

2023 SENATE ENERGY AND NATURAL RESOURCES

SB 2310

2023 SENATE STANDING COMMITTEE MINUTES

Energy and Natural Resources Committee Room J216, State Capitol

SB 2310
1/26/2023

A bill relating to state reimbursement for the cost of claims; and to provide for application.

10:53 AM Chairman Patten opened the meeting.

Present were Chairman Patten, Senators Magrum, Boehm, Kessel, Beard and Kannianen.

Discussion Topics:

- Lawsuits
- Eminent domain
- Energy projects

10:53 AM Senator Mangrum introduced the bill and provided written testimony #17070.

10:57AM Tag Anderson, Director, Risk Management Division of OMB, testified opposed to the bill and provided written testimony #16842.

11:01 AM Chairman Patten closed the public hearing.

Additional written testimony:

Sue and Dan McLean provided written testimony #15864

11:01 AM Chairman Patten closed the meeting.

Rick Schuchard, Committee Clerk

2023 SENATE STANDING COMMITTEE MINUTES

Energy and Natural Resources Committee Peace Garden Room, State Capitol

SB 2310
2/16/2023

A bill relating to state reimbursement for the cost of claims; and to provide for application.

9:20 AM Chairman Patten opened the meeting.

Chairman Patten and Senators Kessel, Kannianen, Beard, Boehm and Magrum are present.

Discussion Topics:

- Committee action

9:21 AM Tag Anderson, North Dakota Risk Management, gave oral testimony.

9:35 AM Senator Kessel moved to Do Not Pass the bill. Motion seconded by Senator Kannianen.

9:41 PM Roll call vote is taken.

Senators	Vote
Senator Dale Patten	Y
Senator Jeffery J. Magrum	N
Senator Todd Beard	Y
Senator Keith Boehm	N
Senator Jordan L. Kannianen	Y
Senator Greg Kessel	Y

Motion passes 4-2-0

Senator Beard will carry the bill.

This bill does not affect workforce development.

9:35 AM Chairman Patten closed the meeting.

Rick Schuchard, Committee Clerk

REPORT OF STANDING COMMITTEE

SB 2310: Energy and Natural Resources Committee (Sen. Patten, Chairman) recommends **DO NOT PASS** (4 YEAS, 2 NAYS, 0 ABSENT AND NOT VOTING). SB 2310 was placed on the Eleventh order on the calendar. This bill does not affect workforce development.

TESTIMONY

SB 2310

Please note that we are in favor of SB 2209, SB 2212, SB 2228

We were called and told by Summit Carbon (with no personal names given) that we were going to have a pipeline on our land. When we told them we did not want this on our land, they said fine they would just take it by eminent domain. Period. Even Senator Hoeven feels this should be voluntary.

We bought this land several years ago as a retirement investment. We both had full time jobs off the farm as well as about 100 head of sheep, and then about 100 head of cows. We eventually sold the sheep because they were labor intensive and kept the cows. As you can imagine we did not have a lot of free time. Weekends were spent trying to catch up on all of the work we didn't get done during the working hours on our jobs. But this was OK. We were working to pay off the land for our retirement. As mother nature has her own plan, we sold the cows during the drought. At our age (67 & 68) it was not feasible for us to restock. We were able to completely pay off the land. This gave us to opportunity to rent the pastures to other younger families. Now a private company that stands to make billions of dollars tells us they are taking our land and putting a pipeline on it that will devalue any retirement funds we may have wished for. This does nothing for my neighbors except puts a dangerous element in their backyards. This company states that they are in compliance with PHMSA regulations, but what they would like to do is completely new and regulations are not, as yet, fully adequate.

We are not the only people that do not like this in our neighborhood. Six townships have passed resolutions opposing eminent domain. We are also not the only state that does not want this (see SD, IA, NE).

In the United States, eminent domain is the power of the government to take away someone's private property. But the Fifth Amendment places two strict limits on eminent domain. First, private property can be taken only for "public use," or public works projects, like roads and bridges. Second, even if a property is taken for a public use, the owner must be paid "just compensation." (Institute for justice.)

Sue & Dan McLean

Menoken ND

TESTIMONY OF

Tag Anderson, Director Risk Management Division

Chairman Patten and members of the Senate Energy and Natural Resources committee, my name is Tag Anderson. I am the Director of the Risk Management Division of the Office of Management and Budget (OMB). I appear today in opposition of SB 2310.

The Risk Management Division of OMB administers the Risk Management Fund pursuant to N.D.C.C. Chap. 32-12.2. This chapter outlines the state of North Dakota's tort liability for money damages. The Risk Management Fund is not insurance, it is a self-retention fund that is funded through agency contributions that are actuarially determined every two years, before the budgeting process for the next Legislative Session.

The Risk Management Division does not address claims against the state the way in which a "for profit" insurance company would. We have a statutory obligation to provide compensation to injured parties who are harmed through state activities as the facts and applicable law dictate. We take that responsibility very seriously and do not engage in any tactics which are designed to force citizens to accept less than they are entitled. In addition, there simply are no incentives to engage in such practices. We compensate parties as the facts and law requires and where there is uncertainty, we work in good faith to reach a mutually beneficial compromise. In fact, in the last approximate fifteen years, there does not appear to have been a single meritorious claim against the state that was not resolved through prompt payment or settlement. Simply put, the ability to collect fees and costs as outlined in SB 2310 would not have occurred at any point during at least the last approximate fifteen years as there have been no adverse judgments.

However, there are still significant issues with this bill. The fee shifting is mandatory and creates a disincentive for a claimant to act in good faith to resolve a claim. Under this legislation, the claimant will receive fees and costs regardless, even in cases where the claimant was offered more money than he received in the lawsuit and resulting judgment. In fact, this legislation may well raise constitutional separation of powers issues to the extent it would interfere with Rule 68 of the North Dakota Rules of Civil Procedure and the "cut off" of recoverable costs where the resulting judgment is less than a formal settlement offer made through a Rule 68 offer of judgment.

In addition, this bill will impact the actuarial assumptions that go into funding recommendations and required agency contributions to the Risk Management Fund. The statutory caps on liability contained in N.D.C.C. chap. 32-12.2 are actuarially assumed per person and per occurrence limits. We reinsure through the purchase of an excess insurance

product above the statutory caps to address those exposures. However, these assumptions are undercut where costs and fees are required to be included and there are no limits on the amounts of costs and fees that are recoverable. Our ability to insure above statutorily provided limits is also impacted, resulting in greater uncertainties in required biennial funding and agency contributions.

Chairman Patten and committee members, this concludes my testimony. I ask for a do not pass recommendation. I would be happy to answer any questions.

Thank you.



North Dakota Senate

STATE CAPITOL
600 EAST BOULEVARD
BISMARCK, ND 58505-0360



Senator Jeffery J. Magrum

District 8
P.O. Box 467
Hazelton, ND 58544-0467

C: 701-321-2224

jmagrum@ndlegis.gov

COMMITTEES:
Finance and Taxation
Energy and Natural Resources

01/26/2023

Chairman Patten and committee members

I sponsored SB 2310 because of a lawsuit that recently happened with a state agency. The Supreme Court ruled 5-0 unanimously against the State of North Dakota. Judge Jerod Tufte's opinion was very clear that the state official did not follow procedures in this case as he had always done for many years.

I am concerned that the individual's with limited financial resources are not getting justice and when we pass this law if an individual has a solid case those individuals would have the ability to access capital because of a position of confidence.

Thanks Chairman and committee members and I stand for questions.

ARTICLE I DECLARATION OF RIGHTS

Section 1. All individuals are by nature equally free and independent and have certain inalienable rights, among which are those of enjoying and defending life and liberty; acquiring, possessing and protecting property and reputation; pursuing and obtaining safety and happiness; and to keep and bear arms for the defense of their person, family, property, and the state, and for lawful hunting, recreational, and other lawful purposes, which shall not be infringed.

Section 2. All political power is inherent in the people. Government is instituted for the protection, security and benefit of the people, and they have a right to alter or reform the same whenever the public good may require.

Section 3. The free exercise and enjoyment of religious profession and worship, without discrimination or preference shall be forever guaranteed in this state, and no person shall be rendered incompetent to be a witness or juror on account of his opinion on matters of religious belief; but the liberty of conscience hereby secured shall not be so construed as to excuse acts of licentiousness, or justify practices inconsistent with the peace or safety of this state.

Section 4. Every man may freely write, speak and publish his opinions on all subjects, being responsible for the abuse of that privilege. In all civil and criminal trials for libel the truth may be given in evidence, and shall be a sufficient defense when the matter is published with good motives and for justifiable ends; and the jury shall have the same power of giving a general verdict as in other cases; and in all indictments or informations for libels the jury shall have the right to determine the law and the facts under the direction of the court as in other cases.

Section 5. The citizens have a right, in a peaceable manner, to assemble together for the common good, and to apply to those invested with the powers of government for the redress of grievances, or for other proper purposes, by petition, address or remonstrance.

Section 6. Neither slavery nor involuntary servitude, unless for the punishment of crime, shall ever be tolerated in this state.

Section 7. Every citizen of this state shall be free to obtain employment wherever possible, and any person, corporation, or agent thereof, maliciously interfering or hindering in any way, any citizen from obtaining or enjoying employment already obtained, from any other corporation or person, shall be deemed guilty of a misdemeanor.

Section 8. The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures shall not be violated; and no warrant shall issue but upon probable cause, supported by oath or affirmation, particularly describing the place to be searched and the persons and things to be seized.

Section 9. All courts shall be open, and every man for any injury done him in his lands, goods, person or reputation shall have remedy by due process of law, and right and justice administered without sale, denial or delay. Suits may be brought against the state in such manner, in such courts, and in such cases, as the legislative assembly may, by law, direct.

Section 10. Until otherwise provided by law, no person shall, for a felony, be proceeded against criminally, otherwise than by indictment, except in cases arising in the land or naval

THE
REVISED CODES

OF THE
STATE OF NORTH DAKOTA

1895

TOGETHER WITH

THE CONSTITUTION OF THE UNITED STATES AND OF THE
STATE OF NORTH DAKOTA

WITH THE AMENDMENTS THERETO

BY AUTHORITY OF THE LEGISLATIVE ASSEMBLY

5. Roads, tunnels, ditches, flumes, pipes and dumping places for working mines; also outlets, natural or otherwise, for the flow, deposit or conduct of tailings or refuse matter from mines; also milldams.

6. By-roads leading from highways to residences and farms.

7. Telegraph and telephone lines.

8. Sewerage of any incorporated city, or of any village or town, whether incorporated or unincorporated, or of any settlement consisting of not less than ten families, or of any public buildings belonging to the state, or to any college or university.

9. Cemeteries and public parks.

§ 5957. What estate subject to be taken. The following is a classification of the estates and rights in lands subject to be taken for public use:

1. A fee simple, when taken for public buildings or grounds, or for permanent buildings, for reservoirs and dams and permanent flooding occasioned thereby, or for an outlet for a flow or a place for the deposit of debris or tailings of a mine.

2. An easement, when taken for any other use.

3. The right of entry upon and occupation of lands and the right to take therefrom such earth, gravel, stones, trees and timber as may be necessary for a public use.

§ 5958. What property may be taken. The private property which may be taken under this chapter includes:

1. All real property belonging to any person.

2. Lands belonging to this state; or to any county, incorporated city, village or town not appropriated to some public use.

3. Property appropriated to public use; but such property shall not be taken unless for a more necessary public use than that to which it has been already appropriated.

4. Franchises for toll roads, toll bridges, ferries and all other franchises; but such franchises shall not be taken unless for free highways, railroads or other more necessary public use.

5. All rights of way for any and all the purposes mentioned in section 5956 and any and all structures and improvements thereon and the lands, held or used in connection therewith shall be subject to be connected with, crossed or intersected by any other right of way or improvement or structure thereon. They shall also be subject to a limited use in common with the owner thereof when necessary; but such uses, crossings, intersections and connections shall be made in the manner most compatible with the greatest public benefit and the least private injury.

6. All classes of private property not enumerated may be taken for public use, when such taking is authorized by law.

§ 5959. What must appear before property taken. Before property can be taken it must appear:

1. That the use to which it is to be applied is a use authorized by law.

2. That the taking is necessary to such use.

3. If already appropriated to some public use, that the public use to which it is to be applied is a more necessary public use.

§ 5960. Entry for making surveys, etc. In all cases when land is required for public use the person or corporation, or his or its agents, in charge of such use may survey and locate the same; but it must be located in the manner which will be compatible with the greatest public benefit and the least private injury and subject to the

provisions of section 5964. Whoever may be in charge of such public use may enter upon the land and make examinations, surveys and maps thereof, and such entry shall constitute no cause of action in favor of the owner of the land except for injuries resulting from negligence, wantonness or malice.

§ 5961. **Proceedings by civil action.** All proceedings under this chapter must be prosecuted by civil action brought in the district court of the county in which the property, or some part thereof, is situated.

§ 5962. **What complaint must contain.** The complaint must contain:

1. The name of the corporation, association, commission or person in charge of the public use for which the property is sought, who must be styled plaintiff.

2. The names of all owners and claimants of the property, if known, or a statement that they are unknown, who must be styled defendants.

3. A statement of the right of the plaintiff.

4. If a right of way is sought, the complaint must show the location, general route and termini and must be accompanied with a map thereof so far as the same is involved in the action or proceeding.

5. A description of each piece of land sought to be taken and whether the same includes the whole or only a part of an entire parcel or tract. All parcels lying in the county and required for the same public use may be included in the same or separate proceedings, at the option of the plaintiff, but the court may consolidate or separate them to suit the convenience of parties.

§ 5963. **Who may defend.** All persons in occupation of, or having or claiming an interest in any of the property described in the complaint or in the damages for the taking thereof, though not named, may appear, plead and defend, each in respect to his own property or interest, or that claimed by him in like manner as if named in the complaint.

§ 5964. **Power of court.** The court shall have power:

1. To regulate and determine the place and manner of making connections and crossings, or of enjoying the common use mentioned in the fifth subdivision of section 5960.

2. To hear and determine all adverse or conflicting claims to the property sought to be condemned and to the damages therefor.

3. To determine the respective rights of different parties seeking condemnation of the same property.

§ 5965. **Assessment of damages.** The jury, or court or referee, if a jury is waived, must hear such legal testimony as may be offered by any of the parties to the proceedings and thereupon must ascertain and assess:

1. The value of the property sought to be condemned and all improvements thereon pertaining to the realty and of each and every separate estate or interest therein; if it consists of different parcels, the value of each parcel and each estate and interest therein shall be separately assessed.

2. If the property sought to be condemned constitutes only a part of a larger parcel, the damages which will accrue to the portion not sought to be condemned by reason of its severance from the portion sought to be condemned and the construction of the improvement in the manner proposed by the plaintiff.