

2015 HOUSE POLITICAL SUBDIVISIONS

HB 1332

2015 HOUSE STANDING COMMITTEE MINUTES

Political Subdivisions Committee

Prairie Room, State Capitol

HB 1332

2/6/2015

23410

Subcommittee

Conference Committee

Ormonda Musecha

Explanation or reason for introduction of bill/resolution:

Relating to exercise of eminent domain authority on behalf of unelected boards.

Minutes:

Testimony 1, 2, 3, 4, 5

Chairman Klemin: Opened hearing on HB 1332

Representative Toman: This bill seeks to move authority from appointive governing body to elected governing body in eminent domain. It is to protect landowners from nonelected officials.

Chairman Klemin: Can you give examples how this is working and being changed?

Representative Toman: In housing authorities they don't think they should have the power. Water districts also have an issue.

Representative Maragos: Are you aware under the eminent domain authority of appointed officials, do their decisions have to be ratified by the elected officials?

Representative Toman: Not to my knowledge.

Senator Cook: My dad had land taken from him to build interstate. The eminent domain had that power. There was no price offer that was accepted. I take care of my mother's land and eminent domain could have taken the land. Through it though we were able to negotiate a price. When you go to court you better have the money to pay for the land. If I took someone's property and court wanted to give them more money than I wanted to I wouldn't be able to.

Chairman Klemin: In the situation in housing authority the appointive body could not exercise eminent domain but only through the elected people who would that be?

Senator Cook: The Morton county chairman official

Chairman Klemin: Your concern about having to pay would it be then Morton county that would have to pay?

Senator Cook: Yes it would and Morton county would then work better in decisions of eminent domain.

Chairman Klemin: It doesn't really say any procedure here about what to do so what if the housing authority wanted to exercise eminent domain and is this bill passed and Morton County didn't?

Senator Cook: Then it wouldn't happen. I would have to go through Morton County to exercise the power of eminent domain. Morton county and those 5 commissions would have to make that decision and if they decided not to it would not happen.

Representative Maragos: What may exercise the authority only through the governing body means?

Senator Cook: If the housing authority thought they should take a piece of property and the only reason you would be in eminent domain would be if you don't want to sell the property. If there is that problem they would have to go to court for the decision to be made. There will be a negotiation of price then.

Dustin Gawrlylow: Testimony 1

Representative Maragos: Example of the multi-jurisdictional subdivisions?

Dustin Gawrlylow: I would say that mentioned previously water authorities and there are probably others.

Chairman Klemin: Second proposed amendment? On public service commission deciding that would cover areas where the public service commission has no other jurisdiction.

Dustin Gawrlylow: That was just my idea.

Pete Hanebutt: We have policy regarding this and Eminent domain is useful but as a practical matter it is safer for the people to reside in an elected body.

Representative Zubke: Are you aware of situations where eminent domain has been used improperly?

Pete Hanebutt: I am not originally from here I am not sure.

Opposition:

Sean Fredricks: Testimony 2

Chairman Klemin: We understand the process. How does this bill affect you?

Sean Fredricks: Testimony 2

Chairman Klemin: What you're saying is the county commissioners have appointed the water district managers and they did that based on having some confidence in their ability to handle the assignment they have been given and the county commissioners maybe want to rely on those people they have appointed to do their job rather than have them come back to the county commission?

Sean Fredricks: Yes. County commissioners because they feel they understand water but the county commission when they handle water say we appointed these people talk to them. I am not seeing a situation where it has been abused.

Representative Kelsh: Joint water resource district does that mean you have to go to multiple counties to get approved?

Sean Fredricks: We represent multiple we are concerned about the individual.

Representative Beadle: Is it possible under current law for an elected person for them to establish restrictions on that appointive board?

Sean Fredricks: Water resource districts are separate political subdivisions so even though we are appointed by the county commissions, they do have authority over our budget but by law they don't have the authority to make rules that control us.

Representative Klein: In your area, in the past three years how many times have you used eminent domain?

Sean Fredricks: We have filed 3 and it was land owners hoping to stop the process. We have negotiated a process and they haven't gone to court.

Representative Klein: Utilizing this system, how much of a delay would you expect in processing your program?

Sean Fredricks: If they would agree it would take time and delay very much.

Tami Norgard: Testimony 3

Chairman Klemin: Tell us how this affects you

Tami Norgard: Testimony 3

Representative Kelsh: Can you give me an explanation of quick take and who has that authority and who doesn't?

Tami Norgard: Special form of condemnation that has to specifically granted and the difference is when you get title to the property. We file and get the property in a week. The person can fight in court the value. The difference with regular condemnation is we negotiate with the property owner doesn't go anywhere, we file the petition, we don't get the pipe line right away until we have been to court and the jury then through the appeals (two years later) quick take is different and important.

Chairman Klemin: Quick take is constitutional provision it only applies for right of way.

Tami Norgard: It applies to right of way and where the legislature is specifically stated it will apply so it is used in roads, pipe lines...

Mike Loy: Water resource districts are appointed and many times for many years and if there was a problem county commissions would address that and sometimes find new managers. If something is not broken don't fix it.

Representative Beadle: What is the process for removing a water district manager?

Mike Loy: They serve a 3 year term so when the terms expire you can appoint others. There is also a process where you can remove them.

Gary Thompson: Testimony 4

Josh Ihry: Testimony 5

Mark Brodshog: I echo them all.

Jurgen Sewer: I am the chairman of the joint maple river steel county water board and we are building the upper maple river dam if this passes our project would be at a dead stop.

Representative Zubke: Eminent domain makes the process fair.

Representative Zubke: Moved a do not pass

Representative Klein: seconded

Representative Beadle: I do think the elected officials should have a say but I can't think of any amendments either.

A Roll Call Vote Was Taken: Yes 12, No 1, Absent 1 (Koppelman)

Motion carries

Representative Becker will carry the bill

**2015 HOUSE STANDING COMMITTEE
 ROLL CALL VOTES
 BILL/RESOLUTION NO. 1332**

House Political Subdivisions Committee

- Subcommittee Conference Committee

Amendment LC# or Description: _____

- Recommendation: Adopt Amendment
 Do Pass Do Not Pass Without Committee Recommendation
 As Amended Rerefer to Appropriations
 Other Actions: Reconsider _____

Motion Made By Zubke Seconded By Klein

Representative	Yes	No	Representative	Yes	No
Chariman Lawrence R. Klemin	X		Rep. Pamela Anderson	X	
Vice Chair Patrick R. Hatlestad	X		Rep. Jerry Kelsh	X	
Rep. Thomas Beadle	X		Rep. Kylie Oversen	X	
Rep. Rich S. Becker	X		Rep. Marie Strinden	X	
Rep. Matthew M. Klein	X				
Rep. Kim Koppleman	/				
Rep. William E. Kretschmar	X				
Rep. Andrew G. Maragos	X				
Rep. Nathan Toman		X			
Rep. Denton Zubke	X				

Total (Yes) 12 No 1

Absent 1 (Koppelman)

Floor Assignment Besser

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

motion carries

REPORT OF STANDING COMMITTEE

HB 1332: Political Subdivisions Committee (Rep. Klemin, Chairman) recommends DO NOT PASS (12 YEAS, 1 NAYS, 1 ABSENT AND NOT VOTING). HB 1332 was placed on the Eleventh order on the calendar.

2015 TESTIMONY

HB 1332

HB 1332 – Testimony by Dustin Gawrylow (Lobbyist #244) North Dakota Watchdog Network

Eminent Domain by unelected boards

Intent of bill is great, question is whether there are loopholes in the language with regards to whether certain boards that respond to and are appointed by multiple other political subdivisions would be properly abide by the intent.

Suggested Amendments to tighten intent of language:

6. If the appointments of the board are made of by more than one political subdivision, a super-majority of 60% of the appointing political subdivisions must formally concur with the use of the power.

7. For a political subdivision or other state-chartered authority which has a governing body comprised of members from other political subdivisions, the use of eminent domain power may only be used for purposes deemed to be in the public interest. Any use of eminent domain for the purpose of benefiting private for-profit entities must be explicitly approved by the Public Service Commission.

**Testimony by Sean M. Fredricks
Counsel for Red River Joint Water Resource District
Before the House Political Subdivisions Committee
In Opposition to HB 1332**

**North Dakota Legislature
63rd Legislative Assembly
Bismarck, North Dakota
February 6, 2015**

Chairman Klemin, members of the Committee, I appreciate the opportunity to testify before you today in opposition to HB 1332. My name is Sean Fredricks, and I work for the Red River Joint Water Resource District and several individual water resource districts in the State, including several water resource districts in rural counties. Without even the necessity for hyperbole, I can unequivocally say HB 1332 would be catastrophic for water resource districts and the development of water projects in North Dakota. HB 1332 seeks to strip water resource districts of their eminent domain authority, a move that would *reverse over a century of North Dakota legislative policy*. The bill would render water resource districts powerless and hopeless in the face of holdout landowners who refuse to negotiate reasonably, often in an effort to simply kill important public water projects. Not a single water resource district enjoys exercising eminent domain, but without eminent domain authority water project opponents will have the upper hand and will easily prevent water projects in the future. A change of this nature would fly in the face of longtime legislative policy of supporting water development, and would supplant the will of landowners and voters who vote to support important water projects.

HB 1332 Would Create an Anti-Water Project Environment

HB 1332 would strip the eminent domain authority of every “appointed governing body of a political subdivision.” Water resource districts are appointed entities, appointed by their county commissions. However, by law, water resource districts are their own, independent political subdivisions under North Dakota law. Water resource districts build water projects, they have water expertise, and County Commissions appoint water managers based on their water expertise. If HB 1332 passes, water resource districts would basically have to beg their county commissions to step into the water world, and to participate in water projects, projects in which the county commissions have no involvement in developing, to utilize the county’s eminent domain authority. My experience with County Commissions is they want the water resource districts to keep them in the loop, but they would rather not step into the middle of land acquisition negotiations to condemn property.

The prospect of asking another entity to step in solely to borrow their eminent domain authority may not sound daunting, but recognize eminent domain is not a power most political subdivisions take lightly, nor should they. Most political subdivisions are not often excited about the prospect of condemning property even for their own projects if they can avoid it, and their apprehension will be significantly elevated when asked to condemn property for another entity’s project. Public entities must sometimes condemn property; few relish the task, but after years of sweat equity in developing a project, a public entity will often recognize the value and the public need for a project and, if one landowner hold-out tries to kill a project, the public entity will often recognize benefit to the public must outweigh the vocal opposition of a single project opponent.

Over the course of the last several floods, water resource districts have heard the vociferous calls for retention, including by members of the North Dakota Legislature. Passage of this bill, however, would create an additional hurdle in the development of retention.

The Practical Implications of HB 1332

Water resource districts are the entities that develop water projects, they will have the expertise, they will understand the facts, they will know the parties; water resource districts are the entities that should acquire the property, not County Commissions with little or no involvement or interest in developing water resource district projects, and with little or no understanding of all of the relevant facts and players involved. County Commissions will not likely jump at the opportunity to condemn property for a water resource district project.

Despite the seemingly innocuous nature of HB 1332, the change would severely limit the ability of water resource districts to construct projects. The following is a summary of how HB 1332 will work in practice:

- Water projects can take years to develop, and right of way acquisition (by law) must be later in the process (an entity cannot demonstrate “necessity” to acquire property without an approved “project” so water resource districts must spend time and money developing projects)
- Most water resource districts have severely limited general funds and must rely on landowners to vote for a project via a special assessment vote
- A water resource district may develop a project for years, including a study of project feasibility
- The water resource district will engage landowners to determine interest in the project, and to determine if landowners would support the creation of a special assessment district (often several public input meetings, meetings with individual landowners, etc.)
- The water resource district will retain engineering consultants, and incur expenses, to prepare a preliminary design, assist in the benefit analysis, and conduct a special assessment vote
- The water resource district will apply for cost-share from the North Dakota State Water Commission, and any other entity with cost-share available

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- The water resource district will invest substantial time, effort, and money to develop a project to a point where the district is prepared to present the project to an assessment district vote
- The water resource district will conduct the special assessment vote (landowners vote on their own assessments), including mailings, publications, and mandated public hearings
- Landowners vote on the creation of the special assessment district; if they support the project and recognize the project will benefit their property, they will vote to assess themselves (recognize the significance of landowners voting to tax themselves; support must be there)
- If the vote is successful, the water resource district will apply for a permit from the State Engineer's Office and all other applicable permitting agencies (e.g., Corps of Engineers)
- The water resource district is then prepared to negotiate right of way with landowners, likely including appraisals and meetings with landowners
- Under HB 1332, after all of the costs incurred and time invested in developing the project and presenting the project to a vote, despite the voting support of the affected landowners, if even a single landowner holds-out and refuses to sell the requisite right of way, the water resource district will lack the authority to proceed
- The water resource district will have to ask the County Commission to utilize the County's eminent domain authority to condemn the property (a County Commission that has had little involvement in developing the project, and may not be excited about condemning property for the water resource district's project)
- If the County Commission refuses, the water resource district will have no options; the vote of the landowners that voted to assess themselves to support the project will not be heard because the project cannot proceed
- The water resource district will have no method to recover its costs incurred in developing the project; if the water resource district cannot acquire the requisite right of way, it cannot build the project and cannot create an assessment district
- If the water resource district cannot create an assessment district, the water resource district will have to utilize its severely limited general funds (possibly depleting the entire general fund, to the detriment of the entire county)
- Even if the County Commission is willing to condemn property for the water project, the County lacks quick-take (WRDs possess quick-take to protect federal and state cost-share dollars), the project will be on-hold until the completion of the eminent domain trial, and cost-share dollars may be in jeopardy
- The County Commission will not have a firm understanding of the facts of the project, nor of the sometimes delicate landowner relationships forged by the water resource district
- The County Commission will not have a stake in the outcome of the eminent domain proceedings

County Commissions typically defer all water issues to water resource districts (that is why the Counties appoint them). HB 1332 would unnecessarily inject County Commissions into water project development (that is, if they are even willing to get involved by stepping in to condemn property). Water projects are difficult and they engender emotion, emotions of project supporters and project opponents. Water resource districts understand these dynamics, they develop water projects and they should be the entities negotiating with affected landowners, not the County Commissions that lack any true stake in the outcome of a project.

HB 1332 Would Render the Voting Rights of Landowners Virtually Meaningless

Water resource districts do not have large general funds nor do they have many other mechanisms available to fund and finance water projects. With that in mind, water resource districts must ask landowners who would benefit from a project if they support the project enough to vote to assess themselves. Passage of an assessment district under the water resource district statutes is not easy and it requires strong local landowner support for a project. Because of the nature of the statutory procedure for creating assessment districts, right of way acquisition is one of the last steps in development of water projects. If HB 1332 passes, there is a very real danger that landowners will vote for a project via assessment vote, only to have a single hold-out landowner kill the project following the successful assessment vote. That type of result is contrary to the entire voting process.

HB 1332 Would Reverse a Century of North Dakota Legislative Policy

The North Dakota legislature set clear public policy when they created water resource districts in 1981, a policy that recognizes the absolute necessity to manage and develop water resources and water projects in this state, and that recognizes the crucial role water resource

districts must play in developing and constructing water projects. Every water project requires acquisition of right of way, and with that in mind the legislature granted water resource districts the power of eminent domain. For your convenience and benefit, the following is the text of Section 61-16.1-01 of the Century Code, enacted in 1981 (when the legislature abolished county drain boards and created water resource districts):

61-16.1-01. Legislative intent and purpose.

The legislative assembly of North Dakota recognizes and declares that the general welfare and the protection of the lives, health, property, and the rights of all people of this state require that the management, conservation, protection, development, and control of waters in this state, navigable or nonnavigable, surface or subsurface, the control of floods, the prevention of damage to property therefrom, involve and necessitate the exercise of the sovereign powers of this state and are affected with and concern a public purpose. To realize these objectives it is hereby declared to be the policy of the state to provide for the management, conservation, protection, development, and control of water resources and for the prevention of flood damage in the watersheds of this state and thereby to protect and promote the health, safety, and general welfare of the people of this state.

The legislative assembly further recognizes the significant achievements that have been made in the management, conservation, protection, development, and control of our water and related land resources, and declares that the most efficient and economical method of accelerating these achievements is to establish water resource districts encompassing all of the geographic area of the state, and emphasizing hydrologic boundaries.

During that 1981 session, when creating water resource districts, the legislature granted them the power of eminent domain, a power county drain boards and watershed management districts (the predecessors of water resource districts) similarly possessed. In fact, water resource districts and their predecessors have possessed eminent domain authority for *over a century*. HB 1332 would reverse a century's worth of North Dakota legislative policy.

The legislature did not grant districts the power of eminent domain because legislators wanted water resource districts to condemn property at will; rather, the legislature understood that, without eminent domain authority, landowners would not have to negotiate with water resource districts in good faith. Instead, project opponents could stop projects dead in their tracks, knowing that if they held out, the water resource district could not do anything about it and the water project would die. The legislature recognized a single project opponent should not have the power to stop an important public water project that would benefit an entire watershed, and understood the mere existence of eminent domain authority would convince most landowners to act reasonably and to negotiate a fair price for their right of way, instead of holding out in hopes of killing a project. The legislative policy was correct and water resource districts have constructed several important water projects, sometimes with eminent domain and sometimes simply with the authority in their back pockets.

During the 2009 legislative session, the legislature once again recognized the importance of water resource districts' eminent domain authority by enacting legislation to allow districts quick-take authority when necessary to protect State Water Commission cost-share dollars. HB 1332 would completely eliminate that 2009 legislation. Again, the pattern here is HB 1332 would reverse over a century of legislative policy put in place to allow water resource districts to construct important water projects.

Most water resource districts never have to resort to eminent domain; once landowners understand water resource districts have eminent domain authority, and understand they cannot doom a project simply by holding out in the right of way phase, they are significantly more likely to engage the districts in reasonable negotiations for fair and just prices. Water resource districts

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do not enjoy exercising their eminent domain authority, few entities do. Water managers are landowners, they value property rights, and they do not take their authority lightly. In fact, the water resource districts I represent do their best in every situation to negotiate with landowners until it is absolutely clear the landowner will hold-out regardless of the negotiation terms, and even then the districts often proceed with eminent domain proceedings with heavy hearts, but in recognition that it is necessary for the public benefit. If HB 1332 passes and water resource districts lose their eminent domain authority, many projects simply will not happen.

Do Not Pass on HB 1332

North Dakota faces significant challenges regarding water resource development, from flooding to water shortage. HB 1332 would pose a new and devastating challenge to communities fighting to protect and strengthen their communities. In the water community, we often hear the cries for retention as the answer to our flooding problems; if HB 1332 passes, I can assure you we will see even less retention in North Dakota.

We strongly oppose HB 1332, and we respectfully urge a Do Not Pass on HB 1332.

Thank you for your consideration.

Testimony of Tami Norgard
Shareholder with Vogel Law Firm, Legal Counsel for WAWSA
House Bill 1332 – Related to Eminent Domain Changes
Before the House Political Subdivisions Committee
Bismarck, North Dakota – February 6, 2015

Testimony Outline:

1. Eminent Domain is Crucial to Building Drainage and Water Systems

- a. HB 1332 proposes that appointed boards cannot initiate eminent domain independently, but that condemnation must be initiated “only through the elected governing body who appointed that governing body.” This significant departure from current practice would have devastating impacts on project development and would leave political subdivisions embroiled in litigation for years before projects could move forward.
- b. I have reviewed the testimony provided by Sean Fredericks, an attorney who represents many eastern North Dakota water resource districts. In the interests of not duplicating testimony, I’ll simply note that I fully agree with Mr. Fredericks’ analysis of the investment of time and money that water resource districts put into planning and permitting projects, which could be entirely thwarted if a hold-out landowner refuses to grant an easement for a project and if the water resource district does not have the ability to exercise eminent domain. There is a long history of the appropriate and necessary use of eminent domain, at least as leverage when negotiating easements with landowners. There is simply no need to change the law at this point.
- c. In addition to representing the McKenzie County Water Resource District (MCWRD), who has similar concerns addressed by Sean Fredericks, I also represent a few multi-jurisdictional boards such as Western Area Water Supply Authority (WAWSA) and Lake Agassiz Water Authority (LAWA), whose members are appointed by the political subdivisions who are stakeholders in WAWSA and LAWA. The application of HB 1332 creates direct conflicts in legal authorities and is ambiguous in application since these multi-jurisdictional entities lack a single “elected governing body who appointed that governing body.”
- d. Typically, with condemnation under Chapter 32-15, the condemnation litigation must be fully adjudicated before the actual title to the property will vest in a political subdivision. This process, with appeals, could take 2 years. In addition to Chapter 32 condemnation, there is a special form of condemnation that allows “quick take” whereby there is deference to the political subdivision on the need for the taking and the statutes allow the subject property to be transferred immediately, reserving only the issue of valuation for

trial and possible appeal. With quick take, a project is not held up for years in court, unlike regular condemnation. In 2011, the Legislature granted WAWSA the power of quick take, in recognition of the dire need to develop water infrastructure in Western North Dakota to serve the expanding population and industrial growth in that area. Without having the ability to use quick take, the process of negotiating easements with landowners, along with appeals, could have delayed the build out of the main transmission lines throughout the Bakken for years, awaiting trials in clogged court systems and the inevitable appeals.

- e. WAWSA has only used condemnation three times in the construction of over 540 miles of constructed transmission lines, rural water distribution systems, pump stations and other critical infrastructure. In short, it is rarely used and is not abused, but it is significant leverage when negotiating for much needed easements to insure that WAWSA can establish a pipeline route to waiting customers in the most logical, safe, and cost effective manner.
- f. Without the authority of quick-take, a hold-out landowner could deny the rights of their neighbors to gain access to good quality drinking water and could also significantly drive up the cost of the project if they hold out for high prices, which ultimately impacts user rates. It is noteworthy that one WAWSA stakeholder, Williams Rural Water District (WRWD), already has the third highest user rates in the State. HB 1332 eliminates the ability for WAWSA to use condemnation entirely, as there is no entity to initiate condemnation on WAWSA's behalf since WAWSA has no "elected governing body of the political subdivision that appointed [WAWSA]."

2. Legal Ambiguities in Application of HB 1332 will Inevitably Result in Litigation

- a. If passed, HB 1332 prohibits appointed boards from initiating eminent domain independently, requiring condemnation to be initiated "only through the elected governing body who appointed that governing body." While that sounds fairly straight-forward, this bill would create significant ambiguities in application, and governmental entities building projects would likely be subjected to years of litigation before construction could commence.
- b. I have litigated a number of condemnation cases, resulting in jury trials and/or appeals to the North Dakota Supreme Court on behalf of counties, water providers and electric utilities. One of the most common objections asserted by landowners to condemnation is an argument that the condemner lacks the legal authority to condemn for the particular stated purpose. The North Dakota Supreme Court case law establishes that the ability to utilize eminent domain is limited to the precise scope and purpose authorized by the legislature. In particular, the North Dakota Supreme Court has repeatedly stated,

The time, manner, and occasion of the exercise of the power of eminent domain are wholly in the control and discretion of the legislature, except as it is restrained by the constitution of the state. *Board of Comm'rs v. Blue Ribbon Ice Cream & Milk Corp., supra, 109 N.E.2d at 89.* See also *Kessler v. Thompson, supra*. The power of eminent domain, however, "lies dormant in the state until *528 the

Legislature by specific enactment designates the occasion, modes, and agencies by which it may be placed in operation.” City of Pryor Creek v. Public Service Co. of Okla., supra, 536 P.2d at 345–346. See also State v. Stumbo, 222 Or. 62, 352 P.2d 478 (1960); 5A Thompson On Real Property § 2576 (1978).

Johnson v. Wells County Water Resource Board, 410 NW2d 525, 527 (N.D. 1987); Minnkota Power Co-op Inc. v. Anderson, 817 NW2d 325, 328 (ND 2012). In short, political subdivisions are only authorized to use eminent domain in the very specific “time, manner and occasion” in which the Legislature has stated “by specific enactment designat[ing] the occasion, modes and agencies by which it may be placed in operation.” This language is routinely used by landowners challenging condemnation as a basis to claim that the condemnor lacks specifically designated authority to condemn for the particular purpose at issue. This very argument can and has stalled projects for years while they work through the court system.

- c. The Supreme Court’s language requiring specificity is important for the Committee to understand, since HB 1332 creates ambiguities regarding how eminent domain will be applied, as discussed below:
 1. In the case of water resource districts like MCWRD, the members are appointed by county commissioners, but the counties and the water resource boards have vastly different authorities. North Dakota Century Code 61-16.1-09 provides water resource boards with the specific authority to use eminent domain for the very specific purposes of “acquir[ing] the necessary rights in land for the construction of dams, flood control projects, and other water conservation, distribution, and supply works of any nature and to permit the flooding of lands, and to secure the right of access to such dams and other devices and the right of public access to any waters impounded thereby.” Yet, the NDCC chapter providing the legal authorities to counties is devoid of any specific authority provisions that would authorize counties to use eminent domain for this specific list of purposes granted to water resource boards. Given that lack of overlap in specific statutory authorities for which these two political subdivisions can condemn, there will be arguments arising where the water resource board has a specific authority to condemn but the county lacks that same specific authority. HB 1332 requires a county to condemn in the place of the water resource board, yet the county may simply not have the authority to condemn for that purpose. A legal challenge along those lines could result in two years of litigation through the district court and North Dakota Supreme Court.
 2. Another ambiguity is the fact that water resource boards have the power to use quick take to immediately obtain right of way for projects. NDCC 61-16.1-09. Yet, while counties have quick take for road projects, other more general county authorities allowing eminent domain to be used for public water supply projects do not include a provision allowing quick take. As such, if the county must initiate condemnation for the water resource district, there is a question to be litigated over

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whether the county is entitled to use quick take where that right is only granted to the water resource board and not the county itself. The Johnson v. Wells County Water Resource District case focused on whether an entity had quick take authority when it was not specifically included within the statutory authorization. The Supreme Court found that quick take cannot be presumed, but must be specifically granted by statute to the entity.

3. Even in situations where there could be overlapping legal authorities to use condemnation, a county may simply lack the interest, time or money to add a water resource district condemnation case to their caseload. For example, in McKenzie County, neither the State's Attorney nor his two relatively new assistants have any experience with condemnation cases. They currently have one of the highest criminal caseloads in the state and are trying hard to reduce the backlog of criminal cases pending in court. The County Attorney will have neither the time nor prioritization of his client to spend his time pursuing matters on behalf of MCWRD. When it comes to settlement negotiations, the County is not building the project, so it would add a layer of bureaucracy, extra distraction and education of County Commissioners on something that is outside of the portfolios of these Commissioners. Further, at least in McKenzie County, the County Commissioners are very adverse to condemnation as a matter of principal. It could create conflict between water boards and counties when it comes to determinations of whether to initiate eminent domain, who will litigate the case, when to settle and for what, etc.
4. The appointed water resource board members are accountable to county boards. They are appointed and can be removed or replaced at the discretion of the county commissioners, so there is accountability for their actions. In the case of MCWRD, MCWRD regularly apprised the McKenzie County board of the activities and challenges of the water resource board. There is no reason to strip MCWRD of its eminent domain authority.
5. Without indication of abuses of process with the current system, this proposed legislation will only serve to add extra bureaucracy, more work for counties and busy State's Attorneys, and potential for protracted litigation over whether the county actually has the right to condemn or use quick take on behalf of the water resource district.
6. HB 1332 has even more potential for ambiguity for multiple-jurisdictional boards like WAWSA, LAWA and even entities created as commerce authorities pursuant to NDCC Chapter 11-37, like R&T Water Supply Commerce Authority (R&T). With each of these political subdivisions, the boards are made up of directors that are appointed by various stakeholders who have an interest in the Board. The WAWSA board consists of two director appointed from each of 5 entities: MCWRD, Williams Rural Water District, R&T, the City of Williston and Burke Divide Williams Water District. The LAWA board consists of appointed directors from various cities and water systems within 13 counties that are selected at the League of Cities and ND Rural Water System Association meetings. (See NDCC 61-39-03). R&T's board

consists of directors appointed from Ray, Tioga and Stanley. The passage of HB 1332 could be argued to strip these entities of their eminent domain authorities entirely, despite having the specific authority granted to each of them by previous legislatures. If any of these three entities need to initiate eminent domain, there is no “elected governing body of the political subdivision that appointed that governing body” who would step in to exercise eminent domain for WAWSA, LAWA or R&T as required in the amendment. Further ambiguities result from the fact that some of the governing bodies appointing members to WAWSA are actually appointed bodies themselves (R&T and MCWRD). This scenario is simply not contemplated or addressed in the proposed legislation.

7. Similar to the incongruities with MCWRD and McKenzie County having different types of condemnation authorities, the same scenario exists with the multijurisdictional boards. For example, WAWSA has a specific authorization allowing it to use quick take eminent domain, yet WAWSA stakeholders do not all have quick take authority, so despite WAWSA being granted quick take authority, challenges may arise as to whether it could be used and by whom. And if MCWRD or R&T were expected to initiate the condemnation in their own jurisdictions for WAWSA, there are further ambiguities created since both MCWRD and R&T are appointed boards and cannot independently initiate eminent domain under HB1332.

3. Consequences of Passing HB 1332

- a. In short, HB1332 seems straight forward when reading the single sentence added, but given vastly different authorities of various entities and very strict interpretation by courts over what authority actually is granted to an entity, litigation over the particular scope of eminent domain granted and to whom will stall projects for years. If WAWSA did not have condemnation authority to build water pipelines, WAWSA would be required to pay much more in easement prices; essentially whatever amount 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 this important water distribution project in Western North Dakota would escalate significantly or else the plan to serve all the intended users would have to be abandoned.
- b. The very premise of the WAWSA funding mechanism created by the Legislature was to allow industrial water sales revenue to pay off the \$150 million in State loans for infrastructure build out. The WAWSA 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 HB 1332 would halt or limit WAWSA’s continued construction and hamper the ability for WAWSA to pay its loans.

4. Conclusion – WAWSA Requests a Do Not Pass Recommendation

- a. If HB1332 passes, multijurisdictional boards like WAWSA and its stakeholders, including MCWRD and R&T, will be precluded from using their condemnation authority in negotiations with landowners for easements and/or to obtain right of way. Passage would be a bold negative statement by this Legislature to (1) residents who have waited patiently for water lines to be built out to their properties; (2) the oil industry who relies on water supply to frac and maintain production at wells in the Bakken, and who adds significantly to the State budget and Resource Trust Fund; and (3) refineries and gas plants in the Bakken, as well as businesses throughout the state who would require the guarantee of a water supply before moving forward with their business plans.
- b. WAWSA requests a Do Not Pass Recommendation.

4.1 1332 2/6/2015

Testimony by Gary W. Thompson
Chairman for the Red River Joint Water Resource Board
Before the House Political Subdivisions Committee
In Opposition to HB 1332

North Dakota Legislature
63rd Legislative Assembly
Bismarck, North Dakota
2015

Chairman Klemin and members of the Committee, Thank you for allowing me to testify here today. My name is Gary Thompson and I am the Chairman of the Red River Joint Water Resource Board, a board that has county participation from the South Dakota border to the Canadian border. I am here today representing these member counties, at their request, in total opposition to House Bill 1332.

First of all we as water managers do not like using eminent domain, but without it projects that have been voted on and have a positive vote, would have a hard time moving forward. For example, one or two parties that don't like a project or that want to be overly compensated for land that is in the project could stall the construction of said project for a lengthy time period which would be detrimental to the majority of people that want said project, and end result, would cost more money creating contingency overruns resulting in said project not to be built.

A project that has a positive vote deserves to move forward without delay, and cannot if eminent domain is taken away from the Water Resource Districts and given to the County Commissioners, who are elected officials. Water managers are appointed by the County Commissioners for reasons of impartiality when it comes to the political arena. I have personally talked with one of my County Commissioners in my home county of Traill, and asked him if he knew of HB 1332, and he replied, no. I then told him what was in HB 1332, and asked him if he would like to have eminent domain power over the water board, he replied by saying "that is the job of the water board and that he doesn't want eminent domain power for projects that come before the Water Resource Districts.

Without repeating testimony similar to Sean Fredricks, who is employed by the Red River Joint Water Resource Districts of North Dakota, we totally agree with Mr. Fredricks testimony and ask for a Do Not Pass on HB 1332.

Thank you very much for the opportunity to testify here today.

5.1
HB 1332
2/6/2015

STEELE COUNTY

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3RD DIST. Ted Johnson, HOPE
4TH DIST. RANDY RICHARDS, HOPE
5TH DIST. Russell Walcker, SHARON

North Dakota House Political Subdivisions Committee
State Capital
Bismarck, ND 58505

Members of the Committee:

The Steele County Commission hereby urges the House Political Subdivisions Committee to reject proposed House Bill 1332. This bill seeks to strip all County Water Resource Districts of the power of eminent domain and transfer that authority to the County Commissioners. Water Resource Districts are the entities that develop water projects. They have the expertise to manage water projects, understand the facts, the law and the parties involved. They need to have the power to acquire the land that they are required by law to manage and maintain. The Steele County Water Resource District has served this County well by developing and managing drainage and water retention projects. The power of eminent domain is critical to their continued mission.



Steele County Commission Chairman

Steele County Water Resource District

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MEMORANDUM


TO: North Dakota House Political Subdivision Committee Members
FROM: Steele County Water Resource District
SUBJECT: HB 1332
DATE: February 3, 2015

The Steele County Water Resource District strongly opposes HB 1332 and would like you to vote against this bill. Under this bill, only the County Commissions could proceed with eminent domain acquisitions. Eminent domain authority is absolutely crucial for our Water Resource Districts to construct projects. Although we prefer to acquire right of way amicably through fair negotiations, some project opponents simply refuse to grant right of way (regardless of compensation offered) in an effort to de-rail a project from proceeding. We rarely have to utilize our eminent domain authority, but if a landowner refuses to sell the right of way needed for a project, we sometimes have no choice. Further, just the knowledge that we have the eminent domain authority is sometimes enough for project opponents to recognize they can't stop a project simply by refusing to sell us an easement.

While we cooperate with our County Commissions in many instances, the Steele County Commissioners would prefer to avoid utilization of eminent domain to accommodate a water project (a project that is not even the County Commission's project).

This bill would be unfavorable for water resource districts and we would have difficulty building projects moving forward if this bill passes. Please vote "NO" on HB1332.

Thank you!



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