

2017 HOUSE ENERGY AND NATURAL RESOURCES

HB 1244

2017 HOUSE STANDING COMMITTEE MINUTES

Energy and Natural Resources Committee Coteau –A Room, State Capitol

HB 1244
1/20/2017
27177

- Subcommittee
 Conference Committee

Committee Clerk Signature

Kathleen Davis

Explanation or reason for introduction of bill/resolution:

relating to the authority of boards and county commissioners to approve the exercise of power of quick take eminent domain by water resource boards

Minutes:

Attachments #1-#2

2:00

Chairman Porter: Called the committee to order on HB 1244. Clerk read the short title.

Rep. Weisz, from District 14, in support of HB 1244, a simple bill but complicated subject. This bill is in reference to quick take authority for water resource boards. I want to be absolutely we're not taking away eminent domain process for anybody. I want to explain the difference between eminent domain and quick take. Eminent domain is a process is used to either easement or take over property for the greater public good and there's a process to go through and the property owner has the ability to object and negotiate and try to resolve the issues, go to court, win or lose in that process. Quick take is eminent domain on steroids. What it does, it's quick take, this again, is reference to water resource boards which is one of the only ones that have quick take authority. Very few have quick take authority on their own without specific authorization for it. Quick take, takes away the need to negotiate in reality. If the water resource board comes in, says we need your lawn for a drainage ditch, and you object, they can say well that's too bad, here's the offer and here's where we're going to go. They put the dollars in an escrow account and within 30 days they have the ability to take land and do what they want with it. The only thing you can do under quick take to challenge is the price. That will go to a court and you can negotiate the price. By the time you negotiate the price, the project is done. It's built. So you don't have the ability to negotiate for example do I want crossings (inaudible) do I have the ditch to move that a half mile or whatever your issues might be. Those are eliminated under quick take. Under quick take, not only can they take an easement and but they can take your property. They can make that call. They can decide how much and what is part of the quick take process. So myself personally and then some others have some real objections to the idea of an unelected, and water resource boards are not elected, you have an unelected entity that has the ability to take your property without even a sense of real negotiation decides the price. (inaudible) is not prohibited that they negotiate and the fact the law says they should negotiate, but as

others may testify, that there's been (inaudible 6:08) when an oil committee, all they have to do is show up and say this is what we want to do, if the property owner says no, well we tried, we negotiated, this is the price, take it or leave it, this is the location, and if you don't like it we're going to go with quick take. Generally, that causes them to cave because you have no other option. You're going to lose it anyway. So that's the reason for this bill. This bill does, it doesn't take away their authority. It merely says that an elected body, which is the county commission, will make that decision. I think that's extremely important. For those of you who may not understand often how (inaudible 6:59) water resource boards work, and the whole idea of a drainage district or an assessment, water boards are unelected, and these projects are not necessarily for the greater public good. They're for the economic benefit of boards within that drainage assessment. There's nothing wrong with that, that's a good thing. But generally people vote to assess themselves because they're going to get an economic (inaudible 7:28). In other words, the value of their land is going to go up. The revenue from that land will increase because they'll have less drown outs (inaudible 7:36). So they look at if my tax is "X" amount per acre, and I feel it will increase my land value by 10%-20%-30% or my revenue might go up 5%, they will certainly vote for that assessment and that's the right thing to do. But at the same time, their ability to do that shouldn't supersede the rights of someone downstream who gets no benefit, because their land is already maybe flowing to the river or to whatever drainage system and they don't necessarily have a say in this under quick take. Again, eminent domain was made for the greater public good. We all understand that you have a utility line that benefits everyone. You would have things that benefit the whole, not just for the economic benefit, it's for the greater public good. Whether it's a highway, pipeline, or whatever it might be. Where in this case we're looking for the economic benefit and in (inaudible 8:46) it'd be 3 or 4 and they only serve on the water resource board. So talk about a conflict of interest, you have a severe one in that case. So again this doesn't take away the ability to quick take. It moves it to an elected body that at least has to answer to its citizens. It does nothing to affect eminent domain. (inaudible 9:09) will always be there. So I would hope this committee would look favorably upon HB 1244 and give it a do pass. Thank you. Questions?

9:32

Chairman Lefor: On line 9 where you're talking about quick take eminent domain, you're not affecting eminent domain whatsoever. You're not affect eminent domain at all, you're just talking quick affect correct?

Rep Weisz: Absolutely correct. (inaudible 10:04) then those who aren't big fans of the eminent domain process, but it's necessary and we need it. This will in no way affect (eminent domain). It only affects the quick take portion of that. As I said, eminent domain on steroids.

Rep. Bosch: Do you know a number of how many quick take actions happen in a year?

Rep Weisz: Very few. Generally, when they (inaudible 10:42) quick take, people, I'm certainly away of a couple that have ended up in court. It doesn't affect me, this bill isn't because of me, but, fortunately I'm in an area where drainage districts don't work so I don't have ability to take advantage of that. Prior to 2009 they didn't have the authority of quick take. And you (inaudible 11:15) ask the question, how many thousands of miles of drainage

districts and acres were done prior to prior to 2009. So this (inaudible11:26) to do a drainage assessment and form drainage districts and do drains. Prior to 2009 it wasn't interpreted that they had quick take authority. This has all been the the last 6-7 years.

Rep. Seibel: Who other than water resource boards have the authority for quick take? Is there anyone?

Rep Weisz: Airport boards have quick take. Generally, when we have a federal project requires quick take authority. That's (inaudible) so then they're granted quick take authority. An example would be the Fargo diversion. It's federal funds. You're southwest, they have quick take authority. Other than that, my understanding is only water resource boards and aviation, airport authorities have quick take authority that can have it within their ability and not specific. Someone could correct me.

Rep. Seibel: Would this bill only affect water resource boards? Or does that chapter pertain to all quick take?

12:48

Rep Weisz: My understanding would (inaudible) because they're the only ones that have inherit quick take authority, and it would not affect those who get quick take authority by the federal appropriation process.

Chairman Porter: To clarify Rep. Seibel, that this is written in Chapter 61-16 so it is strictly related to water.

Vice Chairman Damschen: I'm on a water board. I don't promote using eminent domain either but quick take is. We don't usually try to acquire land. We usually try to acquire land. We usually ask for an easement and sometimes that's on a project where it's been voted on and maybe 51% have approved it. You might have the landowner you talked about down the road a ways that didn't want it but without the drain going through his land, the project would not work. So we would probably exercise eminent domain to get an easement or else we would work out an agreement where he lets us go through his land without an easement, which kind of puts us at risk, the water board. I guess quick take wouldn't very often be needed by water boards for drainage projects would it?

Rep. Weisz: For drainage projects, I don't see where quick take is ever needed. My rationale being, is yes, eminent domain may take some time. But that issue they voted for the drainage assessment, it's been there probably since time began. The argument that we have to do it now, doesn't hold water, (pardon the pun) they certainly could have started the process 2 years earlier or 10 or 20 years earlier. It won't take away the rights, if you have to if you can't get an agreement, you certain can go through the eminent domain process. The key would be the landowner would at least have some ability then to say, where you want to put a ditch, I'm thinking of putting a building here some time on the other side of my farm, and now I can't do that if you do it. So okay, can we move the ditch a quarter of a mile or whatever, and you have the ability to negotiate that. With quick take if they want, it doesn't have to be an easement as you said, you normally don't want to own land, they can ask for an easement, and under quick take, they could say we're just going to own 10-20-30 acres, whatever they

need. Rep. Anderson it's going to go down that spot and I guess you won't be putting your building up there if that's what you want, or your shelterbelt. That's where again, prior to 2009, water resource boards never had that problem. So they're able to do these projects. I think they can, will it delay some projects in some cases, sure it will. That's part of the process to protect the individual property owners' rights. As an example, if quick take was available say for a city, and this is how it works out these in the country. Let's say you owned a business in downtown Bismarck, and you own a lot that was empty. The business next to you says, I'd really like part of that lot for a parking lot because traffic, business, (inaudible 17:02). So the city comes to you and said they'd like to purchase that. You say no, because I might want to build something there 5 years from now. So they only need half the lot. You say no, I'm not interested. If they had quick take like water resource boards, they could say were giving you "X" amount per acre, we're going to take the whole lot, not just half, and in 30 days we can start building a parking lot. The only recourse you have is to go to court and argue if the price they gave you for that lot was fair and reasonable. That's the only thing you can argue. That's what's happening in some cases out here in the country. To me that would be why cities don't have quick take. I'm not implying anything. To me that's the perfect of what would happen.

18:02

Vice Chairman Damschen: I just want to remind everyone that our constitution has an amendment that doesn't allow eminent domain for economic development. I understand your point. Similar things have happened in cities. I'm not promoting quick take; I'm just wondering if it's a big issue. I understand your point.

Rep. Weisz: As I pointed out from comments I'm getting across the state, it isn't that it's actually used very often, but it's the hammer. If you don't agree to what we're offering, we're going to quick take and you're not going to get any money for yours because it'll be in escrow and we're going to do it the way we want anyway.

Vice Chairman Damschen: I definitely agree. Eminent domain or quick take should not be used as a negotiating tool. I think too often it is. We've had that discussion in this committee in years past.

20:20

Rep. Mock: Full disclosure. My wife works for an engineering company and they work with water projects. Because I'm a thoughtful and attentive husband, I listen to every time we talk about work (laughter). Let the record show, that I am an attentive and thoughtful husband and listen every time we talk about the water project she's working on. She would be rolling her eyes right now if she were in the room.

Chairman Porter: You can get a copy of the tape.

Rep. Mock: I have missed many anniversaries, so anything I can do to build up for a good anniversary present would be helpful! As I look at this, as it affects water resource boards, because it's going to remove authority from them to ultimately approve or deny quick take, what expertise do we have or does the county commission have to fully understand the larger

water resource picture downstream, water quality flooding downstream impacts, because at the end of the day we're ultimately removing the authority from those that understand the water issues, and bringing it to an elected body that may not have the full understanding of big picture consequences. I'm just curious have you thought about this and what assurances we can have that we're not removing expertise from the process.

Rep Weisz: It's not going to change any of the engineering or any of that. Statute requires they go through this process, they have to have the engineering, do the flow, have to show the impact. All of that is done currently and it wouldn't change any of this because they do that before they even decide if the project is feasible and to estimate the cost so people that are going to vote for or against it, know what the cost is going to be and what their tax will be. You've make the assumption that the water resource board are water experts and they're not. I don't mean to imply, but they are just local landowners within that are appointed by the county commission, who may or may not be very good at their job. But in many cases, many of them have a person stake in what may or may not be happening. I don't see where their expertise is any greater necessarily on the water resource board versus the county commission. Certainly they have the availability of the engineering and anything else that is done, when the water resource board would go to them and say, John Doe, we got to have quick take authority, we haven't been able to come to an agreement with them, they list reasons why we can't do (inaudible) eminent domain process. Why that would somehow severely affect the project and then the county commission makes that decision. It either says yes go ahead or no you can't go ahead with quick take. It wouldn't stop the project because they could still go through the normal eminent process. We're not asking the county commission to take over the water resource board and the decisions they make. Only if you want to go to that level, you have to convince us, who are elected by the people and why you have to have quick take in this instance.

23:00

Chairman Porter: In the current law, (1) in this bill, it's not taking away the authority from the water resource board to recommend quick take to the county commission, it's only moving the authority to grant it from the water resource board to the elected officials. Am I correct in that?

Rep Weisz: That's absolutely correct.

Chairman Porter: (2) On lines 21-22, are you aware of any projects where water resource boards have threatened, technically tried to use quick take where the state or federal funds have not been part of the project, but they think they have that authority anyway?

Rep Weisz: The issue that has come because of this language, what does it mean by state funds. So the issue seems to be if the water commission agrees to cost share a drainage assessment, is that an appropriation of state funds. That's really where the change came in 2009. They said they had quick take because the interpretation was then by the water resource boards. If we get money from the water commission, then we can use quick take. Virtually every project probably gets some funding from the water commission.

Chairman Porter: So you think there's very few then that are stand alone, locally assessed taxed projects for a drainage system that's strictly local funds raised in that assessment district that they all get a little cost share from the state and even getting a penny allows them the ability to use quick take for that project.

Rep Weisz: I can't say for certainty, I just know basically the cost of these projects, most of them, the vote is contingent on water commission funding in most cases. But are there some, maybe someone else can answer that questions, I don't know. I would make it a safe bet close to 100% don't happen unless there is some water commission funding.

Chairman Porter: ? Further testimony in support of HB 1244?

26:38

Mike Dwyer, attorney, representing the ND Water Resource Districts Association: In 1973 the legislature decided that every county would have a water resource district due to the water management issues across the state. In the eastern 2/3 or eastern 1/3 of the state, surface water management is a primary issue to improve agriculture production to clear rivers, streams from obstructions. Over the years, the legislature has added responsibilities and mandated some requirements on water resource districts to take certain actions. I want to clarify a couple things. (1) quick take can only be used for right away not for acquiring fee, title, interest, and land. The water resource districts have no objection to county commissioners approving the use of this authority. We think it's a very important tool for projects. There are some projects that are local, that are not funded, that do not receive funding from state or federal government. In the case of state funding, the legislature, has indicated and increasing interest in having funds that are allocated, be used up before and not be carried over too long. In any event, water managers are farmers, landowners. They use these authorities only as a very last resort. There was an interim committee study on this issue and numerous water managers testified that they go through extensive negotiations and meetings with landowners before this authority is utilized. In the event we have water resource districts have a very good working relationships with county commissions. So we have no objections to this requirement.

Chairman Porter: further questions? Further testimony in support? Opposition?

29:20

Pete Hanebutt, with the ND Farm Bureau. We appreciate what Rep. Weisz is doing with this bill. We also have policy that says we're against takings. So I'm going to be consistent with what I said in the Senate and what I said in the interim study committee and say, we still don't like the idea of quick take and that takings are going to be a problem for us as an organization. This bill doesn't go far enough because it still allows that quick take. So while I think the Senate bill has been amended, and I like the idea of putting it with an elected body, it doesn't go far enough because the gun is still there on the table before you start the negotiations, and that's a challenge for us as an organization.

Chairman Porter: So that makes you opposed because it doesn't go far enough?

Pete Hanebutt: It makes us a little shaky on it yes. It's great to go this step further that what we have in the interim but it doesn't go far enough because that quick take gun on the table before you start the negotiation is still a challenge for us.

Chairman Porter: Typically, people would stand up in support of making it less of a gun or a smaller caliber, and then ask us to make it a bigger gun. To oppose is rather odd.

Pete Hanebutt: I certainly appreciate that and whether I'm neutral, against or for is kind of a challenge, but I feel I need to error on the side of opposition because it is a taking and that's what our policy says.

Chairman Porter: Further testimony in opposition?

31:09

Julie Ellingson, ND Stockman's Association. For similar reasons as described by the previous speaker, we have a hard line policy regarding eminent domain as well as quick take. She presented Attachment #1.

Chairman Porter: Do you have that bill number?

Julie Ellingson: I believe the bill number is SB 2047.

Chairman Porter: Questions? Further testimony in opposition? Mr. Paczkowski you had a letter do you want to explain your letter.

33:06

John Pasckowski, assistant state engineer, State Engineer/State Water Commission, presented Attachment #2, we're neither for or against.

Rep. Keiser: You say you would like clarification on an issue. What do you want us to say regarding that issue?

John Paczkowski: Right now if you look at the bills that exist right now, Lines 22-23 talk about whether state or federal funds are appropriated. If they are then quick take is an option for water resource districts. The question is, is a state appropriation money given specifically for a project, or is it funds that go through our agency for a cost share? The water resource districts believe because they receive funding for a cost share that they have quick take ability. We're uncertain as to that. Our agency does not have quick take except in specific examples, SW pipeline, Naws (? 35:22), Devils Lake outlet projects. So the question before you is what does that language mean.

Rep. Keiser: That's my point. Which one of the two options, when money is appropriated or when money becomes available? What would your recommendation be?

John Paczkowski: I'd have to defer and talk with our state engineers as far as what our agency policy would be. I don't have an answer for you today.

Chairman Porter: Has the position of the department been when the project is approved or when money is actually made available in the budget or when the money has been spent? Currently, what is the current policy of the agency?

John Paczkowski: The way the cost share works is, a project sponsor would come and ask the water commission for cost share dollars. Those would be approved by the commission at that time. We don't make that payment until such time as the project sponsor has incurred those expenses, and essentially turned those receipts over to us and then we pay those monies back. How the water resource districts have treated it, once they get commission approval, then they're under the assumption they have quick take authority. When they use that necessarily that's up to their discretion.

Rep. Roers Jones: It sounds like from your comments, that the quick take authority is only available when they have state or federal funding. Based on the testimony of Mr. Dwyer, there are some local projects without state or federal funding that do qualify for quick take, so I wanted to know, is there a hard line? Does the quick take only apply when there is state or federal funding? Or is it sometimes available for local funded projects?

37:58

Chairman Porter: My understanding is the way it's written in this section of the century code in regards to quick take, it's only if federal or state funds have been appropriated. That a local project without any other cost share availability, would not have the ability to do quick take. They may still have the available to do eminent domain, but quick take is not part of it. Is that the understanding of the water commission?

John Paczkowski: That's my understanding as well.

Rep. Keiser: Since the agency doesn't know which way they would like it to be, would it be possible to have Mr. Dwyer come back and express what his preference would be?

Vice Chairman Damschen: If there was a situation where a local water board really needed the quick take, or eminent domain, they'd almost have to have it before they got the money or it's kind of a chicken before the egg. Which came first? If they can't finish the project, they can't get the cost share from the water commission, and probably can't bill them, or show them the bill they need reimbursement for, 35%-45% or whatever. Wouldn't that negate the option of even using it?

John Paczkowski: The project would still move forward. There's costs incurred. It would just be once they get to that point; they'd have to come to some sort of negotiation. So just the ability to have quick take doesn't preclude the water commission from paying out funds that they approved for cost share dollars. Yes, there would be a point in time in a project, if somebody stopped it, that progress would cease, and therefore no further expenses incurred and therefore no further payments made.

Rep. Heinert: Has there been any court cases?

John Paczkowski: I am not a lawyer, but as I understand it, with the Fargo Diversion Project, the location of the inlet control structure, I believe there is some legal proceedings that took place relative to the use of quick take for the property needed for that project.

Rep. Heinert: Did that court case identify provide any language you could use in reference to answering your own question on this.

John Paczkowski: I'm aware of the language there, and I'm not sure all of those cases have been settled yet.

Rep. Heinert: Has an attorney general's opinion been sought on this language at all?

John Paczkowski: Not that I'm aware of.

Vice Chairman Damschen: In the Fargo diversion situation, is that on a county water board so it would have exercised quick take or would that be the diversion authority?

41:54

John Paczkowski: In that instance it would be the water resource district that is part of the FM Diversion Authority that would have that ability to utilize that quick take. It wouldn't be all of the member groups of that organization.

Chairman Porter: Further questions?

43:00

Mike Dwyer: 2 years ago the water commission raised the same question and asked for clarification so the water resource districts met with the state water commission and the state engineer. To clarify any confusion that possible could exist, we didn't think there was confusion because we think it's pretty clear what appropriated means. To clarify we jointly, the water commission and water resource districts came up with this language. Line 23 the word appropriated, strike that word, put in place of it approved by Congress the legislative assembly or any federal or state agency. That was language we came up with together to clarify any question about what appropriated means. We clearly understand that if there's no federal or state funds, we know we don't have quick take, we know that.

Chairman Porter: I thought that was the case too.

Rep. Roers Jones: inaudible – no mic on

Chairman Porter: Was there a HB from that previous session was referenced?

Mike Dwyer: Yes, HB 1095 from previous session. After this question was raised we met with the water commission and presented this language to the Senate and they adopted it. Then the bill ended up in conference committee. It ended up getting referred to an interim committee. So that law did not pass.

Chairman Porter: That's where SB 2047 originated from was that interim committee off of that language that was presented last session that was taken out and asked to be studied.

Mike Paczkowski: This particular language really wasn't the main focal point of that bill 2 years ago. It was, should county commissions approve it. Actually that bill completely took away the quick take authority. That's why it was referred to the interim committee.

Chairman Porter: No more questions, and he closed the hearing on HB 1244.

2017 HOUSE STANDING COMMITTEE MINUTES

Energy and Natural Resources Committee Coteau –A Room, State Capitol

HB 1244
2/16/2017
28468

- Subcommittee
 Conference Committee

Committee Clerk Signature

Kathleen Davis

Explanation or reason for introduction of bill/resolution:

relating to the authority of boards and county commissioners to approve the exercise of power of quick take eminent domain by water resource boards

Minutes:

Amendment #1

Chairman Porter: Called the committee to order on HB 1244. Rep. Weis brought us a proposed amendment.

Rep. Weis: We have Amendment #1 which seeks to clarify the language in HB 1244. I know the Water Commission asked for some clarification having to do with appropriating money. The amendment inserts “directly to the district by Congress or the legislative assembly” after “appropriated”. In other words if it’s a federal project, it’s automatically eligible for quick take and it’s eligible through a water board if it’s appropriated by the legislative assembly. The amendment merely clarifies the language the Water Commission wanted further clarification.

Chairman Porter: Questions? So we’re clear, right now the “directly to the district by Congress or the legislative assembly” has been viewed differently by the local political subdivisions. This straightens out that language. Committee we have the proposed amendment in front of us.

Rep. Keiser: move to adopt the amendment

Rep. Anderson: second

Chairman Porter: We have motion to adopt the amendment from Rep. Keiser, second from Rep. Anderson. Discussion? All in favor say Aye, opposed. Voice vote, motion carries. We have an amended bill.

Rep. Devlin: move a Do Pass as Amended.

Rep. Seibel: second

Chairman Porter: we have a motion from Rep. Devlin, second from Rep. Seibel for a Do
Pass as Amended to HB 1244. Discussion? Roll call vote:

Yes 12 No 0 Absent 2 Motion carries. Rep. Devlin is carrier.

2/16/17 DW

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Title.02000

Prepared by the Legislative Council staff for
Representative Weisz
February 16, 2017

PROPOSED AMENDMENTS TO HOUSE BILL NO. 1244

Page 1, line 23, after "appropriated" insert "directly to the district by Congress or the legislative assembly"

Renumber accordingly

Date: 2-16-17

Roll Call Vote #: 1

2017 HOUSE STANDING COMMITTEE
ROLL CALL VOTES
BILL/RESOLUTION NO. 1244

House Energy & Natural Resources Committee

Subcommittee

Amendment LC# or Description: 17.0737.01001

Recommendation

- Adopt Amendment
- Do Pass Do Not Pass Without Committee Recommendation
- As Amended Rerefer to Appropriations
- Place on Consent Calendar

Other Actions Reconsider _____

Motion Made By Rep Keiser Seconded By Rep Anderson

Representatives	Yes	No	Representatives	Yes	No
Chairman Porter			Rep. Lefor		
Vice Chairman Damschen			Rep. Marschall		
Rep. Anderson			Rep. Roers Jones		
Rep. Bosch			Rep. Ruby		
Rep. Devlin			Rep. Seibel		
Rep. Heinert					
Rep. Keiser			Rep. Mitskog		
			Rep. Mock		

*Voice
Vote
Carries*

Total (Yes) _____ No _____

Absent _____

Floor Assignment _____

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

Date: 2-16-17

Roll Call Vote #: 2

2017 HOUSE STANDING COMMITTEE
ROLL CALL VOTES
BILL/RESOLUTION NO. 1244

House Energy & Natural Resources Committee

Subcommittee

Amendment LC# or Description: _____

Recommendation

- Adopt Amendment
 Do Pass Do Not Pass Without Committee Recommendation
 As Amended Rerefer to Appropriations
 Place on Consent Calendar

Other Actions Reconsider _____

Motion Made By Rep. Devlin Seconded By Rep. Seibel

Representatives	Yes	No	Representatives	Yes	No
Chairman Porter	✓		Rep. Lefor	✓	
Vice Chairman Damschen	✓		Rep. Marschall	AB	
Rep. Anderson	✓		Rep. Roers Jones	AB	
Rep. Bosch	✓		Rep. Ruby	✓	
Rep. Devlin	✓		Rep. Seibel	✓	
Rep. Heinert	✓				
Rep. Keiser	✓		Rep. Mitskog	✓	
			Rep. Mock	✓	

Total (Yes) 12 No 0

Absent 2

Floor Assignment Rep. Devlin

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

REPORT OF STANDING COMMITTEE

HB 1244: Energy and Natural Resources Committee (Rep. Porter, Chairman)
recommends **AMENDMENTS AS FOLLOWS** and when so amended, recommends
DO PASS (12 YEAS, 0 NAYS, 2 ABSENT AND NOT VOTING). HB 1244 was placed
on the Sixth order on the calendar.

Page 1, line 23, after "appropriated" insert "directly to the district by Congress or the
legislative assembly"

Renumber accordingly

2017 SENATE ENERGY AND NATURAL RESOURCES

HB 1244


2017 SENATE STANDING COMMITTEE MINUTES

Energy and Natural Resources Committee Fort Lincoln Room, State Capitol

HB 1244
3/17/2017
Job#29396

- Subcommittee
 Conference Committee

Committee Clerk Signature



Explanation or reason for introduction of bill/resolution: Relating to the authority of boards of county commissioners to approve the exercise of the power of quick take eminent domain by water resources boards; relating to the authority of water resource boards to exercise the power of quick take eminent domain.

Minutes:

Attch#1=Mike Dwire; Attch#2=Nancy Willis(left after hearing)

Chairwoman Unruh: Let's open the hearing on HB 1244.

Rep. Robin Weisz, Dist. 14: Here in support of HB 1244. You have already dealt with quick take. This bill helps water resource boards by giving them quick take authority when there is direct appropriation. If there are specific allocations from state or federal, to a project, they would have quick take authority. They would still have to go through county commissioner's approval to use quick take. This does not affect eminent domain whatsoever. Eminent domain is there and will stay there. If you put money in escrow, you can begin digging in 30 days. The only thing that can be negotiated is the price that you are being paid for the easement or property. Quick take has the ability to take an easement or take property itself. That is to be used very, very judiciously. Quick take is not being used much. When it is used, it is the hammer to be used on those who are holding out. Puts the property owner at extreme disadvantage. In most cases, the quick take is used not for the general public benefit. Eminent domain is used for a road or utility and benefits the greater public good. Water boards use it for drainage districts. People get together because it is for their economic benefit. We are benefitting a distinct group. It can be just a handful, depending how they formed their district. It may be at the expense of someone else. That process should be very limited. You need to negotiate but they do not have to now. Reality is, if they say no to what is offered, they are told, we will do it anyway. If you do not do it, you may stretch a project for 2-3 years more. The land did not change its shape overnight. Been there for years. These are not emergency projects. These are for economic benefits. They could tax themselves to get a drain put in. This is restrictive but it is intended to be. Drainage districts are a good thing. We have to be careful on how much authority we give. Any questions? (7.00)

Vice Chair Kreun: Who should have the final say on the quick take if it is necessary?

Rep. Weisz: It would be county commission. They are elected. The water resource board is not elected members. If people are upset, they have elected officials they can go after.

Vice Chair Kreun: And you are supporting that process?

Rep. Weisz: I am aware there are some objections to the appropriation part. But I support that, but there needs to be some elected body that looks at it, yes.

Chairwoman Unruh: Further testimony in support?

Mike Dwyer, ND Water Users Assoc., and ND Water Resource Districts Assoc.: We support the concept that Representative Weisz, to have county commission approval. We are concerned with line 23, because the legislature never directly appropriates to a water resource districts. It appropriates to the Water Commission. This subject was the topic of an interim study. That meeting resulted in the Interim Water Topic Committee introduced a bill SB 2047 that set forth procedures that water resource districts have to follow if they are going to use quick take. That is currently in the House. We support those procedures and when this was taken up by this committee, you amended the bill and required county commission approval. You required the county commission to have a hearing and invite the landowner. That was better. We think that 2047, because it went through a two-year study, we you have to sign an affidavit stating you did follow all the procedures. Also, you had some amendments restricting lack of easements. We think this is a better vehicle for this. What I passed out is from SB2047 (see Attch#1). It is not just the quick take, but the threat of quick take, also. (11.29). It is highlighted in yellow. This is limited to easements. We think SB2047 is a better bill. Questions? (12.59)

Sen. Roers: If I was going into negotiations with a potential lease relationship with the water board, and I had my attorney beside me, you don't think he would advise me to bring up the threat of quick take? Wouldn't that open up a can of worms?

Mike: Are you saying that the attorney for the landowner would bring it up?

Sen. Roers: Correct. If this language is put into law, and you end up at the hearing you talked about, and someone asks were you ever threatened with quick take? He will be able to say, yes, we had conversations on our second meeting about quick take. That would constitute a threat. That would jeopardize the whole ability to negotiate.

Mike: I think the water resource districts are trying to make every accommodation possible. Use all available to get county commission to approve and not use it as a threat, but to say we need this tract or easement for pipeline or drainage project. If you fail in those negotiations, at that point you say we will exercise that authority and go to county commission and ask for a hearing. Hopefully, the landowner would say, they did not threaten upfront, but they explained why they needed this for the project. They explain why they have to take the next step. Not have to be a threat at the beginning. (15.28)

Sen. Schaible: We heard that lots of these project are long term and not immediate issues. Eminent domain could be used. Can you comment on this? Are we seeing long term projects or issues that become where eminent domain could have the same effect, but we are using quick take because it is quicker. Should we have started the eminent domain process sooner? Or it is not an issue until we are close to a dead line?

Mike: For the most part, you don't acquire the easements upfront because you don't know if you are going to get a positive vote. May not know if you can get funding. So you go through all the steps and then finally when you get local approval, and get funding approval either state or federal. Federal is a one-year appropriation. We are considering a bill that a project reapplies if the project goes past 4 years. If you are in that second biennium, you may have to reapply if you try eminent domain. You may not get it if you reapply. The timing is an issue.

Chairwoman Unruh: Further in support? In opposition?

Shaun Federicks, Red River Joint Water Resource Dist.: I echo Mike and support SB2047. We say medium take, instead of quick take. It is important for landowner to have the right of meaningful negotiations. Our board always negotiate, and we do not rush a quick take and not use it as a threat. We support county commission approval. This would make the process

lengthier, but we support that. With regard to HB 1244, the language in line 23, would eliminate quick take for water resource districts. We are in the water management bucket, and that is how we get out cost share. This would eliminate it for us. Hope that is not this committee's objective. It is an important tool in our toolbox. Gave an example in Fargo (20.10-20.57) Drainage is the lifeblood of the Red River Valley. I do take issue that these drainage projects do not represent the public good. Not the case. Most of the drainage projects benefit hundreds of people and hundreds of properties and communities. The comment that drainage has not changed in centuries, why is all of a sudden so important to have a drainage project. Hydrology does change, conditions, change, development changes property. We have been in a wet cycle. Some projects do take a long time to develop. The reason they are coming together now, is because some landowners have experienced lots of precipitation in the last 10 years. Maybe they didn't get that much precipitation before. The way the cost sharing system and way the permitting system works, it is important that right of way is the last piece of the puzzle. They do vote to tax themselves, they recognize it is an important project. If we are out here asking for cost share from Water Commission and plan permits from State Engineers Office. The very last step is to get the right of way. We are not going to start writing checks to people before we know that the project has passed and we have all permits and dollars in line. Our permits are good for 2 years. Our cost share is good for 2 years until we need another cost share agreement. The timing is important in right of way. We do not want a single landowner to derail our project that people have voted for a water district to do. We oppose the language in line 23. (25.05)

Chairwoman Unruh: I am concerned that the right of way is last. That has lessened the significance and importance of that piece of the project. Just because it comes last, I don't think that should bring it down a level. As we try to rush to get these projects, and squeeze that right of way at the end, I feel the value of that has lessened and the value of the negotiations with the landowner has lessened. We are in such a rush. Not sure if that can be fixed with this bill. (26.20)

Shaun: I do appreciate that concern. I can speak for the boards that I work with. We invite people in well before we got going with the assessment process. We wanted to ask if there is support for a project. Would we even go through this process and apply for cost share and permits? Do you support it enough to provide right of way to accommodate the project? We ask them what they think is a fair price. We engage them very early in the process. I appreciate your concern. Does this bill force boards to do like we do? No. SB 2047 does not do that either. I hope for good faith by all boards.

Chairwoman Unruh: Further opposition? Any agency testimony? Hearing is closed.
(Attch#2 was left after the hearing – Nancy Willis)

2017 SENATE STANDING COMMITTEE MINUTES

Energy and Natural Resources Committee
Fort Lincoln Room, State Capitol

HB 1244
3/30/2017
Job # 29825

- Subcommittee
- Conference Committee

Committee Clerk Signature 

Explanation or reason for introduction of bill/resolution:

Minutes: 

Chairwoman Unruh: This is being addressed in another Senate bill. I do not have number.

Sen. Armstrong: I move a Do Not Pass on HB 1244.

Sen. Cook: I second.

Chairwoman Unruh: Any discussion? Call the roll. YES 6 NO 1 -0- absent.

Do Not Pass, Passed. **Sen. Cook** will carry the bill.

3/30/17
Date:
Roll Call Vote #: 1

**2017 SENATE STANDING COMMITTEE
ROLL CALL VOTES
BILL/RESOLUTION NO. HB 1244
engrossed**

Senate Energy and Natural Resources Committee

Subcommittee

Amendment LC# or Description: _____

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

Motion Made By Sen. Armstrong Seconded By Sen. Cook

Senators	Yes	No	Senators	Yes	No
Chairman Jessica Unruh	/		Sen. Erin Oban	/	
Vice Chair Curt Kreun	/				
Sen. Kelly Armstrong	/				
Sen. Dwight Cook	/				
Sen. Jim Roers	/				
Sen. Don Schaible		/			

Total (Yes) 6 No 1

Absent -0-

Floor Assignment Sen. Cook

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

REPORT OF STANDING COMMITTEE

HB 1244, as engrossed: Energy and Natural Resources Committee (Sen. Unruh, Chairman) recommends DO NOT PASS (6 YEAS, 1 NAYS, 0 ABSENT AND NOT VOTING). Engrossed HB 1244 was placed on the Fourteenth order on the calendar.

2017 TESTIMONY

HB 1244

#1
HB 1244
1-20-17

**North Dakota Stockmen's Association
Testimony on HB 1244
Jan. 20, 2017**

Good morning, Chairman Porter and House Energy and Natural Resources Committee members. For the record, my name is Julie Ellingson and I represent the North Dakota Stockmen's Association (NDSA), a 3,000-plus-member cattle industry trade organization.

The Stockmen's Association has a hard-line policy supporting private property rights and opposing threats to those rights, such as eminent domain and quick-take authority. Our organization believes that they should be used only in absolutely necessary situations, when no other options exist. Experts have testified on other bills this session that, unfortunately, quick-take authority is often used unnecessarily, when other more appropriate and palatable options exist.

The Stockmen's Association recognizes the merits of HB 1244 as an important first step in the right direction for property owners. We think adding the county commission step improves the scenario considerably.

Still, the bill is lacking a couple other property rights protections that are included in another bill on the same genre, SB 2047, that your Senate colleagues have passed and are sending your way. Those protections prohibit blanket easements (specific parcels must be defined) and remove no-longer-applicable easements that otherwise muddy landowners' title and have no further purpose. We would respectfully ask that you consider adding those features to this bill or working from SB 2047, which is a more preferred option.

Additionally, HB 1244 pertains only to water resource district boards' quick-take authority. Your committee might also consider adding these features to statute pertaining to other entities with quick-take authority, or studying that issue through the interim if there are additional considerations and study to be conducted.

Thank you for the opportunity to comment.

1-20-17
HB 1244
#2

TESTIMONY ON HOUSE BILL NO. 1244

House Energy and Natural Resources Committee

**John Paczkowski, Assistant State Engineer
Office of the State Engineer/State Water Commission**

January 20, 2017

Mr. Chairman and members of the House Energy and Natural Resources Committee, my name is John Paczkowski. I am the Assistant State Engineer for the Office of the State Engineer/State Water Commission. I am here on behalf of State Engineer Garland Erbele to present our testimony regarding House Bill No. 1244, which would create a new subsection to N.D.C.C. §§ 11-11-14 and seeks to amend N.D.C.C. §§ 61-16.1-09(2).

The amendment to N.D.C.C. § 61-16.1-09(2) requires the board of county commissioners to grant approval before a Water Resource District can secure a right-of-way via the quick take eminent domain process. The State Engineer has no comments or concerns on this process but rather seeks clarification regarding the phrase "...for which federal or state funds have been appropriated..." found on Lines 22 and 23.

Is the authority to utilize quick take granted only if the legislature appropriates funds for a specific project or does it also extend to a district that receives funding from the State Water Commission without a specific legislative appropriation?

The answer to this question is important because property rights are required before the Office of the State Engineer can process Construction Permit Applications which are required prior to building water control projects that affect the property of others. Examples of projects that require construction permits and have the potential to affect adjacent properties are flood control dams, levees, and flood walls like those being proposed as protection measures in a number of the state's larger cities.

Again, we have no concerns with HB 1244 other than the desire to clarify the issue of when state funding enables quick take authority.

Thank you for the opportunity to comment on this matter. I will be happy to answer any questions you might have.

17.0737.01001
Title.

Prepared by the Legislative Council staff for
Representative Weisz
February 15, 2017

1
2-16-17
HB1244
Weisz

PROPOSED AMENDMENTS TO HOUSE BILL NO. 1244

Page 1, line 23, after "appropriated" insert "directly to the district by Congress or the legislative assembly"

Renumber accordingly

3-3-17

On behalf of the Ransom County Water Board, I request you support SB 2047 and oppose HB 1244. Our request is based on the need to preserve the ability to use the so called "quick-take" process in acquiring needed right-of-way leading up to the implementation of approved drainage projects. The same burden of proof is required as to the necessity of property acquired under quick-take as in the ordinary condemnation process and fair-market value is still the minimum compensation required by law. However the added time and administrative costs that would be imposed by the loss of quick-take is an unnecessary burden on needed projects that nearly always are constricted for both time and budget. Additionally, it should be left to the discretion of each group of County Commissioners as to how much step-by-step action the County Commissioners wish to have in the acquisition of Water Board projects. The RCWB serves at the discretion of the Ransom County Commissioners and a Commissioner attends nearly all of our meetings.

Thank-you for your consideration of our input. I regret we were not able to get our comments to the Legislative Committee earlier.

Ronny Hartl
Enderlin, North Dakota
Ransom County Water Board Member

from
SB 2047

From
Mike
Dwine

HB 1244
3-17-17
att #1
ps1

1 requiring a signed receipt, and receiving the signed receipt or
2 documentation of constructive notice.

3 (b) Sending the landowner a written request for a meeting by certified
4 mail or commercial delivery requiring a signed receipt if there is no
5 agreement regarding compensation or no response to the written offer
6 within fifteen days of receipt, and receiving the signed receipt or
7 documentation of constructive notice.

8 (c) Sending the landowner a written notice, by certified mail or
9 commercial delivery requiring a signed receipt, of intent to take
10 possession of the right of way in thirty days if there is no agreement
11 regarding compensation or no response to the written request for a
12 meeting within thirty days of receipt, and receiving the signed receipt
13 or documentation of constructive notice.

14 (2) Any written communication to the landowner must include contact
15 information for responding to the board and a description of the required
16 negotiation timeline.

17 (3) A district may not include or utilize any reference to quick take eminent domain
18 during negotiations to acquire the necessary right of way. If negotiation efforts fail, the
19 district shall request approval from the board of county commissioners of the county
20 in which the right of way is located to take possession of the right of way by quick
21 take eminent domain. After receiving the request, the county commissioners shall
22 hold a public meeting and give the landowner sufficient notice of the meeting to allow
23 the landowner to attend. After receiving verification from the district that there has
24 been no reference or threat of quick take eminent domain by the district during
25 negotiations, if the county commissioners approve the use of quick take
26 eminent domain by a majority vote, the district may take immediate possession of the
27 right of way, but not a blanket easement, if the district files an affidavit by the
28 chairman of the water resource board which states the district has fulfilled the
29 required negotiation steps and deposits the amount of the written offer with the clerk of
30 the district court of the county wherein which the right of way is located, may
31 thereupon take immediate possession of the right of way, as authorized by section 16-
32 of article I of the Constitution of North Dakota.

left after hearing



North Dakota Association of REALTORS®

Nancy Willis

*HB 1244
3-17-17
DH #2
pg 1*

To advocate for the success of our members in partnership with our local Associations and the National Association of REALTORS®

**TESTIMONY IN OPPOSITION TO
HB 1244**

Chairman Unruh and members of the Senate Energy & Natural Resources Committee, my name is Nancy R. Willis and I represent the North Dakota Association of REALTORS® (NDAR). NDAR is a professional association comprised of more than 1700 REALTOR® and more than 200 affiliate members.

NDAR's policy on eminent domain and quick take is that we believe in just reimbursement and demonstrated proven need as unconditional requirements for the confiscation of private property by government entities. We oppose unreasonable confiscation.

We are not opposed to eminent domain and quick take when protections are in place to provide just reimbursement and to show proven need. We believe that SB 2047 does that and would rather see SB 2047 address this issue, as opposed to HB 1244.

SB 2047 came out of the Water Topics interim committee and much work and thought was put into addressing landowner and water resource district needs. That bill has been further amended to address other concerns that arose when it was first heard in committee. We would like to see SB 2047 as the legislation that is passed this session addressing this issue.

For that reason, we ask for a Do Not Pass on HB 1244. Thank you.

