MICROFILM DIVIDER

OMB/RECORDS MANAGEMENT DIVISION
SFN 2053 (2/85) 5M

ROLL NUMBER

DESCRIPTION

2388

2001 SENATE NATURAL RESOURCES

SB 2388

2001 SENATE STANDING COMMITTEE MINUTES

BILL/RESOLUTION NO. SB 2388

Senate Natural Resources Committee

☐ Conference Committee

Hearing Date 2-15-01

Tape Number	Side A	Side B	Meter #
1	X		Start - end
		X	Start - 15.1
2-16-02	X		19.5 - 46.0
Committee Clerk Signature	Janet Jamme		

Minutes:

SENATOR FISCHER opened the meeting of Senate Natural Resources Committee. Roll all was taken indicating all were present with the exception of SENATOR TRAYNOR.

SENATOR FISCHER opened the hearing on SB 2388.

SENATOR GARY NELSON, of District 22 cosponsor of SB 2388 A BILL RELATING TO DURATION OF EASEMENTS. This bill addresses the issue of conservative easements which can provide compensation to landowners for maintaining or improving their property for any reason. These reasons can be for erosion control, wildlife habitat, esthetic values are some of motivations behind this activity. Presently options of conservation easements are very restricted by durations and who is entrusted to manage those easements. SB 2388 will widen the options available and will allow agricultural organizations to become involved in the process allowing them to hold easements. Easements at this time are limited to be purchased by the

federal government through the Game & Fish Department. This bill will broaden the scope of organizations who can actually hold easements.

REPRESENTATIVE DENNIS JOHNSON of District 12, cosponsor of SB 2388 testified in support (See attached testimony).

ERIC ASSMUNDSTAD, President of the North Dakota Farm Bureau testified in support of SB 2388 (See attached testimony).

KEITH TREGO, Executive Director of the North Dakota Wetlands Trust testified in support of SB 2388 (See attached testimony).

WADE MOZER representing the North Dakota Stockmen's Association testified in support of SB 2388. Their duty representing the industry is to educate their members so they can make a good decision when entering into an easement agreement. Maybe all goals can be meet without perpetual easements and if this bill can give flexibility things would be going in the right direction.

PAUL BECKER a farmer from the Devil's Lake area testified in support of SB 2388 (See attached testimony).

ANDY MORK, chairman of BOMMM Joint Water Resources Boards (Burleigh, Oliver, Morton, Mclean, Mercer Counties) testified in support of SB 2388. He presented a information published in Ohio (see attached). He will prepare an amendment to the bill.

???????? a farmer of 30 years testified in support of SB 2388.

GERALD REICHERT, the North Dakota field representative for the Nature Conservancy testified in a neutral position on SB 2388. This legislation would give every landowner the property right to make the decision that solely belongs to the landowner.

JOE SATROM , Director of Land Protection Program for the Great Plains Office of Ducks Unlimited testified in a neutral position of SB 2388 (See attached testimony).

SENATOR KELSH asked if there is was a different tax implication if land was leased to a 501 c (3) or a 501 c (5) organization.

JOE SATROM could not answer that.

BILL PFEIFER, representing the North Dakota Wildlife Society testified in a neutral position of SB 2388 (See attached testimony).

MIKE DONAHUE, representing the North Dakota Wildlife Federation and the United Sportsmen testified in a neutral position of SB 2388.

DENNIS MILLER, President of the LAND (Landowners Association of North Dakota) testified in opposition to SB 2388 (See attached testimony).

CHARLES DAMSCHEN farmer from District 10, testified in opposition to SB 2388. He is concerned about the misuse of easements. He questioned the legality and the ethics of perpetual easements and felt it is not a property right to be able to sell off every future owners property right.

SENATOR TOLLEFSON questioned the marketability and the taxation value of land that under perpetuat easements.

CHARLES DAMSCHEN confirmed that his area that would be the case.

WES DORSETT testified in opposition of SB 2388. He felt that property rights are no longer sacred, the legislature should not be able to dictate in perpetuity and that finally a landowner should not be able to dictate for a future owner. His experience would show that land is always depreciated in value when an easement is involved.

ARDEN HANER testified on behalf of himself in opposition to SB 2388. He posed the question that does a property owner have the right to sell off certain property rights forever and that easements should be passed with the property owner.

ROGER BISCHOFF of Valley City, ND testified in opposition to SB 2388. He experience has been that the value of property is decreased due to easements of that property.

DON BERGE a farmer from Fargo, ND testified in opposition to SB 2388. He is opposed to perpetual easements and will not purchase property with easements.

SENATOR TOLLEFSON asked if perpetual easements are transferable.

DON BERGE answered that they would go with property.

GORDON BISCHOFF testified in opposition of SB 2388. He said that in his experience in appraising property he has always reduced the value of property because of easements on that property.

SENATOR KELSH stated that North Dakota is the only state that does not allow perpetual easements and wondered what is happening in the other states.

SENATOR FISCHER closed the hearing on SB 2388.

FEBRUARY 16, 2001

SENATOR FISCHER reopened the discussion on SB 2388.

It has been brought to attention that there is a Study Resolution already in the process relating to easements (See attached). MIKE DWYER was present a was asked about the present status of HCR 3023. This resolution deals with the issue of easements which would include all the bills already heard by the committee. His intent is to make the committee aware of the resolution not recommending it instead of the bills introduced. He also submitted an amendment to SB 2388 as suggested by Andy Mork of BOMMM. (See attached). Testimony of MALCOLM H. BROWN

of behalf of the Real Property Section of the State Bar Association of North Dakota was submitted that contained comments about proposed amendments (See attached).

After some discussion the Committee decided they are uncomfortable and were struggling with the idea of "perpetual" easements and at this point were more comfortable with the study resolution HCR 3023 which has been passed on the house floor.

SENATOR EVERY made a motion for a "DO NOT PASS" of SB 2388.

SENATOR TOLLEFSON second the motion.

SENATOR FISCHER called for a roll vote of SB 2388. The vote indicated 5 YAYS, 0 NAYS, AND 1 ABSENT.

SENATOR TOLLEFSON will carry SB 2388.

Date: ~~2-5~~ 2-16-01
Roll Call Vote #: 1

2001 SENATE STANDING COMMITTEE ROLL CALL VOTES
BILL/RESOLUTION NO. 2398

Senate NATURAL RESOURCES Committee

☐ Subcommittee on _____
or
☐ Conference Committee

Legislative Council Amendment Number _____

Action Taken Do Not Pass

Motion Made By Every Seconded By Tollefson

Senators	Yes	No	Senators	Yes	No
Sen. Thomas Fischer, Chairman	✓		Sen. Michael A. Every	✓	
Sen. Ben Tollefson, Vice Chair.	✓		Sen. Jerome Kelsh	✓	
Sen. Randel Christmann	A				
Sen. Layton Freborg	✓				
Sen. John T. Traynor	A				

Total (Yes) 5 No 0

Absent 2

Floor Assignment Tollefson

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

REPORT OF STANDING COMMITTEE (410)
February 16, 2001 1:31 p.m.

Module No: SR-29-3687
Carrier: Tollefson
Insert LC: . Title: .

REPORT OF STANDING COMMITTEE

SB 2388: Natural Resources Committee (Sen. Fischer, Chairman) recommends **DO NOT PASS** (5 YEAS, 0 NAYS, 2 ABSENT AND NOT VOTING). SB 2388 was placed on the Eleventh order on the calendar.

2001 HOUSE NATURAL RESOURCES

SB 2388

2001 HOUSE STANDING COMMITTEE MINUTES

BILL/RESOLUTION NO. SB 2388

House Natural Resources Committee

❑ Conference Committee

Hearing Date March 9, 2001

Tape Number	Side A	Side B	Meter #
1	x		1 to end
1		x	1 to end

Committee Clerk Signature

Minutes:

Chairman Earl Rennerfeldt, Vice Chair Jon O. Nelson, Rep. Brekke, Rep. DeKrey, Rep. Drovdal, Rep. Galvin, Rep. Keiser, Rep. Klein, Rep. Nottestad, Rep. Porter, Rep. Weiler, Rep. Hanson, Rep. Kelsh, Rep. Solberg, Rep. Winrich.

Chairman Rennerfeldt: I will call the Natural Resources Committee to order. Clerk call the roll.

Sen. Traynor - District 15: I am the prime sponsor of SB 2388. This bill provides that a perpetual easement may be given by a land owner to be held by a group - the definition, line 16-19 in the bill delineates those groups, which would be farm organizations. We have perpetual easements in ND now. The difference now is that the easements are held by the US Fish and Wildlife Agency. This bill would allow our own farm groups to hold the easements. A much more friendly farmer group than what we presently have. A perpetual easement is forever, so anyone giving it should give it a great deal of thought. It is a sale of part of your ownership. There are instances where

this is desirable. We had two bills in the Senate just delineating certain areas for perpetual easements. Those bills were killed, this one survived. This one would provide easements any where in the state. I think it is important to have farmer friendly groups holding the easements because the funding would be by organizations that are interested in conservation. We want to see those funds put in the pocket of ND landowners. The testimony in the Senate indicated that the amount paid by the conservation groups is maybe 20-25% of what the sale value of the property is. I submit to you that may not be enough. Maybe what the land would sell for isn't necessarily the top. Giving a perpetual easement goes on forever and it is another use of the property. I hope that you make this opportunity available to ND landowners that want to use it. It is an option that we should allow our citizens to take. It would be a more friendly setup than the present situation.

Rep. Solberg: You mentioned 25% of value as the compensation for a perpetual easement and that is an issue with all landowners. What in your opinion would be fair?

Sen. Traynor: It is a matter of negotiation, I am not so sure if you had pasture land that was selling for $100 an acre. Maybe a perpetual easement should get more than that? That is something the landowner and the conservation groups have to negotiate.

Rep. Kelsh: What type of organization is a 501(c)(5)?

Sen. Traynor: Those are the farm organizations, the horticultural organizations and the labor union. 501c3 are charitable organizations.

Rep. Winrich: How many organizations are there that meet these three restrictions on lines 14-19?

Sen. Traynor: There are three farm organizations. I don't know about the horticultural or labor organizations. I think that other two, a and b boil it down so only the three farm organizations meet all three criteria.

Rep. Winrich: Can you tell us what those three organizations are?

Sen. Traynor: The Farm Bureau, the Farmers Union, and the Stockmen's Association.

Chairman Rennerfeldt: Would Soil Conservation qualify?

Sen. Traynor: I don't believe so. Not as the bill is drawn.

Rep. Drovdal: If one landowner sells his perpetual easement for his land, does that have any reflection on the value of his neighbors land who doesn't sell a perpetual easement.

Sen. Traynor: It would depend on the situation. The lay of the land and so forth. Each instance would have to be evaluated that way.

Chairman Rennerfeldt: Any further questions.

Rep. D. Johnson - District 12: (See written testimony). The question you had about the Soil Conservation Association. They would also qualify with the other groups previously mentioned. Since this bill is drafted and after the Senate hearing we are seeing some language that should be included in the bill. (See amendment).

Vice Chair Nelson: On line 16, under subsection a, the director ship of the organization must consist of agricultural producers. Is that all ag producers? Or would it be a majority. What is the membership of the board of directors have to consist of?

Rep. Johnson: Page 1, line 16, the amendment I just handed out addresses that.

Vice Chair Nelson: The question is - if one none-ag producer, if there was one member on the board of these groups that wasn't an ag producer would that disqualify that group from acceptance by this provision? Do they have to be all, or just a majority?

Rep. Johnson: I'm not sure?

Chairman Rennerfeldt: Anyone else care to testify in favor of this bill?

Eric Aasmundstad - ND Farm Bureau: The ND Farm Bureau supports Senate Bill 2388. (See written testimony).

Vice Chair Nelson: When you say that the Soil Conservation Districts would qualify under this section, they may under the 501(c)(5). But isn't it true that they have some technical staff as part of their board and would that disqualify them under section a of subsection 2?

Aasmundstad: Can I refer this to Gary Puppe.

Gary Puppe - Executive Vice President of the ND Association of Soil Conservation Districts: The ND Association of Soil Conservation Districts is a 501(c)(5) non profit organization. The districts themselves are political subdivisions of the state. The Association is made up of supervisors of soil conservation districts.

Vice Chair Nelson: That meets part c, but under part a it says they have to be Ag Producers? Isn't it true that some of those supervisors wouldn't meet that criteria?

Puppe: That would be true as far as Soil Conservation Districts are concerned, but the ND Association of Soil Conservation Districts all the board members are ag producers.

Rep. Keiser: What are the tax implications for the counties and communities for these easements?

Aasmundstad: Minimal. The valuation of the land probably won't change. When we are dealing with this issue, if we look at this legislation, and just take the word easement out of it and replace that word with contract. That is what this is, each and every one of these easements is just that... Contracts. Negotiable contracts between the producer and the organization that wishes to acquire the easement. The farm groups in the state would be allowed to hold easements instead of the US

Government. The conservation groups could work through us and use us to hold the easement rather than the Federal Government. These are negotiable contracts, there are no two pieces of land the same. Therefore, no two conservation easements should be the same. They should be individually negotiable to each piece of land, each producer and these things can be worked out between the parties that want to participate. The producers can outline the things in terms of easements and derive the benefit they think they need. The impact on the valuation of the ag land would be minimal. One of the amendments speaks to the tax implications. That's the amendment that says "or affiliates". Currently ND Farm Bureau does not have an affiliate that is a 501(c)(3). We are in the process of developing one, the tax implications to the producer is where that comes in. If a producer wanted to enter into a perpetual easement, what they could do is pass that easements to a (c)(3). If they so choose, and they could get the dollar value of the easement payment and that would be taken away from the taxable value of the property at the time of death. The preferred way to deal with that would be to get rid of the inheritance tax. But we have yet to see that happen. This can be construed as a benefit to some people.

Rep. Keiser: If a soil conservation which is a political subdivision of the state were to participate in one of these easements, there is no political subdivision that pays any property taxes by statute. There is no political subdivision that I am aware of that pays in lieu of taxes. So I think there are potential tax implications.

Aasmundstad: The ND Association of Soil Conservation Districts is a 501(c)(5). Individual soil conservation districts cannot hold the easements under this legislation. It is limited to their association which would pay taxes.

Chairman Rennerfeldt: You see this as being a tool that can be used, for example, the Farm Bureau can hold the easement, but someone else would be providing the funding to make this happen. Is that not right?

Aasmundstad: That is correct. We would act as a pass through. When you hold an easement there is a very serious responsibility that comes with that in the administration of the contract. From a producers point of view, if I was to do something like this I would certainly rather have someone from a ND farm organization come out and make sure I am living up to my end of the contract, rather than someone from US Fish and Wildlife.

Rep. Hanson: It might be in here someplace, but I don't see it. If an easement is granted, does it have to be approved by the local County Commission and approved by the Governor?

Aasmundstad: No it doesn't, it doesn't now. If I wanted to convey a perpetual easement to an organization, I can. They can buy that easement from me. But, by state law, they are prohibited to carry it.

Rep. Hanson: What easements have to go through the County Commissioners and then approved by the Governor

Aasmundstad: I don't believe any easements have to, sales or purchases have to, but easements do not have to.

Rep. Drovdal: This legislative body has been pretty unfavorable to very many changes in the easement rights. One of my concerns is, if we pass this bill to allow permanent easements, how can we be assured that down the road we won't find a member of the green party sitting as a judge somewhere and say a nonprofit is a nonprofit and any nonprofit will qualify and we lose control over perpetual easements?

Aasmundstad: The thing that is certain is death and taxes. The way I view this, is if we don't do something like this, to take this out of the hands of the Federal Government, to bring it back to the control of the state, the pressure in the years to come will be so great to do this that sooner or later it is going to happen. To me, this gives this legislative body the real ability to address these groups in the future and say, we took care of it. You can have perpetual easements, but you must work with our folks here in ND.

Vice Chair Nelson: The assumption that would have to be made that there would be a loss of tax revenue, would be that land values would go down with the purchase of a perpetual easement. In past history with US Fish and Wildlife easements, have you seen any indication that that is true?

Aasmundstad: That is a widely variable response. Devils Lake has a more than their share of perpetual easements that were taken in the 60's and early 70's by US Fish and Wildlife. They are very rigid and hard to work with. I don't dispute that, but you have to remember they are carried by the US Fish and Wildlife Service, not by someone that has an interest in our state and in agriculture. I watched land sales in my area and the price of the land still depends on who wants it. I have not personally seen anyone come in and say, "well, by golly there is a pretty good piece of land that I would pay $4-500 an acre on it, but oh, no there is a perpetual easement on it and I am only going to bid $200." That doesn't happen, it depends on who wants it.

Vice Chair Nelson: That being said, let's use the US Fish and Wildlife easement holder as the worst case scenario as I would view it personally. Do you think there is any chance that if a farm organization would hold that easement that there would be a hold harmless or an increased value?

Aasmundstad: I would certainly think there could be. (cites example). You can actually improve the value of your land through some of the things you could possibly negotiate into the contract. That is the thing we have to remember, these are negotiable.

Rep. Keiser: One of the strengths of your proposal is the flexibility of negotiations. Does that flexibility allow the entity entering the easement, not the landowner, to develop additional easements with third parties within the easement. Is that a possibility?

Aasmundstad: Not being an attorney, but my first blush on that would be No! This is a contract, it would have to be mutually agreed upon by all parties that signed this contract, what could be done with it. Say, ND Farm Bureau held the easement...and it was with Rep. Nelson and some conservation group. If we wanted out for whatever reason, or the conservation group wanted out, they could propose to Jon or our organization, let us out, let us sell it to these other people. If that was agreeable to all involved, there would be no reason not to do it. These are contracts, and they effectively shut out anyone else.

Rep. Keiser: That is the point, it is a contract and if you enter the contract and one of the provisions of the contract is that you have the right to negotiate an additional third party easement, and the land owner agrees with that at the signing of the contract, is that a possibility?

Aasmundstad: I would certainly think it would be. If you have a contractual agreement and you want to renegotiate the terms, I don't see why you couldn't?

Rep. Kelsh: Is there a precedence to this idea going on in other states?

Aasmundstad: ND is the only state in the union that does not allow something like this.

Keith Trego - ND Wetlands Trust: We support this bill. (see written testimony).

CONT

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Rep. DeKrey: How are private property rights enhanced by this bill? We already have perpetual easements, so if we grant another group the rights to perpetual easements, if it is perpetual, it is forever, does it really matter who's paying the bill?

Trego: The best situation is to have as many options as you can made available to the landowner. Right now we do have perpetual easements, they are limited to the Federal Government. They are also, any work that any group would do, the Federal government for example with their conservation easements where they are dealing with land in the native grasslands and the wetlands complex is the limit of their focus. A private landowner may want to do an easement in an area where there is no buyers, right now there are no buyers, we have limited the pool. We have pushed all the business to the Federal Government. A landowner may want to do an easement and may not have a buyer. If this bill were to pass there is a probability that the landowner would have more options. There may be a buyer for the easement they are trying to sell, and this would allow them a transaction not available otherwise.

Rep. DeKrey: You stated that you believed this easement issue is a long term process and what that says to me, is this session, we grant easements to perhaps a farmer friendly group, but then next session when they don't have any money to buy easements they come back and say well ND Legislature has put their stamp of approval on perpetual easements, and we gave it to a group that doesn't have money to do this, but now we have these groups that have the money and are willing...so haven't we started the process to approve something we have adamantly opposed before?

Trego: The evolution of this process is difficult to predict. I would guess that what you are going to see in the ensuing years is increasing landowner interest in all parts of the state and you are going to find additional groups that may be willing to participate in this. It may lead in fact to

just what you outlined. I think that is one the basic issues that this group should consider as you look at this bill. This is to benefit the landowners. If landowners are interested in something not available to them, I would guess they would be back here asking for the changes to avail themselves of their full private property rights. Isn't that what we are really all about, trying to help these landowners to protect their private property rights?

Jullie Ellingson - ND Stockmen's Association: We stand in support of SB 2388. (see written testimony).

Chairman Rennerfeldt: Questions?

Jerry Jeffers: As of this date, conservation easements are a new thing for our country, we don't have a lot of them. Although I do understand easements fairly well, we have a lot of energy easements, oil companies and so on. I have kind of an idea of what happens when you get into a perpetual easement. Conservation easements are coming in our area, as they come in we are striving as farmers and ranchers to find a way that we can work with someone who will understand our feelings and our beliefs. We think that easements are good. Easements in economic times when we are in hardships, they can provide another income for us. Once we have that easements we can stem off of that and maybe find other ways to make income. So they are not all bad. But, this bill would allow someone who understands our position as farmers and ranchers what we would like to see in those easements. Rather than dealing with someone from Washington that maybe doesn't understand how SW North Dakota operates versus Eastern North Dakota. We are all different, we all require something different. If we can be involved with an organization that is friendly to all farmers in all parts of the state we have a better opportunity of it serving us in more prosperous ways. When we take an easement we give up certain rights, but we also have additional rights and we would like to keep those intact. Through an organization

such as Farm Bureau, we have a better chance than with US Fish and Wildlife. So I would ask that you Do Pass this bill.

Andy Mork - BOMMM: I am offering you today an amendment to SB 2388. (See written testimony).

Rep. Porter: Just a question of your amendment. Wouldn't this bill the way it is drafted already allow you the opportunity to do your easements?

Mork: It does increase those available to buy up what I am talking about, but it probably doesn't go all the way. We need probably more than that. The reason to go 99 years is because you can't get a good bid on anything unless it is perpetual. There is a tremendous focus on saving the environmental aspects and this is one of them. With Lewis and Clark coming up now you are going to see a lot of focus on a lot of our abilities to do things.

Joe Satrom - Ducks Unlimited: We are neutral on this bill. (See written testimony).

Bill Pfeifer - ND Chapter of the Wildlife Society: We support SB 2388. (See written testimony).

Paul Becker: Submitted written testimony in support of SB 2388.

John Enderle: Submitted written testimony in support of SB 2388.

Chairman Rennerfeldt: We will now take testimony in opposition of SB 2388.

Dennis Miller - LAND: LAND rises in opposition to this bill. Probably the main reason we do so is explained on the map we are handing out. It was produced in 1981 and shows the land already under perpetual easement in this state. (See map). If that map was brought up to date, the shaded portion would be 20% larger than it is now. Our question to each of us is "how many perpetual easements are enough?" LAND, if you will notice in the blue pamphlet (see pamphlet) it is the purpose of LAND "we are dedicated to the preservation of revenue generating activities of our farmers and ranchers along with this their most valuable renewable resource, land." It is for this

very reason we rise in opposition to SB 2388. The supporters of this bill say they will be working in cooperation with the conservation groups and the conservation groups that have testified in front of this very microphone have talking that easements should be no less than 50 years and ideally be perpetual. As Farm Bureau has stated, 10 to 30 years is enough. In our opinion the organizations with the money are going to rule. There will be more perpetual easements on our property. We understand there is a bill before you to allow a study on perpetual easements. We would highly support that. The other reason we have reservations about this bill, we question the credibility of some of the organizations. Governor Schaffer received a letter from one of these groups with money for these easements, and the letter contains blatant misrepresentation of the views of ND land owners. The top of the second page says about 70% of the survey respondents said they would like to retain the same number or increase wetlands on their land. I don't know of one land owner that would want that. The sponsor of this organization said that this bill would hopefully increase the trust that farmers would have for the conservation groups. In working with organizations like this I cannot see how trust will be increased. Mr. Trego talked about the right to sell a perpetual as a property right. We do not disagree with that, but we have a moral obligation to retain the revenue generating capacity of the people farming in the future. I have two examples of the decrease in revenue generating capacity of easements and of the devaluating of property. (cites examples). I would ask that you give this bill consideration on a Do Not Pass and go for the study of easements instead.

Rep. Nottestad: You are standing up there then saying we should only give the landowner the right to deal with the Federal Government on perpetual easements. You do not feel that I have a right as a landowner to rather deal with a farm organization than the Federal Government?

Miller: Yes. As a property owner we have the right to deal with anybody we want. We highly respect the sincerity of the ND Farm Bureau in pushing this. I guess if we would have our druthers this bill would be amended so the duration of easements would be limited to possibility 10 years. With buy back provisions and annual payments rather than lump sum and the reason I say that is the Farm Bureau has been saying we don't like perpetual easements either but the people providing the money for this bill are saying we want a minimum of 50 years and probably perpetual if we can. We feel that the people providing the money will be dictating the duration.

Rep. Nottestad: Have you done any research into the amount of money that would be available for a 10 year easement when they can get the same perpetual, by bring it to the Federal Government? And you also said that we want to have the right to deal with anyone we want and yet this bill would permit this and yet you are against the bill?

Miller: Our main opposition to the bill is that is allows perpetual easements and we do not feel in any way that we need more perpetual easements in this state.

Vice Chair Nelson: First of all, are you aware of that the US Fish and Wildlife is pushing up against the restriction on the number of acres they can purchase under easement?

Miller: Yes, I am.

Vice Chair Nelson: If it is possible by you or Mr. Trego to get a copy of that distributed to the committee. The other part of the question is, currently this year's Ducks Unlimited were able to purchase their perpetual easements by associati g with the US Fish and Wildlife. With the passage of this bill would there be any reason why they couldn't direct that purchase to the ND Farm Bureau or Stockmen's Association?

Miller: My understanding is they could not. They could work with any organization that would qualify under this bill.

Vice Chair Nelson: If that is true, wouldn't your organization look at that as being more favorable than the US Fish and Wildlife holding that easement?

Miller: Yes, we do feel that if we had our choice, we would choose between the lesser of two evils. Our concern lies with the fact that we have seen how willing sellers can be created and if we open the door, we feel that there is going to be a great rush by environmental groups to create willing sellers amongst farmers. There will not be the incentive to create a living wage for the farm. The government will turn around and say you can create income by selling easements on your property, we don't need to support you with programs that will make farming profitable. We support Farm Bureau in their sincerity, but we do not want to get involved in a situation where we have to sell an easement on our property to be competitive.

Vice Chair Nelson: I understand your objection to the perpetual easement content, but you said that these organizations wouldn't have the funding available for purchasing these easements, but in reality, they would have the ability to accept money from endowments or from private individuals or from 501(c)(3)s for example and purchase that easement from them. They could be funded very rapidly?

Miller: Yes, they could.

Rep. Porter: On one hand you want landowners rights, on the other hand you want to restrict landowners rights. Not all land in ND is owned by farmers and ranchers. You think it should be?

Miller: That is a very good question. In America, anybody has the right to own property if they can afford it. We do no want to make a statement as to whose qualified to own property or not. Our main purpose is we do not want to get into a position where we have to sell an easement on our property to become competitive in the climate to generate enough income to survive in farming. Our purpose is to continue to try to strive to provide enough income through the

agricultural activities of our property to survive and not have to rely on easements. Which are sometimes down the road prohibitive of the profitability of the land.

Rep. Porter: So then you think it would be okay if a non farmer or non rancher who owned land should be able to sell a perpetual easement on their land, it's only the farmers and ranchers that shouldn't be allowed to sell perpetual easements?

Miller: We do not support perpetual easements at all. No matter who is selling them. We are dealing in a state that is agricultural and I don't know that there is a great percentage of the state that has land other than agricultural. The purpose of our opposition is to keep the control of our property in agricultural land.

Rep. Porter: What property rights then do you support for non farmers and ranchers who are land owners?

Miller: I guess I am not sure the point of your question. We would support property rights that are socially, economically and culturally acceptable in the community. People have a moral right to turn the property over to their heirs or to the future purchasers. We have the moral right to turn that property over in better shape than when we purchased it. We don't feel that perpetual easements accomplish this.

Rep. Porter: On the land value point you brought up about being able to buy land that is 45% less because it has perpetual easements, wouldn't that be the case that a person that sold you that land already cashed in on that 45% of the value and you just got a better deal and when you sell it you will not see a net gain of 45%. You are going to see an equal amount going across and that it stabilized once the sale has been done once and there is no value loss after that time.

Miller: The original person I bought this property from was the nephew of the person who sold the easements and the easement was sold for $800 on a half section of land.

Rep. Porter: Then you got a good deal.

Miller: Time will tell.

Rep. Klein: Also wouldn't the value of the land be determined as to what the easement is?

Miller: Yes that is true, in fairness there are some states where some land has appreciated with the easements.

Richard Schlosser - ND Farmers Union: We come in on opposition to SB 2388. The recent issues of the past have created a lot of controversy. We are a 501(c)(5). Our point here is we feel it would not be proper that we as a farm organization would hold these easements if we have specific policies as developed by our membership that we as an organization are in opposition to perpetual easements which this bill would allow. 3 issues. The proponents pointed out that perpetual easements are forever. That is the issue. When we sign that contract we forfeit certain uses of the land. Secondly, the contract passes on to the next generation. The third thing is how do we implement this? I think we would like to say at the very least we should take a go slow approach to this and study this issue.

Rep. Nottestad: Have you ever polled your members pertaining to changing your policy on perpetual easements? How they would feel. On the map that was passed out there is thousands of acres held in easements right now. If your farm organization members are interested in easements wouldn't they rather deal with you than with the Federal Government. Hasn't your policy changed on this bill. Didn't the Tribune report that you were neutral on this bill?

Schlosser: We took a neutral stand on the Senate side and I received a lot of phone calls asking me to look at our policy very specifically because we are opposed to permanent easements. This was not a priority issue of ours, but when your membership asks, you respond to their needs and wants. As far as a survey, we have not specifically done a survey as far as membership issues are

on easements. There is some opposition in our membership because of the permanent easements placed on the land they are farming now. It has been somewhat problematic. I think that is the issued, how the easements are passed on from farmer to farmer.

Rep. Nottestad: That is my very point. The past is history, this bill is future. Do we live in the past and say, we can't do this? Because it didn't work then. Easements are not going to stop, they are going to continue. This would give your farmer members the right to sell an easement governed by an organization that I trust. I would love to have your group involved in this as well.

Schlosser: I am speaking from our policy stand. We did not take a position on whether farm groups should hold easements or not. But the issue here is that we would like to back off and take a good hard look at this. How we can move this through as a benefit. I have to speak on policy because I am a member representative.

Rep. Nottestad: Policy can be changed, I would think that most people who own land that are looking at easements would say, we would rather deal with our locals. If that is the case your board of directors needs to be hearing from your members. Rather than hide behind your policy.

Schlosser: I totally agree with you and our policy is up for review every year and I have to speak to policy. We stayed out last time, but spoke to Eric on this and felt comfortable staying out of this bill. We have some concerns and I have to address them through policy.

Bea Wall: I am opposed to this bill simply because I feel it is a rush through bill. I support SCR 3023. I feel we need to study this. Until we know what are the pros and cons for our state, why would we jump into something that would come back to bite us. How can sales be protected from one entity to another? The monitoring and enforcement codes are subject to interpretation. Whose interpretation? What make up will the group be? Money always has strings attached. When these funds are given to the 501(c)(5) groups, who will be in charge of the property once

the papers are signed. We need study. I agree with the rights of land owners, but if we can't make informed decisions, then what is right? It is hard to say you are doing the right thing for your property and the state when you sign on to a perpetual agreement. I heard that the payments maybe should go into perpetuity also, maybe that is an alternative so one person may not cash in on the full value of the piece of land. I feel all of this needs to be addressed before we make a state law. We are the only state that doesn't allow it, maybe we are right? Maybe we are wrong? We need to study it.

Chuck Damschen - Past President of LAND Association: I am here in opposition to SB 2388. I will try to not go over all the things said, but I would like to think the Farm Bureau has good intentions. But I am not so sure they are realizing who they are trying to make an alliance with. One of the reasons that perpetual easements are such an item of discussion is because most of them to this point have been obtained under questionable circumstances or representation. I can't prove that on every case, but the people I have talked to that have sold them or bought land that had easements on it have never gotten all the facts about that easements. Because the facts would not have enticed them into signing the easement. ND has been to court twice on easements. Are we approaching the limits of land the Fish and Wildlife Service can hold. One of the court cases involved the state and one of the opinions I have read that the Supreme Court felt that The Fish and Wildlife Service owned easements in the state of ND only at the blessing of the Governor. That particular case went to the Supreme Court because ND maintained that Fish and Wildlife had reached their limits. They said they had not. The limits being what the Governor had consented to. The Legislature set the law that set that limit back. That's how we got to court. We are approaching that limit. I believe that law still stands. If that is the case this is the perfect way for Government agencies to circumvent that limitation. I think that is a concern. A good reason

to support the study resolution instead. In our area, land is devalued. You talk about the rights to sell a perpetual easement, whose rights am I selling? Can I sell your right, can your father sell your right? The people that provide the money will have the control. I do question the legality. I don't think we should be encouraging anyone to be the sales men of perpetual easements in ND.

Wes Tossett - LAND: There are a lot of property rights. A land owner with a split title does not own all the rights to the land. We need to stay flexible. I don't think any human being has the right to dictate to the future generations how that land can be used. Easements never change. Perpetual easements are an attempt to control people and property without paying taxes. How about using zoning instead of easements. 99 years is long enough.

George Bishop: We have to keep in mind the 900,000 acres of wetlands held in easement, that for every acre of wetland they have they control the surrounding areas. So realistically they hold 5 million acres. I have letters from land appraisers and auctioneers and the general consensus is it always has effect on land value. Regardless of the type of easement. I varies to as high as 70% of the land value drop because of easements. This has cost the state of ND billions of dollars in lost economic income. There is also the health and safety issue, we have had some drownings in the state because of water in the ditches. The reason the water is there is because of the easements. I do like the idea of further study. It would be beneficial to this thing. How close are we to the maximum that US Fish and Wildlife can hold? The door will be closed if this is true. If this bill would pass it would open the door wide open for more easements.

Vice Chair Nelson: You mentioned the five acres around an easement is applicable to the ...

Bishop: It is not applicable, but we all know it was there. Just go up there and try to touch it. I have requested the Wetland determination and they have refused, so we don't know where it is at, but I do know if you get close to it, they're going to be on your case.

Vice Chair Nelson: Didn't the Johanson agreement define what the wetland was?

Bishop: To my knowledge, if they have ever identified a wetland so far, they have brought maps out where they drew the map out in the office, but never from when the easement was taken. The newer easements are different, but the older maps were made up in the office.

Vice Chair Nelson: And that had a later date?

Bishop: Yes, about 1996.

Rep. Porter: Your comment about water in the road ditches. Isn't that more of a problem of building roads where they shouldn't have been built?

Bishop: Where are you from?

Rep. Porter: If the roads block the natural pathways of the water, then it will be like a dam rather than a drainage.

Bishop: That is what I just said, we have to move the water off the sides of the road for the safety of the people. Soon as we get these easements, they are going to control it. This whole thing is about control.

Chairman Rennerfeldt: I am going to end the hearing on SB 2388. I will appoint a subcominittee to look at this, Rep. DeKrey, Rep. Nelson and Rep. Kelsh to see what can be worked out on this.

2001 HOUSE STANDING COMMITTEE MINUTES

BILL/RESOLUTION NO. SB 2388

House Natural Resources Committee

☐ Conference Committee

Hearing Date March 22, 2001

Tape Number	Side A	Side B	Meter #
1	x		568 to 3428
Committee Clerk Signature			

Minutes:

Chairman Earl Rennerfeldt, Vice Chair Jon O. Nelson, Rep. Brekke, Rep. DeKrey, Rep. Drovdal, Rep. Galvin, Rep. Keiser, Rep. Klein, Rep. Nottestad, Rep. Porter, Rep. Weiler, Rep. Hanson, Rep. Kelsh, Rep. Solberg, Rep. Winrich.

Vice Chair Nelson: When we considered 2388. I had some questions on limits of wetlands easement and I asked the Attorney General for an opinion on the matter. (See copy).

Chairman Rennerfeldt: Let's look at 2388, the easement bill.

Rep. DeKrey: We agreed to disagree, but decided to use the amendments provided to us and vote it up or vote it down.

Vice Chair Nelson: I move the amendment 1.757.0101 by Dennis Johnson.

Rep. Nottestad: Second.

Chairman Rennerfeldt: Any discussion. (someone explains amendment).

(Discussion on amendment)

Chairman Rennerfeldt: We have the Dennis Johnson amendments before us, all those in favor signify by saying Aye. Opposed? Amendments carry.

Vice Chair Nelson: I move a Do Pass on Amended SB 2388.

Rep. Keiser: I second.

(Discussion on motion).

Chairman Rennerfeldt: The question has been called on the amended bill for a Do Pass. Call the roll.

MOTION FOR A DO PASS AS AMENDED

YES, 8 NO, 7

CARRIED BY REP. NELSON

10757.0101
Title.0200

Adopted by the Natural Resources Committee

March 7, 2001

VR
3/22/01

HOUSE AMENDMENTS TO SB 2388 **HOUSE NATURAL RESOURCES 03/23/01**

Page 1, line 6, after the period insert "a."

Page 1, line 15, after "organization" insert "or its affiliates"

Page 1, line 16, replace "a." with "(1)" and replace "directorate" with "board of directors"

Page 1, line 17, replace "b." with "(2)"

Page 1, line 18, replace "c." with "(3)"

Page 1, after line 19, insert:

"b. A statement within the body of the easement that the grantee of the easement meets the requirements of paragraphs 1, 2, and 3 is sufficient proof of compliance with this subsection."

Renumber accordingly

Date: 3/22/01
Roll Call Vote #: 1

2001 HOUSE STANDING COMMITTEE ROLL CALL VOTES
BILL/RESOLUTION NO. SB2388

House Natural Resources Committee

☐ Subcommittee on _____
or
☐ Conference Committee

Legislative Council Amendment Number _____

Action Taken DO Pass Amended

Motion Made By Rep. Nelson Seconded By Rep. Keiser

Representatives	Yes	No	Representatives	Yes	No
Earl Rennerfeldt - Chairman		✓	Lyle Hanson	✓	
Jon O. Nelson - Vice Chairman	✓		Scot Kelsh	✓	
Curtis E. Brekke	✓	✓	Lonnie B. Winrich	✓	
Duane DeKrey		✓	Dorvan Solberg	✓	
David Drovdal		✓			
Pat Galvin		✓			
George Keiser	✓				
Frank Klein		✓			
Darrell D. Nottestad	✓				
Todd Porter	✓				
Dave Weiler		✓			

Total (Yes) 8 No 7

Absent _____

Floor Assignment Rep. Nelson

If the vote is on an amendment, briefly indicate intent: 10757.0101

Nelson - Moved DO - 2nd
Dennis Johnson amendment
Amends Carry by voice vote

REPORT OF STANDING COMMITTEE

SB 2388: Natural Resources Committee (Rep. Rennerfeldt, Chairman) recommends **AMENDMENTS AS FOLLOWS** and when so amended, recommends **DO PASS** (8 YEAS, 7 NAYS, 0 ABSENT AND NOT VOTING). SB 2388 was placed on the Sixth order on the calendar.

Page 1, line 6, after the period insert "a."

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Renumber accordingly

2001 TESTIMONY

SB 2388

Rep. Dennis Johnson

Testimony on Senate Bill 2388

Senate Bill 2388 is an effort to deal with a recurring issue that is very contentious. This issue is conservation easements. SB 2388 would allow a very finely defined group of organizations the ability to hold all types of conservation easements, including perpetual easements.

In current law, if a landowner is considering a conservation easement they have only one option. Landowners that desire to sell an easement should not be forced to turn to the U.S. Fish and Wildlife Service. This bill would expand the options available to landowners. It allows agricultural organizations to become involved by granting these organizations the ability to hold easements.

This bill will allow a leveling of the playing field between farm groups, the producers they represent, and the federal government. I hope that the conservation community will realize the significance of what this bill will do for them, and embrace it. SB 2388 will give agricultural organizations and conservation groups the ability to work together in a cooperative effort that can hopefully benefit all. I support this bill, and hope this committee will also.

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North Dakota Farm Bureau

www.ndfb.org

Testimony of North Dakota Farm Bureau
Senate Bill 2388

Chairman Fischer, members of the Senate Natural Resources Committee. My name is Eric Aasmundstad. I am a farmer from the Devils Lake Area, and President of the North Dakota Farm Bureau. I am here today representing the 26,000 member families of North Dakota Farm Bureau. North Dakota Farm Bureau supports Senate Bill 2388.

We believe SB 2388 is a viable solution to questions that have been nagging farmers, conservation groups, and this assembly for years. Should easements be allowed? How long should the term of the easements be? Who should hold these easements? We believe this legislation answers these questions, while addressing most of the concerns held on either side of this issue.

In North Dakota, it is illegal for entities other than a federal agency to contract anything longer than a 99-year easement. If a landowner wants to enter into a perpetual easement, or any other term not prescribed in statute, they are forced to turn to the federal agencies. We don't think people should be forced to go to the U.S. Fish and Wildlife Service if they want to sell an easement. We believe that one of the duties of government is the protection of private property, especially from invasion and interference by government itself. This can be accomplished by limiting the regulation of private property. Property owners should be able to determine if they want an easement (perpetual or otherwise) on their land. This stick is as important as any other in the property rights bundle.

It is important to realize that by granting organizations such as Farm Bureau the ability to hold easements, the start of a mutually beneficial effort can begin. By

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working with conservation organizations, I think there is a lot we can do to support our members and provide them workable, flexible easement options that will benefit the producer, and all of society. This legislation should demonstrate to the conservation community that agriculture is sincere in our efforts to allow them to do what they need to do, while protecting the interests of our producers.

SB 2388 is an effort to put to rest the animosity created by many years of mistrust between agriculture and the conservation community. It is also about property rights and the options available to landowners, as well as cooperation between two groups, that to date, have resisted most efforts to work together.

February 15, 2001

Senate Natural Resources Committee

SB 2388

Mr. Chairman, members of the Senate Natural Resources Committee, my name is Keith Trego. I am the Executive Director of the North Dakota Wetlands Trust. I appear before you this morning in support of the concept embodied in SB 2388. I believe the bill can be improved, and my understanding is that specific suggestions for improvement will be offered by others. I will offer some suggestions and perspectives about private property rights and private land protection that I would ask you to consider. I believe strongly that it is time to restore a private property right that North Dakota farmers and ranchers have had withheld from them for too long. SB 2388 is a partial solution - a step in the right direction.

The right to own, and sell, private property rights, in whole or in part, is one of the basic premises of freedom. In states other than North Dakota the right of a private property owner to sell all or any subset of the "bundle of sticks" that make up property ownership is not questioned. North Dakota has chosen a different path, one that selectively regulates the sale of property rights, who may buy property rights and the length of term during which they may own them. For example, we allow the sale of mineral rights and the resulting establishment of "split" mineral and surface estates, but we prohibit or interfere through regulation with the sale of property rights that promote protection of agricultural land or the retention or enhancement of conservation, scenic or open space values.

The list of restrictions is long. Suffice it to say that the volume and complexity of restrictions on the ownership and transfer of private property has one overall impact - to inhibit the private property owner from exercising the full array of options that should be available to them to realize economic gain, do proper estate planning, make business decisions and, perhaps most importantly, to exercise full freedom to shape and mold their property to meet their desires, both now and into the future. In short, existing state law shouts to us that government does know best, will enthusiastically join us at the kitchen table as we gather with our families and plan the disposition of property that might well represent our life's work, and protect us from ourselves.

SB 2388 represents a welcome departure from the scenario I just described. It partially opens the door to a wider array of landowner options. It announces recognition that we might at least be willing to try collaboration between agricultural, conservation and others interested in land protection. It returns at least some of the withheld private property rights to our farmers and ranchers. I commend ND Farm Bureau President Eric Aasmundstad and his organization for their leadership on this issue. They have been willing to step forward with vision and courage, promoting a course of action that may not be currently popular and is certainly poorly understood.

The North Dakota Wetlands Trust will continue to do its part to promote natural resource conservation and an environment of harmony between agriculture and conservation. Perhaps SB 2388 will be the vehicle that facilitates North Dakota's trip to a more enlightened future. Eric and I have agreed it is worth a try. Mr. Chairman and members of the Committee, we hope you will concur and give this bill a strong DO PASS recommendation.

Senate Bill 2388

Presented by Paul Becker

Chairman Fisher, Members of the Senate Natural Resources Committee. My name is Paul Becker, I am a farmer from the Devils Lake area.

I am here today in support of Senate Bill 2388. I have a problem with the whole idea of perpetual easements but this is a step in the right direction. This would allow landowners a choice of which organization holds the easement. This would hopefully help the landowner negociate an easement that would be more farmer friendly. I see this as a compromise where the landowner who wants to sell an easement can work with an organization he may be more comfortable with. I own land that has US Fish & Wildlife Easements on it. I would not recommend selling a perpetual easement to anyone, because the options that our future generations have will be limited by these easements. If perpetual easements must be allowed, also give the landowner the option to work with someone other than the US Fish & Wildlife Service. Thank you I would be happy to answer any questions you have.

dmiller@progressivefarmer.com

ILLUSTRATION RAYE WATKINS, JR.

Ohio's Promise To Farmers

BY DAN MILLER

During the early weeks of this new year, the Ohio General Assembly will be writing the rules for a new land preservation and revitalization effort. If done right, it ought to do a lot to preserve Ohio farmland and the state's $70 billion ag industry.

The $400 million Conservation and Revitalization Fund, State Issue 1 on the November ballot, caps four years of hard work in which state officials, farm and environmental groups, and citizens have completed a top-to-bottom review of ways the state can better manage its land resources.

Ohio is 26 million acres, half of it prime farmland. But also in the state are 16 urban areas.

Ohio's innovative and ongoing efforts to protect farmland first gained traction when former Gov. George Voinovich issued an order that all state agencies consider the impact of their policies on the state's farmland.

Then the governor appointed a Farmland Preservation Task Force. From that work, completed in 1997, came a quiver of initiatives and programs. Among them:

- The Ohio Department of Agriculture opened an Office of Farmland Preservation.
- The state created a Family Farm Loan Guarantee program for beginning and expanding farmers.
- Two-thirds of Ohio's counties develop land-use plans.
- The General Assembly approved an Agricultural Easement Purchase Fund. This is a purchase of development rights program in which local governments buy from willing farmers their land's development rights.

Earlier this year, current Gov. Bob Taft signed a $200 million reduction in Ohio's estate tax. A provision in that new law gives special attention to the preservation of family farms.

Then came State Issue 1, an idea also forwarded by Taft.

Half of the $400 million committed to the program will be used to clean up brownfield sites—old industrial sites. The brownfield program supports farmland preservation efforts by creating new land for urban development.

The other $200 million, works more directly for farmland preservation and open spaces.

About $25 million will be spent on buying development rights.

Another $100 million will be used to establish and protect urban parks, such as river corridors, forests and wetlands. The program will benefit farmland owners volunteering to be part of it.

About $50 million is targeted to 44 major watersheds for voluntary cleanup programs, which farmers will be able to tap if they agree to help lighten their footprint on local watersheds.

Progressive Farmer, has written much over the years about conservation programs. The most popular have been those that are voluntary, that pay landowners a fair price for their preservation and conservation work, and fit well within the economic realities of farming communities.

Ohio legislators must ensure that the rights of its farmland owners are protected. Well-intended conservation programs sometimes have unintended consequences for farm owners.

For example, USDA's Conservation Reserve Program has in some locations made it difficult for cow/calf producers to find land to graze their cattle.

Another potential problem arises when voluntary programs put undue pressures on farmland owners to participate.

Ohio's program is designed to address local needs. It is to be run by local agencies and citizens. But in its zeal to protect open spaces, green spaces and farms, the state must ensure that farmers who don't want to participate aren't in reality disadvantaged by overly expansive county land-use conservation programs.

After all, a voluntary program must ensure that a farmer has every right to sell his farm for development if he desires, just as it helps him keep on farming or preserve a fragile corner of the farm.

The challenges are now for the state's General Assembly to write rules for the program that fulfill the promise of a special conservation program.

Ohio's $400 million conservation program gives farmers new options to help protect their farms. PHOTO: JOE LINK

MIDWEST EDITOR

Need information on a story or know of a subject we should cover? Write to us or give us a call.

[redacted]

Testimony - State Senate Natural Resources Committee - February 15, 2001
SB 2388

Good Morning, Mr. Chairman, Members of the North Dakota Senate Natural Resources Committee. My name is Joe Satrom and I am the Director of Land Protection Programs for the Great Plains Office of Ducks Unlimited, Inc. Ducks Unlimited is an international conservation organization with four regional offices including the Great Plains Office here in Bismarck.

I am appearing here today to present and explain Ducks Unlimited's neutral position on Senate Bill 2388:

From a positive perspective, our organization compliments the North Dakota Farm Bureau on their earlier acknowledgement that easement decisions are a right of all landowners and that farm organizations have a responsibility and opportunity in North Dakota to protect agricultural land for agriculture. SB 2388 acknowledges that permanent easements are an appropriate land protection tool and recognizes agricultural producer directed organizations as the only legal holders of these permanent easements.

The work that Farm Bureau leadership has put forth in advancing SB 2388 is a commendable first step and follows well with the support that the American Farm Bureau Federation has given to educating and guiding landowners in making decisions related to easements. The "Landowner's Guide to Conservation Easements" recently published with the support of the American Farm Bureau Federation is an important contribution to the growing discussion of this matter.

From a less positive perspective, SB 2388 has some significant shortcomings. I highly recommend that the legislation be amended to allow non-profit 501 © (3) conservation organizations to hold permanent easements. In the "Landowners Guide" that I previously mentioned the authors recommend (page 19) that landowners investigate every potential easement holder in their area and that established, experienced non-profit conservation groups and public agencies are the field from which landowners should carefully pick their easement holder. As drafted SB 2388 establishes organizations run by agricultural producers as the only holders of conservation easements. I am not aware of any North Dakota, producer directed, organization that has any experience in holding easements. In addition, including 501 © (3) organizations in this legislation would clearly offer the landowner the potential to take advantage of tax deductible elements of doing conservation easements as permitted under Chapter 170 (h) of the Internal Revenue Service Code.

In conclusion, I want to attempt to clarify several aspects of this discussion:

- Easements are one of the rights associated with the ownership of real property. Conservation easements are just one type of these many and varied rights. Other types include utilities, drainage, flood mitigation, open space, viewsheds, cultural, historical, etc. Current North Dakota law is ambiguous concerning many aspects of easements.

- Contrary to discussion in this committee related to easements, our organization was not involved in the drafting of SB 2388. While it is not unlikely that we would refer some land protection easement opportunities to farm organizations, it is not likely that we will look to farm organizations as the holders of easements that we are funding on the Missouri Coteau. As the Farm Bureau Federation suggests in their "Guidebook for Landowners", our organization will look for highly qualified and experienced holders for these grassland easements. Holding, monitoring and enforcing the terms of easements is a major responsibility and if SB 2388 passes, I believe that it will be some time before North Dakota farm organizations are in a position to have the infrastructure, staff, equipment, and field presence to carryout these types of responsibilities on large landscapes. I look forward to working with the land protection staffs of the farm organizations on the protection of North Dakota agricultural lands and open space.

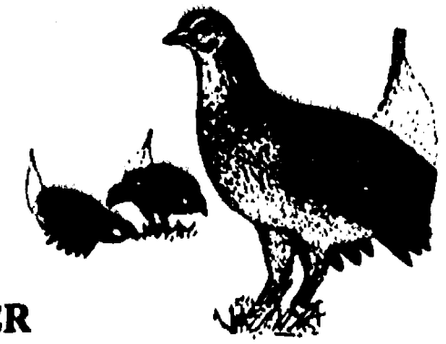
In conclusion, I want to reiterate that SB 2388 represents a bold step by the leadership of the North Dakota Farm Bureau. It is a work in progress and hopefully this Legislature can make some important and necessary changes. This Senate Natural Resources Committee has an important role in developing and directing state policy related to our natural resources. I would be happy to handle any questions you have concerning this legislation.

Thank You!

North Dakota Chapter

THE WILDLIFE SOCIETY

P.O. BOX 1442 • BISMARCK, ND 58502



TESTIMONY OF BILL PFEIFER
NORTH DAKOTA CHAPTER OF THE WILDLIFE SOCIETY
PRESENTED TO THE SENATE NATURAL RESOURCE COMMITTEE
ON SB 2388, FEBRUARY 15, 2001

MR. CHAIRMAN AND MEMBERS OF THE COMMITTEE:

I'm Bill Pfeifer speaking on behalf of the North Dakota Chapter of The Wildlife Society. The Wildlife Society wishes to be on record as being neutral on SB 2388.

The Wildlife Society recognizes the benefits of easements to both the landowner and to the natural resources community. Every possible option, with no restrictions, including duration and purchasing organization, should be available to the landowner. Any restriction reduces the landowner options and benefits.

LANDOWNERS ASSOCIATION OF NORTH DAKOTA

P. O. Box 38, Bismarck, ND 58502-0038 Phone/Fax: 701-667-4185

Home Page: http://www.geocities.com/landowners

Email: LHARNER@gcentral.com

Oppose SB 2388

Chairman Fischer and members of the Senate Natural Resources Committee,

Thank you for the time you are giving to hearing both the pro's and con's of Senate Bill 2388.

My name is Dennis Miller from District 15. I farm north east of Devils Lake and serve as president of the Landowners Association of North Dakota. I represent LAND before you today.

LAND opposes Senate Bill 2388 for a number of reasons.

First and foremost, SB2388 would allow perpetual easements to be attached to deeded farm property. Perpetual is forever. North East North Dakota has experienced perpetual easements since the early 1960's and these easements are perpetual headaches for the owners or those who rent the property and try to make a living from the land.

None of us can predict what the future holds or what economic, social or cultural forces will rule when those of us here present pass the keys of society to the next generation. LAND does not feel it moral or just to encumber our property with perpetual easements. I remember the words of a vocational agriculture teacher who said it is our responsibility to pass our land to the next generation in better condition than we received it, which would allow the future owners to prosper from the land in a better way than we did. Perpetual easements, as we have experienced in North East North Dakota, do the opposite of what this wise instructor tried to teach us.

LAND is aware of a number of cases in other states where property encumbered by perpetual conservation easements was either unsaleable or of no value for collateral on the owners bank loan.

Major questions remain unanswered should SB2388 become law.

Are the agricultural organizations who propose to carry these easements prepared to defend the property owners against lawsuits filed by environmental organizations to force the owners to comply with the Endangered Species Act? These lawsuits will undoubtedly arise if the organizations carrying the easements are too owner friendly.

Will the courts view the restrictions written into SB2388 as prejudicial and rule that non agricultural related organizations can carry perpetual easements as well? Farmers who wish to do so have the right to sell perpetual easements today. LAND is not in favor of expanding the use of perpetual easements.

LAND has been criticized for opposing the right of a property owner to sell a perpetual easement on his/her property. LAND was organized to protect the revenue generating ability of farm property. We believe this ability should extend to future as well as current property owners. Our ancestors fought for each of us to have the privilege of owning private property. With every privilege comes an equal responsibility. We are responsible to pass our land on to the next generation with equal or greater revenue generating capacity than we received it.

The proponents of this legislation have stated that SB2388 is necessary to allow for estate and income tax savings on land transfers. With the move to reduce and eventually eliminate the death tax, LAND feels this is a mute point.

Thank you for your time. LAND asks that the Senate Natural Resources Committee give SB2388 a do not pass recommendation.

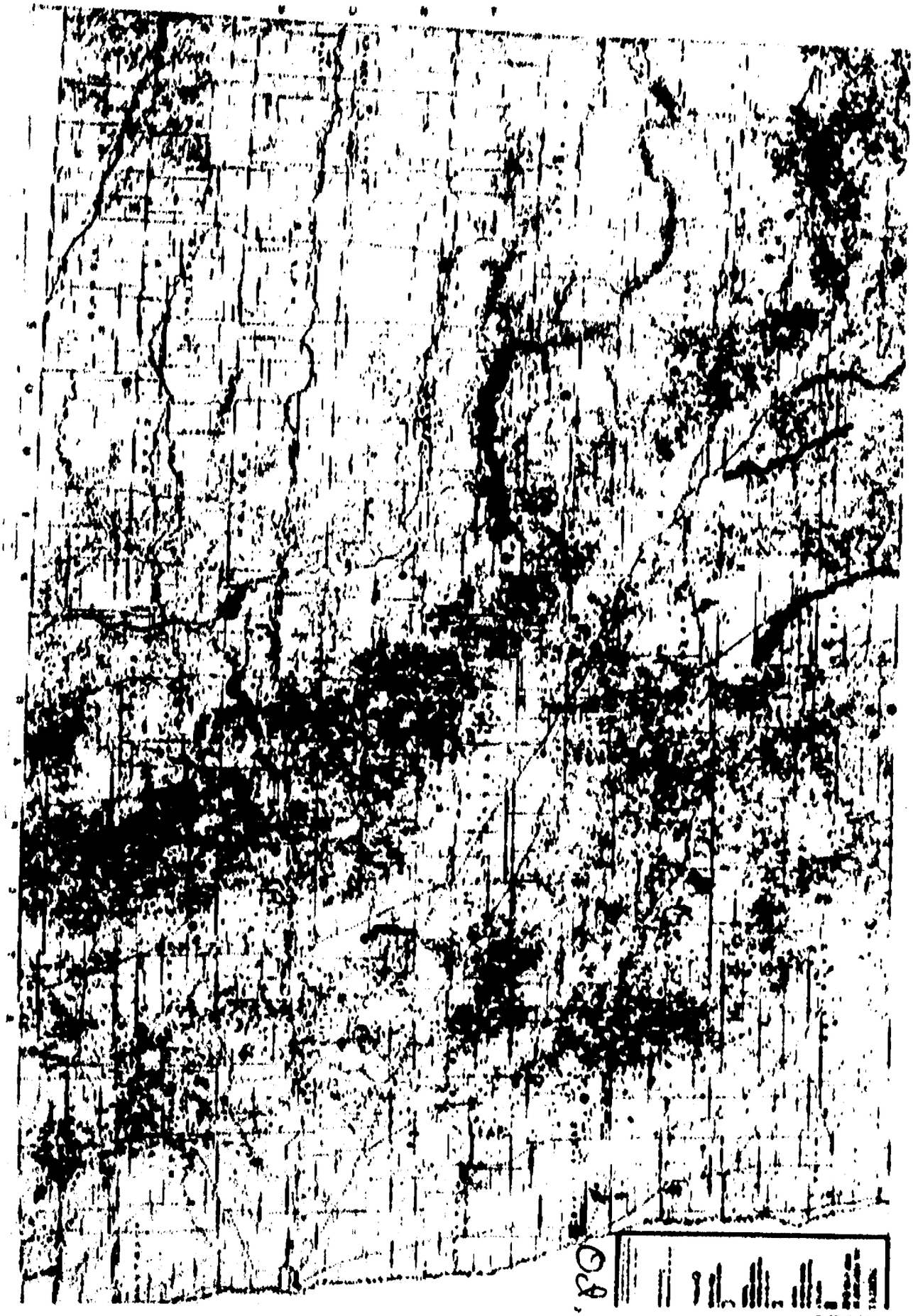
Dennis Miller, LAND President

DEDICATED

To the preservation of the revenue generating activities of our farmers and ranchers along with their most valuable, renewable resource - Land.

To the preservation of our wildlife, environmental, and soil resources through voluntary and compensatory programs.

To the preservation of private property rights



2/28/01

Dennis Miller

"Perpetual" means 99 years.
FALSE. Perpetual is forever. There is precedent for breaking an easement through eminent domain when a strong public need is found, but two rural water systems in ND had problems accessing easement property. This cost all users of the system time and money. What happens when new telephone or electrical lines are needed?

If I sell a conservation easement, I can still use my property just as I always have.
FALSE. No, you give up control of all property covered in the easement. Forever, there will be an organization or agency with the power to look over your shoulder and approve or disapprove your management practices.

Most easements require you to give access at all times, even during the growing season when access can damage crops. You may have to obtain approval for weed control, grazing or other management practices. Many easements allow "approved" practices, but may not list specific practices. That's a loophole in the contract that allows the easement holder to change the list of approved practices without your consent.

Imagine selling a grassland easement, believing that is all your property would ever produce. It sounds good, right? Then you get an offer to have wind generators installed. You look at the easement and realize that, in order to dig into the ground to pour a foundation, you have to negotiate an addendum to the easement. This entire choice to alter the agreement is up to the organization or agency owning the easement. This is a situation already facing some North Dakotans.

When I sell a conservation easement on my property, I retain full title to the land.
FALSE. The title becomes split between the landowner and the holder of the easement. Many easements allow sale or transfer of the easement title to other organizations or agencies, so you may find yourself or your heirs with an entirely different partner than the one to whom you sold the easement.

I need money right now and a conservation easement will put cash in my pocket.
THINK AGAIN. If your land is mortgaged, chances are the conservation easement payment will go directly to the lender and may be used for the interest payment instead of reducing the principle. Read the fine print. Regardless, you are responsible for paying income taxes on the full amount of the easement. Selling an easement may actually harm your cash flow because of the tax complications.

My easement allows "normal management practices," so anything I normally would do with my property will always be allowed.
FALSE. While the easement might allow for *"normal management practices,"* the definition of that term may change over time and in ways you can not imagine now. Selling an easement to be managed in conjunction with an organization or agency does not guarantee a particular management practice for years to come. Many easement contracts allow the purchasing organization or agency to sell or transfer title to the easement, so it may be an entirely different entity who interprets *"normal management practices,"* for your heirs or future owners of this property. For example, during the next dry spell or short grass summer the new *"management specialists"* may decide to limit how many cows you can have in your pastures and for how long. You could be under the same rules as the ranchers who run cattle on our National Grasslands except that you are still required to pay all the property taxes!

Easements on agricultural property in North Dakota are limited to 30 years.
TRUE AND FALSE. North Dakota law allows only certain organizations and agencies to hold easements, and those easements are limited to 30 years. However, Federal agencies are not bound by state law, so organizations may purchase perpetual easements if the title is given to Federal agencies. While this violates the spirit of the law, it is technically legal in the mind of some officials.

Before you consider selling off your 'management rights' you might want to talk to some of the 2nd and 3rd generation North Dakotans who have some of this state's 790,000 + acres of perpetual wetland easements that the previous owners have sold off. They are not "happy campers."

Provided by
Landowners Association of North Dakota
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DEDICATED
To the preservation of the revenue generating activities of our farmers and ranchers along with their most valuable, renewable resource – Land.
To the preservation of our wildlife, environmental, and soil resources through voluntary and compensatory programs.
To the preservation of private property owners' rights.

MYTHS ABOUT CONSERVATION EASEMENTS

What every landowner should consider before signing any type of conservation easement.

We strongly urge you to seek professional advice from accountants and attorneys experienced with easements before you make a decision

Shorter term (30 years or less) easements are better than perpetual easements.
TRUE. Easements of a shorter duration allow future generations more options and flexibility in managing their property. But short term easements still give up control of your property, so it pays to talk to professionals before you make any decisions.

Conservation easements are the only way to protect native sod.
FALSE. Most of the land suitable for cultivation in our state has already been broken. There is no incentive for breaking more land unless tillage is the only effective means of weed control.

Some of the land identified as "native sod" for the purpose of conservation easements was farmed within recent memory. If the characteristics of native sod cannot be distinguished between that which was never plowed and farmland which was planted back to grass, then landowners must be doing a pretty good job managing their prairie. If we need more prairie, we can always convert more farmland to grass. It just takes ingenuity North Dakota landowners already possess.

Conservation easements will save me money in taxes.
THINK AGAIN. If you own land valued at $100/acre and sell a conservation easement for $30/acre, you pay income tax on the $30. Since this was a sale of a tangible piece of your property your basis for tax pur-poses in the property is reduced to $70. When you sell the land if it appreciates the difference in sale price over the $70 becomes taxable. Hence you pay tax on the $30 during the second sale.

We're developing too much land now. If we keep up at this rate, we've going to be all developed and not have agricultural land.
FALSE. According to the National Conservation and Resource Service's (NRCS) 1997 National Resources Inventory, the rate of development of agricultural land in North Dakota for 1992-97 was approximately half of the rate from 1987-92. Development has slowed and North Dakota is losing population. We are not in danger of running out of agricultural land.

A conservation easement requires you to allow hunting.
TRUE or FALSE, depending on how your lease reads. Many conservation easements currently sold in North Dakota are governed by the National Wildlife Refuge System Administration Act, so you need to read the fine print to see all of the requirements. Many of the funds and support for purchasing conservation easements come from hunters who believe they will have automatic access to your property, but that isn't always required.

I've read the contract and understand it, so I should just sign.
THINK AGAIN. Words have certain meanings and sometimes, those meanings change. For example, some of the easements sold in ND today state that *"the rights and interests granted to the United States, herein shall become part of the National Wildlife Refuge System and shall be administered by the USFWS, pursuant to the National Wildlife Refuge System Administration Act, 16 USC 668dd."* Have you read that piece of legislation? Do you understand it? Does it allow the agency flexibility with rules and definitions? Have you ever known an agency to change rules? THINK! Then consult an attorney and accountant experienced with easements.

Selling property with a conservation easement will be easy.
FALSE. You are required to inform the buyer a conservation easement exists. This may lessen the value of the property, the number of people willing to share title with an organization or government agency, and the number of banks willing to lend money for a loan to purchase property with a split title.

Some easements require the bank to take a secondary interest in deference to the easement. This can dramatically decrease the willingness of a financial institution to loan money on the property.

Because the holder of the easement already owns part of the title, they may have an interest in purchasing the remainder of the property. If this is a non-profit organization or Federal agency, that may take the property off tax rolls.

My neighbor sold a conservation easement last year and he hasn't had any trouble, so my heirs and I won't.
FALSE. Perpetual easements generally don't cause problems right away. But wait 20 or more years and see what problems crop up.

Thousands of acres of wetland easements were sold in ND during the 1960's and 70's, but most landowners didn't experience problems until the next generation took over the property. Now basic terms seem to have been redefined and boundaries covered by the easement changed. The original maps were "lost" or are "not available." Many of these landowners would love the opportunity to buy back the easement and regain control of their property.

A conservation easement will preserve my property just as it is, forever.
FALSE. Land changes. Each season brings change to the land. Some changes are major and others minor but, over time, even with no intrusion or help from man, land will change.

The purchasing agent seems like a nice person so I don't need anyone else to review the easement contract before I sign.
FALSE. The purchasing agent wants something that you have - your property. It is in that person's best interest to be pleasant and agreeable. The purchasing agent works for someone else - not you.

In any type of land transaction, you need professionals (an accountant and attorney) with experience in easements, tax, estate planning and property transactions to represent you and your best interests. If you are dealing with a perpetual easement, you want to double and triple check the contract. Most land sales deal only with the property until it is sold, but a perpetual easement is forever.

Keep in mind that, however pleasant the purchasing agent is, that will likely not be the person with whom you will deal if easement management issues and will certainly not be the person to manage the easement during its lifetime. Many easement contracts allow the easement to be sold, so your heirs or future owners of the property may end up dealing with an entirely different organization or agency holding the easement. That's why you need professional assistance to look at all of the options before you sign a contract.

TESTIMONY OF MALCOLM H. BROWN
SENATE NATURAL RESOURCES COMMITTEE
SB 2388
FEBRUARY 15, 2001

Mr. Chairman and Members of the Committee:

I appear on behalf of the Real Property Section of the State Bar Association of North Dakota with regard to SB 2388.

The State Bar Association is taking no position with regard to the amendments to § 47-05-02.1, NDCC, proposed by SB 2388. However, we have two comments that are technical in nature relating to the proposed amendment:

a. Line 16 of SB 2388 uses the term "directorate." A word search of the North Dakota Century Code indicates that term does not appear elsewhere in the Century Code. We suggest that the term "Board of Directors" be substituted.

b. Because current law does not differentiate what organization can acquire different types of easements, and a title examiner may question the duration of a perpetual easement acquired under this amendment, we suggest a subsection (d) that would clarify easements that might be obtained if this bill becomes law. We suggest language as follows:

> <u>d. A statement within the body of the easement that the grantee of the easement meets the above requirements is sufficient proof of compliance with this subsection.</u>

Testimony on Senate Bill 2388

Paul Becker, Devils Lake

Chairman Rennerfeldt and members of the House Natural Resources Committee, for the record I am Paul Becker, a farmer from the Devils Lake area.

I am here today in support of SB 2388. We have a long history of perpetual easements in our area. I own land with perpetual easements and would not recommend that anyone sell an easement. But I do respect an individual's right to do so. This bill would allow some options on who would hold that easement. At the same time, these organizations could be involved in the negotiations, as well as educate the landowners, who are probably only going to enter into one perpetual easement in their lifetime. The other party is continually negotiating easements and has much more experience in this area. This would hopefully level the field in the negotiation process.

Thank you for this opportunity to testify in support of Senate Bill 2388.

March 9, 2001

House Natural Resources Committee

SB 2388

Mr. Chairman, members of the House Natural Resources Committee, my name is Keith Trego. I am the Executive Director of the North Dakota Wetlands Trust. I appear before you this morning in support of SB 2388.

While I would like to see SB 2388 go further in facilitating landowner's access to easements, I am a realist. North Dakota has been so regressive on this private property rights issue for so long I fully recognize we need to correct our current situation incrementally. SB 2388 is a first step in the right direction.

The right to own, and sell, private property rights, in whole or in part, is one of the basic premises of freedom. In states other than North Dakota the right of a private property owner to sell all or any subset of the "bundle of sticks" that make up property ownership is not questioned. North Dakota has chosen a different path, one that selectively regulates the sale of property rights, who may buy property rights and the length of term during which they may own them. For example, we allow the sale of mineral rights and the resulting establishment of "split" mineral and surface estates, but we prohibit or interfere through regulation with the sale of property rights that promote protection of agricultural land or the retention or enhancement of conservation, scenic or open space values.

The list of restrictions is long. Suffice it to say that the volume and complexity of restrictions on the ownership and transfer of private property has one overall impact - to inhibit the private property owner from exercising the full array of options that should be available to them to realize economic gain, do proper estate planning, make business decisions and, perhaps most importantly, to exercise full freedom to shape and mold their property to meet their desires, both now and into the future. In short, existing state law shouts to us that government does know best, will enthusiastically join us at the kitchen table as we gather with our families and plan the disposition of property that might well represent our life's work, and protect us from ourselves. I would suggest that is a pretty sad state of affairs for a state whose citizens pride themselves on independence, self reliance and protection of private property rights.

SB 2388 represents a welcome departure from the scenario I just described. It partially opens the door to a wider array of landowner options. It announces recognition that we might at least be willing to try collaboration between agricultural, conservation and others interested in land protection. It returns at least some of the withheld private property rights to our farmers and ranchers. I commend ND Farm Bureau President Eric Aasmundstad and his organization for their leadership on this issue. They have been willing to step forward with vision and courage, promoting a course of action that may not be currently popular and is certainly poorly understood.

The North Dakota Wetlands Trust will continue to do its part to promote natural resource conservation and an environment of harmony between agriculture and conservation. Perhaps SB 2388 will be the vehicle that facilitates North Dakota's trip to a more enlightened future. Eric and I have agreed it is worth a try. Mr. Chairman and members of the Committee, we hope you will concur and give this bill a strong DO PASS recommendation.

Testimony on
SB 2388
House Natural Resources Committee
Andy Mork, Chairman
BOMMM
Burleigh, Oliver, Morton, Mercer, McLean Joint Water Resource Board

Members of the Committee,

I am Andy Mork, Chairman of the BOMMM Joint Water Resource Board. I would like to ask the House Natural Resources Committee to consider an amendment to SB 2388 to exempt riparian land along the Missouri River from the 99 year easement limitation. I offer this amendment for the following reasons:

1. North Dakota Farm Bureau supported this exemption, which was contained in SB 2266.

2. There are 87 miles of free-flowing Missouri River in North Dakota, and if there ever was a unique area that warranted an exemption, it is the Missouri River.

3. There is enormous development pressure to build homes along the Missouri River, and if we don't act now, the farmers cannot forgo the value being offered for farmland for residential development purposes. The result will be loss of farmland, and further erosion of North Dakota's agriculture base.

4. The proposed exemption is limited to 1,000 feet from the ordinary high water mark of the Missouri River, so it should have very little impact on other areas in North Dakota.

5. The exemption proposed in SB 2388 will take considerable time to be implemented, and the addition of an exemption for the Missouri River would enable this area to be addressed as the other exemption is being developed.

We are asking for this amendment to help protect farmland along the Missouri River. Thank you for considering this request.

Proposed Amendments
SB 2388

Page 1, Line 8, after the word "section" add the words "except riparian land located along the Missouri River within one thousand feet from the ordinary high water mark."

Ease into easements

Landowner's guide suggests reducing the costs of ownership when land is sold. ■ By Ed Maixner

Farmland owners can expect to see more opportunities in the coming years to sell conservation easements.

Interest in such easements among state wildlife agencies and nonprofit organizations continues to grow, and the Department of Agriculture has laid out $30 million this year for matching grants to purchase easements.

Besides that, farm bill considerations in Congress this year will probably be heavy on green programs. That may mean more dollars for conservation easements, but it also means a menu of other options for pieces of land that might go into conservation uses.

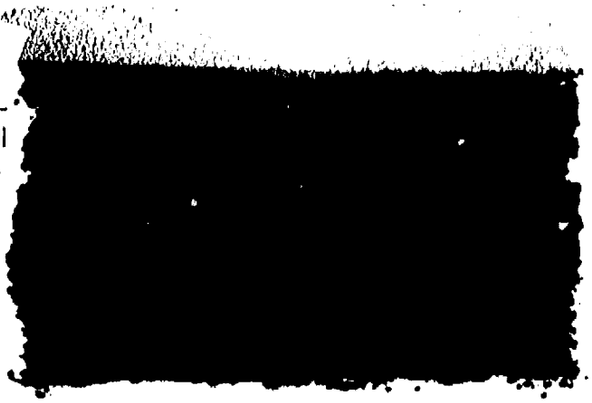
Landowners can benefit both short term and long term by selling easements. In the short term, the easements can mean cash in the pocket. Long term, they can help improve the quality and productivity of the land.

Conservation easements are layers of a complex thing called ownership and, therefore, can push your property rights out onto thin ice.

That is where Steven Bick and Harry Haney come in. Funded by the American Farm Bureau Federation (AFBF), they wrote "A Landowner's Guide to Conservation Easements." Bick teaches at New York's College of Environmental Science and Forestry in Syracuse, N.Y., and Haney is a specialist in forest management and economics at Virginia Tech.

Don Parrish, an AFBF environmental policy specialist who helped edit the guide, says a lot has been written about conservation easements, but the farm organization sponsored the guide because, "we were shocked at how little had been done from a landowner's perspective."

Parrish says the most important thing landowners must understand about easements is this: "They are selling off property rights." No matter what the language of an easement document, he says, "they are clearly dividing an interest in their property."



In their guide, Bick and Haney say a landowner often first considers selling or donating conservation easements to solve a land ownership problem. That is, the owner wants to reduce the costs of ownership or the capital gains or estate tax consequences when the land is sold or inherited.

When a farmer has full use of the normally tillable acres of the land, paying taxes and maintenance on the rest may be an unnecessary, even unaffordable, burden. The situation might be compared to maintaining extra cars and trucks that are not used, or keeping a 10-bedroom house after the kids are on their own.

The guide details what is gained and lost in selling easements. When selling, you get cash but also income tax liability. When donating, you forfeit the cash but reduce your property value, which means reduced capital gains and estate taxes. However, the guide points out the pitfalls. For example, the donation does not qualify with the Internal Revenue Service unless it is permanent and to a qualified recipient, an agency or organization IRS believes will actually maintain the conservation goals of the easement.

Whether intending to sell or donate easements, the guide tells landowners to be a shopper. Both what is taken and what is given varies among agencies and land trusts, and it's important that an easement coincides with the landowner's goals for the land.

Bick and Haney recommend the landowner draft an overall management and conservation plan — including the basics of proposed easements — for the tract from which an easement may be granted. Then, they suggest sending the plan to several potential grantees for a response.

Landowners might first check with state and local agencies that may be interested in conservation easements, but also contact the Land Trust Alliance in Washington, D.C. (*www.lta.org*). The alliance lists more than a thousand agencies and organizations that either buy or accept easements.

Copies of "The Landowner's Guide to Conservation Easements," $25 each, can be ordered online at the American Farm Bureau Web site, *www.fb.com*, or from Kendall/Hunt Publishing Co., (800) 228-0810. ◆

ED MAIXNER is a member of our Washington Bureau. He may be reached at *emaixner@farmprogress.com*.

Testimony on Senate Bill 2388

John Enderle, Taylor

Chairman Rennerfeldt and members of the House Natural Resources Committee: Thank you for this distinct honor.

My name is John Enderle from Taylor, North Dakota. I would like to speak in favor of SB 2388 in regard to perpetual easements. We need more local control in this arena to protect our farmers' interests here in North Dakota.

I feel this bill will help our farm groups direct the flow of easement activity in North Dakota in favor of our long-term interests. U.S. Fish and Wildlife takes its direction from Washington at the whim of an ever-changing political climate, and I feel the stabilizing influence of groups such as North Dakota Farm Bureau will keep our interests at the forefront. We need a place at the table to keep our interests safe, and this bill will be one valuable tool.

Thank you again for this opportunity to testify.

NORTH DAKOTA ASSOCIATION OF SOIL CONSERVATION DISTRICTS

OWNER AND OPERATOR OF LINCOLN-OAKES NURSERIES

3310 University Drive • P.O. Box 1601
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PRESIDENT
Rodney Hickle

EXECUTIVE VICE PRESIDENT
Gary Puppe

March 14, 2001

Representative Earl Rennerfeldt
Chairman, Natural Resources Committee
State Capitol – Legislative Assembly
600 E. Boulevard Avenue
Bismarck, ND 58505-0360

Dear Representative Rennerfeldt:

Senate Bill 2388 is currently before your committee which provides that 501 (C) (5) organizations would be authorized to enter into easements that exceed 99 years.

The North Dakota Association of Soil Conservation Districts would be included as an eligible organization under the bill.

Since the North Dakota Association of Soil Conservation Districts does not support easements that exceed current provisions of state law, the Board of Directors urge defeat of SB 2388.

Sincerely,

Rodney Hickle,
President

OFFICE OF ATTORNEY GENERAL
STATE OF NORTH DAKOTA

Wayne Stenehjem
ATTORNEY GENERAL

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MEMORANDUM

TO: Rep. Jon Nelson

FROM: Charles M. Carvell, Assistant Attorney General

DATE: March 20, 2001

RE: Easements

Last week you asked me two questions. Your first question asks what authority, if any, the governor has to approve the conveyance of easements.

The governor has some specific statutory authority to approve state acquisition of easements. E.g. N.D.C.C. § 20.1-02-05(7)(acquisitions by the Game & Fish Dep't). And of course the governor can control acquisition of easements by the state agencies under his authority. But the general rule is that conveyance and acquisition of easements is not subject to gubernatorial review and approval. The only possible source of such authority is N.D.C.C. § 10-06.1-10. This statute subjects "purchases" of farmland and ranchland by nonprofit organizations to the governor's approval.

While the statute doesn't explain whether it is confined to just purchases of fee title, or whether it also applies to purchases of a lesser property interest, such as an easement, it is my view that it applies only to fee title purchases. The statute's language -- "[b]efore any farmland or ranchland may be purchased by any nonprofit organization" -- seems to indicate that just fee purchases are contemplated.

I also reviewed the statute's legislative history. Nowhere does it mention easements and any other kind of acquisition involving less than fee title. Therefore, the only general authority, N.D.C.C. § 10-06.1-10, allowing the governor to approve private land conveyances doesn't extend to easements, just fee conveyances.

In sum, the governor has little authority to approve the conveyance of an easement, and the authority he has is limited to transactions by state agencies.

Your second question concerns acquisitions of wetland easements by the U.S. Fish and Wildlife Service. You stated that you understand that some kind of agreement was made in the 1960s or 1970s between the state and the FWS that imposes an acreage cap on the number of wetland acres the FWS can acquire. You asked if this is indeed true and, if so, whether the limitation applies to the purchase of conservation easements by the FWS.

There is indeed a cap on the FWS's wetland easement purchases. In 1958 Congress enacted a law allowing the Dep't of Interior to purchase "waterfowl production areas." M. Sagsveen, "Waterfowl Production Areas: A State Perspective," 60 N.D. L. Rev. 659, 660 (1984). These have become known as federal wetland easements. They were to be purchased with money from the Migratory Bird Conservation Fund ("Fund"). Id.

In 1961 Congress placed a condition on the purchase of wetland easements. It required that money from the Fund could only be used to make acquisitions approved by the governor of the state in which acquisitions were sought. Id. This condition is still the law. 16 U.S.C. § 715k-5 ("No land shall be acquired with moneys from the migratory bird conservation fund unless the acquisition thereof has been approved by the Governor of the State or appropriate State agency"). In the 1960s and 1970s Govs. Guy and Link approved the acquisition of about 1.5 million acres. North Dakota v. United States, 460 U.S. 300, 311 (1983).

Thus, if the FWS uses money from the Fund to purchase any kind of a property interest, whether it is a wetland easement or a conservation easement, its purchase is subject to the acreage cap set by Govs. Guy and Link. If, however, the FWS or another federal agency uses money from a source other than the Migratory Bird Conservation Fund, it may not be subject to these limitations. And other federal easement acquisition programs exist.

For example, the Wetlands Trust has the power to purchase "[l]ands or interests in land," but its purchases require the governor's approval. 100 Stat. 4235 (1986). Also, the FWS told me that it purchases "grasslands easements" -- a kind of conservation easement -- and that it doesn't need the governor's consent to make these purchases.

The U.S. Dep't of Agriculture can purchase "wetland reserves" and "environmental easements," but in doing so must comply with any term limits imposed by state law. 16 U.S.C. §§ 3837a(a)(3), 3839(a), 3839a(a)(2)(A). North Dakota has limited the duration of such interests to 30 years. N.D.C.C. § 47-05-02.1. The Dep't of Agriculture may also establish "perpetual wetland conservation easements" on property it

acquires through its Farmers Home Administration program. 7 U.S.C. § 1985(g).

Of course, at any time in the future Congress could authorize a federal agency to undertake a land or easement acquisition program and in doing so decline to give the state a say in the nature and duration of the property interests acquired.

I hope this information is helpful to you.

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Testimony Senate Bill 2388, Perpetual Easements
House Natural Resources Committee 3/09/01

Chairman Rennerfeldt, Vice Chairman Nelson and the members of the House Natural Resources Committee, my name is Gerald Reichert, I am the North Dakota Field Representative for The Nature Conservancy.

I would like to thank you for allowing me the opportunity to offer this written testimony as part of our legislative process. The Nature Conservancy stands in support of SB 2388.

I applaud the sponsors and the active supporters of this legislation for their enormous vision in recognition of perpetual easements as a tool in protecting the natural and human heritage values which are intrinsic to farm and ranchland of North Dakota. This represents a break from the past and a step toward the future. The Farm Bureau is thinking outside the box, a concept that is never easy when it involves change.

This legislation makes available to every property owner, a right, which is not now available to him or her. The decision to exercise this right will rest solely and completely where it belongs, with the landowner.

I would be less than honest if I did not say that The Nature Conservancy as well as the other non-profit conservation organizations are disappointed we are not given equal status in holding perpetual easements. However we believe strongly in the concept of landowner rights and easements as a indivisible part of those rights.

It is very important to remember that if this legislation becomes law, not one perpetual easement will be done in the State of North Dakota until that individual property owner and no one else decides it is in his or her best interest!

The Nature Conservancy believes that the sponsors and supporters of this bill are showing a very real commitment to people by acknowledging a respect for the needs of local communities to develop ways to conserve natural areas while at the same time enabling people to live productively and sustainably on the landscape.

Mr. Chairman, and members of the committee I respectfully ask that you give SB 2388 Do Pass.

Gerald Reichert

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North Dakota Farm Bureau www.ndfb.org

Testimony of North Dakota Farm Bureau
Senate Bill 2388

Chairman Rennerfeldt, member of the Natural Resources Committee. My name is Eric Aasmundstad. I am a farmer from the Devils Lake area, and President of North Dakota Farm Bureau. I am here today representing the 26,000 member-families of North Dakota Farm Bureau. North Dakota Farm Bureau supports Senate Bill 2388.

North Dakota Farm Bureau believes SB 2388 is a viable solution to questions that have been nagging agricultural producers, conservation groups, and this assembly for years. Should easements be allowed in North Dakota? How long should the terms of easements be allowed to run? Who should hold these easements – entities with the best interest of our state in mind, or a federal regulatory agency?

North Dakota Farm Bureau believes one of the duties of government is the protection of private property, especially from invasion and interference by government itself. This can be accomplished by limiting the regulation of private property. Property owners in North Dakota should be able to determine if they will benefit by the conveyance of an easement on their property, regardless of length. Currently in North Dakota, it is not possible for a landowner to sell an easement exceeding 99 years, unless that easement is passed to the federal government. This is wrong, and SB 2388 will correct this.

Senate Bill 2388, if passed, will give landowners options they do not enjoy at this time. By allowing groups such as North Dakota Farm Bureau to hold easements, landowners will not be forced to the U.S. Fish and Wildlife Service. This legislation will allow

organizations with a vested interest in the well being of North Dakota and its citizens to hold easements, not the federal government.

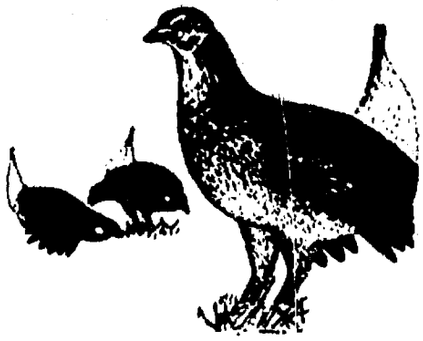
It is important to realize that by granting organizations such as Farm Bureau the ability to hold easements, the start of a mutually beneficial effort can begin. Organizations such as ours, working together with property owners and conservation groups, can accomplish many goals that can benefit all. This legislation should demonstrate to the conservation community that we are sincere in our efforts to allow them to do what they need to do. At the same time, it shows property owners that they will be represented and supported by organizations dedicated to the future of North Dakota.

Senate Bill 2388 is an effort to put to rest the animosity created by many years of mistrust between agriculture and the conservation community. It is also about property rights and the options available to landowners, as well as cooperation between two groups that, to date, have resisted most efforts to work together.

North Dakota Chapter

THE WILDLIFE SOCIETY

P.O. BOX 1442 • BISMARCK, ND 58502



TESTIMONY OF BILL PFEIFER
NORTH DAKOTA CHAPTER OF THE WILDLIFE SOCIETY
PRESENTED TO THE HOUSE NATURAL RESOURCE COMMITTEE
ON SB 2388, MARCH 9, 2001

MR. CHAIRMAN AND MEMBERS OF THE COMMITTEE:

I'm Bill Pfeifer speaking on behalf of the North Dakota Chapter of The Wildlife Society. The Wildlife Society wishes to be on record as supporting SB 2388, a Bill which will relax restrictions on the duration of easements.

The Wildlife Society recognizes the benefits of easements to both the landowner and to the natural resource community. Every possible option, with no restrictions including duration or which purchasing organization is involved, should be available to the landowner. Any restriction reduces the landowner options and benefits.

Easements are important resource tools made available to the landowner. The land remains productive and in private care. Full agricultural taxes are paid on easement lands. The natural resources including wildlife, soil, and water management are all benefits to the landowner. For better management of these resources, the landowner receives a cash award to further the farm or ranch cash flow.

The Wildlife Society applauds the North Dakota Farm Bureau for taking this major positive step in encouraging the landowners of North Dakota to better manage their land property.

The Wildlife Society also endorses the amendment to include the (c)(3) element of the Internal Revenue Code [26, U.S.C. 501] into this Bill so landowners can realize additional benefits from tax savings.

Therefore, The Wildlife Society supports SB 2388 and requests a DO PASS.

DUCKS UNLIMITED INC.

GREAT PLAINS REGIONAL OFFICE

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March 6, 2001

State Representative Earl Rennerfeldt
Chairman, House Natural Resources Committee
North Dakota State Legislature
Bismarck, ND 58505

Dear Chairman Rennerfeldt:

My schedule will prevent me from attending the hearings of the House Natural Resources Committee on Friday, March 9, 2001. At 9 a.m. on Friday the Committee is taking testimony concerning Senate Bill 2388 which would allow agricultural producer controlled 501 © (5) corporations to hold perpetual easements.

Enclosed is written testimony concerning Ducks Unlimited's position on this legislation. I will not be returning to Bismarck until late Monday, March 12th but I would be pleased to answer questions concerning our position on this legislation at that time.

Best wishes,

Joe

Joseph A. Satrom
Director, Land Protection Programs

cc: Vice Chairman, State Representative Jon Nelson
Natural Resources Committee Members

Enclosure: Testimony on SB 2388

Testimony - House of Representatives Natural Rescurces Committee 3/9/01
State Representative Earl Rennerfeldt, Chairperson
Public Hearing - SB 2388

Good Morning, Mr. Chairman, Members of the North Dakota House Natural Resources Committee. My name is Joe Satrom and I am the Director of Land Protection Programs for the Great Plains Office of Ducks Unlimited, Inc. Ducks Unlimited is an international conservation organization with four regional offices including the Great Plains Office here in Bismarck.

I am appearing here today to present and explain Ducks Unlimited's neutral position on Senate Bill 2388:

From a positive perspective, our organization compliments the North Dakota Farm Bureau on their earlier acknowledgement that easement decisions are a right of all landowners and that farm organizations have a responsibility and opportunity in North Dakota to protect agricultural land for agriculture. SB 2388 acknowledges that permanent easements are an appropriate land protection tool and recognizes agricultural producer directed organizations as the only legal holders of these permanent easements.

The work that Farm Bureau leadership has put forth in advancing SB 2388 is a commendable first step and follows well with the support that the American Farm Bureau Federation has given to educating and guiding landowners in making decisions related to easements. The "Landowner's Guide to Conservation Easements" recently published with the support of the American Farm Bureau Federation is an important contribution to the growing discussion of this matter.

From a less positive perspective, SB 2388 has some significant shortcomings. I highly recommend that this legislation be amended to allow non-profit 501 © (3) conservation organizations to hold permanent easements. In the "Landowners Guide" that I previously mentioned the authors recommend (page 19) that landowners investigate every potential easement holder in their area and that established, experienced non-profit conservation groups and public agencies are the field from which landowners should carefully pick their easement holder. As drafted, SB 2388 establishes organizations run by agricultural producers as the only holders of conservation easements. I am not aware of any North Dakota, producer directed, organization that has any experience in holding easements. In addition, including 501 © (3) organizations in this legislation would clearly offer the landowner the potential to take advantage of the tax advantages of doing conservation easements as permitted under Chapter 170 (h) of the Internal Revenue Service Code.

In conclusion, I want to attempt to clarify several aspects of this discussion:

- Easements are one of the rights associated with the ownership of real property. Conservation easements are just one type of these many and varied rights. Other types include utilities, drainage, flood mitigation, open space, viewsheds, cultural, historical, developmental, etc. Current North Dakota law is ambiguous concerning many aspects of easements.

- I want to clarify Ducks Unlimited's relationship to SB 2388. Our organization was not involved in the drafting of SB 2388. I think it is possible that we would refer some easement opportunities to farm organizations. It is not likely, however, that we will look to farm organizations as the holders of easements that we are funding on the Missouri Coteau. As the Farm Bureau Federation suggests in their "Guidebook for Landowners", our organization will look for highly qualified and experienced holders for these grassland easements. Holding, monitoring and enforcing the terms of easements is a major responsibility and if SB 2388 passes, I believe that it will be some time before North Dakota farm organizations are in a position to have the infrastructure, staff, equipment, and field presence to carryout these types of field responsibilities on large landscapes. I look forward to working with the land protection staffs of the farm organizations on the protection of North Dakota agricultural lands and open space.

In conclusion, I want to reiterate that SB 2388 represents a bold step by the leadership of the North Dakota Farm Bureau. It is a work in progress and hopefully this Legislature can make some important and necessary changes. This House Natural Resources Committee has an important role in developing and directing state policy related to our natural resources. We respectfully ask the House Natural Resources Committee to amend this legislation to allow 501 © (3) non-profit corporations to hold perpetual easements along with the 501 © (5) organizations permitted under the bill's current language.

I would be happy to handle any questions you have concerning this legislation after I return to Bismarck on March 12.

Thank You!

Joseph A. Satrom
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Good morning, Chairman Rennerfelt and members of the House Natural Resources Committee. For the record, my name is Julie Ellingson and I represent the North Dakota Stockmen's Association.

As you know, SB 2388 would allow 501c5s, including the North Dakota Stockmen's Association, to hold conservation easements in North Dakota. As you also know, our 2,700-plus-member organization time and again stands before you to oppose bills that would allow any type of perpetual easements in our state. For that very reason, we stand in support of SB 2388.

Currently, those who want to sell easements on their land have few options. If this bill is passed and our association and its other agricultural counterparts are allowed to hold easements, we will be able to offer more and better choices to landowners. Our members believe that conservation objectives can be accomplished just as well with short-term, buy-back and generational easements and, at the same time, serve North Dakota landowners and the state of North Dakota better, since a contract with a duration of forever can never be reconsidered.

A perpetual easement, in the view of the North Dakota Stockmen's Association, is about as palatable as perpetual legislation. A bill that suits the needs of North Dakotans today may not suit those needs two years down the road or 20 years down the road or 50 years down the road. That's why it is so important we are able to change our laws as time passes and priorities change. The same goes, we think, with easements. Even if an easement suits the needs of a landowner today, it may not do so in the future. The consequences are much less threatening and devastating with an easement with terms that are not perpetual.

For these reasons, we look for your favorable consideration on SB 2388 and encourage a do-pass recommendation on the bill.