

2019 SENATE INDUSTRY, BUSINESS AND LABOR

SB 2354

2019 SENATE STANDING COMMITTEE MINUTES

Industry, Business and Labor Committee Roosevelt Park Room, State Capitol

SB 2354
2/4/2019
Job #32070

- ☐ Subcommittee
☐ Conference Committee

Committee Clerk: Amy Crane

Explanation or reason for introduction of bill/resolution:

Relating to restoration of real property as a measure of damages.

Minutes:

Att. #1-3

Chairman Klein: Opened the hearing on SB 2354. A quorum was present.

Senator Heckaman, District 23: See attachment #1 for testimony in support of the bill.

Troy Coonz, North Dakota Land Owners Association: See attachment #2 for testimony in support of the bill.

(10:00)Chairman Klein: What we're asking for is to bring a value that isn't a part of the real value but is kind of a sentimental value, historical, other additional value? I'm trying to get a handle on what you really mean.

Troy: For example, in Montana, industry damaged the water system of a small town. It was determined that the damage to the water system was \$12 million, but the whole cost of the town was \$8 million, because of the law they decided to fix the water system for \$12 million, which is greater than the value of the property but there were personal reasons, that had another value to it because that was people's homes.

Chairman Klein: Because of people's homes? So in North Dakota they would have only gotten the \$8 million?

Troy: Yes, because it was their homes. That's where the jury and the court would decide if it truly had a personal value. If it was on a personal item only, like a car, this would not apply. Because items are replaceable, but land is not. It's got a real value and a personal value. This is being implemented all across the country.

Chairman Klein: Have we had this bill somewhere before in the North Dakota legislature?

Troy: There was something similar, I believe, six years ago.

Senator Piepkorn: What this bill says to me, is that regardless of sentimental value or anything like that, is that regardless of what it costs to restore the property to its condition before it was damaged, that's what the transgressor will have to pay to restore it. For example, if you've got a \$1000 pasture, if a ditch is dug there and it costs \$2000 to restore it to its original condition, that's what they are gonna have to pay? If it costs more to fix the damages then they will pay that amount, and not just what the actual property is worth? People can't just take the money and go, and leave the property damaged?

Troy: So you understand, it allows the real property owner the option of this, it still would get decided through the court system but for a judge and jury, what values could be put on that, and it would be so they would be compensated to that level to remedy the damage.

Chairman Klein: However, I think most likely they would replace that ditch, but if you have a garden at the end of that ditch, and they say they're only giving you \$1000, but I had \$500 tied up in that garden, this is a \$1500 project. Am I close here because now we're adding additional value over and above what the replacement value would have been, you want to help we with that? Because we're asking someone to say this is more than just dirt and a ditch, we've got the value of our garden and we want that also?

Troy: The intent of the bill is to, when determined that it has a personal value about just the monetary of the property, that you can be compensated about the \$1000 for restoration of the ditch and whatever negative effect there was.

Chairman Klein: The personal value, so that's over and above the actual cost?

Senator Piepkorn: To clarify, then what I'm asking you again is, that reimbursement, or whatever it is, then you would restore that garden area to its original condition and not just take the money and pocket it.

Troy: Again, the intent of this bill, and across the nation how it is used, so whatever value is above the value of the property, it would get used to do the restoration and compensate the person for the personal loss, personal value above that.

Chairman Klein: The key word here is personal reasons. Something over and above the value that, you built a hunting hut on something and it just happened to be on the value of the NW water pipeline and they just gave you the value of the dirt and not where you had your blind set up. Which would be a personal addition that you would like to be compensated for?

Troy: Again, to remember that the judge and jury will determine if there is personal value there. I would say on many of those instances, they might not find in that favor. But if you're looking at a piece of property that can't be replaced that's 100 years old, you don't just buy more property like that.

Chairman Klein: So if this is going to the before the court anyway, isn't there an opportunity to plead your case that this is a personal reason and the can't the courts take that into account too? Or do they go to the law and say well this is as far as I can go. Isn't there an opportunity for the plaintiff to say well this is the value because of. Can't you do that even in that case.

Troy: Yes, you do go before the judge and jury, but this language has been implemented all across the country, in most all states and is being looked at more and more in case law so that leads me to believe that they feel this is necessary to get to that point.

Senator Burckhard: Let's say there's a 1950s oil well and it's been leaking fluid for years and the land around it is ruined. So to fix it would cost a lot of money, is that the right thing? To mediate that soil would take a lot of money, is that what we're talking about here or is that another case?

Troy: No, I believe that would be different.

Chairman Klein: I think the key term here is 'personal reasons', if that soil and they had some sort of additional personal building there and they had to take all of that out, remove it, and didn't replace the hunting shack. That would be the personal reason. Because they would restore the rest for what it's worth but we're asking for something over and above just the actual value of the land. It's a personal.

Troy: Again, the key here would be, say that property was worth \$1000 and let's say that it was gonna cost \$1200 to remediate that, it allows you to go above the value of that property instead of leaving and stopping at that \$1000.

Senator Kreun: There are 58 categories in 32-03, you don't indicate where this would fit into that in the century code. And just looking at the Century code 32-03-05 is when interest or discretion of court or jury in an action for the breach of an obligation, not arising from contract, in every case of oppression, fraud, or malice, is what you're basically indicating, interest may be given in the discretion of the court or jury. That's just what you said, this goes to the court or jury that's 32-03-05, does exactly what you're asking here. And then there's another one, if there's interest in damages, even after damages resulting after commencement has started you still have the award of a judicial proceeding to determine resulting after the commencement. So even after the commencement of the suit or whatever, certain results in the future can be added to it. So if those are the things that you're asking, you haven't indicated where this would fit in 32-03 at all, I don't know where you would put it. But there's 58 different areas, and the title of the chapter is Damages and Compensatory Relief, so each one of those 58 areas relate to what you're saying and I'm wondering if what you're asking doesn't already fit in what we have in law. Have you looked in that do you know where it would fit?

Troy: There is all that listing, we have had it reviewed by several different lawyers, and in our law, they feel like this is needed for those reasons personal to be better than the current language, and that is why most other states have adopted this language already, except for North Dakota. And if you would like, I can get you the exact spot.

Senator Kreun: I would because if you go through this there's 58 different measures on how to compensate people for this and the first one that popped out at me is fraud, malice, oppression, all of that is listed right in there and its left up to a court and jury what you're exactly saying is in your testimony.

Troy: With all of those, it does not have the personal reasons language and that's the difference, here where the judge and the jury can go above and beyond the value there and that's why across the nation they're switching to this language. I understand that that's what you see but with our legal review that's not how it was seen by them.

Bruce Bale, Mandan: testified in support of the bill. I don't presume to know what North Dakota law is. The song money can't buy me love I think applies here. But you have an old jalopy that gets you to work. You were dumb enough to insure it for the body value. It gets totaled. The insurance company gives you \$800. Good luck trying to find that car. You're gonna have to pay \$2000 cause that's what it costs to get that car and that's not the one your grandpa gave you. I think that's the direction we're headed. So there was an old bachelor dairy farmer, well known in the area a rodeo went by his farm. I don't know if he had any equipment or drove a car. He was a bachelor farmer, milked his all the 60 head every morning and evening you'd see the lights on. He was quite well known. He farmed with a team of horses. The state realized it was getting pretty busy out there and they wanted to build a highway, and they got it all lined up, there were people surveying on his property and about the time they were ready to go on the interstate/highway, he hung himself. It created quite a stir. The mention has been made that a majority of the states have switched their law. If a judge is constrained by whatever state he is sitting in, he has to maybe turn to the law, or a defendant in this case asked to pay a trespasser we're calling him, who went on someone else's property, the judge would have to say in North Dakota here is the law. It sounds like this proposed provision, would cover, doesn't go that far. It's the very minority view. If instead it said there can be special values that are personal to someone. But that personal isn't always just one person's odd value. The garden that grandma put in. or the garden space the town put in. There are native cultural values, you could have a religious group, off in the boonies like the Mennonites might be out somewhere that it's found to have the best or easiest to get crude or other resource. Someone get imminent domain and off they go and ruins more things, how do you restore that? Well there's a ceiling, its fair market value. At one time highest and best use, was a measure of what you could do with property and that always meant build and develop. The highest and best use has changed over time. What else should that or could that be used for? Should that Missouri River Correctional center now be used for a park? Is that really the highest and best use, not a sky scraper or not a better correctional center, same idea there. I understand the idea of you can't just take the value, you need to restore the property. Put it back the way it was. I think a court could require that, it might be called something like specific performance. Bought a home in moderately priced neighborhood. You're building too much, you put in a pool, six bedrooms, landscaping, and they're gonna retire there. And now that home is taken from them. And here's the value of the vacant lot, maybe a vacant lot with a house on it like the other ones in the neighborhood but it's not what they had there. That's specific to them. We shouldn't encourage more courtroom filling litigation. But each property and circumstance may turn on its particulars. There's a focus here on particulars. Well that's always unique to one party personally, but it's not so; an entire town or an entire tribe or nation of people, a religious group. Those types of things are irreplaceable. And can be harder to find more property just like the one I had to leave. It's reasonably amenable to rebuilding or moving too. So yes, I think in court you could plead that anyway, but the judge is gonna have to look at that and back what is North Dakota law. You're constrained, North Dakota has decided through its legislatures we're gonna stick with this earlier way. This is a very narrowly held minority law view. There's another one, 20-year-old well is leaking but suppose it's a new well. And we promised, we've got the proper

equipment. We're a model oil driller. There's a rule in courts I believe called the thing skull rule, you take the plaintiff, as you find him. I slap somebody upside the head he's my buddy it doesn't hurt him at all. I get carried away I slap the next guy upside the head, he had a plate in his head and that caused damage. He's the plaintiff. I don't get to pay only for lightly tapping somebody on the side of the head, I have to pay that guy for what happened for my actions. And it's specific and personal to him but that's broadly recognized by the law I believe. I appreciate Senator Kreun bringing up North Dakota century code 32-03-05, yes there the judge can aware, I think you mentioned interest which I think would just be monetary, you were referring to a person's and I'm not sure if that would be bank account interest on the money. There are general damages, special damages, damages and compensatory relief, fraud not here, malice not here, oppression not really here. But in the interest of helping a bit, that's it.

Senator Piepkorn: Again, you bring up a point, there's an infusion into the language of the bill that's just not there, and that is something like sentimental value. What the bill says, and it seems clear, if the owner has personal reasons to restore the property the cost of restoration of the real property is the appropriate measure of damages even if it costs more to restore it to that original state, is great than the market value, simple as that. And all of this conversation about personal value and it was grandma's and that's worth whatever to me, is not addressed in the language of this bill. I think we're just making it more complicated than it needs be.

Bruce: Personal, might be a great way, though, in the bill to address the whole globe of what might happen. One person, the farmer who had no equipment and no more highway, I'm out of here. But if you had personal, you can have many persons. That half of the town, let's call it Butte, Montana for instance, that is no longer there. There is a big acid pit after the copper mining company left, all those persons can be compensated for something beyond mere market replacement value of even the land before it was ever mined much less the pit.

(36:12) Todd Kranda, Kelsch, Ruff, Kranda, Nagle and Ludwig Law firm, on behalf of the North Dakota Petroleum Council: See attachment #3 for testimony in opposition of the bill.

(43:20) Senator Roers: What do you say about the fact that all these other states have adopted this particular law?

Todd: I can't comment really; I haven't done the research. I think our law is working well. Senator Kreun talked about how many sections of law in the chapter that talks about damages and compensatory acts. So there are some flexibilities that the court has but when you're talking about opening it up to some sentimental personal reasons and personal value, there has got to be some reasonable limits. And you've established that already with the market value and restoration is part of it. Restoration is the first thing you look to but there has to be some top end level that you establish some reasonableness.

Senator Piepkorn: You talk about restoration for oil and gas spills or operation is already required under existing law to remediate damaged property to the satisfaction of state regulators. So are the standards of state regulators what, and again, I see this bill as much simpler than what's being interpreted. But according to my interpretation of the words in this

bill, are the standards of the regulators to restore the real property, to fully restore the property to its original condition is that the standard of the regulators or is it less than that?

Todd: Tesoro is spending \$30 million plus, for 15-18 acres, that's the standard that I was talking about in that paragraph, that's what the regulators, the department of health and the industrial commission established. There wasn't a set limit by the regulators saying how much they can spend, they spent what they had to, to clean it up.

Chairman Klein: They are required to put it back to the way it was, no cost to the land owner, and there's an oversight by the industrial commission that they are fulfilling their part of the bargain to put that land back to the way it was.

Todd: I'm sure the land owner got compensated for crop loss.

John Ward, attorney/lobbyist, Association of North Dakota Insurers: testified in opposition. As far as the insurance industry is involved, what we would be looking at, it would be just impossible to assess damages when we look at personal reasons as being entirely subjective. I don't know how we would resolve any claims or anything else, it just gets into a world where it's such speculative measures that it would be nearly impossible to try and resolve anything. It would also create ambiguity in the law in North Dakota as regards the reasonable value versus the replacement value of property. It could create ambiguities between insurance contracts and state case law. this is a highly subjective standard and we would urge do not pass.

Senator Piepkorn: If the words personal reasons were removed would you accept it, or understand that it removes some of the subjectivity of it

John: The issue would still remain. What would be happening is we would be taking what is a pretty objective and clear standard that we have which is that if you can repair a piece of property that the reasonable cost for repairs is in there. And I think if you have a garden that is gone, it can be replaced. Here it goes beyond that, it's a new measure of damages that goes above and beyond. So if we're not talking about clear market value, the reasonable cost to replace something, it just makes you wonder what is going to be satisfactory that individual owner. That's part of the reason that in the oil and gas context, that's why we have regulators in the oil and gas, that are the ones that can make that statement.

Chairman Klein: But without the words personal reasons the bill doesn't do anything. Personal reasons are really what makes this bill. Otherwise we're back to just doing what we always do. Cause personal reasons is that subjective thing which would create that ambiguity as to how you would settle this. My personal reasons may differ and how do you determine that.

John: I think if we were to pass legislation along those lines, if we have a section of code that already says that, and we add personal reasons to the existing language that might give us some more ambiguity.

Bruce: I think I am more in favor. This bill has existed since 1961, some laws on the North Dakota books have existed since 1889, some of those were changes. The fact that it's on

the books, and maybe has served us fairly well until now. We're given a partial list of the states where this is majority law, there are four other states included in that that believe this kind of a law to be reasonable. Montana, Wyoming, Louisiana, Alaska, all have extensive oil activity some form of this kind of a bill works there, unless the litigators are having a free hand. What's the language, in those states? What works there? The fellow speaking on behalf of North Dakota Insurers, I bet they are in all fifty states, so somehow they are able to make their operations work there, maybe it's really expensive but I bet not everyone here who's damaged needs to go beyond a special or subjective or unique form of relief.

Senator Piepkorn: How do you spell your last name?

Bruce: B A L E

Chairman Klein: Closed the bill on SB 2354.

2019 SENATE STANDING COMMITTEE MINUTES

Industry, Business and Labor Committee Roosevelt Park Room, State Capitol

SB 2354
2/6/2019
Job #32257

- ☐ Subcommittee
☐ Conference Committee

Committee Clerk: Amy Crane

Explanation or reason for introduction of bill/resolution:

Relating to restoration of real property as a measure of damages.

Minutes:

Att. #1

Chairman Klein: Opened the committee work session on SB 2354.

Chairman Klein: There were some questions on personal reasons and how that impacts the bill.

Johannes: Provided neutral testimony on the bill. I did a bit of research, in the general provisions of the century code, it defines what personhood means, it defines property insurance to include property both real and personal property, and then defines real property as shall be coextensive with lands tenants and hereditaments, property that you inherit.

Senator Piepkorn: The first word? Extensive?

Johannes: It's going to be permanent fixtures also associated with your property. The land, tenements and any property that can be inherited from a person to a person. 32-03-09.1 that's currently the statute that talks about the measure of damages and injury to property not arising from contract. That would be the correct statute that governs property right now. As far as the insurance department understands it, that's the one that will decide on how property is valued.

Senator Kreun: Which one?

Johannes: 32-03-09.1. It appears that 2354 would add an additional measure of damages, it wasn't identified in the statute itself. I believe the courts would see this as legally superseding that statute when it comes to real property. I didn't have a chance to look into exactly what personal reasons means, but generally, it would be up to a court to determine what personal reasons are. If there actually is a reason, a person who wants to restore this property rather than get value for this. However, because those words are not limited, I don't believe a trial judge would be limited to just that interpretation, it would be up to a court to decide whose personal reasons are persuasive enough to determine this extra bit of value

on the property. The department is neutral on the bill with the caveat that it would allow some interpretation of what those personal reasons are.

Chairman Klein: We're creating a concern among the industry? A slippery slope some would call it?

Johannes: In my opinion those concerns are valid, the bill doesn't specify enough for a court to know what a valid personal reason would be. We heard substantial testimony from the industry on both sides of the argument. Their concerns have merit. This bill would also impact and benefit people with regular property, homes, this would impact just your average real estate. Apartment buildings. Anything where there is liability and this is not part of the contract.

Senator Piepkorn: All these legal terms, and definitions. To me, the simple thing to do would be to just delete personal reasons and then the bill would restore the real property to the way it was before whatever happened. Restore it to the way it was.

Chairman Klein: Isn't that currently required?

Johannes: Currently under the statute that I read, 09.1, it caps the value at the value of the land. So there may be a unique circumstance where it would be covered. If there was a house somewhere and when the house was purchased the value was higher than it is now, and now by a third party there was a flood. That land may be worth less, that land itself, than with the structure on it. That person would be compensated for the current value of that land. Senator Piepkorn makes a good point that the real question is remove the ambiguity and just say for real property the measure of damages, is this. It's gonna be the restoration cost, that's one way to go. It would be a new direction. That's gonna cause some change. The other question is leave it how it is. That is how ownership of land works, there's a certain amount of risk and change that happens to your land.

Chairman Klein: In Mr. Coons' comments if a land owner can convince a jury that he or she has noneconomic reasons to restore a property, such as significant sentimental value. So they're still going before the judge and but what's happening primarily in western North Dakota is they're getting their value, that 1906 farm that was referenced that creates more sentimental value so they're getting the value of the land but it's just not like what you think the sentimental value should be.

Senator Kreun: I went through hundreds of these in the flood, and under 32-03-20 this says the measure of damages by tort. You can interpret that for intrinsic value whether it could be anticipated or not. So there is a compensation process in mind anyway, that if we want to go through this and you don't feel that this settlement was accurate, this would go to court and you could argue why the intrinsic value is greater than what the appraised value is. In my view this is already taken care of in several different areas of the code.

Johannes: I can't speak to that statute because I haven't reviewed it, but I wouldn't be surprised if a clever attorney was able to persuade the judge that there is more value in tort.

Senator Kreun: I was in court and we won every single one. Because in negotiations the actual amounts were more than we settled for in court because the intrinsic value is much greater than what the actual value is. And when you get in between even, the judge and/or jury both indicated a lower amount. They did give them a little more but not anywhere close. That's what happens, it's worth so much more than what you are advocating for. And we used these conversations in court and we came with very amicable, reasonable settlements for the city of Grand Forks and the complainant.

Chairman Klein: Is there still some discussion?

Senator Piepkorn: My thing is still the personal reasons, and the crafters don't want to be rid of that.

Senator Kreun: Moved Do Not Pass.

Senator Roers: Seconded.

A Roll Call Vote Was Taken: 6 yeas, 0 nays, 0 absent.

Motion Carried.

Senator Kreun will carry the bill.

See attachment #1 for additional testimony submitted to the committee.

Date: 2/6
Roll Call Vote #: 1

2019 SENATE STANDING COMMITTEE
ROLL CALL VOTES
BILL/RESOLUTION NO. 2354

Senate Industry, Business and Labor 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 Kneun Seconded By Roers

Senators	Yes	No	Senators	Yes	No
Chairman Klein	X		Senator Piepkorn	X	
Vice Chairman Vedaa	X				
Senator Burckhard	X				
Senator Kreun	X				
Senator Roers	X				

Total (Yes) 6 No 0

Absent 0

Floor Assignment Kneun

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

REPORT OF STANDING COMMITTEE

SB 2354: Industry, Business and Labor Committee (Sen. Klein, Chairman) recommends **DO NOT PASS** (6 YEAS, 0 NAYS, 0 ABSENT AND NOT VOTING). SB 2354 was placed on the Eleventh order on the calendar.

2019 TESTIMONY

SB 2354

SB 2354

SENATE INDUSTRY, BUSINESS, AND LABOR COMMITTEE

February 4, 2019

Chairman and Members of the Committee: I am Senator Joan Heckaman, D-23, and I am here to introduce SB 2354 to you this morning. I agreed to introduce this bill to have a conversation on what is going on in North Dakota and a possible solution to those impacted.

This bill relates to restoring property to its original condition even if the cost is greater than the market value of the property.

To present further information and rational for this bill, I would introduce you to a member of the Northwest Landowner's Association.

Please direct your questions to him.

Thank you for your consideration of SB 2354.

Senator Joan Heckaman

Troy Coons
Northwest Landowners Association
Industry, Business, and Labor Committee
Testimony for SB 2354
February 4, 2019

Good morning, Chairman Klein and members of the committee, thank you for taking my testimony into consideration today.

My name is Troy Coons, and I am the Chairman of the Northwest Landowners Association. Northwest Landowners Association represents over 525 farmers, ranchers, and property owners in North Dakota. Northwest Landowners Association is a nonprofit organization, and I am an unpaid lobbyist.

Northwest Landowners Association appreciates the opportunity to submit comments regarding SB 2354, related to restoration value as a measure of damage for certain real property. We support this bill. Currently, if a landowner's land is damaged or destroyed due to negligence or intentional trespass, North Dakota law limits the recovery in court to the lesser of the property's market value or restoration damages. That law results in unjust and unfair outcomes, especially in rural areas. For example, some rural lands might have a market value of \$1,000 or \$2,000/acre. If that land is damaged or destroyed by protests, spills, or any number of calamities, the most that the landowner could recover is \$1,000 or \$2,000 per acre. That is very rarely, if ever, enough to restore the land. Even if the destroyed property is something that clearly has personal value to its owner—such as the garden at the homestead of a century farm—the most that the landowner could recover is that land's market value.

North Dakota is one of the few states left in the United States that does not allow landowners to obtain restoration damages when land is damaged or destroyed, and that land has personal value to its owner. Over the years, most states have modified their laws. The language in SB2353 follows, nearly verbatim, the Restatement of Torts, which restates the law of the majority of the states. The Restatement includes a helpful example:

Even in the absence of value arising from personal use, the reasonable cost of replacing the land in its original position is ordinarily allowable as the measure of recovery. Thus if a ditch is wrongfully dug upon the land of another, the other normally is entitled to damages measured by the expense of filling the ditch, if he wishes it filled. If, however, the cost of replacing the land in its original condition is disproportionate to the diminution in the value of the land caused

Troy Coons
Northwest Landowners Association
Industry, Business, and Labor Committee
Testimony for SB 2354
February 4, 2019

by the trespass, unless there is a reason personal to the owner for restoring the original condition, damages are measured only by the difference between the value of the land before and after the harm. This would be true, for example, if in trying the effect of explosives, a person were to create large pits upon the comparatively worthless land of another.

On the other hand, if a building such as a homestead is used for a purpose personal to the owner, the damages ordinarily include an amount for repairs, even though this might be greater than the entire value of the building. So, when a garden has been maintained in a city in connection with a dwelling house, the owner is entitled to recover the expense of putting the garden in its original condition even though the market value of the premises has not been decreased by the defendant's invasion.

Courts in the states of Louisiana, Maryland, Colorado, Delaware, Illinois, Rhode Island, Alaska, Ohio, Oregon, South Carolina, Arkansas, New Jersey, New Mexico, North Carolina, and Wyoming all have caselaw that directly and favorably cite to these examples. Other states also use similar language. In our neighboring state of Montana, for example, the state Supreme Court explained that "an award of restoration damages must be available to compensate a plaintiff fully for damages to real property when diminution in value fails to provide an adequate remedy ... the loss in market value is a poor gauge of damage' when the property gains its principal value from personal use rather than for pecuniary gain.")

SB2354 is limited in scope, carefully tailored, and has been accepted as law by the majority of states. Under this bill, the court still has to determine what evidence may be considered by a jury. The jury then would have to determine if land has personal value to its owner. The bill allows landowners to obtain a fair result if real property that has personal value to its owner is damaged or destroyed by allowing damages sufficient to restore that property.

Northwest Landowners Association is in favor of this proposed bill, and asks that you pass SB 2354.

SB2354 2/4/19 Att #2 p.3

Troy Coons
Northwest Landowners Association
Industry, Business, and Labor Committee
Testimony for SB 2354
February 4, 2019

Thank you for taking the time to consider our comments. I am available for any questions.

Sincerely,



Troy Coons, Chairman

Northwest Landowners Association

Troy Coons
Northwest Landowners Association
Industry, Business, and Labor Committee
Testimony for SB 2354
February 4, 2019

A list of cases favorably citing to restoration damages when land has personal value to owner follows below. Note that because different states may use slightly different language in their cases or statutes, this list does not represent every state that has adopted this rule:

Montana: Sunburst Sch. Dist. No. 2 v. Texaco, Inc., 2007 MT 183, ¶ 38, 165 P.3d 1079

Wyoming: Anderson v. Bauer, 681 P.2d 1316, 1324 (Wyo. 1984)

Maryland: Regal Const. Co. v. West Lanham Hills Citizen's Ass'n, 260 A.2d 82, 84 (Md. 1970)

Delaware: Brandywine 100 Corp. v. New Castle Cty., 527 A.2d 1241 (Del. 1987)

Louisiana: Roman Catholic Church of Archdiocese of New Orleans v. Louisiana Gas Serv. Co., 618 So. 2d

Colorado: Board of Cty. Comm'rs of Weld Cty. v. Slovek, 723 P.2d 1309, 1315 (Colo. 1986)

Illinois: Jones v. Consolidation Coal Co., 528 N.E.2d 33, 38 (Ill. App. Ct. 1988)

Alaska: Wiersum v. Harder, 316 P.3d 557, 562 (Alaska 2013)

Rhode Island: Norden v. United States, 187 F. Supp. 594, 596 (D.R.I. 1960)

Ohio: Francis Corp. v. Sun Co., Inc., No. 74966, 1999 WL 1249534, at *2 (Ohio Ct. App. Dec. 23, 1999)

Oregon: Hanset v. General Const. Co., 589 P.2d 1117, 1119 (Or. 1979)

South Carolina: Vaught v. A.O. Hardee & Sons, Inc., 623 S.E.2d 373, 378 (S.C. 2005)

Arkansas: Felton Oil Co., L.L.C. v. Gee, 182 S.W.3d 72, 80 (Ark. 2004)

New Jersey: Martin v. Bank of Am., No. A-2128-15T4, 2018 WL 3614171, at *10 (N.J. Super. Ct. App. Div. July 30, 2018)

New Mexico: McNeill v. Burlington Res. Oil & Gas Co., 153 P.3d 46, aff'd, (N.M. App., 2008).

North Carolina: BSK Enterprises, Inc. v. Beroth Oil Co., 783 S.E.2d 236, 243 (N.C. Ct. App. 2016)

**Testimony in Opposition to
SENATE BILL NO. 2354
Senate Industry Business and Labor Committee**

February 4, 2019

Chairman Klein, Senate Industry Business and Labor Committee members, for the record my name is Todd D. Kranda. I am an attorney with the Kelsch Ruff Kranda Nagle & Ludwig Law Firm in Mandan. I appear before you today as a lobbyist on behalf of the North Dakota Petroleum Council (NDPC) to oppose SB 2354.

NDPC represents more than 500 companies involved in all aspects of the oil and gas industry, including oil and gas production, refining, pipelines, transportation, mineral leasing, consulting, legal work, and oilfield service activities in North Dakota, and has been representing the energy industry since 1952.

SB 2354 is somewhat familiar and fairly similar to a proposal that was introduced and considered during the 2015 Session. A bill that attempted to change the measure of damages with injury to real property regarding restoration was introduced in the 2015 Session as HB 1468, copy attached. I have also attached for your reference a copy of the Bill Actions for HB 1468 which received a 14 to 0 Do Not Pass recommendation along with the relevant portion of the Journal of the House, page 578 from the 32nd Day, with the House vote defeating HB 1468 by a vote of 21 to 73 with 1 absent and not voting.

SB 2354 provides for a measure of damages to real property depending upon the "personal reasons" of the owner to require restoration regardless of the cost to do so, even if the restoration costs are greater than and exceed the actual market value of the property.

North Dakota law already has a statute that addresses the appropriate measure of damages for injury to property such as is being considered by SB 2354, it is Section 32-03-09.1. I have included for your reference a copy of Chapter 32-03 which covers judicial remedies with regard to damages and compensatory relief, and more specifically Section 32-03-09.1 for the type of situation being addressed by

SB 2354. Also, with regard to restoration for oil and gas spills or operations, industry is already required under existing law to remediate damaged property to the satisfaction of state regulators (DOH & NDIC).

NDPC is opposed to SB 2354 because it is completely unnecessary and is inconsistent with the judicial remedy already available for determining the measure of damages for injury to real property under Section 32-03- 09.1.

SB 2354 attempts to remove of the market value any cap for reasonableness on damages. By way of an example, if a land owner can show there is some damage to a piece of real property that has a market value of \$50,000 and there is a “personal reason” and desire to restore the property that is damaged, perhaps with an extreme effort at an unreasonable cost of upwards of \$50 million or even \$500 million, then that would be the amount of the damage claimed.

SB 2354 attempts to change the law on the objective standard for the measure of damages which has existed since 1961 when first introduced and passed in North Dakota (Section 32-03-09.1). SB 2354 could be interpreted as a trial lawyer’s bill to provide a litigation advantage. The bill would establish a new measure of damages for restoration regardless of the full market value of the impacted property. SB 2354 creates ambiguity and uncertainty as to the current reasonable objective standard for the measure of damages.

The current law with Section 32-03-09.1 provides that damages are presumed to be the reasonable costs of repair to restore the property, but if restoration is impossible or impractical, then damages are presumed to be the diminution in value of the property, which is the value before and after the damage.

In conclusion, NDPC urges your opposition to **SB 2259** and respectfully requests a **Do Not Pass** recommendation. Thank you and I would be happy to try to answer any questions.

15.0896.01000

Sixty-fourth
Legislative Assembly
of North Dakota

HOUSE BILL NO. 1468

2015
Session

Introduced by

Representatives Hunsakor, D. Anderson, D. Johnson

Senators O'Connell, Wanzek

1 A BILL for an Act to amend and reenact section 32-03-09.1 of the North Dakota Century Code,
2 relating to injury to property not from contract.

3 **BE IT ENACTED BY THE LEGISLATIVE ASSEMBLY OF NORTH DAKOTA:**

4 **SECTION 1. AMENDMENT.** Section 32-03-09.1 of the North Dakota Century Code is
5 amended and reenacted as follows:

6 **32-03-09.1. Measure of damages for injury to property not arising from contract.**

7 The measure of damages for injury to property caused by the breach of an obligation not
8 arising from contract, except when otherwise expressly provided by law, is presumed to be the
9 reasonable cost of repairs necessary to restore the property to the condition it was in
10 immediately before the injury was inflicted and the reasonable value of the loss of use pending
11 restoration of the property, unless restoration of the property within a reasonable period of time
12 is impossible or impracticable, in which case the measure of damages is presumed to be the
13 difference between the market value of the property immediately before and immediately after
14 the injury and the reasonable value of the loss of use pending replacement of the property.
15 ~~Restoration of the property shall be deemed impracticable when the reasonable cost of~~
16 ~~necessary repairs and the reasonable value of the loss of use pending restoration is greater~~
17 ~~than the amount by which the market value of the property has been diminished because of the~~
18 ~~injury and the reasonable value of the loss of use pending replacement.~~

SB2354 2/4/19 Att#3 p.4

North Dakota Legislative Branch

Bill Actions for HB 1468

2015
Session

Send me to Bill No. (9999):

HJ=House Journal; SJ=Senate Journal

Introduced by Rep. Hunskor, D. Anderson, D. Johnson

Introduced by Sen. O'Connell, Wanzek

A BILL for an Act to amend and reenact section 32-03-09.1 of the North Dakota Century Code, relating to injury to property not from contract.

Date	Chamber	Meeting Description	Journal
01/19	House	Introduced, first reading, referred Industry, Business and Labor Committee	HJ 171
01/27	House	Committee Hearing 02:00	
02/16	House	Reported back, do not pass, placed on calendar 14 0 1	HJ 548
02/18	House	Second reading, failed to pass, yeas 21 nays 72	HJ 578

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578

JOURNAL OF THE HOUSE

32nd DAY

HB 1376 passed.

SECOND READING OF HOUSE BILL

HB 1468: A BILL for an Act to amend and reenact section 32-03-09.1 of the North Dakota Century Code, relating to injury to property not from contract.

ROLL CALL

The question being on the final passage of the bill, which has been read, and has committee recommendation of DO NOT PASS, the roll was called and there were 21 YEAS, 72 NAYS, 0 EXCUSED, 1 ABSENT AND NOT VOTING.

YEAS: Boe; Boschee; Delmore; Froseth; Glassheim; Hofstad; Hogan; Holman; Hunskor; Johnson, D.; Kelsh; Kempenich; Klein; Mitskog; Mooney; Muscha; Onstad; Oversen; Steiner; Wallman; Zubke

NAYS: Amerman; Anderson, B.; Anderson, D.; Anderson, P.; Beadle; Becker, Rich S.; Becker, Rick C.; Bellew; Boehning; Brabandt; Brandenburg; Carlson; Damschen; Delzer; Devlin; Dockter; Dosch; Fehr; Guggisberg; Haak; Hanson; Hatlestad; Hawken; Headland; Johnson, M.; Kading; Karls; Kasper; Keiser; Kiefert; Klemin; Koppelman, B.; Koppelman, K.; Kreidt; Kretschmar; Laning; Larson; Lefor; Looyen; Louser; Maragos; Martinson; Meier; Mock; Monson; Nathe; Nelson, J.; Nelson, M.; Olson; Owens; Paur; Pollert; Porter; Rohr; Ruby; Sanford; Schatz; Schmidt; Schneider; Schreiber Beck; Seibel; Silbernagel; Skarphol; Streyle; Strinden; Sukut; Thoreson; Toman; Trottier; Vigasaa; Weisz; Speaker Belter

ABSENT AND NOT VOTING: Frantsvog

HB 1468 failed.

North Dakota Legislative Branch

Chapter 32-03

Damages and Compensatory Relief

Section	Section Name
32-03-01	Damages for any injury
32-03-02	Detriment defined
32-03-03	Damages resulting after action commenced
32-03-04	Interest on damages
32-03-05	When interest in discretion of court or jury
32-03-06	When accepting principal waives interest
32-03-07	When court or jury may give exemplary damages
32-03-08	When minor or incompetent subjected to exemplary damages
32-03-09	Measure of damages for breach of contract - Damages must be certain
32-03-09.1	Measure of damages for injury to property not arising from contract
32-03-09.2	Liability for willful damages to property
32-03-10	Damages for breach of obligation to pay money
32-03-11	Damages for breach of covenants in grants
32-03-12	Damages for breach of covenant against encumbrances
32-03-13	Damages for breach of agreement to convey realty
32-03-14	Damages for breach of agreement to buy realty
32-03-15	Damages for breach of carrier's obligation to accept freight, messages, or passengers
32-03-16	Damages for breach of carrier's obligation to deliver freight
32-03-17	Damages for carrier's delay
32-03-18	Damages for breach of warranty of agent's authority
32-03-19	Damages for breach of promise to marry
32-03-20	Measure of damages for tort
32-03-21	Damages for wrongful occupation of realty
32-03-22	Damages for willful detention of realty
32-03-23	Damages for conversion of personally
32-03-24	Presumption of damages cannot be repelled
32-03-25	Damages recoverable by lienholder
32-03-26	Damages for seduction
32-03-27	Damages for tenant's failure to surrender premises
32-03-28	Damages for tenant's willful holding over
32-03-29	Damages for forcible exclusion from realty
32-03-30	Damages for wrongful injuries to timber
32-03-31	What value of property to seller deemed to be
32-03-32	What value of property to buyer or owner deemed to be
32-03-33	When peculiar value to person deemed value
32-03-34	Value of title papers
32-03-35	Damages prescribed by this chapter exclude exemplary damages
32-03-36	Recovery not more than gained by performance
32-03-37	Damages must be reasonable
32-03-38	Nominal damages
32-03-39	Parental responsibility for minor children - Recovery limitations
32-03-40	Emergency treatment by firemen, policemen, or peace officers
32-03-41	Immunity for mitigating hazardous materials discharge - Exceptions
32-03-42	Limited liability for gratuitous health care provided amateur athletes
32-03-43	Wrongful life action prohibited - Definition
32-03-44	Immunity of officers, directors, and trustees of nonprofit organizations
32-03-45	Immunity of volunteers providing services for nonprofit organizations
32-03-46	Immunity of volunteer athletic coaches and officials
32-03-47	Definitions - Voluntary engineering services - Immunity
32-03-48	Definitions
32-03-49	Immunity from liability

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Section	Section Name
32-03-50	Confidentiality of critical incident stress management team proceedings and records
32-03-51	Limited liability of owner or operator of railroad
32-03-52	Damages for fraudulent use of social security number - Attorney's fees
32-03-53	Damage or destruction of crops, livestock, or commodities - Damages
32-03-54	Limited liability - Firearms
32-03-55	Immunity for report of suspected exploitation of disabled or vulnerable elderly adult
32-03-56	Immunity for theft of anhydrous ammonia
32-03-57	Liquefied petroleum gas dealers immunity from civil liability
32-03-58	Distribution of intimate images without or against consent - Remedies

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CHAPTER 32-03 DAMAGES AND COMPENSATORY RELIEF

32-03-01. Damages for any injury.

Every person who suffers detriment from the unlawful act or omission of another may recover from the person in fault a compensation therefor in money, which is called damages.

32-03-02. Detriment defined.

Detriment is a loss or harm suffered in person or property.

32-03-03. Damages resulting after action commenced.

Damages may be awarded in a judicial proceeding for detriment resulting after the commencement thereof or certain to result in the future.

32-03-04. Interest on damages.

Every person who is entitled to recover damages certain or capable of being made certain by calculation, the right to recover which is vested in the person upon a particular day, also is entitled to recover interest thereon from that day, except for such time as the debtor is prevented by law or by the act of the creditor from paying the debt.

32-03-05. When interest in discretion of court or jury.

In an action for the breach of an obligation not arising from contract and in every case of oppression, fraud, or malice, interest may be given in the discretion of the court or jury.

32-03-06. When accepting principal waives interest.

Accepting payment of the whole principal as such waives all claim to interest, unless interest is provided for expressly in the contract.

32-03-07. When court or jury may give exemplary damages.

Repealed by S.L. 1987, ch. 404, § 13, as amended by S.L. 1993, ch. 324, § 1.

32-03-08. When minor or incompetent subjected to exemplary damages.

A minor or person of unsound mind cannot be subjected to exemplary damages unless at the time of the act the minor or person of unsound mind was capable of knowing that it was wrongful.

32-03-09. Measure of damages for breach of contract - Damages must be certain.

For the breach of an obligation arising from contract, the measure of damages, except when otherwise expressly provided by the laws of this state, is the amount which will compensate the party aggrieved for all the detriment proximately caused thereby or which in the ordinary course of things would be likely to result therefrom. No damages can be recovered for a breach of contract if they are not clearly ascertainable in both their nature and origin.

32-03-09.1. Measure of damages for injury to property not arising from contract.

The measure of damages for injury to property caused by the breach of an obligation not arising from contract, except when otherwise expressly provided by law, is presumed to be the reasonable cost of repairs necessary to restore the property to the condition it was in immediately before the injury was inflicted and the reasonable value of the loss of use pending restoration of the property, unless restoration of the property within a reasonable period of time is impossible or impracticable, in which case the measure of damages is presumed to be the difference between the market value of the property immediately before and immediately after the injury and the reasonable value of the loss of use pending replacement of the property. Restoration of the property shall be deemed impracticable when the reasonable cost of necessary repairs and the reasonable value of the loss of use pending restoration is greater

than the amount by which the market value of the property has been diminished because of the injury and the reasonable value of the loss of use pending replacement.

32-03-09.2. Liability for willful damages to property.

Any person convicted of criminal mischief shall be responsible for the actual damages to real and personal property and such damages may be recovered in a civil action in a court of competent jurisdiction. Additionally, any minor against whose parents a judgment may be entered pursuant to section 32-03-39 for damages resulting from action of the minor shall be jointly and severally liable with the parents of the minor for such action up to the maximum amount provided in section 32-03-39 and solely liable for any damages over that amount. Any judgment rendered pursuant to this section shall not be discharged in bankruptcy and shall not be subject to the statutes of limitations provided in chapter 28-01, nor shall such judgment be canceled pursuant to section 28-20-35.

32-03-10. Damages for breach of obligation to pay money.

The detriment caused by the breach of an obligation to pay money only is deemed to be the amount due by the terms of the obligation, with interest thereon.

32-03-11. Damages for breach of covenants in grants.

The detriment caused by the breach of a covenant of seizin, of right to convey, of warranty, or of quiet enjoyment, in a grant of an estate in real property, is deemed to be:

1. The price paid to the grantor, or if the breach is partial only, such proportion of the price as the value of the property affected by the breach bore at the time of the grant to the value of the whole property.
2. Interest thereon for the time during which the grantee derived no benefit from the property, not exceeding six years.
3. Any expense properly incurred by the covenantee in defending the covenantee's possession.

32-03-12. Damages for breach of covenant against encumbrances.

The detriment caused by the breach of a covenant against encumbrances in a grant of an estate in real property is deemed to be the amount which has been expended actually by the covenantee in extinguishing either the principal or interest thereof, not exceeding in the former case a proportion of the price paid to the grantor, equivalent to the relative value at the time of the grant of the property affected by the breach as compared with the whole, or, in the latter case, interest on a like amount.

32-03-13. Damages for breach of agreement to convey realty.

The detriment caused by the breach of an agreement to convey an estate in real property is the difference between the price agreed to be paid and the value of the estate agreed to be conveyed at the time of the breach and the expenses properly incurred in examining the title, and in preparing to enter upon the land, and the amount paid on the purchase price, if any, with interest thereon from the time of the breach.

32-03-14. Damages for breach of agreement to buy realty.

The detriment caused by the breach of an agreement to purchase an estate in real property is deemed to be the excess, if any, of the amount which would have been due to the seller under the contract over the value of the property.

32-03-15. Damages for breach of carrier's obligation to accept freight, messages, or passengers.

The detriment caused by the breach of a carrier's obligation to accept freight, messages, or passengers is deemed to be the difference between the amount which the carrier had a right to charge for the carriage and the amount it would be necessary to pay for the same service when it ought to be performed.

32-03-16. Damages for breach of carrier's obligation to deliver freight.

The detriment caused by the breach of a carrier's obligation to deliver freight, when the carrier has not converted it to the carrier's own use, is deemed to be the value thereof at the place and on the day at which it should have been delivered, deducting the freightage to which the carrier would have been entitled if the carrier had completed the delivery.

32-03-17. Damages for carrier's delay.

The detriment caused by a carrier's delay in the delivery of freight is deemed to be the depreciation in the intrinsic value of the freight during the delay and also the depreciation, if any, in the market value thereof, otherwise than by reason of a depreciation in the intrinsic value, at the place where it ought to have been delivered between the day at which it ought to have been delivered and the day of its actual delivery.

32-03-18. Damages for breach of warranty of agent's authority.

The detriment caused by the breach of a warranty of an agent's authority is deemed to be the amount which could have been recovered and collected from the agent's principal if the warranty had been complied with and the reasonable expenses of legal proceedings taken in good faith to enforce the act of the agent against the agent's principal.

32-03-19. Damages for breach of promise to marry.

Repealed by S.L. 1997, ch. 51, § 40.

32-03-20. Measure of damages for tort.

For the breach of an obligation not arising from contract, the measure of damages, except when otherwise expressly provided by law, is the amount which will compensate for all the detriment proximately caused thereby, whether it could have been anticipated or not.

32-03-21. Damages for wrongful occupation of realty.

The detriment caused by the wrongful occupation of real property in cases not embraced in sections 32-03-22, 32-03-27, 32-03-28, and 32-03-29 is deemed to be the value of the use of the property for the time of such occupation, not exceeding six years next preceding the commencement of the action or proceeding to enforce the right to damages and the costs, if any, of recovering the possession.

32-03-22. Damages for willful detention of realty.

For willfully holding over real property by a person who entered upon the same as guardian or trustee for an infant or by right of an estate terminable with any life or lives after the termination of the trust or particular estate without the consent of the party immediately entitled after such termination, the measure of damages is the value of the profits received during such holding over.

32-03-23. Damages for conversion of personalty.

The detriment caused by the wrongful conversion of personal property is presumed to be:

1. The value of the property at the time of the conversion, with the interest from that time; or
2. When the action has been prosecuted with reasonable diligence, the highest market value of the property at any time between the conversion and the verdict, without interest, at the option of the injured party; and
3. A fair compensation for the time and money properly expended in pursuit of the property.

32-03-24. Presumption of damages cannot be repelled.

The presumption declared by section 32-03-23 cannot be repelled in favor of one whose possession was wrongful from the beginning by that person's subsequent application of the property to the benefit of the owner without the owner's consent.

32-03-25. Damages recoverable by lienholder.

One having a mere lien on personal property cannot recover greater damages for its conversion from one having a superior right thereto after the lien is discharged than the amount secured by the lien and the compensation allowed by section 32-03-23 for loss of time and expenses.

32-03-26. Damages for seduction.

Repealed by S.L. 1997, ch. 51, § 40.

32-03-27. Damages for tenant's failure to surrender premises.

For the failure of a tenant to give up the premises held by the tenant, when the tenant has given notice of intention to do so, the measure of damages is double the rent which the tenant otherwise ought to pay.

32-03-28. Damages for tenant's willful holding over.

For willfully holding over real property by a tenant, after the end of the term and after notice of intention to evict has been duly given and demand of possession made, the measure of damages is double the yearly value of the property for the time of withholding, in addition to compensation for the detriment occasioned thereby.

32-03-29. Damages for forcible exclusion from realty.

For forcibly ejecting or excluding a person from the possession of real property, the measure of damages is three times such a sum as would compensate for the detriment caused to the person by the act complained of.

32-03-30. Damages for wrongful injuries to timber.

For wrongful injuries to timber, trees, or underwood upon the land of another, or removal thereof, the measure of damages is three times such a sum as would compensate for the actual detriment, except when the trespass was casual and involuntary or committed under the belief that the land belonged to the trespasser, or when the wood was taken by the authority of highway officers for the purposes of a highway. In such a case the damages are a sum equal to the actual detriment.

32-03-31. What value of property to seller deemed to be.

In estimating damages, the value of property to a seller thereof is deemed to be the price which the seller could have obtained therefor in the market nearest to the place at which it should have been accepted by the buyer and at such time after the breach of the contract as would have sufficed with reasonable diligence for the seller to effect a resale.

32-03-32. What value of property to buyer or owner deemed to be.

In estimating damages, except as provided by sections 32-03-33 and 32-03-34, the value of property to a buyer or owner thereof deprived of its possession is deemed to be the price at which the buyer or owner might have bought an equivalent thing in the market nearest to the place where the property ought to have been put into such person's possession, and at such time after the breach of duty upon which that person's right to damages is founded as would suffice with reasonable diligence for that person to make such a purchase.

32-03-33. When peculiar value to person deemed value.

When certain property has a peculiar value to a person recovering damages for deprivation thereof or injury thereto, that value may be deemed to be its value against one who had notice thereof before incurring a liability to damages in respect thereof or against a willful wrongdoer.

32-03-34. Value of title papers.

For the purpose of estimating damages, the value of an instrument in writing is presumed to be equal to that of the property to which it entitles its owner.

32-03-35. Damages prescribed by this chapter exclude exemplary damages.

The damages prescribed by this chapter are exclusive of exemplary damages and interest except when those are mentioned expressly.

32-03-36. Recovery not more than gained by performance.

Notwithstanding the provisions of this chapter, no person can recover a greater amount in damages for the breach of an obligation than the person could have gained by the full performance thereof on both sides, except in the cases wherein exemplary damages or penal damages are authorized, and in the case specified in section 36-21-13.

32-03-37. Damages must be reasonable.

Damages in all cases must be reasonable, and when an obligation of any kind appears to create a right to unconscionable and grossly oppressive damages contrary to substantial justice, no more than reasonable damages can be recovered.

32-03-38. Nominal damages.

When a breach of duty has caused no appreciable detriment to the party affected, the party may recover nominal damages.

32-03-39. Parental responsibility for minor children - Recovery limitations.

Any municipal corporation, county, township, school district, or department of the state of North Dakota, or any person, partnership, corporation, limited liability company, association, or religious organization, whether incorporated or unincorporated, shall be entitled to recover damages in a civil action in an amount not to exceed one thousand dollars in a court of competent jurisdiction from the parents of any minor, living with a parent, who shall maliciously or willfully destroy property, real, personal, or mixed, belonging to such municipal corporation, county, township, school district, or department of the state of North Dakota, or person, partnership, corporation, limited liability company, association, or religious organization.

Recovery shall be limited to actual damages in an amount not to exceed one thousand dollars, in addition to taxable court costs.

32-03-40. Emergency treatment by firemen, policemen, or peace officers.

Any fireman, policeman, or peace officer who in good faith renders emergency care at the scene of an emergency in this state shall be expected to render only such emergency care as in such person's judgment is at the time indicated and shall not be liable for any civil damages for acts or omissions done in the person's good-faith judgment except for damages occasioned by wanton acts of misconduct or negligence in rendering such emergency care.

32-03-41. Immunity for mitigating hazardous materials discharge - Exceptions.

A person who assists or advises in mitigating or attempting to mitigate the effects of an actual or threatened discharge, leakage, seepage, or other release of materials or substances designated or defined as hazardous by any state or federal law or the rules and regulations of any state or federal entity, or in preventing, cleaning up, or disposing of or in attempting to prevent, clean up, or dispose of any such discharge, leakage, seepage, or other release is not subject to any civil liability or penalty. This section does not apply to damages caused by that person's gross negligence or reckless, wanton, or intentional misconduct, nor does this section apply to any person whose act or omission caused the actual or threatened discharge, leakage, seepage, or other release and who would otherwise be liable therefor, or to any person who receives compensation other than reimbursement for out-of-pocket expenses for services in rendering such assistance or advice.

32-03-42. Limited liability for gratuitous health care provided amateur athletes.

Any person licensed to provide health care services in this state who in good faith voluntarily provides a health care service without compensation or the expectation of compensation for amateur athletes, or at an amateur athletic event, is not liable for any

damages resulting from any act or omission in the rendering of that care, including the failure to arrange for further treatment or care. This section may not be construed to relieve the person of liability for injury or death of the person receiving the health care service proximately resulting from the intoxication, willful misconduct, or gross negligence of the person rendering the care.

32-03-43. Wrongful life action prohibited - Definition.

No person may maintain a claim for relief or receive an award for damages on that person's own behalf based on the claim that, but for the act or omission of another, that person would have been aborted. As used in this section, "abortion" means the termination of human pregnancy with an intention other than to produce a live birth or to remove a dead embryo or fetus.

32-03-44. Immunity of officers, directors, and trustees of nonprofit organizations.

Any person who serves as a director, officer, or trustee of a nonprofit organization that is, or would qualify as a nonprofit organization that is, described in paragraphs 3, 4, 5, 6, 7, 10, and 19 of section 501(c) of the Internal Revenue Code of 1954 as amended [26 U.S.C. 501(c)(3), (4), (5), (6), (7), (10), and (19)], is immune from civil liability for any act or omission resulting in damage or injury if at the time of the act or omission all of the following are met:

1. The officer, director, or trustee was acting in good faith and in the scope of that person's official duties as a director, officer, or trustee of the nonprofit organization.
2. The act or omission did not constitute willful misconduct or gross negligence on the part of the officer, director, or trustee.
3. The officer, director, or trustee did not receive or expect to receive reimbursement for or payment of expenses in excess of two thousand dollars per year for expenses actually incurred as a result of providing services as a director, officer, or trustee of the nonprofit organization and did not receive or expect to receive compensation or anything in lieu of compensation as payment for services provided as a director, officer, or trustee of the nonprofit organization.

32-03-45. Immunity of volunteers providing services for nonprofit organizations.

Except as provided in section 32-03-46, any person who, on a volunteer basis, provides services or performs duties on behalf of a nonprofit organization is immune from civil liability for any act or omission resulting in damage or injury if at the time of the act or omission all of the following are met:

1. The person who caused the damage or injury was acting in good faith and in the scope of that person's duties as a volunteer for the nonprofit organization.
2. The act or omission did not constitute willful misconduct or gross negligence.

This section does not grant immunity to any person causing damage as the result of the negligent operation of a motor vehicle.

32-03-46. Immunity of volunteer athletic coaches and officials.

1. Any person who provides services or assistance free of charge, except for reimbursement of expenses, as an athletic coach, manager, or official for a sports team which is organized or performing pursuant to a nonprofit or similar charter is immune from civil liability for any act or omission resulting in damage or injury to a player or participant if at the time of the act or omission all the following are met:
 - a. The person who caused the damage or injury was acting in good faith and in the scope of that person's duties for the sports team.
 - b. The act or omission did not constitute willful misconduct or gross negligence.
 - c. The coach, manager, or official had participated in a safety orientation and training program established by the league or team with which the person is affiliated.
2. This section does not grant immunity to:
 - a. Any person causing damage as the result of the negligent operation of a motor vehicle.

- b. Any person for any damage caused by that person permitting a sports competition or practice to be conducted without supervision.
- c. Any athletic coach, manager, or official providing service as a part of a public or private educational institution's athletic program.

32-03-47. Definitions - Voluntary engineering services - Immunity.

1. As used in this section:
 - a. "Architect" means a person registered under chapter 43-03 as an architect.
 - b. "Building inspection official" means any appointed or elected federal, state, or local official with overall executive responsibility to coordinate building inspection in the jurisdiction in which the emergency or event has occurred.
 - c. "Law enforcement official" means any appointed or elected federal, state, or local official with overall executive responsibility to coordinate law enforcement in the jurisdiction in which the emergency or event has occurred.
 - d. "Professional engineer" means a person licensed under chapter 43-19.1 as a professional engineer.
 - e. "Public official" means any federal, state, or locally elected official with overall executive responsibility in the jurisdiction in which the emergency or event has occurred.
 - f. "Public safety official" means any appointed or elected federal, state, or local official with overall executive responsibility to coordinate public safety in the jurisdiction in which the emergency or event has occurred.
2. An architect or a professional engineer who voluntarily, without compensation, provides architectural or structural, electrical, mechanical, or other engineering services at the scene of a declared national, state, or local emergency caused by a major earthquake, hurricane, tornado, fire, explosion, collapse, or other similar disaster or catastrophic event at the request of a national, state, or local public official, law enforcement official, public safety official, or building inspection official acting in an official capacity, is not liable for any personal injury, wrongful death, property damage, or other loss caused by the architect's or professional engineer's acts, errors, or omissions in the performance of any engineering services for any structure, building, piping, or other engineered system, either publicly or privately owned.
3. The immunity provided in this section applies only to a voluntary engineering service that occurs within ninety days of the emergency, disaster, or catastrophic event, unless extended by the governor under chapter 37-17.1.
4. Nothing in this section provides immunity for wanton, willful, or intentional misconduct.

32-03-48. Definitions.

As used in sections 32-03-48 through 32-03-50, unless the context otherwise requires:

1. "Critical incident" means any event encountered by emergency service personnel within the scope of their employment which causes them to experience unusually strong emotional reactions that have the potential to interfere with their ability to perform their jobs or that may interfere with their personal lives.
2. "Critical incident stress debriefing" means the process of resolving the effects of critical incidents on emergency service personnel through a structured meeting with both psychological and educational components according to the model approved by the state department of health.
3. "Critical incident stress management team" means those volunteers who are recognized by the state department of health as members of an organized group that provides critical incident stress debriefing services on behalf of the state.
4. "Emergency service personnel" means individuals who provide emergency services to persons requiring medical aid, firefighting services, law enforcement assistance, or other emergency assistance. The term includes law enforcement officers, firefighters, rescue personnel, ambulance personnel, quick response personnel, emergency service dispatchers, nurses, physicians, and other emergency care providers.

5. "Peer support personnel" means those members of a critical incident stress management team who are emergency service personnel and who have completed appropriate training approved by the state department of health.

32-03-49. Immunity from liability.

Notwithstanding any other law, any member of a critical incident stress management team is immune from any civil liability for the member's activities in connection with critical incident stress debriefing services unless, based upon the member's level of training, the member's activities constitute gross negligence.

32-03-50. Confidentiality of critical incident stress management team proceedings and records.

Notwithstanding sections 44-04-18 and 44-04-19, all records and proceedings of a critical incident stress management team in connection with its critical incident stress debriefing activities are confidential. The records and proceedings are not subject to discovery or introduction into evidence in any action or proceeding involving the emergency service personnel in attendance at a debriefing and which arises out of the matters that are the subject of the debriefing. No person in attendance at a debriefing may be required to testify in any action or proceeding as to any evidence or other matters produced or presented during the debriefing. Information, documents, or records otherwise available from original sources are not immune from discovery because they were presented during a critical incident stress debriefing. Any person in attendance at a critical incident stress debriefing may testify as to matters within the person's knowledge, but the person may not testify about the specific events that occurred at a debriefing.

32-03-51. Limited liability of owner or operator of railroad.

An individual who is injured while boarding or attempting to board a moving locomotive or railroad car, without authority from the owner or operator of the railroad, or who having boarded a locomotive or railroad car without authority from the owner or operator of the railroad, is injured while riding or getting off the locomotive or railroad car, may not recover any damages from the owner or operator of the railroad for that injury unless the injury is proximately caused by an intentional act of the railroad owner or operator and the railroad owner or operator knew that serious injury was the probable result of the act, or that the owner or operator of the railroad acted with wanton and reckless disregard of the probable result of the act. This section does not exempt a railroad corporation from any liability created under chapter 49-16 or the federal Employer's Liability Act [45 U.S.C. 51 et seq.] for injuries to its employees or agents.

32-03-52. Damages for fraudulent use of social security number - Attorney's fees.

1. No person may buy or otherwise obtain or sell, offer for sale, take or give in exchange, pledge or give in pledge, or use any individual's social security account number, or any derivative of the number, for the purpose of committing fraud or fraudulently using or assuming the individual's identity.
2. Any individual aggrieved by the act of any person in violation of subsection 1 may bring a claim for relief to recover any equitable relief as the court determines to be appropriate and the greater of the actual damages or liquidated damages of up to ten thousand dollars.
3. In addition to any damages or other relief awarded under subsection 2, if the aggrieved individual prevails, the court may assess against the defendant reasonable attorney's fees and any other litigation costs and expenses, including expert fees, reasonably incurred by the aggrieved individual.
4. Any action brought under this section is in addition to any criminal prosecution that may be brought under any state or federal law.

32-03-53. Damage or destruction of crops, livestock, or commodities - Damages.

1. A person is liable for damages as provided in subsection 2 if that person willfully and knowingly damages or destroys any crop, livestock, or commodity which is being produced, or has been produced for:
 - a. Personal or commercial purposes; or
 - b. Testing or research purposes as part of a product development program in conjunction with or in coordination with a private research facility, a university, or any federal, state, or local government entity.
2. In awarding damages under subsection 1, a court shall consider the market value of the crop, livestock, or commodity before the damage or destruction and the production, research, testing, replacement, and development costs directly related to the crop, livestock, or the commodity. A person found by the court to have been damaged under this section may recover reasonable attorney's fees, exemplary damages, and twice the market value of the crop, livestock, or commodity before the damage or destruction and twice the actual production, research, testing, replacement, and development costs. Damages to crops, livestock, or commodities under this section which are reasonably necessary under a written contract or recorded easement duly entered into by the crop, livestock, or commodity producer are not recoverable.
3. This section does not preclude or limit any other right or remedy available under law or equity.

32-03-54. Limited liability - Firearms.

1. In this section, a firearm is defined as in section 62.1-01-01.
2. A firearm manufacturer, distributor, or seller who lawfully manufactures, distributes, or sells a firearm is not liable to any person or to the estate, a successor, or survivor of any person for any injury suffered, including wrongful death and property damage, because of the use of a firearm by another.
3. An association of persons who are licensed under section 923 of title 18 of the United States Code, or amendments thereto, is not liable to any person or to the estate, a successor, or survivor of any person for any injury suffered, including wrongful death and property damage, because of the use of a firearm sold or manufactured by any licensee who is a member of the association.
4. This section does not apply to a claim for relief for deceit, breach of contract, express or implied warranty, or for injury resulting from failure of a firearm to operate in a normal or usual manner due to defects or negligence in design or manufacture. This section does not apply to a claim for relief arising from the unlawful sale or transfer of a firearm or an instance when the transferor knew or should have known that the recipient would engage in the unlawful sale or transfer of the firearm or would use or purposely allow the use of the firearm in an unlawful, negligent, or improper fashion. For the purposes of this subsection, the potential of a firearm to cause serious injury, damage, or death as a result of normal function does not constitute a defective condition of the product. A firearm may not be deemed defective on the basis of its potential to cause serious injury, damage, or death when discharged.

32-03-55. Immunity for report of suspected exploitation of disabled or vulnerable elderly adult.

A financial institution or financial institution employee participating in good faith in the making of a report of suspected exploitation of a disabled adult or vulnerable elderly adult to a government agency or law enforcement agency, assisting in an investigation of suspected exploitation of a disabled adult or vulnerable elderly adult by a government agency or law enforcement agency, or furnishing information to a government agency or law enforcement agency about suspected exploitation of a disabled adult or vulnerable elderly adult is immune from any liability, civil or criminal, that might otherwise result from reporting a suspected case of exploitation of a disabled adult or vulnerable elderly adult. For purposes of any proceeding, civil or criminal, the good faith of a financial institution making a report of suspected exploitation of a

disabled adult or vulnerable elderly adult to a government agency or law enforcement agency must be presumed.

32-03-56. Immunity for theft of anhydrous ammonia.

The owner of anhydrous ammonia is immune from civil liability for any loss, damage, or injury from the theft by another or attempted theft by another of anhydrous ammonia from the tank, equipment, or storage facility in which it is contained. For purposes of this section, "owner" means:

1. A person who lawfully owns anhydrous ammonia;
2. A person who lawfully owns a container, equipment, or storage facility containing anhydrous ammonia;
3. A person responsible for the installation or operation of an anhydrous ammonia container, equipment, or storage facility;
4. A person who lawfully sells anhydrous ammonia;
5. A person who lawfully purchases anhydrous ammonia for agricultural purposes; and
6. A person who operates or uses anhydrous ammonia containers, equipment, or storage facilities when lawfully applying anhydrous ammonia for agricultural purposes.

32-03-57. Liquefied petroleum gas dealers immunity from civil liability.

1. Any person engaged in this state in the business of selling at retail, supplying, handling, or transporting liquefied petroleum gas is immune from civil liability if the direct cause of any loss, damage, or injury was caused by the alteration, modification, or repair of liquefied petroleum gas equipment or a liquefied petroleum gas appliance if the alteration, modification, or repair was done without the knowledge and consent of the liquefied petroleum gas seller, supplier, handler, or transporter or was completed by a person not certified to repair the equipment or appliance.
2. This section applies only to fixed liquefied petroleum gas fuel systems. "Fixed liquefied petroleum gas fuel system" means an installation with a maximum operating pressure of one hundred twenty-five pounds per square inch [861.84 kilopascal] or less and includes the container assembly, pressure regulator, piping system, gas utilization equipment and components, and venting system in residential, commercial, or institutional installations.

32-03-58. Distribution of intimate images without or against consent - Remedies.

An individual whose intimate image is distributed in violation of section 12.1-17-07.2 may maintain a private right of action against each person who has distributed that image in violation of section 12.1-17-07.2, without regard to whether the defendant has been charged with, found guilty of, or pleaded guilty to that offense. An individual whose intimate image is distributed in violation of section 12.1-17-07.2 is entitled to pursue all of the economic, noneconomic, and exemplary or punitive damages and other remedies available by law and to obtain a temporary restraining order or a preliminary or permanent injunction ordering the person to cease distribution of the intimate image.

Troy Coons
Northwest Landowners Association
Industry, Business, and Labor Committee
Testimony for SB 2354
February 5, 2019

Re: Follow-up answers to questions of Committee regarding SB 2354

Thank you for the opportunity to provide additional comments on SB 2354. Because the language in SB 2354 has been widely adopted in other states, the answers to the questions asked by the Committee are readily available. That widespread adoption of the language in SB 2354 is one of its key benefits because it allows us to turn to the numerous cases that have already interpreted its language under a variety of circumstances. Below, we have reproduced the questions asked by the Committee and have placed answers directly below each question.

1. Why does this bill use the language “personal reasons”?

Over the past decades, numerous states developed rules allowing restoration damages in the limited circumstance of real property, which has personal value to its owner, that is damaged or destroyed. These properties usually have extraordinary characteristics beyond just their economic value. Usually, the properties are people’s homes or other properties that have significant sentimental value to their owners. For those types of properties, the majority of states recognize that if the property is damaged or destroyed, simply providing the market value of the property would not make the landowner whole. Instead, those states recognized that the only way to make the landowner whole is to restore the property to its prior condition. In our system, this makes sense. If a landowner is wronged by a trespasser or some other wrongdoer who destroys this type of property, that wrongdoer should be required to make the owner of the lost property whole. That, of course, is the premise of our tort system.

Today, the majority of states have settled on the phrase “reasons personal” as a limited exception to allow restoration damages in a small category of cases. In other words, a landowner may recover restoration damages if they have “reasons personal” to restore that land. This language may seem odd or old-fashioned, but that is probably because it has been in use for decades in other states. In the early 1960s, the language was so widely used that it was placed into the Restatement of Torts, where it remains today. This is an important fact because the Restatement is the effort of the leading law professors and practitioners throughout the United States to explain the majority of the states’ tort laws in a format that reads much like a statute. The language in SB 2354 is almost identical to what has been in the Restatement for nearly fifty years. The Restatement uses the phrase “reasons personal.” SB 2354 uses the phrase “personal reasons.” The meaning of the phrase, regardless of the order of these two words, is the same. The language means that if a landowner can convince a jury that he or she has non-economic reasons to restore a property (such as due significant sentimental value or historical value to the family), then those are “personal reasons” that would allow an award of restoration damages to make the landowner whole (by restoring the damaged land).

2. Is this bill overly broad?

In 2015, a much broader bill was proposed. That bill sought to allow restoration damages in all circumstances. SB 2354 addresses the concerns brought in response to the 2015 bill and is

significantly narrower. First, SB 2354 says that it only applies to real property and not to personal property. Second, the bill only applies to truly extraordinary properties, i.e., those that do not just have economic value to their owners, but also have non-economic value. The Petroleum Council appeared to express concern that this bill would apply to all properties impacted by oil spills. Addressing all spills is not what this bill is about. This bill is about making sure that if lands that are truly extraordinary to their owners are destroyed or damaged, then the landowner has a remedy to ensure that the land is restored. If we cannot provide landowners with a remedy for those extraordinary lands, we risk losing those lands permanently.

Further, the plaintiff would have to convince the jury to unanimously conclude that the land has extraordinary non-economic value and therefore has personal value to its owner. Yesterday, we provided the example of a homeowner's garden as one type of property that might have personal value. The Committee seemed to express skepticism that such a garden would have personal value to its owner. This bill takes those concerns directly into account. The landowner would have to convince a jury to unanimously conclude that the land truly has personal value. If the Committee were a jury, the Committee's skepticism about a garden not having personal value would mean that it would not award restoration damages in that circumstance.

In summary, this bill is narrow because it only applies to real property, the real property must actually be damaged, the real property must have some type of extraordinary, non-economic, personal value to its owner, and the landowner must convince a jury of his or her peers to unanimously conclude that all of this is true. Only then, in that limited circumstance, would this bill allow restoration damages.

3. Must the landowner spend the restoration damages on restoring the property?

Cases that have interpreted the "reasons personal" rule have all concluded that "[t]he reasons personal rule requires plaintiff to establish that the award actually will be used for restoration." This quoted language comes from a recent case in Montana. *See Lamp v. Speed*, 261 P.3d 1000 (Mont. 2011). That recent case explained that in all cases that have discussed this issue, as well as the Restatement itself, every court concluded that the rule requires the landowner to prove to the jury that the award will be used for restoration. If SB 2354 becomes law in North Dakota, this interpretation would undoubtedly apply in North Dakota as well. That is because this law would be enacted with the benefit of decades of judicial interpretation of the same language in other states.

4. Does the Health Department and Industrial Commission already require contaminated land to be restored?

No, they do not. Both agencies have certain rules in place that require remediation of properties in certain circumstances. For example, NDIC requires reclamation of plugged and abandoned well sites, while the Health Department requires removal of contamination to protect the public's health and the environment.

In the event of a spill, neither agency requires restoration of land back to its original condition. NDIC's rules simply say that "[d]ischarged fluids must be properly removed." N.D.A.C. § 43-02-03-30.1. And the Health Department itself has explained that its rules are not

necessarily even sufficient to restore agriculture productivity. Instead, the Health Department's oil spill cleanup guidance says "[i]n order to prevent loss of productivity on agricultural lands and subsequent private property damage, lower constituent levels may be needed. These levels will be negotiated between the landowner and responsible party and do not require the involvement of the NDDoH."¹ In other words the Health Department treats property damage arising from an oil or produced water spill as a private issue between the landowner and the company. The Health Department's rules are only focused on minimizing the threat to public health and safety from these types of events. SB 2354 provides a remedy for harm to a landowner if the land has personal value (and not just monetary value) to its owner. That is very different than what NDDH's and NDIC's rules address. However, if a company completely restored a property (whether in response to an NDDH/NDIC order, or voluntarily), then a jury would not award further restoration damages because the land would already be restored.

5. Summary

In summary, this bill addresses a very important issue to our members, which is the inability under current law to recover restoration damages when particularly sensitive or important pieces of real property are damaged. This bill does not allow restoration damages for all property. But it does give landowners a carefully limited remedy to go to court, obtain confirmation from a jury that the land has personal value to its owner, and therefore the landowner has "personal reasons" (or "reasons personal") to obtain restoration damages from the party causing the damage to that extraordinary piece of property. This bill uses language that is tried and true and has been subjected to decades of testing under numerous circumstances throughout other parts of the United States. On behalf of our members, Northwest Landowners urges that you vote in favor of SB 2354.

Respectfully,



Troy Coons

¹ NDDH Guidelines for the Assessment and Cleanup of Saltwater Releases, at p. 8 (2016), available at https://deq.nd.gov/Publications/WQ/4_SI/Final_BrineGuideline_09282016.pdf.