

**Water Topics Overview Committee
North Dakota Legislature
Bismarck, North Dakota
March 8, 2016
Red River Joint Water Resource District**

The Red River Joint Water Resource District, its member water resource districts in the Red River Basin, and water resource districts across the State of North Dakota are concerned about recent efforts to eliminate water resource districts' eminent domain authorities. The following is a brief outline of the primary concerns of water resource districts ("WRDs") regarding the prospect of losing their quick-take authority and the adverse impacts that course of action would have for development of water projects across the State, including retention and other important flood protection projects.

- Quick-take eminent domain authority is simply a matter of timing; quick-take does not reduce or eliminate any landowner rights. In fact, under the quick-take process, WRDs can only condemn a "right of way," a property right similar to an easement, whereas under normal eminent domain procedures a water resource district can acquire full fee simple title. In that respect, the law protects landowners with regard to quick-take since WRDs cannot acquire fee simple title through the quick-take process.
- Under the standard eminent domain process, WRDs do not have the right to access property until "the entry of judgment" on the eminent domain matter. See N.D. Cent. Code § 32-15-29. Entry of judgment does not occur until the conclusion of a trial to determine the value of property, a process that can take a year or more; that process typically delays construction for at least a year and likely longer, and can cost hundreds of thousands or even millions of dollars, depending on the size of the project. In some instances, inability to proceed expeditiously can actually kill a project.
- Landowners retain all of their due process rights under the quick-take process. One of the common allegations of opponents of quick-take authority for WRDs is that landowners lose their due process rights in the quick-take process. That claim is simply erroneous. Landowners retain all of their due process rights, they have every opportunity to challenge the public necessity of a project, to challenge the public necessity of the acquisition of their "right of way," or the amount of compensation offered. Again, the quick-take process is only about timing and actually affords landowners extra protection since WRDs cannot acquire fee simple title via quick-take.
- Under quick-take, a WRD is simply entitled to possession of the right of way once the WRD deposits the appraisal amount with the district court. This process allows landowners to challenge the public necessity of the project, the public necessity for acquisition of the "right of way," and the amount of compensation offered by the WRD. In the meantime, the WRD has the legal right to commence construction on its project without expensive construction delays while the litigation proceeds. Landowners retain their rights while WRDs can begin construction.

- WRDs utilize quick-take only as a last resort. The law requires WRDs to negotiate with landowners in good faith before they can commence any eminent domain proceedings. WRDs only commence quick-take after substantial negotiations with landowners have failed, and even then most WRDs are incredibly apprehensive about actually exercising eminent domain or any quick-take procedures. Most water managers are farmers, all are landowners, and they value property rights. Water managers want to treat landowners fairly and want to compensate landowners fairly, and with that in mind, WRDs typically negotiate with landowners for months before commencing quick-take. Only when landowners refuse to negotiate, are unreasonable regarding demands or compensation requests, or are simply attempting to delay or defeat a project through right of way negotiations will a water resource district finally make the decision to commence quick-take proceedings.
- Quick-take protects the will of voters. Allowing a single holdout landowner to de-rail a project is contrary to the will of other landowners who voted for a project. WRDs finance and fund the vast majority of their projects through creation of assessment districts. The WRD assessment process is a democratic and transparent, upfront voting process where landowners who would benefit from a project vote on proposed projects. If the majority of votes is not in favor of the project, the WRD cannot proceed with creation of the assessment district and construction of the project with assessment dollars. In other words, landowners must vote to tax themselves to finance and fund a water project before a WRD can proceed with creation of an assessment district and construction of a project with those funds. WRDs do not proceed with right of way acquisition on a project until long after a successful assessment district vote; by the time a water resource district commences right of way acquisition, the benefitted landowners will have already voted to create the assessment district and proceed with the project. For example, if the legislature were to strip WRDs of their quick-take eminent domain authority, that decision would allow a single holdout landowner to stop or significantly delay retention project if the WRD needed access to that landowner's right of way to construct a dam embankment. In other words, months after fellow landowners voted to tax themselves to finance a retention project, this single holdout landowner could basically defy the will of the neighboring landowners simply by refusing to grant a WRD an easement to build the project. A delay of that magnitude could cost hundreds of thousands of dollars, or even more, and cost overruns of that nature could hamstring a project or even doom a project. One single holdout landowner should not have the ability to defy the will of other voting landowners. Quick-take eminent domain authority would eliminate that option.
- In most instances where a single holdout landowner believes the holdout can doom a project, once a WRD commences quick-take and the landowner recognizes the project is going to proceed and the holdout will not kill the project, most of those landowners are ultimately reasonable regarding the compensation for their right of way. Most of those situations result in a mutual resolution before any trial.

- Quick-take eminent domain authority protects state and federal cost-share, as well as state and federal permits. Most WRD projects require permits at the state level, and many require permits at the federal level. In most instances WRDs will not proceed with projects without state cost-share dollars to defray local expenses. Without quick-take, if a WRD has to proceed under the standard eminent domain process, that lengthy process could put cost-share dollars and permits at risk; local landowners who want the project would then have to pay those extra costs.
- Many water projects and many other public entities possess quick-take eminent domain authority in North Dakota for various projects, including:
 1. Southwest Pipeline;
 2. Northwest Area Water Supply Project;
 3. Devils Lake Outlet;
 4. Rural Water Systems;
 5. Garrison Diversion;
 6. County Highway Departments;
 7. Cities; and
 8. North Dakota Department of Transportation.
- WRDs only seek to protect the same type of authority to build their important water projects. WRDs must follow the same quick-take procedures as all of these other entities, and they must demonstrate the same public necessity to construct their projects before a court will grant them authority to enter upon property to commence construction.
- Some opponents have argued only elected entities should have quick-take authority. In fact, HB 1332 during the 2015 legislative session sought to strip WRDs and other appointed governing entities and political subdivisions of their eminent domain authorities. The House Political Subdivisions Committee issued a Do Not Pass recommendation on HB 1332, and the vote on the House floor was overwhelmingly in opposition to HB 1332. WRDs are appointed entities, appointed by their County Commissions. However, by law, WRDs are their own, independent political subdivisions under North Dakota law. County Commissions appoint water managers because they have expertise in water, and they understand how to build water projects. If a WRD lacked quick-take authority and their County Commission had to step in to exercise quick-take, the County Commission would be in a difficult situation. That type of arrangement would basically require WRDs to ask their County Commissions to step into the middle of difficult negotiations regarding a project the County Commission did not develop, and to condemn right of way for a project the County Commission had no involvement developing. Most County Commissions want WRDs to keep them informed regarding water projects, but they would rather not step into the middle of contentious land acquisition negotiations to condemn property for a water project they did not develop. Further, if a County Commission decided they were not interested in “wearing the black hat” and were not interested in condemning property for a WRD’s project, that particular project would languish and likely fail as a result.

- The Commissioner of the North Dakota Department of Transportation is appointed, Water Commissioners are appointed, Western Area Water Supply directors are appointed, and other entities with quick-take authority are appointed. These are people with expertise who take their authority seriously. Water managers are the same, they do not take their quick-take eminent domain authority lightly, and have not abused their quick-take authority. Opponents have not offered any credible evidence to demonstrate why WRDs, and other appointed entities, lack the qualifications to utilize quick-take simply in light of their appointed positions.
- WRDs have had quick-take authority when federal dollars are involved since 1989, and quick-take authority when state dollars are involved since 2009. Opponents have not offered any credible evidence of abuse by WRDs since 1989, and have not otherwise demonstrated why the legislature was somehow wrong in 1989 and 2009.
- Following wet years, WRDs often hear cries for additional water retention in the state. If WRDs lost their quick-take authority, that would deal a serious blow to development of any retention project in the state.