

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

December 8, 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

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

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TABLE OF CONTENTS

TABLE OF AUTHORITIES	Page 4
	<u>Paragraph</u>
LAW AND ARGUMENT	¶ 1
CONCLUSION	¶ 10
CERTIFICATE OF COMPLIANCE	¶ 11
CERTIFICATE OF SERVICE	¶ 12

TABLE OF AUTHORITIES

NORTH DAKOTA STATE CASES

Alliance Pipeline L.P. v. Smith,

2013 ND 117, 833 N.W.2d 464 ¶ 2

In re 2015 Application for Permit to Enter Lands for Surveys and
Examinations Associated with a Proposed N. Dakota Diversion &
Associated Structures,

2016 ND 165, 883 N.W.2d 844 ¶ 5, 6

Square Butte Elec. Co-op. v. Dohn,

219 N.W.2d 877 (N.D. 1974) ¶ 5

UNITED STATES SUPREME COURT CASES

Loretto v. Teleprompter Manhattan CATV Corp.,

458 U.S. 419 (1982) ¶ 7, 8

CONSTITUTIONAL PROVISIONS

U.S. Const. amend. V. ¶ 4

STATUTES

N.D.C.C. § 32-15-06 ¶ 1, 2, 3, 4, 5, 9

N.D.C.C. § 61-16.1-09 (12) ¶ 1

LAW AND ARGUMENT

[¶ 1] In order to determine whether or not the Order Granting Right of Entry amounted to a taking, the District asks this Court to ignore the totality of the circumstances and instead, look at whether the District is within the class of persons entitled to exercise eminent domain. The District states again and again in its brief that because the District is within the class of persons entitled to exercise the privilege of eminent domain pursuant to North Dakota Century Code § 61-16.1-09(12), therefore the Order allowing Right of Entry was proper by the district court. The District tries to draw attention away from the fact that it has already had a Right of Entry Order granted in 2017, allowing the District sixteen and a half months to perform surveys, examinations, and tests under N.D.C.C. § 32-15-06. These are the same examinations and surveys the District asked to conduct once again in the current 2020 Application, this time for an additional nineteen and a half months. Landowners do not assert that any attempt by any entity at successive use of the right of entry statute is unlawful, but as-applied to the facts at hand, the Order Granting Right of Entry is a taking of Landowners' private property without just compensation.

[¶ 2] Landowners contest the district court's order granting entry onto their private properties' for an additional nineteen and a half months and assert that it is a taking. The District has previously had a right of entry pursuant to N.D.C.C. § 32-15-06 to Landowners' private properties beginning in 2017 for sixteen and a half months, during which the District entered onto the properties numerous times to make surveys, complete tests, and conduct examinations. The completion of these surveys and examinations of Landowners' properties by the District is evidenced by solicitation of easements to Landowners after the 2017 Order Granting Right of Entry expired. Similar to Alliance Pipeline L.P. v. Smith, the 2017 Right of Entry Order for the District was for the purpose

of conducting examinations and surveys in contemplation of condemnation for a public use. 2013 ND 117, 833 N.W.2d 464. This Court held in Alliance, “N.D.C.C. § 32–15–06, authorizes an entity in charge of a public use to enter upon another's land and make examinations and surveys in contemplation of condemnation for a public use. Id. at ¶ 19. However, instead of pursuing a condemnation action against Landowners after the expiration of the 2017 Right of Entry Order, the District pursued a successive right of entry order under the preliminary entry statute.

[¶ 3] After the 2017 Order Granting Right of Entry, the record shows that the District had success in ascertaining easements from almost every parcel it deemed necessary, except for the parcels owned by Landowners and a few others who ultimately agreed to easements after the 2020 Application was filed. The Application by the District states in paragraph fifteen “The Joint Board has attempted to obtain the right to enter the Necessary Property by agreement. As of the date of this application, the Landowners of the Necessary Property have not allowed the access necessary to satisfy the requirements of the Project. The Joint Board is therefore requesting this Court issue its Order permitted access to the Necessary Property....” (Appendix “App.” 14). The 2020 Application is clear that the District requested the Right of Entry only for properties where easements had already been denied. This further illustrates that instead of proceeding with an eminent domain action against Landowners, the District intentionally circumvented the property rights of Landowners by once again applying for a successive right of entry under N.D.C.C. § 32–15–06.

[¶ 4] The District purportedly states that this is the final application under the right of entry statute, but it does not negate the current Right of Entry Order amounting to

a taking. Furthermore, the Order Granting Right of Entry by the District does not specify that this will be the last right of entry granted to the District pursuant to N.D.C.C. § 32–15–06. If the current Right of Entry Order is upheld, there is nothing to stop the District from applying for an additional right of entry once it expires. The District attempts to bolster its use of the right of entry statute by indicating this is the final entry, when there are no legally binding orders affirming the same. Rather, numerous documents exist, showing plans and agenda for future entry onto properties by the District to continue its monitoring and surveying long-term. Based on the current order, the District could continue to apply for and be granted right of entries for continued follow through of testing and surveying, continually ignoring and violating the property rights of the Landowners under the Fifth Amendment of the United States Constitution.

[¶ 5] The case at hand must be distinguished from Square Butte and Brakke despite the arguments by the District. See In re 2015 Application for Permit to Enter Lands for Surveys and Examinations Associated with a Proposed N. Dakota Diversion & Associated Structures, 883 N.W.2d 844 (N.D. 2016) (Cass County Joint Water Resource District v. Brakke, et al. (referred to herein as “Brakke”)); Square Butte Elec. Co-op. v. Dohn, 219 N.W.2d 877 (N.D. 1974). The argument made by the District is that the current right of entry order has similar limitations and restrictions imposed by the district courts in Square Butte and Brakke, and therefore this Court should not vacate the Order Granting Right of Entry. The contemplated Right of Entry Order has limitations and a maximum number of times the properties can be entered, but the major distinguishing factor is that the order granting right of entry under N.D.C.C. § 32–15–06 was the first right of entry in Square Butte and Brakke. The entities in Square Butte had not been able to make surveys,

examinations, and tests prior to filing for the right of entry under N.D.C.C. § 32–15–06. Unlike in Square Butte and Brakke, the District has already utilized the 2017 Right of Entry Order allowing entry to Landowners’ private properties for sixteen and a half months to conduct surveys, examinations, and tests.

[¶ 6] The Landowners’ case is distinguished from Brakke not only because it is the second right of entry, but because of the permanent monuments placed on Landowners’ private properties by the District. In Brakke, the District’s application stated that it needed to bore a limited number of holes on certain properties to obtain subsurface soil samples. Brakke at ¶ 9. The holes would then be filled in after removing enough soil for testing, and restored to their existing condition, including new top soil and seeding in the spring. Id. Unlike in Brakke, the District has placed permanent monuments for surveying on Landowners’ properties. The evidence in the record shows that the District plans to utilize those monuments on Landowners’ properties in accordance with its long-term environmental monitoring plan.

[¶ 7] The District tries to distinguish Loretto from the case at hand by arguing that it does not involve a significant flood control project and surveys and examinations pursuant to a right of entry statute. However, the lower courts in Loretto originally looked at the greater benefit to society in upholding the statute, rationalizing that the New York statute had “important educational and community benefits.” Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982). When the “character of the governmental action,” is a permanent physical occupation of real property, there is a taking to the extent of the occupation without regard to whether the action achieves an important public benefit or has only minimal economic impact on the owner. Id. at 419-420. In determining

whether an invasion amounted to a taking, the United States Supreme Court stated that it relied on:

[T]he 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. Not only are the geomorphological markers permanent, but the continued use and long-term monitoring on Landowners' private properties pursuant to the Order Granting Right of Entry amount to a taking.

[¶ 8] What the District fails to address is that the Right of Entry Order destroys one of the most valuable property rights a person has – the right to exclude others. Pursuant to the district court order, the Landowners are being stripped of their right as property owners to exclude others from their properties, this time, for an additional nineteen and a half months. The United States Supreme Court explained in Loretto,

To the extent that the government permanently occupies physical property, it effectively destroys the owner's rights to possess, use, and dispose of the property. Moreover, the owner suffers a special kind of injury when a stranger invades and occupies the owner's property. Such an invasion is qualitatively more severe than a regulation of the use of property, since the owner may have no control over the timing, extent, or nature of the invasion.

Id. at 420. The Landowners' case is similar to Loretto in that their right to exclude others has been destroyed by the order granting entry, especially since they have no control over the timing, extent, or nature of the invasion despite the limitations imposed within the Order Granting Right of Entry.

[¶ 9] The District's argument that including protective conditions on the right of entry cures the violation of Landowners' property rights and right to privacy is misplaced. The District's arguments suggest that protective conditions on right of entry orders can

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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 8th day of December, 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:

Reply 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;

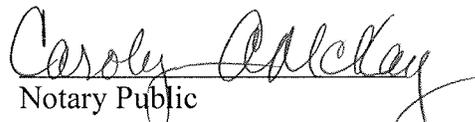
Jeffrey C. Shipley at shipleyjeff1@gmail.com;

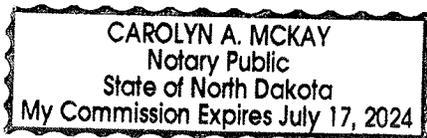
Thomas Jorgenson at thomas@bradford-staffing.com

[¶ 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 8 day of December, 2020.


Notary Public
My Commission Expires:



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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 8th day of December, 2020, this affiant did this affiant did serve a true and correct copy of the following attached documents filed in the above matter:

Reply Brief of Appellant

upon the following person or persons:

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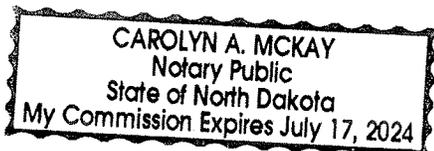
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by placing a true and correct copy thereof in an envelope so addressed and depositing the same, with postage prepaid, in the United States mail in Fargo, North Dakota.


Denise Brinkman

Subscribed and sworn to before me this 8 day of December, 2020.




Notary Public
My Commission Expires: