

2019 HOUSE ENERGY AND NATURAL RESOURCES COMMITTEE

HB 1299

2019 HOUSE STANDING COMMITTEE MINUTES

Energy and Natural Resources Committee Coteau Room, State Capitol

HB 1299
1/18/2019
31066

- Subcommittee
 Conference Committee

Committee Clerk: Kathleen Davis

Explanation or reason for introduction of bill/resolution:

a bill relating to the duration of easements on the use of real property for pipelines

Minutes:

Attachment 1, 2, 3, 4

Chairman Porter: called the hearing to order.

Rep. Marvin Nelson, Dist 9: presented Attachment 1

4:00

Rep. Ruby: Is there any way to get out of that contract that's lying dormant? If so, do you have any idea how often it's denied?

Rep. Nelson: I know of no simple way to make these go away. You could go to the company and try to buy them back. Often the surface owner has a hard time to find the company.

Rep. Keiser: Are these easements created with any legal form of document, filed and do they have time considerations, or continuous and are we circumventing contract law with this provision?

Rep. Nelson: On an individual basis we might be but this law will not void valid contracts. This law would minimize things. Contracts are not recorded, an easement is. You don't know what the contract said. Easement are sometimes recorded on the wrong land.

Rep. Keiser: If it specifies a date it terminates, if not, it's an open easement. You're saying if it's on my property and I can't prove that, am I not bound? You're asking us to say we know you had a contract or agreement, filed, and if I can't prove it has continuity, it's on my property and I can't prove that, am I not bound? Unless it's abandoned are we getting into legally reversing contracts.

7:00

Rep. Nelson: These are becoming a nuisance. After 20 years, this is an abandoned property. Here we're trying to give a reasonable amount of time. If they abandoned property, should be society be bound forever under this abandoned property.

Rep. Zubke: The easement is the actual contract and has been remuneration to the landowner for that easement. Whether they're using the easement or not shouldn't matter to the landowner because he was paid for that easement.

Rep. Nelson: I've seen where much less is recorded. I'm not focused on just the landowner. I'm not focused on the landowner that got money but the effects of the easement that sits there. I'm trying to give a reasonable time for these easements. At what time do these easements become a public nuisance. How do we get rid of these? My proposal is to treat them at as abandoned property.

Chairman Porter: There's a difference between abandoned and something owned but they're not using yet. These are still owned by someone and there's a use for.

Rep. Nelson: How many decades do you give them and how do we track and find owners? No reasonable way to find them.

Chairman Porter: It's not abandoned though. There's still a process to steal it back. You're just taking it back. This goes retroactive because it says 1977. The way I read this they'd have to give it up. Should I be limited to how long I can hold that real property before I develop it?

Rep. Nelson: Clearly the minerals are real property and have value. Here we have someone sitting on an easement, how many decades do we give them to hold up and no one else can develop? And it's hard to find them when we don't have a system to tract these owners to follow up.

Chairman Porter: You're not making the person buy it back, just taking it away without compensation. This really does go retroactive because after 1977 they're binding where you're writing this. If someone has a 19 yr old easement and don't use in the next year, they'd have to give it up.

Nelson: I'm not trying to take property as the intention of the owner that may be used. Bankers are nervous about loans, oil companies are somewhat nervous. There easements we can't find the owner. You're not using your easement. People need a way to clean this up.

Chairman Porter: You're not making the surface owner or the person who currently owns the surface easement, you're taking it away from the person who owns it without any compensation even though they bought it in the first place. Did you want this to be a taking or that they would purchase it? We don't force a surface owner. There's always instances where we can't find the owners.

Rep. Roers Jones: I understand the property interest that has been transferred and the right to respect that. If it's truly abandoned, how do you resolve it? If you can show you're using

it, or have the pipeline companies periodically file something. It does seem reasonable to have a process for cleaning up that.

20:53

Vice Chairman Damschen: Do you know if there's any existing law on easements not recorded? Are they more of a problem when not filed with the Register of Deeds?

Rep. Nelson: The person who signed is bound by that contract but if not filed then there's no public notice.

Vice Chairman Damschen: Then how valid is the easement when you can't find that owner? Who's going to complain?

Rep. Nelson: I don't know of anything in our century code that says you have to have a valid easement. You do it at your own risk and bankers aren't willing to finance projects on those easements.

Chairman Porter: questions? Further support? Opposition?

Duane DeKrey, General Manager to Garrison Diversion Conservancy District: presented Attachment 2. Without a carve out for water or public works I would have to stand in opposition.

Rep. Roers Jones: Would it be acceptable if you just had to file a continuation easement every 10 years or so?

DeKrey: Better than losing an easement but an administrative added labor.

Rep. Keiser: Why do we have to make all the companies maintain it rather than someone who wants to challenge an easement? We're going to create a whole bunch of work for companies, the owner of the easement.

DeKrey: We spend a lot of money on easements and go over the 20 year mark, how do you know if it's a valid easement if the burden is on us to locate? We'd have to go back to court and do it over again.

Rep. Keiser: 20 years doesn't work for me. If it's abandoned, I go through whatever steps, then you don't have to worry.

DeKrey: agree

Vice Chairman Damschen: if the Red River Water Supply Project came within a couple miles of unidentifiable owner easements, what do you do?

DeKrey: We haven't found any ground in that experience. Just a straight 20 year isn't an answer.

Michael Humann, ND Dept of Trust Lands, presented Attachment 3.

Todd Kranda, attorney with Kelsch Ruff Kranda Nagle & Ludwig Law Firm, Mandan, ND: presented Attachment 4.

41:00

Rep. Zubke: Rep. Nelson made reference to flaring of gas in the state and causing some of the flaring. Are you aware of any situation where that's occurred?

Kranda: no.

Rep. Marschall: Would you be opposed to an amendment if the owner couldn't be found?

Kranda: Yes, you're putting a burden on an easement holder. They are generally binding. There are rights for the landowner or others interested, go to court.

Vice Chairman Damschen: Most easements I've seen the landowner still pays the taxes. What about pipeline?

Kranda: I think that's right. The tax is on the surface, easements are below. There are taxes that are paid. Pipelines do pay a significant tax for the existence of their pipeline. There are taxes paid by the easement holder.

Vice Chairman Damschen: The landowner still pays the real estate taxes.

Kranda: The landowner still owns the land. An easement is just a right to access or pass. This bill does not attempt to deal with that. There's an easement, an agreement the landowner entered into with the company and to what development might be impacted, I don't see how that's affected by this bill.

Chairman Porter: I think it depends on what the easement is used for. For a rural water line I don't think they're paying a tax for moving water. If it's a pipeline they're paying into the county, the school district on a set valuation inside of the tax codes.

Rep. Keiser: Easements are an access right purchased or given. There's a landmark case, 113 yrs old in CA, where a landowner took his cattle through land not his own for 40-50 years, handshake agreement with owner, and his kids came in and wait they wanted to charge him, took him to court, and it's a perpetual agreement he has a right to do that forever. If you have that access right for a pipeline, could you sell that to someone else in the pipeline business? Could you transfer that?

Kranda: Depends on what the easement says. Yes there can be some opportunities depending on the type.

Rep. Zubke: Wouldn't you say all easements return that surface back to the landowner for their use and should continue to pay taxes? And if not, then there's a purchase of that property?

Kranda: Exactly. Even while construction is going on, the pipeline pays surface damages, the use of the surface if interrupting crops, etc.

Vice Chairman Damschen: I think this bill doesn't address easements that are being working.

Kranda: I think this is too large, you'd be impacting here.

Vice Chairman Damschen: I'm not saying this is the way to address it but there's potential for problems.

Rep. Roers Jones: Is the solution you're thinking of, for dealing with an easement that isn't be utilized where you can't identify the owner of quiet title action or something other than that?

Kranda: That could be or some abandonment claim and bring it to a judge. Let the legal pursue that inactive use.

Rep. Roers Jones: Could you give a range what a quiet title would cost a landowner?

Kranda: I have not been involved in many. It varies.

Rep. Roers Jones: Would you say it would be a couple thousand or is that high?

Kranda: it depends on the attorney.

Chairman Porter: further opposition? Closed.

2019 HOUSE STANDING COMMITTEE MINUTES

Energy and Natural Resources Committee Coteau Room, State Capitol

HB 1299
1/25/2019
31464

- Subcommittee
 Conference Committee

Committee Clerk: Kathleen Davis

Explanation or reason for introduction of bill/resolution:

a bill relating to the duration of easements on the use of real property for pipelines

Minutes:

--

Chairman Porter: called the hearing to order on HB 1299.

Rep. Zubke: moved a Do Not Pass.

Rep Bosch: Second.

Vice Chairman Damschen stated he was not totally against this bill. There are some good points.

Rep. Marschall: There are mechanisms in place. If 20-30 years down the road, somebody wanted to find the owner, may not be the original owner. They're looking for the person that owns that easement, they can't find them and done due diligence, there's a mechanism in place, they can go to the court and get relief provided everyone has done due diligence trying to track these parties down.

Vice Chairman Damschen: What happens is we probably should have had a time limit on all easements but that's another discussion. You get the land tied up, the privilege of paying the taxes, but you can't fully utilize the property. Maybe someday we will. Perpetual ones and self-renewing ones are a real burden. That's what bothers me about it.

Rep. Mitskog: I purchased a property with an existing structure on it. We did an addition in the direction we had the extra land that had an abandoned track with a long term easement. It was very cumbersome and hindered what we could do on that property because of that perpetual easement. The track has long been abandoned and not even close to my property but because of that easement we were very limited in what we could do.

Chairman Porter: Further discussion? Clerk will take the roll on a Do Not Pass on HB 1299. 11 yes 2 no 1 absent. Motion carried. Rep. Keiser is carrier.

Date: 1-25-19
 Roll Call Vote #: 1

**2019 HOUSE STANDING COMMITTEE
 ROLL CALL VOTES
 BILL/RESOLUTION NO. 1299**

House Energy and Natural Resources Committee

Subcommittee

Amendment LC# or Description: _____

Recommendation: Adopt Amendment
 Do Pass Do Not Pass Without Committee Recommendation
 As Amended Rerefer to Appropriations
 Place on Consent Calendar
 Other Actions: Reconsider _____

Motion Made By Rep Zubke Seconded By Rep Bosch

Representatives	Yes	No	Representatives	Yes	No
Chairman Porter	✓		Rep. Lefor	✓	
Vice Chairman Damschen	✓		Rep. Marschall	✓	
Rep. Anderson		AB	Rep. Roers Jones	✓	
Rep Bosch	✓		Rep. Ruby	✓	
Rep. Devlin	✓		Rep. Zubke	✓	
Rep. Heinert	✓				
Rep. Keiser	✓		Rep. Mitskog		✓
			Rep. Eidson		✓

Total (Yes) 11 No 2

Absent 1

Floor Assignment Rep. Keiser

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

REPORT OF STANDING COMMITTEE

HB 1299: Energy and Natural Resources Committee (Rep. Porter, Chairman)
recommends **DO NOT PASS** (11 YEAS, 2 NAYS, 1 ABSENT AND NOT VOTING).
HB 1299 was placed on the Eleventh order on the calendar.

2019 TESTIMONY

HB 1299

Chairman Porter and members of the House Energy and Natural Resources Committee

Representative Marvin E. Nelson, District 9

HB1299 is looking to help with a growing problem, easements are numerous, and pipelines are going in the ground, but increasingly, there are easements, no resulting pipeline and then the easement sit there and cause development problems.

I have been told some of the easements even just mention a whole quarter section and do not lay out a route, so anything done on that quarter is at your risk, buildings, other pipelines anything.

And, unlike surface ownership there is no tax or anything so it is easy to lose the owner when no pipe exists. Sometimes the corporation doesn't even exist and it is not unusual to the corporation to be in closed states which you cannot find out who the owners and officers of the corporation were.

I hear bankers are getting more and more concerned with lending in such situations.

So I thought we should do something.

I used the time frame for adverse possession so that is where the 20 years come from and I would note the most common comment I have heard on the bill is that is too long.

I think of this much like a car. It is your property, you get to use it, you can even park it and all that is fine. But if you just abandon it and it is in the way, eventually it is towed and eventually it is sold.

20 years gives a more than reasonable time for easements to be used, surely by then the odds are pretty low that the owner is going to do anything, and much like that car, they are in the way, a nuisance and as such we should recognize them as abandoned and act accordingly so that they do not continue to be a nuisance forever.

I should point out there that transmission lines almost always result in some easements that will never be used. Most of the easements, often 80-90% are obtained before the PSC routes the project, changes in the route result in easements that sit there, with no intention of them ever being used. This would eventually clean those up.

Gathering pipelines are different, you have people trying to put projects together, sometimes a different project removes the need that existed, or a multitude of things result in the project not being built. I would not want to see the years be too short because it does take time. But after awhile these easements become a barrier themselves to success in putting lines in.

So the idea is to give every reasonable chance to use the easement without having an unused easement sit in the way of development forever.

**Testimony of Duane DeKrey, General Manager of
Garrison Diversion Conservancy District
House Bill 1299
House Energy and Natural Resources Committee
Bismarck, North Dakota – January 18, 2019**

Good morning, Chairman Porter and members of the House Energy and Natural Resources Committee. Thank you for this opportunity to testify in regard to HB 1299. My name is Duane DeKrey and I am the General Manager of the Garrison Diversion Conservancy District (Garrison Diversion).

Garrison Diversion is committed to providing a reliable, high quality and affordable water supply to benefit North Dakota residents through our many programs. One example is the Municipal, Rural & Industrial Program, also known as MR&I. This program brings millions of dollars in federal funding to North Dakota to help water systems build or expand drinking water infrastructure to serve homes, businesses and farms.

In addition, Garrison Diversion is a co-sponsor of the state and local Red River Valley Water Supply Project. It is an emergency water supply project that will mitigate drought conditions by delivering Missouri River water to 35 cities and water systems in central and eastern North Dakota. When it's completed, it will serve about 50 percent of the state's population.

Both of these Garrison Diversion programs utilize underground pipelines that need to pass through various properties to deliver water where it is needed. Therefore, easements are frequently a necessary part of Garrison Diversion's projects.

Water projects – particularly large water projects like the Red River Valley Water Supply - can take a very long time to complete because of the lengthy design, permitting, financing, and construction phases, and even in some cases, it could be due to litigation. Garrison Diversion is very concerned about the portion of HB 1299 that states an easement obtained to build a

pipeline is considered abandoned if the pipeline is not built within 20 years of the date on which the easement was obtained.

Garrison Diversion encourages this committee to exempt public water supply projects from the 20-year easement limit that appears in HB 1299. We believe that without an exemption for public water projects, North Dakota may find itself with partially completed projects across the state.

In summary, Garrison Diversion is concerned that public water supply projects could be severely delayed or may never be completed due to "abandoned" easement agreements on pipeline projects that take more than 20 years to complete as described in HB 1299. Please exempt public water supply projects from HB 1299.

Thank you Chairman Porter and committee members for your time this morning.

1707 North 9th Street
PO Box 5523
Bismarck, ND 58506-5523
Phone: (701) 328 – 2800
Fax: (701) 328 – 3650

www.land.nd.gov



Jodi A. Smith, Commissioner

**TESTIMONY OF MICHAEL HUMANN
Surface Division Manager**

North Dakota Department of Trust Lands

House Bill 1299

House Energy and Natural Resources Committee
January 18, 2019

Chairman Porter and members of the House Energy and Natural Resources Committee, I am Michael Humann, the Surface Division Manager with the North Dakota Department of Trust Lands (Department). I am here to testify on House Bill 1299.

The Department is the administrative arm of the Board of University and School Lands, serving under the direction and authority of the Board. The Board is comprised of the Governor, Secretary of State, Attorney General, State Treasurer, and Superintendent of Public Instruction. The Department's primary responsibility is managing the Common Schools Trust Fund and 13 other permanent educational trust funds. The beneficiaries of the trust funds include local school districts, various colleges and universities, and other institutions in North Dakota. The Department manages four additional funds: the Strategic Investment and Improvements Fund, the Coal Development Trust Fund, the Capitol Building Fund, and the Indian Cultural Education Trust.

The Department also administers the responsibilities outlined in the Uniform Unclaimed Property Act, N.D.C.C. ch. 47-30.1. In this role the Department collects "unclaimed property" (uncashed checks, unused bank accounts, etc.), and processes owners' claims. This property is held in permanent trust for owners to claim, with the revenue from the investment of the property benefiting the Common Schools Trust Fund.

Additionally, the Department operates the Energy Infrastructure and Impact Office (EIIO), which provides financial support to political subdivisions that are affected by energy development. Assistance is provided through both the oil and gas impact grant program and the coal impact loan program. The EIIO also distributes energy and flood grants carried over from prior biennia.

Revenues are generated through the prudent management of trust assets, which assets include approximately 706,600 surface acres and 2.6 million mineral acres. The mineral acres are available for oil, gas, coal, gravel, and scoria leasing. The surface acres are leased to ranchers and farmers. In addition numerous right-of-way applications for trust lands, mostly due to energy development, are processed each year with application fees and negotiated consideration payments for issued right-of-way agreements providing revenue to the various trusts.

Surface Acres by County					
As of June 30, 2017					
County	Acres	County	Acres	County	Acres
Adams	17,097.52	Golden Valley	28,983.55	Ramsey	2,056.50
Barnes	2,803.32	Grant	33,517.76	Ransom	1,120.00
Benson	11,999.60	Griggs	1,741.24	Renville	1,910.12
Billings	30,927.06	Hettinger	9,892.50	Richland	513.68
Bottineau	3,271.94	Kidder	28,643.79	Rolette	6,226.08
Bowman	29,310.48	LaMoure	1,435.72	Sargent	1,128.17
Burke	16,137.16	Logan	9,421.53	Sheridan	25,826.44
Burleigh	27,891.66	McHenry	22,720.56	Sioux	23,411.56
Cass	40.00	McIntosh	6,209.87	Slope	23,605.98
Cavalier	556.47	McKenzie	64,586.70	Stark	6,150.13
Dickey	3,981.51	McLean	20,890.99	Stutsman	15,627.81
Divide	20,791.24	Mercer	15,129.38	Towner	8,076.00
Dunn	25,673.31	Morton	18,101.82	Walsh	160.00
Eddy	10,292.81	Mountrail	32,445.59	Ward	10,798.98
Emmons	13,533.97	Nelson	2,694.45	Wells	5,251.89
Foster	3,111.51	Oliver	7,588.41	Williams	38,380.84
Grand Forks	1,274.77	Pierce	13,664.93	Total	706,607.30

The Surface Management Division manages surface acres owned by the various trust funds under the control of the Board of University and School Lands. The major source of income from these lands comes from agricultural leases (grassland, crop and hay land uses), with significant revenue generated from right-of-way, surface damage agreements, and construction aggregate mining. The objective of surface management is to obtain a "fair market" return from the trust lands while maintaining or improving the condition and value.

Professional staff work day-to-day on land management projects that result in the generation of surface revenue and land improvement on school trust lands. These projects include:

- Linear easements.
- Oil well pad, saltwater disposal sites, pipeline and road siting and reclamation.
- Developing water wells, pipelines, dams, and dugouts for livestock water and wildlife enhancement.
- Grazing management plans for improving range condition and productivity.
- Cooperative trash site clean-up and abandoned water well sealing.
- Gravel and scoria mine site reclamation.
- Noxious weed chemical and biological control.
- Coal mine reclamation.
- Monitoring flood affected tracts.

- Seismic permitting.
- Lessee and right-of-way contacts and public inquiries.

There were approximately 450 rights-of-way issued the 2015-17 biennium. Most of the requests for rights-of-way are directly related to oil and gas development activities. Rights-of-way activity continues to be much greater than the pre-oil development activity period with this continued high activity expected to continue until sufficient pipelines and electrical lines have been installed to support the new wells. Rights-of-way consideration payments have generated considerable revenue for the trusts.

House Bill 1299 as currently proposed would consider a pipeline abandoned if the pipeline is not built within twenty years of the date on which the easement, servitude, or nonappurtenant restriction was obtained. Current Board policy regarding the expiration of an encumbrance or right-of-way (easements, permits, letters of permission, surface damage agreements) states the following: "Unless otherwise stated in the encumbrance, the encumbrance expires two years from the date of issuance if the activity or construction is not fully completed. An encumbrance automatically terminates without notice at the end of its term or for failure to complete an activity or construction. Prior to the expiration of the encumbrance, the holder may apply for an amendment or extension in accordance with these Board policies." Thus, as it currently stands, easements issued by the Board terminate if a utility, such as a pipeline, is not constructed within two years from the date of issuance. The Department is concerned that this bill could extend the time to construct a pipeline up to 20 years, notwithstanding the fact that the parties have agreed construction is to be completed within two years to avoid termination. To add clarity to this bill, the Department requests that language be added that allows parties to agree to a shorter time period for construction than 20 years. As an example, the Department proposes the following statement be inserted after the word "law" in paragraph 4 at page 2, line 8:

Unless otherwise provided by law or by a shorter time period as specified within the easement, an easement, servitude, or nonappurtenant restriction

We look forward to working with the committee on these issues and would be happy to answer any questions.

**Testimony in Opposition to
HOUSE BILL NO. 1299
House Energy and Natural Resources Committee**

January 18, 2019

Chairman Porter, House Energy and Natural Resources Committee members, for the record my name is Todd D. Kranda. I am an attorney with the Kelsch Ruff Kranda Nagle & Ludwig Law Firm in Mandan. I appear before you today as a lobbyist on behalf of the North Dakota Petroleum Council (NDPC) to oppose HB 1299.

NDPC represents more than 500 companies involved in all aspects of the oil and gas industry, including oil and gas production, refining, pipelines, transportation, mineral leasing, consulting, legal work, and oilfield service activities in North Dakota, and has been representing the energy industry since 1952.

HB 1299 provides on page 2 lines 8-13 that an easement is deemed abandoned if a pipeline is not built within 20 years. HB 1299 appears to be an attempt to frustrate and deny a granting landowner and the easement holder from being allowed to negotiate and implement an agreement for more than one pipeline located within an easement area or designated corridor.

Typically, an initial pipeline is capable of being constructed within the 20 year period. However, on occasion, more than one pipeline is negotiated and contracted for within an easement that is granted by the landowner. That subsequent pipeline may not be built and completed within the same easement area within the 20 year period. The subsequent pipeline may be built many years later or not at all, but HB 1299 eliminates that as an option for the landowner and easement holder.

It should also be noted that under existing North Dakota law, namely Section 47-05-02.1 (2) NDCC, an easement is valid for a period of up to ninety-nine (99) years (excluding a waterfowl production area easement or a wetlands reserve program easement). Technically, HB 1299 restricts and limits the landowner and easement holder from being able to negotiate and contract beyond a 20 year period if they desire to do so with regard to a subsequent pipeline being built within the same easement area.

Accordingly, HB 1299 unnecessarily interferes with and restricts a landowner's property right to negotiate and enter into an easement for more than one pipeline located within the easement area or designated corridor.

In conclusion, NDPC urges your opposition to **HB 1299** and respectfully requests a **Do Not Pass** recommendation. Thank you and I would be happy to try to answer any questions.