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STATE OF NORTH DAKOTA

SUPREME COURT NO: 20160017
Grand Forks County No: 18-2014-CV-01058

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

North Dakota Pipeline Company, LLC,

Plaintiff *and Appellee and Cross-Appellant*,

vs.

James R. Botsford and Krista L. Botsford, as
Trustees of the James and Krista Botsford
Trust dated November 24, 1999,

Defendants *and Appellants and Cross-Appellees*,

BRIEF OF APPELLEE AND CROSS-APPELLANT
North Dakota Pipeline Company, LLC

Appeal From Orders and Judgment allowing condemnation.

RESPECTFULLY SUBMITTED this 3rd day of June, 2016.

s/ Scott D. Jensen

SCOTT D. JENSEN, ND ID#04315
MATT. A. PAULSON, ND ID #08196
For: Camrud, Maddock, Olson & Larson, Ltd.
401 DeMers Avenue, Suite 500
P.O. Box 5849
Grand Forks, ND 58206 5849
Phone: (701) 775-5595
Fax: (701) 772-3743
Email: sjensen@camrudlaw.com
ATTORNEY FOR PLAINTIFF/APPELLEE
AND CROSS-APPELLANT
NORTH DAKOTA PIPELINE COMPANY, LLC.

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STATEMENT OF THE FACTS

[1] This is an appeal from an Order granting summary judgment to North Dakota Pipeline Company LLC ("NDPL") allowing it to condemn land owned by the Botsfords for an interstate oil pipeline. The pipeline will carry North Dakota oil from the oilfields in western North Dakota to refineries in other states. North Dakota is not a "pass-through" state. Oil produced in North Dakota will be shipped in the pipeline. "Most of the resultant refined product can be expected to be consumed by the people in the Midwest." Direct Testimony Neil Earnest, Aug. 8, 2014 at p 6, Docket #47.

[2] The pipeline had previously been approved, sited and permitted by the North Dakota Public Service Commission (PSC). Supp. App. at 3. The pipeline had been reviewed by the Federal Energy Regulatory Commission (FERC), and an initial rate and tariff structure established. Supp. App. at 71. FERC had previously ruled on objections similar to those raised here—objections that the rate structure provided advantages to those who committed to using the pipeline if demand exceeded capacity—and ruled against the objections. Id.

[3] The district court ruled as a matter of law that NDPL was a common carrier. FERC had previously found that NDPL was a common carrier. The district court held that NDPL was entitled to condemnation as a matter of law and that additional time or factual discovery was not going to alter that determination.

[4] A peripheral issue was the amount of money the Botsfords would receive. After the Court's ruling that condemnation was allowed as a matter of law, the jury trial issue was limited to the amount of compensation. NDPL had submitted an appraisal indicating that just compensation was $2,000. The Botsfords submitted an economist's report

indicating that the compensation due the Botsfords was $12,158.96. NDPL offered to pay the higher amount. (Transcript, Final Dispositional Conference, p. 4). The Botsfords sought to introduce evidence of the original $38,062 offer made by NDPL many months before. Judge Kleven ruled the offer was inadmissible. In light of that, the Botsfords agreed to entry of judgment in the amount of $12,158.96, preserving their right to perfect this appeal. Attorneys' fees of $41,944 were awarded, greatly in excess of the monetary award to the Botsfords. Fees that were incurred in preparing for trial on the issue of compensation after a higher offer had been made were denied.

LAW AND ARGUMENT

[5] NDPL is a common pipeline carrier and has satisfied all statutory and constitutional requirements to exercise eminent domain.

I. NDPL has satisfied all statutory requirements to exercise eminent domain.

A. Condemnation in behalf of oil pipelines serves a statutorily-recognized public use, and is specifically authorized by law.

[6] NDPL has satisfied the first statutory requirement for exercising eminent domain: the use for which the property is sought is specifically authorized by law. "Eminent domain is the right to take private property for public use." N.D.C.C. § 32-15-01(1). North Dakota statutes specifically authorize condemnation in behalf of certain public uses. See, N.D.C.C. §§ 32-15-02 and 32-15-05. The statutorily-recognized public uses include the construction, operation, and maintenance of "oil pipelines." N.D.C.C. § 32-15-02(10). To exercise the power of eminent domain, the property taken must be "necessary" to the use "authorized by law" N.D.C.C. § 32-15-05. Necessity was conceded by the Botsfords below. See Transcript at pp. 11 and 42. It is undisputed that

NDPL intends to use the condemned property to construct an oil pipeline. The district court found the proposed condemnation was for a use authorized by state law. App. at 21.

B. NDPL is a statutorily-defined common carrier with the right of eminent domain.

[7] NDPL has satisfied the second statutory requirement for exercising eminent domain: it has proven that it is a "common pipeline carrier" within the meaning of Chapter 49-19, N.D.C.C. The second requirement addresses the class of persons that may exercise eminent domain. North Dakota law defines "common pipeline carrier" as:

> Every person . . . [o]wning, operating, or managing any pipeline or any part of any pipeline within this state for the transportation of crude petroleum . . . to or for the public for hire, or engaged in the business of transporting crude petroleum . . . by pipeline[,] . . . is a common carrier and is subject to the provisions of this chapter as a common pipeline carrier.

N.D.C.C. § 49-19-01(1). NDPL will operate the Sandpiper Pipeline for the transportation of crude petroleum. See, e.g., Supp. App. at 5, ¶¶ 4–5, 6 and 9. The Botsfords argue that NDPL will not carry "to or for the public for hire" and thus NDPL is not a common carrier. This argument is meritless.

1. NDPL will carry oil "to or for the public for hire."

[8] NDPL will carry oil "to or for the public for hire" and it is "engaged in the business of transporting crude petroleum … by pipelines." NDPL held itself out to the public as a common carrier by conducting a "widely publicized" open season, which was "conducted on an open and transparent basis," and by which it offered oil conducting services to the public. Supp. App. at 80. It gave every member of the public, on equal terms, the ability to become a committed-volume shipper. Id. It also acts as a common carrier by reserving pipeline capacity for uncommitted shippers. Id. at 75. In the event that demand exceeds capacity, at least 10% of the pipeline's available capacity is still

reserved for uncommitted shippers. Id. at 75. Members of the public that did not avail themselves of the opportunity to be a committed-volume shipper will still have a right to utilize the pipeline. See, Sunoco Pipeline L.P., 137 FERC ¶ 61, 098, at PP 16-18 (2012); Enbridge Pipelines (Illinois) LLC, 144 FERC ¶ 61, 085, at P24 (2013); Shell, 139 FERC ¶ 61, 228 at P 21; Sunoco Pipeline L.P., 139 FERC ¶ 61, 259, at P 14 (2012) (FERC orders approving the reservation of at least 10 percent of capacity for uncommitted shippers).

[9] Whether an entity is a common pipeline carrier is not determined by the number of customers actually shipping oil; it is determined by the *right* of the public to ship their oil. Cf. Square Butte Elec. Co-op., v. Hilken, 244 N.W.2d 519, 523 (N.D. 1976) (in the related context of "public use" determinations, "public use is not confined to actual use by the public, but is measured in terms of the right of the public to use the proposed facilities").

[10] The district court concluded that the "public is entitled to access the pipeline." It relied upon two key facts to support that conclusion: (1) NDPL "will reserve at least 10% of [the pipeline's] capacity for uncommitted volumes," and (2) each potential shipper had the opportunity, on equal terms, to become a committed or non-committed volume shipper. App. at 22–23. From this, the Court found NDPL "is a common carrier and is committed to accepting oil of any citizen of North Dakota." Id.

[11] The Botsfords advocate heightened judicial scrutiny of common-carrier status. They cite to Texas Rice Land Partners, Ltd. v. Denbury Green Pipeline—Texas, LLC, 363 S.W.3d 192, 202 (Tex. 2012), which requires a "reasonable probability" that the pipeline will at some point after construction serve the public by transporting [oil] for one

or more customers who will either retain ownership of their [oil] or sell it to parties other than the carrier." While the Texas standard is not the law in North Dakota, NDPL would prevail under the standard if it were applied.

[12] The record reflects that at least one non-affiliated person is a committed shipper for the new line. Supp. App. at 68–70. Because the record reflects Enerplus Resources is a committed shipper, there is, as a matter of law, more than a "reasonable probability" that the pipeline will transport oil other than its own. NDPL is a common pipeline carrier as a matter of law.

2. NDPL will carry the public's oil "without discrimination."

[13] The Botsfords' second argument against common-carrier status is that NDPL's tariff structure is discriminatory. NDPL's tariff structure, which charges separate rates for committed priority volumes, committed non-priority volumes, and uncommitted volumes, does not embody "discrimination" within the meaning of Chapter 49-19, N.D.C.C. NDPL is aware of no North Dakota case interpreting the phrase "discrimination" as it appears in that chapter. This Court has, however, interpreted "discrimination" in the related contexts of public utility and electrical co-operative rate regulation. See, e.g., Cass Cnty. Elec. Co-op., Inc. v. Northern States Power Co., 518 N.W.2d 216 (N.D. 1994); Lill v. Cavalier Rural Elec. Co-op., Inc., 456 N.W.2d 527, 529–30 (N.D. 1990). Under these principles NDPL's tariff structure is not discriminatory.

[14] This Court has suggested that "discrimination," in the context of rate-setting, has the same meaning under federal and state law. To construe North Dakota antidiscrimination provisions, this Court has relied upon federal precedent interpreting the Interstate Commerce Act ("ICA"). See, Northern States Power Co., 518 N.W.2d at

220 (quoting Associated Gas Distributors v. F.E.R.C., 824 F.2d 981, 1009 (D.C. Cir. 1987)). Accordingly, this Court should give substantial weight to the precedents developed by the federal courts and FERC interpreting the ICA. Under their precedents, discussed infra, NDPL's tariff structure is not discriminatory.

[15] Under North Dakota and federal law, charging contracted and non-contracted shippers different rates is not "discrimination" so long as all potential shippers had an opportunity to contract on the same terms and conditions.

> Although one normally regards contract relationships as highly individualized, contract rates can still be accommodated to the principle of nondiscrimination by requiring a carrier offering such rates to make them available to any shipper willing and able to meet the contract's terms. If those terms result in lower costs or respond to unique competitive conditions, the shippers who agree to enter into the contract are not similarly situated with other shippers who are unwilling or unable to do so.

Sea-Land Services, Inc. v. ICC, 738 F.2d 1311, 1317 (D.C. Cir. 1984); accord, Lill, 456 N.W.2d at 529–30 (N.D. 1990) (electric co-operative customers that executed a minimum-length service contract were not required to pay a security deposit, but non-contract customers were; held not discrimination because all potential customers were "treated similarly" in that they were given the choice to enter the minimum-length service contract).

[16] FERC correctly determined that NDPL's tariff structure involves "no issues of undue discrimination." Supp. App. at 80. It reasoned that, during the open season, "[a]ll potential shippers had the opportunity to sign a [committed-rate contract] and become either a committed priority shipper or committed non-priority shipper or to forego signing a [contract] and be subject to the uncommitted rate." Id. FERC cited other factors to support its conclusion: (1) the open season was "widely publicized and conducted on an

open and transparent basis"; (2) there was no evidence that any shipper, including Marathon Petroleum, was shown favoritism during the open season; and (3) there was no evidence that any shipper "signed a contract or received contract terms that were different than those available to any other potential shipper." Id.

[17] FERC's analysis is consistent with both North Dakota and federal precedents interpreting "discrimination." Furthermore, FERC is vested with exclusive rate-making authority over interstate common pipeline carriers. Its determinations are entitled to substantial deference. There was no discrimination.

3. The fact that Marathon Petroleum entered a committed-rate contract with NDPL is irrelevant to NDPL's common-carrier status.

[18] Marathon Petroleum has contracted to be a committed-priority shipper. Supp. App. 80. During the open season, all potential shippers had the opportunity to sign a committed-rate contract on identical terms and conditions. Id. at 80. Marathon Petroleum was shown no favoritism. It did not receive contract terms different from any other committed-priority shipper. Id. The Botsfords' characterization of this contract as "self-dealing" is meritless.

4.That NDPL is subject to the rate-setting authority of FERC does not deprive it of common-carrier status or the power of eminent domain.

[19] Because NDPL is subject to the rate-setting authority of FERC rather than the North Dakota PSC, the Botsfords argue that NDPL is not a "common pipeline carrier" within the meaning of Chapter 49-19, N.D.C.C. The argument incorrectly assumes that the phrase "subject to the provisions of this chapter" is part of the definition of common

carrier. The argument concludes that anything not wholly regulated by the North Dakota PSC fails to be a common pipeline carrier. This argument is meritless.

i. Based on the plain language of N.D.C.C. § 49-19-01, the definition of "common pipeline carrier" includes interstate pipeline carriers and does not exclude FERC-regulated carriers.

[20] The relevant definitions of "common pipeline carrier" are contained in N.D.C.C. § 49-19-01(1) and (4).

> Every person … [o]wning, operating, or managing any pipeline or any part of any pipeline within this state for the transportation of crude petroleum … to or for the public for hire, or engaged in the business of transporting crude petroleum … by pipeline[] … is a common carrier and is subject to the provisions of this chapter as a common pipeline carrier."

Id. at subdiv. 1. Subdivision one expresses two separate ideas: it defines "common pipeline carrier," and then it indicates that common pipeline carriers are the class of common carrier subject to Chapter 49-19, N.D.C.C. The phrase "subject to the provision of this chapter as a common pipeline carrier" follows and is not a part of the definition, and the definition does not incorporate each and every term of Chapter 49-19. If it did, there would be little point in having a definition section at all. Because regulation by North Dakota's PSC is not a definitional requirement of common-carrier status, federal preemption of one "provision" does not defeat common-carrier status.

ii. Chapter 49-19's history shows that the legislature intended to regulate interstate pipelines to the extent state regulation was not preempted by federal law.

[21] The definitions of "common pipeline carrier" defined in N.D.C.C. §49-19-01(1) and (4) demonstrate that the legislature contemplated interstate pipelines being regulated by Chapter 49-19. Subdivision 1 defines "common pipeline carrier" to include "person[s] . . . [o]wning . . . any *part* of any pipeline within this state." (Emphasis added). Clearly,

this language contemplated interstate pipelines being regulated under Chapter 49-19 despite the fact that they are regulated under federal law. See, 49 U.S.C. § 60502 (vesting in FERC "the duties and powers related to the establishment of a rate or charge for the transportation of oil by pipeline"); Interstate Commerce Act (ICA) § 1, subdiv. (5). Similarly, N.D.C.C. §49-19-1(4), provides an alternative definition of "common pipeline carrier," which is: "Every person … [m]ade a common carrier … in pursuance of the laws of the United States … is a common carrier and is subject to the provisions of this chapter as a common pipeline carrier." This definition unambiguously contemplates federal common pipeline carriers, which are defined, under the Interstate Commerce Act, to include "all pipe-line companies" that transport "oil … by pipeline." ICA § 1, subdivs. (1)(b) & (3)(a).

[22] Section 49-19-01, N.D.C.C. was first enacted in 1933 (see, N.D. S.L. 1933, ch. 207, § 1), approximately 24 years after the Hepburn Act gave the federal government regulatory power over common pipeline carriers (See, Christopher J. Barr, Unfinished Business: FERC's Evolving Standard for Capacity Rights on Oil Pipelines, 32 Energy L.J. 563, 564 n. 1 (2011)). The legislature was aware of the federal preemption issues and, notwithstanding them, intended to regulate common pipeline carriers to the extent not preempted by federal law. As a consequence, an oil pipeline regulated by FERC is not excluded from the definition of "common pipeline carrier."

iii. Applying the Botsfords' construction of "common pipeline carrier" leads to absurd and unintended results.

[23] Adopting the Botsfords' construction of "common pipeline carrier" would have absurd and unintended consequences. All interstate pipelines are subject to the rate-

setting powers of FERC pursuant to the Interstate Commerce Act (see, 49 U.S.C. § 60502; ICA § 1, subdiv. (5)). If a "common pipeline carrier" must, as a matter of definition, be regulated by the North Dakota PSC, then all interstate pipeline companies would be excluded from the definition of "common pipeline carrier." This was not a consequence intended by the legislature, and a construction having this consequence must be disregarded.

iv. Foreign precedent, interpreting a virtually identical statute, refused to make regulation by the state's public service commission a definitional requirement of common-carrier status.

[24] North Dakota and Texas enacted similar statutory language to govern common pipeline carriers. Compare Ch. 49-19, N.D.C.C. with Tex. Nat. Res. Code Ch. 111. Like in the North Dakota Century Code, Texas law defines "common carrier" as follows:

> A person is a common carrier subject to the provisions of this chapter if it . . . [o]wns, operates, or manages a pipeline or any part of a pipeline in the State of Texas for the transportation of crude petroleum to or for the public for hire, or engages in the business of transporting crude petroleum by pipeline.

Tex. Nat. Res. Code § 111.002, subdiv. 1. Texas law also provides that the Railroad Commission of Texas (i.e., the Texas equivalent of the North Dakota PSC) shall "establish and promulgate rates of charges for gathering, transporting, loading, and delivering crude petroleum by common carriers." § 111.181. Because the Texas and North Dakota statutory provisions are virtually identical, Texas case law interpreting the requirements of common-carrier status are persuasive authority.

[25] In Crawford Family Farm Partnership v. TransCanada Keystone Pipeline, L.P., 409 S.W.3d 908 (Tex. Ct. App. 2013), the Texas Court of Appeals held that an interstate oil pipeline business, which could not subject itself to the state's rate-setting powers due

to federal preemption, was still a common carrier. The court analyzed the text of Tex. Nat. Res. Code § 111.002(1), which is the Texas equivalent of N.D.C.C. § 49-19-01(1). The threshold issue was whether the phrase "subject to the provisions of this chapter" substantively limited the definition of "common carrier," or whether it identified the class of common carriers the chapter applied to. The condemnee argued that, if a pipeline company is not subject to "each and every provision" of the chapter, then it is by definition not a common carrier. From that, the condemnee concluded interstate pipelines, which are subject to the rate-setting powers of FERC, rather than the Texas Railroad Commission, are private pipeline carriers lacking eminent domain power. The court rejected this argument.

[26] Characterizing the phrase as "descriptive" rather than "prescriptive," the court concluded it described "the type of common carrier to which reference is made." To illustrate this point, the court observed that municipal transit systems were both common carriers and not "subject to the provisions" of the pipeline common carrier chapter. The court also noted:

> Here, TransCanada is such a common carrier as contemplated in Chapter 111. However, because TransCanada owns and operates an interstate crude oil pipeline, it is subject to the rate-setting jurisdiction of the FERC and not the similar powers that would otherwise be exercised by Texas Regulatory authorities.

The Court should adopt the reasoning of the Texas Court of Appeals and hold that NDPL is a common pipeline carrier with the right of eminent domain.

C. NDPL has accepted the provisions of Chapter 49-19, N.D.C.C.

[27] NDPL is a statutorily-defined common carrier seeking to condemn land for a use authorized by law. The final statutory requirement for exercising eminent domain is to

file acceptance of the provisions of Chapter 49-19, N.D.C.C. See, Ch. 49-19. The record shows that NDPL filed its acceptance in accordance with the law. Supp. App. at 1.

II. NDPL has satisfied all constitutional requirements to exercise the right and power of eminent domain.

[28] In addition to the statutory requirements, NDPL has satisfied all constitutional requirements to exercise eminent domain. The law presumes "that a use is public when the legislature has declared it to be." City of Jamestown v. Leevers Supermarkets, 552 N.W.2d 365, 369 (N.D. 1996); see also Northern Pacific Ry. Co. v. Kreszeszewski, 115 N.W. 679, 680-81 (N.D. 1908) (statutorily-authorized condemnation for a particular use is strong evidence that the use is in fact "public"). Because N.D.C.C. § 32-15-02(10) authorizes condemnation for oil pipelines, this Court should begin its analysis with the presumption that NDPL's proposed use is a "public use" within the meaning of N.D. Const. Art. I, § 16.

[29] Although courts must "treat the Legislature's decision with the deference due a coordinate branch of government," City of Medora v. Goldberg, 1997 ND 190, ¶8, 569 N.W.2d 257, 259, if "the existence or non-existence of [a] public use is placed in issue, the determination . . . is properly a judicial one." Hilken, 244 N.W.2d at 523. "Whether private property has been taken for a public improvement is a question of law." Gissel v. Kenmare Tp., 512 N.W.2d 470, 475 (N.D. 1994). Because the facts necessary to establish a public use are not contested by the Botsfords, and because the existence of a public use is a question of law, summary judgment was appropriately granted by the district court. See, Anderson v. Zimbelman, 2014 ND 34, ¶7, 842 N.W.2d 852, 856.

[30] In North Dakota, the "public use" requirement is satisfied if three elements are established:

(1) "The public must have either a right to benefit guaranteed by regulatory control through a public service commission or an actual benefit."

(2) "Although other states may also be benefitted, the public in the state which authorizes the taking must derive a substantial and direct benefit, something more than an indirect advantage."

(3) "The public benefit, while not confined exclusively to the state authorizing the use of the power, is nonetheless inextricably attached to the territorial limits of the state because the state's sovereignty is also so constrained."

Hilken, 244 N.W.2d at 525 (internal citations omitted); accord United Power Ass'n v. Mund, 267 N.W.2d 825, 827 n.2 (N.D. 1978) ("[A]lthough Hilken was a 2-1-2 decision, four members of this Court expressed agreement with and approval of the above quote.").

A. The public has a right to benefit guaranteed by regulatory control.

[31] To formulate a definition of "public use," this Court cited favorably to a Montana case, which held:

> [A] public use is one which confers some benefit or advantage to the public. Such public use is not confined to actual use by the public, but is measured in terms of the right of the public to use the proposed facilities for which condemnation is sought. As long as the public has the right of use, whether exercised by one or many members of the public, a 'public advantage' or 'public benefit' accrues sufficient to constitute a public use.

Hilken, 244 N.W.2d at 523 (quoting Montana Power Company v. Bokma, 457 P.2d 769, 772-773 (Mont. 1969)). The issue in Bokma was whether a power-line easement, sought for condemnation by a public utility and intended to provide power to a single customer, satisfied the "public use" requirement. Bokma, 457 P.2d at 793-94. Answering in the affirmative, the court reasoned that the power company was regulated by Montana's public service commission, and the commission could compel the company to serve

members of the public from the proposed line. Id. Irrespective of whether the company was ever actually compelled to do so, the public's legal right to benefit from the power line made the land use public, and, thus, the condemnation served that public use. Id.

[32] This Court explicitly incorporated the Montana rule into North Dakota law. See Hilken, 244 N.W.2d at 525. And while Bokma and Hilken involved power-line easements, their logic applies with equal force to oil-pipeline easements. Other jurisdictions have applied this rule to oil pipelines. See e.g., Linder v. Arkansas Midstream Gas Services Corp., 362 S.W.3d 889, 893-97 (Ark. 2010) (holding that construction and operation of common carrier oil pipelines involves a public use of land). Therefore, if an oil pipeline is subject to the regulation of a public service commission, and if the commission can compel the pipeline operators to make their services available to North Dakota citizens, then the public benefit requirement has been satisfied.

[33] Here, North Dakota residents have a right to conduct oil through the pipeline for which condemnation is sought, and that right is guaranteed by federal regulatory control. FERC regulates the rates charged by interstate pipeline companies and the terms and conditions of service. See, 49 U.S.C. § 60502; ICA § 1. If any inhabitant of North Dakota is denied service on just and reasonable terms, or if such inhabitant is unduly discriminated against, FERC can compel NDPL to serve those persons in conformity with federal law. See ICA §§ 8–10, 41 (imposing civil and criminal liability for violations of ICA).

[34] The PSC also regulates common pipeline carriers, which further guarantees the right of North Dakotans to use the pipeline. A common pipeline carrier is prohibited from construction, unless it first obtains a certificate of site compatibility or a route permit

from the PSC. See, N.D.C.C. §49-22-07. If there is no "need" for the pipeline, or if its adverse impacts outweigh its public benefits, the PSC may "refuse" to designate a site or corridor for a proposed facility." See, N.D.C.C. §49-22-08(1) and (5); see also, §49-22-09. Such regulatory control guarantees North Dakota inhabitants' right to use the pipeline. After a certificate of site compatibility or route permit is obtained, a common pipeline carrier remains subject to the PSC's jurisdiction and must construct, operate, and maintain its pipeline "in conformity with the certificate or permit and any terms, conditions, or modifications of the certificate or permit." N.D.C.C. §49-22-07.

B. The pipeline will provide substantial and direct benefits to North Dakota residents.

[35] The remaining elements of "public use" ensure that the use benefits the residents of the state delegating the eminent domain power. See Hilken, 244 N.W.2d at 524 (citing Grover Irrigation and Line Co. v. Lovella Ditch, Reservoir and Irrigation Co., 131 P. 43, 55 (Wyo. 1913) (observing that "in every case where [a land] use . . . has been questioned, the inquiry . . . has been confined to the interest and welfare of the state or sovereignty within whose limits or jurisdiction the land sought to be condemned is located."). The remaining elements of "public use" are corollaries of one another and collapse into a single inquiry: does the improvement for which condemnation is sought confer a substantial and direct benefit to the people of the state which authorized it? See United Power Ass'n v. Mund, 267 N.W.2d 825, 827-28 (N.D. 1977) (conclusion of law that a land use provided a "direct and substantial" benefit to North Dakota, supported by appropriate findings of fact, demonstrated proper application of the 3-element Hilken standard).

[36] A benefit is "substantial and direct" if it provides "something greater than an indirect advantage" to the citizens of North Dakota. Hilken, 224 N.W.2d at 525. An "indirect advantage" is an "interest or welfare dependent upon or affected by development and growth in another state." Id. at 524. Wyoming's Grover Irrigation case clarifies the meaning of "indirect advantage." A substantial and direct benefit is a benefit greater than the abstract benefits associated with economic stimulus. Accord N.D.C.C. §32-15-01(3) ("[A] public use or a public purpose does not include public benefits of economic development, including an increase in tax base, tax revenues, employment, or general economic health.").

[37] While economic stimulus is not enough to sustain exercise of eminent domain, where a "substantial and direct" benefit to North Dakota residents is found, it is immaterial that the citizens of other states are also benefited. Hilken, 244 N.W.2d at 525 ("although other states may also be benefited, the public in the state which authorizes the taking must derive a substantial and direct benefit, … [which is] greater than an indirect advantage").

[38] In this case, the requirement of a "direct and substantial benefit" is met. North Dakota residents have a legally guaranteed right to conduct oil in the pipeline. It is well-established that the right to transport property by common carrier is sufficiently direct to sustain exercise of the eminent domain power. See, e.g., Norfolk Southern Ry. Co. v. Intermodal Properties, LLC, 71 A.3d 830, 842 (N.J. 2013).

C. Because the district court did not rely upon economic-development benefits to support its determination of public use, the 2006 Amendment is irrelevant to this appeal.

[39] The 2006 amendment to N.D. Const. Art. I, § 16 does not invalidate the "public use" analysis described supra.. It declared that eminent domain may not be exercised in behalf of economic development (i.e., increasing the tax base, increasing tax revenues, creating employment, or promoting general economic health). The district court did not consider economic-development benefits in its "public use" analysis. See, App. at 25–26. Instead, it determined the common carrier pipeline would give North Dakota citizens the right "to transport their oil across the state to the oil refineries." Id. at 26.

[40] The right of the public to transport property by common carrier serves a public use, and that longstanding principle is affirmed by the 2006 amendment. See, N.D. Const. Art. I, § 16 (approving condemnation of property "necessary for conducting a common carrier … business"); Hilken, 244 N.W.2d at 525 (the "right" of North Dakota citizens, guaranteed by regulatory control, to and "substantial and direct" benefit constitutes satisfies the definition of "public use").

D. Because the "right" of North Dakota citizens to a "substantial and direct benefit" constitutes a "public use," irrespective of whether the "broad" or "narrow" view of public use is applied, this Court need not consider the issue.

[41] To resolve this controversy, it is unnecessary to determine whether the "broad" or "narrow" views of "public use" applies. Whether defined broadly or narrowly, a common pipeline carrier serves a "public use." The limited or narrow view … requires in general the actual use or right to use the proposed system by the public as a whole." Hilken, 244 N.W.2d at 523.

> [T]he broad view . . . requires only a use conferring a 'public advantage' or a 'public benefit. . . . Such public use is not confined to actual use by the public, but is measured in terms of the right of the public to use the proposed facilities for which condemnation is sought. As long as the public has the right of use, whether exercised by one or many members of the public, a 'public advantage' or 'public benefit' accrues sufficient to constitute a public use.

Id. Under either view, the "right" of the public to use "the proposed system" or "facilities" constitutes a public use. Because the Sandpiper Pipeline is a common carrier, the public will have the right to conduct oil.

III. The trial court properly denied a Rule 56(f) continuance.

[42] This action was commenced in July of 2014. Motions were to be heard in March of 2015, with the trial in May. Trial was rescheduled to August 11, 2015. Defendants served no discovery until the action had been pending for six months. NDPL timely answered the discovery on February 5, 2015. The Botsfords sought supplementation of the responses and requested that the information be provided by March 6, 2015. Although the information was perhaps irrelevant to the issues before the Court, NDPL provided timely additional responses by March 6. Depositions were never taken by the Botsfords. No motions to compel were ever made. The district court ruled that "[t]here were no discovery issues brought to the Court's attention." App. at 27.

[43] The Botsfords' main issue was that FERC's rate process was not "fair enough" for NDPL to be considered a common carrier. NDPL had proposed through FERC an "open season" as has been described above. Supp. App. at 73-76, 80-81. FERC ruled that the pipeline was open to the public.

[44] The Botsfords discovery requests sought information regarding how often oil in the pipeline was rationed or "apportioned". It sought information on objections that were made in FERC's rate process. The Botsfords attempted to shift the Court's inquiry to the

terms of transportation service available on the Sandpiper line. The appropriate question was whether there was an ability of the public to use the pipeline. Additional discovery, and additional delay, was unnecessary. Judge Kleven ruled that, "Botsfords assert they should be given more time to conduct discovery of the issues of whether NDPL is a common carrier and whether there is public use sufficient to warrant eminent domain. In this opinion, this Court finds that NDPL is a common carrier as a matter of law. Thus any additional discovery will not change this finding. Additionally, this Court finds that a sufficient public benefit exists in the pipeline project and further discovery will not alter this finding." Id. at 27. The district court did not abuse its discretion in denying a Rule 56(f) continuance. The Botsfords' brief is devoid of even a single suggestion as to how additional discovery or time may have impacted the court's decision.

IV. NDPL's easement terms were appropriate.

[45] The Final Order of Condemnation in this matter allows assignment and the ability to mortgage the interest of NDPL in the project. The Botsfords objected to a number of terms in the proposed easement. They were successful in modifying the language to some degree, but appeal on the issue of assignability. Assignability and the ability to mortgage the pipeline are necessary terms for the construction of the pipeline project. They are terms that are similar to those submitted to the PSC in the regulatory process. Instead of being signed by the parties to an easement, the terms here are ordered by the Court. There is no ability of an assignee to take a greater interest in the property than that possessed by the assignor. The easement allows a right of way easement "to construct, operate, maintain, repair or remove one 24" pipeline to transport oil. There would be no

easement for some other purpose. The trial court adequately defined the easement in this matter.

V. The district court properly excluded evidence of NDPL's prior offer to acquire the easement.

[46] Prior to bringing suit, NDPL offered the Botsfords $38,062 for a pipeline easement. This included the use of some land for temporary construction work space and some land for a permanent easement. This offer was based on a formula similar to that offered other landowners. NDPL determined a general land value for different types of land in each county. That per-acre number reflected the approximate value of a fee interest in the number of acres in question. For temporary work space, 50% of the per-acre estimated property value was offered. For permanent easement areas, 125% of the estimated value was offered. In addition, the landowners were offered bonuses of up to $10 per lineal foot for early signing.

[47] NDPL's offer prior to suit was rejected. NDPL then commissioned an appraisal to be performed through Les Roos, a Grand Forks county agricultural property appraiser. That appraisal finding $2,000 in total impact was disclosed to the Botsfords. The Botsfords commissioned their own evaluation through an economist. The Botsfords disclosed their appraisal valuation of $12,158.96 in discovery responses.

[48] Following the granting of partial summary judgment, a jury trial was to be held on the issue of the proper amount of compensation. At the pretrial, counsel for the Botsfords indicated that they intended to introduce evidence of the prior offer to the jury. NDPL filed a motion in limine and Judge Kleven ruled that the evidence should be excluded.

[49] Both parties' valuations cited to studies indicating that there was no real difference in value of agricultural land whether it was crossed by a pipeline or not. While NDPL did not agree with all of the short term costs claimed in the Botsfords' economists report, they did agree to pay the amount set forth in the report. (Transcript of Final Dispositional Conference, pp. 8-9). The Botsfords wished to have a jury trial where they would introduce the pre-litigation offer as their primary evidence of compensation due.

[50] At the final dispositional conference, counsel for the Botsfords conceded that such offers typically were not allowed. Id. at 6. The $38,062 damage claim amount had never been disclosed by the Botsfords, nor had any other claimed damage amount other than the $12,158.96. They first mentioned using the settlement offer as evidence of compensation on the morning of the final dispositional conference. See, Transcript at 9.

[51] Ultimately a motion in limine was made and the issue was briefed. On the day of trial the Court ruled that evidence of the pre-litigation settlement offer would not be received or referred to. (August 11, 2015 Transcript, p. 12).

[52] The trial court did not abuse its discretion in keeping the pre-litigation settlement offer out. Prior to the final dispositional conference James Botsford had never been disclosed as an expert. Further introduction of the evidence would have violated N.D.R. Ev. 408 and been more probative than prejudicial.

[53] N.D.R.Ev. 408 (a)(1) bars evidence that a party offered "valuable consideration in …. attempting to compromise" a claim, if the evidence is offered "to prove . . . the amount of a disputed claim." The Explanatory Note to the Rule indicates that "The policy underlying this rule is the furtherance of compromise and settlement of disputes among parties." Id. at ¶ 2. It reflects a determination that "open and effective discussions

of compromise" are only possible where "the parties know in advance that they will not jeopardize their case by fully discussing all aspects of a claim." Id. at ¶ 4.

[54] In Gangl v. Gangl, 281 N.W.2d 574 (ND 1979) the court specifically ruled that offers of compromise made before the filing of an action are still barred by Rule 408. The Court specifically ruled that, "Although the action had not been initiated when the offer was made, Rule 408 does not require the filing of suit to show the existence of a dispute." Id. at 582.

[55] The Botsfords claim that because N.D.C.C. § 32-15-06.1 requires a pre-condemnation offer, that the offer must be admissible. That statute requires NDPL to determine an amount which it believes to be just compensation and to submit to the owner an offer to acquire the property for the full amount so established." N.D.C.C. §32-15-06.1(2). Here, NDPL offered the Botsfords over $38,000 for an easement. They did so to foster good landowner relations across the state, as well as to avoid the costs of litigation including attorneys' fees.

[56] The Botsfords cite no case for their proposition that the pre-litigation condemnation offer should be allowed. One very similar case has been decided in Arizona, State ex rel. Miller v. Superior Court, 941 P. 2d 240 (Ariz. Ct. App. 1997). In that case, the Arizona Department of Transportation (ADOT) estimated that the "value estimated as the fair value" of the interest in the property sought was $30,795,000. The Court stated that, "The only viable issue for trial is the value of the property and the property owners' damages. Each party plans to offer expert testimony at trial on the value of the land. ADOT's recent valuations are lower than the amounts indicated in the Appraisal and Agreement. Therefore the property owners seek to introduce the Appraisal

and Agreement as evidence relevant to value; they claim that these documents are 'admissions against interest' by ADOT." Id. at 243.

[57] The property owners in Miller argued, similarly to the Botsfords that, "The appraisal report was statutorily required" under Arizona law to support the price for acquisition and therefore is a party admission and that Rule 408 was inapplicable, among other reasons for admission. The Court in Miller ruled that the appraisal and offer was evidence produced to show probable damages in court or used to effectuate that stipulation. Id. at 244. It ruled that use of the Appraisal and Agreement was highly prejudicial to ADOT. Id. The Miller court stated that Rule 408 precludes more than the 'offer' to compromise; conduct and statements made in the pursuit of a settlement are also precluded. The Appraisal. . . falls squarely within the scope of 'conduct and statements' because it was done to effectuate either the stipulation or a court determination for immediate possession. Id. The Court also found that even if the appraisal was an admission, that only overcame a hearsay objection and did "not trump Rule 408". Id. at 246. It overruled the trial court and held that the report should not have been admitted.

[58] A market analysis summary is less significant than an appraisal. An initial offer of compensation is an offer of compromise. It was properly excluded from a potential trial of this matter.

VI. The district court's order placing the burden of proof on the Botsfords was not an abuse of discretion.

[59] The issue of burden of proof in this matter was addressed at the final dispositional conference. (Transcript of July 27, pp. 4-5). NDPL indicated that it took no particular position on which party had the burden of production of the evidence, in other words

which party would lead off the testimony, but that the case law indicated that the Botsfords had the burden of proof of establishing their entitlement to compensation. Id. at 5. The Botsfords acknowledged that recent District Court cases had been tried with the Defendant "going first" and that the ND Supreme Court had decisions indicating that the burden was on the landowner. Id. at 15.

[60] The law is clear in North Dakota. City of Hazelton v. Daugherty, 275 N.W.2d 624, 627 (N.D. 1979) has specifically ruled that the landowner has the burden of proof. The North Dakota Constitution provides that "Private 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 . . ." N.D.C.C. Const. Art. I, Sec. 16. It says nothing about the burden of proof in the action. And there is nothing inconsistent with the procedure used in this case. NDPL has obtained an easement. The order allowed it only after NDPL paid the required amount of money into Court. App. at 45.

[61] The Mississippi case cited by the Botsfords, Ellis v. Mississippi State Highway Comm'n, 487 So.2d 1339, 1342 (Miss. 1986) has no practical bearing on our case. That case stated that, "The only burden on the condemnor is simply to go forward with enough evidence as to the damages suffered by the landowner to make out a prima facie case. Id. at 1339. After that, "if the landowner expects to receive more compensation than that shown, he must go forward with the evidence showing such damage." Id. NDPL offered to present evidence either first or last. It took no position on the issue. And it would have had no practical effect. NDPL would have offered its $2,000 appraisal, and if the Botsfords would have wanted more money, as stated in Ellis, they "must go forward with the evidence showing such damage." Id. at 1339.

[62] North Dakota has established precedent that the burden of proof on the issue of damages is on the landowner. The North Dakota Constitution requires no different result.

VII. The District Court Awarded Excessive Attorney's Fees.

[63] The Botsfords were found entitled to $12,185.96 in compensation. They requested almost $60,000 in costs and attorneys' fees. The trial court granted $41,944 in fees and $2,950 in costs.

[64] The Botsfords appealed contending that their attorney's fees were inappropriately cut for time spent on the case between the $12,158.96 offer of NDPL and the trial. The court did not allow the Botsfords fees for trial preparation where their only evidence of damages in excess of the offer of $12,158.96 was an inadmissible offer of settlement.

[65] The fees for trial preparation for a one issue trial where Plaintiff agreed to pay the $12,158.96 economist's damages claimed by the Botsfords should not have been awarded. The trial court was well within its discretion in refusing to award those. The court specifically stated that "If a ruling on the motion in limine was a substantive factor in this case, the issue certainly should have been brought to the Court's attention at a much earlier date so the matter could be resolved prior to the final dispositional conference. App. at 36.

[66] The Botsfords did not even bring up the fact that they intended to present evidence of a number higher than their valuation until the day of the final dispositional conference. Had they done so, trial preparations would have been unnecessary, as the motion would have been made and denied. Fees were properly excluded.

[67] Furthermore, the fees that were awarded were excessive. There is no indication that the trial court evaluated the result that had been obtained for the Botsfords and

reduced the fees accordingly. The Botsfords had a pre-litigation offer of over $38,000. The compensation awarded was later determined to be just over $12,000. Attorneys' fees in an eminent domain action must be reasonable. City of Medora v. Goldberg, 1997 ND 190, ¶22, 569 N.W.2d 257, 261. A lodestar procedure should be utilized. The Court, "should consider the character of the services rendered by the attorney, the results which the attorney obtained for his client, the customary fee charged for such services, and the ability and skill of the attorney rendering the services. While NDPL did not object to the overall number of hours or the hourly rate, there should be some comparison to the amount of fees expended versus the compensation obtained. In Goldberg the trial court awarded $10,000 in fees on a $27,000 request. The trial court felt that $10,000 was enough based on the fact that the award of damages was only $16,700. There the Supreme Court did not approve of awarding attorneys' fees based on a comparison to the amount of damages, but did allow the trial court to consider the relationship between the initial offer and the ultimate award. In Goldberg the Plaintiff had offered $2,000 and the jury had awarded the $16,700 and that could be considered. The award was 8 times the initial offer.

[68] Here the award was a fraction of the initial offer, less than one third. NDPL should not be forced to pay attorneys' fees when their initial offer was more than fair compensation. Much of the litigation here was over issues on which Defendants did not prevail. The results obtained by an attorney for his client are a "significant" factor in allowing attorney fees. Devils Lake v. Davis. 480 N.W. 2d 720, 727(N.D. 1992). This case should be affirmed and remanded for a reduction in the award of attorneys' fees in light of the lodestar standards.

CONCLUSION

[69] NDPL has satisfied all statutory and constitutional requirements to exercise eminent domain. The trial court's order was appropriately entered. Attorneys' fees should be remanded with direction from this Court that they should be reduced in accordance with the result that was obtained by the Defendant Botsfords.

CERTIFICATE OF COMPLIANCE

[70] The undersigned certifies the above brief is in compliance with N.D.R.App.P. 32(a) and was prepared with proportional type face and that the total number of words in the above brief, excluding words in the Table of Contents, Table of Authorities, signature block, Certificate of Service and Certificate of Compliance totals 7,859.

Dated this 8th day of June, 2016.

/s/ Scott D. Jensen

SCOTT D. JENSEN, ND ID #04315
MATT A. PAULSON, ND ID #08196
For: Camrud, Maddock, Olson & Larson, Ltd.
401 DeMers Avenue, Suite 500
P.O. Box 5849
Grand Forks, ND 58206-5849
Phone: (701) 775-5595
ATTORNEYS FOR APPELLEE AND CROSS APPELLANT

SUPREME COURT NO: 20160017
Grand Forks County No: 18-2014-CV-01058

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

North Dakota Pipeline Company, LLC,

Plaintiff *and Appellee and Cross-Appellant*,

vs.

James R. Botsford and Krista L. Botsford, as
Trustees of the James and Krista Botsford
Trust dated November 24, 1999,

Defendants *and Appellants and Cross-Appellees*,

CERTIFICATE OF SERVCE

I hereby certify that on June 8, 2016, the following documents:

> Brief of Appellee and Cross-Appellant North Dakota Pipeline Company, LLC; and
>
> Supplemental Appendix of Appellee and Cross-Appellant North Dakota Pipeline Company, LLC

were filed electronically with the North Dakota Supreme Court Clerk at:

> SupClerkofCourt@ndcourts.gov

and that counsel for Appellants and Cross-Appellees was served electronically at:

> derrick@baumstarkbraaten.com

RESPECTFULLY SUBMITTED this 8th day of June, 2016.

s/ Scott D. Jensen
SCOTT D. JENSEN, ND ID#04315
MATT. A. PAULSON, ND ID #08196
For: Camrud, Maddock, Olson & Larson, Ltd.
401 DeMers Avenue, Suite 500
P.O. Box 5849
Grand Forks, ND 58206 5849
Phone: (701) 775-5595
Fax: (701) 772-3743
Email: sjensen@camrudlaw.com
ATTORNEY FOR PLAINTIFF/APPELLEE
AND CROSS-APPELLANT
NORTH DAKOTA PIPELINE COMPANY, LLC.

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I hereby certify that on June 13, 2016, the following documents:

> Revised Supplemental Appendix of Appellee and Cross-Appellant North Dakota Pipeline Company, LLC

were filed electronically with the North Dakota Supreme Court Clerk at:

> SupClerkofCourt@ndcourts.gov

and that counsel for Appellants and Cross-Appellees was served electronically at:

> derrick@baumstarkbraaten.com

RESPECTFULLY SUBMITTED this 13th day of June, 2016.

s/ Scott D. Jensen

SCOTT D. JENSEN, ND ID#04315
MATT. A. PAULSON, ND ID #08196
For: Camrud, Maddock, Olson & Larson, Ltd.
401 DeMers Avenue, Suite 500
P.O. Box 5849
Grand Forks, ND 58206 5849
Phone: (701) 775-5595
Fax: (701) 772-3743
Email: sjensen@camrudlaw.com
ATTORNEY FOR PLAINTIFF/APPELLEE
AND CROSS-APPELLANT
NORTH DAKOTA PIPELINE COMPANY, LLC.