

# Red River Joint Water Resource Board

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*Providing a coordinated and cooperative approach to planning and implementing  
a comprehensive water management program in the Red River Valley.*

DATE: August 11, 2016

TO: Chairman Jim Schmidt and Water Topics Overview Committee

FROM: Red River Joint Water Resource District

RE: Water Resource District "Quick-Take" Authority

The Red River Joint Water Resource District ("RRJWRD") appreciates the Water Topics Overview Committee's efforts regarding your ongoing study of water resource district ("WRD") "quick-take" eminent authority. RRJWRD, its member water resource districts in the Red River Basin, and water resource districts across the entire State of North Dakota are concerned about recent efforts to reduce or eliminate WRD quick-take authority, a step that would truly limit WRDs' ability to construct water infrastructure for the benefit of North Dakota landowners, farmers, ranchers, and communities. Our state is facing substantial water challenges and WRDs can improve the lives of thousands of North Dakotans by developing and constructing crucial water infrastructure. However, WRDs' quick-take authority is a key tool for WRDs in their efforts to construct meaningful water projects, and any limitation or outright elimination of quick-take authority for WRDs will be devastating for water development in North Dakota.

To be frank, RRJWRD is confused by the level of attention and scrutiny given to WRD quick-take authority over the last couple of years. WRDs only use this tool when absolutely necessary; we have not abused this authority, and we struggle to understand why we are under such intense scrutiny.

WRDs use quick-take sparingly, and we are not aware of a single credible claim that any WRDs have abused their quick-take authority. From our perspective, this intense scrutiny of WRDs' quick-take authority is an effort to seek a "solution" to a non-existent problem. The North Dakota Legislature has supported water development in our state; however, if the Legislature limits or eliminates WRD quick-take authority, that would be a step in the wrong direction.

We appreciate your Committee's efforts to consider alternatives to existing WRD quick-take authorities under N.D. Cent. Code § 61-16.1-09(2). Recognize, however, that some of the proposals offered to your Committee could have devastating impacts on WRDs' powers to construct meaningful water projects. Please consider the following as your Committee proceeds with its WRD quick-take study:

## MEMBER WATER RESOURCE DISTRICTS

Ransom County  
Richland County  
Sargent County  
Pembina County

Walsh County  
Grand Forks County  
Traill County  
Barnes County

Maple River  
North Cass County  
Southeast Cass County

Rush River  
Nelson County  
Steele County

- The three biggest obstacles to water development are: 1) funding, 2) permitting, and 3) right of way acquisition. The North Dakota Legislature clearly supports water project sponsors regarding two of those three prongs: funding and permitting. Elimination or limitation of WRD quick-take authority would be akin to propping up two legs of a three-legged stool, then cutting off the third.
  1. Funding
    - The North Dakota legislature supports water development through funding; North Dakota State Water Commission cost-share is absolutely crucial for our projects, and we appreciate the Legislature's support via water funding.
  2. Permitting
    - The North Dakota Legislature has created a reasonable permitting framework, and regulatory obstacles at the State level rarely derail water projects in North Dakota.
  3. Right of way acquisition.
    - The third prong, right of way acquisition, is equally as difficult yet crucial to water project development. If the Legislature eliminates or limits WRD quick-take authority, the "third leg" of support will be effectively removed. In other words, the Legislature will be left supporting water projects in terms of funding and regulatory, but making projects more difficult and expensive by making the right of way process exponentially more difficult.
- Remember, quick-take only differs from regular eminent domain in terms of timing; without quick-take, WRDs do not have the right to access property until "the entry of judgment" by a court on an eminent domain matter. Pre-trial discovery and trial can last a year or more, and delays that lengthy can cost projects hundreds of thousands of dollars, or even millions when considering larger projects.
- Landowners retain their due process rights under the quick-take process. Any argument that landowners lose their due process rights in the quick-take process is simply false.

- One alternative proffered recently is the prospect of eliminating quick-take for WRDs and granting it only to *elected* entities. This proposal is not new; in fact, the 2015 Legislature considered this in HB 1332. WRDs and counties were unified in their opposition to HB 1332. WRDs have had eminent domain authority for over a century, and no one has demonstrated that WRDs lack proper judgment to exercise this eminent domain authority simply because they are appointed as opposed to elected. County commissions, simply put, do not want to step into the middle of contentious water projects only to exercise eminent domain.
- Your Committee has voiced considerable concern regarding cost-share carryover regarding the State Water Commission's budget. Of course, without quick-take, project delays will be even lengthier. If the Legislature eliminates or limits WRD quick-take authority, the State Water Commission will encounter *more* cost-share carryover.
- Water projects are difficult, and very few of them proceed without some type of opposition in some form. Elimination of WRD quick-take authority could be devastating for small projects for smaller communities or farmers in need of relief from their water issues; landowners seeking exorbitant compensation for land rights could doom those smaller projects. Similarly, large projects, like the Souris River Project, could become exponentially more difficult and more expensive if WRDs cannot acquire the right of way necessary to construct these projects. Allowing landowners to utilize the right of way process to hold projects hostage is not fair to other landowners who desperately need relief.
- We appreciate your concern for landowner rights. However, not one landowner or any other party in the course of this study has demonstrated a situation where a WRD has abused its quick-take authority. Certainly, several parties have voiced their opposition to various water projects in general, but none have offered any reliable evidence of a WRD abusing the quick-take process. RRJWRD is still confused as to why WRD quick-take authority is suddenly such a concern when no WRDs have abused this authority.
- Water managers are landowners, and they absolutely respect landowner rights; however, they also understand one or two landowners holding out, demanding ridiculous amounts of compensation for their right of way at the expense of the project and the other landowners paying for the project is not fair to the other landowners who need the protection or relief a water project can provide.

- Existing law protects landowners from any attempt to abuse quick-take. Section 32-15-06.1 of the Century Code very clearly requires any government entity to conduct negotiations before ever resorting to any type of eminent domain, including quick-take. Any attempt at abuse or any rush to quick-take without meaningful negotiations is subject to dismissal by any court. Protections are already in place.
- Several public entities in North Dakota possess quick-take eminent domain authority. RRJWRD is confused as to why WRD quick-take authority is under scrutiny since there is no evidence that WRDs abuse this authority.
- The North Dakota Legislature overwhelmingly approved and enacted SB 2255 during the 2009 session (by a 40-6 vote in the Senate, and a 77-14 vote in the House). SB 2255 amended N.D. Cent. Code 61-16.1-09(2), to grant WRDs quick-take authority when a project includes state cost-share (previously WRDs had quick-take only when a project included federal cost-share). Nothing has changed since the Legislature's overwhelming support for SB 2255 in 2009; WRDs are operating in accordance with the law, engaging landowners in negotiations, and affording landowners sufficient opportunity to consider offers and options (not rushing into eminent domain). Again, RRJWRD asks why their quick-take authority is the subject of such intense scrutiny when they have not acted contrary to law and have not abused their authority.
- If the Legislature does, in fact, elect to eliminate or limit WRDs' quick-take authority, project opponents will have the upper hand; they will be in position to kill projects simply by holding out in the right of way process, or to demand exorbitant amounts for right of way.
- If the Legislature reduces or eliminates WRD quick-take authority, the WRDs would then request that the Legislature provide 100% state cost-share for right of way costs over and above the fair market value identified in an appraisal. If the Legislature removes the "third leg" and makes right of way more difficult and expensive, the Legislature should be prepared to help WRDs pay the additional costs of acquiring right of way because, have no doubt, right of way costs will increase *dramatically*.

We hope you take these items under consideration as you proceed with your study. Thank you again for your work and consideration.