

IN DISTRICT COURT, COUNTY OF CASS, STATE OF NORTH DAKOTA

Cass County Joint Water Resource District,
A North Dakota Political Subdivision,

Plaintiff,

vs.

Donald Robert Cossette, individually; and the
Angela R. Cossette Revocable Living Trust
Dated November 12, 2002, by and through its
trustees and co-trustees Donald Robert
Cossette and/or Major Marjorie Cossette
and/or Angela R. Cossette; and all other
persons unknown claiming an estate or interest
in or lien or encumbrance upon the real
property described in the Complaint, whether
as heirs, legatees, devisees, personal
representatives, creditors, or otherwise,

Defendants.

Case No.: 09-2016-CV-01510

**ORDER DENYING DEFENDANTS'
MOTION TO DISMISS**

[¶1] The above-entitled matter came before the Court on the Defendants' Motion to Dismiss Complaint (Quick Take Eminent Domain). A hearing was held on August 12, 2016. The Plaintiff, Cass County Joint Water Resource District ("District"), was represented by Christopher McShane. The Defendants, Donald Robert Cossette, the Angela R. Cossette Revocable Living Trust, and Angela R. Cossette ("Cossettes"), were represented by Jonathan Garaas. No appearances were made by any other defendants.

FACTS

[¶2] The District is a water resource district formed under Chapter 61-16.1 of the North Dakota Century Code. To combat consistent Red River flooding problems in the Fargo-Moorhead area, the District, along with the United States Army Corps of Engineers (USACE), formed a flood control project ("Diversion Project"). To bring about the necessary water staging

and diversion channeling, property rights of a number of North Dakota parcels must be acquired in preparation for fall of 2016 construction.

[¶3] The North Dakota Legislature appropriated up to \$570,000,000 state funds for the Diversion Project in Senate Bill 2020 of the 64th Legislative Assembly. The USACE appropriated \$5,000,000 to the Diversion Project for the fiscal year of 2016. Federal funding up to \$450,000,000, through the USACE, is expected for the Diversion Project.

[¶4] The North Dakota State Water Commission (SWC) issued a permit for the Inlet Structure construction on July 8, 2016. On July 11, 2016, the USACE with the City of Fargo, the City of Moorhead, and the Metro Diversion Authority signed a Project Partnership Agreement (PPA) for the construction of the Diversion Project including the Inlet Structure. Plaintiff (District) is a member of that partnership.

[¶5] The Cossettes, owners of record of real property west of County Road 17 in Cass County, described in exhibit 1 to the complaint, are effected landowners from the Diversion Project. The Cossettes' property will be needed for the Diversion Project's Inlet Structure.

[¶6] In the winter and spring of 2016, the Cossettes were contacted by the District in an attempt to purchase the Cossettes' property. The Cosettes did not accept any District offer and no counteroffer was extended to the District. On May 18, 2016, the District extended a final written offer to the Cossettes in the amount of \$476,040. On June 1, 2016, the District deposited funds totaling the offer price with the Clerk of the District Court for Cass County.

PROCEDURAL HISTORY

[¶7] On May 31, 2016, the District filed a Summons and Complaint (Quick Take Eminent Domain) with this Court. The Cossettes filed a Motion to Dismiss Complaint (Quick Take Eminent Domain) and an Appeal Arising Out of Faulty Quick Take Deposit on June 21,

2016. The District filed a Motion for Order Confirming Immediate Possession on July 12, 2016, along with a Response to the Motion to Dismiss.

[¶8] On August 9, 2016, The Cossettes filed a Reply Brief Supporting the Motion to Dismiss and in reply to the District's Motion for Order Confirming Immediate Possession. Despite being untimely under Rule 3.2, the arguments therein were largely the same as put forth in the original motion, and were considered by the Court. On August 11, 2016, the District filed a Reply Brief in Support of Motion for Order Confirming Immediate Possession.

[¶9] The Court heard arguments on August 12, 2016, on both the Cossettes' Motion to Dismiss and the District's Motion for Order Confirming Immediate Possession. Below is an analysis of the Motion to Dismiss alone.

LAW AND ANALYSIS

[¶10] The Cossettes arguments stem from Section b, Rule 12 of the North Dakota Rules of Civil Procedure, including parts 1, 2, 4, 5, 6, and 7. Each argument attacks the District's Complaint and thus the Complaint is looked at in a light most favorable to the Plaintiff. Nadan, LLP v. City of Fargo, 2015 ND 37, ¶ 11, 858 N.W.2d 892. The Cossettes' arguments also raise questions of statutory interpretation, and this Court will read the statute in an effort to give every section meaning, including other statutes on the same subject. N.D.C.C. § 1-02-07; Rojas v. Workforce Safety and Ins., 2006 ND 221, ¶ 13, 723 N.W.2d 403.

[¶11] Because the District's Complaint (and request for an Order Confirming Immediate Possession) rely solely on N.D.C.C. § 61-16.1-09(2), an understanding of the quick take provision is necessary. Section 61-16.1-09 provides that a water resource board may exercise the power of eminent domain to secure "any rights, titles, interests, estates, or easements necessary" to carry out its duties. N.D.C.C. § 61-16.1-09(2). This includes acquiring any rights

or title necessary for the construction of “flood control projects.” Id. A flood control project may include projects in conjunction with the federal government. N.D.C.C. § 61-16.1-12.

[¶12] Before a water resource board may acquire a “right of way” under § 61-16.1-09(2), three steps must be met. Id. The water resource board must: (1) be seeking a property interest for “any project authorized in this chapter,” (2) be seeking a property interest for a project “which federal or state funds have been appropriated,” and (3) make a written offer to purchase the right of way and then “deposit[] the amount of the offer with the clerk of the district court for the county where in the right of way is located.” Id. Once all three steps are met the water resource board may take immediate possession of the right of way, as allowed by the Constitution of North Dakota article I, section 16. Id.

[¶13] Here, the District is empowered to exercise quick take, and the three prerequisite steps have been met. Section 61-16.1-09(2) specifically allows a “water resource board” to exercise quick take eminent domain, and the District here is such a water resource board. The Diversion Project’s Inlet Structure is also part of a “flood control project” authorized under Chapter 61-16.1. Further, the District was seeking a right of way on the Cossettes’ land: (1) for the Diversion Project’s Inlet Structure, an authorized project per the SWC permit and PPA; (2) for a project funded by both the North Dakota Senate Bill 2020 and federal funds through the USACE; and (3) only after making a \$476,040 written offer to purchase the right of way and depositing the same with the Cass County Clerk of Court.

[¶14] The Cossettes argue that the District should be bringing this action under N.D.C.C. Chapter 32-15 and that quick take is not appropriate. The Cossettes argue that the interest acquired for the District’s purposes must be a fee simple under N.D.C.C. § 32-15-03. If fee simple is being taken as opposed to a “right of way,” quick take is not available under

N.D.C.C. § 61-16.1-09. While the District can take a fee for such projects, it is not required to. The Cossettes further argue that an easement is limited under N.D. law to 99 years. N.D.C.C. § 47-05-02.1(2). The question of whether or not the District will need to be back in court, pursuant to Chapter 32-15, at a later date to condemn any rights that the Cossettes may have left in the property after taking a “right of way” has no bearing on these proceedings.

[¶15] Based on the foregoing, arguments relying on N.D.R.Civ.P. 12(b)(1) and (6), lack of subject matter jurisdiction and failure to state a claim upon which relief can be granted, respectively, are disposed of. This Court has subject matter jurisdiction in this matter and the claim is proper.

[¶16] Next, the Cossettes argue this Court lacks personal jurisdiction over the parties and that an unidentified tenant on the Cossette property completely stalls the quick take process. Both of these arguments are without merit. First, the personal jurisdiction issue is really a valuation issue, and can be decided at a later date. The amount deposited with this Court’s clerk is not binding on the Cossettes or any other party with an interest in what is described as the Cossette property. Whether \$470,040 is a fair offer can be litigated, and the allocation of each party’s individual interest will be allowed. In any event, this is not a jurisdictional argument, and dismissal is not appropriate.

[¶17] Second, the unidentified tenant planting a crop on the Cossette land will not frustrate the progress under N.D.C.C. § 61-16.1-09(2). The District, remarkably, claims to have been unable to identify this tenant. The tenant, however, is likely to be identified through typical discovery tools. If not, the tenant will have a claim for their percentage of the District’s purchase price when the power of eminent domain is exercised. Neither party could point to any recorded

lease agreement between the Cossettes' and the "mystery" farmer. The contractual rights of the mystery farmer are insufficient to delay acquisition of a right of way.

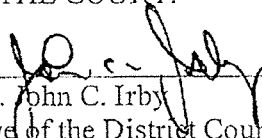
[¶18] Based on the foregoing, arguments relying on N.D.R.Civ.P. 12(b)(2), (4), (5), and (7) are disposed of. This Court has personal jurisdiction over the known individuals with an interest in the Cossette property. The arguments relying on improper service and service of process to both the known and unknown parties is without merit. Finally, the Court fully expects the unknown tenant to be named in the course of litigation and to be joined in this case. Until that time, the relief sought will be fashioned with this tenant in mind, and the language describing persons unknown with an interest in the property will suffice.

[¶19] The Court notes that this denial does not confirm immediate possession of the Cossette land for the District. That matter is disposed will be disposed of in a separate order.

[¶20] On the basis of the foregoing, IT IS HEREBY ORDERED the Cossettes' Motion to Dismiss (Quick Take Eminent Domain) is DENIED.

Dated this 17 day of August, 2016.

BY THE COURT:



Hon. John C. Irby
Judge of the District Court
East Central Judicial District