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AL BAKER — *Of Counsel*

October 11, 2021

Cass County Commission
211 9th Street South
Fargo, ND 58103
SENT VIA EMAIL TO: albrechtt@casscountynd.gov

RE: Cass County Joint Water Resource District
Quick Take of Gene and Branda Sauvageau's Property

Dear Board of Commissioners:

Attorney Al Baker and I represent Gene and Brenda Sauvageau whose property is the subject of the Cass County Joint Water Resource District's (CCJWRD) application for quick take eminent domain authority. CCJWRD is applying for approval from the Cass County Commission, as required by Section 61-16.1-09 of the North Dakota Century Code, to take possession of the property of Gene and Brenda Sauvageau by quick take eminent domain, to remove them from their home and to demolish their buildings. CCJWRD contends the condemnation of the Sauvageau property is necessary to enable the FM Diversion Project to proceed on a timely basis. The Commission should disapprove the application for the following reasons:

1) Gene and Brenda Sauvageau's community.

Gene and Brenda Sauvageau own and reside on a farmstead located approximately 1.5 miles west of St. Benedict. Their residence is unique and includes a 3,340 square foot home with an attached three stall garage, one unattached garage, another building that was used for grain storage, and a 30 by 40 foot barn that Gene renovated inside and out, with steel siding, concrete floor and foundation, hydraulic floor lift and hoist, power, heat and air conditioning. Gene is a machinist and uses his renovated shop/barn to work on his 56 Ford Thunderbird, his other hobbies,

and the equipment he uses to maintain his home and yard. Gene and Brenda chose their rural residence in Gene's historic community as a life choice. Their 7.78 acre yard, maintained like a park with space and privacy necessary to their chosen lifestyle, was an essential part of their decision to purchase the property 37 years ago.

Gene's connection to the St. Benedict community is five generations deep and began in 1871. His great grandfather and his father were French Canadian immigrants that settled the St. Benedict area and established the church and town. Gene grew up on the family farm that was located approximately one mile south of Gene and Brenda's current residence. Gene and his siblings still own farmland in the community and have already surrendered some of their grandfather's land to CCJWRD as result of the Diversion Project. Gene's grandfather and father were educated in the St. Joseph's Catholic School in St. Benedict. Gene attended that same school through the fifth grade, after which he attended and graduated from the Kindred School District. Gene chose his residence because of its location in his family community and within the Kindred School District, where his daughter attended and graduated. Gene and Brenda raised their daughter as members of the St. Benedict Catholic Church, just as Gene, his father and grandfather were. Brenda and Gene purchased their rural residence from the Trottier family in 1984. They chose the Trottier farmstead which is within walking distance of the town his family founded and his family's land, to raise their daughter and live in the community they love. They are surrounded by relatives and friends that share their heritage and ties to the community. Gene is related to many of his neighbors, who are also descendants of the French-Canadian homesteaders who founded the St. Benedict community, and who include the Cossettes, Dubords, Duvals, Richards, Rheaults, and the Trottiers. The CCJWRD Board is familiar with these community names as most of these families will also be displaced or forced to surrender property rights to CCJWRD as a result of the Diversion Project.

2) The Cass County Commission must deny CCJWRD's request for approval to use quick take as the resource district, through its land agent, repeatedly referenced quick take eminent domain during negotiations with Brenda and Gene Sauvageau in violation of Section 61-16.1-09(2)(b)(3) of the North Dakota Century Code.

Section 61-16.1-09(2)(b)(3) of the North Dakota Century Code provides that a water resource district may not use quick take eminent domain against a landowner unless the district first applies and receives authorization from the county commission in which the right of way is located. The statute further provides that the county commission may not even vote on the issue before first receiving verification "that there has been no reference or threat of quick take eminent domain by the district during negotiations." The communications and negotiations occurring between the Sauvageaus and CCJWRD, through the resource district's agent Lisa Kilde of SRF Consulting, contained several threats and references to CCJWRD's published plan to use quick take eminent domain against the Sauvageau's unless they agreed to the terms offered to them by Ms. Kilde for the purchase of their property. CCJWRD opened negotiations with a letter and offer to purchase dated February 1, 2021, from Lisa Kilde on behalf of the CCJWRD. (See attached Exhibit 1). In the letter, Ms. Kilde directed Brenda and Gene to the property acquisition schedule and Cass County Joint Board information on the FM Diversion website. (Exhibit 1). The schedule

contained in the Property Rights Acquisition Manual published on that site, which is of particular interest to anyone whose property was being acquired by CCJWRD/Diversions Authority, informs all landowners, including Brenda and Gene Sauvageau, that unless they agree to sell their property to CCJWRD within 160 days, CCJWRD will seek to take their property by quick take eminent domain. (See attached Exhibit 2 – Acquisition Timeline).

Not only did land agent Lisa Kilde direct the Sauvageau's to the quick take timeline in her letter and offer to purchase of February 1, 2021, she repeated the direction in every email she sent to Gene and Brenda's brother-in-law, Roel Ronken, who was their power of attorney for purposes of negotiating with Ms. Kilde. All of Ms. Kilde's emails contained the following: "*Required Notice: Schedule and Cass County Joint Board Information can be found at: <http://fmdiversions.gov/lands-schedule/>.*" (See attached Exhibit 3).

CCJWRD, through their agent Lisa Kilde of SRF Consulting, repeatedly directed the Sauvageaus to the Diversions Authority website and that informed them that unless they agreed to her offers to purchase their residence, quick take eminent domain would be used against them to take it. For these reasons, the mandatory requirement of the statute that no reference to quick take eminent domain be made during negotiation by the water district cannot be met and CCJWRD's request for authorization to use quick take eminent domain against Gene and Brenda Sauvageau must be declined.

3) Authorizing CCJWRD to use quick take eminent domain to obtain and demolish Brenda and Gene Sauvageau's residence would violate state and federal law.

Section 54-01.1-07 of the North Dakota Century Code provides, in relevant part, as follows:

54-01.1-07. Assurance of availability of housing.

...

2. No person may be required to move from a dwelling on account of any program or project undertaken by the displacing agency unless the displacing agency is satisfied that comparable replacement housing is available to the person.

...

Id.

The United States Code contains a parallel provision: "No person shall be required to move from his dwelling on account of any program or project undertaken by a Federal agency or with Federal financial assistance, unless the head of the displacing agency is satisfied that comparable replacement housing is available to such person." 42 U.S.C 4626. Comparable replacement housing is defined by Section 54-01.1-02(2) of the North Dakota Century Code as follows:

2. "Comparable replacement dwelling" means any dwelling that is:
 - a. Decent, safe, and sanitary;
 - b. Adequate in size to accommodate the occupants;
 - c. Within the financial means of the displaced person;
 - d. **Functionally equivalent**;
 - e. In the area not subject to reasonably adverse environmental conditions; and
 - f. **In a location generally not less desirable** than the location of the displaced dwelling with respect to public utilities, facilities, services, and the displaced person's place of employment.

Id. (emphasis added).

Cass County Water Resource District has established precedent for determining what constitutes comparable replacement housing. When the Diversion Authority managers determined that approximately 42 residences in the Oxbow/Hickson/Bakke community needed to be acquired in order for the FM Diversion Project to proceed in a timely manner, they evaluated whether there was available replacement housing in that community. (See attached Exhibit 4). In that case, the community was Oxbow/Hickson/Bakke. The Cass County Joint Water Resource District determined that available comparable replacement dwellings were not available in the Oxbow/Hickson/Bakke neighborhood. (See attached Exhibit 5). Because of this lack of comparable replacement housing, CCJWRD acknowledged that federal law required that the displaced persons from Oxbow/Hickson/Bakke had a right to remain in their community and receive replacement housing. CCJWRD formalized these findings in a resolution executed August 14, 2014, that provided as follows:

WHEREAS, the Joint Board will pay landowners just compensation for the property interests being acquired. In addition to paying landowners just compensation, the Joint Board will comply with the Uniform Relocation Act governing relocation assistance for residents of structures being acquired for a project. The Uniform Relocation act is codified as 42 United States Code Chapter 61 ("URA"). The URA prohibits federal participation in a project where the acquiring agency does not comply with the URA, and where there is not comparable replacement dwellings available to displaced persons before the displacement.

WHEREAS, regulations have been created to clarify the process and procedures for compliance with the URA. The regulations are published as 49 Code of Federal Regulations Part 24. The regulations governing compliance with the URA include a procedure for ensuring the displaced persons have replacement housing, and that they are fairly compensated for the relocation. 49 CFR 24.404 recognizes that the standard procedures found within the regulations will not work for all projects. Whenever a project cannot proceed on a timely basis because displaced persons will not be provided replacement

housing in a timely manner under the restrictions of the remaining regulations, additional or alternative relocation assistance **must** be provided to those displaced persons.

(See attached Exhibit 5) (emphasis added).

When the CCJWRD provided replacement housing to the individual displaced persons in the Oxbow/Hickson/Bakke Community, they included the following statement in their agreements:

Owner qualifies as a displaced person under the URA, and the District has found it would be impossible for homeowners such as Owner, and other homeowners similarly situated and currently living in the communities of Oxbow, Hickson, or Bakke to obtain comparable replacement housing within the communities of Oxbow, Hickson, or Bakke. The District has found a Housing of Last Resort situation exists. Therefore, in order to proceed with the Levee Project in a timely and cost effective manner, it is necessary to provide Owner with a comparable newly constructed home within the City of Oxbow.

(See attached Exhibit 6).

The CCJWRD Board seeks to quick take Gene and Brenda's residence and, according to its attorney, demolish their home before next summer. The Sauvageaus are therefore "displaced persons" within the meaning of the federal Uniform Relocation Act and North Dakota Statute. N.D.C.C. Section 54-01.1-02. As displaced persons they are entitled to: 1) just compensation for the value of their residence; and 2) comparable placement housing within their community, and their community is rural St. Benedict. No comparable replacement housing is available in their community and CCJWRD Board, through its agent SRF Consulting, refuse to provide replacement housing as required by state and federal law, even though CCJWRD repeatedly acknowledged and conceded its obligation to provide replacement housing in its earlier resolutions and agreements.

CCJWRD's agents refuse to acknowledge that the state and federal law protects the Sauvageaus in the same manner as it did the members of the Oxbow/Hickson/Bakke community. Instead, CCJWRD has falsely claimed to the Sauvageaus that they must accept urban housing that is available in the City of Fargo. (See attached Exhibit 7 - Benefits Notification from SRF). State and federal laws guarantee that the Sauvageaus cannot be forced to move from their home until a comparable replacement home in their community is available that is the "functional equivalent" of their current residence. Section 54-01.1-02(2) N.D.C.C. A house on a small city lot in Fargo is in no way the "functional equivalent" of their rural residence in the St. Benedict community Gene's forefathers established. Counsel has learned that there is evidence to establish that CCJWRD has made a blanket determination to deny all the residents of rural communities such as Horace, St. Benedict, and Christine replacement housing by asserting that houses in the City of Fargo are "comparable" within the meaning of North Dakota Statute and the Federal Uniform

Relocation Act. By this unlawful blanket determination, the managers of the FM Diversion Project intend to minimize mitigation costs by denying rural residents their rights.

Until the CCJWRD provides the Sauvageaus: 1) just compensation for the value of their residence; and 2) legitimate comparable placement housing within their community, in the same manner it did so for the Oxbow/Hickson/Bakke community, approval of CCJWRD's request for quick take eminent domain authority must be denied.

4) Failure to Negotiate.

North Dakota's eminent domain laws require a condemning authority to "make every reasonable and diligent effort to acquire property by negotiation." N.D.C.C. § 32-15-06.1(1). For the reasons stated in the previous section CCJWRD has wholly failed to negotiate with the Sauvageaus in a reasonable and fair manner. At no point did the District even acknowledge that the Sauvageaus were entitled to remain in their community and receive replacement housing. Consequently, CCJWRD's request for quick take eminent domain authority must be denied.

5) State and Federal laws require that persons displaced by the FM Diversion Project receive relocation protections and assistance in a fair and uniform manner.

Federal law requires that "relocation assistance policies must **provide fair, uniform and equitable treatment of all affected persons.**" 42 USC 4621(a)(2) (emphasis added). North Dakota Statute has a similar requirement which provides as follows:

54-01.1-01. Declaration of policy. The purpose of this chapter is to establish a uniform policy for the **fair and equitable treatment of persons displaced** as a direct result of programs or projects undertaken by a state agency so that displaced persons will not suffer disproportionate injuries as a result of programs and projects designed for the benefit of the public as a whole and to minimize the hardship of displacement by the acquisition of real property by state and local land acquisition programs, by federally assisted building code enforcement programs, or by a program of voluntary rehabilitation of buildings or other improvements conducted pursuant to governmental supervision. The policy must be **uniform** as to:

1. Relocation payment;
2. Advisory assistance;
3. Assurance of availability of standard housing; and
- ...

Id. (emphasis added).

Attached hereto as Exhibit 7 is the February 11, 2021 letter from CCJWRD's agent, Lisa Kilde of SRF Consulting, advising Gene and Brenda Sauvageau that the amount of the relocation assistance that they were entitled to was based upon a determination that they were not entitled to relocate in their community. Ms. Kilde wrote: "We have chosen the listed property at 4241 54th

Ave South, ND to use as your “comparable” home in determining your replacement house benefits...” This is a house located not in their rural community but in Fargo City with a .28 acre lot. Based upon CCJWRD’s calculation, the Sauvageaus would not be provided funds to replace their residence in their community but would only receive a payment of \$54,315 for their total relocation assistance.

The Cass County Commissioners are invited to compare the amount of relocation assistance CCJWRD offered the Sauvageaus with the assistance awarded to Michael Bindas to provide him comparable housing and to remain in his community. (See attached Exhibit 6). Bindas is one of 40 families that were given replacement housing to allow them to remain in their community of Oxbow/Hickson/Bakke. Attached as Exhibit 6 is a representative copy of the two agreements CCJWRD made with the Oxbow families to pay then for 1) for the value of their residence, and 2) to provide benefits for replacement housing. As you can see from the last page, CCJWRD paid Bindas \$692,439.00 in replacement housing assistance *over and above the acquisition price of his home*, so that he could construct comparable housing in his community to replace the residence demolished in order for the Diversion project to proceed. CCJWRD gave Bindas \$692,439.00 for comparable replacement housing benefits to remain in his community. CCJWRD are denying the Sauvageaus the very same benefit, comparable replacement housing in their community, and offering them only \$54,315 in relocation benefits. This is unconscionable, in bad faith and violates state and federal law requiring the “the uniform and equitable treatment of all affected persons.” Until CCJWRD remedies this gross disparate treatment of Cass County citizens, its request for quick take eminent domain must be denied.

Current and Former Cass County Commissioners have already weighed in on this very issue. Speaking at a Land Management Committee meeting on July 9, 2015, and discussing replacement housing for Oxbow/Hickson/Bakke, Commissioner Chad Peterson stated: “... a blessed construction climate exists now where all builders, plumbers, etc. are swelling with work; however the ramification of that are that it costs more to build. To replace a house costs what it costs . . . regardless of its assessed value and the reality is that it is likely no one at this table could rebuild their existing home at its assessed value in today’s market.” Speaking at the same meeting Commissioner Ken Pawluk saw the issue clearly: “the same federal process used in the past will be used for homes, businesses and farmsteads in the staging area. . . the provision of Last Resort Housing is a factor in Oxbow and *those displaced by the project should not be asked to dig into their own pocket for equivalent replacement property.*” (See attached Exhibit 8) (emphasis added).

Conclusion.

The law requires the CCJWRD to provide relocation assistance to persons displaced by the FM Diversion Project in a uniform equitable manner. CCJWRD’s attempt to treat these citizens in a disparate and unconscionable manner should not be condoned. Until CCJWRD agrees to provide relocation and replacement housing to the Sauvageaus in the same manner as was provided to the 40 Oxbow families displaced by the FM Diversion Project, CCJWRD’s request for quick take eminent domain authority must be denied. Requiring the Sauvageaus to be removed from their dwelling under these circumstances would violate state and federal law. The Sauvageaus and

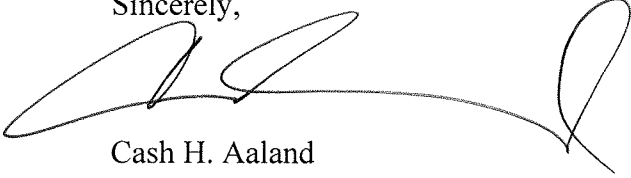
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other residents of rural communities displaced by Fargo's diversion project are not looking for excess, but they are entitled to remain in their communities, receive replacement housing, and fair and equitable treatment from CCJWRD as the law requires.

Sincerely,

A handwritten signature in black ink, consisting of several loops and a long horizontal stroke, positioned above the name 'Cash H. Aaland'.

Cash H. Aaland

Enclosures

cc: Gene and Brenda Sauvageau