

**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

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.

Glen Libbrecht; Danyea Barta; Vance Barta;
Laurie Brakke; Michael Brakke; Marilyn G.
Libbrecht and Glen Libbrecht, Co-Trustees of
the Catherine Libbrecht Trust; Annette
Delaney; David Delaney; Derek S. Flaten;
Micheal Fosse; Merry Lou Haakson;
Kenneth W. Hatlestad; David Houkom;
Douglas W. Johnson; Jeffrey K. Johnson;
Martin Johnson; Douglas Kummer; Jacalyn
Kummer, Jon Larson, Julie Larson; Brian T.
Leiseth; Timothy J. Leiseth; Glen Libbrecht;
Marilyn G. Libbrecht; Nancy Loberg;
David L. Lotzer, James Martin, Marlys
Martin; Anne Miller; Collin Miller; Roger
Miller; Mari Palm and Robert Helbling,
Co-Trustees of the MKRM Trust;
Kelly Pergande; Kristie Sauvageau;
Terry Sauvageau; Alan and Barbara
Thurnberg, Co-Trustees of the Thunberg
Living Trust; Kristine Valan; Orlen Valan,
Jr.; Western Trust Company; Kayla M.
Woodley,

Defendants,

Mari Palm and Robert Helbling, Co-Trustees
of the MKRM Trust; Michael Brakke; and
Laurie Brakke,

Appellants.

Supreme Court No.
20150312
(Consolidated Case)

District Court No.
09-2015-CV-01746

Appeal from the Memorandum Opinion and Order For Entry Upon Land Dated
August 31, 2015, in District Court Case Number 09-2015-CV-01746

And

Appeal from the Memorandum Opinion and Order For Entry Upon Land Dated
September 18, 2015, in District Court Case Number 09-2015-CV-00770

County of Cass, East Central Judicial District
Honorable Douglas R. Herman and Steven E. McCullough, Presiding

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STATEMENT OF THE ISSUES

[¶1] Whether the district court erred as a matter of law by concluding a proceeding under Section 32-15-06 of the North Dakota Century Code for access to property for examinations, surveys, and maps is not an eminent domain action.

[¶2] Whether the district court erred as a matter of law by concluding Section 32-15-06 of the North Dakota Century Code does not require commencement of an action by service of a Summons and Complaint.

[¶3] Whether the district court erred as a matter of law by concluding soil borings fall within the definition of “examinations, surveys, and maps” under Section 32-15-06 of the North Dakota Century Code.

STATEMENT OF THE CASE

[¶4] This is a consolidated appeal from two separate Orders granting permission for the Appellee, Cass County Joint Water Resource District (hereinafter referred to as the “Joint Board”), to enter upon the lands of Appellants Steven Brakke, Colleen Brakke, Dorothy V. Brakke, Paul E. Brakke, H. Donald Brakke, MKRM Trust, Robert Helbling and Mari Palm, Co-Trustees, Michael Brakke, and Laurie Brakke (collectively referred to as the “Brakkes”) for the purpose of examining, surveying, and mapping required for the evaluation and design of a proposed flood control project.

[¶5] The Joint Board is a joint water resource district and political subdivision, with unique and specific statutory authorities to develop, construct, establish, and maintain flood control and protection projects, including the right to acquire real property through eminent domain, if necessary. On March 27, 2015,

the Joint Board filed an Application for Permit to Enter Land in Case No. 09-2015-CV-00770. APP. 5. On July 15, 2015, the Joint Board filed a separate Application for Permit to Enter Land in Case No. 09-2015-CV-01746. APP. 71. Each Application requested access to certain properties in Cass County, North Dakota, for the purpose of conducting examinations, surveys, and mapping required for evaluation and design of a proposed flood control project. The Brakkes objected to each Application on August 6, 2015. APP. 39; APP. 87.

[¶6] On August 31, 2015, the Honorable Douglas R. Herman, Judge of the district court, entered a Memorandum Opinion and Order for Entry Upon Land in Case No. 09-2015-CV-01746. APP. 103. On September 18, 2015, the Honorable Steven E. McCullough, Judge of the district court, entered a Memorandum Opinion and Order for Entry Upon Land in Case No. 09-2015-CV-00770. APP. 55.

[¶7] In each case, the district court concluded the Joint Board was not required to commence an action by service of a Summons and Complaint. APP. 56; APP. 103. The court further held the soil borings sought to be completed by the Joint Board constituted an examination under N.D.C.C. § 32-15-06, and the proceeding for an examination was preliminary to a condemnation action, such that the Brakkes were not entitled to a jury trial in order to determine an amount of just compensation for the borings. APP. 56-60; APP. 104-107. Finally, the court declined to consider the Brakkes' argument that N.D.C.C. § 32-15-06 was unconstitutional because they admitted they had not served notice upon the Attorney General, as required by statute. APP. 60.

[¶8] Under these circumstances, the court granted the Joint Board permission to enter upon the Brakkes' land to examine, survey, and map the property, subject to certain conditions defined by the court. APP. 61; APP. 107. The Brakkes filed a Notice of Appeal in each case on October 22, 2015. APP. 63; APP. 127.

STATEMENT OF THE FACTS

[¶9] In September 2008, the United States Army Corps of Engineers (the "Corps") entered into an agreement (the "Corps Agreement") with the City of Fargo ("Fargo") and the City of Moorhead ("Moorhead") to jointly assess flooding issues. APP. 10. In accordance with the Corps Agreement, the Corps conducted the Fargo-Moorhead Metropolitan Feasibility Study (the "Study") in order to identify viable permanent flood control and protection options to reduce flood damages and risks for the region. Id. Fargo and Moorhead serve as local co-sponsors of the Study under the Corps Agreement. Id.

[¶10] As a continuation of the Study, the Corps, Fargo, and Moorhead negotiated a Design Agreement for the Fargo-Moorhead Metropolitan Area Flood Risk Management Project ("Design Agreement"). Id. As a component of the Design Agreement, the Corps, Fargo, and Moorhead are conducting the design phase of the Fargo-Moorhead Metropolitan Area Flood Risk Management Project (the "Project"). Id. The Design Agreement defines the Project as a diversion project through North Dakota with appurtenant flood control and transportation components. Id. Although the Corps is charged with studying, designing, and ultimately constructing a flood control project under the Corps Agreement, Fargo and Moorhead are responsible for acquiring the real property necessary to complete any diversion

project, including the responsibility of obtaining rights of entry for survey work. APP. 11.

[¶11] The Joint Board is a joint water resource district and political subdivision under chapter 61-16.1 of the North Dakota Century Code, with unique and specific statutory authorities to develop, construct, establish, and maintain flood control and protection projects, including the right to acquire real property through eminent domain, if necessary. APP. 10.

[¶12] In light of the Joint Board's unique authority, the Joint Board, Fargo, and Cass County entered into a Joint Powers Agreement regarding the Joint Board's role in the Project. APP. 11. In accordance with chapter 54-40.3 of the North Dakota Century Code, the Joint Powers Agreement vests the Joint Board 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. Id.

[¶13] At the time the instant matter began, the Corps was engaged in the Planning Engineering and Design Phase (the "PED Phase") for the Project. APP. 10. The PED Phase includes additional studies of the Project to ensure the proposed designs are technically sound and to ensure the Project complies with the controlling statutes and regulations. Id. The studies are required before the Project design can be completed. Id.

[¶14] To determine the adequacy and suitability of the Project as proposed, the Corps and the local sponsors must conduct certain surveys, mapping, testing, and examinations. APP. 11. In accordance with federal statutes and regulations, the Corps and the local sponsors must identify and survey utilities, wetlands, cultural

resources, environmental hazards, wildlife, and river geology that may be impacted by the Project before approval and construction of the Project. Id. In addition, boundary surveys must be conducted to confirm the exact location of the proposed components of the Project. Id.

[¶15] Based on the foregoing, the Joint Board determined, through Resolutions of Necessity dated July 8, 2014, February 12, 2015, and June 25, 2015, respectively, that it is necessary to assess certain parcels that may be impacted by the Project. APP. 10; APP. 30; APP. 76. Access is necessary to conduct surveys, engineering, and environmental analysis, including geotechnical testing, soil borings, and cultural resource surveys. APP. 12.

[¶16] The Joint Board further resolved to attempt in good faith to secure access to the properties at issue without the need for legal proceedings. Id. While many of the record title holders consented to allowing access to the Corps, the local sponsors, and their respective contractors, some property owners could not be reached or refused to allow access, including the Brakkes.

[¶17] On March 27, 2015, and July 15, 2015, the Joint Board filed Applications for Permit to Enter Land (the “Applications”) with the district court, through which the Joint Board sought to obtain access to the Brakkes’ property to conduct examinations, surveys, and mapping for the Project. APP. 5; APP. 71. The district court granted the Joint Board’s Applications on August 31, 2015, and September 18, 2015, and entered orders permitting the Joint Board to enter upon all of the properties identified in the Applications for the purpose of examining, surveying, and mapping. APP. 55; APP. 103. The examinations, surveys, and

mapping recognized in the court orders include conducting geotechnical surveys, conducting wetland reviews in accordance with the National Environmental Policy Act, conducting cultural resource surveys in accordance with the National 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. 61; APP. 108. Not all of these activities are required on each property subject to the court orders at this time.

[¶18] The district court limited the Joint Board's access until November 25, 2016. Id. The court placed other restrictions on access: no buildings were to be entered or damaged, or trees cut, on the property without the consent of the landowner or further order of the court. APP. 62; APP. 108. The orders also required the Joint Board to provide 48-hour advance notice of its intention to enter upon the Brakkes' property and pay the sum of \$250 for each soil boring completed on the property for purposes of the geotechnical surveys. Id. Finally, the property was to be returned, as nearly as practicable, to its original condition, and any damages caused by the Joint Board's entry were to be repaired or compensated for by the Joint Board. Id.

[¶19] Following the entry of the orders, and notice to the Brakkes, entry was made upon the property from October 23, 2015, through December 1, 2015, to complete cultural and utility surveys. The Joint Board did not conduct any soil borings, and it was determined that no soil borings were necessary for the Brakkes' property at the present time. The Joint Board completed the anticipated work on the Brakkes' property subject to the orders.

ARGUMENT

I. Whether the district court erred as a matter of law by concluding a proceeding under Section 32-15-06 of the North Dakota Century Code for access to property for examinations, surveys, and maps is not an eminent domain action.

[¶20] At the outset, it is necessary to clarify the nature of this proceeding. Much of the Brakkes' argument hinges on the faulty premise that this matter is an eminent domain action. It is not. The Applications filed by the Joint Board requested access to the Brakkes' property to conduct surveys and examinations – not to effectuate a taking of the property. The issue of entry to the property for surveys and examinations is preliminary to any future eminent domain action that may occur. Consequently, the entire discussion of eminent domain law in the Brakkes' brief is irrelevant for purposes of this appeal.

[¶21] The Joint Board has authority to enter the properties pursuant to N.D.C.C. § 32-15-06, which states in its entirety:

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.

This Court has had occasion to construe N.D.C.C. § 32-15-06 on multiple occasions.

[¶22] In Square Butte Electric Cooperative v. Dohn, 219 N.W.2d 877, 879 (N.D. 1974), an electric cooperative requested permission to enter upon the lands of various defendants for the purpose of making surveys and conducting soil testing,

pursuant to N.D.C.C. § 32-15-06. While the parties disputed whether the project was for a public use, this Court concluded “a determination of this issue is premature at this time, a condemnation action having not been commenced, and that it is better to delay a determination of what constitutes a public use until that issue has been more extensively briefed and considered by the trial court in conjunction with the condemnation action itself[.]” Id. at 882.

[¶23] The Court further declined to consider whether the particular location of the transmission line at issue was compatible with the greatest public benefit and the least private injury, because to require the electric cooperative to prove this “would be to require it to act prior to the ascertainment of the knowledge necessary to establish such a fact, and might also result in a useless act in the event that after survey and testing a decision were made not to traverse this land.” Id. at 883. In other words, the survey and testing was “a necessary preliminary to the condemnation action itself” and the electric cooperative would not be in a position to determine the best route for the transmission line until the survey and testing was completed. Id.

[¶24] Ultimately, the Court held that, in order to enter land to conduct survey and examinations, a plaintiff “is required to show only that it was in the category of persons entitled to seek eminent domain, and that it was not required to prove that at that stage of the proceedings eminent domain was proper, justified, and necessary.” Id. The electric cooperative satisfied these requirements because it possessed the power of eminent domain, it planned to construct an electric generating plant and power line, it was necessary to conduct surveys and testing to determine the route of the line, and there was a sufficient basis for an order permitting the survey and testing

with reasonable conditions and protections for the landowner. Id. at 884; see also Minnkota Power Co-op., Inc. v. Anderson, 2012 ND 105, ¶ 5, 817 N.W.2d 325 (“[A] party seeking to enter land for surveying and testing under section 32-15-06 must show it is in the category of persons entitled to seek eminent domain.”).

[¶25] In Alliance Pipeline L.P. v. Smith, 2013 ND 117, ¶ 2, 833 N.W.2d 464, a natural gas provider filed a petition to enter the defendants’ land in order to conduct preliminary examinations and surveys under N.D.C.C. § 32-15-06. The examinations were needed to obtain approval for the construction of a proposed pipeline. Id. The district court concluded the natural gas provider was within the category of persons entitled to use eminent domain and it was authorized to enter the land to conduct pre-condemnation examinations and surveys. Id. at ¶ 3.

[¶26] On appeal, the landowners challenged the procedure used to access their land under N.D.C.C. § 32-15-06. Id. at ¶ 14. The Court reaffirmed its holding in Dohn, which “makes clear that a proceeding for a court order authorizing examinations and surveys under N.D.C.C. § 32-15-06 is ‘preliminary to the condemnation action itself’ and is not a condemnation proceeding.” Id. at ¶ 15; see also Eberts v. Billings Cnty. Bd. of Com’rs, 2005 ND 85, ¶ 15, 695 N.W.2d 691 (acknowledging Square Butte “held that for purposes of entering land for a survey for possible condemnation proceedings, a party must show it is in a category of entities entitled to seek eminent domain and is not required to show necessity at that stage of the proceeding.”).

[¶27] In this case, the Joint Board is within the class of persons entitled to exercise the power of eminent domain. See N.D.C.C. § 61-16.1-09(2) (providing

water resource boards with the power and authority to exercise the power of eminent domain under Chapter 32-15). Nothing more is required at this stage of the proceedings. Alliance Pipeline L.P., 2013 ND 117, ¶ 3; Anderson, 2012 ND 105, ¶ 5; Eberts, 2005 ND 85, ¶ 15; Dohn, 219 N.W.2d at 883. Similar to the entity in Dohn, the Joint Board possesses the power of eminent domain, it plans to construct a flood control project, it is necessary to conduct surveys and examinations to determine the suitability of the proposed project, and there exists a sufficient basis for an order permitting the surveys and examinations with reasonable protections for the property owners. Dohn, 219 N.W.2d at 884. The district court stated it best when it said, “[i]t would be extremely negligent for the Joint Board to authorize the design of a multi-billion dollar project of this complex magnitude, including the diversion of one navigable river under another and the building of massive intake and pumping structures, without first conducting these minimally invasive examinations.” APP. 59.

[¶28] In light of this Court’s well-established authority, the Brakkes’ eminent domain challenges are unavailing because “a proceeding for a court order authorizing examinations and surveys under N.D.C.C. § 32-15-06 is ‘preliminary to the condemnation action itself’ and is not a condemnation proceeding.” Alliance Pipeline L.P., 2013 ND 117, ¶ 15; see also Dohn, 219 N.W.2d at 883 (recognizing surveys and examinations are “a necessary preliminary to the condemnation action itself”). The district court correctly held the Brakkes are not presently entitled to a jury trial in order to determine an amount of just compensation. The Court should affirm the district court’s orders in this regard and decline to answer premature questions relating to an eminent domain action that has not yet occurred.

II. Whether the district court erred as a matter of law by concluding Section 32-15-06 of the North Dakota Century Code does not require commencement of an action by service of a Summons and Complaint.

[¶29] The Brakkes next challenge the Joint Board’s authority to enter their land under N.D.C.C. § 32-15-06. According to the Brakkes, the Joint Board failed to commence an action by service of a Summons and Complaint, which results in a lack of subject matter jurisdiction and personal jurisdiction. This argument is in conflict with this Court’s previous decisions, and with the plain language of the North Dakota Rules of Civil Procedure.

A. Standard of Review

[¶30] “To issue a valid order, a district court must have both subject-matter jurisdiction and personal jurisdiction over the parties.” Alliance Pipeline L.P., 2013 ND 117, ¶ 18. “A court has subject-matter jurisdiction over a proceeding if the constitution and laws authorize the court to hear that type of proceeding.” Id. “A court has personal jurisdiction over a party if the party has reasonable notice that an action has been brought and sufficient connection with the forum state to make it fair to require defense of the action in the state.” Id. “Generally, personal jurisdiction over a party is acquired by service of process in compliance with N.D.R.Civ.P. 4.” Id. “A district court’s decision regarding personal jurisdiction is a question of law, fully reviewable on appeal.” In re Guardianship of J.G.S., 2014 ND 239, ¶ 6, 857 N.W.2d 847.

B. The instant proceeding for entry to land is a special proceeding

[¶31] N.D.C.C. § 32-01-01 states remedies in the courts are divided into actions and special proceedings. An “action” is defined as “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. “A special proceeding is any remedy other than an action.” N.D.C.C. § 32-01-04.

[¶32] The Brakkes contend the Joint Board was required to commence an action by serving a Summons and Complaint. However, the Brakkes acknowledge the “Applications do not seek that which is sought by an ‘action’[.]” Appellants’ Br. at 11. Because the Applications did not seek that which is sought by an action, there would be no reason for the Joint Board to have commenced an action.

[¶33] The Brakkes also rely upon N.D.C.C. § 32-15-33, which makes reference to the application of the North Dakota Rules of Civil Procedure for certain proceedings mentioned in the eminent domain chapter. This argument ignores the fact that Rule 81 of the North Dakota Rules of Civil Procedure expressly excludes special statutory proceedings from the rules. Table A, which accompanies Rule 81, enumerates a number of these special statutory proceedings excluded from the rules, including Chapter 32-15 of the North Dakota Century Code. Thus, while the Brakkes allege the North Dakota Rules of Civil Procedure apply to this proceeding, the rules themselves declare they are inapplicable to proceedings under Chapter 32-15 of the North Dakota Century Code. Cf. City of Jamestown v. Leever’s Supermarkets, Inc., 552 N.W.2d 365, 375 (N.D. 1996) (holding the cost provisions of N.D.R.Civ.P. 54(e) did not apply to an eminent domain proceeding because the cost-shifting provisions of N.D.C.C. § 32-15-32 were provided in Chapter 32-15); Gissel v. Kenmare Tp., 512 N.W.2d 470, 475-77 (N.D. 1994) (same).

[¶34] This principle was recognized in the Brakkes' cited authority, In re Guardianship of J.G.S., 2014 ND 239, ¶ 5, in which the appellant asserted the district court lacked personal jurisdiction over him because of a failure of service of process. The Court rejected this argument because the proceeding at issue was a special statutory proceeding specifically excluded from the North Dakota Rules of Civil Procedure under Rule 81. Id. at ¶ 7. Because the appellant was served with notice of the hearing, the Court concluded the petitioners adequately complied with the statute and provided sufficient notice of the proceeding to the appellant. Id. at ¶ 10.

[¶35] Similar to In re Guardianship of J.G.S., this matter constitutes a special proceeding excluded from the North Dakota Rules of Civil Procedure under Rule 81. Moreover, the Joint Board served the Applications upon the Brakkes and provided notice of the proceedings. APP. 2; APP. 67-68. Consequently, the Joint Board complied with the statute and provided sufficient notice to the Brakkes.

[¶36] The Brakkes' jurisdictional arguments were further rejected by this Court in Alliance Pipeline L.P. With respect to the landowners' claim there was a lack of subject matter jurisdiction, the Court noted N.D.C.C. § 32-15-06 "authorizes an entity in charge of public use to enter upon another's land and make examinations and surveys in contemplation of condemnation for a public use." Alliance Pipeline L.P., 2013 ND 117, ¶ 19. The Court held the district court had jurisdiction to issue an order permitting an entry on land based on the provisions of N.D.C.C. § 32-15-06 and N.D.C.C. § 27-05-06, which states the district court has jurisdiction to hear and determine all civil proceedings and all powers necessary to the full and complete jurisdiction of the causes and the parties. Id. Second, the Court rejected the

landowners' challenge to the summons that was issued by the natural gas provider along with the petition because the issue had been waived. Id. at ¶ 17.

[¶37] Once again, Alliance Pipeline L.P. forecloses the jurisdictional arguments advanced by the Brakkes. N.D.C.C. § 27-05-06, coupled with the Joint Board's authority to enter land for examinations and surveys under N.D.C.C. § 32-15-06, provided the district court with jurisdiction to issue orders permitting entry on land. Id. at ¶ 19. Likewise, as explained above, the Joint Board served the Brakkes and provided notice of the proceedings, which belies the Brakkes' personal jurisdiction challenge. Id. at ¶ 18 ("Generally, personal jurisdiction over a party is acquired by service of process in compliance with N.D.R.Civ.P. 4.").

[¶38] Finally, the Brakkes imply the provisions contained in N.D.C.C. § 32-15-06 are unconstitutional, but they stop short of directly challenging the constitutionality of the statute. As recognized by the district court, the Brakkes conceded they had not notified the Attorney General of any constitutional challenge. Tr. 17:17-18, Aug. 14, 2015. Notice is required before any such challenge may be considered. See N.D.C.C. § 32-23-11 ("[I]f the statute . . . is alleged to be unconstitutional, the attorney general of the state must be served with a copy of the proceeding and is entitled to be heard.").

[¶39] Under these circumstances, the Joint Board was not required to commence an action through a Summons and Complaint. The Joint Board complied

with the provisions of N.D.C.C. § 32-15-06 and the district court properly granted the Joint Board permission to enter the property to make surveys and examinations.¹

¹The district court's decision in this case follows numerous district court decisions which have recognized the water resource district's authority under N.D.C.C. § 32-15-06 to enter property to conduct surveys and examinations — including many decisions confirming the Joint Board's authority to enter property for the same Project at issue in this case. See In Re: 2015 Application for Permit to Enter Land for Surveys and Examination Associated with a Proposed North Dakota Diversion and Associated Structures, Civ. No. 09-2015-CV-00051; In Re: 2014 Application for Permit to Enter Land for Surveys and Examination Associated with a Proposed North Dakota Diversion and Associated Structures, Civ. No. 09-2014-CV-02073; In Re: 2013 Application for Permit to Enter Land for Surveys and Examination Associated with a Proposed North Dakota Diversion and Associated Structures, Civ. No. 09-2013-CV-00623; In Re: 2013 Application for Permit to Enter Land for Surveys and Examination Associated with a Proposed North Dakota Diversion and Associated Structures, Civ. No. 09-2013-CV-00909; In Re: 2013 Application for Permit to Enter Land for Surveys and Examination Associated with a Proposed North Dakota Diversion and Associated Structures, Civ. No. 09-2013-CV-01868; In Re: 2013 Application for Permit to Enter Land for Surveys and Examination Associated with a Proposed North Dakota Diversion and Associated Structures, Civ. No. 09-2013-CV-02485; In Re: 2012 Application for Permit to Enter Land Located along the Route of a Proposed North Dakota Diversion and Associated Structures, Civ. No. 09-2012-CV-00631; In Re: 2012 Application for Permit to Enter Land for Surveys and Examination Associated with a Proposed North Dakota Diversion and Associated Structures, Civ. No. 09-2012-CV-01260; In Re: 2011 Application for Permit to Enter Land Located Along the Route of a Proposed North Dakota Diversion and Associated Structures, Civil Number 09-2011-CV-02839; In Re: 2011 Application for Permit to Enter Land Located Along the Corridor of the Sheyenne River, Maple River, Rush River, and Lower Rush River, identified as Civil Number 09-2011-CV-02838; In Re: 2011 Application for Permit to Enter Land Located Along the Route of a Proposed North Dakota Diversion and Associated Structures; Civ. No. 09-2011-CV-02839, In Re: 2011 Application for Permit to Enter Land to Study a Proposed Flood Control Project That Includes a North Dakota Diversion, Civ. No. 09-2011-CV-02840; Devils Lake Basin Joint Water Resource Board v. Unice L. Forde, et al., Civil No. 32-2011-CV-62; Cass County Joint Water Resource District v. Krogh, et. al., Civil No. 09-2010-CV-02313; Southeast Cass Water Resource District v. Olson, Civil No. 09-2009-CV-00520.

III. Whether the district court erred as a matter of law by concluding soil borings fall within the definition of “examinations, surveys, and maps” under Section 32-15-06 of the North Dakota Century Code.

[¶40] Finally, the Brakkes contend the soil borings do not constitute “examinations” encompassed under N.D.C.C. § 32-15-06. As discussed below, this argument belies the plain language of the statute.

A. Standard of Review

[¶41] “Statutory interpretation is a question of law, which is fully reviewable on appeal.” Anderson, 2012 ND 105, ¶ 6. “The primary goal when interpreting a statute is to determine the legislature’s intent from the language of the statute.” Id. “Words in a statute are to be given their ordinary and commonly understood meaning unless defined by statute or a contrary intention is clearly evident.” Id. “Statutes are construed as a whole and are harmonized to give effect to related provisions.” Id.

B. Soil borings qualify as examinations or surveys under N.D.C.C. § 32-15-06

[¶42] According to the Brakkes, the activities allowed under the district court’s orders extend beyond the “traditional definition” of “examinations, surveys, and maps.” Merriam-Webster’s defines an “examination” as “the act or process of examining; the state of being examined.” Merriam-Webster Online Dictionary, <http://www.merriam-webster.com> (last visited Feb. 29, 2016). The process of “examining,” in turn, is defined as “a. to inspect closely; b. to test the condition of; c. to inquire into carefully; investigate.” Id.

[¶43] The tests conducted by the Joint Board are “examinations” because they are inspections to test the condition of the property for the proposed flood control

project. For instance, the soil borings “inspect” and “test the condition of” the soil to determine the physical properties of the soil, its compressibility, and permeability, as well as the structural stability and performance of the land. Ultimately, the test is designed to determine the composition and stability of subsoils in order to analyze the feasibility of the proposed flood control project. Under these circumstances, the soil borings and other tests fall within the “plain, ordinary, and commonly understood meaning[]” of “examinations, surveys, and maps” under N.D.C.C. § 32-15-06. See Olson v. Workforce Safety & Ins., 2008 ND 59, ¶ 14, 747 N.W.2d 71 (stating the Court gives “the words in the statute their plain, ordinary, and commonly understood meanings”).

[¶44] The case law supports this proposition as well. First, while this Court did not directly address the question of whether soil borings constitute surveys or examinations under N.D.C.C. § 32-15-06, Dohn permitted entry “for the purpose of making surveys, *including* soil testing and ground resistance measurements[.]” Dohn, 219 N.W.2d at 878 (emphasis added). Accordingly, the term “surveys” in Dohn encompassed soil tests, which are more extensive than simply walking around the surface of the property (as the Brakkes suggest that term means).

[¶45] A similar construction was adopted in Puryear v. Red River Authority of Texas, 383 S.W.2d 818, 820 (Tex. Ct. App. 1964), where the court considered whether a water district could enter private property to conduct core drilling tests in connection with determining a feasible location for a proposed dam. The specific question at issue was “whether or not appellee’s right to enter upon appellant’s land and conduct ‘surveys’ includes the right to conduct core drilling operations.” Id. The

court answered this question in the affirmative, noting the construction of a dam was essential to the water district's basic functions, and to permit the district "the right to enter land and make surveys but deny it the right to conduct core drilling to determine the feasibility of locating a dam would be contrary to the clear intention of the Legislature." Id. at 821. "Surveying, without the right to test the underground stratum would be of little value to water control districts." Id. "Core drilling to determine the underground stratum is an essential step in determining the location of proposed dams." Id. Moreover, the court held the water district's entry and core drilling was not a taking. Id.

[¶46] Likewise, in State by Waste Management Board v. Brueschoff, 343 N.W.2d 292, 294 (Minn. Ct. App. 1984), a state agency obtained access to private property to conduct electrical resistivity tests to obtain soil permeability information. The landowners argued the agency could only engage in surface surveys and inspections, rather than more intrusive testing that they argued had to be done after an easement was obtained. Id. at 295. Relying on the broad language of the statute, the court disagreed and held the testing did not rise to the level of a taking. Id. "'Obtaining information' and 'conducting surveys and investigations' are expansive phrases, which when interpreted in light of the purpose of the access statute, clearly include electrical resistivity testing." Id. The court also concluded the testing would cause minimal intrusion or damage, and would yield information about soil permeability that was essential to assessing the suitability of the property for the proposed project. Id.

[¶47] Puryear and Brueschoff are persuasive in this case, because the Joint Board is provided with the statutory authority to engage in flood control projects like the Project at issue. In exercising that authority, it is vital for the Joint Board to conduct minimally invasive soil testing in order to determine the suitability of the subject property for the proposed Project. As the district court recognized, it would be negligent for the Joint Board to engage in a multi-billion dollar Project of this scope without first conducting this minimally invasive examinations. APP. 59. Moreover, the language of N.D.C.C. § 32-15-06 is expansive, as it broadly permits the Joint Board to “enter upon the land and make examinations, surveys, and maps thereof[.]”

[¶48] Indeed, the language of N.D.C.C. § 32-15-06 is even more permissive than the statutes at issue in Puryear and Brueschoff because it enables the Joint Board not only to make “surveys,” but “examinations” as well, which, as discussed above, connotes a broad range of activities that go well beyond walking on the surface of the property. Under these circumstances, the district court correctly held the proposed soil borings fell squarely within the meaning of “examinations, surveys, and maps,” and, accordingly, the Joint Board was authorized to conduct the soil borings without commencing an eminent domain action.

[¶49] Puryear and Brueschoff are also more analogous to this matter than the cases cited by the Brakkes. For instance, the Illinois statute involved in Kane County v. Elmhurst National Bank, 443 N.E.2d 292, 295 n.1 (Ill. Ct. App. 1982) explicitly required the entity to obtain written consent from the landowner to conduct subsurface soil surveys. N.D.C.C. § 32-15-06 requires no such written permission.

[¶50] In Missouri Highway and Transportation Commission v. Eilers, 729 S.W.2d 471 (Mo. Ct. App. 1987), the court concluded the soil testing at issue exceeded the “survey” authorized by the statute. The court referenced its earlier decisions that limited “surveys” to surface examinations, as well as other distinguishing state statutes that specifically referred to underground surveys. Id.; see also Coastal Marine Serv. of Tex., Inc. v. City of Port Neches, 11 S.W.3d 509, 514 (Tex. Ct. App. 200) (noting core drilling was impermissible under the statute at issue that permitted a lineal survey); Hailey v. Texas-New Mexico Power Co., 757 S.W.2d 833, 835 (Tex. Ct. App. 1988) (declining to allow core drilling as incidental to the lineal survey permitted by the statute). Once again, N.D.C.C. § 32-15-06 is broader than the statutes at issue in Eilers, Coastal Marine Service, and Hailey, because it also permits “examinations.” Moreover, neither this Court’s precedent nor North Dakota statute limits the “examinations, surveys, and maps” in N.D.C.C. § 32-15-06 to mean only surface activity.

[¶51] With respect to the cases cited by the Brakkes that interpret statutes similar in nature to N.D.C.C. § 32-15-06, the activities at issue are far different than this case. For instance, in National Compressed Steel Corporation v. Unified Government of Wyandotte County/Kansas City, 38 P.3d 723, 727 (Kan. 2002), the authority not only wanted to perform soil tests, but also to convert the borings to monitoring wells that would remain in place for an indefinite period of time. The monitoring wells would require periodic access by the authority to pull samples, and there would be an above-ground presence of the wells. Id.

[¶52] In Burlington Northern and Santa Fe Railway Company v. Chaulk, 631 N.W.2d 131, 138-39 (Neb. 2001), the court concluded the entity at issue was not authorized to conduct geotechnical testing under the governing statute, as compared to the authority provided other entities under that state's laws to engage in those activities. North Dakota does not have the wide ranging statutes at issue in Chaulk, where different entities were given different authority to enter property and conduct various kinds of testing. Accordingly, the statutory interpretation undertaken in Chaulk simply does not apply here.

C. The district court placed conditions on the Joint Board's entry

[¶53] The Brakkes' remaining contentions are, at best, overstated.¹ For instance, the Brakkes suggest the Joint Board may occupy private lands at any time without the landowner having the right to object. To the contrary, the Brakkes could, and did, object to the Applications and was given ample opportunity to be heard prior to the entry of the district court's orders. Accordingly, the Brakkes were not deprived of any due process in their ability to contest the Applications.

[¶54] Moreover, the district court's orders did not endow the Joint Board with some undefined and unlimited ability to occupy the Brakkes' land. Instead, the orders permit entry for the limited purpose of conducting surveys and examinations upon the property, for a specific period of time, and subject to certain conditions. Among other restrictions, the orders state the Joint Board's access expires in November 2016, no buildings are to be entered or damaged, no trees are to be cut, the Joint Board must pay \$250 for each soil boring completed, the Joint Board must return the property as nearly as practicable to its original condition or repair or pay for any damages caused

to the property, the Joint Board must furnish 48-hour advance notice before it can enter, and the Joint Board must indemnify and hold the landowners harmless from all claims, losses, or damages. APP. 61-62; APP. 108.

[¶55] These are precisely the type of “reasonable conditions and protections for the landowner” contemplated in Dohn. Dohn, 219 N.W.2d at 884. Indeed, several of the conditions entered by the district court are identical to the conditions approved of by this Court in Dohn, such as the restrictions on cutting trees and providing advance notice of entry. Id. at 879.

[¶56] In any event, while the Brakkes complain of the possible duration and extent of soil borings permitted by the district court’s orders, they ignore the plain language of N.D.C.C. § 32-15-06, which does not limit the quantity or nature of the Joint Board’s surveys, examinations, and mapping. The Court’s “primary goal when interpreting a statute is to ascertain the intent of the legislature.” Olson, 2008 ND 59, ¶ 14. Because there are no restrictions present in the plain language of the statute, it would be improper for a court to effectively amend the statute by reading such restrictions into the statute. See Ness v. Jones, 88 N.W. 706, 709 (N.D. 1901) (noting the Court will not venture to read restrictions into a statute that do not exist).

CONCLUSION

[¶57] The purpose of N.D.C.C. § 32-15-06 is to allow access to private property in order to complete design of a project before property rights are acquired. In the process of engineering and designing the Project, the Joint Board must conduct soil borings and other tests to know what properties are necessary for completion of the project. Under these circumstances, the district court correctly granted the Joint

board permission to enter the Brakkes' property for the purpose of conducting surveys, examinations, and mapping.

[¶58] The issues raised by the Brakkes do not warrant reversal. First, this proceeding for entry to property for the purpose of conducting surveys and examinations is preliminary to any future eminent domain action. Similarly, the Joint Board was not required to commence an action by the service of a Summons and Complaint, because this is a special proceeding excluded from the application of the North Dakota Rules of Civil Procedure. Finally, the soil borings and other tests permitted by the district court's orders qualify as surveys, examinations, and mapping under the broad language of N.D.C.C. § 32-15-06. In light of these circumstances, and the conditions placed on the Joint Board's entry by the district court, this Court should affirm each order of the district court in its entirety.

Dated: March 3, 2016.

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CERTIFICATE OF COMPLIANCE

The undersigned attorney for the Appellants in the above-entitled matter hereby certifies, in compliance with Rule 32(a)(8)(A), N.D.R.App.P., that the above brief contains 6,436 words (excluding words contained in (1) the table of contents, (2) the table of authorities, and (3) this certificate), which is within the limit of 8,000 words.

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IN THE SUPREME COURT
STATE OF NORTH DAKOTA

Cass County Joint Water Resource District,)	
)	
Plaintiff - Appellee,)	Supreme Court No. 20150311
)	(Consolidated Case)
vs.)	
)	District Court No.
)	09-2015-CV-00770
Steven Brakke, et al.,)	09-2015-CV-01746
)	
)	
Defendants - Appellants.)	

CERTIFICATE OF SERVICE

STATE OF NORTH DAKOTA)
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COUNTY OF CASS)

I hereby certify that on March 3, 2016, I caused to be electronically filed the **Appellee's Brief** with the Clerk of the North Dakota Supreme Court (at supclerkofcourt@ndcourts.gov) and served the same electronically and by U.S. mail as follows:

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**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

Supreme Court No.
20150312
(Consolidated Case)

District Court No.
09-2015-CV-01746

V.

Mari Palm and Robert Helbling, Co-Trustees
of the MKRM Trust; Michael Brakke; and
Laurie Brakke,

Appellants.

CERTIFICATE OF SERVICE

STATE OF NORTH DAKOTA)
) ss.
COUNTY OF CASS)

I hereby certify that on March 4, 2016, I caused to be electronically filed the **Appellee's Brief** with the Clerk of the North Dakota Supreme Court (at supclerkofcourt@ndcourts.gov) and served the same electronically and by U.S. mail as follows:

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