

2015 HOUSE JUDICIARY

HB 1180


2015 HOUSE STANDING COMMITTEE MINUTES

House Judiciary Committee
Prairie Room, State Capitol

HB 1180
1/21/2015
22281

- Subcommittee
 Conference Committee

Committee Clerk Signature



Explanation or reason for introduction of bill/resolution:

Relating to the confidentiality of mediation.

Minutes:

Testimony #1

Chairman K.Koppelman: Opened the hearing on HB 1180 with testimony in support.

Ken Junkert, Acting ND Mediation Service (NDMS) Administrator at the ND Dept. of Agriculture: (See Testimony #1) (:52-4:18)

Rep. Brabandt: Give me a scenario of one of your mediations.

Ken Junkert: We mediate a wide variety of issues. In 2011 the law was changed and we have taken on 41 energy related mediation disputes. An example of a case would be if there is surface disturbance and the surface landowner was not in agreement on what was happening on the surface they would contact us and we would contact the company that was doing the oil development on the land and bring the parties to the table and try to work out the disputes. Historically we have worked on more credit cases than we have on any other issue. In the late 80s and early 90s the credit crunch we have serviced over 11,000 cases in ND. We take on farm program cases. If a person would receive an adverse determination from USDA on a CRP issue or a wetland issue we are automatically notified and then we start a mitigation process.

Rep. Brabandt: So in a pipeline dispute you contact the pipeline and get together here in Bismarck and have your mediation. It is basically that simple?

Ken Junkert: Yes it is that simple. If you are a landowner and have any type of dispute the law allows us to help you resolve that dispute. They call us up on the phone and we will fill out a form for you and then we initiate the contact to the other party that you have the dispute with. We assign a mediator. We have staff mediators and we also have a pool of contract mediators that we excess and we schedule the mediation event. Mediations can last from 15 minutes to many days.

Rep. Mary Johnson: Section 6 regards contracts and obligations and then 44 bring it into open records. Contracts between private parties typically specify where mediation will be brought and at that time when they decide that mediation will be brought to the Department of Agriculture they should understand at that point that it becomes public and rather than a sweeping change for all officers elected I think that can be handled at the contractual level rather than such a broad change in the law.

Ken Junkert: This portion of the law we are changing only affects our mediation program. We are trying to insure that when we have an individual land owner or somebody that has a dispute that when they enter into mediation any records that are brought; any sensitive information like a contract or copy of an email or letter or financial records; and we use that information to help resolve a dispute we want to make sure that information isn't an open record.

Rep. Mary Johnson: I am saying that can be addressed at the private contract level between the parties. I have not seen a lease or other contract that doesn't specify how problems will be resolved and where.

Ken Junkert: Certain contracts have stipulation language in them that will cover confidentiality. Our main concern and the credit reviews board main concern is if parties enter into the process that through our alternative resolution process that we make sure that information stays in house and doesn't become public. We have had people contact us wanting to use the open records law because they heard of a case and they want the details of it. We believe the dispute is between two specific parties and if we can help resolve that dispute and solve it at the table we are reducing legal costs and we are able to help resolve disputes much quicker.

Rep. L. Klemin: This confidentiality only applies to your agency and it does not prohibit the other parties from releasing anything they want to.

Ken Junkert: That would prevent me from releasing the information. I still believe if there is a court order issued or the parties agree to release the information I am out of the game.

Rep. L. Klemin: This does not prevent private parties. They can release whatever they want to whenever they want to unless there is some other agreement that they have entered into that says something different. This only applies to your agency.

Ken Junkert: Correct.

Rep. L. Klemin: The new language seems to be a further explanation of something that is probably already under another part. Is this language being added for further clarification of what is included?

Ken Junkert: That is correct. When we are in a mediation session and have multiple parties there our mediators capture information in a variety of ways. We have avoided voice or video recordings but we do use all the other means. It was on the recommendation of the Attorney General's office that we define what mediation

communication is just so it is very clear. So when we address that file we know what is confidential in that file.

Rep. L. Klemin: This is simply a clarification.

Ken Junkert: Yes it is.

Rep. Lois Delmore: On page 2 you have language you have taken out. Why didn't you choose to put the exclusions in there rather than opening all the other sections? It would seem more logical to me and make us more comfortable with what you are saying.

Ken Junkert: The language on the bottom of the bill is doing is when we are working outside of a credit case the understanding is that our mediation sessions are open. We have had individuals that have wanted to bring members of the media along for the mediation cases. We are trying to make all mediation session would be considered closed meetings in order to protect the confidentiality of our process.

Chairman K. Koppelman: The section you are amending is the section of law dealing with assistance for distressed farmers. This particular section of law deals with this specifically. This is not mediation in general conducted for any purpose anywhere in the state.

Ken Junkert: That is mediation as defined for our program for our purposes.

Chairman K. Koppelman: Explain what is the ND Mediation Service and is that an entity or just the title of your job and I assume you work at the DOA.

Ken Junkert: Yes I am an employee of the Dept. of Agriculture. The ND Mediation is a sub program of the DOA. It is budgeted within the department's budget. I serve as the acting administrator right now. The program has been a part of the department since the very late 80s and it used to be called the Agriculture Mediation Service until the legislature turned it into the ND mediation service because we were beginning to work on cases outside of agriculture, when you added the minerals resource and energy development caseload for us. The law is very clear on what we can and cannot do.

Chairman K. Koppelman: It sounds like you provide mediation services perhaps in a broad realm or anywhere?

Ken Junkert: Our scope is narrow by law. I am unaware of any other public mediation service that is out there. The UND conflict resolution center also provides alternative resolution services and training for our program. There are private mediators and law firms across the state of ND that provides this service. I have four of those on contract for me to help support our program. We only have two part time mediators to supply that workload.

Rep. K. Hawken: Those people would also be covered under this umbrella as it is written; the private people that you contract with. This exception and then someone else will want an exception and the last several sessions I have tried to figure out a bill with the Attorney

General's office because of all the infractions on open records so this concerns me. The people of ND are also very interested especially when we look at energy.

Rep. K. Wallman: The outcome of a mediation you are prohibited from publishing that?

Ken Junkert: Yes that is correct.

Rep. K. Wallman: Is this the current statute?

Ken Junkert: I cannot communicate with anyone about the outcome of mediation. That is currently in statute.

Rep. Brabandt: Give us an example of potential sensitive information.

Ken Junkert: Compensation issues in oil country are extremely sensitive. If I have surface disturbance on my land and I am compensated at a certain level that information seems to be very sensitive to others. That would be one example. When we get into a farm credit case and we have a dispute with a banker and we look at their finances and help organize them and we have everything. We have staff on my program that will set down and go through the finances and help arrange them in the best shape they can be so when they enter into mediation a clear discussion can happen. People do not want that information publically communicated.

Rep. L. Klemin: The ND Supreme Court currently maintains a registry of persons who offer the services as mediators or arbitrator in various things. If someone wanted to find a mediator there is a source to go to.

Rep. G. Paur: Currently if there is a request made you release that information?

Ken Junkert: No I do not.

Rep. D. Larson: When Rep. Klemin was saying there was a list of other mediators that people could just go to and use; I am assuming that anything they do when they are not your department that would be confidential records client privilege type of thing. But if they go to you I would assume the benefit of going to you for mediation services would be cheaper to use your services so yours are not strictly laid out as confidential whereas if they went to a different mediator it would be. Is that right?

Ken Junkert: I think our confidentiality is the same. Supreme Court rule 8.8 discusses this and how a neutral must conduct business under the Supreme Court rules. We have our separate law that we have to deal with. We do have individuals that do approach us because of the cost. We charge \$25 an hour only to each party at the table. We are a significant financial advantage over others. The Credit Review Board recently reviewed that pricing guideline. They are going to hold that they do not want the law changed at this time. A lot of people that come to us have severe credit issues and they feel to pile on the debt to them would not be beneficial in helping resolve the dispute.

Rep. D. Larson: If it already is confidential why do we have to say it is confidential?

Ken Junkert: The intent of the bill was just to define what mediation communication was so it is very clear. What we track and mediation and what records we keep. If it becomes part of our file for each case we want to make sure that we hold that information as confidential so it is not an open record.

Chairman K. Koppelman: Are you saying it is your ethical standard and current practice to keep this kind of thing confidential, but that you want to ensure that is also codified so if anyone challenges that you have the law to back you up.

Ken Junkert: Yes it is just insuring that we have confidentiality with our program.

Rep. P. Anderson: Who wanted to bring the media into the meeting? Was that a landowner?

Ken Junkert: We had an individual that received an adverse determination from the federal government that said what they did on their land is not correct according to federal rule and he believed he was harmed. He believed what he did was in the confines of the rule and he was angry and he wanted to make a public issue of it. When he contacted me I said the mediation session if you brought the individual the meeting would be closed and I would not allow the media to be there. He chose not to go into mediation unfortunately. I think we could have helped resolve that situation.

Chairman K.Koppelman: This law would not have prevented him from walking out the door of that deliberation because it doesn't bind him; it binds you.

Ken Junkert: This is about giving me the standing to say no.

Rep. Mary Johnson: You brought in the federal government and that was going to be my question; does the USDA have like mediation services?

Ken Junkert: What is unique about our program is they must use our program. We are the only certified mediation program in ND that is recognized by the federal government. Annually I must go through a certification process and we must meet certain standards in order for the federal government to use my program. It is an involved stringent program and it is an annual review process. We cannot resolve all disputes.

Rep. Brabandt: Is your mediation process the first step and do you cover oil, gas, wind, and water?

Ken Junkert: The law says 6-09.10-04 tells us exactly who can request assistance for us. It is a farmer; a person eligible for mediation with an agency of the USDA; a landowner; an owner lessee or lessor of mineral interests. In another section of the law it talks about pipeline issues where I can get involved in them. So we have a wide variety of issues we can handle.

Chairman K.Koppelman: Does your service offer arbitration or only mediation?

Ken Junkert: That is a long serving discussion. The ND Legislation in 2011 said that a landowner that has a dispute with the ND Game & Fish Dept. regarding deer depuration and hear their dispute in front of a negotiator or mediator a decision of a mediator decides that case. It is arbitration. That decision can be looked at by the credit review board and upheld or overturned and it stops right there.

Chairman K. Koppelman: Do you require any additional training for your department act as arbitrators should that come up.

Ken Junkert: I would probably look at a contract arbitrator to take care of that. I am a mediator; I don't like to be a decision maker.

Chairman K.Koppelman: What certification is required and where do you get that?

Ken Junkert: We are certified by the USDA. Through our contractual relationship and our grant process we have to certify that we are trained mediators. You have to attend a certain number of hours of training prior to taking on your first case. It has to be training in core mediation knowledge. We take our staff up to the UND Conflict Resolution Center and run through a week long program. We receive our certification at that point. We could add our staff to the neutralists list that is out there that the Supreme Court has. We do not. We have to also complete a minimum set of hours for additional training every two year period according to the federal rule in order to maintain my status as a qualified mediator according to the federal government.

Chairman K. Koppelman: So you meet those qualifications both with USDA and the Supreme Court?

Ken Junkert: Yes.

Chairman K.Koppelman: How do your charges compare to the going rate out there in the private sector?

Ken Junkert: Our charges are cheaper than the going rate on mediations for everything besides energy. The law changes my fees for energy development. For all mediation cases that involve credit in an issue besides energy development issue I have to charge maximum of \$25/hr. For energy development cases the law says that I must charge the actual cost of mediation and that charge must be part of the mediation. I would bring in a contract mediator; we have four on contract; they have a variety of prices. My prices go from \$100/hr. up to \$225/hr. The projected cost for this mediation case could be \$700. How do the parties want to split this cost? More often one of the parties will say in order to move this forward we will take on the cost. In the energy related field out west they have been a great supporter of our program. We bill the parties after mediation is done and that money flows back into the program and helps support it.

Chairman K. Koppelman: Is that the going rate in the private sector as well?

Ken Junkert: I have seen rates as high as \$400/hr. The law firms we use about \$225/hr. maximum.

Chairman K. Koppelman: So it is per party so it is \$50/hr.

Ken Junkert: As a state agency we are required to go through a procurement process so I can't go out there and pick and choose.

Rep. G. Paur: What do you pay the mediator's you contract?

Ken Junkert: We pay them the hourly rate of the contract. We have not used any of our contractors for agricultural related cases.

Rep. Lois Delmore: Are there any other state agencies that do mediation?

Ken Junkert: I am aware that Human Resource Management Service's under the OMB conducts mediation as it applies employment issues. The UND Conflict Resolution Center takes on a caseload. They go out and do family mediator more often than not. I am not aware that the Attorney General does mediation.

Chairman K. Koppelman: Arbitration is when short of the court process. Two parties come into a dispute resolution effort and they say we are willing to present our case and let this arbitrator or judge, if you will, decide what is going to happen and we are going to agree to abide by that. Mediation is when the two parties come together and the mediator's job is to try and help them work their problem out and come to an agreement, but they both have to agree that is the solution.

Rep. L. Klemin: ND has adopted the Uniform Arbitration Act and it has been part of ND law for a long time.

Rep. Mary Johnson: In the mid-80s what was going on when this act came about?

Rep. Kretschmar: The farmers were getting into trouble with credit etc. That is how the system was put in and grew.

Chairman K. Koppelman: Family law cases have become a really big use of mediation.

Opposition: None

Neutral: None

Hearing closed.

Do Pass Motion Made by Rep. G. Paur; Seconded by Rep. L. Klemin:

Roll Call Vote: 11 Yes 0 No 2 Absent Carrier: Rep. Mary Johnson:

**2015 HOUSE STANDING COMMITTEE
ROLL CALL VOTES
BILL NO. HB 1180**

House **JUDICIARY** Committee

Subcommittee Conference Committee

Amendment LC# or Description: _____

Recommendation: Adopt Amendment
 Do Pass Do Not Pass Without Committee Recommendation
 As Amended Rerefer to Appropriations
 Other Actions: Reconsider _____

Motion Made By Rep. G. Paur Seconded By Rep. L. Klemin:

Representative	Yes	No	Representative	Yes	No
Chairman K. Koppelman	X		Rep. Pamela Anderson	X	
Vice Chairman Karls	X		Rep. Delmore	X	
Rep. Brabandt	X		Rep. K. Wallman	X	
Rep. Hawken	--				
Rep. Mary Johnson	X				
Rep. Klemin	X				
Rep. Kretschmar	X				
Rep. D. Larson	X				
Rep. Maragos	--				
Rep. Paur	X				

Total (Yes) 11 No 0

Absent 2

Floor Assignment: Rep. Mary Johnson:

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

REPORT OF STANDING COMMITTEE

HB 1180: Judiciary Committee (Rep. K. Koppelman, Chairman) recommends **DO PASS** (11 YEAS, 0 NAYS, 2 ABSENT AND NOT VOTING). HB 1180 was placed on the Eleventh order on the calendar.

2015 SENATE JUDICIARY

HB 1180

2015 SENATE STANDING COMMITTEE MINUTES

Judiciary Committee
Fort Lincoln Room, State Capitol

HB 1180
3/17/2015
25020

- Subcommittee
 Conference Committee

Committee Clerk Signature

Katie Oliver for Dawn Penick

Minutes:

1

Chairman Hogue opened the hearing on HB 1180. Representative Dick Anderson was on hand to introduce the bill.

Representative Anderson: This is a mediation bill that I sponsored for the department of agriculture; it will amend section 6-09.10-10 of the century code. The ag mediation process has been used to settle dispute with farmers and federal agencies and in rare cased disputes between farmers. The energy industry with land reclamation and pipeline issues with routes and other problems there is a great need for this service.

Ken Junkert: Mediation Service Administrator, North Dakota Department of Agriculture. See attachment #1.

Chairman Hogue: Does this relate primarily to the communications leading up to the mediation and the exchange of information because it looks like the actual mediation session is confidential currently.

Ken Junkert: It would be leading up to what we call the intake process. We sit down and visit one-on-one with the parties in mediation, that would be confidential and including the mediation session itself.

Senator Luick: Can you give me an example of what this mediation session would be and how it ties into the bill that the ag committee had.

Ken Junkert: A typical mediation session we will have a party, a landowner for example, that may have a dispute with an oil company and so they will contact the mediation program. You are referring to SB 2271 the connection between the programs is as such: they lay out a process that if a landowner has an

issue after a pipe has been put into the ground reclamation is complete and isn't done properly. They would contact the department of ag and we would send someone out to the site to work with the pipeline company to come up with a plan to resolve the issue. It is an on the ground type of program.

Senator Luick: Is there a fiscal note on this bill?

Ken Junkert: No there is not.

Senator Luick: The funding from SB 2271 is that going to help with the cost of the mediation?

Ken Junkert: Last session you added additional funds to the department's budget specifically for mediation so we have the ability do to that.

Senator Nelson: The mediation process you want it to remain confidential that means that nobody outside of the room can know about what happened in there. Why is it confidential?

Ken Junkert: If both parties agree they can release that information. One of the strong tenants of good mediation is that when people contact us they are very uneasy about providing sensitive information of a financial nature. They are more willing to be forthcoming if that information is kept confidential.

There was no further testimony on HB 1180 and Chairman Hogue closed the public hearing.

Chairman Hogue: Senator Nelson, what was your question about confidentially?

Senator Nelson: It is line 12-14 where it says that it is confidential not subject to open records and then it says it can be released with written consent. I maintain that you cannot release confidential information no matter who you are if you want it released it needs to be exempt.

Senator Luick: If it is confidential and both parties agree to release the information it is up to them. What does exempt mean?

Chairman Hogue: Exempt from disclosure under our open records law because the department of ag will come into possession of these records that the parties submit to them as part of a mediation attempt to resolve a dispute.

If you were to go down to the department and request those records they will tell you that they are exempt and not subject to the open records law. I do not attach any special legal significance to the term confidential. The legal profession uses the term privilege, records from attorney and client are privileged, and they not required to disclose them except upon an order to do so by a court. I am not sure there is a special meaning to that a part from the open records. If I go to mediation and I am the private party and there is a surface dispute with an oil company confidential means that I cannot release the information to someone without the oil company's permission.

Senator Armstrong: Exempt means that they do not have to provide it but the agency could disclose it, confidential means that the agency cannot disclose it without everybody's permission.

Chairman Hogue: It started out between lenders and farmers but it has evolved into mediation between farmers, surface owners, oil companies.

Senator Grabinger: Why aren't we saying that if all parties agree then it is privileged information otherwise it is open? It seems to me it would be open and if all parties agree that it is privileged and confidential that is how it becomes privileged.

Chairman Hogue: If the parties chose to go through mediation and didn't use the ag commissioner they would be able to do so by hiring a private mediator and everything would be confidential. However sometimes these disputes are not large enough to warrant the hiring of a private mediator; the other advantage is that the commissioner's office develops some expertise as to what is a reasonable compromise and what the scopes of the issues are.

Senator Armstrong: Because otherwise the big companies won't agree to it. If it isn't private they won't go. This is a way to get a resolution for a landowner without significant legal cost.

Senator Luick made a motion for a do pass with a second by Senator Armstrong, there was no further discussion, roll was taken, the motion passed 6-0-0 with Senator Luick carrying the bill to the floor.

Date: 3/17/15

Roll Call Vote #: 1

2015 SENATE STANDING COMMITTEE
ROLL CALL VOTE

BILL/RESOLUTION NO. 1180

Senate JUDICIARY Committee

Subcommittee

Amendment LC# or Description: _____

- Recommendation:
- Adopt Amendment
 - Do Pass Do Not Pass Without Committee Recommendation
 - As Amended Rerefer to Appropriations
 - Place on Consent Calendar

Other Actions: Reconsider _____

Motion Made By Sen. Luick Seconded By Sen. Armstrong

Senators	Yes	No	Senators	Yes	No
Chairman Hogue	✓		Sen. Grabinger	✓	
Sen. Armstrong	✓		Sen. C. Nelson	✓	
Sen. Casper	✓				
Sen. Luick	✓				

Total (Yes) 4 No 0

Absent 0

Floor Assignment Sen. Luick

REPORT OF STANDING COMMITTEE

HB 1180: Judiciary Committee (Sen. Hogue, Chairman) recommends DO PASS
(6 YEAS, 0 NAYS, 0 ABSENT AND NOT VOTING). HB 1180 was placed on the
Fourteenth order on the calendar.

2015 TESTIMONY

HB 1180

COMMISSIONER
DOUG GOEHRING



#1
HB 1180
1-21-15
nda@nd.gov
www.nd.gov/nda

**NORTH DAKOTA
DEPARTMENT OF AGRICULTURE**

STATE CAPITOL
600 E BOULEVARD AVE DEPT 602
BISMARCK ND 58505-0020

**Testimony of Ken Junkert, Acting North Dakota Mediation Service Administrator
North Dakota Department of Agriculture
House Bill 1180
House Judiciary Committee
Prairie Room
January 21, 2015**

Chairman Koppelman and members of the House Judiciary Committee, I am Ken Junkert, the Acting North Dakota Mediation Service (NDMS) Administrator at the North Dakota Department of Agriculture. Thank you for the opportunity to appear before the committee. I am here today on behalf of Agriculture Commissioner Doug Goehring and the Credit Review Board in support of HB 1180, which amends North Dakota Century Code (NDCC) § 6-09.10-10 to address the confidential nature of mediation communication and meetings.

Section 1 of this bill protects information NDMS captures while considering, initiating, conducting, continuing, or reconvening a mediation and closes meetings to individuals who are not a party to the mediation regardless of the subject matter of the dispute. These changes will ensure NDMS' mediation process remains confidential and effective.

Confidentiality is at the very core of an effective mediation session and is critical to the successful resolution of disputes. Many parties are understandably uneasy exchanging potentially sensitive information without the reasonable assurance that the mediation session, and

what takes place within it, will be held in confidence by the parties. Without a free flow and exchange of information among the parties, a mediation process is unlikely to make progress and achieve resolution of the difficult issues before it. As such, appropriate parameters of confidentiality remain a strict tenant of mediation. This bill accomplishes that, in that it provides for that necessary confidentiality, protecting all parties to the mediation.

Accordingly, Chairman Koppelman and committee members, Commissioner Goehring and the Credit Review Board urge a "do pass" on HB 1180. I would be happy to answer any questions you may have.

Thank you.

#1-1

COMMISSIONER
DOUG GOEHRING



ndda@nd.gov
www.nd.gov/ndda

NORTH DAKOTA
DEPARTMENT OF AGRICULTURE
STATE CAPITOL
600 E BOULEVARD AVE DEPT 602
BISMARCK ND 58505-0020

Testimony of Ken Junkert, Acting North Dakota Mediation Service Administrator
North Dakota Department of Agriculture
House Bill 1180
Senate Judiciary Committee
Prairie Room
March 17, 2015

Chairman Hogue and members of the Senate Judiciary Committee, I am Ken Junkert, the Acting North Dakota Mediation Service (NDMS) Administrator at the North Dakota Department of Agriculture. Thank you for the opportunity to appear before the committee. I am here today on behalf of Agriculture Commissioner Doug Goehring and the Credit Review Board in support of HB 1180, which amends North Dakota Century Code (NDCC) § 6-09.10-10 to address the confidential nature of mediation communication and meetings.

Section 1 of this bill protects information NDMS captures while considering, initiating, conducting, continuing, or reconvening a mediation and closes meetings to individuals who are not a party to the mediation regardless of the subject matter of the dispute. These changes will ensure NDMS' mediation process remains confidential and effective.

Confidentiality is at the very core of an effective mediation session and is critical to the successful resolution of disputes. Many parties are understandably uneasy exchanging potentially sensitive information without the reasonable assurance that the mediation session, and

what takes place within it, will be held in confidence by the parties. Without a free flow and exchange of information among the parties, a mediation process is unlikely to make progress and achieve resolution of the difficult issues before it. As such, appropriate parameters of confidentiality remain a strict tenant of mediation. This bill accomplishes that, in that it provides for that necessary confidentiality, protecting all parties to the mediation.

Accordingly, Chairman Hogue and committee members, Commissioner Goehring and the Credit Review Board urge a "do pass" on HB 1180. I would be happy to answer any questions you may have.

Thank you.