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2003 JOINT CONSTITUTIONAL REVISION

HCR 3017

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2003 HOUSE STANDING COMMITTEE MINUTES

BILL/RESOLUTION NO. 3017

Joint Constitutional Revision Committee

☐ Conference Committee

Hearing Date January 29, 2003

Tape Number	Side A	Side B	Meter #
1		X	3716-end
2	X		0-830
Committee Clerk Signature Elizabeth R. Lein			

Minutes: **Chair Kretschmar** Opened hearing on HCR 3017

Doug Bahr (Dir. of Civil Litigation-AG office): Opposed with written testimony.

Rep. Hawken: If something comes up in the administrative process, it can be appealed? Bahr said you can currently appeal. If the facts are the concern, it can be reversed.

Glen Baltrusch: Supports with written testimony. Offered amendments because the original draft is different is different than the bill language.

Christine Hogan: Opposed with written testimony.

Bruce Hicks (NDIC Oil and Gas Division): Opposed with written testimony.

DeNae Kautzman (Dept. of Human Services): Neutral with written testimony

David Thiele (WC Board of Directors): Reminded committee that this is not new legislation and that this was considered in the 56th Legislative Assembly.

Rep. Kretschmar: How many hearings per year does your agency hear? Thiele replied that they hear about 80-85 hearings per year.

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Testimony handed out on behalf of **Joe Ibach** in opposition.

Chair Kretschmar closed hearing on HCR 3017.

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2003 SENATE STANDING COMMITTEE MINUTES

BILL/RESOLUTION NO. HCR 3017

Senate Joint Constitutional Revision Committee

☐ Conference Committee

Hearing Date 02-05-03

Tape Number	Side A	Side B	Meter #
1	X		6060-end
		X	0-103
Committee Clerk Signature			

Minutes:

SENATOR TOLLEFSON opened discussion on HCR 3017.

REPRESENTATIVE WINRICH This same thing was introduced as a House Bill and it was recommended as a Do Not Pass.

Representative Maragos moved a DO NOT PASS. Seconded by Representative Winrich.

Roll Call Vote: 9 YES. 0 NO. 1 Absent.

Carrier: Representative Kretschmar.

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Date: 2/5/03
Roll Call Vote #: 1

2003 HOUSE STANDING COMMITTEE ROLL CALL VOTES
BILL/RESOLUTION NO.

House Joint Constitutional Revison Committee

☐ Check here for Conference Committee

Legislative Council Amendment Number HCR 3017

Action Taken Do Not Pass

Motion Made By Rep. Maragos Seconded By Rep. Winrich

Representatives	Yes	No	Senators	Yes	No
Rep. Kretschmar, Co-Chair	✓		Sen. Tollefson, Co-Chair	✓	
Rep. Maragos	✓		Sen. Mutch	✓	
Rep. Hawkin	✓		Sen. Kresbach	Absent	
Rep. Eckre	✓		Sen. Nichols	✓	
Rep. Winrich	✓		Sen. Seymour	✓	

Both Leier (House Clerk) did standing Committee Report; System would not allow me to do them. [initials]

Total (Yes) 9 No 0

Absent 1

Floor Assignment (House) Rep. Kretschmar (Senate) Senator Nichols

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

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[signature] 10/6/03
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REPORT OF STANDING COMMITTEE (410)
February 6, 2003 11:32 a.m.

Module No: HR-23-1821
Carrier: Kretschmar
Insert LC: . Title: .

REPORT OF STANDING COMMITTEE

HCR 3017: Joint Constitutional Revision Committee (Rep. Kretschmar, Chairman) recommends **DO NOT PASS** (9 YEAS, 0 NAYS, 1 ABSENT AND NOT VOTING). HCR 3017 was placed on the Eleventh order on the calendar.

(2) DESK, (3) COMM

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2003 TESTIMONY

HCR 3017

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TESTIMONY BEFORE THE HOUSE
JOINT CONSTITUTIONAL REVISION COMMITTEE
IN OPPOSITION TO HOUSE CONCURRENT RESOLUTION 3017

Douglas A. Bahr
Director, Civil Litigation Division
Office of Attorney General

January 29, 2003

My name is Doug Bahr. I am the Director of the Civil Litigation Division of the Office of Attorney General. I am appearing today on behalf of Attorney General Wayne Stenehjem in opposition to House Concurrent Resolution No. 3017.

The proposed amendment to Article 1, Section 9 of the North Dakota Constitution appears (1) to permit a person or entity to challenge a governmental determination at district court without participating in any administrative process, and (2) to provide that a person who elects to participate in an administrative process may seek a de novo judicial review by trial by jury.

HCR 3017 IS VERY BROAD

The State and its political subdivisions are involved in numerous governmental decisions that arguably impact a person's activities or property. In addition to formal adjudicative decisions made under N.D.C.C. ch. 28-32, governmental entities make decisions regarding personnel matters (hiring, promotions, firing), awarding bids and entering contracts, transferring and disciplining inmates, revoking or denying hunting and fishing licenses, etc. Although unclear, HCR 3017 could arguably apply to all such determinations.

ELIMINATION OF THE ADMINISTRATIVE PROCESS

A constitutional amendment to permit a person to seek judicial review of a governmental determination without participating in the administrative process would drastically change current law, have unintended far reaching effects, and create numerous practical and financial concerns.

First, from a practical standpoint, under most circumstances the government does not and cannot make a determination until completion of the administrative process. It is through the administrative process that a government entity obtains the necessary information to make a determination. In other words, absent participation in the administrative process, there is no governmental determination. Permitting a person to seek judicial review of a governmental determination without an administrative process places the cart before the horse.

Second, eliminating the administrative process will place every governmental determination in the judicial arena. It will convert every administrative decision into a civil action. Requiring the courts to try every governmental determination will impose an unbearable burden on an already overburdened judiciary, prolong resolution of governmental determinations, and impose additional financial burdens on North Dakota taxpayers.

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With regard to state administrative agencies, eliminating the administrative process will also lose the benefit of agency expertise. The legislature establishes administrative agencies to deal with highly sensitive and technical issues, such as environmental protection, regulation of public utilities, taxation, regulation of numerous professions and industries, etc. The staff of administrative agencies typically have specialized education and training in the areas within the agency's jurisdiction. Because of their expertise, the legislature typically authorizes agencies to promulgate administrative rules and hold administrative proceedings to resolve factual and legal issues within the realm of their statutory authority. This regulatory authority is provided to agencies because of their experience and expertise.

Eliminating the administrative process will force a jury, with little or no experience or expertise, to make decisions in extremely technical and complex areas. This would eviscerate the benefits of agency experience and expertise.

DE NOVO REVIEW

As explained above, the scope of HCR 3017 could go far beyond the type of determinations made in administrative actions. Although much of my testimony equally applies to other governmental decisions, I will limit my testimony to appeals of formal determinations of state administrative agencies.

Section 28-32-46, N.D.C.C., provides for the appeal of a determination of an administrative agency. Under current law, the district court's review of an agency decision is based upon the record made at the hearing before the agency and in accordance with specific statutory standards. See N.D.C.C. § 28-32-46. Judicial review of an administrative agency determination consists of the parties submitting written briefs and, sometimes, appearing at oral argument. The district court can typically issue an opinion within three or four months after the record is filed with the court.

HCR 3017 would change the nature of the appeal of an agency's decision by permitting the party to request a jury trial de novo. A jury trial de novo means there would be an evidentiary trial before a jury. Prior to the trial, there would be the typical pretrial motions, discovery, and hearings. At the trial, the parties could present testimony and evidence, cross-examine witnesses, and rebut evidence. In all likelihood, the jury would hear the same expert and lay witnesses and see the same physical or documentary evidence admitted at the administrative hearing. At the trial de novo, the parties could also present witnesses or introduce evidence not presented to the administrative agency.

Permitting trial de novo of administrative agency decisions would ignore the very purpose and function of administrative agencies. The advantage of the experience and expertise of the administrative agency would be lost. Permitting trial de novo review of administrative agency decisions will also likely increase the frequency of appeals from administrative agency decisions, placing a substantial and unmanageable burden on an already taxed judiciary. A trial de novo would also unnecessarily increase the costs of administrative proceedings and unduly prolong resolution of controversies before administrative agencies.

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The advantage of agency expertise is lost by a trial de novo.

As explained earlier, the legislature establishes administrative agencies to deal with highly sensitive and technical issues. Permitting trial de novo would require a jury, with little or no experience or expertise, to resolve disputes in those technical and complex areas. This would eviscerate the benefits of agency experience and expertise.

Trial de novo would impose an additional burden on the courts.

A party dissatisfied with a decision of an administrative agency is more likely to appeal that decision if it knows it can have a trial de novo. Because a jury will lack the expertise of the administrative agency, an unsuccessful party may feel it has a better chance at prevailing before a jury than it did before the agency. In fact, in some cases, if trial de novo is permitted, parties may use the administrative hearing as a "trial run" to prepare for the jury trial. A party could attend the administrative hearing for the purpose of conducting discovery, to see the agency's strategy, and to determine the best trial strategy at the district court. Because the jury would be trying the case anew the administrative hearing would simply be a practice run. The administrative proceeding would be a meaningless, yet expensive and time consuming, process.

Trial de novo would require substantially more judicial time than judicial review under the current law. Judicial review currently requires the court review the administrative record and briefs of the parties. If requested by one of the parties, a 20-30 minute oral argument is scheduled. Although current reviews do require judicial time, that time is minimal in comparison to the time that could be required by a jury trial. A trial de novo would, in essence, be a new civil case on the court's docket. Various, and in some cases numerous, discovery and pre-trial motions may need to be addressed by the court. A scheduling conference and pre-trial conference may need to be held. Then, depending on the nature of the case, days or weeks may need to be spent presiding over the trial. The court's time spent on a trial de novo will likely be duplicative of what occurred in the administrative proceeding before the independent administrative law judge.

The increased frequency of appeals, as well as the additional judicial time required to conduct a trial de novo instead of a review on the record, would place an undue and likely overwhelming burden on an already overtaxed judiciary. The brunt of this burden would likely fall on the Burleigh County District Court because of the number of administrative appeals taken in Burleigh County.

Increased costs.

One of the purposes of administrative agencies is to provide a quick, efficient and less expensive method of resolving controversies. A trial de novo would defeat that purpose.

Trial de novo of an administrative agency determination would require the parties to the proceeding (private individuals, businesses entities, and the administrative agency) to present the same witnesses and evidence twice, first at the administrative proceeding and then again at district court. Because of the highly technical issues in many administrative proceedings, many proceedings require the testimony of multiple expert witnesses. Paying the fees and travel expenses of expert witnesses for an administrative proceeding is already an expensive

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proposition. Duplicating those costs so a second hearing can be held is not sound public policy. In addition to the burdensome costs of expert witnesses, a trial de novo will require duplication of time spent by attorneys representing the parties. This would, of course, also add to all parties' litigation costs. But the increased costs of trial de novo go beyond out-of-pocket costs for expert witnesses and attorneys. A second hearing will divert agency staff time and resources from other pressing agency business. At a time when fiscal budgets are tight and individuals and entities are exploring alternative methods to resolve legal disputes -- methods that reduce the skyrocketing costs of litigation -- sound public policy does not warrant the unnecessary duplication of litigation costs.

In addition to the costs to the litigants, trial de novo will increase the public's costs. As previously discussed, trial de novo will increase the judicial time required to resolve the matter. This means more judges to handle the additional work. It also means paying jurors fees for each administrative appeal. These costs could be significant.

Increased delays.

Permitting trial de novo would substantially delay resolution of the issues before administrative agencies -- issues that impact the health, safety, and welfare of the citizens of North Dakota. Unnecessarily delaying resolution of those issues is not in the best interest of the citizens of North Dakota or the parties.

Under current law, judicial review of an administrative agency determination consists of the parties submitting written briefs and, sometimes, appearing at oral argument. The district court can typically issue an opinion within three or four months after the record is filed with the court. As previously explained, trial de novo is basically be a new civil action on the court's docket. The typical civil action takes one or more year to resolve. There is no reason to believe the typical administrative appeal would take less time.

Trial de novo is unnecessary.

Trial de novo will not provide any meaningful benefits. No information has been provided to demonstrate this drastic change in law is needed. The Office of Attorney General is not aware of any study or other empirical evidence demonstrating the current review process is inadequate or unfair.

Section 28-32-46, N.D.C.C., provides specific grounds upon which a district court can reverse an agency's decision. Grounds for reversal include if the agency's decision is not in accordance with the law or violates the constitutional rights of the appellant. Reversal is also authorized if the agency decision does not comply with statutory requirements or if the administrative process did not provide the appellant a fair hearing. With regard to factual issues, the district court can reverse the factual findings of the agency if they are not supported by the preponderance of the evidence or if the agency did not sufficiently address the evidence presented by the appellant. These statutory grounds for reversing an agency decision adequately protect all parties to an administrative proceeding.

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CONCLUSION

THE ATTORNEY GENERAL ENCOURAGES THIS COMMITTEE TO RECOMMEND A "DO NOT PASS" ON HOUSE CONCURRENT RESOLUTION 3017.

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HOUSE CONCURRENT RESOLUTION NO. 3017
TESTIMONY BEFORE THE JOINT CONSTITUTIONAL REVISION COMMITTEE
JANUARY 29, 2003

Mr. Chairman, Members of the Committee,

First, I wish to thank Rep. Dekrey for sponsoring HCR 3017 and placing it before this august committee for hearing.

My name is Glen E. Baltrusch. I am a North Dakota citizen by birth and a voter in this great state. I am not a paid lobbyist nor am I a paid state employee who lobbies and proposes legislation against the citizens of North Dakota to justify their own existence.

I stand before you today in support of and to testify for your support to have House Concurrent Resolution No. 3017 placed on the ballot at the general election to be held in 2004.

However, I find errors in House Concurrent Resolution No. 3017 that are inconsistant with the original draft that must be corrected, as this resolution is not the same language nor the proper amendment language Rep. DeKrey presented to the Legislative Council to be

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put into bill form.

Therefore, I respectfully request that this House Concurrent Resolution No. 3017 be withdrawn from hearing at this time until the correct language is placed into it, along with the proper amending language, as submitted by Rep. DeKrey.

The errors are as follows: Page No. 1

Line 17, the word "primary" is to be "general".

Line 21, remove the overstrike on the word "shall"; remove the word "must"; remove the overstrike on the word "man"; remove the word "individual".

Line 22, remove the overstrike on the words "him in his"; remove the words "to the individual's"; remove the overstrike on the words "shall have"; remove the words "is entitled to";

Line 24, remove the overstrike on the word "such"; remove the word "the"; remove the overstrike on the word "such"; remove the word "the"; remove the overstrike on the word "such"; remove the word "the"; on Page No. 1.

Page No. 2

Line 1, remove the word "may"; insert the word "shall";

Line 2, before the word "be" remove the word "remedy";

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insert the word "decision".

In addition to the afore mentioned corrections, I firmly believe that Line 3 on Page No. 2 must be amended. As it currently reads, all matters before the court would require a jury. That is my mistake and must be amend as follows:

Page 2 Line 3, after the word "a" insert the words "right to"; and after the word "jury" insert the words "except in questions of law"

For your convenience I have attached the original bill draft that was provided to Rep. DeKrey, who then submitted it to be put into form.

Thank-you for your time and consideration of this matter.

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Fifty eighth
Legislative Assembly
of North Dakota

HOUSE CONCURRENT RESOLUTION NO.

Introduced by

A concurrent resolution for the amendment of section 9 of article I of the Constitution of North Dakota, relating to judicial review of governmental determinations that impact a person's property or activities.

STATEMENT OF INTENT

This amendment would allow a person to immediately seek a judicial review of a governmental determination that impacts the person's property or activities without being required to participate in an administrative remedy process that is outside the judicial branch of state government. This amendment would not abolish or prohibit administrative remedies processes. This amendment would guarantee that a person would not be required to participate in any process as a condition of seeking judicial review of disputes the person has with governmental entities and would provide that if the person participates in the administrative remedy processes, that person may seek de novo judicial review with the right to a jury.

BE IT RESOLVED BY THE HOUSE OF REPRESENTATIVES OF NORTH DAKOTA, THE SENATE CONCURRING THEREIN:

That the following proposed amendment to section 9 of article I of the Constitution of North Dakota is agreed to and must be submitted to the qualified electors of North Dakota at the general election to be held in 2004, in accordance with section 16 of article IV of the Constitution of North Dakota.

SECTION 1. AMENDMENT. Section 9 of article I of the Constitution of North Dakota is amended and reenacted as follows:

Section 9. All courts shall be open, and every man for any injury done him in his lands, goods, person or reputation shall have remedy by due process of law, and right and justice administered without sale, denial or delay. Suits may be brought against the state in such manner, in such courts, and in such cases, as the legislative assembly may, by law, direct. <u>In every claim for relief over which the district court has jurisdiction, the jurisdiction shall not be conditioned upon or effected by the availability or exhaustion of any administrative remedy and any administrative decision be reviewed de novo in the district court with a jury.</u>

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Dakota Resource Council
P. O. Box 1095, Dickinson ND 58602-1095
(701) 483-2851; www.drcinfo.com

TESTIMONY: HCR 3017
House Judiciary Committee
January 29, 2003

Representative DeKrey and Members of the Committee,

Dakota Resource Council submits this testimony in opposition to HCR 3017, which would threaten the separation of powers among branches of government that undergirds our democracy.

The United States Supreme Court has set a long-established standard whereby courts may not rule on takings claims until the government entity in question has taken a final action, and until the property owner has exhausted every administrative avenue of appeal. The benefit of this standard is that the court then knows exactly what the government entity is allowing the property owner to do with the property, as well as what uses will not be allowed. This bill would short-circuit that process and put the judiciary in the position of ruling on administrative decisions that have yet to be made.

If North Dakota were to change its constitution in this way, the beneficiaries would be large, wealthy, powerful companies anxious to use the threat of a lawsuit as a way of intimidating administrative agencies or county, township, or city commissions. The companies most likely to use the provisions of this proposed constitutional amendment would be those that have a large social or environmental impact on communities, and that encounter significant public resistance—for example industrial landfills, hazardous waste burning facilities, refineries, power plants, or immense factory-style livestock production facilities.

If North Dakota were to change its constitution according to HCR 3017, administrative bodies at the state and local level that are charged with the difficult task of permitting such facilities could find themselves dragged into court before they even reach a decision on the terms of the permit or whether or not to grant it. They would be faced with the difficult decision whether to risk their limited resources to fight frivolous lawsuits by wealthy corporations, or whether to allow those corporations to dictate decisions that should rightfully be made by public officials.

Similar legislation was introduced in Congress in 1997 and 1999, but that body had the wisdom not to pass it. Dakota Resource Council urges the North Dakota State Legislature to follow its example. We urge this committee to give the measure a "do not pass" recommendation.

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Testimony on HCR 3017

House Constitutional Revision Committee

Christine Hogan
Executive Director
State Bar Association of North Dakota

The State Bar Association of North Dakota represents the 1800 attorneys who are licensed to practice in North Dakota. The Association opposes House Concurrent Resolution 3017 because the Legislative Committee and the Board of Governors of the Association believe the bill would have a significant negative impact on the legal system.

The Association has a fundamental problem with this measure. It proposes to amend the North Dakota Constitution to allow de novo judicial review in district court, including the right to jury trial, in virtually all administrative agency cases. This measure would, in effect, defeat the purpose of the administrative agency process as we know it. The process would become useless. It does not make good sense to open up an entire de novo review, complete with new evidence, new witnesses and a jury, of an agency decision. Currently, the district court reviews agency decisions on the record.

The entire purpose of requiring administrative agency decisions to be reviewed *on the record* is to give deference to rulings of agency hearing bodies. The hearing body has the expertise in the subject matter to develop the factual record to support a decision. For example, the Tax Department has specialized knowledge of taxation issues; its staff has the expertise to develop a factual record for an informed decision by the Tax

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Commission. The state district courts, on the other hand, are courts of general jurisdiction. They do not have specialized expertise in particular subject matter such as tax. Our state does not have tax courts or other special courts with subject –matter jurisdiction.

If this measure were adopted, agency decisions would essentially become meaningless and the district courts would be inundated. This would happen because, in every case, the litigant could start over in district court. Rather than review the agency decision on the record, the district court would have to hear the case all over again. Each litigant would be entitled to a full trial, even a jury trial, in district court. There is no good reason to change the current system. Many matters such as tax, utility regulation and workers compensation are now handled efficiently and economically at the agency level, with the right of appeal to district court on the agency record.

This amendment would create a significant change from existing law and it would impose a serious burden on the district courts. It would needlessly add to the cost of litigation. The cost to the taxpayers to support the court system contemplated by the measure has not been calculated, but it would be immense.

The State Bar Association respectfully submits that the fundamental legal change contemplated in House Concurrent Resolution 3017 is unjustified, unnecessary and, in view of the negative effect on judicial resources, inappropriate. We strongly urge the measure be defeated.

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House Concurrent Resolution No. 3017
House Joint Constitutional Revision Committee

Testimony By
Bruce E. Hicks
Assistant Director
Oil and Gas Division
North Dakota Industrial Commission

Mr. Chairman and members of the House Joint Constitutional Revision Committee, my name is Bruce Hicks. I am the Assistant Director of the Oil and Gas Division of the North Dakota Industrial Commission (NDIC).

I appear in opposition to amending Section 9 of Article I of the Constitution of North Dakota as proposed in House Concurrent Resolution No. 3017. This resolution would impale our administrative process by circumventing the administrative procedure and allowing de novo review.

The NDIC is the oil and gas regulatory commission for the State of North Dakota. The Oil & Gas Division is the agency that provides the technical expertise needed for creating and enforcing statutes, rules, regulations, and orders of the Commission pertaining to geophysical exploration, drilling, development, production of oil and gas, disposal of oil field brine, and plugging and reclamation of abandoned wells. Many oil and gas development and exploration activities are subject to state review and approval. The process is usually formal.

We hold hearings once a month and hear about twenty cases each month. Most of these cases are very technical, involving testimony from petroleum landmen, geologists, and engineers. The testimony might involve such things as calculating the location, extent, and future potential of oil and gas deposits; evaluating the porosity, hydrocarbon saturation, and permeability of oil bearing zones; and interpreting 3-D seismic analyses.

Our technical staff, which is composed of geologists and engineers, evaluates the evidence presented at the hearings. Such an evaluation requires a great deal of specialized training, experience, and computer software. Upon this review, a recommendation is made and an order of the Industrial Commission is issued. Resolving the many highly technical matters inherent in regulating the oil and gas industry is best left in the hands of geologists and engineers.

This resolution would allow a party participating in a current administrative hearing to file a concurrent case in district court, even prior to the administrative decision on the case. This would cause an undue financial burden and be a tremendous waste of time and energy to all parties involved in the administrative hearing process.

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The Oil and Gas Division heard a very contentious case several years ago concerning the unitization of the Cedar Hills Field (the largest oil field in North Dakota) located in Bowman and Slope Counties. A well trade agreement between the two main operators was litigated in an Oklahoma district court and the parties indicated the process could take up to six years to resolve before all their appeal processes had been exhausted. Production in the field had to be restricted due to the inability of the parties to unitize the field. There is no doubt one of the parties in this matter would have filed a concurrent case in North Dakota district court if the option would have been available. This would have proved to be very onerous and would have further delayed the unitization process for years.

If the standard is changed allowing de novo judicial review, or allowing circumvention of the administrative process altogether, the rules governing the industry will become less predictable and the costs of doing business in the state will rise. Neither result would benefit North Dakota's royalty owners or the oil and gas industry.

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10/16/03
Date

January 28, 2003

House Concurrent Resolution No. 3017

Presented by: Joe Ibach
President, North Dakota Real Estate Appraiser Qualifications & Ethics Board

On January 27, 2003, the North Dakota Real Estate Appraiser Qualifications and Ethics Board (Appraisal Board) met via conference call to discuss HCR 3017. The Appraisal Board voted unanimously to **oppose** the bill.

This proposed resolution will undoubtedly result in considerably more time spent by the agency attorneys and agency representatives and their witnesses. More time translates into more costs which, therefore, translates into possibly increasing member dues. Section 1 would allow for a "de novo" review by the district court. This method of appeal could be costly and cause undue delays in our court system. Most appealing parties will undoubtedly ask for a de novo review. The case was heard once, the party was not successful, the party now knows the mistakes made the first time, and now they feel confident that appealing the matter will avoid these mistakes. This de novo process will allow the party to tell the story to the "new guy", a real judge. The result, from the Appraisal Boards' perspective, is that it will place considerably more pressure into an already taxed court system. Instead of scheduling an administrative hearing under the present system which takes a couple of hours to one-half day, the judge will have to schedule sufficient time to hear all the witnesses and arguments again. This hearing could easily take one to several days.

The entire purpose of the Administrative Hearing Process now used was to provide the court system some relief, speed up the appeal process, and reduce costs. It is the Appraisal Board's contention that this bill would do a good job of "gutting" those objectives. The only reason to pass the bill is because the present system is not working. The Appraisal Board takes exception to this observation. The present system is working!

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JOINT CONSTITUTIONAL REVISION COMMITTEE
REPRESENTATIVE WILLIAM KRETSCHMAR, CHAIRMAN
JANUARY 29, 2003

Chairman Kretschmar and members of the Joint Constitutional Revision Committee, my name is DeNae Kautzmann. I am the Appeals Supervisor for the Department of Human Services.

The Department is neutral on House Concurrent Resolution 3017 but we wish to point out some areas of concern.

If administrative appeals are reviewed de novo, the legal costs will significantly increase since the case will have to be tried twice instead of being reviewed on the record at the district court level. This has not been accounted for in the Department's budget. The administrative hearing cost averages approximately $ 2,500 per appeal. The costs for an Assistant Attorney General to represent the Department in an appeal doubles since the case is tried twice. The cost of representation averages about $1,000 per appeal. This will have a fiscal impact on all state agencies that conduct administrative hearings. Further, the resolution calls for a de novo hearing with a jury. The mileage and compensation of jurors for administrative cases will drive up the cost at the district court level.

Another area of major concern is the fact that federal Medicaid and Food Stamps regulations require that the agency make the final decision. If the Department does otherwise, we will be in violation of federal statute. See 42 USC 1396a (a) (3) and 7 CFR 273.15 (m). If the case is initially heard by the district court, or if it is heard de novo after an administrative decision, the final decision is taken out of the hands of the agency.

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Finally, this resolution may violate the doctrine of separation of powers and Article VI, Section 10 of the North Dakota Constitution in that it appears to impose nonjudicial duties on the court. With the district court hearing the case initially or de novo after the administrative decision, it is making independent findings and substituting its judgment for that of the agency. The constitution precludes the judiciary from making a legislative or administrative decision. Article VI, Section 10 states in relevant part that "No duties shall be imposed by law upon the supreme court or any of the justices thereof, except such as are judicial, . . ." See also, ***Powers Fuels, Inc. v. Elkin,*** 283 N.W. 2d 214 (N.D. 1979).

I'd be happy to try and answer any questions. Thank you.

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