

EMINENT DOMAIN "QUICK TAKE" AUTHORITY FOR WATER RESOURCE DISTRICTS

The Fifth Amendment of the United States Constitution provides a prohibition on governmental taking of private property "for public use without just compensation." Governmental taking of private property for public use, the power of eminent domain, is addressed in Article I, Section 16, of the Constitution of North Dakota which provides:

Section 16. Private property shall not be taken or damaged for public use without just compensation having been first made to, or paid into court for the owner, unless the owner chooses to accept annual payments as may be provided for by law. No right of way shall be appropriated to the use of any corporation until full compensation therefor be first made in money or ascertained and paid into court for the owner, unless the owner chooses annual payments as may be provided by law, irrespective of any benefit from any improvement proposed by such corporation. Compensation shall be ascertained by a jury, unless a jury be waived. When the state or any of its departments, agencies or political subdivisions seeks to acquire right of way, it may take possession upon making an offer to purchase and by depositing the amount of such offer with the clerk of the district court of the county wherein the right of way is located. The clerk shall immediately notify the owner of such deposit. The owner may thereupon appeal to the court in the manner provided by law, and may have a jury trial, unless a jury be waived, to determine the damages, which damages the owner may choose to accept in annual payments as may be provided for by law. Annual payments shall not be subject to escalator clauses but may be supplemented by interest earned.

For purposes of this section, a public use or a public purpose does not include public benefits of economic development, including an increase in tax base, tax revenues, employment, or general economic health. Private property shall not be taken for the use of, or ownership by, any private individual or entity, unless that property is necessary for conducting a common carrier or utility business.

The first portion of this provision was adopted as part of the 1889 Constitution of North Dakota. The underscored language was added by a constitutional amendment approved by the voters in 1956. The North Dakota Supreme Court had ruled in previous cases that state and local government in North Dakota did not have "quick take" authority under the eminent domain provision. The court recognized that allowing "quick take" authority provides less protection to property owners than possession after judgment. Prior to the 1956 amendment, the court concluded the reduced protection to property owners from "quick take" authority was authority the people could provide to the Legislative Assembly, but the 1889 constitutional provision did not include that grant.

Although the language added in the 1956 amendment might appear to allow any political subdivisions to exercise "quick take" authority, and the trial court reached that conclusion, the North Dakota Supreme Court in *Johnson v. Wells County Water Resource Board*, 410 N.W.2d 525 (1987) concluded the constitutional provision is not a self-executing grant of "quick take" authority to the water resource board that had attempted to exercise that authority. The court's opinion stated "The power of eminent domain, however, 'lies dormant in the state until the Legislature by specific enactment designates the occasion, modes, and agencies by which it may be placed in operation.'"(Citations omitted)

The Supreme Court concluded the "quick take" provision was added to the Constitution not to grant power to water resource districts but to remove the limitation imposed by previous court decisions that the legislature did not have authority to enact "quick take" statutes.

The Legislative Assembly enacted North Dakota Century Code Section 24-01-22.1 in 1957 to provide the State Highway Department "quick take" authority, enacted Section 2-06-08 in 1959 to provide "quick take" authority for an airport authority, and enacted Section 40-22-05 in 1961 for city special assessment projects. "Quick take" authority has been authorized by legislation for the State Water Commission, counties, water districts, the Devils Lake outlet, Southwest Pipeline Project, and the Northwest Area Water Supply Project.

In 1981, the Legislative Assembly enacted Chapter 61-16.1, relating to water resource district formation and authority. The 1981 provision in Section 61-16.1-09 permitted water resource districts to exercise the power of eminent domain in the manner provided by Title 32, which does not include "quick take" general authority. A 1989 amendment added "quick take" authority for a water resource district for any project for which federal funds have been appropriated. A 2009 amendment added "quick take" authority if state funds have been appropriated.

Consideration of 2015 House Bill No. 1095 raised arguments regarding the "quick take" provision for water resource districts and determining when state funds have been appropriated for a project.

The bill as introduced by the State Engineer would have clarified the definition of the term "drain" and submission timing for appeals to the State Engineer if a water resource board has not acted on a drainage complaint. An amendment before House floor action added "approved by the Legislative Assembly for a specific project" to the water resource district precondition of state fund appropriation to authorize "quick take" authority. The Senate was urged by representatives of water resource districts to remove the "specific project" language and did so. A conference committee considered the arguments for and against the language regarding funding approval for a "specific project." The conference committee ultimately removed the section on "quick take" from the bill and inserted the study directive this committee is considering. The conference committee changes were approved by both chambers.

The conference committee on Senate Bill No. 2015, the appropriation measure for the Office of Management and Budget, was requested to amend the change removed from House Bill No. 1095 into Senate Bill No. 2015, so the restriction of "quick take" to approval of funding for a "specific project" was included in Senate Bill No. 2015 as approved by both chambers. The Governor vetoed this amendment and stated there is no definition of "specific project" so interpretation arguments would persist. The Governor's veto message pointed out this interim study should provide the clear direction as to what policy changes, if any, are needed.