

## Quick Take Background

**SB2047 (17.0224.03000)** is the product of a study assigned to the Interim Water Topics Committee as the result of Section 4 of HB1095 (2015-17). HB1095's genesis was rooted in constituent complaints about local Water Resource Districts' use of the "quick take" provisions of the eminent domain processes. An argument can be made that it was only one constituent complaint that surfaced in the 2015 session.

"Quick Take" allows the political subdivision exercising the eminent domain process to immediately make use of (to stabilize construction costs and negate long delays, especially with our limited effective construction seasons) the disputed property after depositing an amount of an offer with the district court. "Quick Take" **does not** allow the political subdivision to take ownership of the property. It functions as an easement until the eminent domain process can be completed so ownership is clarified or established. Many would argue that when the quick take process is executed, defacto ownership is passed.

The Interim Committee took a good deal of testimony and reviewed research on the issue. Their information is available at: <http://www.legis.nd.gov/assembly/64-2015/session-interim>. The best place to start looking for detailed information is in the minutes of each committee meeting.

Three basic proposals were presented during the Interim Committee's work. The first one required County Commissions (because they are elected bodies) to approve the use of "quick take" actions prior to Water Resource Districts using them. The second eliminated the Water Resource District use of the "quick take" process entirely. The third was a compromise position proposed by the Water Resource District Association, putting additional official notification and response timing processes in statute. It was backed by the Committee and resulted in proposed SB 2047. The committee's final proposed action options are detailed below.

## Additional Background

Governmental taking of private property for public use, the power of eminent domain, is addressed in Article I, Section 16, of the Constitution of North Dakota. For purposes of this section, a public use or a public purpose does not include public benefits of economic development, including an increase in tax base, tax revenues, employment, or general economic health. Private property shall not be taken for the use of, or ownership by, any private individual or entity, unless that property is necessary for conducting a common carrier or utility business.

The Legislative Assembly provided the State Highway Department "quick take" authority in 1957; in 1959 to provide "quick take" authority for an airport authorities; and in 1961 for city special assessment projects. "Quick take" authority has been authorized by legislation for the State Water Commission, counties, water districts, the Devils Lake outlet, Southwest Pipeline Project, and the Northwest Area Water Supply Project.

Although this paper focuses on state involvement in water management and projects, one area in which there is bottom-up control is the draining of surface water. The Legislative Assembly

enacted authority to establish legal drain boards in 1895. In 1935 the Legislative Assembly established water control and conservation districts separate from legal drain boards. In 1973 the Legislative Assembly determined each county should have a water conservation and resource district and also changed the name of these districts to water management districts. In 1977 the Legislative Assembly authorized joint boards under which authority two or more water management districts could do what one board could do alone. The first joint board was the Red River Joint Board, which was created in 1979.

During the 1979-80 interim, the Legislative Council studied water organizations. At that time, there were drain boards, water management districts, and joint boards, all of which were designed to manage water. The Legislative Council reviewed the Nebraska system under which one district does all the functions done by separate water organizations and which are organized on watershed boundaries as opposed to political boundaries. The result of this study was to change the name of water management districts to water resource districts and to change the name of legal drains to assessment drains. Also, legal drain boards were abolished and authority over drainage was placed with water resource districts.

North Dakota funds most its water projects through the State Water Commission. Funding funneled through the commission for water development has come from several sources, including the General Fund; the Dakota Water Resources Act; the federal municipal, rural, and industrial water supply program; the Resources Trust Fund; and the Water Development trust fund. In addition to these sources, the commission is authorized to issue revenue bonds for water projects, and the commission has shared control of the drinking water state revolving loan fund.

A Legislative Council staffer presented research on whether water resource boards may lawfully exercise eminent domain in other water resource districts. She said there have been no North Dakota court cases to settle this issue. She said a court likely would rule the plain language in North Dakota Century Code Section 61-16.1-09(12) allows a water resource board to condemn an easement or right-of-way in another water resource district if it was necessary for the exercise of another power of the board. She said the relevant language in that section has existed for several decades and predates the current iteration of water resource boards, but there is no legislative history explaining the intention behind it.

Legislative Council staff said the statute does not contain language indicating it would apply differently if there are negative impacts on the water district where the condemnation occurred. She said there is a strong argument a county in one part of the state could take an easement in another part of the state if it is necessary to a water resource district's project, but the only way to have absolute certainty about the statute is to have a court rule on it. She said the statute at issue is found in the chapter regarding water resource boards, and statutory language on other topics likely would not modify it. She said she would have to see the language at issue to know with certainty.

Legislative Council staff said landowners whose land was condemned could go to court for an injunction or to disagree over the amount of compensation owed.

It has been suggested that Section 61-16.1-09(5) arguably prevents water resource boards from taking land in other districts. I have not looked at those provisions.

Interim Water Topic Committee 2017 Final Action Options (Sept 2016):

Three initial quick take authority interim bill proposals: three bill drafts [[17.0223.01000](#)] removed quick take authority entirely, [[17.0224.01000](#)], (from WRD Organization) modified current language and [[17.0259.01000](#)] requires WRD get approval for quick take authority from the County Commission on a project.

**It was moved by Senator Robinson, seconded by Representative M. Nelson, and failed on a roll call vote that the committee approve and recommend to the Legislative Management the bill draft requiring water resource boards to obtain the approval of county commissioners before exercising quick take eminent domain.** Representative M. Nelson and Senators Robinson and Schaible voted "aye." Representatives Schmidt, Amerman, Anderson, Muscha, J. Nelson, Porter, Sanford, Westlind, and Zubke and Senators Casper, Holmberg, Lee, Luick, Sinner, Sorvaag, and Unruh voted "nay."

**It was moved by Representative Zubke, seconded by Senator Sorvaag, and carried on a roll call vote that the bill draft requiring water resource boards to engage in a specified negotiation process with land owners before exercising quick take eminent domain be amended to permit evidence of constructive notice to satisfy the requirement for water resource boards to deliver certain documents to landowners.** Representatives Schmidt, Amerman, Anderson, Muscha, J. Nelson, M. Nelson, Porter, Sanford, Westlind, and Zubke and Senators Casper, Holmberg, Lee, Luick, Robinson, Schaible, Sorvaag, Sinner, and Unruh voted "aye." No negative votes were cast.

**It was moved by Senator Sorvaag, seconded by Senator Lee, and carried on a roll call vote that the committee approve and recommend to Legislative Management the bill draft, as amended, requiring water resource boards to engage in a specified negotiation process with land owners before exercising quick take eminent domain.** Representatives Schmidt, Amerman, Anderson, Muscha, J. Nelson, M. Nelson, Porter, Sanford, Westlind, and Zubke and Senators Casper, Holmberg, Lee, Luick, Schaible, Sorvaag, Sinner, and Unruh voted "aye." Senator Robinson voted "nay."