

Testimony of Attorney Lynn Boughey regarding House Bill No. 1384

February 9, 2023

Mr. Chairman and members of the committee,

My name is Lynn Boughey and I am an attorney that specializes in litigation on behalf of farmers and ranchers and other landowners, and I have had many cases regarding eminent domain and inverse condemnation. I also have written various law review articles relating to constitutional law, including one focus entirely on the North Dakota Constitution.

I was actually here to testify in regards to House Bill 1466, and will do so momentarily. But after reading House Bill 1384, I would like to make a few comments. As a lawyer representing landowners, I'm thrilled that the proponents of this bill have decided to add an additional one third to every award based on eminent domain.

That being said, it seems to me that there are substantial problems with simply adding a set percentage to the jury's award. The jury is of course supposed to make a finding of the what the damages actually are, which is why we have juries. Implicit in this change is the suggestion that juries are not awarding enough money and we have to add to whatever they award. In other words, the underlying assumption is that the juries are not awarding enough damages in these types of cases.

Even if that is not implicit within this change, I see several substantial constitutional issues to simply adding one third to every eminent domain award . Is this a fine? A penalty of some sort?

It seems to me that if there is no basis for adding one third to the award, it will not survive judicial scrutiny and most probably violate the due process clause or the equal protection clause.

I have a suggestion on how you may want to amend this proposal so it survives judicial scrutiny. One option is to simply provide a legal basis for the additional award, such as the amount tendered by the entity employing eminent domain powers was substantially lower than the amount awarded.

I have been involved in many cases where the large corporation taking the property uses an appraiser that always lowballs the number. I had one case with the jury in Williston awarded 10 times more than what the company offered.

In order to resolve the issues I've raised, perhaps you should change the language to provide a factual basis for the increased to the award by one third, such as the following language:

"Following the assessment of damages by the trier of fact, if the award provided by a jury or judge is more than 15% of the amount originally offered or deposited with the court, the court shall increase the award by 33% and enter judgment according."

In my view, instead of increasing the award by one third, you should double it.

One final point: The greatest value of this particular bill is that would give the large corporations that are using eminent domain to take land from our farmers and ranchers and landowners incentive to present a fair and reasonable price at the beginning, and not a lowball price obtained by a questionable appraisal bought for and paid for by the corporation.