policy analysis firm (see first attachment for details of methodology, P. 2).

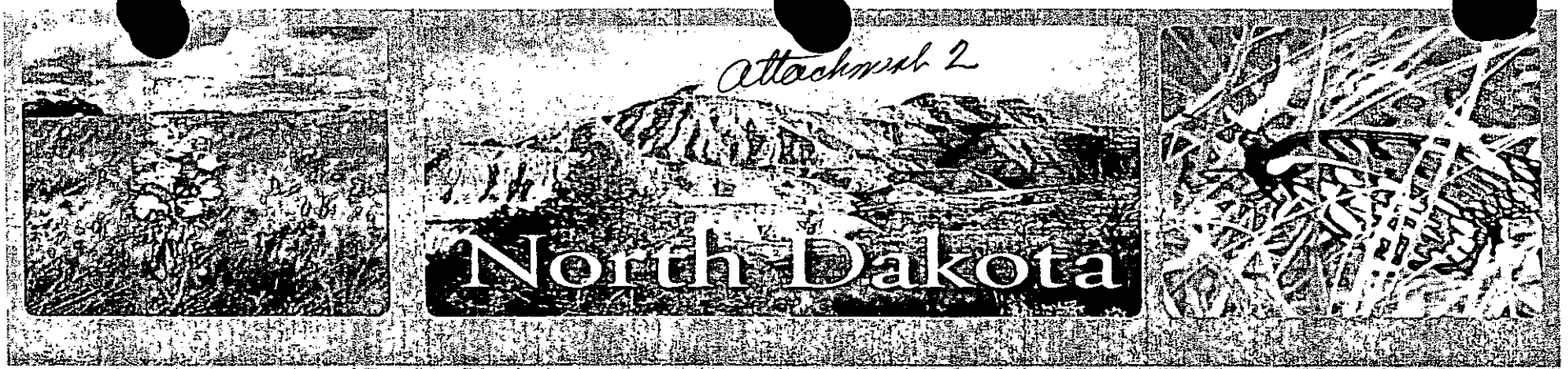
Among the issues explored were conservation funding, as well as use of land acquisition and long-term or perpetual easements as tools to secure and protect our state's natural resource values for future generations. This morning I will share a portion of the statewide survey results relevant to SB 2362.

Overall, the survey results clearly demonstrated that by a wide margin **North Dakota voters support conservation** and approve of expanding current efforts to better protect the state's natural areas, water, and wildlife habitat.

One of the initial purposes of SB 2362 was to provide the option of non federal permanent easements for certain lands and landowners. As you know, the bill was modified in the Senate to remove any opportunity for non federal permanent easements. But it is educational to see the viewpoint of rank and file North Dakota citizens on the permanent easement issue.

On the specific question of long-term or perpetual conservation easements, three-in-five North Dakota voters support allowing conservation organizations to use permanent easements as a strategy for conserving natural areas, water, and wildlife habitat in the state. And because permanent conservation easements are so often misrepresented in North Dakota, the survey design tested alternative language regarding easements. The language tested was "voluntary land preservation agreements" vs. "conservation easements," with each set of terminology being asked of half of the respondents (see second attachment, P. 12). There was no significant difference in responses based on the alternate language (see third attachment, P. 13). Of additional interest, the majority of survey respondents across all geographic, demographic, and political spectrums supported use of permanent conservation easements in North Dakota.

In its current form, SB 2362 still runs counter to North Dakota's often articulated support for private property rights and deprives North Dakota citizens of permanent non federal easements and the associated tax and estate planning options available to citizens in all other states. As amended in the Senate the bill serves no useful purpose and I concur with the bill's prime sponsor Senator Triplett in asking your committee to give the bill a DO NOT PASS recommendation.



Permanent Easements

Respondents were asked about permanent easements while testing to see if a language distinction created a difference in reactions

North Dakota

There are two main ways land can be preserved – One is purchasing land out right, The other is purchasing (voluntary land preservation agreements / conservation easements) from willing, private land owners. The land owner continues to work or maintain the land and pay taxes on it, but cannot develop the land, fill wetlands, or significantly alter it.

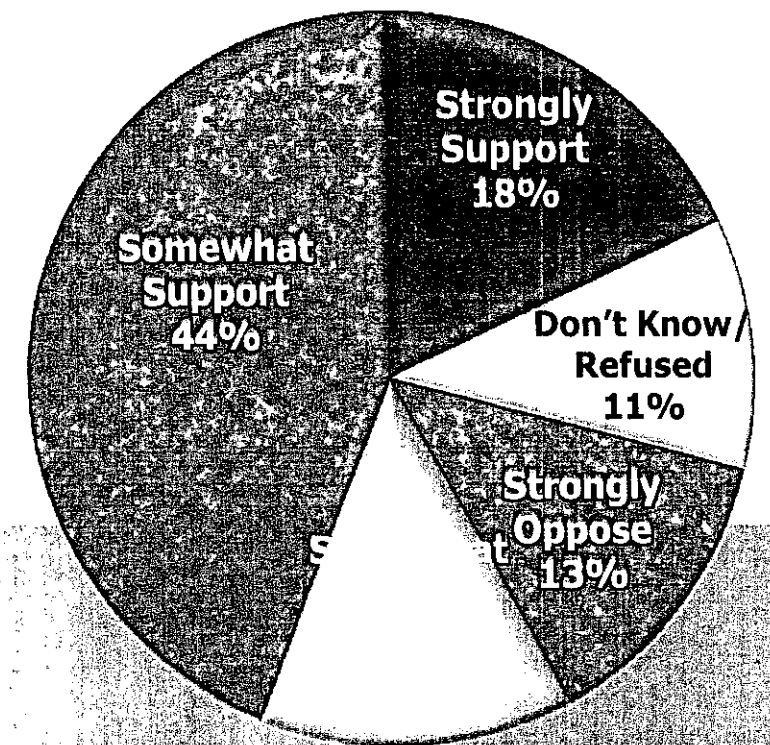
In general, would you support of oppose the state allowing non-profit conservation organizations to use this strategy of purchasing permanent (voluntary land preservation agreements / conservation easements) in order to conserve natural areas, water and wildlife habitat

Within the larger concept, the distinction between "easements" and "voluntary agreements" is not significant.

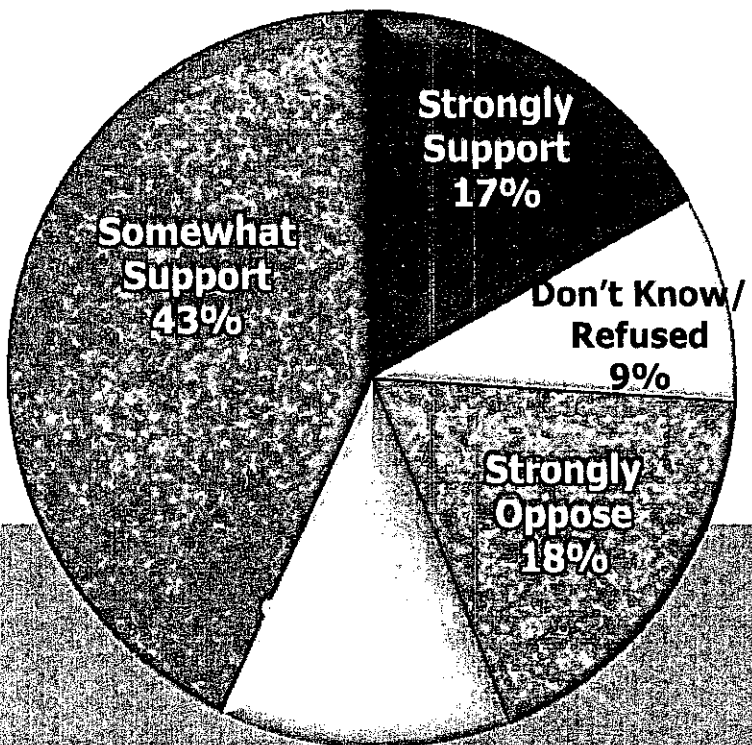
North Dakota

Voluntary Land Preservation Agreements *Conservation Easements*

Total Support	62%
Total Oppose	27%



Total Support	60%
Total Oppose	31%



There is a partisan and ideological dimension to this issue…

Party/Ideology	Support^	Oppose^	Difference Score
Conservative Republicans	53%	37%	+16%
Moderate/Liberal Republicans	65%	26%	+39%
Independents	61%	29%	+32%
Conservative Democrats	63%	24%	+39%
Moderate/Liberal Democrats	76%	16%	+60%

^Combined data

As well as a geographic dimension:

Geography/Media Market	Support^	Oppose^	Difference Score
Urban	66%	22%	+44%
Suburban/Small Town	63%	32%	+31%
Rural	51%	37%	+14%
Fargo/Valley City	65%	25%	+40%
Minot/Bismarck	56%	33%	+23%

^Combined data

North Dakota

- The geographic distinction is likely driven by a weaker response among those whose livelihood is dependent on agriculture.

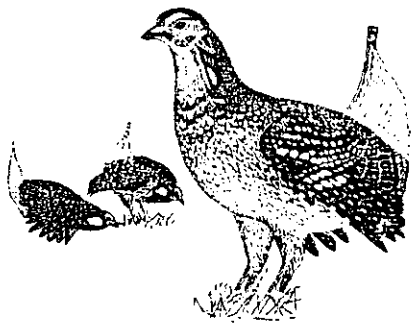
Dependency on Farming	Support^	Oppose^	Difference Score
Very Dependent	45%	44%	+1%
Very/Somewhat Dependent	52%	36%	+16%
Not Dependent	71%	20%	+51%

^Combined data.

North Dakota Chapter Attachment 3

THE WILDLIFE SOCIETY

P.O. BOX 1442 • BISMARCK, ND 58502



TESTIMONY OF MIKE McENROE
NORTH DAKOTA CHAPTER OF THE WILDLIFE SOCIETY
ON SB 2362
HOUSE ENERGY AND NATURAL RESOURCES COMMITTEE
MARCH 11, 2011

Chairman Porter and members of the Energy and Natural Resources Committee:

My name is Mike McEnroe and I represent the North Dakota Chapter of The Wildlife Society. The Chapter is a professional organization made up of over 320 biologists, land managers, university educators, and law enforcement officers in the wildlife and natural resource field.

The Chapter supported SB 2362 as it was introduced. However, as passed by the Senate, it is 180 degrees different from the introduced bill.

Current State laws restrict all easement opportunities except those of the U. S. Fish and Wildlife Service and several USDA programs. Current State law prohibits the State or State-based agricultural entities from developing their own perpetual conservation or agricultural land protection easements. The Federal government is the only game in town, or in the State.

Perpetual easements can be used by farm and ranch families to stay in farm or grassland agriculture, and to provide financial incentives through federal income tax, estate planning and estate tax management.

Engrossed SB 2362 has none of these benefits and further restricts opportunities for long-term conservation easements in the State. For these reasons we urge a "Do not Pass vote on SB 2362. I would stand for any questions the Committee may have.

During Committee discussion, a question was asked among the members about the length of a Wetland Reserve Program easement; could it be shorter than 30 years? The Wetland Reserve Program was created by the Food, Agriculture, Conservation,

and Trade Act of 1990 (the 1990 Farm Bill), and it authorized the Natural Resource Conservation Service (NRCS) to acquire perpetual wetland conservation easements, or easements limited to a duration set by individual States. The North Dakota Legislature in the 1991 sessions limited WRP easements to a 30year duration. NRCS values a 30-year easement at about 25-30 percent of the value of a perpetual WRP easement. This large reduction in value has limited the acceptance of 30-year easements by landowners. The Legislature could further limit the duration of WRP easements, but shorter periods will result in smaller easement payments.

attachment 4

SB 2362 – Testimony to the House Natural Resources Committee

March 11, 2011

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

As you have heard, Engrossed SB 2362 is significantly different than its original version, which would have removed the state's long-standing prohibition on perpetual easements and allowed for third parties to bring forth judicial action to "enforce" the terms of conservation easements. We opposed that bill, as we have opposed other efforts to allow for perpetual easements in our state, believing that a duration of forever would impede future property owners' rights and ability to make the best decisions for that property at that time.

The Stockmen's Association, however, is not opposed to conservation. In fact, while we may disagree with our conservation friends on the appropriate terms of conservation easements, we have many similar goals. That's because, in order to make a living, producers have to be good stewards of their land. Their livelihood depends on it. That's why many employ various conservation practices, like rotational grazing, weed control, tree planting and wildlife habitat and water development, to enhance their property and leave it in better shape than it began and why many of our members participate in a variety of voluntary conservation programs.

We were intrigued by Sen. Hogue's amendment to this bill, which was adopted by the Senate Natural Resources Committee and, ultimately, the full Senate. As presented now, the bill would still define conservation easements in code, but establish a 40-year timeframe for those easements. Our position is that a 20-year timeframe would be even more appropriate, as 20 years is more reflective of one generation and one generation's worth of decision-making.

As you may know, current statute provides that waterfowl easements acquired by the federal government not exceed 50 years, and that Wetlands Reserve Program easements not exceed 30 years. This bill would provide for conservation easements not to exceed 40 years – or 20 years, if you so choose.

While these easements would have a shorter term, they can still be effective in protecting and enhancing our natural resources and accomplishing the shared goals of agricultural and conservation stakeholders. If landowners have positive experiences by participating, renewing these easements after their expiration should not be a problem.

To us, shorter-term easements center the discussion around the conservation practices instead of the control of the property, and that is better for the state of North Dakota.

For these reasons, we support the concept of SB 2362 in its new form. We ask for your consideration of it and the 20-year option as you make your recommendation on this bill.