

2009 SENATE FINANCE AND TAXATION

SB 2246

## 2009 SENATE STANDING COMMITTEE MINUTES

Bill/Resolution No. SB 2246

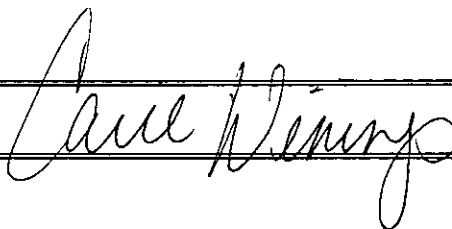
Senate Finance and Taxation Committee

☐ Check here for Conference Committee

Hearing Date: 02/16/2009

Recorder Job Number: 9534

Committee Clerk Signature



Minutes:

**Chairman Cook:** Opened the hearing on SB 2246.

**Senator Constance Triplett, District 18:** See Attachment #1 for testimony as sponsor and in support of the bill.

5.25 **Senator Robert Erbele, District 28:** I want to speak to you addressing this bill and I come to you rather conflicted on this bill. I was totally against it years ago and I am part of farm organizations that are against this idea, but in my own personal life I have researched the easement and I think that it is time to take a fresh look at it. It does go back to the early days with fish and wildlife easement issues. There are groups with conservation in their names that I despise to this day. They are protectionist and they want to take the land out of production and never to be used again. The easements that I am talking about today, there are those that have merit and there are organizations that do very well in that and are beneficial to the farming and ranching community because it is a way of protecting the land and the farming heritage into the next generation. Sometimes in order to carry yourself into retirement you need to protect your assets. It was a good way for me to sit down with my sons and determine that the land we own would be protected for them. There are some organizations that are very farmer friendly and some even allow cost sharing for fencing to improve grazing system. I have

increased production and grass quality on my land. The current perpetual easements that are available on the federal level are only specific to a few areas within the state, and that is why it is necessary. We all do rule from the grave, we do have an impact on the next generation and we must be responsible for that.

**12.00 Vice Chairman Miller:** I have a problem with perpetual easements because if someone does that then it is very difficult to get that taken off there. (Gives a personal experience) Why can't we just be happy with a termed easement, a 99 year lease? If it is because of a federal program, I find that a very reckless way to legislate state legislation just to please a federal program. Why perpetual?

**Senator Erbele:** I cannot speak to your particular case directly. I would say that you should never make decisions on dire straits. As for perpetual easements, there is a cost advantage to that. The short term easements don't pay as well. With today's market things have changed significantly. If you are doing it not under duress, I think you can really be creative. Some of these groups will work with you even allow you to carve certain areas out.

**16.07 Chairman Cook:** Comment.

**16.33 Representative George Keiser, District 47:** Testified as sponsor and in support of the bill. I am part of this because of a little piece of land. It is the exit to the Painted Canyon overlook, it is private land and the owner wanted it set aside for the generations of the future in a perpetual easement. The owner feels very strongly about it not becoming commercialized. Are there pieces of property that we will be concerned about in the future for North Dakota? Do we want to keep them protected from commercialism? Changes that are occurring on the federal level and we have to decide what to do. This is a landowners right in part, and society's right. Our state cannot continue to live in a vacuum. There are bad operators in any segment of business that will take advantage of people and we need to do what we can from a policy

standpoint to protect and maintain the right for them to make that decision. Should we systematically address this issue or not? does it work? These easements can be structured and require them to stay a certain direction and there can be carve outs.

**22.45 Chairman Cook:** You made me think of another land transaction, the Louisiana Purchase. I am wondering if at the time of that purchase there were perpetual easements available, what do you think if a perpetual easement would have been put on that.

**Representative Keiser:** I think the government had the perpetual easement on that at the time and they chose how to distribute that land.

**Chairman Cook:** There might be some people that thought they had the easement on it too.

**Senator Dotzenrod:** Where I live in the southeast corner where there is some issue with people wanting to maintain that for long periods of time, the nature conservancy districts have been a buyer. Would that not work in the situation you described?

**Representative Keiser:** I don't know. I have not thought about that.

**24.48 Michael Schmitz, CPA, Bismarck:** See Attachment #2 for testimony in support of the bill.

**26.25 Chairman Cook:** What is it in perpetual easements that the federal government finds so attractive that they would offer million dollar tax deductions?

**Michael Schmitz:** It is a charitable donation and it is part of the code for a number of years. There are other parts of the code that might outweigh that. I do not know.

**27.14 Randy Hatzenbuehler, President, Theodore Roosevelt Medora Foundation:** See Attachment #8 for testimony in support of the bill.

**29.45 Senator Dotzenrod:** You said that if a non-profit owns this land, they are forced to develop it?

**Randy Hatzenbuehler:** We are a corporation in the state of North Dakota, and corporations cannot hold agricultural land. This is a ranch and it is being ranched today and the buyer wants to allow the rancher to use that as ranch land.

**Chairman Cook:** How many years do you have left?

**Randy Hatzenbuehler:** We are at the critical time. We are in the process of negotiating a trade with the forest service with land that is already in a development that the foundation owns and it has already be approved that this is an area being developed and it is appropriate for that.

**Senator Dotzenrod:** Like the nature conservancy, are they under that same kind of problem?

**Randy Hatzenbuehler:** I cannot answer that.

**31.20 Chuck Petersen, Local Land Owner:** See Attachment #3 for testimony in support of the bill.

**37.30 John Hanson, Slope County Resident:** Testified in support of the bill. Raised on a piece of property known as the Loggin (?) Camp Ranch. It is an area of exceptionally high natural resource value. I have spent 25 years being a fairly progressive voice in my community about land use issues and issues that address generational succession. I am a great grandson of William Hiram Hanson who came from Iowa in 1894 to western North Dakota. From that time forward my family has been presented with issues that are pertinent to our succession as a family on that property. That area also presents unique responsibilities and unique perspectives and for that reason my family considered conservation easements as a means to protect a very high valued natural resource area in Slope County. It is made unique by the presence of a ponderosa pine forest. The private lands in excess of 4000 acres are also contiguous to also very high valued US forest service properties and contiguous to areas that eventually may have other protections; In terms of open space issues in North Dakota. I will tell you that if I need to address a retirement issue or debt retirement issue I will

not hesitate to take action as Mr. Peterson suggested preserving the most of my family's holdings into the next generation or beyond. I am not opposed to developments and if necessary I myself might be interested in being involved in that. But long term the highest value of the area where I live and other river courses and other high value natural resource areas the best long term value is for it to remain in its natural state. I have strong feeling about how these areas are going to appear in the future.

**40.45 Senator Dotzenrod:** Have you had any personal experience with problems because of this current 99 year limitation?

**John Hanson:** Yes, for the past several years my family has been involved in a review and a knowledge acquisition about what conservation easements mean. The fact that we were not able to consider a perpetual easement makes the value of the easement substantially less and substantially less interest for purchase. (Explains how the conservation easement value is calculated.)

**42.15 Rod Backman, Resident of North Dakota:** See Attachment #4 for testimony in support of the bill.

**48.07 Chairman Cook:** You talked about out of state people coming in and buying up land. If we change this law won't they still have the opportunity to come in and take our land and put it in a perpetual easement and take the financial incentive from the tax break? Are you concerned about that?

**Rod Backman:** I don't think so because you don't have to sell the easement. They could buy the land and put the easement on, but if they are going to take advantage of the IRS provision what that is going to do is keep that land in agricultural production. There are even some advantages to that.

**Senator Dotzenrod:** Can hunters come in and take out an easement for the hunting rights on that land?

**Rod Backman:** I am not sure that I can answer that. I believe there is another statute in North Dakota that does not allow the hunting rights to be severed beyond the life of the current owner.

49.50 **Woody Barth, North Dakota Farmers Union:** See Attachment #5 in opposition to the bill.

51.38 **Julie Ellingson, North Dakota Stockman's Association:** Testified in opposition to the bill. See Attachment #7 for testimony.

54.45 **Vice Chairman Miller:** Are you aware of how the other states set up a fund to help buy easement on land so that a farmer who wants to preserve the agricultural use of that land participate with some kind of trust fund or something, and are you aware of how they are working?

**Julie Ellingson:** I have heard of that being done by some agricultural organizations but I cannot speak to how they are working.

56.05 **Brian Kramer, North Dakota Farm Bureau Public Policy Director:** See Attachment #6 for testimony in opposition to SB 2246. Gives some comments on prior testimony in support.

1.01.15 **Vice Chairman Miller:** Are you aware of how long the concept of perpetual easement has been around?

**Brian Kramer:** Not specifically. A number of the conservation easements were taken in the 50's and 60's, wetland easements. We have had members up in arms, the second generation, the following purchaser of the property have been up in arms about that ever since.

**Vice Chairman Miller:** If you would have owned land between Fargo and West Fargo and were offered a perpetual easement on that land and not developed it, would you have taken that?

**Brian Kramer:** That is a rhetorical question. I suppose. It points out a very interesting situation. There was a farmstead that sat in the middle of that area for a number of years. That is no longer the situation in that area. Had they taken a perpetual easement on it, I suppose they could still be raising cattle on it.

**Chairman Cook:** Closed hearing on SB 2246.

(See Attachment # 9 for additional testimony in support of the bill)



## 2009 SENATE STANDING COMMITTEE MINUTES

Bill/Resolution No. SB 2246

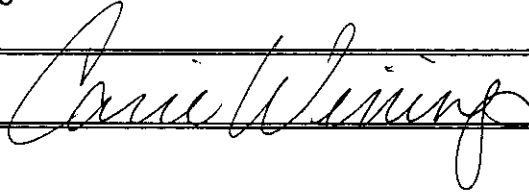
Senate Finance and Taxation Committee

☐ Check here for Conference Committee

Hearing Date: 02/17/2009

Recorder Job Number: 9605

Committee Clerk Signature



Minutes:

**Chairman Cook:** Reopened discussion on SB 2246.

**Senator Triplett: Moved a Do Pass.**

**Senator Anderson: Seconded.**

**Senator Dotzenrod:** This is one of those bills that the arguments are pretty strong on both sides. It would be nice to be able to vote both ways. The whole concept of perpetual is problematic in some ways. I think 99 years is a long time. Some of these places, it is needed to be able to preserve that and it is worth a lot to know that can be done.

**Chairman Cook:** Out in the country how do perpetual easements come into play with eminent domain?

**Senator Triplett:** Eminent domain would take priority I believe. In terms of the traditional governmental uses for utilities, transmission lines, etc.

**Chairman Cook:** We had a discussion yesterday about painted canyon and there was a time where there was no interstate highway going through there. Then the interstate went through there and I am sure that it was by eminent domain just like it was in my dad's farm. The

question popped in my mind if that is treated any differently?

**Senator Triplett:** I would assume that eminent domain would be the right of the government and I don't think a conservation easement would stand a chance against eminent domain.

**Senator Hogue:** I had a couple of thoughts. I think with eminent domain you can take all or any portion of that as long as it is for public use and if you just needed an easement you could have partial takings. However I am going to vote against the motion, I think perpetual easements, although they are prevalent in other states, are exceptionally bad land use policy. That is because like you pointed out, they are forever. We have regulatory regime set up in North Dakota. We have planning commissions that try to look out into the future. We have political subdivisions with zoning authority; counties and cities. That is what those bodies are for to decide what an appropriate use for land is. It seems to me when you get a land owner out somewhere away from those zoning authorities that can decide how that land is going to be used for perpetuity that is just bad policy. Jefferson said land use is for the living to decide not the dead. I have a problem with 99 years frankly. I think that goes out too many generations as well. The better policy is to have public bodies to decide the appropriate use. We did hear testimony about Medora and the problem with this bill is that not all easements are the same. Interests in land that don't affect the surface use are different from what Representative Keiser was talking about where you want to preserve the beauty and the aesthetics of a surface. This bill would lump them all together. I don't think that is good policy either.

5.14 **Senator Triplett:** I think there is some confusion about what the meaning of the word perpetual is in this context. As I said when I introduced the bill yesterday, this whole issue has been so confused in North Dakota because of our early history with the federal government and the US fish and wildlife wetlands easements. I think that federal policy certainly implies that at least the next revolution that those are really permanent. The notion of perpetual

easements as a voluntary thing with conservation groups is not perpetual in the sense that it is like making a land use decision for the rest of eternity. These easements can be negotiated. The terms of them can be negotiated and they can be bought out at some future point if somebody really wants to develop an area. They can be repurchased. It is not perpetual from the standpoint of the use of land forever and always. It is perpetual in the sense of what the current land owner is giving up. That is why the IRS regulations require that it be a perpetual easement in order to count as a donation. The land owner has to be making a donation that is permanent as far as that person is concerned. It is no more permanent than the fact of selling ones land. This is giving individual people the right to permanently and perpetually alienate the development rights off their property, but they get to keep a piece which in many cases is the piece that is most important to them and their family which is the ability to go on living there; to pass the farmstead or the ranchland in its physical sense on to their children and grandchildren. It is nothing more than like severing mineral rights. This notion of ruling from the grave is really a misnomer. If it is important enough for somebody somewhere down the road to develop an area they could buy it back. It might be very expensive to buy it back from a conservation minded organization. It is theoretically possible.

**Senator Hogue:** You reminded me of another reason I cannot support the bill. It is also bad policy to start breaking up the surface owners rights. We have had several bills in this session that do that. There needs to be certainty in title. You are decreasing the marketability of land. Imagine someone who wants to buy that land and put it to a specific use and now they do their title search and they see it is subject to not just the usual customary liens for underground utilities and maybe there is a highway easement and maybe a waterfowl, but now there is a perpetual easement that says you can't use this land for the purpose desired. That adversely

affects the marketability of that title. Any policy in my mind that does that we ought to not support.

**Senator Triplett:** I share your attitude regarding hunting rights because no one has come up with a way to do it without it potentially causing conflicts down the road. On this one, I think there is enough experience in all of the other states that people do know how to draft these things in a way that will allow the primary use for continuing agriculture or if that is appropriate or continuing grazing if that is appropriate preventing the development rights. Those are two such very specific things that I think they are easily definable and easily separable. You are right that it does reduce the market value to some degree, but the person who is selling the development rights by agreeing to the conservation easement is receiving money for it. So you are just separating out the two parts and what is left does have some definable value. I think the experience in other states is that while the market value of what is remaining does drop in the initial amount when it first happens as it should. If a landowner is being paid a large amount of money for giving up development rights then there is a simple math formula that tells you what is left. I think the experience in other state is that what is left increases in value because there are people out there who value land that is subject to a conservation easement. It is a negotiated sale. You are selling something in return for value and nobody is forcing you to do it. It is a voluntary process.

**Chairman Cook:** What are the property tax implications? Who has the responsibility for the tax obligations?

**Senator Triplett:** I suppose that could be negotiated too.

**Chairman Cook:** You don't know what is being done in other states?

**Senator Triplett:** I do not.

**Senator Oehlke:** I agree with Senator Triplett when she talks about the market value of the land. Give an example. It frustrates me what people in North Dakota cannot do right now. They cannot take a tax benefit for easements that they have because the IRS is blind to that.

**Senator Anderson:** I am kind of like Senator Dotzenrod. It is a tossup, but you either have to have it or you don't. We read and hear about what is happening to historical sites in other parts of the country and that does alarm me. I think that we need something in North Dakota to keep flashing lights away. I think it is needed.

**Vice Chairman Miller:** There are several problems with perpetual easements particularly with the fact that we are having this discussion based upon an action by the IRS, now that throws red flags out right there when the IRS or the federal government has to tell us in North Dakota how we should do something. Perpetual may not necessarily be permanent because there are ways to get it back, but the problem that I have with it is that there may be a certain benefit to it for protection of historical sites but this generation is telling the future that they are not smart enough to figure things out for themselves.

**Senator Dotzenrod:** If some of these local sites could have a county zoning ordinance that would protect that site. There are always exceptions.

**Senator Hogue:** That is my concern if you allow one person to spot zone. I don't think there could ever be a workable process for that. Oftentimes the rights of the surface owner and the use they want to put that land to will be in conflict with what the hunter wants. I think there are irreconcilable conflicts that you have that we can't sever off all these different rights and I continue to think that the best approach is through the liberative planning process that we have in place through the planning commissions and zoning authorities.

**Senator Triplett:** I think that the federal government does what it does in regards to tax policy and we all can respond or not respond as we choose. In many other contexts they offer

deductions for different things like mortgage interest on the theory that it would be good public policy to encourage home ownership, it is there and people can take advantage or not take advantage. This is just one more policy choice that the federal government has put in place that people have an opportunity to take advantage of or not except that we in North Dakota are preventing them from taking advantage of it. No one is going to force them to. We are also controlling the future for our children and grandchildren when the property is sold – then it is just gone. Who are you or the state to tell me I can't do it. It is more of a violation of private property right by a long shot than this is. This is a voluntary process that individual people get to make for themselves whereas planning is something that is imposed is government upon sometimes very unwilling land owners. If you care about landowner rights then this is a better way for people to make decisions for property that they have legitimately come to own. This is a way of letting decide if and how they want to disperse it and also get some tax advantages on the side.

**Chairman Cook:** All property owners also have neighbors that are also a property owner and both have property rights. Sometimes what one does certainly challenges the property rights of the neighbor.

**Senator Triplett:** That is where the zoning comes in and why we tolerate it.

**Chairman Cook:** That is where zoning comes in and that is why it is important to us. Is there anyone who is not sure where they are going to vote on this?

**Senator Dotzenrod:** I just think that it is an unusual situation here. Thinking back on the hearing both sides on the bill had the same ideas and arguments.

**Chairman Cook:** Any other discussion? **A Roll Call vote was taken: Yea 4, Nay 3, Absent 0.**

**Senator Triplett will carry the bill.**

Roll Call Vote #:

2009 SENATE STANDING COMMITTEE ROLL CALL VOTES  
BILL/RESOLUTION NO.: 20.11

Senate Finance and Taxation Committee

☐ Check here for Conference Committee

Legislative Council Amendment Number

Action Taken ☒ Do Pass ☐ Do Not Pass ☐ Amended

Motion Made By Senator Triplett Seconded By Senator Anderson

[illegible]

Total: Yes 4 No 2

Absent ☒

Floor Assignment Senator Triplett

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

**REPORT OF STANDING COMMITTEE**

**SB 2246: Finance and Taxation Committee (Sen. Cook, Chairman) recommends DO PASS (4 YEAS, 3 NAYS, 0 ABSENT AND NOT VOTING). SB 2246 was placed on the Eleventh order on the calendar.**



2009 TESTIMONY

SB 2246

**Testimony of Constance Triplett**

**Senator, District 18, Grand Forks**

**SB 2246**

**Senate Finance and Taxation Committee**

**February 16, 2009**

Mr. Chairman and members of the committee:

I am pleased to introduce to you SB 2246. This was a simple bill to write and it's a simple bill to read. But it relates to a complicated story spanning more than three decades of history. As you can see, the bill proposes to delete the 99-year limitation on easements. If passed, this bill will open the way for perpetual easements in our state. North Dakota is the only state in the nation that still attempts to forbid perpetual easements.

I say "attempts", because, ironically, the types of easements that were the target of this statute when it was enacted in 1977 were the perpetual easements being granted to the US Fish and Wildlife Service. There's a long and bitter history in the prairie pothole region of North Dakota around US Fish and Wildlife easements to protect wetlands. Farmers accepted money from the federal government and signed perpetual easement agreements. Later, some of those farmers, or, more often, people who later bought the land subject to those easements, began to drain the wetlands and farm through the easement areas. The US Fish and Wildlife Service sought help from the courts to enforce their easements and there developed a very antagonistic attitude between landowners and the federal government.

The statute that we are attempting to amend today was part of a package of legislation that attempted to place limits on easements obtained by the federal government. However, in subsequent court cases that went all the way to the US Supreme Court, the Court found that most of the provisions of the state law did not apply to the programs of the US government. So there's the irony: the state enacted this legislation specifically to limit the easements being purchased by US Fish and Wildlife, but because of federal preemption and federal court action, the federal government is now the only group within the state that can purchase perpetual easements.

The broader consequence of the 99-year limitation has been to prevent non-profit groups from acquiring perpetual easements. Those groups can acquire land outright through a very cumbersome process (but that's a different story for a different day). Conservation groups can also acquire short-term easements – 30 years, 50 years, up to 99 years – but they can't acquire perpetual easements, which is a tool widely used in some other states and available as an option in all other states.

The point of a conservation easement is to protect and maintain land in its current state. That includes preserving native grasslands which are becoming increasingly scarce. It includes preserving the agricultural heritage that we value in North Dakota. It could include preserving historic sites located on private property. You will hear in later testimony about the idea of using conservation easements to protect the viewshed of some significant tourist attractions in North Dakota.

Those of you have been here awhile will remember that bills similar to this one have been here before and have failed. So why bring it up again? My major reason for filing this bill in this session is because of some new tax credit opportunities in the most recent farm bill and I believe that its time that we take a fresh look at this issue. There are some very generous tax credit options in the 2008 farm bill that have not been available in the past, or at least they have not been available to the degree

that they are now available. With our present law, North Dakota landowners will not be able to take advantage of those tax credits. They are only available to landowners who can legally grant perpetual easements.

Another reason for introducing this bill at this time is because of the recent volatility in land prices. Because of high commodity prices in the recent past, land values in some parts of the state have jumped considerably. This situation makes it more difficult than ever for one generation of landowner to pass land on to the next generation. There are people here to testify in detail how conservation easements can be used to protect the productive nature of agricultural land or grazing land while reducing debt load for current producers and their children or grandchildren who want to work the land.

Attached to my testimony is a one-page summary briefly describing conservation easements and some of the benefits they bring to landowners. There is also a one-page summary of the terms of the 2008 farm bill which relate to this topic. Others will fill you in on the details of the tax advantages of perpetual easements.

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

Questions?

## **SB 2246 Background Information**

### **What is a Conservation Easement?**

- A conservation easement is a legally binding agreement between a private landowner and a qualified non-profit land protection organization or government agency.
- Through the donation or sale of a conservation easement, the landowner transfers specific property rights to the easement holder in order to protect the land's natural resources and place certain limitations on its use to maintain its positive attributes.
- The landowner retains title to the land but the easement becomes part of the deed. All future owners are bound by its terms for as long as specified in the contract.
- Landowners negotiate the terms of the easement to meet their needs and goals.

### **What are the Benefits of a Conservation Easement?**

- Reducing the market value of the land thereby decreasing the often escalating tax burdens (income, real estate and inheritance.)
- Reducing the market value of the land, making it more affordable for farmers and ranchers and securing its future availability for agricultural uses.
- Generating cash for landowners to help pay off their debt and/or expand their operations.
- Decreasing tax burdens through a variety of tax incentives.

### ***What you can do***

- ✓ Put in roads;
- ✓ Put in sewer lines;
- ✓ Build a home;
- ✓ Tear out native sod;
- ✓ Mine for coal;
- ✓ Drill for oil and gas;
- ✓ Place wind towers;
- ✓ Grant a 99 year easement;
- ✓ Sell it;
- ✓ Build a shopping center;
- ✓ Grant a perpetual easement, but just to the federal government.

### ***What you cannot do***

- ✓ Grant a perpetual easement to anyone other than the federal government;
- ✓ Get essentially tax-free money up to your adjusted gross income;
- ✓ Assure that you will be able to live on the farm;
- ✓ Assure that your children and grandchildren will be able to live on the farm.

#2 ✓  
**Senate Bill SB2246**

**Michael T. Schmitz, CPA**  
**Bismarck, ND**

Mr. Chairman and Members of the Committee, thank you for your attention.

I am here to support the passage of SB2246. My support of this bill is due the impact the current language of North Dakota Century Code is having on a client. I represent a North Dakota resident land owner who donated an easement to a charitable organization. The Internal Revenue Service is challenging the donation deduction solely on the basis that the ND Century Code only allows an easement of 99 years. My client stands to lose approximately \$1 million in deductions with the current language. If North Dakota Century Code allowed a perpetual easement the donation, would not be challenged.

I would be happy to entertain any questions you may have.

#3  
2-16-09

Senate Finance and Taxation Committee  
Senator Cook and Committee Members.

Re: Senate Bill 2246

I appreciate opportunity to appear before you to discuss my concerns regarding land use. My name is Chuck Peterson. My wife and I own 1200 acres 15 miles north of Bismarck in Glenview Township. The land is located half way between highway 83 and 1804. We have lived there for almost 40 years. Attached is a topographical map of the two sections.

The land is native prairie. It is an excellent example of the "tall and mixed grass" country that is so prized as we proceed into the eastern states. Coulees that intersect the land have natural springs and are filled with oak, poplar, and aspen. It is excellent for grazing and wildlife habitat.

We have watched the proliferation of 40 acre tracts around us. Burleigh County allows one home per 40 acres without zoning restrictions. There are many of these tracts being offered on the market. It is an opportunity for landowners to receive a significant price for their farmland. Many acres have been subdivided and changed forever.

There is need for landowners to protect the land particularly the native prairie. There were 16 building permits approved on 40 acre tracts in Burleigh County in 2007. There were 15 in 2008. This does not include the actual amount of land that was subdivided into 40 acre tracts and sold. We can easily conclude that these numbers will increase as population increases. It is easy to assume that in 20 years we will have subdivided a township. Let us remember that this is land that will no longer provide the agricultural base that it once did which is an important benefit to the community.

We have a 30 year easement with the Natural Resources Conservation Service (NRCS) on 1160 acres. We have always utilized the NRCS to learn good management practices. Each section is divided into 5 tracts. We graze 50 head in each section, that is one cow calf unit per 12 acres. The cattle are rotated every 18 days. The maximum grazing period is 5 months. Usually they are removed early to leave 50% grass at the end of the season. A representative of the NRCS inspects the land each year to observe our practices.

Open space is one of North Dakota's special assets. Unfortunately it is becoming less and less. It is widely known that land in North Dakota is a bargain. Many consider the open prairie as land waiting to be developed. Western North Dakota is on the edge of change with increased pressure from developers and the attraction to subdivide. Cass County and Grand Forks County have recently revised their comprehensive land use plans in an effort to control unwanted sprawl. Minnehaha County and Sioux Falls have taken a very aggressive approach to managing land use in that region.



My wife and I believe that it is our right to sell or gift the development rights on our property. The 99 year restriction, peculiar to North Dakota, has taken a very fundamental right from us. It has also removed the ability to claim a deduction for the gifting of development rights. There is value offering landowners the opportunity to preserve the integrity of their farm or ranch. Land that may soon become scattered development could remain viable farm and ranch land for agriculture producers.

I urge you give strong consideration to approval of SB 2245.



SB 2246

Testimony by Rod Backman

Chairman Cook & members of the committee my name is Rod Backman, I am here today speaking on behave of myself and my grandchildren. In addition, I am a CPA who represents clients in North Dakota on income and estate tax issues.

The 2008 Farm Bill contains extensions of federal income tax provisions that allow taxpayers special breaks for donations of qualifying conservation easements designed to keep land in agricultural production. Old law limited tax deductions for contributions of such easements to 30% of a taxpayers (AGI) income and allowed a 5 year carryover of any unused deduction. The new law bumps the percentage to 50% for non-farmers and 100% of qualifying farmers. In addition the carryover has moved from 5 years to 15 years.

This is a great tax break for farmers, not only currently in the income tax area but also for estate tax purposes. Once an easement is placed on the property the valuation is lowered making it easier for farmers to pass the property on to their children and or reducing the estate tax burden upon death.

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

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

In my own case we still own and operate the land my Great-grandfather homesteaded in Territorial days. My goal is to keep this land in agricultural production and to keep it in the family. Without the use of these tax planning tools, economic conditions may make it very hard to meet my goals.

I ask that you support SB 2246.

Thank You.



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February 16, 2009

SB 2246  
Senate Finance and Taxation Committee

Chairman Cook and members of the Senate Finance and Taxation Committee,

My name is Woody Barth; I am here to represent North Dakota Farmer Union. North Dakota Farmers Union opposes SB 2246.

SB 2246 would allow any permanent easement to be attached to real property except for those named in code. North Dakota Farmers Union has had long standing policy concerning permanent easements. Our members believe that each generation should be allowed to decide the use of their land. As Thomas Jefferson once said, "The earth belongs to the living not the dead."

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

Thank you, Chairman Cook and members of the committee. I respectfully ask for a "do not pass" recommendation for SB 2246.



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North Dakota Farm Bureau Testimony on Senate Bill 2246  
Presented by Brian Kramer,  
ND Farm Bureau Public Policy Director  
February 16, 2009

Good morning Chairman Cook and members of the Senate Finance and Tax Committee. My name is Brian Kramer and I am representing North Dakota Farm Bureau in opposition to SB 2246.

North Dakota Farm Bureau has long standing policy against perpetual easements on land in this state. Our members are adamantly opposed to governmental agencies holding everlasting sway over the management of private property. Members are continually telling us of being forced to comply with rules and regulations on property because of a perpetual easement signed by a previous generation or former owner.

Those former owners did receive some financial benefit at the time the easement was taken, but the current owner did not and is now saddled with compliance. Mr. Chairman and committee members that is one of the main reasons that North Dakota established the thirty-year maximum on conservation easements. It provides easements roughly equal to one generation of ownership of land.

A one-time payment for a perpetual easement does not reflect economic changes. When the wetland easements were installed in the 1950's – 1960's the monetary value was probably just compensation to the owners. If you tried to secure an easement today at those payment levels you would never acquire an easement. The point being, these easements need to be reevaluated from time to time to reflect the economics of the time. This was another reason for the 30-year limit.

The federal government has recognized that states can and do place limitations on the length of easements. I direct your attention to the attached form, which is language from the current farm bill. In each category of conservation easement, a provision applies that a perpetual or an easement of duration allowed by the state is permissible. I will grant that a 30-year easement does not provide the compensation of one that is perpetual. However, it can be renegotiated.

Mr. Chairman, we believe the current North Dakota laws are in the best interest of landowners of this state. We ask that your committee gives SB 2246 a do not pass recommendation.

Thank you for your time, Mr. Chairman and committee members. I would try to answer any questions you may have.

# Food, Conservation, and Energy Act of 2008

## SEC. 1230. COMPREHENSIVE CONSERVATION ENHANCEMENT PROGRAM.

PROGRAMS- The CCEP shall consist of--

- ' (A) the conservation reserve program established under subchapter B;
- ' (B) the wetlands reserve program established under subchapter C; and
- ' (C) the healthy forests reserve program established under subchapter D.

' (b) Contracts and Enrollments-

' (1) IN GENERAL- In carrying out the CCEP, the Secretary shall enter into contracts with owners and operators and acquire interests in land through easements from owners, as provided in this chapter.

## **Subchapter C--Wetlands Reserve Program**

### **SEC. 2321. WETLANDS RESERVE PROGRAM.**

Section 1237 of the Food Security Act of 1985 (16 U.S.C. 3837) is amended--

(1) by striking subsection (b) and inserting the following:

' (b) Enrollment Conditions-

' (1) ANNUAL ENROLLMENT- To the maximum extent practicable, the Secretary shall enroll 250,000 acres in each fiscal year, with no enrollments beginning in fiscal year 2013.

' (2) METHODS OF ENROLLMENT-

' (A) IN GENERAL- Except as provided in subparagraph (B), the Secretary shall enroll acreage into the wetlands reserve program through the use of--

' (i) **permanent easements;**

' (ii) **30-year easements;**

' (iii) restoration cost-share agreements; or

' (iv) any combination of the options described in clauses (i) through (iii).

' (B) ACREAGE OWNED BY INDIAN TRIBES- In the case of acreage owned by an Indian tribe, the Secretary shall enroll acreage into the wetlands reserve program through the use of--

' (i) **a 30-year contract (the value of which shall be equivalent to the value of a 30-year easement);**



**SEC. 1237M. ESTABLISHMENT OF HEALTHY FORESTS RESERVE PROGRAM.**

**(e) Methods of Enrollment-**

**(1) IN GENERAL-** Land may be enrolled in the healthy forests reserve program in accordance with--

**(A) a 10-year cost-share agreement;**

**(B) a 30-year easement; or**

**(C) a permanent easement.**

**SEC. 2381. GRASSLAND RESERVE PROGRAM.**

**(A) a permanent easement; or**

**(B) in a State that imposes a maximum duration for easements, an easement for the maximum duration allowed under State law.**

**(b) Enrollment of Land-**

**(2) OPTIONS-** Eligible land enrolled in the program shall be subject to--

**(A) a 30-year contract;**


**(B) a 30-year conservation easement; or**

**(C) a permanent conservation easement.**




## **SB 2246**

Good morning, Chairman Cook and members of the Senate Finance and Taxation Committee. For the record, my name is Julie Ellingson and I represent the North Dakota Stockmen's Association.



The North Dakota Stockmen's Association respectfully opposes SB 2246, since it would remove the time-honored time limits on easements that have been in place and that served North Dakotans for many years.

Our organization has long-standing policy opposing perpetual easements. Our cattle industry members contend that while private property owners should be able to do as they wish with their property in almost all cases with almost no exceptions, they should not be able to enter into perpetual easements, as this erodes the private property rights of all those who own the property in succeeding generations. A perpetual easement can tie the hands of the current landowner in making the best management decisions for the time and the land's current situation. It's been said that perpetual easements allow landowners to control their property from the grave. Our law is already permissive enough to allow up to 99-year easements, and the average life expectancy is only 76.2 years.



I will not argue the value of many of the programs and easements that landowners can participate in and that this bill's supporters represent. Many of them are closely in line with the goals and values of our own organization. And if the terms of those easements are right for the landowner, their promoters should not have any trouble renewing an expiring contract or convincing a subsequent landowner to enroll the property again.

But what if the easement is not right for the landowner down the road? What if time or technology bring forth a better alternate for the family or even for the land? You cannot wait out perpetuity and renegotiate the terms. Perpetuity is forever.

And that's a difficult concept for most of us to get our arms around. My husband teases me about how many times I change my mind about my hairstyle and the color of the paint on our walls. What if I had been stuck with the crispy, curly, big-banged hair I had and loved in the '80s, or if my great, great grandchildren were stuck with that hair? It looked good at the time, and was the right decision back then, but it wouldn't be for today, and certainly wouldn't be for a generation or so down the road. It's the same story with the bubble gum pink paint I chose for my 7-year-old daughter's bedroom. It is appropriate for a Barbie-Doll-loving preteen, but wouldn't seem so appropriate if the room was intended for a teenage boy, for instance.

I use these examples not to make light of this serious issue, but to illustrate how important it is to be able to reconsider even little decisions. How much more important than is it to be able to reconsider, if needed, decisions regarding land management strategies and usage that have implications for a family's livelihood and legacy?

That's why the North Dakota Stockmen's Association thinks it is important that North Dakota preserves the time limits on easements it has in law today so landowners have the ability to do what is best for them, not be forced to live with a decision someone else made generations before.

For these reasons, we ask you to consider a do-not-pass recommendation on this bill.

#8  
THE THEODORE ROOSEVELT MEDORA FOUNDATION'S SUPPORT FOR  
SENATE BILL 2246

Presented by Randy Hatzenbuehler, President  
Monday, February 16, 2009

Mr. Chairman, and Members of the Committee:

In 1995, Harold Schafer, founder of the Theodore Roosevelt Medora Foundation, purchased what was then known as the O'Connell Ranch east of Medora. The ranch consists of about 2,500 acres of deeded land and the same amount of leased grazing land owned by the U.S. Forest Service. The ranch extends about six miles, immediately adjacent to Interstate 94 east of Medora on the south side of the highway, from the Painted Canyon Scenic Overlook in Theodore Roosevelt National Park to the Medora city limits. Harold purchased the land to protect it from development. Because all the land on the north side of the Interstate from Painted Canyon to Medora is owned by the National Park Service, his purchase insured that the six mile corridor between Painted Canyon and Medora would remain pristine and provide a spectacular unobstructed view of the badlands to visitors approaching the historic town of Medora.

In 1999, Harold gifted the ranch to the Theodore Roosevelt Medora Foundation, which manages many of the historic properties and attractions in the city of Medora. The Foundation has leased the grazing rights to a local rancher since that time, and the land has remained undeveloped. However, North Dakota's anti-corporation farming law requires the Foundation, a non-profit corporation, to dispose of agricultural land that it does not intend to develop, within ten years. That deadline for the Medora Foundation arrives in 2009. We have begun steps to divest ourselves of that land. Most of it will be traded to the U.S. Forest Service for a similar amount of Forest Service land adjacent to the Bully Pulpit Golf Course south of Medora. That area has been developed to a large extent already, and the Medora Foundation would probably do some limited development on the land it acquires there, while the Forest Service will preserve the corridor east of Medora in its pristine state.

However, to insure the land immediately adjacent to the Painted Canyon Scenic overlook remains undeveloped (that land has been described as one of the most desirable areas for commercial development in North Dakota, since an average of about 300,000 vehicles visit Painted Canyon each year) we have reached an agreement with a conservation buyer to purchase the 750 acres at that intersection. That buyer wishes to place a perpetual easement on the land, guaranteeing it will never be developed. While the land is safe during the buyer's lifetime, financial or other pressure on heirs could change the status of the land unless it is protected in perpetuity. North Dakota law does not allow perpetual easements. That is why we support this legislation.

#9  
Mr. Chairman and members of the Finance and Tax Committee thank you for allowing me to provide you input today. I'm Al Geisen and reside in Burleigh County and am here to support SB2246. This bill allows landowners like myself the freedom to place perpetual conservation easements on their property. I urge you to pass this for the following reasons:

1<sup>st</sup>, it respects the concept of landowner rights. Currently land developers are allowed to convert agricultural land to residential, commercial or industrial property. The chances of this developed land being converted back to agricultural land is almost nil, in other words, it's really converted in perpetuity. So, if developers are permitted to convert agricultural land why shouldn't other landowners be permitted to maintain the land in its current state in perpetuity?

2<sup>nd</sup>, perpetual conservation easements recognize the concept of multi-use. Native grasses and other types of cover will still in the majority of cases be cut for forage. Why, because periodic cutting is one of the best ways to maintain a healthy stand of grass. So, producers will still be able to gain benefit from the land as will wildlife.

3<sup>rd</sup>, no law is irrevocable. If the legislature in future years felt that too much land were being set aside by perpetual conservation easements the law could be repealed. Perpetual easements set aside prior to repeal would stand, however, no further perpetual conservation easements would be allowed after repeal.

In summary, our state has been blessed with some of the most unique, beneficial and fragile natural resources in the nation. These of course are our wetlands and grasslands. Unfortunately they are only finite in number and we are losing more of them each year even with current conservation measures. One additional way to protect them is to pass SB2246. Please give this your sincere consideration.

Respectfully submitted,

Allen L. Geisen  
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