

**2015 SENATE INDUSTRY, BUSINESS AND LABOR**

**SB 2361**

# 2015 SENATE STANDING COMMITTEE MINUTES

## Industry, Business and Labor Committee

Roosevelt Park Room, State Capitol

SB 2361

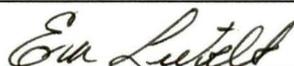
2/4/2015

Job Number 23172

Subcommittee

Conference Committee

Committee Clerk Signature



### Explanation or reason for introduction of bill/resolution:

Relating to the use of eminent domain by the western area water supply authority

### Minutes:

Attachments

**Chairman Klein:** Called the committee to order.

**Senator Miller:** This is a bill relating to the WAWS system and the interplay with domestic water supply and commercial water supply and the use of eminent domain thereof. (:38-1:05)

**Chairman Klein:** We have a problem and you are here to help the folks facilitate a discussion.

**Robert Harms, Lobbyist for the Independent Water Providers:** In support of the bill. Written Testimony Attached (1) and WAWS at a glance (2) (1:27-12:17)

**Senator Murphy:** As long as you are sharing your figures on the market shares of industrial use, how has WAWSA been doing on providing to the domestic market?

**Robert Harms:** Very poorly. They have had a little trouble being able to identify the domestic market and that would be a number that he thinks the legislature should find. He went over his WAWS at a glance sheet and also read from the emails attached. (12:46-19:15)

**Steven Mortenson, Chairman of the Independent Water Providers:** Written Testimony Attached (3). (19:45-23:31)

**Chairman Klein:** You've suggested that the main arteries have been laid.

**Steven Mortenson:** Yes and like I said for domestic municipal use, I can see their threat of eminent domain having to be used for those main arteries but as we continue to go out and continue to send out pipeline and to use that threat of eminent domain to where they are selling industrial water that is not fair to the landowners. (23:40-24:22)

**Senator Campbell:** Going back to 2010 could the private landowners, if WAWS had stuck to providing water just to the rural municipalities, could you have provided enough water to the oil and the rapid expansion of the fracking and how many of you were there total initially and now in terms of private water people?

**Steven Mortenson:** In 2010 are group was fourteen to twenty people that started at that growth. As the oil industry wrapped up we would have wrapped up right along with it. He believes the private sector could have accommodated all the needs of the oil fields. They grew as large as eighty and have fallen back. (25:00-26:38)

**Senator Murphy:** We always have to try and balance a lot of interests here. Can you tell the committee some of the infrastructure you need to sell?

**Steven Mortenson:** In our business we have one depot. He went on to talk about what one oil company has invested and also what his partner invested but not what his cost were. (27:15-28:40)

**Senator Murphy:** Asked how he is doing out there.

**Steven Mortenson:** Since WAWS has come into the market he is down forty to fifty percent over the last three years. (28:52-30:00)

**Chairman Klein:** You certainly could have provided the water to the oil companies and continue to grow but the state saw it as an opportunity to provide water for domestic and municipal use and have a way to pay for it. (30:05-31:08)

**Duane Sand, Vice Chairman of the Independent Water Producers:** In support of the bill. His purpose is to give them a different perspective from his point of view. (33:04-36:55)

**Pat Ward, Representing Ames Savage Water Solutions:** In support of the bill. Ames is one of the largest independent water providers in the Bakken. They have three objectives and one of them is the focus of this bill. One; is the unfair use of eminent domain, Two; refocus this project so its focus is domestic use of water. Three; they are looking for more money and that will put more pressure on them, WAWS, for more industrial sales. (37:05-40:26)

**David King, Northwest Landowner Association:** In support of the bill. This eminent domain for commercial purposes is offensive. There association promotes negotiating, communicating, cooperating and partnering and when those avenues are exhausted, mediation.

**Chairman Klein:** We heard the concerns last week in the AG committee of all the situations with all the easements and all the pipes and the people are just tired. Are you caught in that when you hear of folks using the power of eminent domain inappropriately? (44:25-45:03)

**David King:** There are a thousand reasons why a landowner may or may not sign an easement so it has to be done on case by case bases.

**Jaret Wirtz, Executive Director, WAWSA:** In opposition to the bill. Written Testimony Attached (4) and (5). (46:28-53:31)

**Chairman Klein:** This was a unique system and isn't like the rest of the rural water systems. You get water out there four years now, we just started this. I don't think anyone would argue that the thought behind this was using the industrial sales to pay for it and we have done a lot of things to try to smooth all these issues out amongst the warring parties. (53:35-55:52)

**Jaret Wirtz:** I think the problem is the misconception that we are running these lines with an oil end user at the end of the line. That is not the point; the point is we may be building an eight inch line coming from north of Williston going into an area almost to the Canadian border and serving people all the way along that. (56:00-57:00)

**Senator Burckhard:** Commented that he gets emails that say the water lines are going past their yards but they are not getting the water.

**Jaret Wirtz:** Said it is a case by case basis. A lot of the systems that we have in McKenzie and Williams's rural water are under moratoriums until we can get additional lines out to them. The systems were built over twenty years ago in some case and were built for the population that we had twenty years ago. (57:18-58:48)

**Senator Poolman:** You mentioned that you use eminent domain only three times but I can assure you that I have received more than three emails from landowners who are upset about it. Do you have any documentation about how many times it has been threatened or even mentioned? I think we are North Dakota nice here and maybe people just know it is out there so they aren't going to push it.

**Jaret Wirtz:** Again yes we have only filed it three times. Our legal counsel will be up here after me discussing some of the times we did use it. (59:15-1:00:59)

**Senator Miller:** How much industrial water do you sell that is not in your depots and not a municipality? How many oil wells are you hooking up?

**Jaret Wirtz:** Right now directly hooked up to our rural distribution line, we probably have thirty to forty connections to existing oil well pads where they are taking maintenance water. (1:01:45-1:02:19)

**Senator Miller:** I would like to know how many gallons of water you are serving through that method, all of your industrial water, how much are you selling?

**Jaret Wirtz:** As of right now we sold thirty five and a half million dollars in 2014. About forty percent of that was sold into someone else's pipeline. The other sixty percent was sold at the depots the industrial water. (1:03-1:04:38)

**Senator Miller:** What do you charge an industrial water user?

**Jaret Wirtz:** It is set at twenty dollars per thousand gallons or eighty four cents a barrel. That rate was set by the North Dakota Industrial Commission.

**Senator Sinner:** Asked him to address the issue of threats a little more.

**Jaret Wirtz:** Said he would explain how the process works. Right now we have a system that we are going to build out. The engineers design the pre-routing of that system and where they think they would like to take that pipeline without looking at landowners, just looking at the hydraulics of the system getting the shortest way to the people. We take that and give it to the land easement people that we have contracted with WAWSA. Through that they go out and create the easements, do the title work and get the easements out to the people. That process starts by going out and talking to those people by phone first and then in person. Once that process has been exhausted where they are no longer answering the phone, telling them they don't want it, we look at reroutes. If they have a huge chunk of land and we can't get around them or it is going to cost large amounts of additional dollars to the project, we then go back to them and say we can move it over here or we can't move it over here and we will have to come through here, if again it gets exhausted and that process goes nowhere it usually comes back to us as WAWSA. We try to go around the WAWSA board or try to find someone who can talk to them. The board is made up of people that live in the community as well. If we can't get anywhere with that it then goes to our legal counsel. (1:07:37-1:09:55)

**Senator Sinner:** Said he was lead to believe by the independents that they have lost market share and that their businesses are not growing like they would like, how would you respond to that?

**Jaret Wirtz:** When we came in 2011 we predicted to take about twenty percent of the market and as they have shown you today in 2011 we took 6, 2012 - 8, 2013 - 18 and in 2014 we are taking about 21 percent. (1:10:51-1:11:20)

**Chairman Klein:** With the decrease in the oil revenue and the decrease in the drilling rigs what is your forecast?

**Jaret Wirtz:** Yes we have a forecast we put out. We think we reached our peak in 2014. (1:13:25-1:14)

**Senator Bekkedahl:** Said that WAWS is an integral part of the city of Williston. That they have a financial interest in WAWS succeeding and a public benefit with this project. If the line had not gone through they would not have been able to grow. (1:17:40-1:21:45)

**Senator Miller:** The point I was sold on when we were talking about these years ago was this was going to get water to the rural area and help the cities and then we are going to put these truck depots up and then we will stop but it appears we have gone beyond that scope.

**Senator Bekkedahl:** We've seen more growth than was anticipated. We were planning this development for sixty thousands users and now we are over one hundred thousand users in that area. That is part of the reason and the other reason is this industry is consolidating to the better play areas and that happens to be southern and eastern Williams County and northern and northeastern McKenzie County. That is the distribution system area of WAWS. It is the water source the industry prefers to use. (1:22:28-1:23:40)

**Chairman Klein:** Said that Williston had just provided forty million dollars in an upgrade to the Williston treatment plant. At that time it was treating how many gallons and now where are we at today?

**Senator Bekkedahl:** With that upgrade we are able to treat about six million gallons a day we are working towards ten million gallons a day. (1:24:00-1:24:52)

**Tami Norgard, Shareholder with Vogel Law Firm, Legal Counsel for WAWSA:** In opposition to the bill. Written Testimony Attached (6). (1:25-1:25:47)

**Chairman Klein:** If we have only used it three times how many times is this going to get stopped?

**Tami Norgard:** It is a process of your ability to negotiate.

**Chairman Klein:** This is the hammer we would be taking away?

**Tami Norgard:** I want to be very clear about how often it is actually used. Yes we have only filed the pleadings three times. It only comes to me when they have exhausted all of their opportunities and then the board will pass a resolution to condemn. (1:26:20-1:29:07)

**Senator Miller:** It seems you have gone significantly beyond eminent domain. You are threatening them to never have access to water at all. That is quite substantial I think.

**Tami Norgard:** That policy is a very standard policy it is being used by the Southwest Water Authority it is used by many rural water systems. The concept is if you want water out in the rural community you have to be willing to give an easement to get there. If you're not going to give an easement you can't expect that you will get water in response.

**Senator Miller:** If you are also using that line to service oil companies, doesn't the land owner have a little bit of a say.

**Tami Norgard:** I have sent that policy out maybe three times ever and we are talking about five hundred miles of pipeline and seventy thousand people. Maybe forty to fifty people have gone to the level of having a communication with me at all before they have agreed to sign and out of those forty to fifty only three have gone to condemnation. (1:30:15-1:34:04)

**Senator Poolman:** We are frustrated with the language here that says that it is solely for domestic use. What if you switched it and said that they can't use it if it is solely for industrial or oil use. Is that something that would be less offensive to WAWSA because if

you are using all these lines for so many different things, the emails I am getting say that, they are using eminent domain to get across their land just to go to an oil company?

**Tami Norgard:** I guess that would be a question for WAWS but I absolutely think it would be less offensive if it was a single industrial, if it said you can't use eminent domain to bring water to an industrial customer. If you chose to make that amendment it would alleviate a lot of the concerns. (1:35-1:36:20)

**Erik Volk, Executive Director North Dakota Rural Water Systems Association:** In opposition to the bill. Written Testimony Attached (7). (1:36:45-1:39:06)

**Alexius Baxley, North Dakota Petroleum Council:** In opposition to the bill. (1:39:30-1:40)

**Chairman Klein:** Closed the hearing.

# 2015 SENATE STANDING COMMITTEE MINUTES

Industry, Business and Labor Committee  
Roosevelt Park Room, State Capitol

SB 2361  
2/11/2015  
Job Number 23642

- Subcommittee  
 Conference Committee

Committee Clerk Signature



## Explanation or reason for introduction of bill/resolution:

Relating to the use of eminent domain by the western area water supply authority

## Minutes:

Amendment

**Chairman Klein:** Opened the meeting. He handed out an amendment. There was a concern with the eminent domain and how it is being used. There was a lot of discussion about what is domestic use and what if a company comes in and a farmer needs water for his livestock feeding operation. Some would suggest that this doesn't do anything because they will be able to figure out a way to provide a domestic user and still use their power than but I do think it does suggest if they are going to go across your property solely for industrial sales for the oil and gas company they can't use eminent domain. We heard that they rarely use it and this way they can't use it for oil and gas development. He went over the amendment. Amendment Attached (1).

**Senator Miller:** Motioned to adopt the amendment.

**Senator Burckhard:** Seconded the motion.

**Senator Murphy:** I am not sure what this really changes from the current situation. This will still allow WAWS to use eminent domain, as they had, for domestic water supply.

**Senator Miller:** The amendment narrows the focus.

Roll Call Vote: Yes-7 No-0 Absent-0

**Senator Poolman:** Moved a do pass as amended.

**Senator Murphy:** Seconded the motion.

Roll Call Vote: Yes-6 No-1 Absent-0

**Senator Murphy will carry the bill.**

February 6, 2015

JD  
2/11/15

PROPOSED AMENDMENTS TO SENATE BILL NO. 2361

- Page 1, line 6, after the underscored comma insert "except"
- Page 1, line 7, replace "domestic use" with "industrial water sales for oil and gas development"
- Page 1, line 9, remove the overstrike over "~~carry out the duties imposed by this chapter~~" and insert immediately thereafter ", except"
- Page 1, line 10, replace "domestic use" with "industrial water sales for oil and gas development"
- Page 1, line 14, remove "providing infrastructure that is solely for domestic use by"
- Page 1, line 14, after "authority" insert ", except for providing infrastructure that is solely for industrial water sales for oil and gas development"
- Page 1, line 15, remove the overstrike over "~~any project authorized in this~~"
- Page 1, line 16, remove the overstrike over "~~chapter~~" and insert immediately thereafter ", except for right of way for"
- Page 1, line 16, replace "domestic use" with "industrial water sales for oil and gas development"
- Renumber accordingly

**2015 SENATE STANDING COMMITTEE  
ROLL CALL VOTES  
BILL/RESOLUTION NO. SB 2361**

Senate Industry, Business and Labor Committee

Subcommittee

Amendment LC# or Description: 15.0837.01001

Recommendation:  Adopt Amendment  
 Do Pass     Do Not Pass     Without Committee Recommendation  
 As Amended     Rerefer to Appropriations  
 Place on Consent Calendar  
Other Actions:     Reconsider     \_\_\_\_\_

Motion Made By Senator Miller    Seconded By Senator Burckhard

Senators	Yes	No	Senators	Yes	No
Chairman Klein	x		Senator Murphy	x	
Vice Chairman Campbell	x		Senator Sinner	x	
Senator Burckhard	x				
Senator Miller	x				
Senator Poolman	x				

Total    (Yes) 7    No 0

Absent 0

Floor Assignment \_\_\_\_\_

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



**REPORT OF STANDING COMMITTEE**

**SB 2361: Industry, Business and Labor Committee (Sen. Klein, Chairman) recommends AMENDMENTS AS FOLLOWS** and when so amended, recommends **DO PASS** (6 YEAS, 1 NAYS, 0 ABSENT AND NOT VOTING). SB 2361 was placed on the Sixth order on the calendar.

Page 1, line 6, after the underscored comma insert "except"

Page 1, line 7, replace "domestic use" with "industrial water sales for oil and gas development"

Page 1, line 9, remove the overstrike over "~~carry out the duties imposed by this chapter~~" and insert immediately thereafter "except"

Page 1, line 10, replace "domestic use" with "industrial water sales for oil and gas development"

Page 1, line 14, remove "providing infrastructure that is solely for domestic use by"

Page 1, line 14, after "authority" insert "except for providing infrastructure that is solely for industrial water sales for oil and gas development"

Page 1, line 15, remove the overstrike over "~~any project authorized in this~~"

Page 1, line 16, remove the overstrike over "~~chapter~~" and insert immediately thereafter "except for right of way for"

Page 1, line 16, replace "domestic use" with "industrial water sales for oil and gas development"

Re-number accordingly

**2015 HOUSE ENERGY AND NATURAL RESOURCES**

**SB 2361**

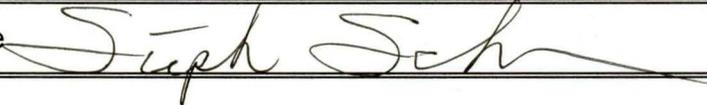
# 2015 HOUSE STANDING COMMITTEE MINUTES

Energy and Natural Resources Committee  
Pioneer Room, State Capitol

SB 2361  
3/12/2015  
Job # 24750

- Subcommittee  
 Conference Committee

Committee Clerk Signature



## Explanation or reason for introduction of bill/resolution:

Relating to the use of eminent domain by the western area water supply authority.

## Minutes:

Attachments 7

**Chairman Porter** opens hearing

**Robert Harms, Lobbyist-Independent Water Providers-The Harms Group; written testimony #1**

**Rep. Dick Anderson:** If this bill passes and some time the demand and use for the water changed would that prevent WAWSA from fulfilling a need?

**Harms:** I don't see how this bill would do that. The bill leaves the legal authority to use eminent domain for domestic and municipal water supply.

**Rep. Dick Anderson:** What if there is an industrial use for the water and they had the line there and there was no water supply? Would that restrict the industrial part from using that water or the WAWSA from selling them the water?

**Harms:** The availability of water is not related to this bill. WAWSA has a policy that if there is a shortage of water that they're obligated to provide water to domestic and municipal use first and then industrial supply later. That has not actually worked out very well in terms of the actual delivery, as we talked about in the earlier hearing (referring to SB 2336). Most of the water is going to the oil industry rather than to the people in western North Dakota.

**Chairman Porter:** The language being used as industrial water sales, that would include a fertilizer plant, a gas processing plant, Menards, at what point is your line being drawn so that it narrows it down to what you're trying to get at? Rather than cover all of commercial or industrial water sales?

**Harms:** I think as the project has evolved, there has been a distinction between commercial use and industrial use. Most of the time we have tried to make the point that industrial use includes the language for oil and gas exploration and development.

**Chairman Porter:** Is that definition someplace in the century code, that makes it crystal clear?

**Harms:** I think SB2233 speaks to that in a number of instances. The bill you have in front of you also speaks to industrial infrastructure, solely for industrial water sales for oil and gas development. So we see that throughout the chapter that deals with WAWSA, with the intent of trying to make the distinction between industrial water sales. I know WAWSA makes two distinctions: One domestic and municipal that includes any of the commercial; a welding shop, private business or residence and two, industrial oil and gas sales.

**Chairman Porter:** Our little ranch east of here had a rural water supply coming by that basically gave the same comments. That if you don't let the water line go through here then you're not going to get hooked up to the water. Don't you think that it's fairly relevant that if you are stopping the water line that you shouldn't get hooked up to the water line? If you are the person creating the law suit, the next day should you get to be a friend too?

**Harms:** I think you're right, it's common practice within the rural water district community to have policy like that. We're not taking issue with that particular policy. We're taking issue with two things: One and most importantly, that you use eminent domain to put the waterline in to get to an oil facility. That's what this bill is designed to address. That does not affect the situation that you're talking about. Secondly, if you have one land owner that holds up the process for their neighbors to get water.

**Chairman Porter:** The other thing that I've been involved in is the same situation with electricity, I may not directly benefit from the transmission line but they have the right to use eminent domain because it serves the better good of the entire area. In some cases the line going through my property doesn't even touch down inside of the state of North Dakota, but they still have the power of eminent domain. How do we draw that line, if it's good for one public utility is it good for all public utilities?

**Harms:** I think you are exactly right, I don't think SB2361 does anything of the sort. What it does is continue the authority that you just described. We recognize that there is an enormous amount of public good that goes along with this project. What we are trying to do is maintain some management of it during the interim. This bill simply says to WAWSA you cannot use eminent domain to take water for industrial purposes.

**Steve Mortenson, Chairmen of Independent Water Users; testimony #2**

**Robert Howton, Operations Manager- Lindale Water Company; testimony #3**

**Mike Ames, Ames Water Solution; testimony #4**

I would like to explain the cost for a private company to put in water pipe compared to what WAWSA pays; **written testimony #4**. Typically, buying easements is the toughest part of putting in water pipeline. It takes us 6 to 12 months to secure easements for 10 miles. We don't have the option of using highway right of way, we can't do that. That poses a real unfair advantage in the market. We are asking for a little equity in this bill. Typically a rural water system doesn't have to buy easements. What we are asking for is fairness in the market place. Our concern is when they compete in the market and are selling industrial

water and are getting easements at an unfair advantage. If they don't have eminent domain and are willing to pay fair market price for it, then we are fine with it.

**Rep. Dick Anderson:** How many miles of pipe do you have?

**Ames:** We have close to 30 miles. Our water is on demand, we have 5,000 barrel storage tanks and some dugouts we will store water in.

**Troy Kuntz, Chairman-NW Land Owners Association.** We believe it is a very short step for the oil industry to use eminent domain for industrial purposes on private land. We ask that you support this bill.

#### **OPPOSITION:**

**John Olson: Western Area Water Supply, Attorney:** This bill originally was designed to shut down any build-out of WAWSA, it was amended so that the water cannot be used solely for industrial use. I think that the language used would be open to litigation.

#### **Jarat Wirtz, Executive Director of WAWSA; written testimony #5**

**Rep. Mike Nathe:** It seems to me that the gist of this bill is a customer service problem. Have you reviewed the letter to see what they're telling these land owners so when they mention eminent domain it's done in a tasteful manor?

**Wirtz:** The letter states that WAWSA does hold the right to use eminent domain, although it might be a last resort issue. We do reserve that right to use it. We don't allow the land agents to talk about it.

**Rep. Mike Nathe:** Do they send them one letter or a couple letters that gradually become more stern?

**Wirtz:** Just one letter, at that time the attorneys make contact through the phone or visitation.

**Rep. Mike Nathe:** In regards to the testimony from the Dominick bothers (#1B, p.4), "the WAWSA board has passed a policy to recommend denial of water service on any property where the owner did not voluntarily grant an easement, As such, if you have any commercial development plans for your property, the WAWSA Board...would be unlikely to recommend providing water service to your parcel." Is that true?

**Wirtz:** Yes, we have a problem that people don't want the line but they want the water. We feel we have to do something and as Chairman Porter pointed out it is common policy with public utilities. We would be open to negotiating with the land owner at a later date if they want water, but we feel we need to have some consequences or we would never get anywhere.

**Chairman Porter:** There was an accusation that was made previously that said you're using the power of eminent domain to allow oil companies to get easements that they would not otherwise get, can you expound on that?

**Wirtz:** We are only using eminent domain where there is a domestic benefit at the end. The oil companies are coming to our line and hooking up, they're bringing their own infrastructure to us with their equipment.

**Chairman Porter:** Regarding the Water Commission's budget, the policy put into the budget does the same thing as this bill does. It states that, "funds may not be used solely to construct industrial water infrastructure or to provide industrial water for exploration or the development of oil and gas." It appears in the Water Commission's Budget that this has been taken away and that this is the extra hammer on top of it to take it away even more?

**Wirtz:** Yes, we don't build infrastructure solely for industrial uses, it's their job to come to us.

**Chairman Porter:** Inside the water commission budget, I know full good and well that there is talk of a Red River water supply project, talks about running pipeline for industrial use only to Jamestown so that a fertilizer plant can be built. Shouldn't we be taking away their use of eminent domain on those projects to keep this fair and equitable across the state? It is really our job to make sure that all of our laws apply to everyone?

**Wirtz:** We believe that would be only correct.

**Eric Volk, Executive Director-ND Rural Water Systems Association; written testimony #6:** I would like to invite anyone that has rural water issues to call me, we're on the World Wide Web. We get calls from people all over the state and try to help them through water issues. Our services are free of charge.

**Tami Norgard, Legal Counsel for WAWSA; written testimony #7,** handed out.

**Chairman Porter:** We will put this hearing on hold for Mr. Sand until tomorrow, he is serving our country and unable to attend today.

# 2015 HOUSE STANDING COMMITTEE MINUTES

## Energy and Natural Resources Committee Pioneer Room, State Capitol

SB 2361  
3/13/2015  
Job # 24826

- Subcommittee  
 Conference Committee

Committee Clerk Signature



### Explanation or reason for introduction of bill/resolution:

Relating to the use of eminent domain by the western area supply authority.

### Minutes:

Attachments 0

**Chairman Porter** reopens hearing.

**Duane Sand, Independent Water Providers:** I support SB2361. I think that this bill is very important for the success of a level playing field and that we not get into the slippery slope of not condemning people's land so a public business can get into the commercial business of making money. If it's true that the oil companies come to WAWSA, as Mr. Wirtz claims, then why do they need eminent domain for commercial use when the oil companies come to them using their own pipelines and equipment? If this is true the easement are taken care of by the oil companies. I think you who are charged with protecting tax payer's dollars need to really look at and understand.

**Chairman Porter:** So you would suggest that we remove the component for oil and gas development and make it for all infrastructure that is solely for industrial water sales, so it covers the entire state?

**Sand:** If I understand your question correctly, as it pertains to WAWSA, condemning or using eminent domain to put pipe in the ground that is for commercial use, I think they should not be allowed to do it and that's the way the bill should read.

**Chairman Porter:** Are you asking us to amend out the sales for oil and gas development so that it does cover the entire state of North Dakota for all of this type of situation so that in the future we aren't having this discussion again. That eminent domain can only be used for residential and commercial use.

**Sand:** I've not thought about it, but I think it makes great sense. I don't know anywhere else in the state that pits a public and utility and a private business.

**Chairman Porter:** Apparently you haven't seen the fight that happens between MDU and the rural electric cooperatives.

**Rep. Mike Nathe:** The bill pertains to WAWSA and eminent domain but it doesn't mention any other rural water cooperatives in the state. How do we answer that? If this bill passes and it takes away WAWSA eminent domain but not the other rural water coops, how do we explain that?

**Sand:** I'm not sure I'm best prepared to answer that. I can tell you I have heard the Rural Water Association oppose some of these changes. I think the question is where else in the state are private individuals trying to compete with a public entity? I don't think there are many other places.

**Rep. Curt Hofstad:** Because of eminent domain you are in an uneven playing field, as far as cost is concerned, eminent domain does not guarantee a cost from a stand point of WAWSA that land owner still has the ability to negotiate with WAWSA as he does with a private independent who wants to lay that same line. How do you justify the fact that other than the time constraints?

**Sand:** You're right there are negotiations, in 90% of them I would say, are with oil companies or eminent domain that goes across land. There's not been a lot of times when WAWSA has used eminent domain and that's another reason I don't understand why they oppose it so much. It's a well-known fact that it is the settlement is largely less than what the market will bear.

**Rep. Curt Hofstad:** I'm confused as to why the independent has less standing in those negotiations, other than the time factor?

**Sand:** They put in their trunk line that was at a much reduced cost. Now, the issue is that we're paying a lot more for the pipes that go through these people's land. Their stated policy is if you don't let us go through your land we will eminent domain you. That's their policy. I cannot sell my water as cheaply as WAWSA does, I was told by an oil company that I have to charge them a certain amount for water or they will go to WAWSA to supply it.

**OPPOSITION:** None.

**Chairman Porter** closes hearing

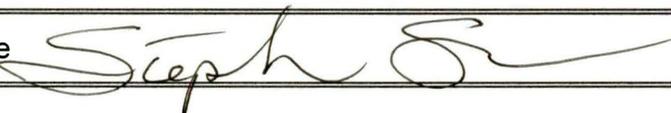
# 2015 HOUSE STANDING COMMITTEE MINUTES

Energy and Natural Resources Committee  
Pioneer Room, State Capitol

SB 2361  
3/20/2015  
Job # 25182

- Subcommittee  
 Conference Committee

Committee Clerk Signature



## Explanation or reason for introduction of bill/resolution:

Relating to the use of eminent domain by the western area water supply authority.

Minutes:

Attachments 0

**Chairman Porter** opens hearing.

**Rep. Curt Hofstad:** I move a Do Not Pass.

**Rep. George Keiser:** Second.

**Vice Chairman Damschen:** I will not support the motion because I think our constitution says it can't be used strictly for economic development. I think it clouds the issue a little bit to not do what this bill says.

**Chairman Porter:** The only thing I would add to that is that the constitutional amendment was for private economic development, public utilities; MDU, Basin Electric, they still use eminent domain. Basin Electric's looped power line around the oil patch certainly would have an economic development argument that they used eminent domain or a possibility to use eminent domain. We still fully allow utilities to use it. My issue is that you can't just restrict one utility and not the others. How are you going to put a water line from over to Jamestown industrial park for the sole use of Cenex Harvest States to make fertilizer in the name of economic development and value added ag if they don't have the ability to use eminent domain for that water line? To single out one entity is the wrong policy.

**Vice Chairman Damschen:** I basically agree with that but I think there are times when it's really hard to differentiate between what's providing a public service and what's actually economic development. I'm going to resist the motion.

**Vote:** Yes 12, No 1, Absent 0.

**Rep. Mike Lefor:** Carrier.

Date: 3/20/15  
 Roll Call Vote #: 1

**2015 HOUSE STANDING COMMITTEE  
 ROLL CALL VOTES  
 BILL/RESOLUTION NO. SB 2361**

House Energy and Natural Resources Committee

Subcommittee

Amendment LC# or Description: \_\_\_\_\_

- Recommendation:  Adopt Amendment  
 Do Pass  Do Not Pass  Without Committee Recommendation  
 As Amended  Rerefer to Appropriations  
 Place on Consent Calendar  
 Other Actions:  Reconsider  \_\_\_\_\_

Motion Made By Rep Hofstad Seconded By Rep Keiser

Representatives	Yes	No	Representatives	Yes	No
Chairman Porter	✓		Rep Hunskor	✓	
Vice Chairman Damschen		✓	Rep Mock	✓	
Rep D Anderson	✓		Rep Muscha	✓	
Rep Brabandt	✓				
Rep Devlin	✓				
Rep Froseth	✓				
Rep Hofstad	✓				
Rep Keiser	✓				
Rep Lefor	✓				
Rep Nathe	✓				

Total (Yes) 12 No 1

Absent 0

Floor Assignment Rep Lefor

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

**REPORT OF STANDING COMMITTEE**

**SB 2361, as engrossed: Energy and Natural Resources Committee (Rep. Porter, Chairman) recommends DO NOT PASS (12 YEAS, 1 NAYS, 0 ABSENT AND NOT VOTING). Engrossed SB 2361 was placed on the Fourteenth order on the calendar.**

**2015 TESTIMONY**

**SB 2361**

2/4/15

#1

# THE HARMS GROUP

SB 2361

Senate IBL Committee

Mr. Chairman, Members of the Committee:

My name is Robert Harms. I am the lobbyist for the Independent Water Providers who support SB 2361.

The bill is necessary to curtail the abuse of eminent domain authority being wielded by WAWS against ND citizens.

What does the bill do?

The bill simply limits WAWS to the use of eminent domain authority for the purpose of providing domestic water supply to the people in its service area. It would prevent WAWS from abusing the eminent domain authority in the manner it has for the past several years.

Why is it necessary?

WAWS abuses eminent domain authority.

It threatens landowners that they will not get water if the landowner forces WAWS to use eminent domain which is WAWS policy (see—attached). Then it will often place a water line upon their property—not for domestic use, but to sell water to the oil industry, and not provide water to the landowner. And finally WAWS compounds the problem by using these heavy handed tactics by paying a fraction of what the private sector pays for right of way/easements.

We ask for your support of SB 2361.

Thank you.



Robert W. Harms

POLICY BULLETIN NO.

**SUBJECT:** Availability of Project Water for Voluntary Acquisition of Right of Way

**POLICY:**

To meet the Business Plan, WAWSA needs to acquire a significant amount of right of way in a short time period.

For property owners who voluntarily enter into easement agreements or sell property to WAWSA, WAWSA will favorably consider providing water service from the Project if requested by these property owners. If the property owner is served by a WAWSA member, the WAWSA board will recommendation to the member that service be provided to the property owner.

For any property owner who does not voluntarily grant an easement or sell property to WAWSA, where condemnation is initiated, WAWSA will likely not consider any requests for project water from the owner of the condemned property. If water service is instead provided by a WAWSA member system, the WAWSA board will likely recommend that the member deny any requests for service from that property owner.

Adopted April 18, 2012

**Robert Harms**

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**From:** Steven Mortenson <56smort@gmail.com>  
**Sent:** Tuesday, February 03, 2015 12:31 PM  
**To:** jklein@nd.gov; tomcampbell@nd.gov; raburckhard@nd.gov; joetmiller@nd.gov; npoolman@nd.gov; pmmurphy@nd.gov; georgesinner@nd.gov; 'Robert Harms'; 'Duane Sand'; 'Dustin Gawrylow'; 'Mike Ames'  
**Subject:** FW: Letter for WAWS from Rod Prewitt

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**From:** Kim [mailto:kimr@prewittandco.com]  
**Sent:** Tuesday, February 03, 2015 12:27 PM  
**To:** 56smort@gmail.com  
**Subject:** Letter for WAWS from Rod Prewitt

My name is Rod Prewitt, local farmer, rancher and cattle buyer in this area for all my life I own and operate a feedlot and farm and ranch on the North Dakota side by Fairview Montana. I was approached by WAWS were they wanted to install a water pipeline across my field. they did not say what it was for, but they told me they had the **right to condemn** my land and put the water line in were ever they wanted, and also if I did not give them a easement for this they would deny me water. I have gravity irrigation land and were they wanted to put the line would have affected the flow of water on my property , that was the main reason I did not want the line. Also they were so rude and arrogant to me I didn't care if they every touch foot on the place again. After dealing with oil companies and pipeline companies they have treated me far more better and fair then I was ever treated by this organization. I later found out that they were trying to obtain **easements so they could continue to sell water to the oil industry**, hell this a state project what is it doing competing with private business. They didn't condemn my land but I made they go around the field instead going of right though it which they wanted to to. Again I was treated very rude and if this is the way North Dakota runs their state , I am glad I live in Sidney Montana.

**Robert Harms**

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**From:** Shawn Berry <shawnb@unverferth.com>  
**Sent:** Tuesday, February 03, 2015 9:49 PM  
**To:** Steven Mortenson  
**Cc:** Shawn Berry; Robert Harms  
**Subject:** IBL Committee

Dear Mr. Chairman and members of the Senate IBL Committee,

My name is Shawn Berry. I am a fourth generation landowner and have enjoyed living in Mckienzie County over 40 years. We were first approached Feb. 12, 2012 for right of way. My family owns several miles of property next to highway 200 near the Yellowstone River. Please understand this is an area of prime interest for development. Decisions we make could affect my grandchildren some day. We had not once indicated we would not sign and began to receive threatening letters that with quick claim they would push through anyway and we would be taken off the list for use of the WAWS line. Before we had time to discuss we were threatened to the point I felt it was affecting my fathers health and it wasn't worth the fight. We also have property Township 152, Range 104, Sec 34 and at the time the map from WAWS indicated 2 oil wells with no other water interest. Yes, no residence. No one except oil wells and we were threatened to the point I can't even find the letter as it upset everyone so much we threw them away. I don't have access to WAWS 2012 map, however if someone views the land I described, you will find map with 2 oil wells with WAWS water only through the use of eminent domain. We want to work together through discussion to improve our community. We were never opposed to rural water, however when the line begins to blur with commercial use for profit, it will affect decisions by land owners. I hope legislators understand just the notion of eminent domain sours any efforts with land owners who would otherwise gladly improve the community.

One more thing, I received a bill from rural water. I still don't have meter or water. A buried line and waiting?? I called and insisted I will not pay my bill until water is flowing, I'll share with the cows until then...

Thanks for your time,  
Shawn Berry

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2/4/15

SB2361

#2

**WAWS at a glance:**

January, 2015

REVISED: IWP: 1/31/2015

**2011:** Cost: \$150 million

Authorized by HB 1206 to construct water system for NW ND, paid in part by sales of industrial water to the oil industry for fracking. \$110 million loan from ND; \$40 million likely in 2013.

After the debt is paid, WAWS members retain profits less 5% to ND.

Intent was to build 12-15 water depots along major highways; not the spider web system seen in 2013.

IWP objected and warned: oil industry would find ways to reduce water needs; market was mature; needs being met; 80% of water from private sector; balance by local communities. Competition was vigorous and growing.

In 2011, ND used 9400 ac.ft. of water; 20,000 ac.ft. of new permits were pending. Today ND has 116,000+ ac.ft of permitted water available to the oil industry. (325,851 gal. = 1 acre foot)

Legislature mandated WAWS to "minimize impacts" upon private sector as it located water depots.

**2013:** Cost \$230 million (\$120 million new funds; \$80 million debt; \$40 million grants)

WAWS had shifted strategy from water depots along highways to a broad network of lateral pipelines to provide industrial water throughout the oil industry, and failing to meet domestic water demands.

**The Compromise—a new model--SB 2233:**

Controversy continued into 2013 and produced SB 2233—a compromise designed for resolution. IWP supported SB 2233 as a compromise to resolve the conflict. SB 2233 provided:

- ND took responsibility for \$190 million of debt (absolving locals, in case of default)
- ND retained all profits once debts were paid--to be paid to Resources Trust Fund
- WAWS was to concentrate on domestic water supply
- No future industrial water expansion was to occur, unless approved by State Water Commission (SB 2233 Section 19(3))

The Compromise failed; controversy remains; WAWS continues expansion to industrial water supply. SWC has regularly approved expansion of industrial water supply, in spite of the intent of SB 2233.

WAWS now has 41% of the industrial water market in McKenzie and Williams County (SWC presentation of 11/18/2013), including a contract signed with Continental Resources, in May, 2013—before effective date of SB 2233-- for up to 35 MILLION gallons @ month (about 25% of the water in Williams County).

**2015:** Cost \$350 million (WAWS indicates they are headed to \$460 million)

WAWS wants \$120 million (\$30 million of debt) for further expansion, purportedly to meet population demands projected to **2035**. The apparent goal is the expansion of industrial water supply—via a spider web system never contemplated, nor approved by ND Legislature, rather than getting water to people.

**2015 Legislative objectives:**

1. Direct WAWS to deliver water to people in NW ND, as its primary objective.
2. Implement SWC oversight of any further expansion of industrial water as intended by SB 2233.
3. Suspend additional debt in view of decline in oil prices and drilling rigs in 2015-2017 biennium.
4. Condition future funding for domestic build out, upon independent verification of domestic demand.

**WAWS At-a-glance---ADDENDUM I:** Other facts of interest

1/31/2014

State Engineer approved WAWS expansions since passage of SB 2233 in 2013:

2013: 7 expansions 9,500,000 gallons  
2014: 18 expansions 448,700,000 gallons

Engineers: AE2S did the study, lobbied for HB 1206, wrote the RFP after passage, was the only firm to bid on RFP; awarded 4 year contract, and then imposed 4-8% fee increase. Fees paid:

2012: \$10.8 million  
2013/14: \$15,572,351.11+  
AE2S CONSTRUCTION \$118,091.29; AE2S division provides water to oil industry; AE2S website.

Lawyers/lobbyists:

\$500,000 on lawyers (Vogel law firm-2011-2012) + \$340,000 (2013 and 2014)  
\$50,000 annually for a lobbyist + \$63,000 (2013 and 2014)

Costs: Has grown from \$150 million to \$350 million and headed to \$460 million

**Change in the Market: 2011 and today**

In 2011, WAWS proponents argued they would have little impact on the private sector and that there would be enough water sales for everyone:

- 2011 ND used 9,400 ac.ft.; WAWS (members) provided 579 ac.ft. 6% of market\*
- 2012 ND used 16,362 ac.ft.; WAWS provided 1332 ac.ft. 8% of market \*
- 2013 ND used 15,600 ac.ft.; WAWS provided 3607 ac.ft. 18% of market\*
- \*SWC Report: July 2014
- 2014 ND used 25-28,000 ac.ft.;\*\* WAWS provided 5905. ac.ft. 21% of market\*\*\*
- \*\* estimate from 2014 NDIC frac water report in consultation with SWC; excludes SWP
- \*\*\* final figures for 2014 industrial water are pending and will be provided

WAWS industrial sales revenues:

2012 \$11,678,000  
2013 \$24,044,000  
2014 \$32,851,000 (through 8/2014)\* as per Interim Legislative Committee report

Eminent domain: Threats to landowners; WAWS policy is to NOT provide water if landowner refuses to provide an easement (even if pipe is for the oil industry). Threat gives advantage over private sector—a likely violation of ND Constitution prohibition. (See Art I, Section16)

Federal monopoly—1926(b): WAWS asserted that it had a monopoly to sell water, under federal law (7 USC 1926(b)); controversy followed, threatening access to Lake Sakakawea and private water development. WAWS knew of but did not disclose the issue in the 2011 Session. (Invoices Vogel Law Firm). SB 2233 resolved the issue.

Debt service status: BND reports WAWS is 18 months and \$10,000,000 ahead of schedule.

Most new capacity for industrial water: Records through 2013, reveal 65-70% of new expansion of WAWS is dedicated to— and utilized for industrial water supply! (See SWC website; WAWS minutes)

Independent Water Providers  
Mortenson farms  
Steve and Lois Mortenson

2/4/15

#3

14018 49 St NW  
Williston, ND 58801  
Home Phone (701) 572-5873  
Cell Phone (701) 770-0942  
56smort@gmail.com

To the Senate IBL Committee:

SB 2361

My name is Steven Mortenson, a local farmer and rancher from western North Dakota and chairman of the Independent Water Providers.

To start, here is a little history on why our group was formed in 2011.

North Dakota had been blessed with the start of an energy boom. The oil industry figured out how to use water to frac oil wells and release crude from the shale located two miles beneath the ground. In the early stage of the development, the private sector was the first to invest in supplying the oil companies with their water needs. There were no guarantees and we took this risk ourselves.

In the fall of 2010 we heard rumors about a state project being planned to come and serve the oil industry. At the same time, it was supposed to develop municipal and domestic needs for the area. The IWP supported developing a water project for the northwest area to serve municipal and domestic needs, but were opposed to a project, known as Western Area Water Supply, that wanted a state guarantee and to compete with private business.

The bill passed by the Legislature in 2011 contained a "quick take provision," (eminent domain) which allowed WAWS to obtain easements to install the water pipelines. These easements could be taken from a landowner without their consent as provided rules of eminent domain.

We felt if this project was only going to address the rural and municipal needs the eminent domain authority could be accepted, but the project has evolved into a commercial enterprise for selling water to the oil industry rather than getting water to people of our area. It is wrong that WAWS can get an easement in two months and only have to pay \$14 per rod to the landowner when oil companies, pipeline companies, and private water sellers are paying \$100 to \$200 per rod on top of waiting up to a year. This is an unfair to the landowners and private

water sellers. You will hear today, and see examples where WAWS has threatened North Dakota landowners with eminent domain----and then put in a pipeline to an oil company, while the landowner still waits for potable water.

Now that the major trunk pipelines have been installed, the IWP feels that the WAWS should be restrained to use of eminent domain---solely for domestic purposes, and prohibited to threaten landowners for placement of industrial water lines that serve a commercial purpose.

The IWP has worked hard in the last two Sessions to focus WAWS on its mission of delivering water to people in northwestern North Dakota, as promised and to limit their industrial market share, which was at 40% for the Williams and McKenzie counties as of November of 2013. Since we are still waiting for numbers for the 2014 year that number could be even higher.

Originally, my goal as chairman of the IWP was to stop the State from selling industrial water. During the 2013 Session we realized the State had to sell water to pay off the debt committed to them in 2011. But, to allow WAWS to accrue even more debt and ignore the original intent of providing water to rural and municipal areas is not fair to your constituents in North Dakota. And it's even worse when they are being abused with eminent domain authority that takes WAWS further from their assigned mission. It is time to limit WAWS authority to threatened North Dakota landowners with eminent domain, when the purpose is not to provide water for domestic use. For these reasons we ask you to support SB 2361.

Steve Mortenson



**Testimony of Jaret Wirtz, Executive Director, WAWSA  
Opposition to Senate Bill 2361 – Related to Eminent Domain  
Senate Industry, Business, and Labor Committee, Sen. Jerry Klein, Chairman  
Bismarck, North Dakota – February 4, 2015**

Good morning Chairman Klein and members of the Committee. My name is Jaret Wirtz and I serve as Executive Director of the Western Area Water Supply Authority (WAWSA). I am here today to explain the importance of eminent domain for rural water systems and our opposition to SB2361 as it singles out WAWSA and potentially erodes this tool for all rural systems across the State.

**The Importance of Eminent Domain**

Unrestricted eminent domain is critical to the success of rural water systems across the State and across the Nation. The right to exercise eminent domain ensures that a rural water system can route to waiting customers in the most logical, safe, and cost effective manner. Generally speaking, rural water systems use it sparingly and, for the most part, landowners are eager to receive good quality drinking water onto their property.

There are some distinctions between large transmission lines and rural water lines in that WAWSA has paid approximately \$1.3M in easements for large transmission mains that can range in excess of 24-inches. Rural water lines for WAWSA are handled as they are for all rural water systems across the state in that the landowner/end user is asked for clearance (or easement is gifted) to reach the end user.

It is not uncommon for rural water customers to wait years after the initial sign-up period to receive water. Eminent domain can mitigate a lone landowner issue to make sure one person isn't denying others around them access to good quality drinking water as well as driving up the cost of the project, which ultimately affects the user rates.

WAWSA can not afford to raise user rates to cover any project costs due to delays. WAWSA members are already at the top of the scale in comparison with other communities and rural water systems around the State. (Williams Rural Water is the third highest in the State) [See Attached Water Rate Info]

### **WAWSA has a History of Using Eminent Domain Sparingly**

Although WAWSA has not exercised eminent domain but for three times, having the right to use it in certain instances ensured timely progress of the system. Over the course of the last four years, WAWSA has constructed more than 540 miles of transmission lines and rural water distribution networks, as well as pump stations, reservoirs, and other critical infrastructure serving an estimated 70,000 people in the service area.

In that time, eminent domain was used three times including once when the landowners themselves recommended condemnation to expedite the sale of the land as it was held in a trust and was tied up in legal issues. In the other two instances, individual land owners were holding up construction. In one case, WAWSA negotiated with the landowner for over a year and a half and for over two years in the other case.

### **Complexity of WAWSA System as it Relates to SB2361**

SB2361 intends to amend Subsection 2 of Section 61-40-05 of the North Dakota Century Code where by designating that WAWSA may only use eminent domain for infrastructure (pipelines, pump stations, reservoirs, etc.) that is solely for domestic use.

The reality of WAWSA is that transmission lines and rural water distribution lines as well as other infrastructure carry water for both domestic and industrial use. The system is comprised of multiple communities and rural water systems coming together with their own infrastructure in place as well as additional build out of transmission lines and rural water distribution lines, looping, etc.

Some of the founding members already had industrial infrastructure tied to their systems. Other infrastructure was built out with the idea that, at some point along the system, there may be an industrial

connection. The majority of the transmission lines and rural water distribution lines have some form of industrial water use as this was the basis of the business plan for the project.

There is no way to simply isolate the domestic use lines from the industrial lines. The water flowing throughout the system is a mixture of both. Unfortunately, this bill does not take into account the technical nature and complexity of the system.

### **The Dangers of Passing SB2361**

With over 320 miles in construction, over 270 more miles in final design, hundreds of additional miles in the planning stages, and a current total project cost of approximately \$469M, this bill could cause significant schedule and financial issues down the road.

If enacted, this bill could dramatically increase the cost of the project, inflate user rates, as well as delay or prevent service to rural users. It would be possible for one landowner to cause a delay of a project serving hundreds. Not only is it a nuisance, and sometimes a hardship, for rural users to wait for water but the delays can start to wear away the ability to sell water overall which is critical in paying back approximately \$150M of current State guaranteed loans.

Additionally, when project costs start to creep up, more sales to industry are needed to cover the debt. It turns into a catch-22 for WAWSA and the State.

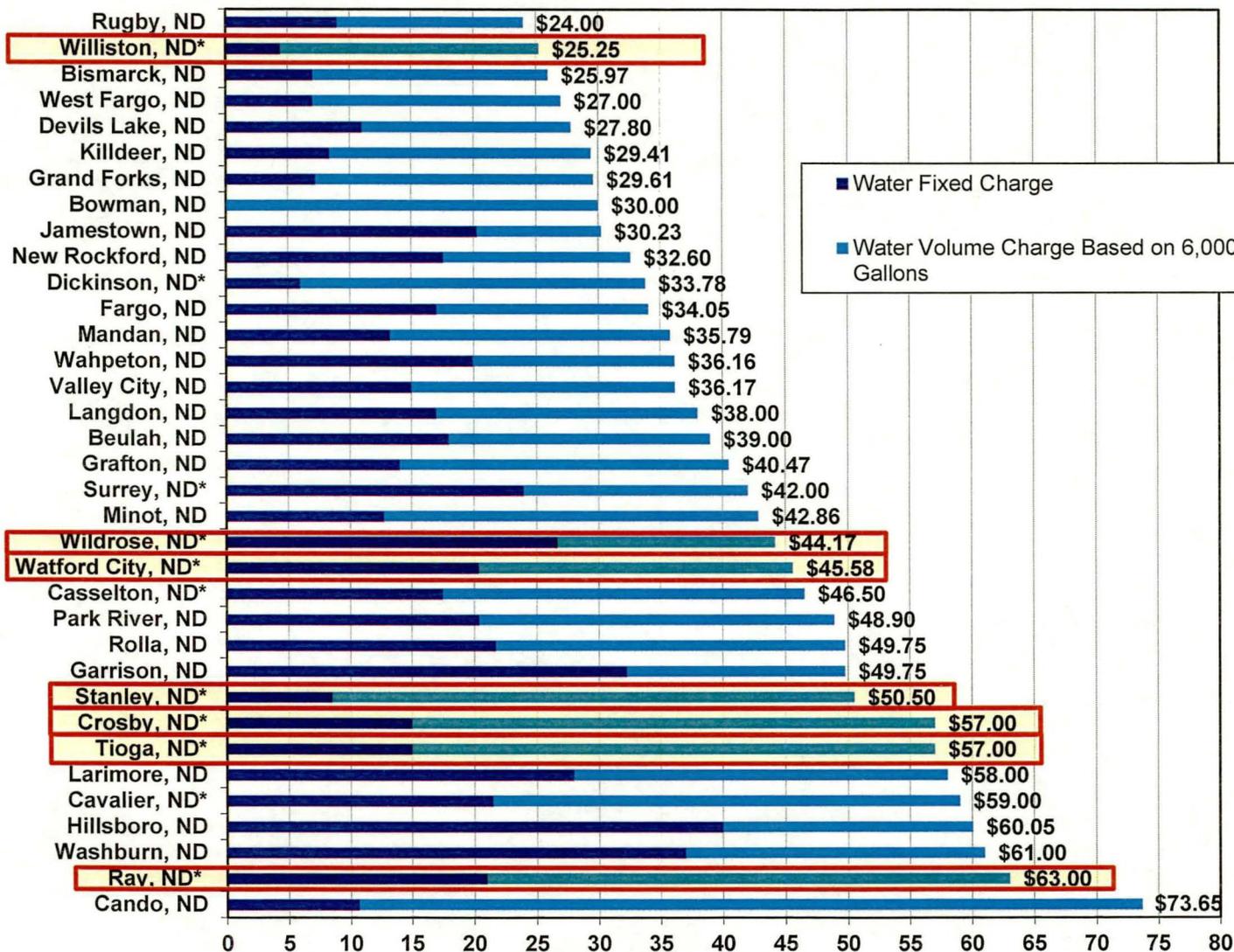
Beyond singling out WAWSA, we fear that this bill also sets a dangerous precedence for other rural water systems in the State. Once this bill is passed, it starts to erode the very nature and purpose of eminent domain. Other rural water systems in the Bakken region currently do and potentially could sell additional water also to the oil industry. Are other rural water systems next? Could this legislation lay the groundwork for other caveats across the State?

**Do Not Pass SB2361**

WAWSA strives to be fair and continues to work towards doing the most good for the most people. We try to focus on building trust with landowners and to utilize eminent domain sparingly. We treat landowners fairly, while advancing our goal of serving a growing population effectively and efficiently.

We strongly urge a do not pass on SB2361. At a basic level, it simply cannot be applied to WAWSA as it was written because it does not take into account the complexity and purpose of the system. On a broader level, it has the potential to cause significant delays and increase project costs. Please do not set this precedence of disregarding long-standing regional and rural water system rights.

# NORTH DAKOTA



Typical Monthly Residential Water Bill (\$)

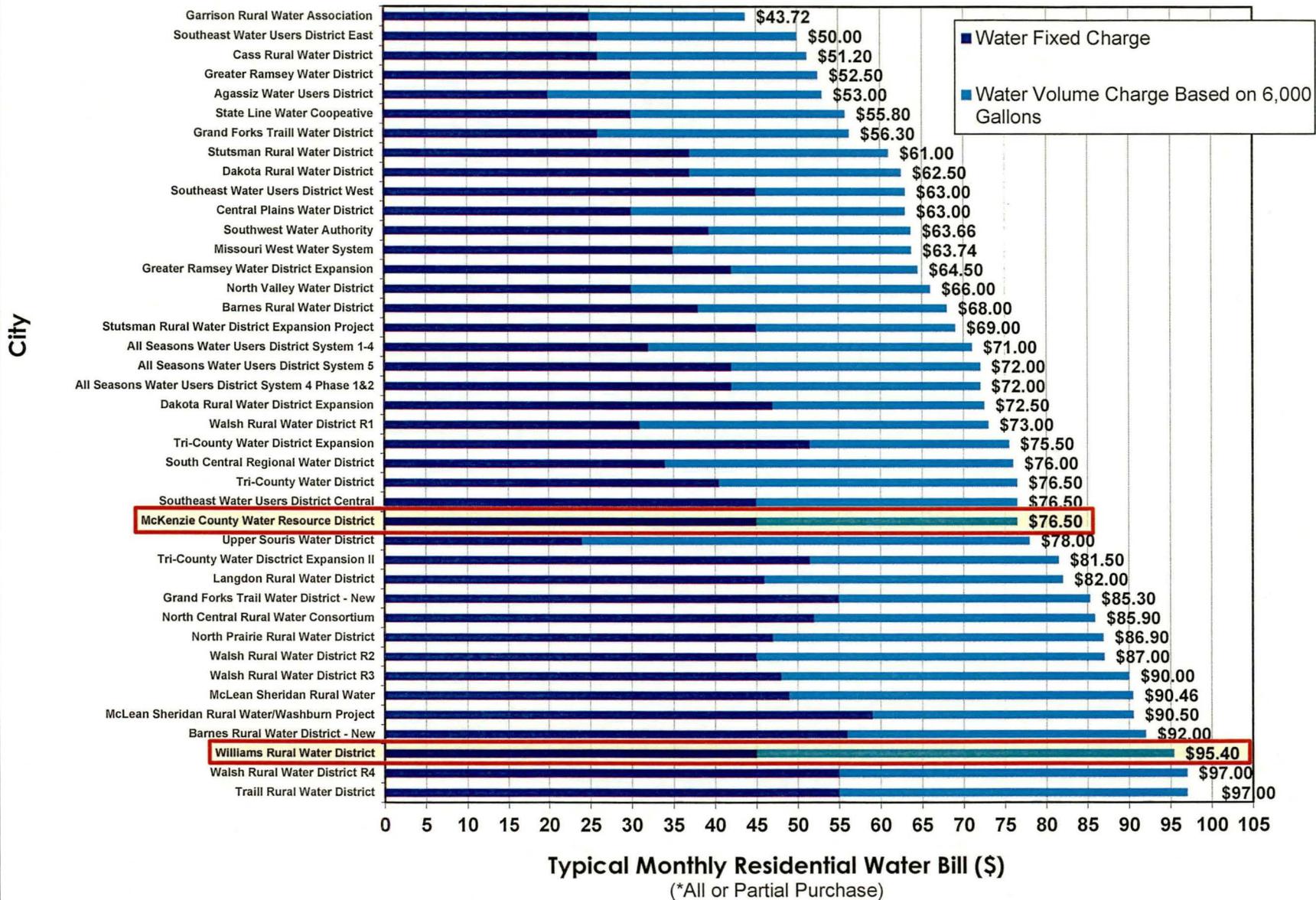
(\*All or Partial Purchase)

City

SB 2361 2/4/15

#5

# NORTH DAKOTA REGIONAL WATER SYSTEMS



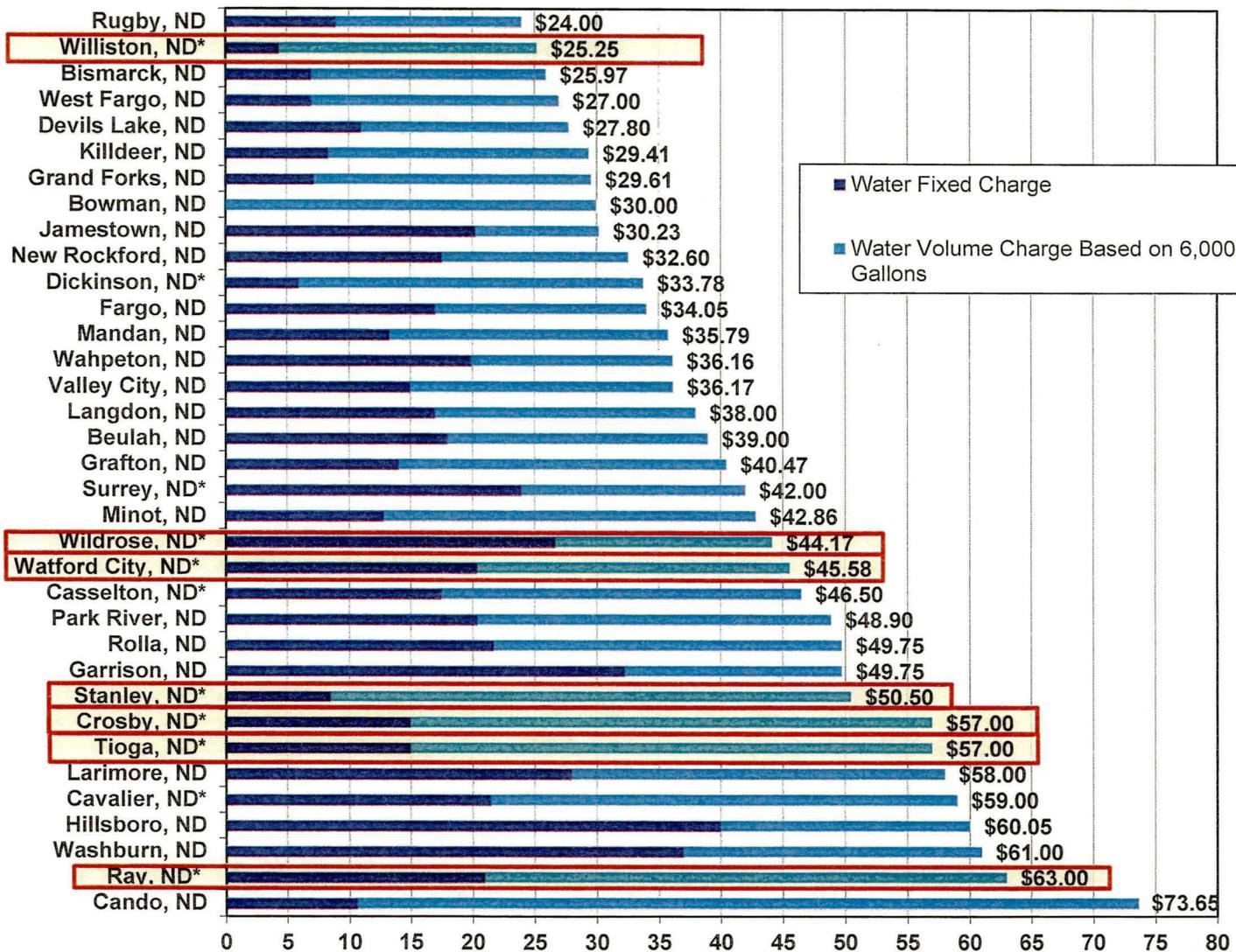
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SB 2361

2/4/15

#5

# NORTH DAKOTA



City

Typical Monthly Residential Water Bill (\$)  
(\*All or Partial Purchase)

SB2361 2/4/15 #5

**Testimony of Tami Norgard**  
**Shareholder with Vogel Law Firm, Legal Counsel for WAWSA**  
**Senate Bill 2361 – Related to Eminent Domain Changes**  
**Senate Industry, Business, and Labor Committee**  
**Bismarck, North Dakota – February 4, 2015**

**Testimony Outline:**

**1. Domestic and Industrial Water Services are Integrally Intertwined**

- a. All Main Transmission Lines and many of the rural water system lines built out include some component of industrial water uses, such as service to a water depot, lateral pipeline or connecting an oil well to rural water for maintenance water service. As such, SB 2361 would impact the ability to design and construct most of the planned WAWSA infrastructure.
- b. SB 2361 proposed to eliminate WAWSA's ability to use eminent domain to acquire any water pipeline easement if there is any industrial water served by that pipeline. Since most of the pipelines WAWSA builds could include a component of industrial water supply, the practical (and likely intended) effect of SB 2361 is to halt WAWSA's ability to build water pipelines to new service areas and limit WAWSA's industrial water sales.

**2. Eminent Domain is Crucial to Building a Public Water System**

- a. Landowners in Western North Dakota counties are understandably fatigued with requests for easements. I'm from McKenzie County and work with many landowners who receive a few requests per month for new electric line easements, natural gas line easement, water lines, produce water lines, pad sites, etc. And not all companies do a great job or restoration, leading landowners to be less willing to grant easements. As such, having the authority of eminent domain is a key point in negotiations with landowners.
- b. WAWSA does not abuse its eminent domain authority, but generally works through a process with landowners to try to address their concerns. WAWSA has right-of-way agents contact and meet with landowners to discuss the requested easement and answer any questions of the landowner. If it becomes obvious that the landowner is unwilling to sign after a few contacts, the WAWSA board will issue a resolution of condemnation and ask me to engage in discussions with the landowner before taking any legal action. The negotiations are fairly successful, as WAWSA has actually only filed condemnation actions 3 times with over 320 miles of pipeline being installed.
- c. I typically send a letter to landowners advising them of the resolution of the WAWSA Board to initiate condemnation if we are unable to work out the terms of an easement. Often times, landowners have decided they will not grant any new easements given past bad experiences or else they want to be paid at the same rates as the oil companies pay. I advise the landowners of the difference in prices required by oil companies, without the power of eminent domain in most

cases, which have to pay whatever the landowner wants in order to cross that land. With eminent domain, the value of the easement is determined by law to be equivalent to the level of land value lost by the easement. In short, how much less would a willing buyer pay for a property with a water pipeline as opposed to a similar property without a water pipeline. That difference is the value of the easement according to the courts. Buyers in the Western North Dakota market will typically pay the same amount (or actually more) for properties with water pipeline easements and access to water, so the easement value is fairly limited when comparable sales are studied by appraisers.

- d. Once landowners understand the legal process and the valuation, we are generally able to work out the terms of an easement and address concerns they have regarding crop loss, fencing, drainage, indemnification, etc.
- e. In the three cases where condemnation pleadings were actually filed, they were all resolved amicably.
  - 1. In one case, the landowner was a trust who agreed to sell WAWSA land for a reservoir site. Yet there was a right of first refusal for one trust beneficiary who was able to buy any land sold by the Trust. In that case, the beneficiary would not release his right of first refusal, so WAWSA proceeded with condemnation with the full agreement of an agreed upon compensation to the trust. The Court transferred the property and the case was dismissed.
  - 2. In the second condemnation case, the beneficiary with the right of first refusal in the example above refused to grant a rural water line easement after almost 2 years of negotiations of the terms. Within a very short time of filing the condemnation paperwork, a signed easement was provided by the landowner.
  - 3. In the third condemnation, the landowner simply refused to sign since he wanted a free hookup for multiple rental trailers on his property, which were not granted. That action was filed and was settled through a voluntary easement last month.

**3. Consequences of Passing SB 2361**

- a. If WAWSA did not have condemnation authority to build a water pipeline, WAWSA would be required to pay much more in easement prices, basically whatever it would take to get across landowners' property. And if one landowner received high payments, all landowners on that line would want similarly high payments. As a consequence, the expense of the project would escalate significantly or the plan to serve all the intended users would have to be abandoned.
- b. The very premise of the funding mechanism for created by the Legislature for WAWSA was to allow industrial water sales revenue to pay off the \$150 million in State loans for infrastructure build out. The project is successfully operating and beginning to pay back loans, just as it was represented to the Legislature in the past two sessions. Passage of SB 2361 would limit WAWSA's ability to pay its loans.

**4. Conclusion – WAWSA Requests a Do Not Pass Recommendation**

- a. Prohibiting cities and rural water systems from being able to construct lines to meet industrial customer's requests for water service is simply bad for business in North Dakota. It would stifle industrial development in the state if our Legislature decides that water systems building lines for industrial uses cannot have the benefit of eminent domain, adding uncertainty to an industrial user's business plan. What message would that send to the fertilizer plants that have indicated an intent to develop in North Dakota?
- b. Opponents of the WAWSA project include independent water sellers, who generate millions of dollars per year selling water of the State that is appropriated to them free of charge. In past legislative sessions, the independent water sellers have tried to get the Legislature to cap WAWSA's share of the industrial water sales market, which would limit WAWSA's construction of infrastructure to residents in need of water and limit WAWSA's ability to repay their loans. In past sessions, the Legislature recognized the dire need for infrastructure in the Western North Dakota communities and refused to cap WAWSA's share of the market. Like the past two sessions, WAWSA requests that this Committee recognize the need to build out the water system infrastructure in Western North Dakota and support WAWSA's ability to repay loans by not limiting industrial sales. WAWSA requests a "do not pass" recommendation.

**Testimony of Eric Volk, Executive Director**

**ND Rural Water Systems Association**

**Senate Bill 2361**

**Senate Industry, Business and Labor Committee – February 4, 2015**

Chairman Klein and members of the Senate Industry, Business and Labor Committee, my name is Eric Volk. I am the executive director of the North Dakota Rural Water Systems Association (NDRWSA) which serves a membership of more than 250 cities, 28 rural/regional water systems, and four tribal systems.

The NDRWSA is committed to ensuring all of North Dakota's residents receive affordable drinking water of excellent quality and sufficient quantity. NDRWSA is committed to completing and maintaining North Dakota's water infrastructure for economic growth and quality of life. Today I am submitting testimony in opposition of Senate Bill 2361. The powers of eminent domain play an integral part of water supply development across the state. Passage of this bill would have direct negative effects on northwestern North Dakota and set an unfavorable precedent for the remainder of the state's rural and regional water systems.

Historically, regional and rural water systems across North Dakota have been successful in obtaining a vast majority of easements via donation. Regional and rural water systems rely on donated easements to minimize project costs down, which helps keep end user costs down. The loss of eminent domain could jeopardize rural water system's ability to control costs and subject systems to paying market rates (as high as \$300/rod in western North Dakota). Paying market rates would likely end rural water service expansion in northwest North Dakota. This legislation creates a dangerous precedent for rural water systems. Other special interest groups could ask

for the elimination of eminent domain for rural water systems in other parts of the state, either ending rural water expansions in those areas, or increasing costs of service significantly.

Below are two instances when a water system has had to use their powers of eminent domain. Both used "quick take condemnation" to gain the right to cross land with a pipeline. Scenario #1 involved a landowner who was opposed to a commercial dairy. Several failed attempts were made to acquire an easement. The easement involved a simple road crossing, but the landowner legally owns the land to the center of the road, so they had to use the condemnation procedure to cross the road with a pipeline. The second condemnation scenario was an attempt to obtain an easement to cross about 1,000 feet of pasture. The water system had been through a bad debt collection process with the landowner (customer did not pay their bill and was taken to small claims court) and it just wasn't possible to obtain an easement from him.

Numerous attempts are made to obtain easements from individuals before resorting to condemnation. Systems also look at changing the pipeline route to go around. Sometimes that is not possible or is just too expensive to reroute. That was the case with scenario #2. It would have involved a river crossing and a railroad crossing to change routes. Systems try their best to not to go through a condemnation process, but as you can see, the option still needs to be available to water systems for domestic, commercial, industrial and agricultural situations.

With that said, I urge you to give this bill a do not pass recommendation. Thank you for your time.

2/11/15 #1

15.0837.01001  
Title.

Prepared by the Legislative Council staff for  
Senator Klein

February 6, 2015

PROPOSED AMENDMENTS TO SENATE BILL NO. 2361

- Page 1, line 6, after the underscored comma insert "except"
  - Page 1, line 7, replace "domestic use" with "industrial water sales for oil and gas development"
  - Page 1, line 9, remove the overstrike over "~~carry out the duties imposed by this chapter~~" and insert immediately thereafter "except"
  - Page 1, line 10, replace "domestic use" with "industrial water sales for oil and gas development"
  - Page 1, line 14, remove "providing infrastructure that is solely for domestic use by"
  - Page 1, line 14, after "authority" insert "except for providing infrastructure that is solely for industrial water sales for oil and gas development"
  - Page 1, line 15, remove the overstrike over "~~any project authorized in this~~"
  - Page 1, line 16, remove the overstrike over "~~chapter~~" and insert immediately thereafter "except for right of way for"
  - Page 1, line 16, replace "domestic use" with "industrial water sales for oil and gas development"
- Renumber accordingly

#18 p1

# THE HARMS GROUP

Proposed amendment to Engrossed SB 2361 (eminent domain---WAWS)

March 12, 2015

P 1. Line 7, replace "solely" with "primarily"

P 1. Lines 10-11, remove "except provide infrastructure that is solely for industrial water sales for oil and gas development"

P 1. Line 14-15, remove "except provide infrastructure that is solely for industrial water sales for oil and gas development"

P 1. Line 17-18, remove "except provide infrastructure that is solely for industrial water sales for oil and gas development"

# THE HARMS GROUP

SB 2361  
March 12, 2015

House Energy and Natural Resources Committee

Mr. Chairman, Members of the Committee:

My name is Robert Harms. I am the lobbyist for the Independent Water Providers. We support engrossed SB 2361 which limits WAWS use of eminent domain for solely for industrial water sales to the oil and gas industry. We believe the bill should be amended slightly to make it clear that the Legislature allows eminent domain for domestic or municipal water supply, but NOT where it is primarily for the purpose of industrial water infrastructure. Our amendment would make that clear.

The bill is necessary to curtail the abuse of eminent domain authority being wielded by WAWS against ND citizens.

#### What does the bill do?

The bill simply limits WAWS to the use of eminent domain authority for the purpose of providing domestic water supply to the people in its service area. It would prevent WAWS from abusing the eminent domain authority in the manner it has for the past several years.

#### Why is it necessary?

WAWS abuses eminent domain authority.

It threatens landowners that they will not get water if the landowner forces WAWS to use eminent domain which is WAWS policy (see—attached). Then it will often place a water line upon their property—not for domestic use, but to sell water to the oil industry, and not provide water to the landowner. WAWS compounds the problem of using these heavy handed tactics by paying a fraction of what the private sector pays for right of way/easements.

For these reasons, we ask for your support and amendment of Engrossed SB 2361.

Thank you.



Robert W. Harms

POLICY BULLETIN NO.

**SUBJECT:** Availability of Project Water for Voluntary Acquisition of Right of Way

**POLICY:**

To meet the Business Plan, WAWSA needs to acquire a significant amount of right of way in a short time period.

For property owners who voluntarily enter into easement agreements or sell property to WAWSA, WAWSA will favorably consider providing water service from the Project if requested by these property owners. If the property owner is served by a WAWSA member, the WAWSA board will recommendation to the member that service be provided to the property owner.

For any property owner who does not voluntarily grant an easement or sell property to WAWSA, where condemnation is initiated, WAWSA will likely not consider any requests for project water from the owner of the condemned property. If water service is instead provided by a WAWSA member system, the WAWSA board will likely recommend that the member deny any requests for service from that property owner.

Adopted April 18, 2012

## Robert Harms

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**From:** Steven Mortenson <56smort@gmail.com>  
**Sent:** Tuesday, February 03, 2015 12:31 PM  
**To:** jklein@nd.gov; tomcampbell@nd.gov; raburckhard@nd.gov; joetmiller@nd.gov; npoolman@nd.gov; pmmurphy@nd.gov; georgesinner@nd.gov; 'Robert Harms'; 'Duane Sand'; 'Dustin Gawrylow'; 'Mike Ames'  
**Subject:** FW: Letter for WAWS from Rod Prewitt

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**From:** Kim [mailto:kimr@prewittandco.com]  
**Sent:** Tuesday, February 03, 2015 12:27 PM  
**To:** 56smort@gmail.com  
**Subject:** Letter for WAWS from Rod Prewitt

My name is Rod Prewitt, local farmer, rancher and cattle buyer in this area for all my life I own and operate a feedlot and farm and ranch on the North Dakota side by Fairview Montana. I was approached by WAWS were they wanted to install a water pipeline across my field. they did not say what it was for, but they told me they had the right to condemn my land and put the water line in were ever they wanted, and also if I did not give them a easement for this they would deny me water. I have gravity irrigation land and were they wanted to put the line would have affected the flow of water on my property , that was the main reason I did not want the line. Also they were so rude and arrogant to me I didn't care if they every touch foot on the place again. After dealing with oil companies and pipeline companies they have treated me far more better and fair then I was ever treated by this organization. I later found out that they were trying to obtain easements so they could continue to sell water to the oil industry, hell this a state project what is it ng competing with private business. They didn't condemn my land but I made they go around the field instead going of right though it which they wanted to to. Again I was treated very rude and if this is the way North Dakota runs their state , I am glad I live in Sidney Montana.

## Robert Harms

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**From:** Steven Mortenson <smortens@wil.midco.net>  
**Sent:** Tuesday, February 03, 2015 8:29 AM  
**To:** jklein@nd.gov; tomcampbell@nd.gov; raburckhard@nd.gov; joetmiller@nd.gov; npoolman@nd.gov; pmmurphy@nd.gov; georgesinner@nd.gov; 'Robert Harms'  
**Subject:** Eminent Domain Concerns  
**Attachments:** nd\_senate\_letter.pdf

Dear Mr. Chairman and members of the Senate IBL Committee:

My brother and I are land owners in Williams County. We have had an experience with WAWS in the past threatening to take our land away through eminent domain. We have offered testimony before concerning Senate Bills 2359 and 2373 which did not pass. A letter at that time was composed concerning our experience with WAWS. Our experience was far from being pleasant.

We have been informed of new senate bills SB 2361 and SB 2336 to curb the threat of eminent domain from WAWS which we are in favor of.

Sincerely,

Allen Dominek  
2761 Leeds Rd, Columbus, OH 43221

February 3, 2013

Dear Committee Members:

Thank you for addressing our concerns regarding the Western Area Water Supply in relation to Senate Bills 2359 and 2373. Representatives of the Williams Rural Water District contacted us last year for an easement to bury a 10" water line on our property west of Williston. We were informed that this line was very important since Basin Electric required this water for a new substation being built. We were told that they had contributed a sizable amount of money to acquire access to this water. Historically, we have had the belief that rural water was for domestic needs of farmers and ranchers living in the country, not for industrial/commercial applications or for people wanting to live in the country for pleasure or to escape city taxes. This is very important in the Williston area now since there is extensive, hard to control development outside the city limits of Williston.

Because of these beliefs, we were not interested in restricting our land rights as a result of these easements - especially when we were to have no compensation for this non-domestic application. Allowing easements on ones' property reduces the owners' control of this property and limits future enjoyment of ones' own land. The following discussions involved Advanced Engineering and Environmental Solutions and attorney Tami L. Norgard of the Vogel Law Firm.

The terms of the easement were not very conducive to us. We were not offered any monetary compensation. Ms. Norgard related that if we did not sign, WRSA had the right to condemn our land and take it any way. We were told that condemnation would occur in weeks if we did not sign. We were also informed that

*the WAWSA board has passed a policy to recommend denial of water service on any property where the owner did not voluntarily grant an easement. As such, if you have any commercial development plans for your property, the WAWSA Board (who provides water for Williams Rural Water District) would be unlikely to recommend providing water service to your parcel." The WAWSA board has passed a policy to recommend denial of water service on any property where the owner did not voluntarily grant an easement. As such, if you have any commercial development plans for your property, the WAWSA Board (who provides water for Williams Rural Water District) would be unlikely to recommend providing water service to your parcel.*

We had to quickly find an attorney to obtain guidance, which cost us money. Additionally, it is very hard to find an attorney on short notice in the Williston area that has time to immediately assist a client on a new matter. In the meantime, Ms. Norgard related:

*While you might think you have more leverage by having us wait - WAWSA has the power of quick take condemnation - so it isn't as if you can stop the project by waiting to sign. By allowing us to proceed with construction, you will be allowing many other individuals to receive water much sooner than having to wait until June.*

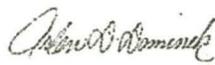
We proceeded in good faith as expeditiously as we could, given not only our own time constraints, but that of our counsel as well. When we advised Ms. Norgard that if she wished to contact our counsel to expedite matters at her own expense, she responded, *In your last communication, you advised that WAWSA would be required to pay if we called your attorney, which is not going to happen.* She subsequently called the attorney, and we have been billed for the same.

After many hours of our personal time as well as considerable expense for the attorney whom we retained, we arrived at a marginally desirable easement, which somewhat minimized impact upon our land and afforded a guarantee of very short duration to reserve a modest amount of water for five residential hookups. We are still awaiting payment of the nominal consideration of \$10.00 within the easement agreement. Moreover, we were recently contacted to authorize access to our land for surveying for another pipeline.

Two of our attorneys have told us that we were not the only ones being strong armed into giving up control of ones' own land. We resent the intimidation and strong-arming by a quasi governmental entity with no compensation to us for damages or compensation for value received by the District and its commercial customers, particularly when such an entities are competing with other private entities in selling water to commercial/industrial users. We object to the unfair taking of our land without adequate compensation while subsidizing other commercial entities at our expense.

Sincerely,

  
Allen Dominek

  
Arlen D. Dominek

2268 Northwest Boulevard, Columbus, Ohio

## Robert Harms

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**From:** Shawn Berry <shawnb@unverferth.com>  
**Sent:** Tuesday, February 03, 2015 9:49 PM  
Steven Mortenson  
**Cc:** Shawn Berry; Robert Harms  
**Subject:** IBL Committee

Dear Mr. Chairman and members of the Senate IBL Committee,

My name is Shawn Berry. I am a fourth generation landowner and have enjoyed living in Mckenzie County over 40 years. We were first approached Feb. 12, 2012 for right of way. My family owns several miles of property next to highway 200 near the Yellowstone River. Please understand this is an area of prime interest for development. Decisions we make could affect my grandchildren some day. We had not once indicated we would not sign and began to receive threatening letters that with quick claim they would push through anyway and we would be taken off the list for use of the WAWS line. Before we had time to discuss we were threatened to the point I felt it was affecting my fathers health and it wasn't worth the fight. We also have property Township 152, Range 104, Sec 34 and at the time the map from WAWS indicated 2 oil wells with no other water interest. Yes, no residence. No one except oil wells and we were threatened to the point I can't even find the letter as it upset everyone so much we threw them away. I don't have access to WAWS 2012 map, however if someone views the land I described, you will find map with 2 oil wells with WAWS water only through the use of eminent domain. We want to work together through discussion to improve our community. We were never opposed to rural water, however when the line begins to blur with commercial use for profit, it will affect decisions by land owners. I hope legislators understand just the notion of eminent domain sours any efforts with land owners who would otherwise gladly improve the community.

One more thing, I received a bill from rural water. I still don't have meter or water. A buried line and waiting?? I called and insisted I will not pay my bill until water is flowing, I'll share with the cows until then...

Thanks for your time,  
Shawn Berry

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Tami L. Norgard

Direct Dial: 701.336.6309 | tnorgard@vogellaw.com

October 24, 2012

*Name & where From*

*Testify on Behalf Landowner*

*4th generation my kids represent*

*Chris strand*

*- Bullied*

*- ~~Threatened~~ threatened*

Luke Berry  
2901 Cheney Creek Road  
Cartwright, ND 58838

Re: Pre-condemnation Notification

Dear Mr. Berry,

I am working with the Western Area Water Supply Authority (WAWSA) to assist them in acquiring parcels along their planned water pipeline that will provide a long-term water supply to communities and rural residents throughout the region. As you know from your discussions with WAWSA land agents and from prior mailings, there is a rural water pipeline planned to be located on property you own, as identified in the attached easement. Since the WAWSA land agents have been unable to obtain a voluntary negotiation of an easement with you, your file has been transferred to my office for legal acquisition. I will be calling next week to discuss this before initiating legal proceedings.

It is my understanding that you have been previously contacted by WAWSA's right-of-way agents and that you have advised that you are unwilling to provide an easement. As I understand, your family is involved in private water supplies to the oil industry and asked WAWSA to commit that they would never build a water depot within 10 miles of your property. The Board has no present intention of developing a public water depot within 10 miles of your property, so they were inclined to agree to that language at first, but then ultimately decided not to make that commitment after considering that it would set a precedent that they may not be willing to grant in another instance. If you have seen the WAWSA Business Plan, you likely know that there are no public depots planned within 10 miles of your site. Further, the Board authorized me to commit that they have no current plan, interest or intention to develop a publicly funded depot within 10 miles of your location. With the pace of development in Western North Dakota, no one knows what is around the corner, but WAWSA hasn't been approached by any private entities with an interest in developing a depot within that radius either.

While I realize you see yourself as being in competition with WAWSA for industrial water sales, I will emphasize that this is a rural water pipeline with the purpose of serving you, your family members and your neighbors. Given the high cost of delivering water to rural customers, there is no way to make a rural water pipeline cash-flow. Rural water organizations simply have to rely on subsidies from the state government in order to bring water to rural people. Clearly the cost charged for rural water cannot be so high to cover the significant construction costs. Much like rural electricity development across North Dakota, rural water development has generally be bringing a necessary and appreciated utility service to rural residents at their request. As such, the rural water lines have been generally constructed on easements donated by landowners. The rationale has been that anyone requesting

218 NP Avenue | PO Box 1389 | Fargo, ND 58107-1389  
Phone: 701.237.6983 | Toll Free: 800.677.5024

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18 p7

October 24, 2012  
Page 2

*A lot of change in western ND  
Not everyone take it. Worked hard to <sup>come up w/ cash</sup> must in a  
Depo.*

service should be willing to allow the line to cross their land to get the rural service there. I hope you are willing to disassociate the objections you have stemming from your for-profit water sales operation interests from the interests of WAWSA and your rural neighbors who want to obtain good quality drinking water. The entire WAWSA project is premised on the concept that the oil industry can assist in subsidizing bringing water to the rural residents, to leave a positive legacy and infrastructure to be a resource for generations to come. WAWSA is not profiting from bringing in this pipeline and selling water to you and your rural neighbors. I hope you can see the positive purpose in this project and agree to grant the easement.

While you may have received significantly higher offers from oil companies for oil and natural gas pipeline right of way on your land, there is a good explanation for that. Oil companies do not generally have the power of eminent domain, so the oil companies are forced to offer prices high enough to make the landowners willing to voluntarily sell an easement to cross their land. With a public water project like this one, WAWSA has the power of eminent domain to take a pipeline easement so long as it pays what an appraiser would consider to be the fair market value to use the subsurface of that land, which is determined based on how much the easement will devalue the land. In fact, WAWSA has "quick take" authority, which means there is no opportunity for a landowner to object to WAWSA's ability to take land for a project, but a landowner is entitled to have a trial later on for a court to determine the valuation.

Since we have not seemed to reach an understanding with you, the WAWSA board authorized me to initiate a lawsuit against you to obtain the right of way through the condemnation process. I want to have an opportunity to discuss this easement with you, as I'm hoping that we can find some agreement to avoid spending the next year in court and on appeals.

In order to provide full disclosure, I want to also advise you about the condemnation litigation process so you will fully understand how this will move forward. WAWSA has the power of condemnation, and even a special type of condemnation called "quick take". With quick take, WAWSA will be able to proceed with the project by obtaining an appraisal, depositing the appraised value in court and serving you with the court pleadings. Once the court action has started, WAWSA will be in a position to be starting construction on the land. At some later point, the court will hold a trial, where the sole question to be determined is how much WAWSA needs to pay for an easement. At this trial, your attorney and appraiser can provide information to the court regarding valuation, and I will assist WAWSA present its appraiser's testimony regarding valuation. A court will ultimately determine the value of the underground pipeline easement. I'll note that if we end up in court, there will not be an easement document with provisions negotiated for your protection, but merely a court order granting an easement, which may not offer as many protections for your interests as are available in the written easement document. If there is some language in the easement document that gives you particular concerns, please let me know and I'll see what we can do to address them.

One other benefit in voluntarily agreeing to an easement is priority for water service. The WAWSA Board passed a policy that will look favorably on any requests for water by persons who voluntarily agreed to a pipeline easement on their property. For those who require condemnation, the WAWSA

*North end of the valley 2 wells no houses*

# 500 Paid

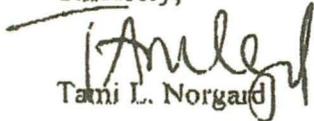
policy advises that a request for water service will likely be denied. This policy applies to all land you own.

I have talked to numerous appraisers about the level of compensation legally required for a buried water pipeline. They all use the same legal standard to find out the value of an easement, which is the value of the parcel before the easement less the value of the land after the easement exists. In short, how much less would a willing buyer when comparing two nearly identical 80 acre parcels, with the only difference being that one has a buried water pipeline and one does not. Four appraisers who conduct appraisals in North Dakota have told me there is little, if any, difference in what an interested buyer would pay for two nearly identical properties, one with a buried water pipeline and one without. As such, WAWSA believes the court action will result in a rather limited easement valuation, if any. In court, you will hire an attorney and appraiser to provide testimony on what you think the difference in value would be. WAWSA will do the same thing. After considering both sides' testimony, there will be a decision in court on what the value is. As I indicated, all easements in this project and all rural water easements I know of throughout North Dakota have always been obtained with a donation, which will be offered as evidence in the condemnation case.

In sum, I was asked to start preparing the legal process to acquire right of way on the remaining properties, including yours. I wanted to provide one last opportunity to see if there is anything WAWSA can do to address your concerns and avoid that process. If there is any further information or explanation, I would be happy to talk to you or your legal counsel, as condemnation is certainly our last possible choice. We would much prefer to work with you. Unfortunately, we cannot offer what oil companies do for easements, but if you have other concerns, please contact me. Without the easements across your lands, many neighbors would be without an opportunity to get rural water. So your willingness to help others in your community would be appreciated.

I will give you a call to discuss this. I am also attaching easements for property that you have deeded to your children. We are trying to track down current addresses for them, but thought you might be dealing with the properties together, so thought we would send them all to you to start with.

Sincerely,

  
Tami L. Norgard

cc: Jaret Wirtz

~~\_\_\_\_\_~~  
~~\_\_\_\_\_~~  
~~\_\_\_\_\_~~  
~~\_\_\_\_\_~~

Mar. 12, 2013

#2

INDEPENDENT WATER PROVIDERS  
MORTENSON FARMS  
STEVE AND LOIS MORTENSON

14018 49 St NW  
Williston, ND 58801  
Home Phone (701) 572-5873  
Cell Phone (701) 770-0942  
56smort@gmail.com

To the House Energy and Natural Resources Committee:

SB 2361

My name is Steven Mortenson, a local farmer and rancher from western North Dakota and chairman of the Independent Water Providers.

To start, here is a little history on why our group was formed in 2011.

North Dakota had been blessed with the start of an energy boom. The oil industry figured out how to use water to frac oil wells and release crude from the shale located two miles beneath the ground. In the early stage of the development, the private sector was the first to invest in supplying the oil companies with their water needs. There were no guarantees and we took this risk ourselves.

In the fall of 2010 we heard rumors about a state project being planned to come and serve the oil industry. At the same time, it was supposed to develop municipal and domestic water needs for the area. The IWP supported developing a water project for the northwest area to serve municipal and domestic needs, but were opposed to the Western Area Water Supply (WAWS), that wanted a state guarantee to compete with private business.

The bill passed by the Legislature in 2011 contained a "quick take provision," (eminent domain) which allowed WAWS to obtain easements to install the water pipelines. These easements could be taken from a landowner without their consent as provided rules of eminent domain.

We felt if this project was only going to address the rural and municipal needs the eminent domain authority could be accepted, but the project has evolved into a commercial enterprise for selling water to the oil industry rather than getting water to people of our area. It is wrong that WAWS can get an easement in two months and only pay \$14 per rod to the landowner when oil companies, pipeline companies, and private water sellers are

paying \$100 to \$200 per rod on top of waiting up to a year. This is an unfair to the landowners and private water sellers. You will hear today, and see examples where WAWS has threatened North Dakota landowners with eminent domain----and then put in a pipeline to an oil company, while the landowner still waits for potable water. Now that the major trunk pipelines have been installed, the IWP feels that the WAWS should be restrained to use of eminent domain---solely for domestic purposes, and prohibited from threatening landowners for placement of industrial water lines that serve a commercial purpose.

The IWP has worked hard in the last two Legislative Sessions to focus WAWS on its mission of delivering water to people in northwestern North Dakota, as promised and to control their industrial market share, which was at 40% for the Williams and McKenzie counties as of November of 2013. We are still waiting for numbers for 2014, so that number could be even higher.

Originally, my goal as chairman of the IWP was to stop the State from selling industrial water. During the 2013 Session we realized WAWS had to sell water to pay off the debt committed to them in 2011. But, to allow WAWS to accrue even more debt and ignore the original intent of providing water to rural and municipal areas is not fair to your constituents in North Dakota. And it's even worse when they are being abused with eminent domain authority that takes WAWS further from their assigned mission. It is time to limit WAWS authority from threatening North Dakota landowners with eminent domain, when the purpose is not to provide water for domestic use. For these reasons we ask you to support SB 2361.

Steve Mortenson

#3

Mar. 12, 2013

LINDALE WATER COMPANY

To the House Natural Resource Committee:

SB 2361

My name is Robert Howton, operations manager for the Lindale Water Company and manager of a McKenzie County property called the River Ranch. Our company thoughts and concern of WAWS having the ability for eminent domain for the oil industry directly effects our bottom line. To secure easements for our water line we have to pay from \$100 to \$200 per rod for the right to put a water pipeline in the ground. We were told that this project would not affect what we do, because there would be plenty of sales for everyone's water. Also with the price of oil reaching new lows the demand for water will decrease with the amount of rigs being stack out. Our sales will slow down just like everyone else's. It is very hard for us to be competitive when we are dealing with a state guaranteed project which has the right of "quick take" or eminent domain for their pipeline easements. We don't mind competing but please make this a fair playing field for all. Also and another note the ranch that I am manager for in McKenzie County has been waiting for two years for water and the WAWS line is approximately two miles away, in fact the pump station below Indian Hills sits on this ranch property and we still cannot get rural water.

Thank you Robert Howton

Mike Ames  
SB 2361 #4 pl. Mar. 12, 2015

## **The Cost of Eminent Domain**

### **Independent Water Providers:**

**10 Miles x 320 Rods Per Mile x \$100/Rod = \$320,000.00**

### **WAWS:**

**10 Miles x 320 Rods Per Mile x \$14/Rod = \$44,800.00**

**Land Owner Difference = \$275,200.00**

**Rural water systems typically do not pay for easements.  
Rural water systems do not have eminent domain  
Land owners have not been treated fairly by WAWS with the  
threat of eminent domain**

**The main reason for eminent domain was to install the  
mainlines from Williston to Ray and Williston to Watford City  
which are done.**

**They have sufficient industrial water sales to pay their  
obligations.**



#5 p1

**Testimony of Jaret Wirtz, Executive Director, WAWSA**  
**Opposition to Senate Bill 2361 – Related to Eminent Domain Changes**  
**House Energy and Natural Resources Committee, Rep. Todd Porter, Chairman**  
**Bismarck, North Dakota – March 12, 2015**

Good morning Chairman Porter and members of the Committee. I am Jaret Wirtz, the Executive Director of the Western Area Water Supply Authority (WAWSA). I am here to give testimony of opposition to eminent domain as proposed in SB2361.

**SB2361 Alters ND's Proven Eminent Domain Laws in an Inconsistent Manner**

WAWSA is opposing SB2361 because it alters proven eminent domain laws by selectively applying them to only one of the many regional water systems in the State. Additionally, the bill calls out situational alternations in which eminent domain authority will not apply.

At its core, the right to exercise eminent domain ensures that a regional water system (or any public water system) can route to a waiting domestic or industrial/business customer in the most logical, safe, and cost effective manner. Selective eminent domain for WAWSA in the manner presented in this bill is not consistent with current eminent domain laws on the State or Federal level.

Although the changes to eminent domain in SB2361 may seem slight, these proposed changes have not been litigated. Current eminent domain laws have been heavily litigated and, thus, are well established legally and functionally. The language in SB2361 may be subject to interpretation by the court system that could result in unintended eminent domain restrictions for WAWSA.

Beyond singling out WAWSA, we fear that this bill sets a dangerous precedence for other rural water systems in the State. Once this bill is passed, it starts to erode the very nature and purpose of eminent domain. Other public water systems in the Bakken region currently do and potentially could sell additional water to the oil industry such as the Southwest Water Authority.

*Are other rural water systems next?*

*Could this lay the groundwork for other caveats across the State?*

## **No Need For Any Eminent Domain Legislation - WAWSA Uses Sparingly**

No public water system relishes utilizing eminent domain. It is a last resort effort and used sparingly. Such is the case with WAWSA.

So far, 540 miles of rural distribution and transmission pipeline have been installed serving approximately 70,000 people, another 320 miles are currently under construction, and more than 270 miles of additional pipelines are in the final design phase. WAWSA has already paid approximately \$1.3M in easements for transmission pipelines.

Through all of this, WAWSA has only used eminent domain three times. Once when the landowners themselves recommended condemnation to expedite the sale of land as it was held in a trust and was tied up in legal issues, and two other times when, after having spent customary negotiating efforts for 18 months with one landowner and 24 months with another, WAWSA was left no choice but to condemn as construction and project completion were being delayed.

Continued consistent eminent domain laws need to remain in place so there is not unintended consequences that hinder progress. Out of the of 1,130 miles of pipeline installed, under construction, or under design, WAWSA still needs to secure easements for 2,716 of the total 4,085 parcels needed to complete the project.

## **As Amended, SB2361 Simply Has No Purpose**

Beyond the issues with the bill explained to this point, the amended SB2361 is redundant to current WAWSA policies. If the purpose is to put a focus on oil industrial infrastructure, there is no practical application as WAWSA and its member entities have already developed policies whereby they do not use eminent domain for pipelines that solely provide service to oil and gas wells.

Simply put, this bill has no purpose and actually can do more harm than good. SB2361 inconsistently alters proven eminent domain laws and sets a dangerous precedence for WAWSA and other public water systems in North Dakota.

For all these reasons, we strongly urge a do not pass on SB2361.

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**Testimony of Eric Volk, Executive Director**

**ND Rural Water Systems Association**

**Senate Bill 2361**

**House Energy and Natural Resources Committee – March 12, 2015**

Chairman Porter and members of the House Energy and Natural Resources Committee, my name is Eric Volk. I am the executive director of the North Dakota Rural Water Systems Association (NDRWSA) which serves a membership of more than 250 cities, 28 rural/regional water systems, and four tribal systems.

The NDRWSA is committed to ensuring all of North Dakota's residents receive affordable drinking water of excellent quality and sufficient quantity. NDRWSA is committed to completing and maintaining North Dakota's water infrastructure for economic growth and quality of life. Today I am submitting testimony in opposition of Senate Bill 2361. The powers of eminent domain play an integral part of water supply development across the state. Passage of this bill would have direct negative effects on northwestern North Dakota and set an unfavorable precedent for the remainder of the state's rural and regional water systems.

Historically, regional and rural water systems across North Dakota have been successful in obtaining a vast majority of easements via donation. Regional and rural water systems rely on donated easements to minimize project costs down, which helps keep end user costs down. The loss of eminent domain could jeopardize rural water system's ability to control costs and subject systems to paying market rates (as high as \$300/rod in western North Dakota). Paying market rates would likely end rural water service expansion in northwest North Dakota. This legislation creates a dangerous precedent for rural water systems. Other special interest groups could ask

for the elimination of eminent domain for rural water systems in other parts of the state, either ending rural water expansions in those areas, or increasing costs of service significantly.

Below are two instances when a water system has had to use their powers of eminent domain. Both used “quick take condemnation” to gain the right to cross land with a pipeline. Scenario #1 involved a landowner who was opposed to a commercial dairy. Several failed attempts were made to acquire an easement. The easement involved a simple road crossing, but the landowner legally owns the land to the center of the road, so they had to use the condemnation procedure to cross the road with a pipeline. The second condemnation scenario was an attempt to obtain an easement to cross about 1,000 feet of pasture. The water system had been through a bad debt collection process with the landowner (customer did not pay their bill and was taken to small claims court) and it just wasn’t possible to obtain an easement from him.

Numerous attempts are made to obtain easements from individuals before resorting to condemnation. Systems also look at changing the pipeline route to go around. Sometimes that is not possible or is just too expensive to reroute. That was the case with scenario #2. It would have involved a river crossing and a railroad crossing to change routes. Systems try their best to not to go through a condemnation process, but as you can see, the option still needs to be available to water systems for domestic, commercial, industrial and agricultural situations.

With that said, I urge you to give this bill a do not pass recommendation. Thank you for your time.

**Testimony of Tami Norgard**  
**Shareholder with Vogel Law Firm, Legal Counsel for WAWSA**  
**Senate Bill 2361 – Related to Eminent Domain Changes**  
**House Energy and Natural Resources Committee**  
**Bismarck, North Dakota – March 12, 2015**

**Testimony Outline:**

**1. The Significant Difference with the Amendment by the Senate IBL Committee.**

- a. As initially proposed, SB2361 would eliminate WAWSA’s use of eminent domain authority for any pipelines that carry both domestic water and any industrial water used for oilfield purposes. After the Senate IBL Hearing, where WAWSA made it clear that most of their infrastructure carries both industrial and domestic water supplies jointly so the bill would effectively shut down all WAWSA infrastructure growth, the IBL Committee amended SB2361. The Amendment revised the bill such that the eminent domain and quick take can continue to be used in connection with the WAWSA project, however WAWSA would not be allowed to use eminent domain for any pipelines or parcels that solely transport industrial water supplies.

**2. SB 2361 Proposes a Solution where there is Currently no Problem.**

- a. The Independent Water Providers proposed SB2361 as a means of limiting WAWSA’s growth. As amended, the curtailment of WAWSA’s use of eminent domain only applies where the right of way is needed for a pipeline that solely carries industrial water. The entire bill is unnecessary, as there has not been a single case where eminent domain has been suggested to a landowner where the sole purpose of obtaining right of way on their property was for the transportation of solely industrial water for fracking. Yet, just because WAWSA has not used or mentioned eminent domain in connection with solely an industrial line doesn’t mean there would be no impact to WAWSA from passage of SB2361. There is always a risk of unintended consequences when passing a law, which is especially concerning here, where the reason for passage of a law that addresses a non-issue beyond some placation of the project opponents. There are numerous potential iterations of factual scenarios that might be frustrated by this bill, which would not have been a concern to this Legislature or even the project opponents. Eminent domain matters are generally quite contentious and landowners use any ammunition they can to challenge the authority of the condemnor. This somewhat vague amendment may be setting up future court actions in cases that aren’t currently intended to be within the category proposed for exemption, yet those landowners may attempt to capitalize on vague language as another basis to fight against a condemnor.
- b. SB2361 could halt WAWSA’s ability to construct additional WAWSA water depots or hook up oil wells for maintenance water. The IWP was the advocate for SB2361, yet their goal to stop the growth of WAWSA was effectively refused by the Senate IBL, leading to the Amendment. While the amendment is certainly preferable over the original language, passage of the Bill may have significant impacts on the road conditions in Western North Dakota, which is an unfortunate

unintended consequence of such an Amendment. In addition, if SB2361 passes in its current form, it could halt WAWSA from hooking up oil wells as monthly customers of rural water systems, which is something that currently exists at some level and which many operators are considering for future infrastructure development. Many wells in McKenzie and Williams Counties have high sodium concentrations and need fresh water supplies to flush the casings in order to maximize productivity of a well. Those fresh water supplies have typically been delivered by large trucks traversing deteriorating gravel roads, but are increasingly being delivered by WAWSA as the rural water build-out continues. The concept of hooking oil wells onto 2-4 inch rural water distribution lines will take thousands of trucks off the Bakken area's gravel roads while providing needed maintenance water to the well sites. The small distribution lines are not big enough to supply water for fracking, so the level of competition by WAWSA for the IWP relating to well maintenance water is relatively insignificant. While there may be some maintenance water provided in some locations by the IWP, it does not appear that obtaining easements and constructing small diameter pipelines to deliver low-volume maintenance water to well-sites is a big priority of the independent providers. The low volume of water sold would not necessarily justify the cost of constructing a huge web of pipelines. So the passage of SB2361 as amended, even if it were done to provide 'something' to the IWP, would do nothing more than frustrate township and county officials who are charged with maintaining adequate road conditions.

- c. SB2361 could also restrict the ability of WAWSA to site another water depot or bring a water pipeline to a new water depot. WAWSA pared down their original plan presented to the legislature in 2011 to construct 22 water depots, down to 9 water depots in order to mitigate the impacts on the IWP and to allow IWP members to maintain a larger market share. WAWSA still has 2 depots to be built, which would presumably sell largely, if not solely, industrial water for oilfield uses. Passage of SB2361 could frustrate WAWSA's plan to construct the last two WAWSA depots that are currently planned and/or the pipelines necessary to provide water to those new depots.
- d. If WAWSA did not have the authority to use eminent domain for the pipeline easements or parcels needed for a depot location, it may make it more difficult to complete those projects. In short, it would hold WAWSA hostage, being required to pay well beyond market rate for property or easements, in whatever amount it would take to get on or across landowners' property. And if one landowner received high payments, all landowners on that line would want similarly high payments. As a consequence, the expense of the project would escalate significantly or the potential to add additional depots may be thwarted, which would have a substantial impact on WAWSA revenues, which are needed to meet the long term loan repayment schedule to the BND for the Legislatively-approved loans to WAWSA that are essentially backed by the State. If the drilling slows down and the market for industrial water sales shrinks in the current scenario, there may be some risk to the longer-term repayment of the WAWSA loans. Given the uncertainty surrounding oil prices and production levels, now is not the time to curtail WAWSA's income opportunities, or the state may ultimately be on the hook for WAWSA's loan payments.
- e. The very premise of the funding mechanism for created by the Legislature for WAWSA was to allow industrial water sales revenue to pay off the \$150 million in State loans for infrastructure build out. The project is successfully operating and beginning to pay back loans on a slightly elevated schedule, just as it was predicted by the work plan and represented to the Legislature during the

past two sessions. Passage of SB 2361 is an unfortunate and unnecessary attempt to limit WAWSA's growth, and will have the consequences of further deteriorating gravel roads in Western North Dakota, and adding uncertainty in WAWSA's ability to pay its loans.

### 3. Eminent Domain is Crucial to Building a Public Water System

- a. Landowners in Western North Dakota counties are understandably fatigued with requests for easements. I'm from McKenzie County and work with many landowners who receive a few requests per month for new electric line easements, natural gas line easement, water lines, produce water lines, pad sites, etc. And not all companies do a great job or restoration, leading landowners to be less willing to grant easements. As such, having the authority of eminent domain is a key point in negotiations with landowners. WAWSA does not 'threaten' eminent domain frequently, but it is a necessary tool to have in the toolbox when engaging landowners in meaningful negotiations.
- b. WAWSA does not abuse its eminent domain authority, but generally works through a process with landowners to try to address their concerns. WAWSA has right-of-way agents contact and meet with landowners to discuss the requested easement and answer any questions of the landowner. These right-of-way agents are instructed not to mention the concept of condemnation, but to honestly answer the landowner's question if it comes up. If it becomes obvious that the landowner is unwilling to sign after a few contacts, the WAWSA board will issue a resolution of condemnation and ask me to engage in discussions with the landowner before taking any legal action. The negotiations are fairly successful, as WAWSA has actually only filed condemnation actions 3 times with over 320 miles of pipeline being installed. And two of the three condemnation actions were relating to the same person who refused to provide an agreement to WAWSA.
- c. Since it will likely be alleged that WAWSA has threatened condemnation, I will walk you through the process so you have an understanding what it entails. I typically send a letter to landowners advising them of the resolution of the WAWSA Board to initiate condemnation if we are unable to work out the terms of an easement. Often times, landowners have decided they will not grant any new easements given past bad experiences or else they want to be paid at the same rates as the oil companies pay. I advise the landowners of the difference in prices required by oil companies, without the power of eminent domain in most cases, which have to pay whatever the landowner wants in order to cross that land. With eminent domain, the value of the easement is determined by law to be equivalent to the level of land value lost by the easement. In short, how much less would a willing buyer pay for a property with a water pipeline as opposed to a similar property without a water pipeline. That difference is the value of the easement according to the courts. Buyers in the Western North Dakota market will typically pay the same amount (or actually more) for properties with water pipeline easements and access to water, so the easement value is fairly limited when comparable sales are studied by appraisers.
- d. Once landowners understand the legal process and the valuation, we are generally able to work out the terms of an easement and address concerns they have regarding crop loss, fencing, drainage, indemnification, etc.

- e. In the three cases where condemnation pleadings were actually filed, they were all resolved amicably.
1. In one case, the landowner was a trust who agreed to sell WAWSA land for a reservoir site. Yet there was a right of first refusal for one trust beneficiary who was able to buy any land sold by the Trust. In that case, the beneficiary would not release his right of first refusal, so WAWSA proceeded with a 'friendly' condemnation action against the Trust, with the full agreement of the agreed upon compensation to the Trust. The Court transferred the property and the case was dismissed.
  2. In the second condemnation case, the beneficiary with the right of first refusal in the example above refused to grant a rural water line easement after WAWSA patiently negotiated with the landowner for almost 2 years of negotiations of the terms. Within a very short time of filing the condemnation paperwork, a signed easement was provided by the landowner, so this action was resolved very quickly after filing the paperwork.
  3. In the third condemnation, the landowner simply refused to sign since he wanted a free hookup for multiple rental trailers on his property, which were not granted since it would be inconsistent treatment with the hundreds of landowners who voluntarily agreed to an easement on their land. That legal action was filed and was settled through a voluntary easement in January 2015.

#### 4. Conclusion – WAWSA Requests a Do Not Pass Recommendation

- a. Prohibiting cities and rural water systems from being able to construct lines to meet industrial customer's requests for water service is simply bad for business in North Dakota. It would stifle industrial development in the state if our Legislature decides that water systems building lines for industrial uses cannot have the benefit of eminent domain, adding uncertainty to an industrial user's business plan. What message would that send to the fertilizer plants that have indicated an intent to develop in North Dakota?
- b. Opponents of the WAWSA project include the Independent Water Providers, who generate millions of dollars per year selling water of the State that is appropriated to them free of charge. In past legislative sessions, the Independent Water Providers have tried to get the Legislature to cap WAWSA's share of the industrial water sales market, which would limit WAWSA's construction of infrastructure to residents in need of water and limit WAWSA's ability to repay their loans. In past sessions, the Legislature recognized the dire need for infrastructure in the Western North Dakota communities and refused to cap WAWSA's share of the market or unduly limit WAWSA's growth. Like the past two sessions, WAWSA requests that this Committee recognize the need to build out the water system infrastructure in Western North Dakota and support WAWSA's ability to repay loans by not limiting industrial sales. WAWSA requests a "do not pass" recommendation.