FILED
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CLERK OF SUPREME COURT
FEBRUARY 1, 2016
STATE OF NORTH DAKOTA

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

In re: 2015 Application for Permit to Enter Land for Surveys and Examination Associated with a Proposed North Dakota Diversion and Associated Structures

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Cass County Joint Water Resource District, — Plaintiff and Appellee

v.

Steven Brakke; Colleen Brakke; Dorothy V. Brakke, as trustee of the Dorothy V. Brakke Revocable Living Trust under agreement dated April 3, 1980, as amended and as beneficiary and possible successor Trustee of the H. Donald Brakke Revocable Living Trust under agreement dated July 28, 1977, as amended; Paul E. Brakke; and H. Donald Brakke; K-F Farm Partnership; Christopher Narum; and Jeanne D. Narum, — Defendants

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Steven Brakke; Colleen Brakke; Dorothy V. Brakke, as trustee of the Dorothy V. Brakke Revocable Living Trust under agreement dated April 3, 1980, as amended and as beneficiary and possible successor Trustee of the H. Donald Brakke Revocable Living Trust under agreement dated July 28, 1977, as amended; Paul E. Brakke; and H. Donald Brakke, — Appellants

Supreme Court No. 20150311
(Consolidated Case)

District Court No.
09-2015-CV-00770
09-2015-CV-01746

BRIEF OF DEFENDANTS-APPELLANTS

Appeal From the Memorandum Opinion and Order for Entry Upon Land of the Said District Court Entered on August 31, 2015, in District Court Case Number 09-2015-CV-01746

And
Appeal From the Memorandum Opinion and Order for Entry Upon Land
of the Said District Court Entered on September 18, 2015, as Corrected
On and Through an Amended Exhibit A on September 21, 2015,
in District Court Case Number 09-2015-CV-00770

CASS COUNTY DISTRICT COURT, EAST-CENTRAL JUDICIAL DISTRICT
HONORABLE DOUGLAS R. HERMAN AND STEVEN E. McCULLOUGH

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[¶1] **ISSUES ON APPEAL**

[¶2] 1. Did the District Court have jurisdiction over private landowners when they were never served with a Summons and Complaint grounded in eminent domain?

[¶3] 2. Did the District Court misconstrue the statutory parameters of N.D.C.C. § 32-15-06?

[¶4] 3. Is a Court-granted governmental right to occupy private lands for a period of fourteen months, with the right to conduct soil borings [or other physically invasive tests that remove soil from the land], a "taking" within the meaning of the Fifth Amendment to the Constitution of the United States of America, Article I, § 16 of the Constitution of North Dakota, and Chapter 32-15 of the North Dakota Century Code?

[¶5] 4. Are private landowners entitled to a jury trial to determine their just compensation, and the payment of the jury-determined compensation, before the District Court could allow the Government the right to occupy their lands for fourteen (14) months and conduct soil borings, or other tests, causing removal of the private landowner's soil?

[¶6] **STATEMENT OF THE CASE**

[¶7] The Cass County Joint Water Resource District [hereinafter "WATER DISTRICT"] filed two (2) different Application(s) for Permit to Enter Land owned by forty-seven (47) identified Cass County landowners, to include Steven Brakke, Colleen Brakke, Dorothy V.

Brakke, Paul E. Brakke, H. Donald Brakke, [Appellants; Appendix, page 63], MKRM Trust, Robert Helbling & Mari Palm, Co-Trustees, Michael Brakke, and Laurie Brakke [Appellants, App., p. 127]. These specifically identified Cass County landowners are represented by the Garaas Law Firm, and will be hereinafter identified as "LANDOWNERS", while all Cass County property owners will be referenced as "landowners". So far as is known to the undersigned, the laws apply to all landowners uniformly. LANDOWNERS' appeal consolidation motion was granted by the Supreme Court [Supreme Court Docket #s 4 & 8]; the Statement of the Case will so reflect.

[¶8] The Application(s) for Permit to Enter Land dated March 27, 2015 [App., ps. 5-38] and July 15, 2015 [App., ps. 71-86], were predicated upon N.D.C.C. § 32-15-06 "*for the purpose of obtaining access to certain properties* in Cass County, North Dakota, to conduct examinations, surveys, and mapping required for evaluation and design of a *proposed* flood control project." App., p. 5, 71; ¶s 2-3. *Emphasis* added.

[¶9] In separate actions in the lower court, LANDOWNERS submitted their Responses/Answers, both dated August 6, 2015, and somewhat similar [App., ps. 39-54; 87-102], each beginning with a "Preliminary Objection - Abuse of Process" [¶s 2-5]. The abuse of process claim revolves around LANDOWNERS' knowledge that eminent domain proceedings must follow mandated constitutional and statutory principles, and also, strict adherence to the North Dakota Rules of Civil Procedure with respect to service of process, beginning with a summons and a complaint. LANDOWNERS have always asserted lack of subject matter and personal jurisdiction. App., ps. 39-41 & 50-51, ¶s 3-5, 29; 87-89 & 98-

99, ¶s 3-5, 28.

[¶10] Judge Steven E. McCullough officiated at the first of the scheduled hearings on August 14, 2015. App., p. 3; Transcript of Hearing dated August 14, 2015.

[¶11] Judge Douglas Herman officiated at the second scheduled hearing on August 20, 2015. App., p. 69; Tr. of 8/20/2015.

[¶12] Judge Herman issued a Memorandum Opinion and Order for Entry Upon Land dated August 31, 2015. App., ps. 103-126. Judge McCullough issued a similar Memorandum Opinion and Order for Entry Upon Land dated September 18, 2015. App., ps. 55-62.

[¶13] LANDOWNERS timely filed Notice(s) of Appeal dated October 22, 2015, with probable issues. App., ps. 63-64; 127-128.

[¶14] **STATEMENT OF FACTS**

[¶15] LANDOWNERS always posed a "PRELIMINARY OBJECTION - ABUSE OF PROCESS" [App., ps. 39-41; 87-89], followed by their "SECONDARY OBJECTION" predicated upon the Application's facts. App., ps. 41-53; 89-101.

[¶16] Neither Judge issued any "findings of fact", apparently of the belief that their judicial role was to rubber stamp a government request predicated upon a single statute – specifically, N.D.C.C. § 32-15-06, isolated and independent of two (2) Constitutions.

[¶17] Predicated upon LANDOWNER "admitted" facts, LANDOWNERS believes factual basis may exist as hereafter set forth.

[¶18] The WATER DISTRICT claims to be a joint water resource district and political subdivision of the State of North Dakota under N.D.C.C. Chapter 61-16.1, and that was

"acting pursuant to Section 32-15-06 of the North Dakota Century Code." App., p. 5, ¶s 1 & 2; p. 71, ¶s 1 & 2.

[¶19] The two (2) "Applications (were) *for the purpose of obtaining access to certain properties* in Cass County, North Dakota, to conduct examinations, surveys, and mapping required for evaluation and design of a *proposed* flood control project." App., p. 5, ¶ 3; p. 71, ¶ 3. *Emphasis* by LANDOWNERS.

[¶20] The WATER DISTRICT gave recital to numerous irrelevant activities or events, to include actions taken by, or the responsibilities of, the United States Army Corps of Engineers, the City of Fargo, and the City of Moorhead going back to 2008. App., ps. 5-6, ¶s 4-6, 8; ps. 71-72, ¶s 4-6, 8. Attempting to take advantage of the WATER DISTRICT'S "right to acquire real property through eminent domain, if necessary", the existence of a "Joint Powers Agreement" was plead under the authority of N.D.C.C. Chapter 54-40.3 to "vest" the WATER DISTRICT "with Fargo's current obligation to obtain rights of entry and to ultimately acquire the requisite real property rights located in North Dakota for any approved project", in the process, also establishing its servility. App., p. 6, ¶ 7; p. 72, ¶ 7.

[¶21] No "Project" was plead to exist; any project "routes" were only "proposed". App., p. 6, ¶ 9; p. 72, ¶ 9. Tr. of 8/14/2015, p. 6, line 10, to p. 7, line 6; p. 11, line 21, to p. 12, line 9; p. 17, lines 1-2; p. 28, lines 8-13; Tr. of 8/20/2015, p. 4, lines 2-17; p. 23, lines 10-20; p. 27, lines 17-21; p. 46, lines 3-15.

[¶22] For unknown reasons, the WATER DISTRICT'S application(s) attempt to impart, or share, the legal obligations by others "(t)o Comply (sic) with federal statutes and regulations

(of) the Corps and the local sponsors (to) identify and survey wetlands, cultural resources, environmental hazards, wildlife, and river geology that may potentially be impacted by the Project before approval and construction of the Project." App., p. 6, ¶ 10; p. 72, ¶ 10. The WATER DISTRICT is not a "local sponsor", nor is it the Army Corps of Engineers, and it does not claim to have such obligation imposed by federal statutes and regulations. App., p. 5, ¶ 4; p. 71, ¶ 4. The WATER DISTRICT attempts to wrap itself in legal fluff.

[¶23] The WATER DISTRICT'S application(s) claim necessity to comply with a determination made by others: "The Corps, and its local sponsors (City of Fargo and City of Moorhead), have determined it is necessary to access certain parcels that may be impacted by the Project. Access is necessary to conduct mapping, engineering, geotechnical testing, surveys, environmental analysis, and cultural resource surveys." App., p. 7, ¶ 12; p. 73, ¶ 12. Such determination(s) by others are greater than the mere "examinations, surveys, and maps" possibly allowed in N.D.C.C. § 32-15-06.

[¶24] LANDOWNERS, and apparently the other landowners, did not consent to the entry of their lands by either outright refusal, or could not be reached. App., p. 7, ¶ 12; p. 73, ¶ 12. LANDOWNERS attempted to make clear an important legal and factual point in each RESPONSE/ANSWER [App., ps. 53-54, ¶ 36 ; 101-102, ¶ 35][1]:

> Please be advised that (LANDOWNERS) do not assert that Applicant JOINT BOARD [if it is established that the Cass County Joint Water Resource District exists, and that said Applicant has the right of eminent domain], does not have the right to "survey"(FN#1) after entry upon the land with "the least private injury and subject to the provisions of section 32-15-

[1] See also, Transcript of August 20, 2015, p. 31, line 22, to p. 33, line 11.

> 21." N.D.C.C. § 32-15-06. Under the provisions of N.D.C.C. § 32-15-21, the Court has the power to regulate and determine the place and manner of such survey, and the time and place of said survey should be limited to (a) a period of a few days when no interference with farming operations are likely, and (b) upon advance notice to (LANDOWNERS) [who are allowed to oversee and monitor the JOINT BOARD'S actions, if determined necessary by (LANDOWNERS), or any of them].
>
> > 1. N.D.C.C. § 47-20.1-02(4) defines the "'(p)ractice of land surveying' (to mean) the assuming of responsibility for the surveying of land for the establishment of corners, lines, boundaries, and monuments, the laying out and subdivision of land, the defining and locating of corners, lines, boundaries, and monuments after they have been established, the survey of land areas for the purpose of determining the topography thereof, the making of topographical delineations, and the preparing of maps and accurate records thereof, when the proper performance of such services requires technical knowledge and skill." Please note, the removal of earth, gravel, stones, etc. is not included in such definition.

[¶25] Ultimately, neither the *North Dakota* WATER DISTRICT, nor the *North Dakota* District Court Judges felt constrained by the two (2) referenced *North Dakota* statute(s), nor other *North Dakota* laws.

[¶26] Indeed, Judge Herman recognized the WATER DISTRICT'S application was a legal mutation without invoking eminent domain [Tr. of 8/20/2015, p. 10, ls. 8-16]:

> "So I want to focus on what I think the real hardcore issue is here. Looking at, obviously, the authority of your Board, but focusing on Chapter 32-15. What are the rights here where you are not required to invoke either your quick take action or your eminent domain action. And I understand this is preparatory to any actual negotiations for compensation for easements, or the taking of any land on a permanent basis, or even the taking of large easements. I understand that is in the future."

[¶27] Claiming the existence of various Resolution(s) of Necessity – each (a) parroting its subservient role to the Army Corps of Engineers, the City of Fargo, and the City of

Moorhead, and (b) falsely asserting both statutory authority and the legal process [see LANDOWNERS' Response/Answer; App., ps. 46, ¶s 16-17; p. 94, ¶ 16] – the WATER DISTRICT identified certain landowners, including LANDOWNERS, whose land was to be accessed. App., ps. 10-29; 30-38; 76-86. Thereafter, the WATER DISTRICT again made known its subservient role, and a new objective never authorized by the referenced North Dakota statute [N.D.C.C. § 32-15-06], "(t)o complete the geotechnical surveys necessary to analyze the flood control project, the Corps and the local entities must bore a limited number of holes on certain properties to obtain subsurface soil samples." App., ps. 8, ¶ 17; p. 74, ¶ 16.

[¶28] There has never been a determination by the WATER DISTRICT that LANDOWNERS' "land is required for public use", a legal and factual observation plead by LANDOWNERS. App., p. 42, ¶ 9; p. 45, ¶ 15; p. 90, ¶ 9; p. 93, ¶ 15. Only a "proposed" project now exists, the WATER DISTRICT apparently believing it has the right to now access and occupy private landowners' real property so it can thereafter design the contemplated project.

[¶29] LANDOWNERS always protested WATER DISTRICTS' willingness to subserve the Army Corps of Engineers, the City of Moorhead, and the City of Fargo. App., ps. 43-45, 50-51, ¶s 10-13, 28; ps. 91-93, 98 , ¶s 10-13, 27.

[¶30] Despite reasonable requests for access limitations, and recognition of the legal process for just compensation, both District Court Judges allowed access to lands owned by LANDOWNERS, and the other landowners, without adherence to the eminent domain laws

of North Dakota found in our Constitution, and statutorily implemented in N.D.C.C. Chap. 32-15.

[¶31] **LAW AND ARGUMENT**

[¶32] **POINT 1. "Eminent Domain" is a special proceeding arising out of two (2) Constitutions.**

[¶33] **A. The "rule of law" must be respected.**

[¶34] Mindful of the rule of law predicated upon *stare decisis* [*Citizens United v. Federal Election Com'n*, 558 U.S. 310, 378 (2010)], LANDOWNERS feel compelled to point out the obvious – "(l)aw is a rule of property and of conduct prescribed by the sovereign power", and also, "(t)he will of the sovereign power is expressed by" a seven (7) step legal hierarchy topped by the Constitution of the United States, the Constitution of North Dakota and its statutes taking fourth and fifth positions, respectively, and judicial decisions recognized at the lowest level. N.D.C.C. § 1-01-02; N.D.C.C. § 1–01-03.

[¶35] The WATER DISTRICT is not mentioned in the statute's legal hierarchy; its pronouncements do not express the "will of the sovereign power", nor does a district court judge purporting to possibly enforce customary or common law. The law of eminent domain "is declared by the code" [N.D.C.C. § 1-01-06], requiring adherence to both statutory law and two (2) constitutions first.

[¶36] **B. In the exercise of eminent domain, the government must adhere to the implementing statutory process, to include the North Dakota Rules of Civil Procedure.**

[¶37] The North Dakota Constitution provides that "(p)rivate 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 .. (and) (c)ompensation shall be ascertained by a jury, unless a jury be waived. .." North Dakota Constitution, Article I, § 16; see also, Constitution of the United States, Amendment V, Takings clause ["nor shall private property be taken for public use, without just compensation"] which applies to the States as well as the Federal Government. In *Brown v. Legal Foundation of Washington*, 538 U.S. 216, 233 (2003), the United States Supreme Court determined that compensation is always required when "the government acquires private property for a public purpose, whether the acquisition is the result of a condemnation proceeding or a physical appropriation", applying *per se* rules for condemnation and physical takings:

> "When the government physically takes possession of an interest in property for some public purpose, it has a categorical duty to compensate the former owner, *United States v. Pewee Coal Co.,* 341 U.S. 114, 115, 71 S.Ct. 670, 95 L.Ed. 809 (1951), regardless of whether the interest that is taken constitutes an entire parcel or merely a part thereof. Thus, compensation is mandated when a leasehold is taken and the government occupies the property for its own purposes, even though that use is temporary. *United States v. General Motors Corp.,* 323 U.S. 373, 65 S.Ct. 357, 89 L.Ed. 311 (1945), *United States v. Petty Motor Co.,* 327 U.S. 372, 66 S.Ct. 596, 90 L.Ed. 729 (1946) .."

[¶38] LANDOWNERS understand the government may take private property, but there exists a concurrent categorical duty by the government to compensate for any occupation of the private property for its own purposes, even though that use is temporary. LANDOWNERS assert eminent domain is a constitutional provision that is self-executing because it establishes a sufficient rule by which its purpose can be accomplished without the need of legislation to give it effect, but nevertheless, the North Dakota Legislative Assembly

has also provided all of the legislation necessary to effectuate its purposes. State ex rel. Vogel v. Garaas, 261 N.W.2d 914, 918 (N.D. 1978). Subject to a lone exception for certain preliminary proceedings,[2] N.D.C.C. Chapter 32-15 implements the government's method for determining "just compensation" – but with respect to any judicial aspect of the eminent domain process, it is always predicated upon service of a summons and complaint because there are no exceptions "otherwise provided in this chapter .." N.D.C.C. § 32-15-33.

[¶39] By statute, North Dakota's Legislative Assembly has determined that all remedies in North Dakota's courts of justice are divided into either "actions" or "special proceedings". N.D.C.C. § 32-01-01. The other two (2) branches in North Dakota's scheme – the WATER DISTRICT (executive branch) and the district court (judicial branch) – now claim the right to disregard that law, by creating a legal mutation called "Application for Permit to Enter Land". The "application" is merely an invitation extended by the executive branch seeking judicial approval for its enduring physical occupation of private lands of North Dakota landowners – in this case, upon government demand, the right to occupy private lands at anytime for a term in excess of fourteen (14) months *without landowner right to object, interfere, or receive just compensation*.

[¶40] Specific definitions are important, and the North Dakota Supreme Court has provided assistance. "An action is 'an ordinary proceeding in a court of justice, by which a party prosecutes another party for the enforcement or protection of a right, the redress or prevention of a wrong, or the punishment of a public offense.' N.D.C.C. § 32-01-02, and

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[2] N.D.C.C. § 24-01-18 through N.D.C.C. § 24-01-25 provides for another method for state highways. The state is not involved. See, Kessler v. Thompson, 75 N.W.2d 172 (N.D. 1956) - just compensation must first be paid.

'[a] civil action is commenced by the service of a summons.' N.D.R.Civ.P. 3." State ex rel. Dept. of Human Services, Child Support Enforcement Div. v. North Dakota Ins. Reserve Fund, 2012 ND 216, ¶ 6, 822 N.W.2d 38.

[¶41] There has never been a summons, nor complaint prepared by the WATER DISTRICT, nor served upon any of the landowners. Its mutant Applications do not seek that which is sought by an "action", and if it claims "the enforcement or protection of a right" would first require a "right" superior to the implementing laws of eminent domain protecting private landowners, and such action must commence with service of a summons, and a complaint. N.D.R.Civ.P. 3 & 4(c)(2). The lower courts have improperly granted the WATER DISTRICT rights superior to the private landowners without due process of law required for any "action".

[¶42] Failing "action" status, the "application" must be the only other possible type of proceeding statutorily possible according to the Legislative Assembly: "A special proceeding is any remedy other than an action." N.D.C.C. § 32-01-04. LANDOWNERS assert that eminent domain proceedings are a special statutory proceeding mandated by our rule of law. North Dakota enacted N.D.C.C. Chapter 32-15 entitled "Eminent Domain", which provides for special proceedings, but always requiring adherence to the North Dakota Rules of Civil Procedure:

> "Except as otherwise provided in this chapter, the provisions of the North Dakota Rules of Civil Procedure are applicable to and constitute the rules of practice in the proceedings mentioned in this chapter." N.D.C.C. § 32-15-33.

[¶43] Nowhere within N.D.C.C. Chapter 32-15 would allow for the exercise of eminent domain by way of "application", nor is there any exception excusing "service of a summons"

[N.D.R.Civ.P. 3], accompanied by a complaint. N.D.R.Civ.P. 4(c)(2)[except if service by publication]; N.D.C.C. § 32-15-18.

[¶44] WATER DISTRICT'S failure to honor the sovereign power, was judicially sanctioned by two (2) judges. Neither the executive branch, nor the judicial branch has the right to violate a constitutionally protected "rule of property and of conduct". N.D.C.C. § 1-01-02. Without compliance with due process of law, and over repeated objection relating to both subject matter and personal jurisdiction [App., ps. 39-41; 87-89], the district courts were without jurisdiction to proceed, as recently recognized In re Guardianship of J.G.S., 2014 ND 239, ¶ 6, 857 N.W.2d 847, recognizing the critical role played by a summons and valid service of process under N.D.R.Civ.P. 4, both being required for a court to acquire personal jurisdiction over a defendant.

[¶45] **C. The way it is supposed to work in North Dakota – follow the process, pay the money, then take the property.**

[¶46] LANDOWNERS understand the power to appropriate private property for public use is an attribute of sovereignty based upon a principle firmly imbedded in the field of fundamental law, but there exists a limitation won by war with the king, embedded in two (2) constitutions, and implemented by North Dakota statute – just compensation must always first be paid: "Private property may not be taken or damaged for public use without just compensation first having been made to or paid into court for the owner. .. A determination of the compensation must be made by a jury, unless a jury is waived. The right of eminent domain may be exercised in the manner provided in this chapter." N.D.C.C. § 32-15-01(2).

[¶47] **1. North Dakota's special statutory process.**

[¶48] N.D.C.C. Chapter 32-15 was enacted to implement the "just compensation" requirement imposed upon our government when seeking to exercise its right of eminent domain as a "special statutory proceeding", and it was so recognized when adopting N.D.R.Civ.P. 81. Any procedural exceptions to these Rules of Civil Procedure must be found within that chapter of law, entitled "Eminent Domain", or the rule will apply. N.D.C.C. § 32-15-33; N.D.R.Civ.P. 81.

[¶49] The government must have an authorized purpose [N.D.C.C. § 32-15-02], be the type of private property which may be taken [N.D.C.C. § 32-15-04], and "(b)efore any property can be taken it must appear .. (t)hat the use to which it is to be applied is a use authorized by law (and) (t)hat the taking is necessary to such use. .." N.D.C.C. § 32-15-05. LANDOWNERS assert "it must appear" relates to judicial proceedings under Chapter 32-15. In Bigelow v. Draper, 6 N.D. 152, 69 N.W. 570, 570 & 573-75 (N.D. 1896), the *Syllabus by the Court* establishes:

> 3. All issues in a condemnation action, except the issue of compensation, are triable by the court, without a jury.
> 4. The question of the necessity of condemning the property sought to be condemned, while in its essential nature a political question, has been made a judicial question in this state by statute; but it is triable by the court, and not by a jury.

[¶50] See also, Kessler v. Thompson, 75 N.W.2d 179-180 (N.D. 1956).

[¶51] This body of law also requires preliminary governmental activities, some mandatory. Before initiating negotiations, the "condemnor shall establish an amount which it believes to be just compensation therefor and promptly shall submit to the owner an offer to acquire

the property for the full amount so established" which is mandated to be determined by "written appraisal" or by "written statement and summary, showing the basis for the amount it established as just compensation for the property." N.D.C.C. § 32-15-06.1. None of this mandatory process was done by WATER DISTRICT, nor did it even attempt to negotiate – "Sign a consent, or else!", cannot be construed to be a reasonable or diligent effort. A landowner's right to acquire the disclosures [N.D.C.C. § 32-15-06.2], and WATER DISTRICT'S obligatory duty "to apply to the judge of the district court .. for an order requiring a jury to be summoned to assess the damages in such *action*" [N.D.C.C. § 32-15-13; *emphasis* added], are nullified. While obviously a special proceeding, N.D.C.C. § 32-15-17 still recognizes the proceedings are a pending *action* to be tried to a jury based upon a complaint with statutorily-mandatory contents. N.D.C.C. § 32-15-18. This chapter of law contains provisions for conduct of the proceedings, the power of the court, and the assessment of damages. N.D.C.C. § 32-15-19, *et. seq.* Only after payments have been made as required by law, is there a "final order of condemnation" [N.D.C.C. § 32-15-27], with possession to follow. N.D.C.C. § 32-15-29.

[¶52] This statutory process is mandatory upon any condemnor, and even the district courts have no jurisdiction to deviate, even at the invitation of WATER DISTRICT, for mutant proceedings.

[¶53] The possibility of "quick take" is not involved in this appeal. Judge Herman erroneously believed "quick take" authority existed; without a project, and without appropriated state or federal monies, there is no quick take possibility under N.D.C.C. § 61-16.1-09(2). Quick take is further restricted to acquisition of "right of way", posing another

legal question. Judge McCullough appears to understand that quick take authority was not involved. Tr. of 8/14/2015, at p. 19, ls. 6-9.

[¶54] **POINT 2. LANDOWNERS' private property may not be taken without first payment of "just compensation".**

[¶55] The relatively recent case of Wild Rice River Estates, Inc. v. City of Fargo, 2005 ND 193, ¶ 16, 705 N.W.2d 850, makes clear:

> [¶ 16] Under N.D. Const. art. I, § 16, "[p]rivate property shall not be taken or damaged for public use without just compensation." This Court has said our state constitutional provision is broader in some respects than its federal counterpart because the state provision " 'was intended to secure to owners, not only the possession of property, but also those rights which render possession valuable.'" *Grand Forks-Traill Water Users, Inc. v. Hjelle,* 413 N.W.2d 344, 346 (N.D.1987) (quoting *Donaldson v. City of Bismarck,* 71 N.D. 592, 3 N.W.2d 808 Syll. ¶ 1 (1942)).

[¶56] The WATER DISTRICT seeks to "occupy" LANDOWNERS' private property in two (2) ways – (1) the right to physical occupation of the land which is superior in right to the private landowner(s), or their tenants, invitees, or guests,[3] and (2) the right to physically penetrate, and remove soil [and artifacts] from the land. The WATER DISTRICT does not have the right to occupy, nor invade LANDOWNERS' land(s) without first paying "just compensation" as determined by jury, and due process of law.

[¶57] Enactment of N.D.C.C. § 32-15-03 was intended to impose a limitation upon the government's right to eminent domain by recognizing, when so exercised, what estate could

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[3] "(T)he most important of the various rights of an owner is the right of possession which includes the right to exclude others from occupying or using the space." Seawall Associates v. City of New York, 542 N.E.2d 1059, 1063 (New York Court of Appeals, 1989) citing *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 435 (1982).

be taken for which just compensation would be paid.

[¶58] **A. "Just compensation" for "occupation" and/or "removal".**

[¶59] Two (2) attributes of private property ownership are implicated by this mutant application – (1) possible occupation of private lands for fourteen (14) months – the timing, and number of times, determined by the government, and (2) physical possession of subsurface soil samples obtained by government boring(s). The right to occupy private lands must involve at least an easement interest [possibly non-exclusive] for which the owner will always be entitled to just compensation under subsection 2, and the removal of subsurface soil samples following boring will be implicated under subsection 3. Doing either act, requires implementation of the eminent domain process under N.D.C.C. Chapter 32-15, and adherence to the North Dakota Rules of Civil Procedure. The judiciary should never have participated in the forced negotiations arising out of the mutant application.

[¶60] Honoring The North Dakota Supreme Court has held that "payment must precede the taking (citation omitted) even though the ultimate right to take the property for the proposed public use is manifest." Johnson v. Wells County Water Resource Bd., 410 N.W.2d 525, 528 (N.D. 1987), citing Becker County Sand & Gravel Co. v. Wosick, 245 N.W. 454 (N.D. 1932). Both the Johnson case and the Kessler case are replete with references to the right of the Legislature having "extended greater protection to property owners" by its legislation [Johnson, p. 529], other than the eminent domain process allowed by the predecessor to N.D.C.C. § 24-01-18, *et. seq.,* "(t)he eminent domain procedure by a *civil action* is contained in all the codes heretofore mentioned with such changes as were enacted from time to time" [Kessler, p. 179; *emphasis* added]; North Dakota's Constitution "guarantees that (a private

landowner's) property shall not be taken or damaged even for a necessary public use 'without just compensation (in money) having been first made to, or paid into court for the owner.' ***" [Kessler, p. 181]; the private landowner "retains title and enjoyment of the property until final determination of such appeal" [Kessler, p. 182, under alternate method]; "(p)ending final determination of an appeal, there is no interference with any rights of the owner. He retains title, control and enjoyment of the property. His property is neither taken nor damaged without just compensation having been first made to or paid into court for his use and his rights have fully adjudicated as provided by law in accordance with the requirements of our constitution." [Kessler, p. 184, and similar language twice on 189 describing rights under alternate method which match the main eminent domain laws].

[¶61] **1. "Occupation" in the form of a non-exclusive easement requires just compensation.**

[¶62] LANDOWNERS should be entitled to just compensation for the "easement" arising out of N.D.C.C. § 32-15-03(2) – all easements are servitudes upon the landowners. N.D.C.C. Chapter 47-05; Johnson v. Armour & Co., 291 N.W. 113 (N.D. 1940) ["An easement is a charge or burden upon one estate, the servient, for the benefit of another, the dominant."]. An easement is an interest in real property. N.D.C.C. § 47-05-02.1. "An easement is defined at least in part as '[a]n interest which one person has in the land of another.' Black's Law Dictionary 509 (6th ed. 1990). Granting another an interest in real property necessarily 'affect[s] the title to real property.' NDCC § 28-01-15(2)(1991)." Huber v. Oliver County, 529 N.W.2d 179, 181-182 (N.D. 1995). When the district court judges granted an interest in LANDOWNERS' real property allowing occupation at any

time, for any number of times, within a fourteen (14) month period ending November 25, 2016, "just compensation" is first required to be paid. N.D.C.C. § 32-15-01(2).

[¶63] Any attempt to "occupy" LANDOWNERS' land(s) includes the exclusion of LANDOWNERS, their tenants, invitees, or guests constitutes a "taking" for which just compensation must first be paid. In North Dakota, the "owner of land in fee has the right to the surface and to everything permanently situated beneath or above it". N.D.C.C. § 47-01-12. N.D.C.C. § 47-01-20 specifically recognizes that the "owner of a thing also owns all its products and accessions", and further, these landowners' property may only be legally acquired by one (1) of (5) methods established by N.D.C.C. § 47-01-21 – none of which are legally possible – no legal occupancy, accession, transfer, will, or succession favoring the government exists.

[¶64] **2. "Removal" should also result in just compensation.**

[¶65] The jury has not yet determined the amount of just compensation, nor can it without the WATER DISTRICT and the courts adhering to the rule of law. Any attempt to "penetrate", "invade" and/or "remove" LANDOWNERS' private property would also constitute a "taking" [N.D.C.C. § 32-15-03(3)] – if the WATER DISTRICT wants to penetrate, invade and/or remove LANDOWNERS' private property [whether it be soil or artifacts] for some perceived public purpose, it must first secure the right to so penetrate, invade and/or remove, and then pay "just compensation" before it is attempted or accomplished. The WATER DISTRICT'S declaration of intent to not adhere to statute's limitations [essentially allowing conduct, after entry, only involving walking on the land's surface – no penetration, no removal, no damage] to include seeking judicial sanction for a

"taking" of both soil [or artifacts] and actual possession of LANDOWNERS' privately owned lands greater than allowed by the statute as requested in the Application(s) should be condemned, and its attempt to expand upon the words of the statute rejected. If any access be allowed, it must be consistent with the statute – never allowing for penetration, invasion, or removal of LANDOWNERS' privately owned land(s), its soil, or its artifacts.

[¶66] **POINT 3. Entry for making surveys still requires full compliance with the statutory process implementing the government's right of eminent domain.**

[¶67] While subjected to this mutant process, LANDOWNERS made a magnanimous offer to allow entry if a project and necessity were determined to exist, subject to certain restrictions. See, ¶ 24 herein. Such offers were summarily rejected by both WATER DISTRICT and the two (2) district judges. LANDOWNERS' offer to negotiate to allow only that which is contemplated to exist under the clear words of N.D.C.C. § 32-15-06, after there first exists a determination that the "land is required for public use", that it may be surveyed and located, was rejected. Rather than accept the clear words of the statute, the WATER DISTRICT wanted more, and the district court judges granted their desires contrary to process/procedure, and without payment of "just compensation" even being possible.

[¶68] N.D.C.C. § 32-15-06 cannot be construed in isolation – it forms part of the statutory implementation of landowners' right to just compensation:

> In all cases when land is required for public use, the person or corporation, or the person's or corporation's agents, in charge of such use may survey and locate the same, but it must be located in the manner which will be compatible with the greatest public benefit and the least private injury and subject to the provisions of section 32-15-21. Whoever is in charge of such public use may enter upon the land and make examinations, surveys, and maps thereof, and such entry constitutes no claim for relief in favor of the

> owner of the land except for injuries resulting from negligence, wantonness, or malice.

[¶69] The statute contains "conditions precedent" including "land required for public use" with the survey and location subject to the court's statutory powers under N.D.C.C. § 32-15-21, and also, a "public use", or at least, an identified project. If the conditions precedent exist, the statute only allows the condemnor to "enter upon the land and make examinations, surveys, and maps thereof" – however, the WATER DISTRICT was now judicially granted the right to physically enter, to physically occupy, and to perform physically invasive tests, to include the removal of private property for an extended period of approximately fourteen (14) months, and without just compensation first being paid. This is wrong, and the actions, both executive and judicial, should not be countenanced.

[¶70] LANDOWNERS' position is that the WATER DISTRICT always had the obligation to implement the procedures imposed upon a condemnor, starting with an qualified public use, appropriate resolution of necessity, adherence to statutes, and service of a summon and complaint meeting statutory requirements. N.D.C.C. Chapter 32-15. None of those statutory requirements were attempted, nor accomplished. Instead, WATER DISTRICT claimed a right, by mutant application, to be entitled to a judicially sanctioned entry, occupation, and physical taking of LANDOWNERS' private property because it may want to take the property in the future – if it ever has a project.

[¶71] LANDOWNERS understand that access for "survey and locat(ion)" in North Dakota is allowed by N.D.C.C. § 32-15-06, but it will always require judicial oversight for the entry for purposes of only "examinations, surveys, and maps" by eminent domain proceedings.

Judicial authorization for actual physical control over privately owned land(s) superior to that of the fee simple owner [or their tenants, guests, and invitees], and just as offensive, there exists judicial compulsion – the possibility of contempt of court should any landowner [or a tenant, invitee, or guest] act contrary through November 25, 2016. App., ps. 61, 108. For greater than fourteen (14) months, the judiciary allows – over the objections of the private landowners – activities never previously regarded as the subject of "examinations, surveys, and maps" by any traditional definition(s).

[¶72] **A. After entry of private lands under N.D.C.C. § 32-15-06, the government may not remove soil without compliance with eminent domain.**

[¶73] Never invoking eminent domain process or procedures, the WATER DISTRICT'S mutant application(s) claimed it was necessary to "bore a limited number of holes on certain properties to obtain subsurface soil samples". App., p. 8, ¶ 17; p. 74, ¶ 16. While the boring(s) to obtain subsurface soil samples involving physical boring with huge equipment was probably the most odious to rights of private landowners, the WATER DISTRICT sought, and obtained the authority to enter and occupy private lands anytime with a fourteen (14) month period for multiple governmental activities beyond "examinations, surveys, and maps". The WATER DISTRICT'S requests by "application" were turned into judicial declaration(s) of what the three (3) simple statutory words actually meant, to include, by identical orders, "conducting geotechnical surveys, conducting wetland reviews in accordance with the National Environmental Policy Act, conducting cultural resource surveys in accordance with the Natural Historic Preservation Act, all of which may require conducting geomorphic testing, conducting Hazardous Toxic and Radioactive Waste testing,

soil testing, soil borings, stage-discharge observations, and ground resistance measurements." App., ps. 61, 108. LANDOWNERS note that the origin of N.D.C.C. § 32-15-06 goes back to North Dakota's Revised Code of 1895, long before our Legislative Assembly could have known about the two (2) Federal acts enacted in 1969 and 1966, respectively. LANDOWNERS object to any attempt to expand upon the statute by either the executive branch, or the judicial branch, but this argument will primarily revolve around the recognized intent to physically take the LANDOWNERS' soil(s), and also, to occupy LANDOWNERS' private lands.

[¶74] The removal of any earth has been statutorily determined to be an "estate() and right() in lands subject to be taken for public use .." [N.D.C.C. § 32-15-03(3)] for which "just compensation" must first be paid. N.D.C.C. § 32-15-01(2). The physical extraction of the subsurface soil samples is accomplished by "penetration test borings" typically drilled with truck or track mounted core auger drills resulting in soil boring holes typically 6-8 inches in diameter and 60-90 feet deep. Core samples, and possibly bulk samples from the material removed from the borings may be taken, along with "the majority of remaining excess soil" after the "holes are filled with bentonite clay (expansive clay material) if conditions indicate influence or impact to subsurface aquifers." Affidavit of engineer Lee Beauvais; Docket Entry # 24; App., p. 3; similar affidavit in other case. There still exists the possibility of repeated soil borings every day between now and November 25, 2016.

[¶75] It is clear that case law has also determined that anticipated soil borings would be a "taking" within the meaning of Article I, §16, of the Constitution of North Dakota, N.D.C.C. Chap. 32-15 and the Fifth Amendment to the Constitution of the United States of America.

Other states, interpreting statute(s) virtually identical to N.D.C.C. §32-15-06, have determined that "soil borings" do not fit within the contemplated "examination" of the state's statute, and the soil boring would be a "taking" under federal and state law. See, National Compressed Steel Corporation v. Unified Government of Wyandotte County/Kansas City, 272 Kan. 1239, 38 P.3d 723 (2002); County of Kane v. Elmhurst Nat'l Bank, 443 N.E.2d 1149 (Ill.App 2nd Dist. 1982); and Burlington Northern and Santa Fe Railway Company v. Chaulk, 631 N.W.2d 131 (Neb.2001). LANDOWNERS further cite Missouri Highway and Transportation Commission v. Eilers, 729 S.W.2d 471, 472-473 (Missouri Ct. of Appeals, 1987) [precondemnation soil surveys are not within the statute allowing for a survey; it also clearly establishes what is meant by a "survey" involving "an actual examination of the surface of the ground" or "merely evidence of location and boundary" or "a survey is an act of viewing and measuring surface areas", citing other authority]; Coastal Marine Service of Texas, Inc., v. City of Port Neches, 11 S.W.3d 509, 514 (Texas Court of Appeals, 2000) [allowing lineal survey, but "(n)ot included are invasive procedures such as core drilling, soil boring or subsurface soil testing .. (citing two other cases disapproving such invasive procedures)"]; and Hailey v. Texas-New Mexico Power Company, 757 S.W.2d 833, 835 (Texas Court of Appeals, 1988)["(W)e refuse to further erode the strict construction of our eminent domain statutes to permit core drilling or soil boring as incidental to a lineal survey. We reverse the order of the trial court insofar as it permits TNP to conduct core drilling, soil boring and subsurface soil testing on the lands of the appellants."].

[¶76] The WATER DISTRICT, and the district courts, without legal or factual justification reply a 1964 Texas appellate court decision in Puryear v. Red River Authority of Texas, 383

S.W.2d 818 (Tex. Civ. App. 1964) and a Minnesota Court of Appeals decision in State by Waste Management Board v. Bruesehoff, 343 N.W.2d 292 (Minn. Ct. App. 1984). The 1964 Puryear decision does not say "that core samples are not a taking" as originally asserted by the WATER DISTRICT, but rather, in 1964, said "(w)e conclude the contemplated entry and core drilling is not a taking of appellant's property as contemplated by Article I, Section 17 of the Texas Constitution." Puryear, p. 821. The decision was not based upon the United States Constitution, North Dakota's Constitution, nor its statutory laws. However, a lot has happened in Texas since 1964, because Puryear is not an accurate reflection of the status of pre-condemnation governmental acts in Texas[4], nor accepted by other states after it.[5] [6]

[¶77] Any reliance upon Bruesehoff, claiming it "allowed the testing of respondent's property using electrical resistivity testing pursuant to a statute proving the right to enter private property for 'the purpose of obtaining information, or conducting surveys or investigations'" [App., p. 69, Docket Entry #56, ¶ 11], is almost unbelievable. While it is true that the Minnesota Court of Appeals allowed electrical resistivity testing pursuant to the authority of a Minnesota statute [*Syllabus by the Court #2:* "The Waste Management Board's access authority under Minn.Stat. § 115A.06, subd. 5, is not limited to surface surveys and

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[4] Hicks v. Texas Municipal Power Agency, 548 S.W.2d 949 (Tex. 1977); Hailey v. Texas-New Mexico Power Company, 757 S.W.2d 833, 835 (Tex. 1988); Coastal Marine Service of Texas, Inc. V. City of Port Neches, 11 S.W.3d 509, 514 (Tex. 2000).

[5] Mackie v. Mayor and Com'rs of Town of Elkton, 290 A.2d 500, 506 (Maryland 1972); Jacobsen v. Superior Court of Sonoma County, 192 Cal. 319, 219 P. 986 (1923).

[6] National Compressed Steel Corp. v. Unified Government of Wyandotte County/Kansas City, 38 P.3d 723 (Kan. 2002).

inspections. The board may enter private property to conduct electrical resistivity testing pursuant to the statute."], the opinion makes clear the "level of intrusion and damage involved (with electrical resistivity testing) is readily distinguishable from that in *Jacobsen.* Electrical resistivity testing involves walking over an area at quarter mile intervals and inserting ½" x 18" probes every 50 to 300 feet. A portable power unit sends an electrical current through the probes and the resistence of the soil to electricity is measured. The testing yields essential soil permeability information. And since it requires no vehicles or heavy equipment, it causes minimal intrusion or damage." Put another way, if the testing involved vehicles, heavy equipment, or soil borings, and/or occupying private lands for ingress and egress that impinge or impair the rights of the owner to the use and enjoyment of his property, it would be forbidden under Minnesota statute(s), and the Bruesehoff analysis.

[¶78] The WATER DISTRICT, and the district courts, rely upon Square Butte Elec. Co-op. V. Dohn, 219 N.W.2d 877 (ND 1974), because it affirmed an electric company's motion to enter upon privately owned lands in order to conduct "soil testing and ground-resisting measurements". App., ps. 57, 105. Nothing within the decision establishes LANDOWNERS' issues as to process/compensation were issues raised by the litigants, and unfortunately, the litigant in Alliance Pipeline L.P. v. Smith, 2013 ND 117, ¶ 20, 833 N.W.2d 464, waived his issues on appeal that approach the arguments herein advanced. The Alliance Pipeline decision properly recognizes the district court must have subject-matter jurisdiction and personal jurisdiction over the parties, at ¶ 18, but incorrectly looks at N.D.C.C. § 32-15-06 in isolation stating the statute "does not describe a procedure to enforce

that statutory right if the landowner objects to entry upon the land." *Id.*, ¶ 19. The whole "Eminent Domain" chapter provides procedure – the landowner cannot object to the entry if the statutory procedure is followed, landowners first receive just compensation. LANDOWNERS object to the assumption of subject-matter and personal jurisdiction without compliance with law.

[¶79] N.D.C.C. Chapter 32-15 implements the constitutional provision with process, procedure, and many limitations. The government, and court, relied upon a single statute to justify the physical entry and occupation of private properties, along with physically invasive testing requiring the drilling of holes accompanied by the removal of private property, apparently believing the statute does not involve eminent domain. The WATER DISTRICT, nor the district judges can violate the rule of law which does not allow for legal isolationism. If uninvited government entry can be judicially approved by "application", this Court countenances annihilation of the Fourth Amendment to the Constitution of the United States and Article I, § 8, of the North Dakota Constitution, both securing the right of people to be secure in their persons, houses, papers and effect, against unreasonable searches and seizures, without warrants issued pursuant to law. State v. Nelson, 2005 ND 59, ¶ 3, 693 N.W.2d 910. And to the extent the governmental motive is premised upon a possible "taking" under eminent domain concepts, the Supreme Court would be excusing adherence to fundamental constitutional and statutory laws mandating process, and procedure. No jurisdiction will ever exist to ignore the "Eminent Domain" body of law.

[¶80] **CONCLUSION**

[¶81] LANDOWNERS believe the protections of the implementing statutes relating to an

exercise of eminent domain must be followed; the district courts were without jurisdiction to allow the WATER DISTRICT to enter and occupy, or to enter and physically take any earth owned by them.

Respectfully submitted this 1st day of February, 2016.

Garaas Law Firm

_____

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20150311
20150312

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

In re: 2015 Application for Permit to Enter Land for Surveys and Examination Associated with a Proposed North Dakota Diversion and Associated Structures

---

Cass County Joint Water Resource District, Plaintiff and Appellee

v.

Steven Brakke; Colleen Brakke; Dorothy V. Brakke, as trustee of the Dorothy V. Brakke Revocable Living Trust under agreement dated April 3, 1980, as amended and as beneficiary and possible successor Trustee of the H. Donald Brakke Revocable Living Trust under agreement dated July 28, 1977, as amended; Paul E. Brakke; and H. Donald Brakke; K-F Farm Partnership; Christopher Narum; and Jeanne D. Narum, Defendants

---

Steven Brakke; Colleen Brakke; Dorothy V. Brakke, as trustee of the Dorothy V. Brakke Revocable Living Trust under agreement dated April 3, 1980, as amended and as beneficiary and possible successor Trustee of the H. Donald Brakke Revocable Living Trust under agreement dated July 28, 1977, as amended; Paul E. Brakke; and H. Donald Brakke, Appellants

Supreme Court No. 20150311
(Consolidated Case)

District Court No.
09-2015-CV-00770
09-2015-CV-01746

AFFIDAVIT OF MAILING

State of North Dakota
County of Cass

[¶1] Pat Doty, being first duly sworn on oath, deposes and says: Affiant is a resident of the City of Fargo, North Dakota, and over the age of eighteen years, and not a party to the above

entitled matter.

[¶2] On the day of 4th day of February, 2016, Affiant deposited in the United States Post Office at Fargo, North Dakota, a true and correct copy of the following documents in the above entitled action: (1) CORRECTED COVER [Title Page] TO BRIEF OF DEFENDANTS-APPELLANTS and (2) CORRECTED COVER [Title Page] TO APPENDIX TO BRIEF OF DEFENDANTS-APPELLANTS.

[¶3] The copies of the foregoing were securely enclosed in an envelope with postage duly prepaid and addressed as follows:

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Jeanne D. Narum
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[¶6] To the best of Affiant's knowledge, the address above given was the actual post office address of the party intended to be so served. The above documents were duly mailed in accordance with the provisions of the North Dakota Rules of Civil Procedure.

Pat Doty

Pat Doty

Subscribed and sworn to before me this 4th day of February, 2016.

JONATHAN T. GARAAS
Notary Public
State of North Dakota
My Commission Expires Dec. 28, 2021

Notary Public

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

Cass County Joint Water Resource District,

Plaintiff and Appellee

vs.

Steven Brakke, et al,

Defendants-Appellants

Supreme Court No. 20150311
(Consolidated Case)

District Court No.
09-2015-CV-00770
09-2015-CV-01746

AFFIDAVIT OF MAILING

State of North Dakota
County of Cass

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Pat Doty

Pat Doty

Subscribed and sworn to before me this 1st day of February, 2016.

Notary Public

DAVID GARAAS
Notary Public
State of North Dakota
My Commission Expires July 2, 2017