

1999 HOUSE AGRICULTURE
HB 1417

1999 HOUSE STANDING COMMITTEE MINUTES

BILL/RESOLUTION NO. HB 1417

House Agriculture Committee

Conference Committee

Hearing Date 2-05099

| Tape Number | Side A | Side B | Meter # |
|--|--------|--------|---------|
| ONE HB 1417 | x | | 0 to 17 |
| | | | |
| | | | |
| Committee Clerk Signature <i>Arline Hanson</i> | | | |

Minutes:

Summary of bill: Relates to the time within which obstructions to drains, non complying dikes or dams, and non complying drains must be removed or closed.

Rep Gorder: Introduced this bill on behalf of the local water resource board in Walsh County.

This is an attempt to help our water resource board do their job a little better.

Daniel Gaustad: Atty of Walsh County Water Resource Board. Asked to come down and speak in favor of HB 1417. (Testimony attached.) When they receive a complaint the procedure they go through and by statue they must go out and investigate it. Then the procedure they have to go through is to go back and act upon it. If in conflict with the law give the farmer notice and he has 30 days in which to comply. This 30 days is where the conflict comes up as it is usually in the fall when they get the notice. By the time 30 days is up its usually frozen in and nothing get be

done until the next spring. If this could be shortened up to 15 days or less would help a lot. They tried to get an emergency order from a judge but he never did issue a ruling.

Rep Brusegaard: Is the 15 days you would gain with this law enough help to make it worth while.

Daniel Gaustad: This year yes it would of, weather was good up to Dec so lots of work done till then.

Rep Herbel: How much of a problem has this been?

Dan: We have several individuals doing it now but nothing to go to court about.

Arden Haner: ND Water Resource Board in favor of the bill.

Motion by Rep Johnson for a DO PASS Second by Rep Herbel Carried

Vote total: YES 11 NO 3 ABSENT 1

Bill carrier Rep Herbel

Date: 2-5-89
Roll Call Vote #: /

1999 HOUSE STANDING COMMITTEE ROLL CALL VOTES
BILL/RESOLUTION NO. HB 1417

House Agriculture Committee

Subcommittee on _____
or
 Conference Committee

Legislative Council Amendment Number _____

Action Taken Deo pass

Motion Made By Johnson Renner Seconded By Herbel Brandenburg

| Representatives | Yes | No | Representatives | Yes | No |
|-----------------------------|-----|----|-----------------|-----|----|
| Eugene Nicholas, Chaiman | ✓ | | 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 Forlich | ✓ | | | | |
| Robert E. Nowatzki | | | | | |
| Phillip Mueller | ✓ | | | | |

Total (Yes) 11 No 3

Absent 1

Floor Assignment Herbel

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

REPORT OF STANDING COMMITTEE (410)
February 12, 1999 9:53 a.m.

Module No: HR-29-2694
Carrier: Herbel
Insert LC: . Title: .

REPORT OF STANDING COMMITTEE

HB 1417: Agriculture Committee (Rep. Nicholas, Chairman) recommends DO PASS
(11 YEAS, 3 NAYS, 1 ABSENT AND NOT VOTING). HB 1417 was placed on the
Eleventh order on the calendar.

1999 SENATE AGRICULTURE

HB 1417

1999 SENATE STANDING COMMITTEE MINUTES

BILL/RESOLUTION NO. HB 1417

Senate Agriculture Committee

Conference Committee

Hearing Date 3/12/99

| Tape Number | Side A | Side B | Meter # |
|---|--------|--------|---------|
| 1 | X | | 0-2433 |
| | | | |
| | | | |
| Committee Clerk Signature <i>Tricia Johnson</i> | | | |

Minutes:

Senator Wanzek called the meeting to order, roll call was taken, all were present.

Senator Wanzek opened the hearing on HB 1417.

Representative Gorder introduced the bill. It would shorten the amount of time from 30 days to 15 days. He handed out a fax which is enclosed.

Senator Kinnoin: This is in a case where someone has plugged a drain or drained something illegal, this person would have 15 days to correct the problem instead of 30.

Representative Gorder: Yes.

Senator Urlacher: This is only addressed when there is a complaint.

Representative Gorder: Yes.

Senator Urlacher: There is nothing saying as to when the deadline for completion is.

Representative Gorder: That is hard to determine.

Senator Wanzek: The problem has to be rectified within 15 days, the way I read it it says the obstruction has to be removed within a period that the board determines but not less than 15 days. The board can require that the obstruction be removed within a time limit but they have to give them at least 15 days.

Representative Gorder: Yes.

Senator Sand: Can you explain this as to the lateral drains.

Representative Gorder: Lateral drains is three parallel.

Senator Wanzek: Section 1 and Section 3 are almost identical, what do they pertain to?

Representative Gorder: Explains that in the fax that was handed out.

Senator Urlacher: What is the time table on an emergency?

Representative Gorder: I imagine it is determined by court.

Representative Herbel spoke in support of the bill. Under current law they have 30 days, but really have 30 + 30 so about 60 days.

Glenn McCrory from NDWRD Association spoke in support of the bill. Bill just deals with matter of time it would take.

Lloyd Huber a farmer from New Salem spoke in support of the bill. Feels we need to do something soon.

Senator Urlacher: They plugged off drain and if backed up?

Lloyd Huber: The county asked me for overflow channel and I agreed but they don't keep it up.

Senator Wanzek: It's sitting there because someone has a legal obstruction or backing it up?

Lloyd Huber: The creek is completely blocked, so you have water in there all the time.

Senator Sand: Why hasn't it been corrected, how will this bill correct it?

Lloyd Huber: Maybe it will give the water commission and core of engineers more power.

Senator Urlacher: The obstruction is the fault of the county?

Lloyd Huber: Yes.

Dave Sprynczynatyk spoke in support of the bill. Bill will give water resource districts a more efficient way of handling any of the different obstructions and so on.

Senator Urlacher: What is the time table in court.

Dave Sprynczynatyk: Usually heard within a day or two.

Senator Wanzek: What is the difference between the two sections?

Dave Sprynczynatyk: There are two different sections where permitted to build a drain.

Senator Wanzek: The only change we are making with this is the time period.

Dave Sprynczynatyk: Correct, the other changes are simply grammatical.

Senator Urlacher: There is a notification process taken.

Dave Sprynczynatyk: Correct.

Senator Sand: If they didn't correct the problem what would be the consequence?

Dave Sprynczynatyk: The board could remove the obstruction and asses the cost back to the land owner.

Senator Wanzek: They have to allow at least 15 days or the board could allow more time.

Dave Sprynczynatyk: Correct.

Senator Wanzek closed the hearing on HB 1417.

Senator Klein made the motion for a Do Pass.

Senator Urlacher seconded.

ROLL CALL: 7 Yes, 0 No CARRIER: Senator Sand

Date: 3/12
Roll Call Vote #: 1

1999 SENATE STANDING COMMITTEE ROLL CALL VOTES
BILL/RESOLUTION NO. HB 1417

Senate Agriculture Committee

Subcommittee on _____

or

Conference Committee

Legislative Council Amendment Number _____

Action Taken Do Pass

Motion Made By Klein Seconded By Urlacher

| Senators | Yes | No | Senators | Yes | No |
|------------------|-----|----|----------|-----|----|
| Senator Wanzek | ✓ | | | | |
| Senator Klein | ✓ | | | | |
| Senator Sand | ✓ | | | | |
| Senator Urlacher | ✓ | | | | |
| Senator Kinnoin | ✓ | | | | |
| Senator Kroeplin | ✓ | | | | |
| Senator Mathern | ✓ | | | | |
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Total (Yes) 7 No 0

Absent _____

Floor Assignment Senator Sand

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

REPORT OF STANDING COMMITTEE (410)
March 12, 1999 1:23 p.m.

Module No: SR-45-4678
Carrier: Sand
Insert LC: . Title: .

REPORT OF STANDING COMMITTEE

HB 1417: Agriculture Committee (Sen. Wanzek, Chairman) recommends DO PASS
(7 YEAS, 0 NAYS, 0 ABSENT AND NOT VOTING). HB 1417 was placed on the
Fourteenth order on the calendar.

1999 TESTIMONY

HB 1417

EINARSON & GAUSTAD, PLLP

ATTORNEYS AT LAW



425 HILL AVENUE
GRAFTON, NORTH DAKOTA 58237

TELEPHONE: (701) 352-9311
FACSIMILE: (701) 352-4096

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.

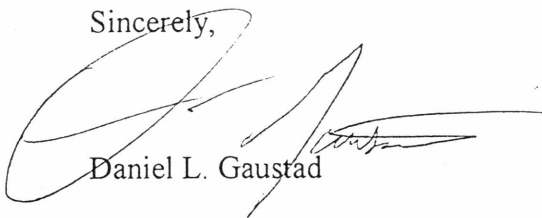
The benefits that can be derived from the enactment of this statute would be to assist the local water resource boards in enforcing their local rules and regulations through their respective State's Attorney. Currently, a water resource board must commence a costly civil action to enforce such rules 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.

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', written over a large, stylized flourish that loops back to the left.

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

EINARSON & GAUSTAD, PLLP

**Attorneys at Law
425 Hill Avenue
Grafton, North Dakota
Telephone: (701) 352-9311
Facsimile: (701) 352-4096**

Date/Time: 3/10/99 12:08 PM

**TO: Representative Bill Gorder
North Dakota House of Representatives
North Dakota State Legislature
600 East Boulevard Avenue
Bismarck, ND 58505**

**FAX #: (701) 328-1997
FROM: Daniel L. Gaustad**

This transmission consists of 3 pages (including this cover sheet).

A hard copy of this fax: _____ will x will not be sent by mail.

If fax is not fully received, call (701) 352-9311.

For return fax messages, send to (701) 352-4096.

MESSAGE:

Please forward to Representative Bill Gorder.

The information contained in this fax transmittal is confidential, may be subject to the attorney-client privilege, and is intended only for the use of the recipient named above. If the reader is not the intended recipient, you are notified that this is not a waiver of privilege and any dissemination, distribution or copying of this information is strictly prohibited. If you have received this transmittal in error, please immediately notify the sender by telephone and return this transmittal to the sender, by U.S. Postal Service, at the above address. Thank you.

EINARSON & GAUSTAD, PLLP

ATTORNEYS AT LAW

DARCIE M. EINARSON
(LICENSED IN NORTH DAKOTA & MINNESOTA)

425 HILL AVENUE
GRAFTON, NORTH DAKOTA 58237

TELEPHONE: (701) 352-0311
FACSIMILE: (701) 352-1006

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

March 10, 1999

Senator Terry Wanzek
North Dakota Senate
Agriculture Committee
North Dakota State Legislature
600 East Boulevard Avenue
Bismarck, ND 58505

VIA FACSIMILE (701-328-1997)

RE: House Bill 1417

Dear Senator Wanzek:

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. It is my understanding that the above-noted House Bill 1417 will be considered by the Senate Agriculture Committee on Friday, March 12, 1999, at its scheduled meeting to commence at 8:30 a.m. Although I will not be able to be present for this hearing, I would request that this correspondence be considered by this Committee and be made a part of the record.

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 (a) the nature and extent of the unauthorized water control device, (b) its cause, and (c) providing that if the water control device is not removed within a period of time, which must not be less than thirty (30) days, the board shall procure its removal and assess the costs against the responsible landowner. These same statutes also establish emergency procedures whereby a water resource board is allowed to petition a court to seek immediate relief.

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, with a local water board's investigation period coupled with the required thirty (30) day notice under the present statutory procedures, these unauthorized water control devices are not able to be removed until

Senator Terry Wanzek
March 10, 1999
Page 2 of 2

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.

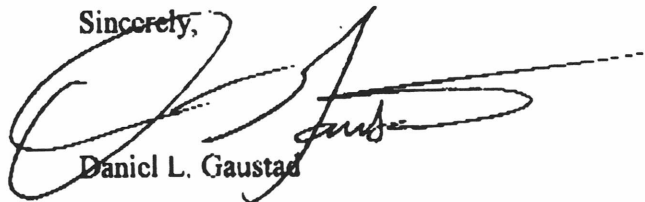
As stated above, there does exist procedures whereby a local water board may petition a court to have the unauthorized water control device removed in the event of an "emergency." In a recent court case the Water Board was involved in, it sought an emergency order from the court to immediately remove an unauthorized water control device that was established at the end of October. In this case, the Water Board argued that an emergency did exist because, under the thirty day notice period, this structure would to continue to be in place subsequent to the winter freeze and therefore would not be able to be removed until after the upcoming spring run-off. At a preliminary hearing, the judge indicated that he did not believe that such a circumstance gave rise to an "emergency" which would warrant an immediate court order. With such a statement, the Water Board agreed to then proceed with the "non-emergency" procedures.

Bear in mind that the proposed modification does not, in any manner abridge, an individual's right, under these statutes, to appeal a decision of a local water resource board. All such appeal rights are unaffected by the proposed legislation.

To assure consensus among local water resource districts, this proposed legislative change was presented at 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. At this meeting this legislative proposal garnered unanimous support.

In summary, I would request that House Bill 1417 be given a do pass recommendation from the Agriculture Committee to the full North Dakota Senate.

Sincerely,



Daniel L. Gaustad

cc: Representative Bill Gorder (via facsimile 701-328-1997)
Representative Gil Herbel (via facsimile 701-328-1997)
Walsh County Water Resource District
Walsh County Commissioners
Mr. Michael Dwyer, ND Water Users
Association (via facsimile 701-223-4645)