

STATE OF NORTH DAKOTA

IN DISTRICT COURT

COUNTY OF CASS

EAST CENTRAL JUDICIAL DISTRICT

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

Plaintiff,

vs.

Donald Robert Cossette, individually; and the
Angela R. Cossette Irrevocable Living Trust
Dated November 12, 2012, by and through its
trustees and co-trustees Donald Robert
Cossette and/or 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.

File No. 09-2016-CV-01510

**ORDER DENYING MOTION FOR
ORDER CONFIRMING IMMEDIATE
POSSESSION**

[¶1] This matter came on before the Court pursuant to the Plaintiff's "Motion for Order Confirming Immediate Possession." This matter was heard on August 12, 2016. The Plaintiff, Cass County Joint Water Resource District (District), was represented by Christopher McShane of the Ohnstad Twichell Law Firm, West Fargo, North Dakota. The Defendants, Donald Robert Cossette, Angela R. Cossette Revocable Living Trust, and Angela R. Cossette were represented by Jonathan Garaas of the Garaas Law Firm, Fargo, North Dakota. The Plaintiff's Motion states as follows:

The Plaintiff, Cass County Joint Water Resource District, moves the Court for an Order, recognizing it has obtained possession of those rights set forth in the permanent right of way easement form attached to the complaint in this matter through quick take, and that the Cass County Sheriff be allowed to enforce any order

confirming possession of the right of way, across and through the property identified in the complaint. This Motion for an order is based on North Dakota Century Code Section 16.1-09(2), all files, records and proceedings herein, and the supporting brief in support.

[¶2] N.D.C.C. § 61-16.1-59 states that a water resource board, before making any contract, or before levying special assessments, or issuing special assessment warrants, or before taking any special action, may commence a special proceeding in District Court by which the proceeding leading up to the making of such contract, levying special assessments, issuing special assessment warrants, or leading up to any other special action, shall be judicially examined, approved and confirmed. Such judicial proceedings shall comply substantially with the procedure required in the case of judicial confirmation of proceedings, acts, and contracts of an irrigation district.

[¶3] At the present time, no facts have been presented to this Court alleging any type of emergency or interference with the rights of the District. As such, it is clear from N.D.C.C. § 61-16.1-59 that in order to have the proceedings judicially examined, approved and confirmed so that the District can enter upon the property with a pre-determined judicial order in hand, allowing the Sheriff to remove any person interfering with the District's rights under its right of way taken through the quick take proceeding, the procedure set forth in the statute must be followed.

[¶4] In order to get such judicial pre-approval, N.D.C.C. § 61-16.1-59 mandates that the proceedings comply substantially with the procedure required in the case of judicial confirmation of proceedings, acts, and contracts of an irrigation district. Those proceedings are found in N.D.C.C. § 61-07-22 through 61-07-27. The essential procedure requires:

1. A petition praying that the proceedings had for the action taken to be examined, approved and confirmed by the Court. N.D.C.C. § 61-07-23.
2. Following appropriate notice which includes publication for two consecutive weeks. The hearing will be held “not less than 15 days nor more than 60 days after the last publication of the notice.” N.D.C.C. § 61-07-24.
3. Interested parties may answer the petition. N.D.C.C. § 61-07-25.
4. The Court shall hold a trial on the matter and will permit the petition to be amended so as to conform to the evidence and facts presented at the hearing. N.D.C.C. § 61-07-26.
5. The Court will issue its Findings and Decree and assess the costs of the proceedings. N.D.C.C. § 61-07-27.

[¶5] The Plaintiff has not undertaken any of the above proceedings. Further, there is no evidence before the Court that a controversy exists such as an individual or individuals preventing the District’s access to the property. For these reasons, alone, the District’s Motion for Immediate Possession is denied.¹

[¶6] In seeking the order to confirm its possession the District points out that it has, in fact, met the requirements for possession of the property set forth in N.D.C.C. § 61-16.1-09(2). The District contends that it is seeking a “right of way” on a project for which federal and state funds have been appropriated. The District further contends that they have made a written offer and have deposited the amount of the offer with the Court.

[¶7] Pursuant to N.D.C.C. § 61-16.1-09, the District has the authority to acquire and secure “rights, titles, interests, and estates or easements necessary or proper to carry out the duties...”

¹ It would seem to this Court that the procedure set forth in N.D.C.C. § 61-16.1-59 could encompass the entire right of way for the entire diversion and the District’s right of immediate possession would not have to be re-litigated for each parcel that the District is seeking to obtain.

There does not appear to be any dispute that the District cannot take the entire fee simple by quick take. The District contends that it does not need fee simple and that a right of way will suffice. The District further contends that as long as the Cossettes retain any incident of ownership, such as mineral rights or surface uses that won't interfere with the project such as haying on property when not flooded, hunting rights, etc., then what the District is taking is a right of way and not a fee. Therefore, the right of way that the District is seeking would be eligible for quick take proceedings. A further question arises on whether or not a right of way is, in fact, an easement limited by law to 99 years pursuant to N.D.C.C. § 47-05-02.1(2). This is relevant to the issue as to whether or not the District can take immediate possession of the right of way that it is claiming. It is not. If the District has to go back at a later time and commence eminent domain proceedings pursuant to N.D.C.C. Chapter 32-15 to condemn whatever rights are left in the Cossettes following the right of way acquisition, so be it.

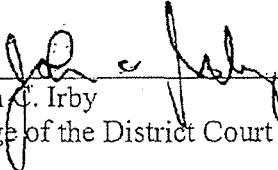
[¶8] A further problem for the Court is the nature of the right of way being sought by the District as it attempts for the purpose of being able to use quick take proceedings. The District attempts to walk the line between taking a right of way sufficient for its purposes while avoiding taking fee simple which is not eligible for quick take. Eminent domain proceedings are defined under N.D.C.C. § 32-15-01(1). "Eminent domain is the right to take private property for public use." Id. In other words, eminent domain takes property from an individual or entity. Eminent domain does not compel the individual whose property has been taken to do anything. The removal of certain rights in property may, by operation of law, prevent the individual from doing certain things on property that was formerly his or her own. The issue in this instance is that the Plaintiff, the District, repeatedly describes the right of way that it is seeking as that set forth in Exhibit 1 to its complaint. Exhibit 1 to the Plaintiff's complaint is actually the Purchase

Agreement that was offered to the Cossettes but rejected. Essentially, it appears that the District is attempting to compel the Cossettes, through court action, to accept the agreement. This is improper and not permitted under its eminent domain powers. It is not the responsibility of the Court to ferret out the extent of the right of way that the District is seeking. It is the responsibility of the District to define to the Court, and Defendants and to properly describe the right of way it is seeking. It is the District that is attempting to define the property interest it needs in such a way as to be able to avail itself upon its statutory quick take authority. Neither the Cossettes nor the Court should be left wondering what it is that the District is seeking as the District attempts to walk the line between taking a fee simple interest, which does not allow for quick take, and obtaining some type of right of way easement that will allow the district to undertake it's project and obtain immediate possession through quick take. The District will need to amend its complaint, or Exhibit 1 of its complaint, accordingly.

[¶9] For the above stated reasons the District's motion for an Order Confirming Immediate Possession is denied.

Dated this 17th day of August, 2016.

BY THE COURT:



John C. Irby
Judge of the District Court