

January 27, 2021

Dear Chairman Luick and  
ND Senate Ag Committee members:

RE: Proposed Senate Bill 2208.

The proposed bill is quite lengthy and deserves a vigorous review. I have a general sense that most of the bill combines to current sections of Century Code into one. In my layman's experience for a drain issue that affected me, I encountered apparent confusion as to what section of law applied to my own circumstance. Only after a thorough reading of the available legislative history which prompted Section 61-16.1 did I realize the 1981 section was created for new drains. This meant I should keep my analysis only to 61-21 since the drain that affected me was installed in 1918. This interpretation has been confirmed several times since 1981 with two ND AG Opinions (84-22):

*"Drainage projects established and built under chapters 61-16.1 and 61-21, N.D.C.C., have specific procedures particular to each. The method of establishing a project, investigations required, bonding requirements, establishing lateral drains and maintaining drains have significant differences when comparing the two sections. These differences militate against establishing a project under one authority and maintaining it under another."*

The other a recent as last September 1, 2020 (2002-L-04):

*"...it is my opinion that "projects" that are established under N.D.C.C. ch. 61-16.1 must remain ch. 61-16.1 projects, and "assessment drains" established under N.D.C.C. ch. 61-21 must remain ch. 61-21 assessment drains."*

This apparent confusion of, which Chapter (21 or 16.1) must be complied to, became a glaring mistake when I read a Resolution of Necessity dated October 20, 2016 for my 1918 drain refers to Chapter 61-16.1.

Being a landowner, I would hope the Committee evaluates this fusion of two sections where the rights landowners currently possess with 61-21 remains as stringent to their benefit as possible. If there are confliction on identical portions of the two existing laws, please utilize caution for the protection of landowners. It has been my experience, landowners depending on current water law leaves them with a steep hill to climb to ask for appeal of water board decisions.

The Section 5 Definitions (8) "Maintenance" would be a very welcomed change and an important one. My current situation for my 1918 drain reveals water boards seem to use both terms interchangeable depending on their audience. Locally to gain financing abilities, in appearance a Board can use the term maintenance to circumvent a landowner vote for

substantial drain improvements. But to gain state's cost share, the project is converted into "improvement" language to qualify. The definition should be consistent.

Personal life experiences would suggest a person instinctively "knows" when repairs /maintenance transfers into "improvement." Public drains essentially are owned by landowners and improvements to them should be fully vetted by the owners of the public drain. Water Boards certainly can consume advice from all sources advocating improvements such as ideas that manage water more efficiently, but landowners should not be removed from the decision to concur with a significant potential project. I have witnessed this. Water Board managers are entrusted with custodial powers to maintain these drains, and not create improvement obligations without landowners ratifying in a completely transparent process including the statutory right to a vote. Please remember, the landowners are the ones ultimately paying for improvements via special assessments, they deserve this right to vote as they judge their own situation and not be subject to an unelected board manager's opinion on what is "best" for all landowners.

Really, common sense would provide this answer, but my latest experience challenges this very basic core belief. A belief I would assume you share. This must change. Otherwise, I already have seen my history has repeated itself in 2020 on another county drain.

Other portions of water law I have concerns for are:

1. Currently ND Supreme Court, in absence of legislative intent, allows deference to water boards to define benefits. This process needs your review if we try to establish consistent good public policy.
2. Please re-enforce that special assessment cost cannot exceed benefits and that water boards provide some calculation to assert its truth.
3. With urgency, please provide relief to landowners whom need the 30-day appeal window opened just a bit more.
4. With our own experience, the 6-year maximum levy landowner test should have legislative intent describe what the cost of the project is. Unchanged, the results are confusing.

Please feel free to follow up with your questions. My public drain experiences have been accumulated for years. Other changes this bill might create for you, regarding public drains, I certainly may have been exposed to and you can gain from my experience.

Thank you for your service to our State.

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