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OCTOBER 26, 2020
STATE OF NORTH DAKOTA

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

October 26, 2020

Cass County Joint Water Resource District,

v. Plaintiff and Appellee

Cash H. Aaland, Larry W. Bakko, and Penny Cirks,

Defendants and Appellants

and

Richard and Sandra Ihland, Stuart D. Boyer and Patricia J. Boyer, Vance G. Gylland, Thomas Jorgensen, Brent Larson and Timothy Larson, Mary Jo Schmid, Thomas R. Nelson and Michelle Nelson, Jeffrey C. Shipley and Maria Shipley, Patricia A. Rudnick, Dona L. Duffy, Myron Ihland, Carol Sheridan, Marjorie Rieger, Betty Jean Hulne (deceased), Gregory S. Hulne, Jack T. Hulne, Michael J. Hulne, David A. Hulne, Jean M. Johnson, Dorothy A. Stapleton and Laura Aaland,

Defendants and Appellees

Supreme Court No. 20200171

Civil No. 39-2020-CV-00048
(Richland County District Court)

APPEAL FROM THE DISTRICT COURT
RICHLAND COUNTY, NORTH DAKOTA
SOUTHEAST CENTRAL JUDICIAL DISTRICT
THE HONORABLE JOHN A. THELEN, PRESIDING

BRIEF OF APPELLANT
***** ORAL ARGUMENT REQUESTED *****

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[¶ 1] STATEMENT OF THE ISSUES

I. Whether the district court erred as a matter of law in finding that the successive order granting right of entry under N.D.C.C. § 32-15-06 onto Landowners private properties and to occupy said properties long-term was not a taking?

[¶ 2] STATEMENT OF THE CASE

[¶ 3] This is an appeal by Landowners from a district court order granting right of entry onto their private properties. Landowners contend the order granting right of entry amounted to a taking, thereby requiring just compensation. The Cass County Joint Water Resource District (hereinafter "District") filed an Application for Permit to Enter Land on February 21, 2020, (hereinafter "2020 Application") to enter the land of the landowners Cash Aaland, Larry Bakko, and Penny Cirks (hereinafter "Landowners") as well as fourteen other parcels in the same area owned by others in Richland County, North Dakota. (Appendix ("App.") at 11).

[¶ 4] Two hearings were held on the 2020 Application. At the first hearing before the district court on May 4, 2020, Cash Aaland, Larry Bakko, Penny Cirks, and other interested parties were present. (Transcript ("Tr.") at 4-5). The district court took the matter under advisement. On May 5, 2020, Cash Aaland filed his Request for an Evidentiary Hearing, accompanied by three supporting exhibits. (Doc. Id. 66-69). The District filed a brief on May 6, 2020, in opposition to the request for an evidentiary hearing. (Doc. Id. 82). Landowner Cash Aaland filed an Affidavit in Support of Request For Evidentiary Hearing along with four exhibits on May 7, 2020, to which the District responded and filed a supplemental brief opposing his request on May 8, 2020. (Doc. Id. 84-88, 101).

[¶ 5] On May 12, 2020, the district court issued its Findings of Fact, Conclusions, and Order Granting Right of Entry and Denying Evidentiary Hearing. (Doc. Id. 104). At the request of the District, on May 13, 2020, the district court issued its Amended Findings of Fact, Conclusions, and Order Granting Right of Entry and Denying Evidentiary Hearing for Appellants Cash Aaland and Penny Cirks. (Doc. Id. 105) (App. 121). Landowner Cash Aaland filed a Motion for Stay Pending Appeal to the North Dakota Supreme Court with the district court on May 19, 2020. (Doc. Id. 114-121).

[¶ 6] Due to an issue with proper notice, a second hearing on the 2020 Application was held on May 29, 2020, with respect to landowner Larry Bakko. (Tr. of May 29, 2020, Civil Hearing). At the end of the hearing, the district court granted an Order Granting Right of Entry (Hulne and Bakko). (Doc. Id. 140).

[¶ 7] On June 11, 2020, District Court Judge Thelen issued an Order Granting Property Owner Larry W. Bakko's Motion to Join Property Owner Cash H. Aaland's Motion for Stay. (Doc. Id. 148). Also on that same date, the district court entered its Order Denying the Motion for Stay. (Doc. Id. 149).

[¶ 8] Landowners Aaland, Bakko, and Cirks timely filed a Notice of Appeal on July 1, 2020, including a preliminary statement of the issues. (App. 128). Landowners now ask this Court to reverse the decision of the district court, vacate the district court's order granting right of entry, and to award Appellants' attorneys fees and costs.

[¶ 9] STATEMENT OF THE FACTS

[¶ 10] In 2017 the District was granted a Right of Entry by the district court pursuant to North Dakota Century Code § 32-15-06 for sixteen and a half months to conduct tests and surveys for pre-construction of the Fargo-Moorhead Flood Diversion Project (hereinafter "Project"). The District utilized that Order and was able to create detailed maps down to the thousandths of an acre of private properties it considered as 'permanent monitoring sites.' During that 2017 Right of Entry, the District entered the Landowners' private properties numerous times to examine, survey, map, and install BioGeo monuments for future monitoring use. (App. 71). The District never sought an extension of the 2017 Order Granting Right of Entry.

[¶ 11] The Adaptive Management Plan was mailed to Landowners Aaland and Bakko on September 6, 2019, and to Landowner Cirks on December 11, 2019, and shows that the District had selected Landowners' properties as permanent monitoring sites. (App. 62, 92, 107). The placement of the BioGeo monuments by the District show that those properties were selected as permanent monitoring sites. (App. 106, 120). The Adaptive Management Plan lays out the plan for monitoring pre-construction, during construction, and post-construction of the Project. (App. 15). The District stated in its information packets mailed to Landowners that the Project schedule indicated the acquisition of easements would need to be completed by Spring 2020. (App. 62, 92, 107).

[¶ 12] The District solicited easements from many property owners, including Landowners, in the area that would be impacted by the Project. Within the informational packets mailed to Landowners from the District, the District states that easements were necessary to perform the required monitoring for the Project on close to 425 parcels. (App. 62, 92, 107). The packets which solicited easements from Landowners contained evidence

that surveys conducted under N.D.C.C. § 32-15-06 under the 2017 Order Granting Right of Entry were done and gave the District the requisite information to proceed forward. For example, the District solicited Landowner Cirks with a packet containing a permanent easement proposal for:

> An easement across Government Lot 1 and the NW¼NE¼, except the westerly 2265.94 fee thereof, as described in Doc. No. 354987, Records of Richland County, in the NE¼ Section 12, T136N, R49W, 5th P.M., Richland County, North Dakota, and being further described as follows:
> Beginning at a point on the line between Sections 1 and 12 in said Township and Range which bears N88°19'41"E a distance of 2360.11 feet from the 1/4 corner common to Sections 1 and 12 ; thence continuing on said section line N88°19'41"E a distance of 240.00 feet to a meander line of the left bank of the Red River; thence on said meander line S28°00'00"E a distance of 192.07 feet to the line between said Section 12 and Section 7, T136N, R48W; thence on said section line S03°12'06"E a distance of 368.53 feet; thence on an 800-foot-radius non-tangent arc to the right a distance of 654.01 feet, said arc having a central angle of 46°50'23", a chord bearing of N33°27'44"W, and a chord length of 635.95 feet, to the Point of the Beginning.
> Said easement contains 2.48 acres, more or less.

(App. 62). Out of almost 425 parcels, the District was able to secure each and every easement it needed except for easements from the Landowners, who are now appealing.

[¶ 13] When the Landowners declined the easements solicited by the District, the District did not seek to employ eminent domain procedures, which would have protected Landowners' rights. Instead, the District elected to shortcut eminent domain procedures and applied for the 2020 Application on February 21, 2020, under the entry statute in N.D.C.C. § 32-15-06. By utilizing the entry statute, the District abrogated Landowners' rights to exclude others and avoid paying just compensation to Landowners.

[¶ 14] STANDARD OF REVIEW

[¶ 15] "Whether there has been a taking of private property for public use is a question of law which is fully reviewable on appeal." City of Minot v. Boger, 2008 ND 7, ¶ 16, 744 N.W.2d 277. Statutory interpretation is a question of law, which is fully reviewable on appeal. Minnkota Power Co-op., Inc. v. Anderson, 2012 ND 105 ¶ 6, 817 N.W.2d 325, 328. This Court's standard of review for this case is well established: "Questions of law are fully reviewable on appeal, and whether a finding of facts meets a legal standard is a question of law." State v. Bohe, 2018 ND 216, ¶ 9, 917 N.W.2d 497 (citations omitted).

[¶ 16] STATEMENT ON ORAL ARGUMENT

[¶ 17] Appellants hereby request oral argument be heard on the matter. Appellants would like the opportunity to answer questions of this Court regarding the issue presented, including but not limited to timelines, correspondence from the District to Landowners, and any other questions the Court may have.

[¶ 18] LAW AND ARGUMENT

I. THE DISTRICT'S USE OF NORTH DAKOTA CENTURY CODE § 32-15-06 TO OBTAIN SUCCESSIVE ORDERS GRANTING RIGHT OF ENTRY ONTO LANDOWNERS' PRIVATE PROPERTIES AND TO OCCUPY SAID PROPERTIES LONG-TERM DEPRIVED LANDOWNERS OF THEIR PROPERTY WHICH IS A "TAKING" WITHOUT PAYMENT OF JUST COMPENSATION.

[¶ 19] The Fifth Amendment of the United States Constitution declares private property shall not "be taken for public use, without just compensation." Article I, § 16 of the North Dakota Constitution also declares that:

> [p]rivate property shall not be taken or damaged for public use without just compensation having been first made to, or paid into court for the owner.... The State has the authority to "take" or "damage" private property for public use through its power of eminent domain if it compensates the property owner for the taking or damage. "[T]he obligation of the state to pay just compensation to the owner for the taking of or for damages to his property is, in effect, a contract to compensate for the damages." Whether there has been a taking of private property for public use is a question of law.

Wilkinson v. Bd. of Univ. and Sch. Lands, 2017 ND 231, ¶ 22, 903 N.W.2d 51, 58. (internal citations omitted). This Court has said our state constitutional provision is broader in some respects than its federal counterpart because the state provision "was intended to secure to owners, not only the possession of property, but also those rights which render possession valuable." Grand Forks-Traill Water Users, Inc. v. Hjelle, 413 N.W.2d 344, 346 (N.D. 1987) (quoting Donaldson v. City of Bismarck, 71 ND 592, 3 N.W.2d 808).

[¶ 20] In Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104 (1978), the United States Supreme Court had an in-depth discussion on the Takings Clause. The Court explained that a "taking" may more readily be found when the interference with property can be characterized as a physical invasion by government." The United States Supreme Court again discussed the standard for a taking in Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982), explaining that "Although this Court's most recent

cases have not addressed the precise issue before us, they have emphasized that physical *invasion* cases are special and have not repudiated the rule that any permanent physical *occupation* is a taking." Id. at 432. The United States Supreme Court has long considered "a physical intrusion by government to be a property restriction of an usually serious character for purposes of the Takings Clause. Id. at 426. In determining whether an invasion amounted to a taking, the United States Supreme Court also indicated it relied on the "character of a physical occupation, clearly establish[ed] that permanent occupations of land by such installations as telegraph and telephone lines, rails, and underground pipes or wires are takings even if they occupy only relatively insubstantial amounts of space and do not seriously interfere with the landowner's use of the rest of his land." Id. at 430.

[¶ 21] The right to exclude others is a fundamental aspect of a property owner's rights.[1] The United States Supreme Court has clearly and unequivocally stated that the right to exclude is a fundamental element of this constitutionally-protected right to private property, that physical intrusion (particularly if permanent), whether by government or by private parties acting under government permission, violates that right, and that individuals given a permanent and continuous right to pass over private property amounts to such physical occupation. See Nollan v. Cal. Coastal Comm'n, 483 U.S. 825 (1987).

[¶ 22] The 2020 Order by the district court granting the successive right of entry under the preliminary entry statute amounts to a taking of Landowners' properties. In Minch v. City of Fargo, this Court explained:

[1] *See* STEVEN J. EAGLE, REGULATORY TAKINGS § 7.2 (1999); DWIGHT MERRIAM & FRANK MELTZ, THE TAKINGS ISSUE 199-128 (1999); JAN LAITOS, LAW OF PROPERTY PROTECTION § 5.03[A] (1999). Daniel Mandelker touched upon this issue in § 2.09 of his widely-used and well-regarded treatise, LAND USE LAW (4th ed. 1997), as well as in his casebook with RICHARD A. CUNNINGHAM & JOHN M. PAYNE, PLANNING AND CONTROL OF LAND DEVELOPMENT 131-32 (4th ed. 1995), and in Daniel R. Mandelker, New Property Rights and the Takings Clause, 81 MARQUETTE L. REV. 9 (1997).

> It is clear that whether or not there is a taking is a question of law which ordinarily is not to be presented to a jury. Nevertheless, where there is a dispute of the facts showing that there has been a taking or damaging of property, as there is in the instant case, there must be a hearing before the trial court on that fact question before the court can determine the question of law.

332 N.W.2d 71 (N.D. 1983). Courts engage in "essentially ad hoc, factual inquiries" in determining whether a governmental regulation or restriction is a valid exercise of the police power or is an unconstitutional taking without just compensation. Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104 (1978). A taking may more readily be found when the interference with property can be characterized as a physical invasion by government. Id. See, e.g., United States v. Causby, 328 U.S. 256 (1946). As is in the case at hand, there is a physical invasion by the District because of the BioGeo survey monuments placed on Landowners' properties.

[¶ 23] The 2020 Order Granting Right of Entry amounts to a "taking" of the Landowners' privately-owned land without just compensation through its use of permanent BioGeo survey monuments for continued surveying and monitoring until December 31, 2021; a total of nineteen and a half months. The District's requested successive use of the private properties including the permanent BioGeo survey monuments is greater than the scope of use allowed by N.D.C.C. § 32-15-06, which provides:

> 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.

North Dakota's entry statute is just that: a statutory scheme which an agency with the power of eminent domain may invoke only when compatible with the greatest public benefit and the least private injury. Section 32-15-06 provides a procedure whereby the court may override an individual's right to exclude others from their private property when the proposed entry and activity is so brief and so minimal as to not constitute a taking. The District should not be allowed to employ Section 32-15-06 to deprive Landowners of the constitutional and procedural protections of eminent domain laws, and to avoid paying fair compensation for the taking of "not only the possession of their property but to secure to them as well those rights which make their possession valuable." Wilson v. City of Fargo, 141 N.W.2d 729, 731 (N.D. 1979).

[¶ 24] Both the District and district court rely on the notion 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." Alliance Pipeline L.P. v. Smith, 2013 ND 117, ¶ 15, 833 N.W.2d 464 (quoting Square Butte Elec. Coop. v. Dohn, 219 N.W.2d 877, 883 (N.D. 1974)). However, the main distinction between the right of entry statute and the case at hand is that the District has already had access to Landowners' private properties for surveys and examinations for sixteen and a half months. (App. 71). The successive intrusion sought by the District and ordered by the district court cannot be dismissed as mere "entries." The statute is an entry statute to conduct preliminary surveys, not a shortcut to take property without regard for the Constitution.

[¶ 25] In Loretto v. Teleprompter Manhattan CATV Corp., the United States Supreme Court decided whether a minor, but permanent physical occupation of an owner's

property authorized by the government constituted a "taking" of property for which just compensation is due under the Fifth and Fourteenth Amendments of the Constitution. 458 U.S. 419 (1982). Prior to the lawsuit by Loretto, Teleprompter Manhattan CAVTV Corp. installed roof cables and boxes on a building owned by Loretto, which it was entitled to do so by the laws of New York. Id. at 423. Appellant Loretto initially filed suit, alleging that Teleprompter's installation of cables and large boxes for cable television service on the apartment building she owned was a trespass and was a taking without just compensation. Id. The United States Supreme Court reversed the New York Court of Appeals, stating that such a physical occupation of a property was a taking. Id. at 421. The Court used the traditional physical occupation test, since the cable installation on Loretto's building involved a direct physical attachment of plates, boxes, wires, bolts, and screws to the building, occupying space immediately above and on the roof. Id. at 420. The United States Supreme Court affirmed the "traditional rule that a permanent physical occupation of property is a taking. In such a case, the property owner entertains a historically rooted expectation of compensation, and the character of the invasion is qualitatively more intrusive than perhaps any other category of property regulation." Id. at 441. The Supreme Court reiterated its position that "when the physical intrusion reaches the extreme form of a permanent physical occupation, a taking has occurred." Id. at 426. Essentially, the Court found that the action by Teleprompter Manhattan CATV Corp. amounted to a taking of Loretto's property despite the law that allowed it to do so at the time. Similar to what the Court found in Loretto, the permanent BioGeo survey monuments installed on the Landowners' private properties, which are monitored and utilized by the District, is a physical occupation that amounts to a taking without just compensation.

[¶ 26] The Court in Loretto stated that the "historical rule that a permanent physical occupation of another's property is a taking has more than tradition to commend it. Such an appropriation is perhaps the most serious form of invasion of an owner's property interests." Id. at 435. The Court went on to explain that it "borrow[ed] a metaphor: the government does not simply take a single 'strand' from the 'bundle' of property rights: it chops through the bundle, taking a slice from every strand." Id. at 435. The Court emphasized these rights in Kaiser Aetna v. United States, 444 U.S. 164 (1979), stating that the servitude took the landowner's right to exclude, "one of the most essential sticks in the bundle of rights that are commonly characterized as property." Loretto, at 433. The Landowners' rights to exclude others from their private properties is one of the most important rights of their property ownership.

[¶ 27] In the 2020 Application, the District states that the purpose is to monitor environmental impacts of the Project. (App. 11). The 2020 Application further states that permanent BioGeo survey monuments must be installed on the 'Necessary Property' and that the District will be conducting a bathometric survey between the monuments on each side of the waterway. (App. 11). These BioGeo monuments have already been placed on Landowners' properties by the District during the course of the 2017 Order Granting Right of Entry. The District's plan imposes continued monitoring and physical occupation and use by the District and constitutes a "taking" of the Landowners' private property interests under the law. Between the previous 2017 Order Granting Right of Entry and the 2020 Application, the District will have long-term access to the Landowners' private property for a total of thirty-six months.

[¶ 28] The purpose of the 2020 Application by the District was to satisfy the Adaptive Management and Mitigation Plan. (App. 15). It is clear from the Adaptive Management and Mitigation Plan that the District will conduct surveys pre-construction, during construction, and post-construction at the very least for every other year or three times within a five year cycle. (App. 15). The District used the entry statute once again to gain access to Landowners' properties in 2020 when it had already completed the purposes allowed by N.D.C.C. § 32-15-06 in 2017, down to the thousandths of an acre. (App. 71). The 2017 Application and Right of Entry Order allowed the District sixteen and a half months of access to the Landowners' private properties for examinations, surveys, and mappings. Most importantly, the District utilized the 2017 Order Granting Right of Entry to enter on to the Landowners' properties numerous times in order to conduct examinations, surveys and mappings, and to install permanent BioGeo survey monuments. (App. 71). Now, the District has moved beyond the ***preliminary*** stages of examinations, surveys, and mapping and sought the current 2020 Application under N.D.C.C. § 32-15-06 for the purpose of monitoring the environmental impacts of the Project in order to proceed with the Project. (emphasis added). It is evident that the purpose of the 2020 Application is to conduct long-term monitoring in order to comply with the Adaptive Management and Mitigation Plan, as well as other requirements to obtain permitting for the Project. In granting the successive Right of Entry, the district court expanded the limited access allowed by N.D.C.C. § 32-15-06, which resulted in a "taking" of the Landowners' private properties without just compensation.

[¶ 29] The 2020 Order Granting Right of Entry entered by the district court allows entry by the District onto Landowners' private properties until December 31, 2021, which

extends well beyond the scope of access defined in N.D.C.C. § 32-15-06. (App. 121). The 2020 Application goes beyond the testing and surveying that this Court considered in Square Butte Elec. Coop. v. Dohn, 219 N.W.2d 877 (N.D. 1974). The District tries to hide behind the rationale discussed in Square Butte, however, the facts at hand distinguish this case from Square Butte because it is the ***second*** right of entry request and order from the same party – requesting to conduct surveys. (emphasis added). The electric cooperative in Square Butte applied for a permit to enter "for the purposes of entering land for survey and limited testing." Id. at 883. The district court granted the electric cooperative permission to enter private lands to conduct "soil testing and ground-resisting measurements, pursuant to Section 32-15-06, N.D.C.C." Id. In Square Butte, this Court instructed "If a decision is made by Square Butte that the transmission line must be constructed over Hilken's land, Square Butte will then be required to commence a condemnation action…" Id. at 883. In the instant case, the District should have commenced an eminent domain action to conduct any further studies and testing after the 2017 Order Granting Right of Entry expired. After the expiration of the 2017 Order, the District knew which properties were necessary for the Project, as there is evidence that the District knew exactly which easements, down to the thousandth of an acre, would be needed. (App. 109, 119). Appellants are asking this Court to vacate the 2020 Order Granting Right of Entry, in which the District's remedy is to pursue an access easement through eminent domain, all of which should have been pursued by the District after the expiration of the 2017 Order Granting Right of Entry.

[¶ 30] Surveying and testing have already been completed by the District pursuant to the original 2017 Application sought under Section 32-15-06 and granted in 2017. The

Project's Adaptive Management and Mitigation Plan calls for permanent monitoring by use of the BioGeo monuments installed on Landowners' properties pre-construction, during construction, and post-construction of the Project. (App. 15). It is clear that the District is using the entry statute intended for making preliminary surveys to implement a long-term surveying plan and such permanent long-term entry is not the intended purpose of N.D.C.C. § 32-15-06 and it is not permitted by the statute. The access requested by the District in this case goes far beyond the scope of the request for access in Square Butte and beyond the testing and surveying allowed under N.D.C.C. § 32-15-06.

[¶ 31] Landowner Cash Aaland was mailed correspondence from the District on September 6, 2019, soliciting a permanent easement from him. (App. 92, 96). It is important to note that the easement solicited by the District included curtilage near Landowner Cash Aaland's house/residence to which Appellant has a Fourth Amendment Constitutional right to privacy. The September 6, 2019, correspondence requesting a permanent easement of the properties owned by Landowners Aaland and Bakko evidences that the District has known for a year or more that it desired access to the properties for long-term monitoring for the Project. (App. 92, 107). The December 11, 2019, correspondence further evidences the intent of the District to utilize Landowner Penny Cirks' property to conduct long-term monitoring for the Project. (App. 62). However, upon rejection of the lone offer to purchase easements from Landowners, the District never commenced eminent domain proceedings to properly secure easements for access to Appellants' properties for long-term monitoring. Instead, the District filed the 2020 Application under the preliminary entry statute to gain access to Appellants' land once

again, this time for an additional nineteen and a half months, for a grand total of thirty-six months.

[¶ 32] Landowner Aaland testified at the May 4, 2020, hearing that he was solicited for an easement of his property and he did not accept the easement and that is when this successive request for entry resulted. (See May 4, 2020 Civil Hearing Transcript ("Tr.") at 16-17, lines ("L.") 17-21). The materials mailed to Aaland, Bakko, and Cirks seeking easements by the District evidence that their properties are part of a long-term environmental management monitoring approach. When Mr. Aaland testified during the hearing, he explained, "What has happened is that the applicant, having solicited and obtained easements from a number of landowners when they didn't get it from those of us who are present today, instead of properly taking that easement for continued access, they attempted to again use this statute." (Tr. at 18, L. 2-7). In considering all of the evidence in the record, the facts establish that the District failed to get easements from all landowners and it also failed to take any other steps to secure access to the properties to conduct its continued monitoring and surveying. Instead, the District resorted back to the entry statute intended for preliminary surveys in order to continue its monitoring to comply with the Project requirements. Under the district court's memorandum and 2020 Order Granting Right of Entry, there is nothing to stop the District from applying for right of entry as many times as it wishes to "complete surveys" with complete disregard for Landowners' constitutional rights.

[¶ 33] The circumstances for the Landowners in this case are different than an inverse condemnation situation because the district court by and through its order prevented the Landowners from excluding others and from exercising their constitutional

rights. The judicial order was granted, allowing the right of entry by the District pursuant to a court order, and that judicial order is exactly what Landowners initially opposed and are now appealing.

[¶ 34] By granting the successive order for right of entry onto Landowners' properties, the district court abrogated Landowners' constitutional right to exclude others from their properties. The District's proper remedy was to employ eminent domain laws and procedures to obtain an easement. Such action would have protected Landowners' rights and provided them due process and just compensation. Compliance with eminent domain procedures to conduct long-term monitoring on Landowners' properties might be inconvenient for the District, but it certainly does not render the Project impossible. Any inconveniences to the District were brought about by its own overreaching and seeking more than the entry statute allowed. Compliance with the eminent domain process is itself a public good, and protects property owners from abrogation of their property rights under the constitution. Here, the District should have utilized eminent domain proceedings against Landowners once the proposed easements were denied by the Landowners. Those proceedings can still be pursued by the District as a remedy if this Court vacates the 2020 Order Granting Right of Entry.

[¶ 35] CONCLUSION

[¶ 36] The District's use of N.D.C.C. § 32-15-06, in this circumstance, was not for proper purposes, but used as a shortcut to circumvent lawful eminent domain requirements that would have safeguarded Landowners' constitutional rights and provided them just compensation. Therefore, the district court order which abrogated Landowners' rights was improper and should be reversed. Landowners respectfully request this Court to reverse the decision of the lower court and vacate the Order Granting Right of Entry.

[¶ 37] Appellants ask this Court to award attorneys fees and costs in Appellants' favor under N.D.C.C. § 32-15-32. Attorneys fees for a fixed fee retainer in the amount of $3,500.00 for this appeal as well as costs for the transcript in the amount of $709.50 have been submitted in an affidavit by the undersigned. Exhibit A. Appellants prayer for relief includes the combined total of attorneys fees and costs in the amount of $4,209.50.

Respectfully submitted this 26th day of October, 2020.

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[¶ 38] CERTIFICATE OF COMPLIANCE

[¶ 39] The undersigned hereby certifies that this document complies with the page limitation designated in Rule 32(a)(8)(A) of the North Dakota Rules of Appellate Procedure, and further certified that this document contains twenty-one (21) pages.

Dated this 26th day of October, 2020.

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[¶ 40] CERTIFICATE OF SERVICE

[¶ 41] The undersigned hereby certifies that on October 26, 2020, the BRIEF OF APPELLANT and APPENDIX TO BRIEF OF APPELLANT were electronically filed with the Clerk of the North Dakota Supreme Court and were also electronically transmitted to Rob Andrew Stefonowicz, Attorney for Cass County Joint Water Resource District, at the following:

Electronic filing TO: <rstefonowicz@larkinhoffman.com>

Rob Andrew Stefonowicz
Larkin Hoffman Daly & Lindgren, Ltd.
Attorney for Cass County Joint Water Resource District

Dated this 26th day of October, 2020.

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CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that this document complies with the page limitation designated in Rule 32(a)(8)(A) of the North Dakota Rules of Appellate Procedure, and further certified that this corrected document, which includes the corrected cover page, contains twenty-two (22) pages.

Dated this 2nd day of November, 2020.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on November 2, 2020, the Corrected BRIEF OF APPELLANT, Corrected CERTIFICATE OF COMPLIANCE, and Corrected APPENDIX TO BRIEF OF APPELLANT were electronically filed with the Clerk of the North Dakota Supreme Court and were also electronically transmitted to Rob Andrew Stefonowicz, Attorney for Cass County Joint Water Resource District, at the following:

Electronic filing TO: <rstefonowicz@larkinhoffman.com>

Rob Andrew Stefonowicz
Larkin Hoffman Daly & Lindgren, Ltd.
Attorney for Cass County Joint Water Resource District

Dated this 2nd day of November, 2020.

AALAND LAW OFFICE, LTD.

By: */s/ Jennifer A. Braun*
Jennifer A. Braun (ND ID 06875)
415 11th St. S.; P.O. Box 1817
Fargo, ND 58107-1817
Telephone: (701) 232-7944
Facsimile: (701) 232-4037
Attorney for Appellants
officemanager@aalandlaw.com

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

Cass County Joint Water Resource District,

v. Plaintiff and Appellee

Cash H. Aaland, Larry W. Bakko, and Penny Cirks,

Defendants and Appellants

and

Richard and Sandra Ihland, Stuart D. Boyer and Patricia J. Boyer, Vance G. Gylland, Thomas Jorgensen, Brent Larson and Timothy Larson, Mary Jo Schmid, Thomas R. Nelson and Michelle Nelson, Jeffrey C. Shipley and Maria Shipley, Patricia A. Rudnick, Dona L. Duffy, Myron Ihland, Carol Sheridan, Marjorie Rieger, Betty Jean Hulne (deceased), Gregory S. Hulne, Jack T. Hulne, Michael J. Hulne, David A. Hulne, Jean M. Johnson, Dorothy A. Stapleton and Laura Aaland,

Defendants and Appellees

Supreme Court No. 20200171

Civil No. 39-2020-CV-00048
(Richland County District Court)

AFFIDAVIT OF SERVICE BY ELECTRONIC SERVICE

STATE OF NORTH DAKOTA)
)**SS**
COUNTY OF CASS)

[¶ 1] Denise Brinkman, hereby being first duly sworn on oath, does depose and say: that she is a citizen of the United States, over the age of eighteen years, and not a party to the above entitled matter.

[¶ 2] That on the 2nd day of November, 2020, this affiant served via electronic mail in the City of Fargo, North Dakota, a true and correct copy of the following documents filed in the above captioned action:

1. **Brief of Appellant**
2. **Corrected Certificate of Compliance**
3. **Appendix to Brief of Appellant**

[¶ 3] That the copy of the above documents were addressed as follows:

Stuart D. Boyer at stuboyer@outlook.com;

Gregory S. Hulne at ghulne@gmail.com;

Sandra Ihland at sihland@rrt.net;

Timothy (Brent) Larson at timothybrentlarson@gmail.com;

Thomas R. Nelson at TNelson@vhfargo.com;

Jeffrey C. Shipley at shipleyjeff1@gmail.com;

Thomas Jorgenson at thomas@bradford-staffing.com

[¶ 4] That the above documents were duly sent in accordance with the provisions of the North Dakota Rules of Civil and Appellate Procedure.

Denise Brinkman

Subscribed and sworn to before me this 2 day of November, 2020.

Notary Public
My Commission Expires:

CAROLYN A. MCKAY
Notary Public
State of North Dakota
My Commission Expires July 17, 2024

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

Cass County Joint Water Resource District,

v. Plaintiff and Appellee

Cash H. Aaland, Larry W. Bakko, and Penny Cirks,

Defendants and Appellants

and

Richard and Sandra Ihland, Stuart D. Boyer and Patricia J. Boyer, Vance G. Gylland, Thomas Jorgensen, Brent Larson and Timothy Larson, Mary Jo Schmid, Thomas R. Nelson and Michelle Nelson, Jeffrey C. Shipley and Maria Shipley, Patricia A. Rudnick, Dona L. Duffy, Myron Ihland, Carol Sheridan, Marjorie Rieger, Betty Jean Hulne (deceased), Gregory S. Hulne, Jack T. Hulne, Michael J. Hulne, David A. Hulne, Jean M. Johnson, Dorothy A. Stapleton and Laura Aaland,

Defendants and Appellees

Supreme Court No. 20200171

Civil No. 39-2020-CV-00048
(Richland County District Court)

AFFIDAVIT OF SERVICE BY U.S. MAIL

STATE OF NORTH DAKOTA)
)SS
COUNTY OF CASS)

[¶ 1] Denise Brinkman, hereby being first duly sworn on oath, does depose and say: that she is a citizen of the United States, over the age of eighteen years, and not a party to the above entitled matter.

[¶ 2] That on the 2nd day of November, 2020, this affiant did this affiant did serve a true and correct copy of the following attached documents filed in the above matter:

1. **Brief of Appellant**
2. **Corrected Certificate of Compliance**
3. **Appendix to Brief of Appellant**

upon the following person or persons:

Laura Aaland
5555 171st Ave. S.E.
Christine, ND 58015

Mary Jo Schmid
17385 Cty. Rd. 4
Colfax, ND 58018

Jean M. Johnson
223 10th Ave. E.
West Fargo, ND 58078

Vance G. Gylland
P.O. Box 35
Colfax, ND 58018

Dorothy A. Stapelton
7110 Hawaii Lane
Arlington, TX 76016

Jack T. Hulne
6506 Pinehurst Dr.
Granbury, TX 76049

Patricia J. Boyer
17105 52nd St. S.E.
Horace, ND 58047

Michelle Nelson
6350 173rd Ave. S.E.
Colfax, ND 58018

David A. Hulne
327 West Knights Rd.
Sandwich, IL 60548

Patricia A Rudnick
Dona L. Duffy
2207 12th St. S.
Moorhead, MN 56560

Myron Ihland
Carol Sheridan
2021 124th Ave.
Kent, MN 56553

Richard Ihland
6510 176½ Ave. S.E.
Wahpeton, ND 58075

Maria Shipley
5535 171st Ave. S.E.
Christine, ND 58015

by placing a true and correct copy thereof in an envelope so addressed and depositing the same, with postage prepaid, in the United States mail in Fargo, North Dakota.

Denise Brinkman

Subscribed and sworn to before me this 2 day of November, 2020.

Notary Public
My Commission Expires:

CAROLYN A. MCKAY
Notary Public
State of North Dakota
My Commission Expires July 17, 2024

COUNTY OF CASS)
)ss. **AFFIDAVIT OF ATTORNEY**
STATE OF NORTH DAKOTA) **JENNIFER A. BRAUN**

I, Jennifer A. Braun, declare under penalty of perjury, the follow to be true and correct:

1. My name is Jennifer Anne Braun. I am Defendants/Appellants counsel for the above-entitled civil case.
2. The agreed-upon fee for my representation of Defendants/Appellants in this matter was a fixed fee of $3,500.00.
3. The cost of the transcript amounted to $709.50.

Executed on October 26th, 2020.

Signed: _____
Jennifer A. Braun

Subscribed and sworn to before me this 26th day of October, 2020.

DENISE M. BRINKMAN
Notary Public
State of North Dakota
My Commission Expires Sept. 17, 2024

_____
Notary Public
My Commission Expires:

EXHIBIT
tabbies
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