

2009 SENATE AGRICULTURE

SB 2255

2009 SENATE STANDING COMMITTEE MINUTES

Bill/Resolution No.2255

Senate Agriculture Committee

Check here for Conference Committee

Hearing Date: February 5, 2009

Recorder Job Number: 8904

Committee Clerk Signature



Minutes:

Sen. Flakoll opened the hearing on SB 2255, a bill relating to exercise of the power of eminent domain by water resource districts. All members (7) were present.

Sean Fredricks, attorney with the Ohnstad Twichell Law Firm in West Fargo, testified in favor of the bill. See attached testimony, attachment #1.

Sen. Taylor- the difference between a water district and the water resource district is what?

Sean Fredricks- the different is rural water systems provide portable drinking water where the water resource districts are more concerned with surface water, drainage, flood control projects things of that nature.

Sen. Wanzek- so the situation that you outlined in your testimony, it would have been a federal project, so if you would have had federal dollars you would have had the ability to do a quick take?

Sean Fredricks- yes but very few water resource districts include federal dollars.

Gary Peterson, Traill Company W.R.D, testified in favor of the bill.

Gary Peterson- This is not always a money factor, sometimes you have someone against the project and they will do everything that they can to stop it even though it passes by a good majority, we run into that in our county.

Gary Thompson, ND water resource districts association, testified in favor of the bill. See attached testimony, attachment #2.

Michael Buringrud, Chairman of the North Cass Water Resource District and a member of the Cass County Joint Water Resource District, testified in favor of the bill. See attached testimony, attachment #3.

Sen. Taylor- as we consider compensation for land owners are those land values sometimes inflated, do those prices go into the formula as we figure out the value of that Ag land for property tax purposes?

Michael Buringrud- sometimes our compensation for land owners is higher then what it is actually valued at.

Sen. Klein- so you are not generally talking a lot of acres here per producer?

Michael Buringrud- nope.

Sen. Klein- who picks up the tab on the taxes?

Michael Buringrud- each farmer pays a amount per acre for water projects right now the max we can charge per acre is \$2 per acre.

Sen. Behm- this is just for drainage purposes?

Michael Buringrud- correct.

Rodger Olson, member of Maple River and Cass County Joint Boards, testified in support of the bill. See attached testimony, attachment #4.

Sen. Klein- In general don't many of these things take many years and that you have all this opportunity without this?

Rodger Olson- yes they do take time the people that benefit from this pay tax to keep these drains up from the time the drains fail.

Joel Halverson, Trail City Water Resource District, testified in favor of the bill.

Joel Halverson- We would urge a do pass on this bill.

Leo Walker, with the Peterson Coulee Outlet Association, testified in opposition to the bill.

See attached testimony, attachment #5.

Curly Haugland, LANO association of ND, testified in opposition to the bill.

Curly Haugland- we are against this bill cause it affects eminent domain, we were the ones that took part in rewriting the eminent domain part of the constitution a couple years back. The state constitution prohibits use of eminent domain for private purposes. So just to raise that issue.

Sen. Wanzek- is there anything in law that more or less requires to prove the public good before they can even start negotiating a project?

Curly Haugland- I would have to draw your attention to the constitution and not the statue.

Eminent domain cannot be used to take private property for private usage.

Sen. Taylor- I am curious on the other 8 entities that have eminent domain are they in conflict with the state constitution that is approved by the voters or how do we define the difference?

Curly Haugland- I cannot answer that question.

Testimony was also submitted in opposition by **Warren Solberg**, see attachment #6.

Sen. Flakoll closed the hearing.

2009 SENATE STANDING COMMITTEE MINUTES

Bill/Resolution No. 2255

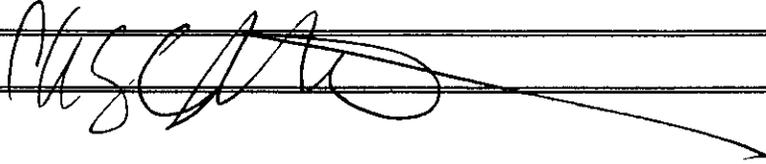
Senate Agriculture Committee

Check here for Conference Committee

Hearing Date: February 5, 2009

Recorder Job Number: 8905

Committee Clerk Signature

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Minutes:

Sen. Flakoll opened discussion on SB 2255, all members were present.

Sen. Klein motioned for a Do pass and was seconded by **Sen. Wanzek**, vote 5 yea 2 nay 0 absent. **Sen. Flakoll** was designated to carry the bill to the floor.

Sen. Flakoll closed the discussion.

Date: 2.5.09
Roll Call Vote #: 1

2009 SENATE STANDING COMMITTEE ROLL CALL VOTES
BILL/RESOLUTION NO. 2255

Senate Agriculture Committee

Check here for Conference Committee

Legislative Council Amendment Number _____

Action Taken Do Pass

Motion Made By Klein Seconded By Wanzek

Senators	Yes	No	Senators	Yes	No
Tim Flakoll-Chairman	X		Arthur Behm		X
Terry Wanzek-Vice Chairman	X		Joan Heckaman	X	
Jerry Klein	X		Ryan Taylor	X	
Joe Miller		X			

Total (Yes) 5 No 2

Absent 0

Floor Assignment Sen. Flakoll

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

REPORT OF STANDING COMMITTEE (410)
February 9, 2009 8:35 a.m.

Module No: SR-25-2085
Carrier: Flakoll
Insert LC: . Title: .

REPORT OF STANDING COMMITTEE

SB 2255: Agriculture Committee (Sen. Flakoll, Chairman) recommends DO PASS
(5 YEAS, 2 NAYS, 0 ABSENT AND NOT VOTING). SB 2255 was placed on the
Eleventh order on the calendar.

2009 HOUSE AGRICULTURE

SB 2255

2009 HOUSE STANDING COMMITTEE MINUTES

Bill/Resolution No. 2255

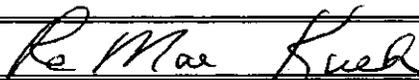
House Agriculture Committee

Check here for Conference Committee

Hearing Date: March 20, 2009

Recorder Job Number: 11339

Committee Clerk Signature



Minutes:

Senator Fischer, Sponsor: This bill is a simple amendment to allow eminent domain. It allows quick take for which state funds have been appropriated. It is already available for federal funds. This is more of an issue of timing. When doing a project, rather than going to eminent domain which could take a year, quick take requires an appraisal to be done of the property that is in dispute. The money is deposited with the court with the resolution of need and the other motions that are needed by a political subdivision. That goes into court but the project can continue.

Representative Froelich: Why do we need the bill?

Senator Fischer: We've had some experiences where the project has been held up for a year using eminent domain. This way you can continue on with the project and the court is going to decide the compensation and damages.

Representative Froelich: Where have we run into the problem?

Senator Fischer: Sean Fredericks has the information on the project that happened some years ago.

Sean Fredricks, Counsel for Red River Joint Water Resource District and Cass County Joint Water, Ohnstad Twichell, P.C.: (Written testimony attached #1)

Representative Mueller: What is the process? When you talk "quick take" it seems we are rushing through the process.

Sean Fredricks: There is significant planning in any project. In the example I gave, we sent letters and asked the landowners to come in and talk about right-of-way prices. This was before we awarded construction contracts. What we arrived at was \$4,000. We asked if that sounded alright to them. All that attended agreed. If they don't agree, we negotiate. In this instance there was a landowner who went along with the project and didn't say much. Then when we had the contractor ready to go, he asked \$32,000/acre. Those are the instances we are concerned about.

Representative Belter: Is it normal to start until you get everyone to sign?

Sean Fredricks: We've never run into this until this instance. It is basically up to the water resource districts of when they want to start spending money on a project. Until all the landowners are in basic agreement, they don't want to pay me to draft deeds, etc. until the vote passes. Once the vote passes, then we have to get moving.

Vice Chairman Brandenburg: How many landowners did you have involved in this project?

Sean Fredricks: I would say 9 or 10.

Vice Chairman Brandenburg: Can you explain how you determined the price of land?

Sean Fredricks: In large projects, where a drain is 3 miles long or part is in city limits and part is outside, where we know there are going to be disparities, that is when we engage an appraiser. When all the property is similar, that is when we engage the landowner to find the land prices out there now.

Vice Chairman Brandenburg: So everyone was in agreement except this one individual.

Representative Kingsbury: Any water resource project, wouldn't it be in conjunction with one of these others that have quick take authority? So couldn't the project happen through one of them that has authority?

Sean Fredricks: While we engage other entities, they often are not involved in flood protection. Most entities are apprehensive about doing that for us. They don't want to be viewed as engaging in a project solely for the purpose of giving quick take authority. If it is not their project, they can't do their quick take authority unless you engage in some sort of Joint Powers Agreement.

Representative Boe: If we have a federal dollar in this project, we have quick take authority. Now does the fact that the state has money in it take that authority away?

Sean Fredricks: If the state has dollars involved in a federal project, the quick take authority is not taken away. The vast majority of our projects do not include federal dollars.

Vice Chairman Brandenburg: In the City of Edgeley, we have a creek that comes through town. Whenever we get more than five inches of rain at one time we have flooding. There are anywhere from 5 to 30 homes that get flooded. The city tried to reroute the water around town. The landowner who continually drains his own water to that creek won't allow the 3-5 acres out of his land to make a ditch. Would quick take help in this situation?

Sean Fredricks: The City of Edgeley would already have quick take authority.

Representative Holman: When do you stop negotiating and start condemning?

Sean Fredricks: Other entities around the state already have quick take. You still have to litigate the value of the property. In negotiating with a landowner, you are going to offer them what you think it is worth. You are not going to low ball it knowing you have quick take.

Because when you go into court, if the judge knows you are using it as a means of avoiding fair negotiations, you are going to get hit hard by the judge. You will end up paying the

landowner what the property is worth. Water resource districts want to avoid quick take and condemnation because of the cost. They have to pay the water resource attorney and the landowner's attorney and costs. We don't see other entities abusing it.

Representative Vig: Are there any other entities that should be included beside water resource districts?

Sean Fredricks: Townships don't have quick take. They have a statutory 33-foot easement on either side of a section line. So they have the right already to go in and construct.

Representative Wall: If quick take becomes real, and someone holds out but construction is started, can the judge order you to cease and desist on your project or is it only about the money and getting a fair price?

Sean Fredricks: Water resource districts do not begin construction until we have a right-of-way figured out. If we did have quick take, we would not have our contractor out there working until we had action filed. You only have condemnation rights if you are constructing a public project for the public benefit. Water resource districts are political subdivisions working on projects for public benefit. They are not private projects.

Representative Rust: If this law passes, what can be done in the Edgeley example?

If this law doesn't pass, what can be done?

Sean Fredricks: The City of Edgeley already has quick take. If a water resource district is involved in this situation and the bill didn't pass, we would negotiate land prices with everybody including the single landowner that is holding out. If we couldn't arrive at a fair price, we would have to present an appraisal. If the appraisal amount is not accepted, we would file a condemnation action with the court. We would continue through the process through the very end. We would pay for our appraiser and their appraiser. We would each have an attorney. We would go through discovery and argue about whose appraisal the court should use in

determining the property value. At the very end, a jury decides whose appraisal to use. Then there might be an appeal to the Supreme Court. It could take more than a year.

Representative Rust: If this situation has been around for years, now you want to do something, what is another year because you are taking someone's personal property.

Sean Fredricks: Usually the requests are from the landowner. The landowners get a vote on whether or not they want the drain to go through. If we don't have quick take that is one more year that the farmers don't get drainage relief.

Sean Fredricks: Continuing on with what would happen if this bill does pass, if there is a landowner that holds out, we could get it done that season yet.

Representative Boe: What is the typical number of acres that a project like this would encompass?

Sean Fredricks: We would try to get a permanent easement or deed from them for a couple of acres.

Representative Boe: Is the whole project 10-20 acres?

Sean Fredricks: Sometimes. About 15 acres is standard. We leave it up to landowner if they want to sell or give an easement. If the landowner says this land has been in my family for three generations, I'm not going to sell any of it to you. We work with them for an easement. If they have an easement, the landowner still owns the land and still pays taxes. They don't mind because they are getting a benefit to get rid of the water and it is going to make their land worth more.

Representative Boe: In your example where you settled with a guy for \$22,000. What percentage of a cost of a project would that represent?

Sean Fredricks: I can't recall that project contractor price? Engineers estimate a little extra in their right-of-way costs to include some of the unknowns. The members of the assessment

district have to pay for that. What we try to explain to people who hold out is the more we have to pay you, the more you & your neighbors are going to have to pay.

Chairman Johnson: How did the other landowners feel?

Sean Fredricks: The landowners were not happy. But they didn't come in and demand equal payment. In this instance it was so unreasonable. The other landowners understood that. quick take would put everyone on an even playing field.

Michael Buringrud, Chairman of North Cass Water Resource District: (Written testimony attached #2) Described personal experience as a landowner.

We had a situation like this run by my property. We talked to neighbors and discussed that \$2,000/acre was just fine. There was a landowner that wanted more. We asked him why as landowners living right along side of you do we have to pay extra for your land. We had a contractor lined up that gave us a good bid. We saved thousands of dollars to get him lined up early. If we would have had to wait, the price would have gone up. I personally would have had to pay more money along with the other landowners. So that is the fairness part of it.

Representative Froelich: I have a bad taste in my mouth from my own experience with land being taken. Nobody can give the definition of "reasonable."

Michael Buringrud: That question came up. It was what the property was selling for in our area at the time. In fact the market value was less than what we received.

Representative Froelich: You have to look to the future of land prices.

Michael Buringrud: In this area there were seven miles of drainage. They needed .5 or .4 of an acre to flatten the area out. Why would one piece be worth more?

Representative Holman: Is there a difference working with farmer landlords and absentee landlords?

Michael Buringrud: Yes. The lessee of the absentee landlords ends up paying more rent.

Representative Boe: When you assess the district, is that a broad assessment for all acres in the district or is it assigned depending how much you benefit from it.

Michael Buringrud: They will do a full assessment. Then we bring the engineers in to find out who will benefit most. We assess a tax of \$2/acre which is the maximum.

Representative Boe: The \$2/acre is on every acre on the quarter section of land?

Michael Buringrud: The \$2/acre is on the land that is benefited from that drain only. Most drains are a ½ mile one each side.

Representative Boe: Is everyone close to the same elevation? In my area the elevation changes more. One drainage area is not going to see the same benefit as another area so it is not just area but elevation also. The guy that benefits the least is the one that will hold up the project.

Michael Buringrud: The drain by my land runs about 11 miles. From where I'm at to the river it is a mile and a half. I'm dealing with water coming from the west. I can get rid of my water. But the water coming from the west plugs up and I can't get rid of my water. If it gets to that point where we have to go to a vote, sometimes we put a percentage on it. It is backwards in my opinion because I'll pay 100% because I live on the bottom end and the guy who is farther away paid 20%. It is his water we're dealing with.

Representative Boe: I'm in the same situation. I pay an assessment on a road that I use 236 feet of. It's the guys miles down the road that use it.

Representative Hofstad, Devils Lake area: I've been a water manager for a number of years both at the local and state level. The timeline of water projects is quite lengthy along with a considerable amount of expenses. This would move the timeline ahead. I don't think it jeopardizes the rights of anybody. They still have the same recourse.

Representative Uglem: When you talk about a vote of the people. Is that a simple majority?

Representative Hofstad: It is a simple majority. That is usually a dollar vote. If you are assessed at \$2/acre, and you have a 100,000 acre assessment and somebody in that assessment has 10,000 acres and if he is assessed a \$1/acre he gets 10,000 votes.

Representative Holman: On a quick take action, has a court ever stopped work?

Representative Hofstad: I don't know of anyone.

Representative Kingsbury: Water resource districts are not new. It seems they are always working with another entity that has the quick take authority. There must be some reason why a county can't claim that authority and work with the water resource district?

Representative Hofstad: You could, but first you need a Joint Powers Agreement. The water resource district stands alone with its own agenda.

Vice Chairman Brandenburg: With a Joint Powers Agreement, you may now end up with county people that are related or have other interests. Could that be part of the reason?

Representative Hofstad: Could be.

Joel Halvorson, Traill County Water Resource District: (Written testimony attached #3)

The ND Water Resource Districts organization passed a resolution in support of SB 2255 at their annual meeting in December.

Representative Mueller: How does it work with FSA and NRCS people and the federal government in regard to drain projects? We have sodbuster where you can't drain wetlands. How do you get around that?

Joel Halvorson: The individual farm/owner, goes to the NRCS office and they do a wet lands evaluation along the property. There is a form that is filled out and gets approved or disapproved by them. It may be that you won't get your wetlands drained because it would be a violation of the swampbuster rules. That is up to each individual landowner to get that approved.

Representative Mueller: Are those difficult to do?

Joel Halvorson: Yes. You can also negotiate with NRCS and probably create a wetland somewhere else.

Gordon Johnson, Richland County Water Resource Board: I am in support of SB 2255. It would give us more options.

Robert Rostad, Richland County Water Resource Board: As a retired farmer and landowner, I am in support of SB 2255.

Opposing:

Warren Solberg, South of Fargo by Wild Rice: (Written testimony attached #4)

I am speaking on the south side Fargo flood project and the mini bypass of it. The base project goes out 60 years of growth. I live about 25 miles south. My cousin is just north of there. The testimony given by the attorney where they had one holdout that stalled the project sounds like someone didn't cross all the t's and dot the i's. The same is happening with the mini pass. I have a document for the project. It has a list of meetings held for the entire south side project. In all the lists of the meetings, not one has been held on the minibypass. Only two comments are listed. One for and one against it. The value of the homes in this area is \$11 million. The mini bypass is going to cost \$15 million to build to protect that \$11 million of structures. The City of Fargo is contributing \$7 million to the mini bypass project to buy down the debt to get it to cash flow. The people won't pay any more than on the base project. We feel the way the process is set up, the cards are against us. The land is appraised at \$7400/acre for the mini bypass. This is an area about 8 miles south of Fargo. Further west and south, land has sold for development for \$19,000/acre and another for over \$20,000. Quick take of the land stops any negotiation for setting price. I wouldn't want to sell my land for that price when the land right across is selling for 2 ½ times more. This is all to the

advantage of the water district or the City of Fargo. On my land the dike is going to be placed on the frontage road. I don't know how many acres I will be giving up for the dike. When I receive documentation, it is for the entire farm. The Southeast Water District is conducting meetings and telling people this is what your assessment is going to be for the project. We as landowners don't know how much acreage we are giving up. We don't know what we are getting for it. Again the cart is before the horse. We feel this quick take law is going to be used to our detriment. We will be in court. Negotiation of price will be out the window. The project could be done for \$7.5 million cheaper if it is moved $\frac{3}{4}$ of a mile north.

Representative Belter: Since the City of Fargo is involved, don't they already have quick take authority?

Warren Solberg: According to the document they prepared, it has a 50/50 share between local and state. There is no federal funding. The mini bypass is a bonus. It is beyond the base of what Fargo wants. There are some heavy hitters in the area that want the protection. We don't know who they are but that is what we've been told.

Representative Froelich: Before we act on this, could we bring in the State Water Commissioner?

Chairman Johnson: Closed the hearing.

2009 HOUSE STANDING COMMITTEE MINUTES

Bill/Resolution No. 2255

House Agriculture Committee

Check here for Conference Committee

Hearing Date: March 20, 2009 (**Committee Work**)

Recorder Job Number: 11340

Committee Clerk Signature

Re Mae Kueh

Minutes:

Representative Froelich: Most of these water projects need State Water Commission approval first.

Dale Frink, State Engineer, ND Water Commission: In some cases they do need permits from us.

Representative Froelich: It may not be a permit. But they have to clear it with you before they start moving water.

Dale Frink: The State Engineer has control of certain things and the Water Resource District has control over certain things. Most of the time for a dam you need permits. For a dugout you do not. If it is for livestock you don't need a permit.

Representative Froelich: Just about every project in the state, you will have a part of it?

Dale Frink: Yes for the larger projects.

Representative Froelich: Since you are involved with these projects, even if there is no state funding, they have to make a state application.

Dale Frink: Correct.

Representative Vig: I know snagging and clearing is quite popular with water resource districts. Will this affect those policies?

Dale Frink: Generally you don't need a permit from us for snagging and clearing. The State Water Commission does have quick take authority for certain projects. We only have quick take for Southwest Pipeline, for Northwest Area Water Supply, and for ??????. Not for anything else.

Vice Chairman Brandenburg: So you don't have the authority to pass it on to other entities.

Dale Frink: That is correct.

Representative Rust: Does the two words "or state" added to SB 2255 expand eminent domain or quick take considerably?

Dale Frink: The way I read this, it would not expand our quick take authority. This would just apply to the water resource districts if they get federal or state funds.

Representative Rust: Does it expand quick take authority for all others considered when you go from federal funds to federal or state funds?

Dale Frink: Yes. It would expand to any project that they would get money from us or any other source. Snagging and clearing projects hardly ever get federal funds.

Representative Boe: In testimony it was indicated to us that the State Water Commission did have quick take authority.

Dale Frink: Only in the 3 listed.

Representative Boe: Do all rural water systems have quick take authority?

Dale Frink: Yes.

2009 HOUSE STANDING COMMITTEE MINUTES

Bill/Resolution No. 2255

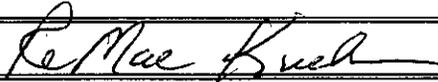
House Agriculture Committee

Check here for Conference Committee

Hearing Date: March 25, 2009 (**Committee Work**)

Recorder Job Number: 11520

Committee Clerk Signature



Minutes:

Vice Chairman Brandenburg: Moved Do Pass.

Representative Uglem: Seconded.

Representative Belter: I support the motion reluctantly. The way we have the drainage program set up is backward. The people that pay the most taxes are the ones that get flooded the worst. It takes away rights from those people who get flooded the most.

Representative Mueller: When most all other agencies are able to use quick take, we are singling out one that cannot. There are some problems here but I don't think it is fair for one party to jack up the price of the land. I will support it

Representative Holman: The fact that there could be injunctive relief. If the water district is misusing their authority, a judge could overrule them. There is still a way to stop the project if the water district is not using their authority appropriately. So I will support the bill.

Vice Chairman Brandenburg: I am against this. Because this is against normally what I do. But when you go through Soil Conservation, Wetlands, all the water people, and you get everything in place and everybody on board. Then you have one person who is probably the same person that is draining all the water who then is going to say I am going to have more

than everybody else. So with that reason I am going to support this bill. The same people that cause the problems are the ones that want more money for their land.

Representative Rust: I do worry a lot about the landowner. So often I hear those individuals talking about that their rights get infringed upon.

Vice Chairman Brandenburg: I wrestle with that too. But there are the rights of the people that do want this project to go forward. It is not fair to the other people who have agreed to go ahead to have it held up.

Representative Vig: What I noticed is the water resource board always networks with the city or county in order to get their funds. This might be a good way to streamline some water projects.

A Roll Call vote was taken. **Yes: 8, No: 2, Absent: 3**, (Representatives Wall, Boe, Froelich).

Representative Brandenburg will carry the bill.

Date: 3/25/09

Roll Call Vote #: _____

2009 HOUSE STANDING COMMITTEE ROLL CALL VOTES
BILL/RESOLUTION NO. 2255

House Agriculture Committee

Check here for Conference Committee

Legislative Council Amendment Number _____

Action Taken Do Pass Do Not Pass Amended

Motion Made By Rep. Brandenburg Seconded By Rep. Uglem

Representatives	Yes	No	Representatives	Yes	No
Dennis Johnson, Chair	✓		Tracy Boe	AB	
Mike Brandenburg, Vice Chair	✓		Rod Froelich	AB	
Wesley R. Belter	✓		Richard Holman	✓	
Joyce M. Kingsbury	✓		Phillip Mueller	✓	
David S. Rust		✓	Benjamin A. Vig	✓	
Mike Schatz		✓			
Gerry Uglem	✓				
John D. Wall	AB				

Total (Yes) 8 No 2

Absent 3

Bill Carrier Rep. Brandenburg

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

REPORT OF STANDING COMMITTEE (410)
March 25, 2009 12:02 p.m.

Module No: HR-54-5775
Carrier: Brandenburg
Insert LC: . Title: .

REPORT OF STANDING COMMITTEE

SB 2255: Agriculture Committee (Rep. D. Johnson, Chairman) recommends DO PASS
(8 YEAS, 2 NAYS, 3 ABSENT AND NOT VOTING). SB 2255 was placed on the
Fourteenth order on the calendar.

2009 TESTIMONY

SB 2255

**Testimony by Sean M. Fredricks
Ohnstad Twichell, P.C.
Counsel for Red River Joint Water Resource District and Cass County Joint Water
Resource District**

**Before the Senate Agriculture Committee
In Support of SB 2255**

**North Dakota Legislature
Bismarck, North Dakota
February 6, 2009**

Chairman Flakoll, members of the Committee, I appreciate the opportunity to testify in support of SB 2255. My name is Sean Fredricks, and I am an attorney with the Ohnstad Twichell Law Firm in West Fargo. I represent the Red River Joint Water Resource District, the Cass County Joint Water Resource District, and several individual water resource districts, including the Southeast Cass Water Resource District, the Maple River Water Resource District, the North Cass Water Resource District, the Rush River Water Resource District, the Sargent County Water Resource District, the Richland County Water Resource District, and the Dickey County Water Resource District.

SB 2255 does not seek a major shift in eminent domain authority. Rather, this bill seeks only a change in eminent domain *timing*, and not in overall eminent domain rights. SB 2255 will permit water resource districts to protect approved State Water Commission cost share dollars, to comply with their construction permits from the State Engineer, and to prevent landowners from unfairly demanding exorbitant right of way compensation. Many entities in North Dakota, including Cities, Counties, and several state agencies, already have quick take authority; SB 2255 would not even put water resource districts on level playing fields with those other entities.

Defining "Quick Take" Eminent Domain

Water resource districts already have the power of eminent domain to acquire right of way to construct water projects. In addition, any time Federal dollars are available for projects, water resource districts also have the authority to commence "quick take" proceedings. However, most projects do not include any Federal cost share, and so water resource districts must comply with the standard condemnation proceedings in Chapter 32-15 of the North Dakota Century Code.

Under normal eminent domain proceedings, a water resource district is not entitled to possession of condemned property until "the entry of judgment" on the matter. See N.D. Cent. Code § 32-15-29. Entry of judgment does not occur until the conclusion of a trial to determine the value of the property, which, in some cases, can take a year or more.

In a "quick take" proceeding, a water resource district is entitled to possession of the right of way once it deposits the appraisal amount with the district court. The landowners still have an opportunity to litigate the value of the property; in the meantime, the water resource district has the legal right to possession of the property to begin construction on its project. In quick take proceedings, landowners still have the same rights to dispute appraisal amounts, and to ensure water resource districts are paying them a fair amount for right of way. But in the meantime, the quick take process provides water resource districts the legal authority to commence construction while the parties litigate the value of the property. The only difference between a quick take condemnation and a normal condemnation action under Chapter 32-15 is the *timing* when a water resource district may take possession; landowner rights to dispute property values remains the same.

Protecting State Dollars and State Permits

Water resource districts currently have quick take authority when there are Federal dollars appropriated for a project. SB 2255 only seeks to add quick take authority when there are State funds available for a project. For projects that do not receive Federal or State cost share, water resource districts would not have quick take, and would operate under standard eminent domain procedures. The addition of quick take authority when there are State dollars available will protect water infrastructure projects, State cost share dollars, and State permits.

Anytime the North Dakota State Water Commission approves cost share dollars for a project, the water resource district must enter into a "Cost Participation Agreement" with the State. Under those agreements, water resource districts must obtain all the necessary right of way for their projects. If a landowner will not sell the necessary right of way to a water resource district for a project, and the parties engage in lengthy and expensive condemnation proceedings, State cost share dollars for that project may be in jeopardy.

Typically, the State will put approved cost share dollars on hold until all litigation is complete. In the meantime, the State agreements contain several contingencies that could jeopardize cost share on a project if lengthy litigation is necessary. For example, if a water resource district is engaged in lengthy condemnation litigation, and State funds run short for some reason, the State agreements permit the State to terminate the cost share. From water resource districts' perspectives, the sooner they can have access to property to construct a project, the sooner they receive their State cost share dollars, and the less their cost share dollars will be at risk.

In addition, the State Engineer's office must approve a construction permit before a water resource district may construct a project. Those permits require completion of construction within two years. If a water resource district must complete a condemnation trial (or worse, multiple condemnation trials) before it can enter upon property to begin construction, its two-year window

under its permit may expire. Obtaining quick take authority in situations where State dollars are available will be crucial in protecting State permits.

SB 2255 would allow Water Resource Districts to obtain all necessary right of way in a timely manner to protect State cost share dollars and to comply with construction permits. At the same time, landowners would retain their right to litigate the value of right of way.

Protection from Unreasonable Compensation Demands

The quick take procedure would provide safeguards for water resource districts against landowners demanding exorbitant compensation. In one instance, a water resource district I represent concluded \$4,000 per acre was a fair price for right of way on a particular drainage project. The landowners along the proposed drainage project agreed the price was fair, and the water resource district then awarded a contract to commence construction. However, immediately prior to commencement of construction, a single holdout landowner demanded \$32,000 per acre, and prohibited the Board's entry upon his property until the Board met his demands.

In that case, the water resource district had two choices: (1) it could commence a condemnation action against that landowner to have a court determine a *fair* amount for the right of way, a process that would have taken approximately one year or longer, to the detriment and cost of the water resource district and the project, as well as the other landowners who needed drainage relief; or (2) it could pay the landowner the exorbitant compensation he sought, again at the expense of the water resource district and the project, and in a manner that was unfair and inequitable to other landowners who already accepted \$4,000 per acre. In the meantime, the contractor would have demanded a higher contract price to offset construction delays. The water resource district ultimately negotiated further with the landowner and paid the landowner \$22,000 per acre. The board

concluded, and the other landowners agreed, that paying the unreasonable price, while unfair, was necessary to accomplish the project.

The project above included State cost share dollars (though not for right of way). If SB 2255 had been in place at the time this situation arose, the Board could have filed a quick take condemnation action against the landowner to litigate a *fair* value for the right of way. I am certain the Court would *not* have awarded \$32,000, or even \$22,000, per acre. More than likely, the number would have been closer to the \$4,000 per acre amount the Board paid other landowners. At any rate, this situation is an excellent illustration of why water resource districts need quick take authority when there are State dollars available on a project, and why water resource districts support SB 2255 to safeguard their projects.

Many Other Entities Possess Quick Take Authority

One additional point for consideration is the fact that many other State entities and political subdivisions already have quick take authority. For example, the following entities and projects already have quick take authority:

1. North Dakota State Water Commission
2. Southwest Pipeline Project
3. Northwest Area Water Supply Project
4. Devils Lake Outlet
5. Water Districts (rural water systems)
6. Counties
7. Cities
8. North Dakota Department of Transportation

These entities have quick take authority *regardless of any Federal or State cost share*. In other words, SB 2255 would not even put water resource districts on an even playing field with these other entities and projects. Rather, water resource districts simply want the ability to protect their projects

when State cost share dollars are available. SB 2255 will provide that protection, for the benefit of water resource districts, their projects, and the people of North Dakota.

This is an important piece of legislation, and we urge its passage. Thank you for your consideration.



Testimony by Gary Thompson

President of the North Dakota Water Resource Districts Assn.

Senate Bill 2255

Mr. Chairman, Committee Members, my name is Gary Thompson and I would like to thank you for allowing me to testify here today on behalf of the North Dakota Water Resource Districts Association.

At our annual meeting in December of 2008 the North Dakota Water Resource Districts Assn. adopted a resolution in support of this legislation and would ask for a do pass on SB 2255

**Testimony by Michael Buringrud
North Cass Water Resource District
Cass County Joint Water Resource District**

**Before the Senate Agriculture Committee
In Support of SB 2255**

Mr. Chairman, members of the Committee, my name is Michael Buringrud and I am the Chairman of the North Cass Water Resource District and a member of the Cass County Joint Water Resource District. I support SB 2255 and I respectfully request a Do Pass recommendation from the Agriculture Committee.

Like many of my fellow water managers around the State, I am a farmer, and I appreciate and respect individual landowner rights. As a water manager, I can assure the Committee that, in instances when we need to acquire property to construct a project, the North Cass Water Resource District, and other water resource districts in Cass County and around the State, want to pay landowners a fair price for their land. SB 2255 will not change that. Rather, SB 2255 will only provide water resource districts with quick take authority when the State approves cost share for a project. Quick take authority in those instances will allow water resource districts to construct our projects without delay, it will protect taxpayer money from unreasonable delays, and it will protect our State dollars. We want to pay landowners a fair price, but we do not want to allow savvy landowners an opportunity to take advantage of taxpayer money when they recognize we do not have quick take authority.

Finally, I was surprised to learn that other government agencies in North Dakota already have quick take authority, while water resource districts lack the same authority. In my opinion, water projects are just as important as projects constructed by those other entities, and we should have the same authorities and tools so we can construct the State's water infrastructure.

The North Cass Water Resource District and the Cass County Joint Water Resource District request passage of SB 2255.

**Testimony by Rodger Olson
Maple River Water Resource District
Cass County Joint Water Resource District**

**Before the Senate Agriculture Committee
In Support of SB 2255**

Chairman Flakoll, members of the Committee, my name is Rodger Olson. I am the Chairman of the Maple River Water Resource District, and Vice-Chair of the Cass County Joint Water Resource District. Both the Maple River and Cass County Joint Boards support SB 2255.

Over the last few years, the Maple River Board has constructed a number of water projects in Cass County, including drainage and flood control projects. Currently, the Maple River-Rush River Joint Water Resource District is reconstructing Lower Swan Creek to provide flood protection for the City of Casselton and surrounding areas, an important project for Cass County. On all of these projects, land acquisition has presented contentious and expensive issues. SB 2255 would create a fair and level playing field for water resource districts as we acquire right of way, for the benefit of our projects and for the benefit of taxpayers.

In most instances, landowners recognize the substantial benefits our projects provide, and we negotiate fair prices with those landowners for right of way to construct the projects. Unfortunately, we also encounter landowners who demand unreasonable reimbursement for their land. We do our best to reason with these landowners, but in some situations, we have no choice but to pay more than the land is worth. That is not fair to other landowners, nor is it fair to taxpayers. However, we recognize the clock is always ticking on our State permits, and, to some extent, on our State cost share dollars. Passage of SB 2255 will place water resource districts in a better position to construct projects in a timely manner, it will protect landowner rights to receive fair prices, it will protect taxpayer money, and it will prevent landowners from holding projects hostage.

The Maple Water Resource District, the Cass County Joint Water Resource District, and I urge a Do Pass on SB 2255.

Peterson Coulee Outlet Association

3321 54th Avenue North East

Maddock, North Dakota 58348

Comments to,

Senate Bill 2255

In 2001, the Fifty-Seventh North Dakota Legislative Assembly passed House Bill No. 1151, which added a new section to North Dakota Century Code Chapter 61-02 authorizing the North Dakota State Water Commission to employ “quick take” possession of property interests for the Devils Lake Outlet and limiting the landowners’ right of appeal to the assessment of damages. Consequently, although the fundamental justification for the exercise of eminent domain implies that the resulting benefits from public use of the land will supercede the benefits enjoyed by the private landowner, under House Bill No. 1151 landowners along the route of the Devils Lake Outlet were prohibited from weighing the benefits of public use of the property against the benefits derived from their continued private use of the land.

The result, of course, was that the State Engineer used “quick take” to acquire private property interests for a \$28 million Devils Lake Outlet

project that he knew would be worthless before it was built and for which he admitted to *The Grand Forks Herald* (August 27, 2008) he had made no determination of economic justification.

Senate Bill No. 2255 now proposes to amend North Dakota Century Code Section 61-16.1-09, Subsection 2, to expand the authority of local water resource districts from exercising “quick take” eminent domain ~~from~~^{for} projects for which federal funds have been appropriated, to also include those for which state funds have been appropriated.

Federal regulations require that economic feasibility and environmental acceptability be demonstrated before taxpayer monies are expended on projects. However, as has unequivocally and unfortunately been shown with the worthless and wasteful Devils Lake Outlet, North Dakota statutes and regulations do not require the demonstration of efficacy, economic feasibility or environmental acceptability before taxpayer revenues are spent on water projects.

Senate Bill No. 2255 would expand the folly and the waste of taxpayer dollars that we have seen with the Devils Lake Outlet to every water resource district in the state. The members of those water resource boards are appointed and not elected, and they have no direct accountability to the citizens. Expanding the eminent domain authority of water resource

boards to include "quick take" further reduces their accountability and the ability of the public to hold them accountable.

Not only should water resource boards be prohibited from exercising "quick take" authority, but when exercising eminent domain, they should be required to acquire fee title to the land, rather than an easement, so landowners do not continue to be held responsible for taxes, weed control, fines for violations of environmental regulations, and other liabilities, as is the case with the Devils Lake outlet. If appropriate, the land could be leased back to the landowners.

Unless the North Dakota Legislative Assembly is prepared to exercise diligent and meaningful oversight over the expenditure of state revenues on water projects, enactment of Senate Bill 2255 will amount to an inexcusable abdication of your responsibility to the citizens and the taxpayers of the state.

Peterson Coulee Outlet Association

Thelma Paulson, Pres.

Thelma Paulson, President

Phone #(701) 438-2700

Attachment #6

SENATE BILL NO. 2255

Warren Solberg

11601 25th Street South

Horace, ND 58047

solberg@cord.edu

*Same given
to House.*

Relating to exercise of the power of eminent domain by water resource districts

I strongly disagree with the wording change in Senate Bill 2255. The burden of proof should be on the water district as to the need to take the land for the water project. The land owner should not have to fight to regain title to their property when it has been taken by act of law and not by reason. This bill is being proposed so that Irene Olson, my 86-year-old widowed cousin's land can be condemned for Fargo's flood protection--an area called the mini-bypass. The area to be protected by the bypass has no benefit for the city of Fargo. The Southeast Cass Water District is aware of two other routes for flood protection in this area that are less expensive. One project would be \$7.5 million less and the other would be \$15 million. Make the right decision and vote no on this proposed change. This change is bad for all property owners in the state.

Warren Solberg

#1
3/20/09

Testimony by Sean M. Fredricks
Ohnstad Twichell, P.C.
Counsel for Red River Joint Water Resource District and Cass County Joint Water
Resource District

Before the House Agriculture Committee
In Support of SB 2255

North Dakota Legislature
Bismarck, North Dakota
March 20, 2009

Chairman Johnson, members of the Committee, I appreciate the opportunity to testify in support of SB 2255. My name is Sean Fredricks, and I am an attorney with the Ohnstad Twichell Law Firm in West Fargo. I represent the Red River Joint Water Resource District, the Cass County Joint Water Resource District, and several individual water resource districts, including the Southeast Cass Water Resource District, the Maple River Water Resource District, the North Cass Water Resource District, the Rush River Water Resource District, the Sargent County Water Resource District, the Richland County Water Resource District, and the Dickey County Water Resource District.

SB 2255 does not seek a major shift in eminent domain authority. Rather, this bill seeks only a change in eminent domain *timing*, and not in overall eminent domain rights. Water managers are landowners and farmers, first and foremost. They value individual property rights, and they want landowners to receive fair compensation for their land. SB 2255 will in no way alter individual landowner rights to receive fair payment for their land. Again, this is just a matter of timing. Understandably, some landowners oppose the entire concept of eminent domain. Water managers do not want to debate the merits of eminent domain; they simply want to change the *timing* of their existing rights so they can timely access property to construct projects.

Note that many State and local entities in North Dakota, including Cities, Counties, and several state agencies, already have quick take authority; SB 2255 would not even put water resource



districts on level playing fields with those other entities. To the extent some oppose the very concept of eminent domain, we respect those opinions. The framers of our Federal and State constitutions, and ultimately the North Dakota legislature, created the concept and made it the law of the land in North Dakota. Water resource districts simply want the same *timing* rights that other local and State entities currently have so they can protect their State cost share dollars, protect their State construction permits, and avoid unnecessary compensation lawsuits with just a few unreasonable landowners.

Defining “Quick Take” Eminent Domain

Water resource districts already have the power of eminent domain to acquire right of way to construct water projects. Under normal eminent domain proceedings, a water resource district is not entitled to possession of condemned property until “the entry of judgment” on the matter. See N.D. Cent. Code § 32-15-29. Entry of judgment does not occur until the conclusion of a trial to determine the value of the property, which, in some cases, can take a year or more.

In a “quick take” proceeding, a water resource district is simply entitled to *possession* of right of way once it deposits the appraisal amount with the district court. Landowners still have the opportunity to litigate the value of the property. In other words, landowners can still challenge the amount of compensation water resource districts offer to purchase their property for a project. In the meantime, the water resource district has the legal right to begin construction on its project.

Water managers want to pay their fellow landowners (who are often their neighbors) fair compensation, and in a quick take proceeding, a landowner still has the same rights to dispute the amount a water resource district has offered for their property. But in the meantime, the quick take process permits water resource districts to commence construction while the parties litigate the value of the property. The only difference between a quick take condemnation and a normal condemnation under Chapter 32-15 of the North Dakota Century Code is the *timing* when a water resource district

may take possession; landowners have the same rights to dispute property values, or even public necessity for a project.

Incidentally, water projects, including legal drains and flood control projects, are clearly public projects, owned by public entities, constructed for the benefit of the public. Quick take does not change the public nature of a given water project; quick take is constitutional, and the passage of the recent constitutional amendment in 2006 has absolutely no bearing on SB 2255.

Protecting State Dollars and State Permits

Water resource districts currently have quick take authority when there are Federal dollars appropriated for a project. SB 2255 only seeks to add quick take authority when there are State funds available for a project. For projects that do not receive Federal or State cost share, water resource districts would not have quick take, and would operate under standard eminent domain procedures. The addition of quick take authority when there are State dollars available will simply protect State cost share dollars and State permits.

Anytime the North Dakota State Water Commission approves cost share dollars for a project, the water resource district must enter into a "Cost Participation Agreement" with the State. Under those agreements, water resource districts must obtain all the necessary right of way for their projects. If a particular landowner will not sell the necessary right of way to a water resource district for a project, and the parties engage in lengthy and expensive condemnation proceedings, State cost share dollars for that project may be in jeopardy.

Typically, the State will put approved cost share dollars on hold until all litigation is complete. In the meantime, the State agreements contain several contingencies that could jeopardize cost share on a project if lengthy litigation is necessary. For example, if a water resource district is engaged in lengthy condemnation litigation, and State funds run short for some reason, the State agreements permit the State to terminate the cost share. From water resource districts' perspectives,

the sooner they can have access to property to construct a project, the sooner they receive their State cost share dollars, and the less their cost share dollars will be at risk (and, ultimately, the less local taxpayers will have to pay in assessments to construct a water project).

In addition, the State Engineer's office must approve a construction permit before a water resource district may construct a project. Those permits require completion of construction within two years. If a water resource district must complete a condemnation trial (or worse, multiple condemnation trials) before it can enter upon property to begin construction, its two-year window under its permit may expire. Obtaining quick take authority in situations where State dollars are available will be crucial in protecting State permits.

SB 2255 would allow Water Resource Districts to obtain all necessary right of way in a timely manner to protect State cost share dollars and to comply with construction permits. At the same time, landowners would retain their right to litigate their compensation for their property, and all landowners would be on a level playing field and would all receive comparable compensation.

Protection from Unreasonable Compensation Demands

The quick take procedure would protect water project dollars against landowners demanding exorbitant compensation. Right of way acquisition for any project really becomes a fairness issue. As you might know, landowners must vote for a project before a water resource district can create an assessment district to construct it. Most landowners negotiate fair prices to sell portions of their land to a water resource district for construction of a project. If one holdout landowner demands unreasonable right of way compensation, that single holdout landowner can hold up a project until they get what they demand (because water resource districts do not have quick take). That simply is not fair to other landowners who accept fair compensation, and who want important water projects for flood or drainage relief for their farmland.

In one instance, a water resource district I represent concluded \$4,000 per acre was a fair price for right of way on a particular drainage project. The landowners along the proposed drainage project agreed the price was fair, and the water resource district then awarded a contract to commence construction. However, immediately prior to commencement of construction, a single holdout landowner demanded \$32,000 per acre, and prohibited the Board's entry upon his property until the Board met his demands.

In that case, the water resource district had two choices: (1) it could commence a condemnation action against that landowner to have a court determine a *fair* amount for the right of way, a process that would have taken approximately one year or longer, to the detriment and cost of the water resource district and the project, as well as the other landowners who needed drainage relief; or (2) it could pay the landowner the exorbitant compensation he sought, again at the expense of the water resource district and the project, and in a manner that was unfair and inequitable to other landowners who already accepted \$4,000 per acre. In the meantime, the contractor would have demanded a higher contract price to offset construction delays. The water resource district ultimately negotiated further with the landowner and paid the landowner \$22,000 per acre. The board concluded, and the other landowners agreed, that paying the unreasonable price, while unfair, was necessary to accomplish the project.

The project above included State cost share dollars (though not for right of way). If SB 2255 had been in place at the time this situation arose, the Board could have filed a quick take condemnation action against the landowner to litigate a *fair* value for the right of way. I am certain the Court would *not* have awarded \$32,000, or even \$22,000, per acre. More than likely, the number would have been closer to the \$4,000 per acre amount the Board paid other landowners.

At any rate, this situation is an excellent illustration of why water resource districts need quick take authority when there are State dollars available on a project, and why water resource

districts support SB 2255 to safeguard their projects. Just a few unreasonable landowners can continue to hold projects hostage by demanding exorbitant right of way prices. That is not fair to the vast majority of landowners out there who want important water projects constructed, and who negotiate and accept *reasonable* prices for their property.

Many Other Entities Possess Quick Take Authority

One additional point for consideration is the fact that many other State entities and political subdivisions already have quick take authority. For example, the following entities and projects already have quick take authority:

1. North Dakota State Water Commission
2. Southwest Pipeline Project
3. Northwest Area Water Supply Project
4. Devils Lake Outlet
5. Water Districts (rural water systems)
6. Counties
7. Cities
8. North Dakota Department of Transportation

These entities have quick take authority *regardless of any Federal or State cost share*. In other words, SB 2255 would not even put water resource districts on an even playing field with these other entities and projects. Rather, water resource districts simply want the ability to protect their projects when State cost share dollars are available. SB 2255 will provide that protection, and it will create a level playing field for landowners, all for the benefit of water resource districts, important public projects, and the people of North Dakota.

This is an important piece of legislation, and we respectfully request a Do Pass from your Committee. Thank you for your consideration.

#2
3/20/09

Testimony by Michael Buringrud
North Cass Water Resource District
Cass County Joint Water Resource District

Before the House Agriculture Committee
In Support of SB 2255

Mr. Chairman, members of the Committee, my name is Michael Buringrud and I am the Chairman of the North Cass Water Resource District and a member of the Cass County Joint Water Resource District. I support SB 2255 and I respectfully request a Do Pass recommendation from the Agriculture Committee.

Like many of my fellow water managers around the State, I am a farmer, and I appreciate and respect individual landowner rights. As a water manager, I can assure the Committee that, when we need to purchase property to construct a project, the North Cass Water Resource District, and other water resource districts in Cass County and around the State, want to pay landowners fair prices for their land. SB 2255 will not change that.

Quick take authority (when State funds are available) will prevent holdout landowners from taking advantage of taxpayer money, and from holding up important water projects. All landowners should receive fair prices, and SB 2255 will ensure that. When a single landowner can demand unreasonable right of way compensation, after other landowners have already sold their property at reasonable prices, that simply is not fair. The quick take process will eliminate that.

I was surprised to learn that other government agencies in North Dakota already have quick take authority, while water resource districts lack the same authority. In my opinion, water projects are just as important as projects built by those other entities, and we should have the same authorities and tools so we can construct the State's water infrastructure.

The North Cass Water Resource District and the Cass County Joint Water Resource District request passage of SB 2255.

#3
3/20/09
2255

Testimony by Joel Halvorson
Trall County Water Resource District

Before the House Agriculture Committee
In Support of SB 2255

Chairman Johnson, members of the Committee, my name is Joel Halvorson. I am a water manager on the Trall County Water Resource District. The Trall County Board supports SB 2255, and we respectfully request a Do Pass recommendation from the Agriculture Committee.

I really want to stress that SB 2255 is really just a matter of timing, and I can assure you that timing has become a major issue in land sales. The Trall County Board has constructed several water projects in recent years, including drainage and flood control projects. Land negotiations have become a large part of our projects. If we have quick take when there is State money available, we know we can treat all landowners fairly. When we do not have quick take, we also know those few unreasonable landowners out there (I'm sure your county has them, too) will put our projects on hold until we pay them their price, no matter how unreasonable. SB 2255 would simply create a fair and level playing field for landowners. That is fair.

On most projects, landowners recognize the value of our projects, and the benefit their land will receive. We negotiate fair prices with those landowners. When we encounter landowners who demand unreasonable prices, we do our best to reason with them, but we know we may have no choice but to pay more than the land is worth. The alternative is to go to court to fight over the price, and that can take many months, and in the meantime, we cannot build our project. That is not fair to residents who need flood or drainage relief, it is not fair to other landowners, and it is not fair to taxpayers in our counties.

The clock is always ticking on our State cost share and our State permits. SB 2255 will protect our projects, it will protect landowner rights to receive fair prices, it will protect taxpayer money, and it will prevent unreasonable landowners from holding projects hostage.

The Trall County Water Resource District respectfully requests a Do Pass on SB 2255.