

2023 HOUSE ENERGY AND NATURAL RESOURCES

HB 1384

2023 HOUSE STANDING COMMITTEE MINUTES

Energy and Natural Resources Committee Coteau AB Room, State Capitol

HB 1384
2/9/2023

Relating to eminent domain and the assessment of damages

2:49 PM

Chairman Porter opened the hearing. Members present: Chairman Porter, Vice Chairman D. Anderson, Representatives Bosch, Conmy, Dockter, Hagert, Heinert, Ista, Kasper, Marschall, Novak, Olson, Roers Jones, and Ruby.

Discussion Topics:

- Private property
- Eminent domain
- Fair market value of property
- Inverse condemnation
- Court costs
- Property Rights Mitigation Plan

In Support:

Rep Louser, District 5, Testimony 21027

Troy Coons, Chairman, NW Landowners Association, Testimony 20382

Lynn Boughey, attorney, Testimony 21195

In Opposition:

Paul Pitner, City County President, Minot ND, Testimony 20010

Jason Bohrer, President and CEO, Lignite Energy Council, Testimony 20063

Carlee McLeod, President, Utility Shareholders of ND, Testimony 20105

Jodi Smith, Director of Lands and Compliance, Metro Flood Diversion Authority (MFDA),
Testimony 20388

Todd Kranda, lobbyist, ND Petroleum Council, in the absence of Brady Pelton, his
testimony was read, Testimony 20288

Andrea Pfennig, Greater ND Chamber, Testimony 19939

Additional written testimony:

Mark Bring, Director of Public Policy and Government Affairs, Otter Tail Power Company,
Testimony 19976

Jeff Skaare, Sequestration Director of Land Legal and Regulatory Affairs for Summit Carbon
Solutions, Testimony 20009

Brenda Derrig, City Engineer, City of Fargo, Testimony 20056

Mark Gaydos, Environmental and Transportation Services, NDDOT, Testimony 20261

3:37 PM Chairman Porter closed the hearing.

Kathleen Davis, Committee Clerk

2023 HOUSE STANDING COMMITTEE MINUTES

Energy and Natural Resources Committee Coteau AB Room, State Capitol

HB 1384
2/16/2023

Relating to eminent domain and the assessment of damages

10:15 AM

Chairman Porter opened the meeting. Members present: Chairman Porter, Vice Chairman D. Anderson, Representatives Bosch, Conmy, Dockter, Hagert, Heinert, Ista, Kasper, Marschall, Novak, Olson, Roers Jones, and Ruby.

Discussion Topics:

- Committee action

Rep Ruby moved to adopt an amendment to insert on Page 2, Line 5, “if the property consists of a primary residence”, and Page 2 Line 6, replace “thirty-three” with “twenty”, seconded by Rep Conmy.

Voice vote. Motion carried.

Rep Ruby moved a Do Not Pass as Amended, seconded by Rep Dockter.

Representatives	Vote
Representative Todd Porter	Y
Representative Dick Anderson	Y
Representative Glenn Bosch	Y
Representative Liz Conmy	Y
Representative Jason Dockter	Y
Representative Jared Hagert	Y
Representative Pat D. Heinert	Y
Representative Zachary Ista	Y
Representative Jim Kasper	AB
Representative Andrew Marschall	N
Representative Anna S. Novak	Y
Representative Jeremy Olson	Y
Representative Shannon Roers Jones	Y
Representative Matthew Ruby	Y

12-1-1 Motion carried. Rep Dockter is carrier.

10:20 AM Chairman Porter closed the meeting.


Kathleen Davis, Committee Clerk


PROPOSED AMENDMENTS TO HOUSE BILL NO. 1384

Page 2, line 5, after the underscored comma insert "if the property consists of a primary residence."

Page 2, line 6, replace "thirty-three" with "twenty"

Renumber accordingly






REPORT OF STANDING COMMITTEE

HB 1384: Energy and Natural Resources Committee (Rep. Porter, Chairman) recommends **AMENDMENTS AS FOLLOWS** and when so amended, recommends **DO NOT PASS** (12 YEAS, 1 NAY, 1 ABSENT AND NOT VOTING). HB 1384 was placed on the Sixth order on the calendar.

Page 2, line 5, after the underscored comma insert "if the property consists of a primary residence."

Page 2, line 6, replace "thirty-three" with "twenty"

Renumber accordingly

TESTIMONY

HB 1384



GREATER NORTH DAKOTA CHAMBER
HB 1384
House Energy & Natural Resources Committee
Chair Todd Porter
February 5, 2023

Mr. Chairman and members of the House Energy & Natural Resources Committee, my name is Andrea Pfennig with the Greater North Dakota Chamber. GNDC is North Dakota's largest statewide business advocacy organization, with membership represented by small and large businesses, local chambers, and trade and industry associations across the state. We stand in **opposition** of House Bill 1384.

Comprehensive infrastructure, whether it is transportation, energy, water, or connectivity is critical to the economic success of North Dakota. Reliable infrastructure networks expand markets by allowing North Dakota businesses to sell products across the state, to other states, and internationally.

Our members support a business-friendly regulatory environment that is consistent and further promotes investment in infrastructure. There are already many hurdles at the federal level that hinder infrastructure development. Our concern is that HB 1384 will create a roadblock at the state level by incentivizing property owners to forego negotiations with developers in order to receive a 33% increase on the assessment.

We urge a Do Not Pass recommendation on HB 1384.

**Testimony of Mark Bring
Director of Public Policy and Government Affairs
Otter Tail Power Company**

**Before the House Energy & Natural Resources Committee
February 9, 2023**

Chairman Porter and members of the Committee, my name is Mark Bring and I serve as Director of Public Policy and Government Affairs for Otter Tail Power Company. I have been licensed as an attorney in North Dakota since 1992 and have been employed continuously in the electric industry since 1997. I respectfully submit this testimony regarding our company's opposition to House Bill 1384.

Otter Tail Power Company is one of the smallest investor-owned utilities in the nation and is a subsidiary of Otter Tail Corporation, which is traded on the NASDAQ as OTTR. Otter Tail Corporation also owns several manufacturing companies engaged in metal fabricating, custom plastic parts manufacturing, and PVC pipe manufacturing. These non-energy businesses include Northern Pipe Products in Fargo.

Otter Tail Power Company is headquartered in Fergus Falls, Minnesota, and provides electricity and energy services to more than 133,000 customers spanning 70,000 square miles in western Minnesota, eastern North Dakota, and northeastern South Dakota. Our service area is predominantly rural and agricultural. By way of example, a median-sized community we serve in North Dakota is Michigan in Nelson County. According to the most recent U.S. Census Bureau statistics, Michigan has a population of 263 people. We serve many towns that are smaller yet, including my hometown of Galesburg in Traill County. The largest North Dakota communities served by our company are Devils Lake, Jamestown, and Wahpeton. Following its incorporation in 1907, our company began serving its very first customer in Wahpeton in 1909.

As an electric provider, our company has eminent domain authority under Chapter 32-15 of the Century Code. We take great pride in working collaboratively with landowners to avoid eminent domain proceedings, relying on right of way agents employed by the company and living in the rural communities we serve. During this process, it is not uncommon for our agents to develop meaningful friendships with the many landowners who recognize electricity is essential to the vibrancy and economic prosperity of the rural communities we serve. However, on very rare occasions it becomes necessary to acquire property interests pursuant to eminent domain proceedings.

Under existing state law, private property may not be taken or damaged for public use without just compensation first having been paid into court for the landowner. A landowner whose property has been taken by condemnation is entitled to fair market value of the property taken. The state Supreme Court has defined “fair market value” as “the highest price property can be sold for in the open market by a willing seller to a willing purchaser, neither acting under compulsion and both exercising reasonable judgment.” Failing a negotiated resolution by the parties, the amount of damages in an eminent domain action is a question of fact for a district court. In addition, the district court has discretion to award attorney fees and costs in an eminent domain action. These factors incent negotiated resolutions.

HB 1384 would turn these traditional policies on their head. It would add a new subsection to section 32-15-22 of the North Dakota Century Code, requiring the district court to increase, by 33%, the fair market value award determined by the trier of fact.

HB 1384 would jeopardize the public interest. First, it would inevitably lead to delay in the timely provision of essential public services. There would be a disincentive for landowners to negotiate a good faith resolution of the fair market value for the condemnation, leading to costly and delay-ridden litigation. In

addition, the 33% premium itself and the additional costs of delay and litigation would ultimately be borne in the electric rates of all electric customers.

The public interest and the greater good are not well-served by such a policy. We urge a DO NOT PASS on HB 1384.

Summit Carbon Solutions Testimony on House Bill 1384
February 9, 2023, 9:00 A.M.
House Energy and Natural Resource Committee
Representative Todd Porter, Chairman

Jeff Skaare – Director of Land Summit Carbon Solutions
Opposition to HB 1384

Chairman Porter, and fellow Representative Committee Members.

My name is **Jeffrey Skaare**. I am the **Sequestration Director of Land Legal and Regulatory Affairs** for **Summit Carbon Solutions**. I am an attorney by education, and a certified professional landman by trade. Born, raised and educated in North Dakota, I have dedicated the majority of my professional career to the development of ND's vast mineral resources. I have witnessed first-hand the need for, and the buildout of, the necessary infrastructure to develop North Dakota's vast natural resources. I have personally overseen the acquisition, build out and operation of over 300 miles of pipeline within North Dakota. In my past employment, I was involved in the acquisition, reclamation, and operation of those same pipelines. I became involved in the Summit Carbon Solutions project because I believe that the two most important industries to North Dakota, namely Agriculture & Energy, will need to find a carbon management solution to continue to thrive. We have reviewed proposed House Bill No. 1384 and we oppose for the following reasons:

- 1.) The enactment of this Bill will only encourage additional eminent domain lawsuits.
- 2.) The enactment of this Bill will negatively impact economic development in North Dakota and will harm the development of infrastructure including infrastructure commissioned by the State.
- 3.) The enactment of this Bill is essentially an unlawful taking from the State or private entities.

I would like to address each of these points in turn.

First, by creating a percentage increase on the fair market value of land needed for infrastructure, you will have incentivized litigation. Landowners will have less incentive to negotiate fair

**Summit Carbon Solutions Testimony on House Bill 1384
February 9, 2023, 9:00 A.M.
House Energy and Natural Resource Committee
Representative Todd Porter, Chairman**

Jeff Skaare – Director of Land Summit Carbon Solutions

Opposition to HB 1384

market value easements when the perception is that a windfall is achieved through litigation. The legal community would embrace such legislation and would encourage legal action because pursuant to N.D.C.C. 32-15-32 the court may award costs and attorney's fees against the Petitioner (i.e., the party initiating the action for condemnation) in favor of the Respondent (landowner). This would create an additional incentive for the legal community to draw out the legal action to recover additional attorney's fees. Currently an eminent domain action creates a level playing field for both sides. It is level because the landowner is guaranteed to receive the highest fair market value of their land based upon a Trier of fact. By increasing the judgment by 33% you are incentivizing additional eminent domain actions.

Secondly, the enactment of this legislation will have a negative impact on all future projects. For North Dakota to continue to develop its vast natural resources, additional infrastructure is needed. North Dakota has long been a state open for business and the enactment of this legislation will send a clear signal to all those interested in developing infrastructure that North Dakota is no longer encouraging development. This bill negatively impacts economic development.

Third, the enactment of this bill is tantamount to an unlawful taking from State or Private Entities. It is picking the winners and losers and is the State Legislatures finger on the scales of justice. Assume for a moment that this Bill requested the opposite, a 33% reduction in the Tier of Facts' fair market value determination. If such a bill was introduced, the pushback would be tremendous and the cry from landowners would be heard nationwide. Such a bill would likely fail a legal challenge as an unlawful taking of property. How does this change when you flip from the Landowner to the State or

**Summit Carbon Solutions Testimony on House Bill 1384
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Private entity? The answer is simple. It does not. Justice needs to be equal and influencing the legal outcomes is, in essence, placing your fingers on the scale of justice and creating an unlawful taking. A recommendation of Pass on this bill sends a clear message that North Dakota is not interested in economic development.

It is for these reasons that **we oppose** the enactment of House bill number 1384 and ask you to forward a **DO NOT PASS** recommendation. Thank you.

February 8, 2023

Sixty-eighth Legislative Assembly of North Dakota
Bismarck, ND

RE: City of Minot Opposition for House Bill 1384

Dear Members of the Committee:

The City of Minot would like to express its strong opposition for House Bill 1384 introduced by Representative Louser and Senator Hogue.

While the use of eminent domain is often unpopular it is seldom used and does have an important role as this procedure is only utilized when there is a significant public purpose. Most recently the City of Minot has used the process to acquire properties necessary for the installation of flood control infrastructure following the 2011 Flood event. To date the City of Minot has acquired approximately 535 residential and commercial properties to address the needed flood control improvements.

Despite the large number of properties acquired, the eminent domain process was started on only 27 properties. Some property owners refuse to sell or negotiate, others demand exorbitant prices. The eminent domain process ensures that the property owner is paid a fair market value (a \$100,000 property isn't purchased for \$10,000) and that the taxpayers aren't forced to pay significantly more than a property is worth (paying \$100,000 for a \$10,000 property). Of the 27 properties: 3 went to trial; 5 properties the property owner didn't respond and a default judgement was entered; 2 are still in process; and the remaining 17 were settled before trial. Using these numbers only 8 properties (3 at trial and 5 awarded by default) of the 535 acquisitions were obtained by eminent domain, or approximately 1.15%. The City of Minot has not used the eminent domain process for any property acquisition outside of flood mitigation according to current staff recollection.

As is outlined above, many acquisitions are settled without using the eminent domain process or before trial. All of these are typically settled at, or reasonably above, fair market value. Should this bill pass all acquisitions will likely go through the court process because property owners and their attorneys will know that even if an entity wins an eminent domain proceeding they will be paid at least 133% of the fair market value of their property. In addition, typically

once these eminent domain cases are awarded the entity is required by the court to pay all costs of the property owner, including attorney fees and appraisal costs. As a result not only will Cities, Counties, and the State pay the additional 33%, they will also have to pay the increase in additional court costs, attorney fees, and appraisal fees of more cases going through the entire eminent domain process.

In Minot's situation, the State helps fund 75% of acquisition costs. To date the City has invested \$81,244,027 in acquisition. If this bill was in effect at the time of acquisition another \$26,810,529 would be needed to complete the sorely needed public improvement of flood mitigation infrastructure. With the current funding commitment of the State this increase would represent an additional \$20,107,897 in State funding. This figure does not include the increase in court fees and attorney costs of the property owners.

If this bill passes entities needing to build public improvements would have to decide whether or not to proceed with the infrastructure project, delay projects to allow more time to raise the needed funding and potentially resulting in increased inflationary costs, or raise the tax burden on citizens to pay the additional cost.

Given the eminent domain process is rarely used, and paying fair market value is reasonable, the City of Minot respectfully requests a **Do Not Pass** vote on HB 1384.

Sincerely,

Paul Pitner, City Council President
City of Minot

Testimony Presented on HB 1384 to the
House Energy and Natural Resources Committee
Representative Todd Porter, Chairman

Brenda E. Derrig, City Engineer for the City of Fargo

February 8, 2023

Mr. Chairman and Members of the Committee,

The City of Fargo is responsible for providing municipal services to its residents, including building roads, water and sewer service, flood protection, and other necessary infrastructure. In order to provide these services, the City collects property and sales taxes, as well as levies assessments to the appropriate benefitting properties.

There are times that the City may require additional property rights in order to provide these services, which may include purchasing land from private property owners. City staff takes every effort during the design of the infrastructure so that any impacts are minimized to the property owners, but nonetheless there are times that additional private property is needed to provide the necessary services. When the need arises, the City of Fargo undertakes negotiations with the property owners by making a good faith offer based on fair value as determined by an independent appraisal, as required by existing statute, all the while serving as good stewards of the taxpayers' money.

Unfortunately, there are times when negotiations are unsuccessful and the parties simply disagree on the value of the property. Under these circumstances, the City Commission determines legal action to secure the property interests is necessary. That determination is not taken lightly since no one favors litigation over negotiation. However, when it does become necessary, existing statutes provide for payment of the property owner's attorney fees in appropriate circumstances. The property owner's rights are protected, while balancing the need to serve the public purpose.

HB 1384 proposes to add thirty-three percent to the damage award, which unnecessarily increases the taxpayer burden for an infrastructure project that requires additional private property in order for the City to properly provide municipal services to its residents. Further, to simply add to the damages in the event of litigation will certainly result in more litigation, not less. It would simply be cost prohibitive to the City to offer an additional 33% at the outset of negotiations, without any certainty of resolution short of litigation. The only individuals who would benefit from that scenario is the lawyers involved.

The City of Fargo requests a DO NOT PASS on HB 1384.

Thank you.



February 8, 2023

Chairman Porter and House Energy and Natural Resources Committee Members,

On behalf of the members of the Lignite Energy Council, I am submitting testimony today in opposition of House Bill 1384. The Lignite Energy Council consists of over 250 members representing lignite mines, electric utilities, independent power producers and contractor suppliers in the Upper Midwest. The lignite industry accounts for over 13,000 direct and indirect jobs, over \$5.4 billion in economic development and millions in state, county and local tax revenue.

For the past two decades, the Lignite Energy Council has worked with the legislature, state agencies and stakeholders to create an environment where our lignite reserves could be used for the production of clean, sustainable electricity, gasification products such as synthetic natural gas as well as fertilizers and many other valuable byproducts. The development of this huge industry has happened in a predictable and stable regulatory environment that elevates landowner relationships and agricultural uses to the top of our list of priorities. We are now adding the legal, tax, and regulatory framework to support development of carbon capture technology for the electric power that would position North Dakota to lead the nation in CO2 development. There is a long list of legislation that has been thoughtfully designed, debated and passed into law that includes conformity with federal laws, the fee structure at the North Dakota Industrial Commission, the long-term accountability for CO2 storage, Class VI primacy for pore space and the critically important state investments into research, and development to name a few policies that our industry has helped place into law.

The language found in HB1384 runs contrary to the decades of development that have sustained this industry and its communities and threatens not just emerging markets such as carbon capture, but even the expansion of our core industries such as electricity generation and transmission. We are proud of the community relations that our power plants and mines have built over the many decades that our industry has been in operation. Strong landowner relationships are the only way that these projects move forward and we have achieved high levels of landowner support while coexisting with the current eminent domain laws. The future of our economy depends on moving the commodities we produce to market through critical infrastructure.

For these reasons, the Lignite Energy Council opposes HB1384 and we respectfully ask that the committee move to give this legislation a "Do Not Pass" recommendation.

Thank you for your consideration,

Jason Bohrer
President and CEO

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House Bill 1384 Testimony in **Opposition**

House Energy and Natural Resources Committee, Representative Porter, Chair

February 9, 2023

Chairman Porter, members of the committee, I am Carlee McLeod, president of the Utility Shareholders of North Dakota, here on behalf of USND utility members, including Montana-Dakota Utilities, Otter Tail Power, and Xcel Energy. We ask you to oppose HB 1384.

Property ownership is a right that should not be challenged unless necessary, and a property owner should not be stripped of any rights in pursuit of just compensation. It is appropriate that the law preserves the right to a jury trial 32-15-13, access to "any general, special, or adjourned term of district court" 32-15-17, and assessment of damages 32-15-22.

Similarly, it is appropriate that the law proscribes the responsibilities of the condemnor, one of which is the duty to "make every reasonable and diligent effort to acquire property by negotiation" 32-15-06.1(1), including offering the full amount established by an appraisal to be just compensation.

This bill is problematic, because it would incentivize the property owner to disregard any such offer, even an offer known to be fair, because of a guaranteed inflated payout through litigation. Litigation is costly and causes delay. Here, a property owner would benefit from refusing any pre-litigation offer knowing that when the court determines just compensation, the property owner will receive a judgment for that amount plus the increased 33%, and likely, also court costs and attorney fees.

In the case of a utility, those increased costs will be borne by customers.

Utility companies work diligently with regulatory agencies and affected parties when siting facilities. Collectively, they make every effort to accommodate the concerns of property owners and fairly compensate them for the use of their land. Use of eminent domain proceedings is extremely rare with ND's investor-owned utilities, but the ND Constitution reserves the right to use eminent domain because utility services are critical services. This bill would drive up costs for those critical services.

This committee knows how critical electric transmission infrastructure is to reliable, affordable electricity. The legislature should be considering and passing laws to incent the development of critical infrastructure rather than advancing ideas that make infrastructure development difficult and expensive. We urge the committee to reject this bill.

**House Bill No. 1384****Energy and Natural Resources**

Coteau AB | February 9, 2023, 9 a.m.

Mark Gaydos, Director of Environmental and Transportation Services

Good morning, Mr. Chairman and members of the committee. My name is Mark Gaydos, Director of Environmental and Transportation Services for the North Dakota Department of Transportation (NDDOT). I'm here to provide information on House Bill 1384.

The NDDOT acquires property interests from landowners for highway transportation projects. When acquiring property, appraisals are completed that comply with the Uniform Relocation Assistance and Real Property Acquisitions Policies Act (The Uniform Act). The appraisals are developed by state-certified appraisers to determine the fair market value and just compensation for the right of way acquisition.

If the property taken is only part of the larger parcel, the appraisals address the before and after taking fair market values and any severance. The NDDOT then makes an offer and negotiates with the property owner. The negotiations address the appraised values and any considerations that may be identified by the property owner. Although the department strives to have successful negotiations, in some instances condemnation is pursued.

When condemnation is required, the NDDOT follows Chapter 32-15 of the NDCC for trial and court procedures. Ultimately, the jury assesses both the value of property taken and damages to the portion of property not taken and determines the award based on the trial proceedings. The courts may also award reasonable attorney fees and expenses associated with the case to the property owner.

House Bill 1384 would impact the amount paid in condemnation cases by increasing the jury determined assessment and award by 33%.

Thank you, Mr. Chairman. This concludes my testimony. I can answer any questions you may have.



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House Bill 1384
Testimony of Brady Pelton
House Energy and Natural Resources Committee
February 9, 2023

Chairman Porter and members of the Committee, my name is Brady Pelton, vice president of the North Dakota Petroleum Council (“NDPC”). The North Dakota Petroleum Council represents more than 600 companies involved in all aspects of the oil and gas industry, including oil and gas production, refining, pipeline, transportation, mineral leasing, consulting, legal work, and oilfield service activities in North Dakota. I appear before you today in opposition to House Bill 1384.

The bill before you creates a significant premium for property sought to be condemned for public use through the eminent domain process by increasing the damages assessment on such property by thirty-three percent. The consequences of this proposal, though likely unintentional, could not be more detrimental to the infrastructure development necessary for North Dakota’s success story to continue.

In the oil and gas industry, eminent domain is a process used rarely and as a last resort in instances where, typically, a small amount of property is sought and cannot be avoided. Eminent domain proceedings are costly and time consuming, often causing significant delays to the start dates of project construction. The use of and access to private property is, quite frankly, not something North Dakota’s oil and gas companies take lightly. Our developers much rather prefer property use issues to be resolved through earnest negotiations between landmen and landowners.

Instead of incentivizing developers to avoid acquiring access to property through the eminent domain process, this bill is likely to result in a dramatic increase in the number of eminent domain proceedings by incentivizing property owners to forego negotiations with developers altogether. Property owners who stand to gain 33 percent more than actual damages simply by forcing a developer to acquire use through eminent domain are extremely unlikely to negotiate with that developer in good faith.

This unlikelihood, coupled with automatically increasing the amount of an eminent domain assessment by 33 percent, will have a tremendous impact on the already high costs of infrastructure development. The cost increases that will result with passage of this bill are likely to make pipelines and other critical infrastructure development uneconomic and cost prohibitive, significantly reducing North Dakota's ability to compete with other regions of the country in growing its economy.

House Bill 1384 severely restricts the ability of all infrastructure developers to use property deemed necessary for public use, and its broad-sweeping application to all instances of eminent domain poses an incredible risk to future development in not only the oil- and gas-producing region of North Dakota but infrastructure development across the state.

NDPC strongly opposes this bill and the multitude of potential negative consequences likely with its passage, and we therefore urge a **Do Not Pass recommendation** for House Bill 1384.

Thank you, and I would be happy to answer any questions.

Testimony of Troy Coons on behalf of
Northwest Landowners Association
in favor of
HOUSE BILL NO. 1384
House Energy and Natural Resources Committee
2/9/2023

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

My name is Troy Coons and I am the Chairman of the Northwest Landowners Association. Northwest Landowners Association represents over 525 farmers, ranchers, and property owners in North Dakota. Northwest Landowners Association is a nonprofit organization, and I am not a paid lobbyist.

We support HB 1384 because market value is often not “just” compensation for a landowner whose land was not for sale. As landowners, we are able to sell our land on the market for market value at most any time we want. Although it is not always the case, just compensation in eminent domain proceedings is most often measured by looking at market values, whether for a residential property or a pipeline easement. When a landowner is being forced to sell his land against his will, it is unfair that the remedy is merely what he would have received if he had chosen to sell his land. The point is that he did not and the land was not for sale, and this should be recognized when we compensate the landowner in an eminent domain proceeding.

I would also like to address the percentage in this bill because our organization helped suggest that percentage. I will admit that there is no magic to this number. Some people believed it should be 25 percent, some people believed it should be 100 percent. We chose something we felt was more middle of the road, but that recognizes the difference between a forced sale and willing seller. Based on feedback we have received, at this point we would offer to amend it as it appears on the attachment to this testimony.

We also believe that the most important effect of this legislation would be to reduce the use of eminent domain proceedings as a threat and encourage more settlements and resolutions instead of litigation.

Thank you,

Troy Coons
Northwest Landowners Association

HOUSE BILL NO. 1384

Introduced by

Representative Louser

Senator Hogue

1 A BILL for an Act to amend and reenact section 32-15-22 of the North Dakota Century Code,
2 relating to eminent domain and the assessment of damages.

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

4 **SECTION 1. AMENDMENT.** Section 32-15-22 of the North Dakota Century Code is
5 amended and reenacted as follows:

6 **32-15-22. Assessment of damages.**

7 The jury, or court, or referee, if a jury is waived, must hear such legal testimony as may be
8 offered by any of the parties to the proceedings and thereupon must ascertain and assess:

- 9 1. The value of the property sought to be condemned and all improvements thereon
10 pertaining to the realty and of each and every separate estate or interest therein. If it
11 consists of different parcels, the value of each parcel and each estate and interest
12 therein shall be separately assessed.
- 13 2. If the property sought to be condemned constitutes only a part of a larger parcel, the
14 damages which will accrue to the portion not sought to be condemned by reason of its
15 severance from the portion sought to be condemned and the construction of the
16 improvement in the manner proposed by the plaintiff.
- 17 3. If the property, though no part thereof is taken, will be damaged by the construction of
18 the proposed improvement, the amount of such damages.
- 19 4. If the property is taken or damaged by the state or a public corporation, separately,
20 how much the portion not sought to be condemned and each estate or interest therein
21 will be benefited, if at all, by the construction of the improvement proposed by the
22 plaintiff, and if the benefit shall be equal to the damages assessed under subsections
23 2 and 3, the owner of the parcel shall be allowed no compensation except the value of
24 the portion taken, but if the benefit shall be less than the damages so assessed the

- 1 former shall be deducted from the latter and the remainder shall be the only damages
2 allowed in addition to the value of the portion taken.
- 3 5. As far as practicable, compensation must be assessed separately for property actually
4 taken and for damages to that which is not taken.
- 5 6. Following the assessment of damages by the trier of fact, the court shall increase the
6 award by ^{twenty}~~thirty-three~~ percent and enter the judgment accordingly. The increase may
7 not be considered by the trier of fact in the original assessment of damages.



TESTIMONY ON HOUSE BILL 1384
House Energy and Natural Resources
February 9, 2023

Chairman Porter and members of the House Energy and Natural Resources, my name is Jodi Smith and I am the Director of Lands and Compliance for the Metro Flood Diversion Authority (the "MFDA"). I want to thank you for the opportunity to provide testimony on HB 1384.

The MFDA is a North Dakota political subdivision that is cooperatively implementing the Fargo-Moorhead Area Diversion comprehensive project (the "project") with the U.S. Army Corps of Engineers. The MFDA also works in partnership with the Red River Valley Alliance in a public-private partnership, as well as working with the City of Fargo, City of Moorhead, Cass County, Clay County and the Cass County Joint Water Resource District.

Together, as a coalition of stakeholders and leaders on both sides of the river, we are working to bring permanent, reliable flood protection to our community. The project will provide a permanent solution to protect our communities, by using an innovative approach to divert excess water around the metro area during significant flood events.

In order to construct such public improvements, it does at times become necessary to acquire property interests from private landowners. In doing so, the Authority, in good faith, makes all reasonable and diligent efforts to acquire these property interests through negotiation as is required by N.D.C.C. § 32-15-06.1. However, despite such efforts, there are times these negotiations are not successful, which makes it necessary for our partner entities to acquire these property interests through eminent domain actions.

As this committee is aware, in an eminent domain action, the property owner is to receive and be paid "just compensation." Just compensation is defined as "the fair market value of the property interests sought to be acquired." Just compensation may also include severance damages, which is if the parcel sought to be acquired is part of a larger parcel, and consequential damages, which is if property is not acquired but damaged by the construction of the public improvement. Finally, the law allows the court to award the property owner the costs and attorneys' fees incurred in the eminent domain action.

House Bill 1384, as proposed, would increase the amount to be paid for the property interests that must be acquired through an eminent domain action to exceed the fair market value of the property acquired and any applicable damages by 33%. House Bill 1384 would essentially set the "floor" for property rights negotiations. This will negatively affect the MFDA and the Fargo-Moorhead Area Diversion. First, this proposed bill will create an obvious financial impact and add stress to the construction of the project, with the resulting financial then becoming a burden on other taxpayers.

Secondly, the proposed bill will also likely create an impediment to effectively negotiating the acquisition of property interests – which are pursued to avoid eminent domain actions – and reaching settlements without eminent domain litigation. This is because even with an offer - made during negotiation that is equal to fair market value and any applicable damages - it is the eminent domain litigation that would result in a 33% multiplier to land acquisition costs, additional litigation expenses and potential stress to the court systems with added eminent domain cases.

23.0950.01002

Sixty-eighth
Legislative Assembly
of North Dakota

HOUSE BILL NO. 1384

Introduced by

Representative Louser

Senator Hogue

1 A BILL for an Act to amend and reenact section 32-15-22 of the North Dakota Century Code,
2 relating to eminent domain and the assessment of damages.

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

4 **SECTION 1. AMENDMENT.** Section 32-15-22 of the North Dakota Century Code is
5 amended and reenacted as follows:

6 **32-15-22. Assessment of damages.**

7 The jury, or court, or referee, if a jury is waived, must hear such legal testimony as may be
8 offered by any of the parties to the proceedings and thereupon must ascertain and assess:

- 9 1. The value of the property sought to be condemned and all improvements thereon
10 pertaining to the realty and of each and every separate estate or interest therein. If it
11 consists of different parcels, the value of each parcel and each estate and interest
12 therein shall be separately assessed.
- 13 2. If the property sought to be condemned constitutes only a part of a larger parcel, the
14 damages which will accrue to the portion not sought to be condemned by reason of its
15 severance from the portion sought to be condemned and the construction of the
16 improvement in the manner proposed by the plaintiff.
- 17 3. If the property, though no part thereof is taken, will be damaged by the construction of
18 the proposed improvement, the amount of such damages.
- 19 4. If the property is taken or damaged by the state or a public corporation, separately,
20 how much the portion not sought to be condemned and each estate or interest therein
21 will be benefited, if at all, by the construction of the improvement proposed by the
22 plaintiff, and if the benefit shall be equal to the damages assessed under subsections
23 2 and 3, the owner of the parcel shall be allowed no compensation except the value of
24 the portion taken, but if the benefit shall be less than the damages so assessed the

- 1 former shall be deducted from the latter and the remainder shall be the only damages
2 allowed in addition to the value of the portion taken.
- 3 5. As far as practicable, compensation must be assessed separately for property actually
4 taken and for damages to that which is not taken.
- 5 6. Following the assessment of damages by the trier of fact, if the property consists of a
6 primary residence, the court shall increase the award by ~~thirty-three~~twenty percent
7 and enter the judgment accordingly. The increase may not be considered by the trier
8 of fact in the original assessment of damages.

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.