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Date: August 23, 2016

To: Chairman Jim Schmidt and Water Topics Overview Committee

RE: FM Diversion Project Recent Quick-Take Proceedings

Dear Chairman Schmidt and Water Topics Overview Committee Members:

As you may know, the Cass County Joint Water Resource District ("CCJWRD") is a member of the Diversion Authority, and CCJWRD is responsible for acquiring right of way in North Dakota to accommodate the FM Diversion project (the "Project"). The Water Topics Overview Committee is currently conducting a study of water resource districts' "quick-take" eminent domain authority and we recognize CCJWRD's Project acquisition activities are of interest to your Committee. Unfortunately, recent news reports regarding CCJWRD acquisition efforts to accommodate the Diversion inlet structure have been inaccurate, and we offer this letter to clarify those inaccuracies.

As a preliminary matter, CCJWRD recognizes right of way acquisition for water projects is difficult and sometimes controversial, and obviously the Diversion is a higher profile project than most. CCJWRD's approach for Project acquisitions is to treat landowners fairly and to be as flexible as possible. We are water managers who support the Diversion and we recognize the FM Metropolitan Area is in desperate need of comprehensive flood protection. At the same time, CCJWRD's water managers are landowners who understand that farmable acres in our area are crucial to our ag economy. We volunteered to conduct acquisitions in North Dakota in light of both our support for the Project and our support for area landowners.

As you know, the Project is the subject of litigation in Federal District Court in Minnesota, and the Court previously issued an injunction regarding various Project activities. Due to the injunction, CCJWRD could not proceed with most acquisition activities until the Minnesota DNR recently issued its Final Environmental Impact Statement. At the same time, the U.S. Army Corps of Engineers has a tight construction window regarding the inlet structure due to the 'new start' designation for the Project in terms of federal funding. Following MnDNR's issuance of its FEIS, CCJWRD had to spring into action quickly to complete acquisition of properties to accommodate the Corps' inlet construction schedule. In fact, the Corps required the inlet right of way by June 30, 2016. By the time CCJWRD and its agents completed surveys, appraisals, and negotiations for these properties, CCJWRD did not have sufficient time remaining to utilize traditional eminent domain, and had no choice but to proceed with quick-take.

We can assure you CCJWRD negotiated with landowners in the inlet area in good faith to acquire the necessary right of way voluntarily and, in fact, we reached mutually acceptable deals with several of them. For others, however, we were clearly not going to reach a mutually acceptable agreement. The

appraisals for these acres came back at \$6,000 per acre; despite our repeated efforts to negotiate, one landowner demanded over \$20K per acre, another demanded over \$30K per acre, and a third has not provided any counteroffer to this day. In light of those substantial disparities, CCJWRD had no choice but to resort to “quick-take” eminent domain; we did not take this decision lightly, but we recognized the Project cannot afford to pay landowners five or six times the appraised value, and we had to meet the Corps’ construction schedule.

CCJWRD commenced three quick-take actions; we deposited the appraised amounts in district court and, by statute, we have possession of right of way over those properties so the Corps may proceed with construction. At the same time, those three landowners will have every opportunity to litigate the value of their right of way with CCJWRD. CCJWRD recently appeared at hearings regarding two of the three quick-take actions. Local media reports regarding the outcome of one of those hearings have been largely erroneous, and we wish to clarify what really transpired.

At the hearings, CCJWRD sought an order from the court confirming that CCJWRD had taken all of the required steps to acquire right of way for the inlet structure under the quick-take procedures in Section 61-16.1-09(2) of the Century Code (the provision your Committee is studying). The purpose of seeking a court order to confirm CCJWRD completed all of the steps necessary to take possession of the necessary right of way was to provide that order to the Sheriff; that way, the Sheriff would have a court order to enforce in the event anyone attempted to physically block access to the property by the Corps’ contractors.

Judge Anderson conducted one of the hearings, and Judge Anderson granted CCJWRD’s request for an order confirming CCJWRD has possession of the right of way across property located in the North Half of the Southwest Quarter of Section 32 of Stanley Township. A copy of Judge Anderson’s Order is attached to this letter.

Judge Irby conducted the other hearing. In this matter, the landowner filed a motion to dismiss CCJWRD’s quick-take action, citing a variety of reasons. In response to the motion to dismiss, CCJWRD explained why the court should deny the arguments raised by the landowners, and also asked Judge Irby for an order confirming CCJWRD has taken possession of the right of way necessary across the East Half of the Southeast Quarter of Section 31 of Stanley Township, by virtue of CCJWRD’s deposit of the appraised amount with the court.

Judge Irby denied the landowners' motion to dismiss; a copy of the Order Denying Defendants' Motion to Dismiss is attached. The defendants raised multiple arguments against CCJWRD's use of quick-take, but Judge Irby denied each of them. In fact, in paragraph 13 of the Order, Judge Irby held CCJWRD met the requirements for quick-take under Section 61-16.1-09(2): "Here, the District is empowered to exercise quick take, and the three prerequisite steps have been met." Despite this statement by Judge Irby, some local media outlets inaccurately reported that CCJWRD has not followed the quick-take process as laid out in the statute. As you can see from Judge Irby's Order, CCJWRD has, in fact, properly followed the statutory quick-take process.

After denying the motion to dismiss, Judge Irby addressed CCJWRD's request for an order confirming possession of the right of way. Judge Irby denied CCJWRD's request; a copy of the Order Denying Motion for Order Confirming Immediate Possession is attached. In paragraph 3 of the Order, Judge Irby determined the defendants have not interfered with the rights of CCJWRD to enter upon the right of way on the East Half of the Southeast Quarter of Section 31. Judge Irby determined that, because no emergency currently exists (because the landowners are not threatening to block access to the right of way), CCJWRD should follow a separate process to obtain an order confirming CCJWRD's possession. In other words, Judge Irby did not conclude CCJWRD does not have possession; rather, he concluded CCJWRD should follow a different process to seek confirmation of its possession. More specifically, Judge Irby ruled that if CCJWRD wants an order the Sheriff could enforce to prohibit anyone from blocking access to the right of way, CCJWRD should follow a process outlined in the irrigation district chapter of the Century Code. CCJWRD was disappointed in the denial of its request for an order confirming its possession, but recognize Judge Irby's order did *not* indicate CCWRD has improperly exercised or abused its quick-take rights, despite media reports that may suggest otherwise.

In addition, Judge Irby asked CCJWRD to amend its complaint to more clearly define the right of way CCJWRD seeks. In requesting the amendment, Judge Irby refers to Exhibit A to the Complaint as a "Purchase Agreement." Exhibit A is actually an easement, not a purchase agreement. CCJWRD secured appraisals of these properties and offered to pay landowners the appraised amounts in exchange for easements. Paragraph 2 of the easement defines the right of way CCJWRD seeks to acquire. The easement attached to CCJWRD's complaint simply demonstrates what CCJWRD previously offered to acquire from the landowners. CCJWRD does not expect the Court to force a landowner to accept an agreement; CCJWRD was simply providing a copy of what the

Board offered to purchase. CCJWRD ultimately requested the Court convey the property rights – the right to construct, operate, and maintain the project – detailed in the easement (and did not request an actual easement). As Judge Irby correctly stated in his order denying the motion to dismiss, the amount of money the landowners should receive as a result of CCJWRD acquiring the property rights defined in the easement is an issue a jury will determine.

While Judge Irby's Order denying CCJWRD's request was not ideal, the Order was not an indictment of CCJWRD's quick-take process. Rather, Judge Irby indicated if CCJWRD wants an order for the Sheriff to enforce in the event anyone attempts to block access to the property, CCJWRD should follow an alternative process. Please note that other agencies that possess quick-take authority do not even seek any order from courts to confirm possession following deposits; CCJWRD has utilized this "extra" step to avoid unnecessary conflict with landowners or others on-site, and to ensure the Sheriff has a court order in-hand to enforce, if necessary. Further, Judge Irby's Order denying the landowners' motion to dismiss confirmed CCJWRD conducted the quick-take process properly, in accordance with the law.

CCJWRD recognizes the serious nature of utilizing quick-take to acquire Project right of way, and we only utilized the quick-take process in this situation as a last resort, after good faith negotiations with the landowners. However, due to the limitations on acquisitions as a result of the ongoing federal litigation, and the Corps' June 30 acquisition deadline to meet the inlet construction schedule, CCJWRD had a very tight timeline. When the landowners' counteroffers were four or five times higher than the appraised amounts, and clearly were not going to grant the right of way voluntarily, CCJWRD had no choice. With regard to future acquisitions for the Project, recognize CCJWRD has indicated to other Project sponsors they should submit all future requests for right of way to CCJWRD no less than two years in advance; a two-year window will ensure CCJWRD can limit the situations when quick-take will be necessary.

Sincerely,

CASS COUNTY JOINT WATER RESOURCE DISTRICT


Mark Brodshaug
Chairman

Attachments