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STATE OF NORTH DAKOTA

**IN THE SUPREME COURT**

**STATE OF NORTH DAKOTA**

**Supreme Court No. 20200122**
**Ward County Civil No. 51-2016-CV-01678**

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|---|---|
| Montana-Dakota Utilities Co., a Division of MDU Resources Group, Inc., n/k/a Montana Dakota Utilities Co., a Subsidiary of MDU Resources Group, Inc., | ) |
| Plaintiff and Appellee, | ) |
| vs. | ) |
| Lavern Behm, | ) |
| Defendant and Appellant. | ) |

# APPELLANT'S BRIEF

**On Appeal from Judgment Dated July 20, 2018 [Docket No. 89] including Order Denying Vern Behm's Motion for Summary Judgment Dated December 14, 2017 [Docket No. 42], Judgment Dated February 11, 2020 [Docket No. 176] including Order Dated January 3, 2020 [Docket No. 149], and Order Dated February 7, 2020 [Docket No. 171], the Honorable Gary H. Lee Presiding, Ward County District Court, North Central Judicial District**

**ORAL ARGUMENTS REQUESTED**

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## ¶1 Statement of the Issues

ISSUE 1 -- Is it a violation of due process and the taking clause for the state to allow a private corporation to take private property through eminent domain?

ISSUE 2 -- Is it a violation of due process and the taking clause for the state to disregard a finding that the taking is not necessary and – as a matter of law – allow a private corporation to take private property through eminent domain based solely on the private corporation's own determination that the taking is for a public use?

ISSUE 3 -- Is it a violation of due process and the taking clause for the state to disregard the evidentiary findings of no public use and allow the taking to occur based solely on the private company's own determination that there is a public use?

ISSUE 4 -- Is it a violation federal due process, the taking clause, and the right to a jury to allow a taking of private property without a jury determination that the taking is for a public use?

ISSUE 5 -- Is it a violation state due process and the right to a jury to allow a taking of private property without a jury determination that the taking is necessary?

ISSUE 6 – Given the statutory language which requires costs "for all judicial proceedings," did the lower court err in not allowing attorney fee and costs relating to Behm's appeal to the United States Supreme Court.

## ¶2 Facts Relevant to The Issues Submitted

**¶3** The facts are provided in the lower court' findings of the case:

¶5 Lavern Behm owns agricultural land in Ward County, Section 16, 155 N., 84 W. The land is bounded on the west side by a gravel township road, commonly referred to as 128th Street Northwest. The land is cut, generally east to west, by a Burlington Northern Santa Fe railroad right-of-way. Along the southern edge of the property MDU maintains a pipeline running generally east to west.

¶6 Burlington Northern Santa Fe maintains and operates a switch on its right-of-way. In order to keep the switch operating in the winter months, Burlington Northern Santa Fe must keep the switch heated so that it is free of ice and snow. Presently, this is done by a propane heater. Propane tanks are located near the property. The propane tanks need to be filled and serviced periodically.

¶7 To obviate the continued need to service and fill the propane tanks MDU proposes to place a buried pipeline of "4 inch poly and 4 inch steel" from

the existing pipeline at the southern border of the property. The pipeline would run approximately 3000 feet, south to north, from the existing MDU pipeline, to the site of the Burlington Northern Santa Fe switches. The pipeline would run entirely beneath property owned by Lavern Behm.

. . .

¶14 The purpose of the proposed pipeline in this case is to carry natural gas to heat the Burlington Northern Santa Fe switch. . . .

. . .

¶20 The location of the proposed pipeline further stretches the meaning of necessity to mean mere convenience to MDU. That convenience is not even a present convenience, but one of a future, highly speculative convenience.

¶21 128th Street Northwest runs down the section line. As such, the standard 66 foot easement exists (33 feet on each side of the section line). The proposed pipeline easement starts at 33 feet from the section line, and is 10 feet wide. The pipeline runs down the middle of this 10 foot easement, a mere 38 feet from the section line, and but 5 feet from the end of the statutory section line right-of-way. The pipeline is to run entirely beneath Lavern Behm's farmland.

¶22 MDU's District Manager, Curtis Olson, testified. He stated he was somewhat involved in the project, but had never even visited the site. He agreed that MDU had only minimal discussions or negotiations with Lavern Behm regarding the placement of the pipeline. MDU did not attempt to place the pipeline within the existing 33 foot section line right-of-way. Olson stated that he had no discussions with local township officers regarding any proposal to place the pipeline within the 33 foot section line right-of-way. Nor did he have any discussions with township officials regarding any plans for future changes or improvements to 128th Street Northwest. The bottom line from this testimony appears to be that MDU considered no other options regarding the placement of the pipeline other than across and beneath Lavern Behm's property.

¶23 When questioned why the proposed route was chosen (a mere 5 feet away from the existing section line right-of-way) and not a possible route within the 33 foot section line right-of-way, Olson stated that if 128th Street Northwest was ever improved, MDU would have to bear the cost of any movement or replacement of the pipeline.

¶24 The proposed taking a Lavern Behm’s property for the purpose of this pipeline is thus premised on a project to benefit a single user, Burlington Northern Santa Fe. It is to be placed on Lavern Behm's property, a mere 5 feet from the existing 33 foot section line right away. That placement is

deemed necessary by MDU based on the speculative fear of a future event which may never occur, and even if it does, may not necessitate the repair or replacement of the pipeline. The necessity proposed by MDU is nothing more than its own mere convenience.

¶25 Contrasted to this are Lavern Behm's rights to own his property and to farm or otherwise develop it as he sees fit, without the burden of this easement. The burden on Lavern Behm is immediate and permanent as opposed to the uncertain and speculative necessity argued by MDU.

¶26 The Court therefore finds that the proposed taking and pipeline route is not compatible with the greatest public benefit when weighed against the immediate and permanent private injury to Lavern Behm.

¶27 The Court further finds that MDU's decision is arbitrary and capricious. A decision is arbitrary or capricious if it is not the product of a rational mental process by which the law and facts are relied upon and considered together for achieving a reasoned and reasonable interpretation. *Grand Forks Housing Authorities v. Grand Forks Board of County Commissioners*, 2010 ND 245, 793 NW2d 168.

¶28 In this case it appears as if MDU looked only at its own convenience when it determined to take this pipeline easement. The decision was based on the sheer speculation of what might, or might not occur at some unknown future date, and which might impose some unknown and uncertain future cost. MDU did not consider at all the private injury its pipeline would impose on Lavern Behm and his property. This one-sided analysis by MDU, resolving all uncertainties and speculations in its favor, and without consideration of Lavern Behm's rights of ownership is arbitrary and capricious.

**Doc. No. 65, A. 84, 85-86, 88, 91-93.**

**¶4 Testimony Received**

**¶5** The testimony received supports the district court's findings. Curt Olson, MDU's district manager for the Minot area, testified that that MDU has proposed a 4-inch pipeline, **T. 6, 8**, whose purpose is to facilitate Burlington Northern in regards to their switch station. **T 15-16**. Olson testified that the switches are now receiving energy or fuel to the propane tanks already in existence, **T. 16**, and that he assumed that the switches presently work. **T. 16**. Olson confirmed that the easement they were requesting over Behm 's property parallel the 33-foot right-of-way along 128th St. **T. 17-18**. Olson

testified that they never applied to use the right-of-way along 128th St. **T. 18**. Olson confirmed that the purpose of the line was to service only Burlington Northern. **T. 20**. Olson confirmed that the 33-foot right-of-way along the road was along a section line right-of-way. **T. 22**. Olson stated that the reason for not using the right-of-way is because if there's any future roadwork or grade changes, the line would have to be moved at MDU's expense. **T. 23**. Olson also confirmed that he had not checked with the township about whether or not there was any planned future roadwork. **T. 25**. Olson also confirmed that after the line is placed on Behm's property it may be necessary to move that line in the future. **T. 26.** Olson confirmed that the purpose of putting in the line was so that the propane tanks presently used by Burlington Northern would no longer be needed. **T. 28-29**. In other words, by putting in the line the only change that will occur is that Burlington Northern will no longer have to fill up its propane tanks. **T. 29**.

**¶6** The landowner Vern Behm testified that he owns land on both sides of the section – i.e., both sides of the township road. **T. 41**. Behm testified that he has observed Burlington Northern filling up the propane tanks that are used to keep the switches warm. **T. 46**. Behm testified that Burlington Northern uses a payloader to keep the service road open, and that they have a daily operator in the winter who checks the switches. **T. 47**. Behm testified that he considers the pipeline merely an issue of convenience on the part of Burlington Northern. **T. 47**. Behm is aware of the right-of-way (33 feet) on each side of the township line. **T. 47-48**. The road is well-maintained and he is not aware of any planned roadwork or any plan to widen the road. **T. 48**. Behm could not see any reason why MDU couldn't simply use the right-of-way along the road. **T. 49**. Behm testified that Burlington Northern has the option of just continuing using the propane tanks and not

doing the natural gas line at all. **T 49**. Behm testified that he has been farming in this area since 1970, and the land has been in his family were 75-80 years. **T. 51**.

**¶7** Ward County Commissioner John Fjeldahl testified as to the purpose of the section line's right-of-way and that the road and right-of-way is for public use for travel, as well as for utilities to be able to use. **T. 53**. Fjeldahl testified that it is his understanding that the intention of the county is to allow these right-of-ways is so they can be used instead of using personal land. **T. 54**. Commissioner Fjeldahl stated that it is his opinion as a property owner and as a County Commissioner that he would prefer that the utilities be put on the statutory right away versus on private property. **T. 55**. Commissioner Fjeldahl further testified that if MDU wants to build a pipeline they should use the right-of-way first if it's available to them. **T. 59**. Commissioner Fjeldahl also testified that it is possible to put a pipeline along the right-of-way because it has been done. **T. 59**.

**¶8 Dismissal of Eminent Domain Action by the Lower Court**

The district court dismissed the action, finding that the purpose of the pipeline – heating a railroad switch during the winter months – was already being met by the use of propane tanks and that MDU's refusal to use the township thirty-three-foot easement that follows and parallels the existing county road demonstrated that the subject easement was not necessary and was indeed a mere convenience to the railroad. The district court, the Honorable Gary H. Lee presiding, ruled as follows:

> ¶10 Eminent domain is the right to take private property for public use. Section 32-15-02 (1), NDCC. Private property shall not be taken for the use of, or ownership by, any private individual or entity, unless the property is necessary for conducting a common carrier or utility business. Article 1, Section 16, ND Const.; and Section 32-15-01 (2), NDCC.
>
> ¶11 MDU is a public utility which provides natural gas and electric services

to customers in a four state area, including North Dakota. Montana-Dakota Utilities Co., v. Public Service Commission of the State of North Dakota, 413 NW2d 308 (ND 1987).

. . .

¶14 The purpose of the proposed pipeline in this case is to carry natural gas to heat the Burlington Northern Santa Fe switch. The proposed pipeline is, therefore, a use authorized by Section 32-15-02, NDCC.

¶15 The inquiry under Section 32-15-05, NDCC, does not, however, stop with a determination that a proposed taking is for a public use. The Section also requires that a taking be necessary for the public use.

. . .

¶19 MDU's proposal is to place a 3000 foot pipeline beneath Lavern Behm's property for the benefit of a single user, Burlington Northern Santa Fe. While it is certainly not subject to dispute that maintaining railway switches is a necessity to the safe operations of the railroad, the construction of this pipeline is not necessary for this purpose. The current switch has been, and can continue to be maintained through the use of propane. The proposed pipeline serves only the convenience of a single user, Burlington Northern Santa Fe, while imposing a permanent restriction on Lavern Behm's use of his private property.

. . .

¶24 The proposed taking [of] Lavern Behm's property for the purpose of this pipeline is thus premised on a project to benefit a single user, Burlington Northern Santa Fe. It is to be placed on Lavern Behm's property, a mere 5 feet from the existing 33 foot section line right [of] way. That placement is deemed necessary by MDU based on the speculative fear of a future event which may never occur, and even if it does, may not necessitate the repair or replacement of the pipeline. The necessity proposed by MDU is nothing more than its own mere convenience.

¶25 Contrasted to this are Lavern Behm's rights to own his property and to farm or otherwise develop it as he sees fit, without the burden of this easement. The burden on Lavern Behm is immediate and permanent as opposed to the uncertain and speculative necessity argued by MDU.

**Doc. No. 65, A. 86-87, 88, 90-91, 92.**

**¶9 Reversal by North Dakota Supreme Court**

**¶10** On appeal the North Dakota Supreme Court reversed the district court, disregarding the lower court's findings relating to necessity and mere convenience to a private company:

> [¶9] Where a property owner contests "public use" under N.D.C.C. ch. 32-15, "there is a presumption a use is public when the Legislature has declared it to be and we treat the Legislature's decision with the deference due a coordinate branch of government." [Citation omitted.] Nevertheless, "the ultimate decision regarding whether a proposed use of property is, in fact, a public use is a judicial question." Id. "Private property may not be taken for the use of, or ownership by, any private individual or entity, unless that property is necessary for conducting a common carrier or utility business." N.D.C.C. § 32-15-01(2). Where, as here, eminent domain is exercised by a utility business, "[c]ondemnation for service to a single industrial customer does not forestall a finding that the taking is for a public use." [Citation omitted.]
>
> [¶10] MDU, the condemnor, and BNSF, the customer it intends to serve, are both "a common carrier or utility business." N.D.C.C. § 32-15-01(2). It is only MDU's use of the easement to pipe gas, not that of its customer BNSF to heat its switch with the gas, that is relevant to the public use determination here. MDU's proposed pipeline to supply natural gas to BNSF for the purpose of heating the railroad switch is for a public use because MDU is a public utility, even though the portion of the pipeline at issue here is intended to serve only a single customer. The district court correctly concluded the "proposed pipeline is . . . a use authorized by Section 32-15-02, NDCC."
>
> [¶11] MDU argues the district court erred in ruling the proposed taking of Behm's property was not necessary for the public use but was of "mere convenience to MDU." Before property may be taken for a use authorized by law, "it must appear . . . [t]hat the taking is necessary to such use." N.D.C.C. § 32-15-05(2); N.D.C.C. § 3215-01(2) ("Private property may not be taken for the use of, or ownership by, any private individual or entity, unless that property is necessary for conducting a common carrier or utility business.").
>
> . . .
>
> [¶14] A "court's review of public necessity is limited to the question of whether the taking of the particular property sought to be condemned is reasonably suitable and usable for the authorized public use." . . .
>
> . . .
>
> [¶16] The district court's belief that the pipeline was unnecessary because BNSF could continue to heat the railroad switch with propane erroneously focuses on the

> customer's necessity rather than the public utility's necessity. Whether a project is necessary at all, including the "condemning authority's determination to exercise the power of eminent domain for an authorized public use[,] is a legislative question which is not subject to judicial review." [Citation omitted.] The necessity inquiry under N.D.C.C. § 32-15-05(2) turns on whether the particular property proposed to be taken is necessary for the public use, not whether the authorized public use is itself necessary. . . . The court's consideration of BNSF's preference for gas by pipeline to heat its railroad switch misapplied the law. It is the necessity of MDU, not that of BNSF that is the proper consideration. . . .
>
> [¶17] Ultimately, it appears the district court substituted its judgment for that of the condemning authority. "In the absence of bad faith, gross abuse of discretion, or fraud by the condemning authority in its determination that the property sought is necessary for the authorized use and is pursuant to specific statutory authority, such determination should not be disturbed by the courts." [Citation omitted.] Behm did not establish that MDU acted in bad faith, grossly abused its discretion, or committed fraud in determining whether its chosen route across Behm's property was reasonably suitable in terms of the greatest public benefit and the least private injury.

*Montana- Dakota Utilities Co. v. Behm*, 2019 ND 139, 927 N.W.2d 865. Thus, the North Dakota Supreme Court held that the private utility company's decision to condemn the property is sufficient to constitute public use and presumably fulfills any necessity requirement, holding that such a taking is proper as long as the use is deemed by the condemning authority to be "necessary for the authorized use and is pursuant to specific statutory authority." *Montana- Dakota Utilities Co. v. Behm*, 2019 ND 139, ¶17, 927 N.W.2d 865. Lavern Behm asserts that this taking is unwarranted and a violation of due process and the taking clause, and that the burden is on MDU to prove public use and necessity.

**¶11 The Case on Remand**

**¶12** On remand, Vern Behm presented both federal and state constitutional

rights to the district court through his pretrial brief and requested jury instructions.[1] **Doc. 144-145, A. 195-218.** Thus, Vern Behm asserted below the following:

> 1. That no taking could occur without the jury specifically finding that the taking is for a public use.
> 2. That no taking could occur without the jury is this specifically finding that the taking is necessary.
> 3. That the burden of proving that the taking constitutes a public use and is necessary is on MDU, the entity proposing the taking.

The district court, deeming itself bound by the North Dakota Supreme Court's order of remand, declined Vern Behm's request to present these questions to the jury as part of the jury's deliberations or to employ the jury in an advisory capacity as to these issues; instead, the district court ruled that "[t]he only matter left for determination in this trial is the issue of eminent domain damages to be awarded." **Doc. No. 149, A. 223.**

**¶13** The parties then resolved the sole remaining issue left before the district court (the valuation relating to the taking) while retaining Vern Behm's right to appeal all of the issues raised before the district court and the issue of attorney fees. **Doc. No. 150. A. 225-27.**

## ¶14 Standard of Review

**¶15** In regard to the findings made by the district court relating to necessity or public use we asserted that the burden is on the condemner to prove necessity and public

[1] The requested jury instructions provided that "such taking must be necessary and or a public use," JI 75.01, and provided a definition of 'public use,' JI 75.03A. **Doc. No. 144, A. 195,-96, 197-99.** Behm also requested that the verdict form include separate determinations by the jury as to whether he taking is necessary and for public use. **Doc. No. 145, A. 217.** Vern Behm also requested a jury instruction that placed the burden on MDU as to the necessity of the takin and whether the taking is a public use. **Doc. No. 144, A. 202-03.** The requested jury instructions included specific reference to the state and federal constitutional provisions and the applicable state statutes. **Doc. No. 144, A. 195-203.**

use, citing. ND CONST. ART. I, SEC. 16, 2nd Paragraph; N.D.C.C. 32-15-01; N.D.C.C. 32-15-05(2). In addition, the findings of fact are not to be set aside unless they are clearly erroneous. N.D. Civ. P. Rule 52.

**¶16** In regard to legal conclusions made by the lower court or statutory/constitutional construction, this Court is free to determine the law. "Statutory interpretation is a question of law, fully reviewable on appeal." *Baker v. Sabinash,* 2015 ND 153, ¶6, 864 N.W.2d 436, citing *State v. Glaser,* 2015 ND 31, ¶ 13, 858 N.W.2d 920. However, we assert that Vern Behm has a fundamental right to his property[2] and as such any interpretation of the law must entail the application of strict scrutiny, and any restriction on the property be limited to that which is necessary and essential to the taking and commensurate with any actual public use.[3]

## ¶17 Applicable Law

**¶18** The following constitutional provisions and statutes apply in this matter:

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[2] Justice Alito has previously described "fundamental rights" as rights and liberties that are deeply rooted in our Nation's history and tradition and implicit in the concept of ordered liberty that without such right liberty or justice would not exist:

> But it is well established that any "substantive" component to the Due Process Clause protects only "those fundamental rights and liberties which are, objectively, 'deeply rooted in this Nation's history and tradition,' " Washington v. Glucksberg, 521 U.S. 702, 720–721, 117 S.Ct. 2258, 138 L.Ed.2d 772 (1997); Snyder v. Massachusetts, 291 U.S. 97, 105, 54 S.Ct. 330, 78 L.Ed. 674 (1934) (referring to fundamental rights as those that are so "rooted in the traditions and conscience of our people as to be ranked as fundamental"), as well as " 'implicit in the concept of ordered liberty,' such that 'neither liberty nor justice would exist if they were sacrificed.' " Glucksberg, supra, at 721, 117 S.Ct. 2258 (quoting *2715 Palko v. Connecticut, 302 U.S. 319, 325–326, 58 S.Ct. 149, 82 L.Ed. 288 (1937)).

U.S. v. Windsor, 570 U.S. 744, 807 (2013)(Alito, J., dissenting). The rights of individual to own property, possess property, and be safe from intrusions and limits upon the ownership and use of property are the hallmark of our country.

[3] *See generally* Nowak, Rotunda & Young, CONSTITUTIONAL LAW HORNBOOK SERIES Ch. 12, Sec. III A. 418-19 (2nd ed.1983).

> **Section 9.** All courts shall be open, and every man for any injury done him in his lands, goods, person or reputation shall have remedy by due process of law, and right and justice administered without sale, denial or delay. . . .

ND CONST Art. I, Section 9.

> **Section 13.** The right of trial by jury shall be secured to all, and remain inviolate.

ND CONST Art. I, Section 13.

> **Section 16.** Private property shall not be taken or damaged for public use without just compensation . . . . No right of way shall be appropriated to the use of any corporation until full compensation therefor be first made . . . . Compensation shall be ascertained by a jury, unless a jury be waived. When the state or any of its departments, agencies or political subdivisions seeks to acquire right of way, it may take possession upon making an offer to purchase and by depositing the amount of such offer with the clerk of the district court of the county wherein the right of way is located. The clerk shall immediately notify the owner of such deposit. The owner may thereupon appeal to the court in the manner provided by law, and may have a jury trial, unless a jury be waived, to determine the damages, which damages the owner may choose to accept in annual payments as may be provided for by law. . . .
>
> For purposes of this section, 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. Private property shall not be taken for the use of, or ownership by, any private individual or entity, unless that property is necessary for conducting a common carrier or utility business.

ND CONST Art. I, Section 16.

> No person shall be . . . deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.

U.S. CONST, Amendment V.

> In suits at common law, where the value in controversy shall exceed $20, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any court of the United States, then according to the rules of common law.

U.S. CONST, Amendment VII.

> All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No

> state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. CONST, Amendment XIV, Section 1.

**¶19** These state requirements are contained in the North Dakota statutes, with more specificity as to the requirement of "necessity" as to such taking by any private individual or entity:

> 32-15-01. Eminent domain defined - How exercised - Condemnor defined - Exceptions.
> 1. Eminent domain is the right to take private property for public use.
> 2. Private property may not be taken or damaged for public use without just compensation first having been made to or paid into court for the owner. When private property is taken by a person, no benefit to accrue from the proposed improvement may be allowed in ascertaining the compensation to be made therefor. Private property may not be taken for the use of, or ownership by, any private individual or entity, unless that property is necessary for conducting a common carrier or utility business. . . .

N.D.C.C. 32-15-01 (emphasis added).

> Before property can be taken it must appear:
> 1. That the use to which it is to be applied is a use authorized by law.
> 2. That the taking is necessary to such use.

N.D.C.C. 32-15-05 (emphasis added).

## ¶20 ARGUMENT

### ¶21 Introduction

**¶22** This is the second time this eminent domain matter has been before this Court and provides this Court a second opportunity to recognize property rights as significant—if not fundamental. This Court's initial decision was appealed to the United States Supreme Court and although the Supreme Court eventually denied certiorari, the Court requested a response from MDU, thus indicating that several of the justices were

interested in granting certiorari.[4] It is impossible to know why certiorari was not granted, but one possibility is that the Court realized that the case was not fully completed at that time because a jury trial still had yet to occur.

**¶23** Part and parcel in this appeal (and the prior one) is the interrelationship and co-mingling of state and federal constitutional law as relating to the historic rights of property and the present state of eminent domain law. Essential to this distinction is the procedural posture in which the district court in its initial 2018 decision applied only state law and dismissed the matter before the parties had an opportunity (or need) to apply federal constitutional law.[5]

**¶24** Merriam-Webster dictionary defines "necessary" as "absolutely needed: REQUIRED. Food is necessary for life." Where there are other options, then such use is not "absolutely needed." And there *are* other options, such as putting the gas line where it should go or by using the right of way along the township road or along the railroad

[4] See **Doc. No. 137, A. 188** (Attorney Boughey Letter to The Honorable Gary A. Lee 9-16-19), **Doc. No. 138, A. 189** (U.S Supreme Court Letter to MDU Attorney), and **Doc. No. 159 –** David C. Thompson and Melanie F. Wachtell, *An Empirical Analysis of Supreme Court Certiorari Petition Procedures: The Call for Response and The Call For The Views Of The Solicitor General*, 16:2 GEO.MASON L. REV. 237, 244 (2009)("[T]he Court issued approximately 200 CFRs per Term" and "a petition is 9 times more likely to be granted once the Court calls for a response."). "[A]ccording to legal literature, any such request for briefing from the respondent comes directly from at least one of the Supreme Court justices." *Ibid* at 242.

[5] **Doc. No. 24, 38, 42 [A. 41], and 65 [A.84].** In order to protect Vern Behm's constitutional rights regarding this taking, counsel for Vern Behm – as an alternative legal basis on the prior appeal – included reference to both federal and state constitutional rights. On remand, Vern name in conjunction with his requested jury instructions specifically raised the federal constitutional issues, as well as the North Dakota Constitution relating to the right to a jury.

tracks – or not employing the gas line at all – by using the propane tanks adjacent to the railroad tracks (as is being done now).

**¶25** Despite having viable options that are presently being used, MDU attempts to use the power of eminent domain to take a private person's land when it is not necessary and is merely more convenient to the large corporation. Instead of using the right of way along the road or along the railroad tracks, MDU seeks to use Vern Behm's private land and insert a gas line within five feet outside the right of way specifically created for this purpose.

**¶26 Analysis of the Original North Dakota Supreme Court Decision**

**¶27** Despite these clear statutory and constitutional requirements of the state, this Court decided that the determination of 'public use' and 'necessity' is basically left to the condemner. Court reversed, declaring that the determination of public use and necessity is left to the entity (public or private) which is using state law to take the property, thus rendering the state's constitutional and statutory protections of property rights meaningless. That being said, Vern Behm on demand asserted his federal property rights – as well as federal due process rights – in regard to the taking of his property.

**¶28** Instead of applying the North Dakota Constitution and the implementing statutes which require necessity, the North Dakota Supreme Court disregarded its own law requiring necessity and reframed Behm's argument as one only asserting there was no public use. *Montana-Dakota Utilities Co. v. Behm*, 2019 ND 139 ¶7, 927 N.W.2d at 868 ("We interpret Behm's argument to be that the court erred in ruling the proposed taking was for a public use."). More specifically, the North Dakota Supreme Court decided that the private corporation would be allowed to take Behm's private property

through eminent domain despite the fact that the adjacent township right away (a mere ten feet from the line of taking) was readily available. The state Supreme Court also refused to consider that the railroad had the option of continuing to heat the switches with propane instead of installing natural gas service on Behm's private property. Instead of applying the necessity requirement found in the state constitution or the state statutes, the North Dakota Supreme Court ruled as a matter of law that the only requirement for the taking is a determination by the private company that its taking is for a public use:

> A "court's review of public necessity is limited to the question of whether the taking of the particular property sought to be condemned is reasonably suitable and usable for the authorized public use." [citation omitted]. . . The necessity inquiry under N.D.C.C. § 32-15-05(2) turns on whether the particular property proposed to be taken is necessary for the public use, not whether the authorized public use is itself necessary. . . . We conclude the district court erred in ruling MDU's proposed taking was not necessary for a public use.

*Montana-Dakota Utilities Co. v. Behm*, 2019 ND 139, ¶¶14, 16, 18, 927 N.W.2d at 870, 871, 871.

**¶29** It appears that instead of determining whether there was a true public use and that placing the pipeline on his property was really necessary, the North Dakota Supreme Court instead adopted the following analysis:

1. The legislature has decided what entities are public utilities;
2. MDU falls within this classification as a public utility;
3. the decision to employ eminent domain by this utility will not be second-guessed by the courts;
4. because MDU is designated by the legislature as a public utility its placement and use of the pipeline constitutes a public use, regardless if the railroad is the only recipient of the product from the pipeline;
5. the determination of whether such use is necessary is left to private entity that is bringing the eminent domain action; and
6. the landowners only defense to such a taking is if the landowner proves bad faith, gross abuse of discretion, or fraud by the condemning authority.

**¶30** In our view, the concept of public use must be more than just the use *for one* of MDU's customers, or for the use of MDU for only one of its customers. To this end we quote Justice Thomas' dissent in *Kelo*: "The Constitution's text, in short, suggests that the Takings Clause authorizes the taking of property *only if the public has a right to employ it*, not if the public realizes any conceivable benefit from the taking." *Kelo v. New London*, 545 U.S. 469, 505 (2005) (Thomas, J., dissenting) (emphasis added). Justice Thomas proceeds to properly assert that "the Public Use Clause is most naturally read to authorize takings for public use *only if the government or the public actually uses the taken property*." *Ibid*. at 514 (Thomas, J., dissenting) (emphasis added). To hold otherwise is to effectively render the Public Use Clause superfluous, if not "a virtual nullity, without the slightest nod to its original meaning." *Ibid*. at 506 (Thomas, J., dissenting).

**¶31** The starting point in reference to property rights must be that the property is owned by an individual, and that the holding of that property is a significant right and that property cannot be taken unless absolutely necessary *and* for public use. Where property rights are being taken by the government, any and all presumptions should be in favor of the landowner, not the government or the private corporation that has been allowed to take the private property. In other words, the presumption should *not* be that there is a public use when the government or a private corporation authorized by the government is taking away someone's property. The presumption should be *against* the taking, and the burden should be on the government (or the private corporation) that asserts the right to take the property. In this case, not only did the Supreme Court of North Dakota ignore the district court's findings and find a public use, it allowed the

private corporation itself to determine on its own whether there is a public use, and did not require necessity for the taking.

**¶32** If indeed property is a fundamental right, or for that matter a right which has constitutional dimensions, one would think that the taking of private property by eminent domain cannot be countenanced if the taking is not necessary—or if the taking is not for public use but merely for the convenience of one particular private corporation. Moreover, this case involves a private corporation, MDU, taking private property to service one single client. Following an evidentiary hearing, the district court made specific findings, including the finding that the taking of the private property is not necessary because a mere five feet away stands a public right-of-way that is not only available to be used, but was statutorily created for this very purpose. In addition, the district court found that the railroad is perfectly capable of continuing to heat the switches through propane tanks that stand adjacent to the rail line on its own railway easement, and as such placing the natural gas pipeline along the landowner's property is not necessary.

**¶33** The district court applied state law, and then the North Dakota Supreme Court applied its own Constitution and the statutes implementing the state constitutional provisions relating to eminent domain, but chose not to use those state provisions to protect the landowner from this taking. We were successful below using state law and thus had no need to phrase federal law at that time. We are now properly raising the federal constitutional rights on appeal – the same federal rights which we raised below in conjunction with preparing for the jury trial and through the requested jury instructions.

We are also asking this Court to apply Vern Behm's state and federal rights to a jury and to allow the jury to decide if the taking is indeed for public use and necessary.

**¶34** In presenting this case recently to the United States Supreme Court we asserted the following arguments:

> We note that the [United States Supreme Court] has, on occasion, stated that the presumption of need in an eminent domain case is not "automatic":
>
> > [T]he Commission's reading of the statute is entitled to deference because it "gave effect to the statutory presumption of Amtrak's need for the track, and in so doing implemented and interpreted the statute in a manner that comports with its words and structure." *Ibid.* But this begs the question of what showing Amtrak must make to establish that the track is "required" so that Amtrak may therefore obtain the benefit of the presumption of need.
>
> *National Railroad Passenger Corporation v. Boston & Maine Corp.*, 503 U.S. 407, 426 (1992), White, J., dissenting. When the taking authority fails to demonstrate that the taking is required, there is no need.
>
> In addition, the [United States Supreme Court] has stated "that delegations of eminent domain power to private entities are of a limited nature." *Ibid*. at 421, citing *United States v. Carmack*, 329 U.S. 230, 243, n.13 (1946). The specific footnote in *Carmack* provides as follows:
>
> > In the instant case, we deal with broad language employed to authorize officials to exercise the sovereign's power of eminent domain on behalf of the sovereign itself. This is a general authorization which carries with it the sovereign's full powers except such as are excluded expressly or by necessary implication. A distinction exists, however, in the case of statutes which grant to others, such as public utilities, a right to exercise the power of eminent domain on behalf of themselves. These are, in their very nature, grants of limited powers.
>
> *United States v. Carmack*, 329 U.S. 230, 243, n.13 (1946).
>
> We assert that a finding of necessity is required before there can be a taking of property by a private company, and where there are alternatives available to render the taking unnecessary, the taking should not be allowed. Again, as aptly stated by Justice Thomas, necessity must be a prerequisite to any taking: "[T]he Government may take property only when necessary and proper to the exercise of an expressly enumerated power." *Ibid*. at 511 (Thomas, J., dissenting). All too often the analysis of many courts with the proposition that the

> taking of private property is allowed as long as just compensation is paid. But the more appropriate analysis should be that property is an essential (if not fundamental) right that cannot encroached upon unless the state – or the private entity asserting the power of the state through eminent domain – proves at an appropriate evidentiary hearing the there is indeed a proper public use and that that the specific taking is required or necessary.
>
> In addition, we believe that deference to the legislature should not justify the abdication of this Court's role to protect property rights. Every court that reviews a government sponsored taking should be obligated to ensure that the taking is indeed for a public use and that the taking is necessary. In our view, a right that is not enforced by the courts is not a right but merely an empty phrase signifying nothing.
>
> It is our position that the right to retain and use one's own property deserves a *higher* standard of constitutional protection than it is presently afforded, especially in regards to real property. It is appropriate for this Court to provide *more* protections – not less – when property is being taken by a government entity or, worse yet, by some private entity given the power of the State to take (or employ for its own use) a person's real property.

**Doc. No. 133, A. 155-187, Petition for Writ of Certiorari 8-12-19 at 13-15, A. 175-177**. After presenting these arguments to the United States Supreme Court, we then discussed why adopting our position is supported by the history of property rights.

**¶35 The Origins and Constitutional Importance of Property Rights**

**¶36** In analyzing the taking of property it is important to understand the origins and Constitutional importance of property rights in our country. To this end, we provide this Court the same overview which we recently provided to the United States Supreme Court in this matter:

> Our founding fathers understood full-well the importance of property and the need for the protection of property rights. The drafters of the Constitution, as well as the drafter of the twelve proposed amendments (of which ten were ratified on December 15, 1791), were careful students of the writings of John Locke, who created a trinity relating to the right to property, asserting that the concept of property entails life, liberty, and his estate:
>
> > [Man] hath by nature a power not only to preserve his property – that is, his life, liberty, and estate, against the injuries and attempts of other men. .

> . . [N]o political society can be, nor subsist, without having in itself the power to preserve property . . . ."

John Locke, AN ESSAY ON CIVIL GOVERNMENT.[6]

Although the specific guarantee of property rights came later through the Fifth Amendment, the proponents of the adoption of the proposed constitution believed that the protection of property rights stood on equal footing to the protection of the rights of individuals:

> Government is instituted no less for the protection of the property, than of the persons, of individuals. . . The rights of property are committed into the same hands with the personal rights.

FEDERALIST No. 54 (Feb. 12, 1788). Although Jefferson made a substantive change to Locke's triad in the Declaration of Independence,[7] it is the Bills of Rights that gave breath and substance to property as a specific right under our supreme law of the land:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject

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[6] Locke further espoused his views of the importance of property rights in his Treatise on Government:

> 94. . . . (Whereas government has no other end but the preservation of property.) . . .
>
> 124. The great and chief end, therefore, of men uniting into commonwealths and putting themselves under government is the preservation of their property; to which the state of Nature there are many things wanting.

John Locke, CONCERNING CIVIL GOVERNMENT ¶¶ 94 & 124. But one should not assume that this right, like any other, is absolute, as shown by the following language: "As much as one can make use of to any advantage of life before it spoils, so much he may by his labour fix a property in. Whatever is beyond this is more than his share." *Ibid*, ¶30. So too, "we should see him give up again to the wild common of Nature whatever was more than would supply the conveniences of life, to be had there for him and his family." *Ibid*., ¶48. "What portion a man carved to himself was easily seen; and it was useless, as well as dishonest, to carve himself too much, or take more than he needed." *Ibid*., ¶51.

[7] Although Thomas Jefferson replaced Locke's property triad of "life, liberty, and estate" with "life, liberty, and the pursuit of happiness," the words found in our Constitution through the amendment process reverted back to Locke's original concept through the fifth amendment. It should be noted that Jefferson's use of "the pursuit of happiness" was derived from John Locke's writings as well. See John Locke, ESSAY CONCERNING HUMAN UNDERSTANDING Bk. II, Chap. XXXI, Para. 52.

> for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, *nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation*.

Amendment V (emphasis added).

The belief that property rights should be afforded the same protections as personal rights is not new. Indeed, no less a figure than Judge Learned Hand presented this view in his celebrated Holmes lectures given at Harvard University in 1958 (subsequently published under the title, THE BILL OF RIGHTS). In discussing the use of the Due Process Clause in cases involving not property but liberty, Judge Hand decried the adoption "of a stiffer interpretation of the 'Due Process Clause,' when the subject matter is not Property but Liberty, as that word has now come to be defined." To this point, Judge Learned Hand said the following:

> I cannot help thinking that it would have seemed a strange anomaly to those who penned the words in the Fifth to learn that they constituted severer restrictions as to Liberty than Property, especially now that Liberty not only includes freedom from personal restraint, but enough economic security to allow its possessor the enjoyment of a satisfactory life.

L. Hand, THE BILL OF RIGHTS 50-51 (1958).

As enunciated in Professor James Ely's superb review of the history of property rights, modern justices such as Justice Stewart, have asserted that property rights should hold the position similar if not equal to personal liberties:

> Speaking for the Supreme Court, Justice Potter Stewart amplified this view in *Lynch v. Household Finance Corp.* (1972). Stewart declared "that the dichotomy between personal liberties and property rights is a false one. Property does not have rights. People have rights." In language evoking the attitudes of the framers, he further stated, "In fact, a fundamental interdependence exists between the personal right to liberty and the personal right in property. Neither could have meeting without the other. The rights in property are basic civil rights has long been recognized."

James W Ely, Jr., THE GUARDIAN OF EVERY OTHER RIGHT: A CONSTITUTIONAL HISTORY OF PROPERTY RIGHTS 150-151 (3rd ed. 2008), quoting *Lynch v. Household Finance Corp.*, 405 U.S. 538, 552 (1972).

According to Professor Ely, the United States Supreme Court began its wayward path away from the historic importance of property rights in its decision in *United States v. Carolene Products Co.*, 304 U.S. 144 (1938):

> By separating property rights from individual freedom [in footnote number 4], the *Carolene Products* analysis instituted a double standard of constitutional review under which the Supreme Court afforded a higher level of judicial protection to the preferred category of personal rights. Economic rights were implicitly assigned a secondary constitutional status. Because the reasonableness of economic regulations was presumed, judicial scrutiny of legislation under the rational basis test became purely nominal. Consequently, the Court gave great latitude to Congress and state legislatures to fashion economic policy, while expressing only perfunctory concern for the rights of individual property owners.

James W Ely, Jr., THE GUARDIAN OF EVERY OTHER RIGHT: A CONSTITUTIONAL HISTORY OF PROPERTY RIGHTS 140 (3rd ed. 2008).

Given the importance of original intent in present-day constitutional jurisprudence, we will take the time to provide an overview of the history of property rights as articulated by Professor Ely.

Professor Ely provides in his book, THE GUARDIAN OF EVERY OTHER RIGHT, the history of property rights and demonstrates that there is a substantial basis for not only the importance of property rights in colonial times, but also indications that the rights of property were perceived at that time as fundamental rights. Professor Ely first refers to a Massachusetts 1657 county court decision that "recognized as 'a fundamental law' that property cannot be taken 'to the use or to be made the right or property of another man without his own free consent.'" *Ibid*. at 14. By 1750 "[m]ost of the colonists owned land, and 80 percent of the population derived their living from agriculture." *Ibid*. at 16.

Professor Ely next provides a review of the importance of the theories of John Locke and the application of Lockean thinking that "permeated English common law." *Ibid*. at 17. Also important during this time was Adam Smith's 1776 landmark *Wealth of Nations* that "contended that governmental intervention in the economy was unnecessary and likely to prove harmful." *Ibid.* at 23.

Although the use of eminent domain was regularly employed by the colonies (but on a limited scale), the colonists generally regarded just compensation as a fundamental principle. *Ibid.* at 25. According to Professor Ely, it is not without meaning that "the cry 'Liberty and Property' became the motto of the revolutionary movement." *Ibid.* at 25. During the Revolutionary era, the general view was that "what a man has honestly acquired is absolutely his own, which he may freely give, but cannot be taken from him without his consent." *Ibid.* at 27. Colonial leaders agreed with "the time-honored English Whig philosophy that regarded protection of private property crucial to the preservation of freedom." *Ibid.* at 28. They also "viewed the security of property as the principal function of government." *Ibid*.

As noted above, it is not without accident that Thomas Jefferson in the Declaration of Independence borrowed heavily from John Locke by adopting Locke's expression of "life, liberty, and estates." Our founders accepted fully the belief that "[t]he acquisition of property and the pursuit of happiness were so closely connected with each other in the minds of the founding generation that naming only one of the two sufficed to evoke both." *Ibid*. at 29.

The Articles of Confederation were adopted in 1781, and in 1787 Congress enacted the Northwest Ordinance which included several provisions relating to property, including the declaration "that no person should be deprived of liberty or property except by the [law of the land], [and] if a person's property were taken for public purpose, 'full compensation shall be made for the same.'" *Ibid.* at 29.

Several states during this colonial period placed in their constitutions "the common law principle that compensation should be paid when private property was taken for public use." *Ibid.* at 31. Professor Ely concludes that "the constitutional protection of property rights was established in the states well before the adoption of the federal constitution." *Ibid.* at 32. Moreover, at the conclusion of the Revolutionary War Professor Ely notes that the Treaty of Paris provided that "there should be no further seizure of property" such as that which had occurred during the Revolutionary War against those who were designated as "traitors" or were declared "person to be guilty of treason" by bills of attainder. *Ibid*. at 34-35. Significantly, "[i]n 1784 James Madison successfully sponsored a bill to halt further confiscation of British property in Virginia." *Ibid.* at 36. At the time of the Constitutional Convention of 1778, "the right to property was among the highest social values in the new republic." *Ibid.* at 41. According to Professor Ely, "the doctrine that property ownership was essential for the enjoyment of liberty had long been a fundamental tenet of Anglo-American constitutional thought. . . . Despite their differences over particular economic issues, the right to acquire and own property was undoubtedly a paramount value of the framers of the Constitution." *Ibid.* at 43.

Given this background, it is therefore not surprising that many provisions of the United States Constitution pertain to property interests and were designed to rectify the abuses that characterize the Revolutionary era. *Ibid.* at 43.

The original Constitution, of course, did not include a provision proclaiming the natural right of property ownership or declaring that a person could not be deprived of property except by due process of law— even though these views existed in full-force at the time of the drafting and adoption of the U.S. Constitution. The failure to include these rights, as well as other basic rights, into the original constitution was simply due to the fact that "[t]he basic constitutional scheme was to protect individual rights, including property, by limiting the exercise of government power through elaborate procedural devices." *Ibid.* at 47.

> According to Professor Ely, "[t]he Federalist attachment to property went beyond the philosophical position that property constituted the basis of civil society and a safeguard to liberty. Federalist also emphasized the economic utility of private property. In their view, a strong national economy rested on private ownership." *Ibid*. at 49.
>
> Because the most compelling objection to ratification related to the lack of the Bill of Rights, "the Federalists informally agreed to accept a bill of rights as the price of ratification." *Ibid.* at 52. The result was the eventual addition of the Fifth Amendment Due Process Clause and the Takings Clause.
>
> The U.S. Constitution was ratified in November 1791, and according to Professor Ely "there is no evidence of opposition to either the due process or the takings clause of the Fifth Amendment." *Ibid.* at 55. Simply put, the framers and the first United States Congress incorporated through the Fifth Amendment the Lockean view of property rights, rights which we reconsidered essential to liberty and were just as fundamental as the individual rights contained in the first ten amendments.

**Docket 133, A. 155, Petition for Writ of Certiorari 8-12-19 at 15-24, A. 177-86.**

**¶37 ISSUE 1 -- Is it a violation of due process and the taking clause for the state to allow a private corporation to take private property through eminent domain?**

**¶38** Although the United States Supreme Court has allowed *governmental* taking of property for public use and then turning it over to a private person or entity – such as in *Kelo v. City of New London*, 545 US 469 (2005) – it is clear from even the *Kelo* case (and others) that a private taking of the property of one to transfer to another is not authorized within our constitutional framework:

> Although the Constitution does not explicitly prohibit the taking of private property for private use, the court reads it as doing so implicitly. Even the payment of just compensation will not validate a private taking. While no one disputes the illegitimacy of private takings, the source of the bar is disputed. Most courts gloss over the text of the Fifth Amendment and simply assume that it is the Fifth Amendment that prescribes private takings. The difficulty in relying on the Fifth Amendment, however, is its plain language, which does not say that property can only be taken for public use. Rather, it provides that when government takes property for a public use, it must pay just compensation. Some authorities point to the due process clause is the source of the van against private takings.

Juergensmeyer & Roberts, LAND-USE PLANNING AND DEVELOPMENT REGULATION LAW Sec. 16:4B at 606 (3rd ed. 2013)(footnotes omitted).[8]

**¶39** Because property rights entail a significant if not fundamental right, the burden should be on the government or entity taking the property to demonstrate that the taking is for a public use and that there is a necessity for the taking of that property. Both elements – that is, public use and necessity – should be prerequisites to any taking by the government or a private entity authorized to do so by the government. It would be a violation of the taking clause and the due process clause to allow the government or a private entity to take property employing any type of presumption that the taking is justified, that it is for public use, or that it is necessary. In addition, any taking should be limited to the least restricted alternative; that is, the taking should be limited to that which is only necessary in order to fulfill the demonstrated public use and necessity.

**¶40 ISSUE 2 -- Is it a violation of due process and the taking clause for the state to disregard a finding that the taking is not necessary and – as a matter of law – allow a private corporation to take private property through eminent domain based solely on the private corporation's own determination that the taking is for a public use?**

**ISSUE 3 -- Is it a violation of due process and the taking clause for the state to disregard the evidentiary findings of no public use and allow the taking to occur based solely on the private company's own determination that there is a public use?**

[8] *Citing Hawaii Housing Authority v. Medcalf*, 467 U.S. 229 (1984), *Thompson v. Consolidated Gas Utilities Corp.*, 300 US 55 (1937), Julius L. Sackman, 2A NICHOLS' THE LAW OF EMINENT DOMAIN, Sec. 70.1[3] to Sec. 70.1[5]a (3rd rev. ed. 1995), Rubenfeld, *Usings*, 102 Yale L. J. 1077, 1119 (1993), and *Forseth v. Village of Sussex*, 199 F.3d 363, 369 (7th Cir. 2000). *See also* Juergensmeyer & Roberts, Sec. 16:4A, at 604-05, discussing the *Kelo* case.

It seems axiomatic that the government, or any private entity authorized by the state to do so, is not allowed to take private property unless that taking is for public use and is necessary. In the *Kelo* case, Justice Thomas asserted that the government may not take property unless it is necessary and proper:

> The Takings Clause is a prohibition, not a grant of power. The Constitution does not expressly grant the Federal Government the power to take property for any public purpose whatsoever. Instead, the Government may take property only when necessary and proper to the exercise of an expressly enumerated power.

*Kelo v. New London*, 545 US 469, 511 (2005) (Thomas, J., dissenting).

**¶41** The taking of a person's property – indeed, the taking of a farmer's land and potentially his very livelihood – by another private party using the power of the state should not be allowed. Only the government should be allowed to avail itself of this awesome (and, to the landowner, destructive) powers; private entities should not be able to use this governmental power. Moreover, the declared public use must be one that inures itself truly to the public at large, and not falling into the grasp of a single corporate entity so it can make more money from another single corporate entity. The public – through statutes and constitutional rights – deserves to be the direct recipient of any such governmental taking.

**¶42** Because the taking of Vern Behm's property impinges on his fundamental constitutional right to that property, we assert that the strict scrutiny standard should apply:

> The Supreme Court continues to make an independent determination of the legitimacy of laws which affect the "fundamental rights" of individuals under the Constitution. If legislation limits a fundamental right—a specific type of civil liberty as defined by the Court—the Court will more carefully scrutinize the underlying factual basis for the legislation. Thus the standard for reviewing such legislation is called a "strict scrutiny" standard. The Court raises the standard that legislation must meet under the due process guarantees if the law regulates or

> limits a fundamental civil liberty. Under the strict scrutiny standard the Court requires that the law be necessary to promote a compelling or overriding interest of government if it is to limit the fundamental rights of individual citizens. If the justices are not satisfied that the law is necessary to promote an end of government which is clearly more important than the limitation of the fundamental liberty, they will find the law violated of the due process clause.

Nowak, Rotunda & Young, CONSTITUTIONAL LAW HORNBOOK SERIES Ch. 12, Sec. III A. 418-19 (2nd ed.1983). In our view taking Vern Behm's property limits one of his fundamental rights and as such the taking cannot be allowed.

**¶43** In our view, the concept of public use must be more than just the use *for one* of MDU's customers. To this end we quote Justice Thomas' dissent in *Kelo*:

> "The constitution's text, in short, suggests that the Takings Clause authorizes the taking of property only if the public has a right to employ it, not if the public realizes any conceivable benefit from the taking."

*Kelo v. New London*, 545 U.S. 469, 505 (2005) (Thomas, J., dissenting). Justice Thomas proceeds to properly assert that "the Public Use Clause is most naturally read to authorize takings for public use only if the government or the public actually uses the taken property." *Ibid*. at 514 (Thomas, J., dissenting). To hold otherwise is to effectively render the Public Use Clause superfluous, if not "a virtual nullity, without the slightest nod to its original meaning." *Ibid*. at 506 (Thomas, J., dissenting). It is time to revert back to the traditional rights to property that landowners and citizens of North Dakota once had not so long ago. By the same token – as discussed in the next section – it is time to place in the hands of our citizens (through the jury process) the power to decide whether the taking of the land is indeed necessary and for a public use.

**ISSUES 4 & 5: Jury Determination of Public Use and Necessity**

**¶44 ISSUE 4 -- Is it a violation federal due process, the taking clause, and the right to a jury to allow a taking of private property without a jury determination that the taking is for a public use?**

**ISSUE 5 -- Is it a violation state due process and the right to a jury to allow a taking of private property without a jury determination that the taking is necessary?**

**¶45** In conjunction with the preparation of this case to the jury Vern Behm proposed several interrogatories to be submitted to the jury—whereby the jury would be allowed to make a specific finding on whether MDU had met its burden that the taking is for public use and is necessary. Given the North Dakota Supreme Court's decision Vern Behm requested that the jury make these determinations in an advisory capacity so that the jury's findings could later receive the force of law either by this Court or the United States Supreme Court's adoption of our legal position.

**¶46** the right to a jury in civil cases in 1787 was already considered an important American right:

> Toward the end of the Constitutional Convention Hugh Williamson of North Carolina noted that "no provision was yet made for juries in civil cases and suggested the necessity of it." Elbridge Gerry agreed, while George Mason further argued that the omission demonstrated that the Constitution needed a Bill of Rights. Nathaniel Gorham responded that the question should be left to Congress because of complexities in determining what kind of civil cases should be given to a jury. . . . Apparently sensing the difficulty in phrasing the guarantee, the Convention unanimously defeated the motion.

THE HERITAGE GUIDE TO THE CONSTITUTION 358-59 (2005).

**¶47** The proponents of the new Constitution of 1787 soon found that the omission of a civil jury provision became one of the major objections against the new Constitution. *Id.* at 359. This omission was cured by the adoption of the Seventh Amendment which maintained the traditional distinction between cases at law and those in equity or admiralty. *Id.* The Judiciary Act of 1789 also provided for use of a jury to determine issues of fact "in all causes except simple causes of admiralty and maritime

jurisdiction." *Id.* As Justice Story later explained, "In a just sense, the amendment then may well be construed to embrace all suits which are not of equity and admiralty jurisdiction, whatever may be the peculiar form which they may assume to settle legal rights." *Id. quoting Parsons v. Bedford*, 28 U.S. (3 Pet.) 433 (1830).

**¶48** Despite this venerable beginning, the United States Supreme Court has limited the reach of the Seventh Amendment:

> The Supreme Court has, however, arrived at a more limited interpretation. It applies the amendment's guarantee to the kinds of cases that "existed under the English common law when the amendment was adopted," *Baltimore & Carolina Line v. Redmond*, [295 U.S. 654] (1935), or to newly developed rights that can be analogized to what existed at the time, *Luria v. United States*, [231 U.S. 9] (1913), *Curtis v. Loether*, [415 U.S. 189] (1974). . . .
>
> The right to trial by jury is not constitutionally guaranteed in certain classes of civil cases that are concededly "suits at common law," particularly when "public" or governmental rights are at issue and if one cannot find eighteenth-century precedent for jury participation in those cases. *Atlas Roofing Co. v. Occupational Safety & Health Review Commission*, [430 U.S. 442] (1977). . . . [W]here practice as it existed in 1791 "provides no clear answer," the rule is that "[o]nly those incidents which are regarded as fundamental, as inherent in and of the essence of the system of trial by jury, are placed beyond the reach of the legislature." Markham v. Westview Instruments, [517 US 370] (1996).

THE HERITAGE GUIDE TO THE CONSTITUTION 359-60 (2005).

**¶49** We assert that the taking of property by the government is indeed a fundamental right that must be protected through the Seventh Amendment guarantee of the right of jury. We further assert that where private property is taken by governmental process the right to a jury applies to the determination of public use and necessity, and that such a right is "implicit in the concept of ordered liberty," *Palko v. State of Connecticut*, 302 U.S. 319 (1937), and is also "fundamental to the American scheme of justice," *Duncan v. Louisiana*, 391 U.S. 145 (1968). As such, in regards to eminent

domain cases, the Seventh Amendment right to a civil jury trial should be recognized as a federal constitutional requirement and be incorporated to the states.

**¶50** It is possible that the reason courts were assigned the role of determining whether there is indeed a 'public use' and that the taking is indeed 'necessary' is because we assumed that the courts would exercise proper judicial review while providing at least some insulation from the more direct self-interests of the people. But when the courts decide to relinquish their role in restricting governmental takings to situations where there is a demonstrated public use and clear necessity and instead hand over these decisions to the very corporate entity that initiate the taking itself, we have no choice but to revert back to the last remaining protection under our English and now American system: The jury.

**¶51** The idea of democracy necessarily envisions that all major decisions are made by the people or their representatives. The adoption of the views of John Locke at our founding solidified the significance, indeed the *essentialness*, of the American rights of property. The concept of property at the founding entailed more than just the importance and protection of physical property; the concept of property at that time also includes the very essence of our existence – indeed life and the concept of self. For that reason, and many others, the right to property is a fundamental right.

**¶52** When the courts refuse to protect the property rights of its citizens, it is imperative that the jury be allowed to step in and determine if the powers of the State

may be used to take another citizen's property and specifically determine if there is a public use and that the taking is necessary .[9]

**¶53 ISSUE 6 – Given the statutory language which requires costs "for all judicial proceedings," did the lower court err in not allowing attorney fees and costs relating to Behm's appeal to the United States Supreme Court.**

**¶54** In regards to the final award of attorney fees, Vern Behm appeals from the district court's decision denying attorney fees relating to the appeal to the United States Supreme Court. The lower court denied these fees despite the fact that our state's eminent domain statute clearly provides that attorney fees are to be awarded as "for all judicial proceedings," **Section 32-15-32**, concluding that the phrase "does not include a side trip to a federal court." **Doc. No. 171**, **¶32, A. 230, 239**. The lower court went on to conclude that the statute "limits the recovery of attorney fees to those legal services related directly to the condemnation proceeding alone." **Doc. No. 171**, **¶40, A. 242**. Vern Behm has the right to appeal this action between himself and MDU to the United States Supreme Court, and if he does so it falls within the confines of "all judicial proceedings" relating to this eminent domain action. It is the same legal action (with the same parties) presented below to the district court, presented next to this appellate court, and presented then to the highest court in the land. "All judicial proceedings" means *all* judicial proceedings; the judicial proceeding presented to the United States Supreme Court has the same caption, the same parties, addresses the same issues, and is a judicial proceeding involving the application of the North Dakota eminent domain statute. The lower court's decision not to award attorney fees for the appeal of this matter to the United States

[9] We respectfully assert that this same requirement of jury review of 'public use' and 'necessity' applies equally to any taking by the state itself.

Supreme Court is nothing less than a refusal to follow the plain language of Section 32-15-32, which provides as follows:

> **32-15-32. Costs.**
> The court may in its discretion award to the defendant reasonable actual or statutory costs or both, which may include interest from the time of taking except interest on the amount of a deposit which is available for withdrawal without prejudice to right of appeal, costs on appeal, and reasonable attorney's fees for all judicial proceedings.

**Section 32-15-32** (emphasis added).

**¶55** The statute at issue does not limit attorney fees to merely *state* legal proceeding, but instead provides for an award of attorney fees for "all" proceeding under the eminent domain statutes. The appropriateness of the taking of Vern Behm's property by eminent domain by use of the North Dakota eminent domain statute – along with the validity an application of that statute – was before the district court, this Court, *and* the United States Supreme Court. This case continues to be a North Dakota eminent domain judicial proceeding, even before the United States Supreme Court.

**¶56** In addition, even if we were to apply the lower court's limiting standard, the appeal to the United States Supreme Court is indeed "directly related" to this condemnation proceeding – as is clearly evident by the fact that any decision by the United States Supreme Court would be implemented directly to this proceeding.

**¶57** It is also very significant that the United States Supreme Court requested a response from MDU. The fact that the Supreme Court requested a response and briefing from MDU indicated that the United States Supreme Court was seriously considering taking certiorari as to this case. This request for response is rare and is indicative of the importance of the issues raised in this judicial proceeding.

**¶58** The statute is plain. Attorney fees are allowed to the landowner, win or lose on the trial level, and win or lose on the appellate level. It is bad enough that this huge private corporation is taking the farmer's land; the legislature properly decided not to add insult to injury by making the landowner also have to pay for the privilege of defending his property. By the same token, the statute is perfectly clear that attorney fees are provided for "all" judicial proceedings, which necessarily includes any appeal to this Court as well as to the United States Supreme Court.

## ¶59 CONCLUSION

**¶60** For the reasons stated above, Vern Behm request that this court reversed the lower court due to a violation of Vern Behm's federal constitutional rights under the due process and takings clause, as well as Vern Behm's state and federal right for jury to determine whether the taking is for public use or is necessary. In addition, Vern Boehm requests that this court reversed the lower court in regards to the attorney fee award and remand for the purpose of awarding attorney fees for all judicial proceedings, including the proceedings before the United States Supreme Court.

**¶61** In addition, Vern Behm specifically request oral arguments in this matter given the federal constitutional issues raised relating to the due process and taking cause of the United States Constitution, and the federal and state rights to a jury trial.

**¶62** Dated this 16th day of June, 2020.

____/s/_____
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