

**1999 HOUSE AGRICULTURE**

**HB 1368**

1999 HOUSE STANDING COMMITTEE MINUTES

BILL/RESOLUTION NO. HB 1368

House Agriculture Committee

Conference Committee

Hearing Date 2-5-99

Tape Number	Side A	Side B	Meter #
ONE HB 1368	x		30 to 53
Committee Clerk Signature <i>Arlyn Hansen</i>			

Minutes:

Summary of bill: Relates to penalty for violating rules adopted by a water resource district.

Rep Gorder: Sponsor of HB 1368. Walsh County.. Shorter bill the last one. Fully in support of this bill.

Daniel Gaustad: Attorney for Walsh County Resource Board . (Testimony attached) This bill relates to the penalty assessed for violating the Resource Board rules. The old adage when you drain water someone down stream has to take care of it holds true in most cases.

Rep Stefonowicz: Is this consistent with written laws.?

Gaustad: Yes there are other boards who have done it.

Rep Stefonowicz: The way this is written you could be making a person guilty of a class B Misdemeanor without him even knowing what the rule is.

Gaustad: We do publish our rules so should be no ignorance of the law.

Rep Berg: Pretty broad authority but rules and regulations gives you the authority to do most anything. How do you make the rules? Who makes the rules that would be referred to in these cases.?

Gaustad: We have open public meetings to adopt the rules and regulations.

Rep Berg: You can make any rule you want then?

Gaustad: Yes we have the authority to make most any rule or regulation we want to.

Rep Herbel: This would put more teeth in not only Walsh County but all over the state.

Mike Dwyer: ND Water Resource board. In favor of bill. This would seem to be pretty weighty stuff you are dealing with and it is. Fights between one farmer and another one down the road or creek can get pretty nasty. This bill would give the Water Resource Bd more authority to rule on these cases without them going to court.

Bill Hardy: Counciler from City Board. We don't need any more laws just enforce the ones we have now.

Brian Kramer: Oppose bill. Who has input into the rule making process.

Don Lee: Ramsey County Water Resource Board. Bill kinda concerns me. Think we have enough laws and haven't had any trouble in Ramsey County.

Arden Haner: Chm "Ward County res board. Been chm since 1982, a long time to be the referee in these water fights. Different in different areas of the state. Not the same problems and thinks the state has the authority to take care of most problems now.

Motion by Rep Renner DO NOT PASS.. second by Rep Brandenburg Carried

Vote total.. YES 11 NO 3 ABSENT 1

Bill carrier Rep Brandenburg

Date: 2-5-99  
Roll Call Vote #:

1999 HOUSE STANDING COMMITTEE ROLL CALL VOTES  
BILL/RESOLUTION NO. HB 1368

House Agriculture Committee

Subcommittee on \_\_\_\_\_  
or  
 Conference Committee

Legislative Council Amendment Number \_\_\_\_\_

Action Taken Do not pass

Motion Made By Renner Seconded By Brandenburg

Representatives	Yes	No	Representatives	Yes	No
Eugene Nicholas, Chairman	✓		Bob Stefonowicz		✓
Dennis E. Johnson, Vice Chm	✓				
Thomas T. Brusegaard	✓				
Earl Rennerfeldt	✓				
Chet Pollert	✓				
Dennis J. Renner	✓				
Michael D. Brandenburg	✓				
Gil Herbel		✓			
Rick Berg	✓				
Myron Koppang	✓				
John M. Warner	✓				
Rod Felich	✓				
Robert E. Nowatzki		✗			
Phillip Mueller		✓			

Total (Yes) 11 No 3

Absent 1

Floor Assignment Brandenburg

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

REPORT OF STANDING COMMITTEE (410)  
February 12, 1999 9:46 a.m.

Module No: HR-29-2690  
Carrier: Brandenburg  
Insert LC: . Title: .

**REPORT OF STANDING COMMITTEE**

**HB 1368: Agriculture Committee (Rep. Nicholas, Chairman)** recommends **DO NOT PASS**  
(11 YEAS, 3 NAYS, 0 ABSENT AND NOT VOTING). HB 1368 was placed on the  
Eleventh order on the calendar.

**1999 TESTIMONY**  
**HB 1368**

# EINARSON & GAUSTAD, PLLP

## ATTORNEYS AT LAW

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DANIEL L. GAUSTAD  
(LICENSED IN NORTH DAKOTA & MONTANA,  
CERTIFIED PUBLIC ACCOUNTANT IN NORTH DAKOTA)

February 5, 1999

North Dakota House of Representatives  
Agriculture Committee  
North Dakota State Legislature  
600 East Boulevard Avenue  
Bismarck, ND 58505

### HAND DELIVERED

RE: House Bills 1417 and 1368

Dear Members of the Agriculture Committee:

I am writing on behalf of my client, the Walsh County Water Resource District Board, concerning the above-noted House Bills. I am the regularly engaged attorney for the Walsh County Water Resource District Board (the "Water Board") and in such capacity have been asked to present to you some information on the Water Board's position with respect to the proposed legislation.

House Bill 1368 would amend § 61-16.1-63 of the North Dakota Century Code so that violations of rules adopted by a water resource district would constitute a Class B misdemeanor. Pursuant to §§ 61-16.1-09(8) and 61-16.1-09(9), a water resource district board is given the power and authority to: (a) make rules and regulations concerning the management, control, regulation and conservation of water and prevent the pollution, contamination, or other misuse of the water resources, stream or bodies of water within its district, and (b) to do all other things reasonably necessary and proper to preserve the benefits derived from the conservation, control and regulation of the water resources of North Dakota. Pursuant to these statutory powers and authorities, the Water Board, in 1996, enacted certain local rules and regulations concerning, in part, the drainage of water. These rules and regulations were enacted primarily as a result of the wet conditions Walsh County has been experiencing throughout the past several years. Prior to enactment of such Water Board rules and regulations, persons in and around Walsh County were draining extensive amounts of water to the detriment of downstream property and persons. Although these rules and regulations have been adopted for a short period of time, they have been relatively successful in being able to deter the continued detrimental drainage of water.

Despite these successes, individuals continue to drain waters to the detriment of property and persons downstream. The Water Board has enforced its rules to prevent such drainage

through civil actions. Notwithstanding these enforcement actions, it has become apparent that such actions do not wholly deter the unlawful drainage of water.

In light of the problems that have been existing with respect to such unlawful drainage, the Water Board noted that § 61-16.1-63, as currently enacted, provides that a person violating any "provision" of § 61-16.1-09 is guilty of a Class B misdemeanor. The Water Board through Mr. Steve Rice, the Walsh County States Attorney, requested an opinion from the North Dakota Attorney General's Office to determine whether the violation of a local rule would give rise to such criminal sanctions. Essentially, the issue presented was whether a rule and regulation adopted by a local water resource board pursuant to § 61-16.1-09, was a "provision" of Chapter 61-16.1 of the North Dakota Century Code, thus resulting in a possible criminal sanction under N.D.C.C § 61-16.1-63. On August 27, 1998, the Attorney General's Office responded to Mr. Rice's inquiry by concluding that such local rules do not fall squarely within the meaning of a "provision" of Chapter 61-16.1 and therefore a violation thereof would not give rise to a criminal sanction. I have enclosed a copy of the Attorney General's opinion for your convenience.

In light of this opinion it became apparent a change to N.D.C.C. § 61-16.1-63 would be required. This proposed change was presented to the North Dakota Water Convention, the North Dakota Water Users Association, North Dakota Water Resource Districts Association, and North Dakota Rural Water Systems Association at its annual meeting held in Bismarck December 7-9, 1998. The proposed legislation was adopted by resolution at this convention.

The benefits that can be derived from the enactment of this statute would be to assist the local water resource boards in enforcing their local rules and regulations through their respective State's Attorney. Currently, a water resource board must commence a costly civil action to enforce such rules and regulations. Accordingly, the cost and expense to properly manage the water resources within the state would be reduced. In addition, it would further inhibit those persons from continuing to unlawfully drain or otherwise manipulate water resources within the State of North Dakota to the detriment of downstream landowners.

House Bill 1417 is being proposed so as to amend §§ 61-16.1-51, 61-16.1-53, 61-21-43.1, 61-21-67 and 61-32-07 of the North Dakota Century Code. These enumerated statutes set forth the processes a water resource board goes through when there exists an unauthorized drain, lateral drain, ditch, an obstruction to a drain, dike, dam or other device for water conservation, flood control, regulation, watershed improvement or storage of water ("water control devices"). These statutes establish what I describe as "non-emergency" procedures. Under these non-emergency procedures, the water resource board investigates the particular issue and makes a determination thereon. The water resource board then sends a notice specifying the nature and extent of the unauthorized water control device, its cause and that if this water control device is not removed within a period of time, which must not be less than thirty (30) days, the board shall procure the removal and assess the cost against the responsible landowner. These same statutes also establish emergency procedures whereby a water resource board is allowed to petition a court to seek emergency relief.

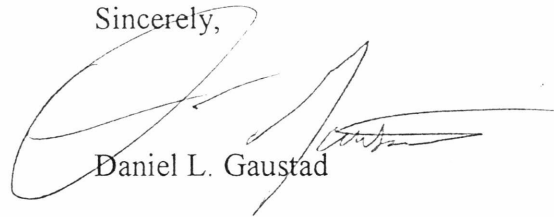


ND House of Representatives  
Agriculture Committee  
February 5, 1999  
Page 3

The Water Board has experienced issues arising from the construction of unauthorized water control devices near the end of October and the beginning of November each year. Accordingly, under the above procedures, these unauthorized water control devices are not able to be removed until the middle of December to the beginning of January of each year. Thus, from a practical standpoint, the unauthorized water control devices are frozen in and cannot be properly removed. The result being the responsible landowner gets the benefit of an unauthorized water control device for the next succeeding spring run-off. With the proposed change, the thirty (30) day period in which a responsible party has to remove an unauthorized water control device would be shortened to a fifteen (15) day period. Such a change would then allow a water resource board to properly remove such unauthorized devices prior to a winter freeze if constructed at the end of October or the beginning of November. Again, this proposed legislative change was even adopted by resolution at the December, 1998 Water Convention.

In summary, I would request that House Bills 1368 and 1417 be given a do pass recommendation to the full North Dakota House of Representatives.

Sincerely,

A handwritten signature in black ink, appearing to read 'Daniel L. Gaustad', is written over the typed name. The signature is stylized with a large initial 'D' and a long horizontal stroke.

Daniel L. Gaustad

DLG/sds

August 27, 1998

Mr. Stephen J. Rice  
Walsh County State's Attorney  
Walsh County Courthouse  
Grafton, ND 58237

Dear Mr. Rice:

Thank you for your letter asking two questions concerning the Walsh County Water Resource District's management of waters.

Your first question concerns application of N.D.C.C. § 61-16.1-63. The statute states:

Any person violating any of the provisions of this chapter shall, if no other criminal penalty is specifically provided, be guilty of a Class B misdemeanor.

You state that the Walsh County Water Resource District has "adopted a permit system for drainage/ditching" under the general powers given water resource districts by N.D.C.C. § 61-16.1-09. You ask whether the criminal penalty of N.D.C.C. § 61-16.1-63 applies to a person who violates the permit system.

Section 61-16.1-63 applies only to violations of "the provisions of this chapter." Provisions of the county's permit system are not strictly provisions of chapter 61-16.1. They are rules and regulations adopted by the Walsh County Water Resource District under that chapter. N.D.C.C. § 61-16.1-09(8). A water resource district, by using its authority to make rules and regulations regarding water management, may implement a permit system for drainage projects of non-meandered bodies of water with watersheds of less than 80 acres. 1985 N.D. Op. Att'y Gen. 16; N.D.C.C. § 61-15-08. N.D.C.C. § 61-32-03 provides that any person desiring to drain a pond, slough, lake, or sheetwater with a watershed of greater than 80 acres must obtain a permit. N.D.C.C. § 61-15-08 prohibits any person from draining a meandered lake or pond regardless of the size of the watershed without the consent of the State Engineer.

Because the permit system does not fall squarely within "the provisions" of chapter 61-16.1, the principle of State v. Sheldon, 312 N.W.2d 367 (N.D. 1981), applies:

It is a well-settled rule of statutory construction that penal statutes should be strictly construed against the government or parties seeking to impose them and in favor of persons on whom they are sought to be imposed.

Id. at 369. See also State v. Rohrich, 450 N.W.2d 774, 776-77 (N.D. 1990). In interpreting penal statutes, "any doubt" is resolved in favor of the criminal defendant. State v. Hogue, 424 N.W.2d 630, 635 (N.D. 1988).

Mr. Stephen J. Rice  
August 27, 1998  
Page 2

Because N.D.C.C. § 61-16.1-63 is to be strictly construed, its application should be confined to violations of specific provisions of chapter 61-16.1, and not to violations of permit requirements adopted pursuant to that chapter.

I note that when the Legislature intends criminal penalties to apply to rules or other executive branch enactments, it has specifically said so. For example, chapter 53-06.1 governs gaming. The criminal penalty in that section applies not only to violations of "this chapter" but also to "any gaming rule, or of any term of a local permit or license." N.D.C.C. § 53-06.1-16. It is a class C felony to violate certain statutes governing the oil and gas industry. N.D.C.C. § 38-08-16(2). But the criminal penalty also applies to any related "rule or order of the [industrial] commission." Id. Any person who violates an order or proclamation issued by the governor under the disaster act is guilty of an infraction. N.D.C.C. § 37-17.1-05(7). The Legislature has also provided that persons violating administrative rules adopted by the Game and Fish Department are subject to statutory criminal sanctions. N.D.C.C. § 20.1-02-05(24).

Unlike these instances, the Legislature did not specifically state that the criminal penalty of N.D.C.C. § 61-16.1-63 extends beyond the duties expressly imposed by chapter 61-16.1. Consequently, it is my opinion that the statute's criminal penalty is confined to violations of statutory duties and does not extend to rules or permit requirements of the Walsh County Water Resource District relating to its drainage/ditching permit system. This conclusion does not mean that a water resource district has no means of enforcing its regulations. The means of enforcement will be through a civil action at law or equity. N.D.C.C. § 61-16.1-09.

You also ask whether, if the Walsh County Water Resource District is not authorized to adopt a permit system, Walsh County could adopt such a permit system under its home rule charter and delegate enforcement thereof to the Water Resource District. In light of the discussion earlier in this letter, which upholds the authority of the Walsh County Water Resource District to adopt a permit system, it does not appear that a response is needed to your second question.

Sincerely,

Heidi Heitkamp  
ATTORNEY GENERAL

jak/vkk